

**Before the Board of Tax Appeals
of the
State of Kansas**

In the Matter of: Revenue Neutral Complaint
of Michael T. Kennedy in Douglas County,
Kansas.

Docket No. 2022-6149 (RN)

Brief of *Amicus Curiae* Kansas Justice Institute

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Kansas Justice Institute submits the following *amicus* brief in support of *pro se* Complainant Michael T. Kennedy.

1. Identity and Interest of *Amicus Curiae*

Kansas Justice Institute (KJI) is a nonprofit, *pro bono*, public-interest litigation firm committed to upholding constitutional freedoms, protecting individual liberty, and defending against government overreach and abuse.¹ KJI directly litigates,² litigates by letterhead,³ files *amicus* briefs in federal and state courts—including at the trial level⁴—and comments on matters of public concern.⁵

KJI has a strong interest in this case. The revenue neutral complaint filed by *pro se* Complainant Michael T. Kennedy, involving Unified School District 348, raises foundational questions involving statutory interpretation, substantive due process, governmental authority, accountability, and transparency, and the rule of law.

¹ KJI is a Kansas limited liability company whose sole member is Kansas Policy Institute, a nonprofit, non-partisan public policy organization—a think tank—founded in 1996. Neither entity is publicly owned or traded.

² *Bunner, et al., v. Beam*, 2019-cv-000785 (Shawnee County); *Modi, et al., v. Kansas State Board of Cosmetology, et al.*, 2020-cv-000595 (Shawnee County); *Taylor, et al., v. Allen, M.D., et al.*, 2:20-cv-02238 (D. Kan); *Ricky Dean’s, Inc., d/b/a The Sandbar, et al., v. Marcellino, M.D., et al.*, 5:20-cv-04063 (D. Kan); *Johnson, et al., v. Smith*, 6:22-cv-01243 (D.Kan).

³ *See, e.g., Letter from KJI to Osage County Health Department*, (April 21, 2020) (accessible at <https://kansasjusticeinstitute.org/first-amendment-sowers/>); *Letter from KJI to Clay County Counselor* (July 10, 2020) (accessible at <https://kansasjusticeinstitute.org/clay-county-parks-dept/>); *Letter from KJI to Riley County Counselor* (Aug. 5, 2020) (accessible at <https://kansasjusticeinstitute.org/riley-county-health-dept/>); *Letter from KJI to Dickinson County Counselor* (Jan. 21, 2021) (accessible at <https://kansasjusticeinstitute.org/religious-liberty/>)

⁴ *Salgado v. United States*, 140 S. Ct. 2640 (2020), review denied; *Butler v. Shawnee Mission Sch. Dist. Bd. of Educ.*, 502 P.3d 89 (Kan. 2022); *State v. Hayes*, 459 P.3d 213 (Kan. App. 2020), review denied (Sept. 29, 2020); *State v. 1959 Chevrolet Corvette, et al.*, 2017-cv-002347 (Johnson County); *United States of America v. Sir Alvis Jai O’Neal*, 21-cr-40046 (D.Kan).

⁵ Kansas’ Unjust Forfeiture Law Amounts to Policing for Profit, KANSAS CITY STAR (May 21, 2019); Asset Forfeiture Law Needs Reform in Kansas, WICHITA EAGLE (July 6, 2019); Constitution can handle virus challenges, TOPEKA CAPITAL-JOURNAL (March 31, 2020); Constitutional rights more important than ever, TOPEKA CAPITAL-JOURNAL (April 25, 2020).

The decision here could have profound, long-lasting negative implications both within and beyond the Board of Tax Appeals. After all, it’s estimated that there are more than 3,600 local taxing entities in Kansas,⁶ which includes 286 school districts.⁷

Analysis

2. **Kansas’ Truth in Taxation Act, Unified School District 348, and Michael T. Kennedy—an Overview.**

In 2021, Kansas adopted what is commonly referred to as the Truth in Taxation Act. Kan. Leg. 2021 SB 13, as amended by Kan. Leg. 2022, Sen. Sub. for HB 2239. The Act is straightforward.

Taxing entities can’t increase property taxes above their “revenue neutral rate” unless they fulfill a number of statutory obligations. *See* KSA § 79-2988, *et seq.* First, they need to notify the public they’re seeking to exceed their revenue neutral rate, *see* § 2988(b)(1),(2); second, hold a public hearing before September 20, § 2988(b)(3); and third, validly pass a resolution approving the revenue *excess* rate by a majority vote, § 2988(b),(b)(4) (emphasis added).

To that end, an entity that doesn’t follow the Act’s three basic requirements can’t collect taxes in excess of their revenue neutral rate—instead, they’re required to either issue tax refunds or reduce the taxes levied, if uncollected. § 2988(c)(1).

On September 14, 2022, Unified School District 348 held a Truth in Taxation hearing on a proposal to exceed the revenue neutral tax rate. Baldwin City USD 348, *Baldwin City USD 348 School Board Special Meeting Sept. 14, 2022*, YouTube.com (Sept. 14, 2022).⁸ At that hearing, after facing public opposition, the USD 348 President moved the Board to “*accept the revenue neutral tax rate as presented.*” *Id.* at 2:00:54. It was seconded, *id.* at 2:01:01, and the motion “carri[ed], four to two, *id.* at 2:01:53.

⁶ *See* Kansas Department of Administration, available at <https://admin.ks.gov/offices/accounts-reports/local-government/municipal-services/municipal-budgets/categories/8175d14d02d44d79b6901a2d8590f5ca> and KansasOpenGov, http://www.kansasopengov.org/kog/databank#report_id=109 (both of which were last accessed Nov. 30, 2022).

⁷ *See* Kansas Department of Revenue, available at <https://www.ksrevenue.gov/pdf/schooldistricts.pdf> and Kansas State Department of Education, *KSDE Data Central - Kansas Education Reports*, Financial Accountability, available at https://datacentral.ksde.org/dist_funding_rpt.aspx (both of which were last accessed Nov. 30, 2022).

⁸ Available here: <https://www.youtube.com/watch?v=LHMdf8hchpQ>

USD 348’s official minutes reflect the same—that it adopted the revenue *neutral* tax rate.⁹

C. Revenue Neutral Rate Hearing
Action: 1. Revenue Neutral Rate Hearing
Nathian Oehlert and Mr. Dodge presented the Revenue Neutral Rate to the board and asked for caps for the individual funds. There was opportunity for public comment, questions, and concerns to be brought to the board’s attention, the board discussed all information brought to them, and proceeded to a vote.
Motion to accept the revenue neutral tax rate as presented.
Motion by Kelley Bethell-Smith, second by Chris Perry
Roll Call Vote:
Ande Parks - yay
Chris Perry - yay
Kelley Bethell-Smith - yay
Tony Brown - yay
Phil Harvey - nay
Kelly Neufeld - nay
Motion approved 4-2 by roll call vote
Brief recess

Based upon the publicly available evidence, USD 348 didn’t adopt a resolution approving a revenue *excess* rate, but instead, approved a revenue neutral tax rate.

Michel Kennedy, *pro se*, filed a complaint pursuant to § 2988(c)(2) arguing USD 348 didn’t strictly comply with the Truth in Taxation statutory regime, and therefore, he shouldn’t be forced to pay a tax that wasn’t properly assessed.

USD 348 will probably argue that it *meant* to adopt a revenue excess rate; and because it *meant* to do so, it *should* be allowed to do so, no matter what the Truth in Taxation statute says or means. But that’s not right—or constitutional.

3. Unified School District 348 Didn’t Follow the Law So It Can’t Collect Taxes.

School districts can’t operate outside their legislative authority. *See, e.g., Wichita Pub. Sch. Emp. Union, Loc. No. 513 v. Smith*, 194 Kan. 2, 4 (1964). As shown below, USD 348 didn’t follow Kansas’ Truth in Taxation Act, it’s not statutorily authorized to collect taxes, and if it does, it violates both the federal and state constitutions.

3.1. The Statute’s Text Controls—*Shall Means Shall*.

The Truth in Taxation’s text. “A majority vote of the governing body, by the adoption of a resolution or ordinance to approve exceeding the revenue neutral rate, shall be required prior to

⁹ Available at <https://go.boarddocs.com/ks/usd348/Board.nsf/Public> (last accessed Nov. 30, 2022).

adoption of a proposed budget that will result in a tax rate in excess of the revenue neutral rate.” § 2988(b)(4).

In a simpler—but still accurate—grammatical format, the Act states that the entity “shall be required” to “adopt[]” “a resolution or ordinance to approve exceeding the revenue neutral rate” by “a majority vote of the governing body” “prior to adoption of a proposed budget that will result in a tax rate in excess of the revenue neutral rate.”

It’s USD 348’s burden to prove it complied with the Act. § 2988(c)(2). The consequences for non-compliance with the Act: 1) the taxing entity “shall refund to taxpayers any property taxes over-collected based on the amount of the levy that was in excess of the revenue neutral rate,” § 2988(c)(1); and the Board of Tax Appeals “shall order such governing body to refund to taxpayers the amount of property taxes over collected or reduce the taxes levied, if uncollected,” § 2988(c)(2).

USD 348 might argue “shall be required” is directory, rather than mandatory—that the statute doesn’t really mean the entity’s *required* to adopt a resolution to approve exceeding the revenue neutral rate, just that it *should* adopt such a resolution. But that would be a misreading of the statute.

Sure enough, sometimes Kansas Courts think “shall” means “should.” *See, e.g., State v. Residential Unit & Real Est. at 930 Windwood No. 2, Junction City, KS 66441*, 26 Kan. App. 2d 260, 263 (1999). But the reasoning for doing so in *Residential Unit* doesn’t apply here.

“A statutory provision is considered mandatory if it is the essence of the thing to be done to matters of substance. When a statute directs acts or proceedings to be done in a certain way, it shows the legislature’s intent that compliance with the provision is essential to the validity of the act or proceeding. A statute is also regarded as mandatory if some antecedent and prerequisite conditions must exist prior to the exercise of power or must be performed before certain other powers can be exercised.” *Residential Unit*, 26 Kan. App. 2d at 262 (relying on *Wilcox v. Billings*, 200 Kan. 654, 657-58 (1968)).

The text is clear and there's no need to resort to quixotic considerations about the "essence of the thing to be done;" but doing so would *still* support Mr. Kennedy's position. The Truth in Taxation Act uses words of absolute prohibition *and* provides penalties for noncompliance, *i.e.*: the entity can't collect increased taxes. The "essence of the thing to be done" *is* a matter of substance.

"Shall" means *shall*; it doesn't mean *should*.

3.2. What USD 348 *Meant* to Do Is Irrelevant.

It's entirely plausible that USD 348 *meant* to adopt a revenue excess rate at the September 14, 2022, hearing. But given the Act's text, and federal and state constitutional considerations, what USD 348 *meant* to do is beside the point.

Due Process of Law

Kansans are protected by two due process of law provisions: the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall ... deprive any person of life, liberty, or property without due process of law[;]" and Section 18 of the Kansas Constitution Bill of Rights which provides that "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Section 18 is Kansas' due process of law clause. *Hodes & Nausser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 627 (2019) ("The Kansas Constitution does include a due process provision, however: section 18 of the Bill of Rights."); *Creecy v. Kansas Dep't of Revenue*, 310 Kan. 454, 462 (2019).

The federal "due process of law guarantee is an effort—one with deep roots in the history of western civilization—to reduce the power of the state to a comprehensible, rational, and principled order, and to ensure that citizens are not deprived of life, liberty, or property except for *good reason*." Timothy Sandefur, *In Defense of Substantive Due Process, Or the Promise of Lawful Rule*, 35 Harv. J.L. & Pub. Pol'y, 283, 285 (2012) (emphasis in original). The clause "guarantee[s] that the government will not employ its coercive powers against the individual on the basis of 'because I say so.'" *Id.* at 292.

Under substantive due process logic, "[w]hen a government act exceeds the government's authority—due to a procedural shortcoming, a substantive violation, a logical contradiction, or any

other flaw—that act cannot qualify as law, and thus any attempt to enforce it constitutes arbitrary or lawless action. All ultra vires action is a violation of the due process of law guarantee, and the Constitution determines, both explicitly and implicitly, what sorts of action are ultra vires.” *Id.* at 314.

Consider a situation where Congress passed a bill, but the President vetoed it. The bill isn’t a law. If a “town sheriff were to try to enforce this vetoed bill by arresting a person who fails to abide by its provisions, that arrest would be unlawful; it would lack the necessary authorization. The sheriff would be enforcing something that is not law and thus depriving the arrestee of liberty without due process of law.” *Id.* at 314-315 (emphasis in original).

Kansas Courts have recognized these deeply rooted principles for more than a century, even if expressed in different constitutional contexts.

In an 1887 case, A.J. Ayers and 35 others filed an action against the Trego County Board of Commissioners, and other Trego County Defendants, claiming the County-Defendants didn’t have the authority to collect taxes against them. *Ayers v. Bd. of Cnty. Comm'rs of Trego Cnty.*, 37 Kan. 240 (1887). The County-Defendants responded, in part, that they *did* have the authority to collect taxes against Mr. Ayers because the taxing-levy-authorization-section—section “31,”—“was put in section 7, c. 70, Sess. Laws 1883, by inadvertence, when the figure ‘9’ was really intended therefor.” *Ayers*, 37 Kan. at 240. The Kansas Supreme Court firmly rejected the County-Defendants’ argument. “The repeal of section ‘31, c.72, Laws 1873, by the legislature of 1883, was the result, perhaps, of hasty legislation,” it said, *id.*, but Courts “have not the right to change the statute” and “have no authority to interpolate ‘9’ in the statute in the place of ‘31’ when ‘9’ does not appear therein.” *Id.*

In 1963, the Kansas Supreme Court again reiterated the principle that “no matter what the legislature may have intended to do, *if it did not in fact do it—under any reasonable interpretation of the language used—the defect is*” not one Courts can correct. *Harris v. Shanahan*, 192 Kan. 183, 196 (1963) (cleaned up).

The Court went on. “No one questions” the “fact” “that the intention of both houses of the legislature and of the governor was to enact a law which gave adequate senatorial representation to every citizen of Kansas, including the residents of the city of Leawood,” *id.* at 199, but intent didn’t matter, *id.*; instead, what mattered was “what was done,” *id.* Even though the Court “deeply regretted that as important a law as this” “be wiped bodily from the statute book,” *id.* at 200, a “strict rule calling for full compliance with constitutional requirements is, in the long run, a good one. In some cases it may work a hardship, but, by and large, it is beneficial to our republican form of government.” *Id.*

Just as in *Ayers* and *Harris*, it makes no difference whether USD 348 *intended* to pass a resolution adopting a revenue excess rate—it adopted a resolution to *accept the revenue neutral tax rate*. It’s a distinction with all the difference.

The Truth in Taxation Act’s text is clear—USD 348 can’t collect increased taxes from Mr. Kennedy. Doing so would violate the substantive due process principles within the Fourteenth Amendment to the United States Constitution and Section 18 of the Kansas Constitution Bill of Rights.

4. Conclusion

Throughout history, there’s always been tension between those who forcibly impose taxes, and those who are forced to pay taxes. Just consider the *Magna Carta* (1215) (Cl. 12, King may not levy or collect taxes without consent of council) and the *Declaration of Independence* (1776) (Grievance 17, “For imposing Taxes on us without our Consent”). But just as true now, governments aren’t above the law. Not even school districts.

Our government is one of laws, not men. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). And “if men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.” *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (cleaned up).

USD 348 didn’t follow the *law*. Mr. Kennedy shouldn’t be forced to pay a tax that wasn’t lawfully imposed.

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