

In the Supreme Court
of the
State of Kansas

Kristen Butler, et al.,

Plaintiffs,

v.

**Shawnee Mission School District Board of
Education,**

Defendant-Appellee.

Attorney General Derek Schmidt,

Intervenor-Appellant.

Case No. 124205

Application to File an *Amicus* Brief;
Certificate of Service.

Application to File an *Amicus* Brief

Pursuant to Rule 6.06 of the Rules of this Court, Kansas Justice Institute respectfully applies for leave to file an *amicus* brief regarding the district court's ruling in 21CV2385, in connection with Kan. Leg. 2021 SB 40 (SB 40).

1. Kansas Justice Institute (KJI) is a non-profit, public-interest litigation firm committed to defending against government overreach and abuse. KJI directly litigates,¹ files *amicus* briefs,² and comments on matters of public concern.³
2. KJI's interest in *this* case stems from its COVID-19 direct litigation, particularly *Ricky Dean's, Inc., d/b/a The Sandbar, et al., v. Marcellino, M.D., et al.*, 5:20-cv-04063 (D. Kan), which argued the Fourteenth Amendment's procedural due process protections

¹ *Burner, 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).

² *Salgado v. United States*, 140 S. Ct. 2640 (2020), review denied; *State v. Hayes*, 459 P.3d 213 (Kan. Ct. App. 2020), review denied (Sept. 29, 2020); *State v. 1959 Corvette, et al.*, 2017-cv-002347 (Johnson County).

³ *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).

applied to orders issued by local health officers, among other claims. Additionally, KJI's interest stems from its COVID-19 litigation by letterhead,⁴ and its pandemic-related commentary.⁵

3. The proposed *amicus* brief provides a unique perspective that is unlikely to be duplicated by other potential *amici*. It provides this Court with a practical and contextual explanation for why SB 40 was an appropriate legislative response to Kansas' outdated public health statutes. The proposed brief focuses on Kansas' local health officer regime—which the district court also declared unconstitutional—and is divided into three parts. The first provides a brief overview of Kansas' local health officer statutes; the second recounts the various responses to COVID-19 by local health officers; and the third explains why SB 40's hearing process warrants affirmation, not criticism.
4. This case is of profound interest to KJI and everyday Kansans impacted by local health orders. It is beyond question COVID-19 is serious, the government has a prominent and important role in public health matters, and local health officers issued their orders with the best of intentions. KJI firmly believes that when the government wields those powers though, the people affected should be afforded a prompt and meaningful hearing—a simple, yet effective remedy against potential government overreach. The Legislature created such a hearing process in Kan. Leg. 2021 SB 40 (SB 40).
5. Earlier today, KJI lodged an application to file an *amicus* brief—along with a copy of the proposed brief—and transmitted the same to the parties. Immediately after KJI lodges *this* application, KJI will transmit the same to the parties as well.
6. The *amicus* brief is complete and would not delay the instant proceedings.

⁴ See, e.g., *Letter from KJI to Osage County Health Department* (April 20, 2020) (accessible at <https://kansasjusticeinstitute.org/first-amendment-sowers/>); *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 <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/>)

⁵ *Constitution can handle virus challenges*, TOPEKA CAPITAL-JOURNAL (March 31, 2020); *Constitutional rights more important than ever*, TOPEKA CAPITAL-JOURNAL (April 25, 2020).

7. KJI respectfully requests this Court grant the instant motion and issue an order permitting the filing of an *amicus* brief.

Kansas Justice Institute
By: Samuel G. MacRoberts, 22781

Dated: August 25, 2021

/s/ Samuel G. MacRoberts
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Certificate of Service

I hereby certify that on the below date, I caused to be delivered *via* electronic mail and/or through the court's electronic filing system, a true copy of the above document:

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Dated: August 25, 2021

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