

FILED
SUPREME COURT
STATE OF WASHINGTON
8/13/2018 4:27 PM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
8/13/2018
BY SUSAN L. CARLSON
CLERK

No. 95134-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PROTECT PUBLIC HEALTH, CITY OF SEATTLE

Respondents,

v.

JOSHUA FREED, IMPACTION,

Appellants,

and

CITIZENS FOR A SAFE KING COUNTY, KING COUNTY, and JULIE
WISE, in her official capacity,

Defendants.

**BRIEF OF AMICI CURIAE PROFESSORS OF PUBLIC HEALTH
AND HEALTH POLICY IN SUPPORT OF RESPONDENT**

Theresa M. DeMonte, WSBA No. 43994
Claire Martirosian, WSBA No. 49528
McNAUL EBEL NAWROT & HELGREN PLLC
One Union Square
600 University Street, Suite 2700
Seattle, WA 98101
(206) 467-1816
tdemonte@mcnaul.com
cmartirosian@mcnaul.com

TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY AND INTEREST OF AMICI 2

III. STATEMENT OF THE CASE..... 2

 A. King County Addresses the Opioid Epidemic 2

 B. I-27 Seeks to Undo King County’s Carefully
 Considered Opioid Epidemic Response Plan 3

 C. Protect Public Health and City of Seattle Obtain
 a Declaratory Judgment Invalidating I-27
 and Enjoining It from the Ballot 4

IV. ARGUMENT 4

 A. The Legislature Has Vested County Boards of
 Health with Authority to Protect Public Health..... 5

 B. The Legislature’s Broad Grant of Authority to
 Local Health Boards Is Based on Sound
 Public Health Policy 6

 1. Local Health Officials Have Expertise
 the Electorate Lacks 6

 2. Public Health Crises Often Require
 a Coordinated Approach 9

 C. I-27 Would Undermine Public Health 10

V. CONCLUSION..... 11

APPENDIX A.....App. 1

TABLE OF AUTHORITIES

CASES

In re Ballot Title for Initiative 333,
88 Wn.2d 192, 558 P.2d 248 (1977)..... 9

Spokane Cnty. Health Dist. v. Brockett,
120 Wn.2d 140, 839 P.2d 324 (1992)..... 5, 6

STATUTES

RCW 70.01.010 8

RCW 70.05.030-.035 8

RCW 70.05.050-55 6

RCW 70.05.060 5

RCW 70.05.070 5, 7

RCW 70.26.040 9

OTHER AUTHORITIES

Background and History of the King County Board of Health 8

Jeff Hastings & Damon Cann, *Ballot Titles and Voter
Decision Making on Ballot Questions*, 46 STATE & LOCAL GOV'T REV.
118 (2014)..... 8

Lindsay Bosslet, *Public Health Insider, Local Public Health Capacity Is
Critical in the Response to Global Health Emergencies* 10

Thad Kousser & Mathew D. McCubbins, *Social Choice,
Crypto-Initiatives, and Policymaking
by Direct Democracy*, 78 S. CAL. L. REV. 949 (2005)..... 7

U.S. DEP'T OF HEALTH & HUMAN SERVS.,
Pandemic Influenza Plan 2017 Update 8

U.S. DEP'T OF HOMELAND SECURITY,
National Response Framework..... 9, 10

I. INTRODUCTION

The Legislature has vested local health boards with the authority to regulate matters of local health. Within this sphere, local health boards' authority operates to the exclusion of the public.

Here, the appellants wish to disturb the Legislature's delegation of authority to local health boards. By way of local initiative, they seek to supplant the King County Board of Health's plan to adopt supervised injection sites. The trial court correctly recognized that I-27 would interfere with the duties and obligations that the Legislature has soundly placed with the Board and the King County Council and should be denied a space on the ballot.

The trial court correctly determined that the initiative exceeded the scope of the local initiative power. The Legislature's vesting of authority with local health boards is not only a matter within its purview, but is also sound as a matter of public policy.

If initiatives like I-27 were allowed, they would upset the Legislature's chosen balance. Moreover, they would harm public health by enabling a public political process to trump the expertise and experience of local public health officials. Allowing such initiatives to go forward, contrary to the Legislature's grant of authority, would imperil the

health of Washington citizens. For these reasons, the trial court should be affirmed.

II. IDENTITY AND INTEREST OF AMICI

Amici curiae are faculty members with expertise in public health and public health law from Washington's leading schools of public health, law, and public policy, as listed in Appendix A. Amici curiae are engaged in the policy and science of protecting and improving the health of communities through research and evidence-based study. Amici believe the public's health will be adversely affected if initiatives like I-27 are placed on electoral ballots. The identity and interest of amici are described in detail in the motion seeking leave to file this amicus brief.

III. STATEMENT OF THE CASE

A. King County Addresses the Opioid Epidemic

The abuse of heroin and prescription opioids is undeniably a public health crisis. Indeed, last fall the Acting Secretary of the federal Department of Health and Human Services determined that a nationwide public health emergency exists due to the opioid crisis.¹ To combat this serious problem, officials in King County convened the Heroin and

¹ See DEP'T OF HEALTH & HUMAN SERVS., DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS (Oct. 26, 2017), *available at* <https://www.hhs.gov/sites/default/files/opioid%20PHE%20Declaration-no-sig.pdf> (last visited Aug. 3, 2018).

Prescription Opiate Addiction Task Force (“Task Force”) in order to develop strategies for prevention, increase access to treatment, and reduce the number of fatal overdoses. The Task Force included more than 30 members representing multiple disciplines, such as public health, human service agencies, hospitals, treatment providers, and criminal justice. The Task Force met over a six-month period in 2016. After extensive investigation and research, the Task Force issued eight primary recommendations to address the opioid crisis, which were published in a 99-page report in September 2016. These recommendations included the creation of Community Health Engagement Locations, or supervised injection sites. In January 2017, the King County Board of Health voted unanimously to adopt the Task Force’s recommendations as the County’s opioid response plan. The King County Council then appropriated funding to implement the Task Force’s recommendations, as adopted by the Board of Health.

B. I-27 Seeks to Undo King County’s Carefully Considered Opioid Epidemic Response Plan

Proposed King County Initiative 27 (I-27) was filed with the King County Clerk the following spring. Designed “to prohibit the funding and operation of supervised drug consumption sites in King County,” I-27 provides that “[n]o public funds may be spent on the registration,

licensing, construction, acquisition, transfer, authorization, use, or operation of a supervised drug consumption site.” The measure further imposes civil and criminal penalties on public health officials or others, including local governments, for operating any supervised injection site and imposes civil liability on the County for any appropriations of funds to such sites.

C. Protect Public Health and City of Seattle Obtain a Declaratory Judgment Invalidating I-27 and Enjoining It from the Ballot

Protect Public Health filed an action seeking a declaration that I-27 was invalid and an injunction precluding I-27 from being placed on the ballot. The City of Seattle intervened as a plaintiff, and the parties moved for judgment and injunctive relief. The trial court granted the parties’ motions, declaring that I-27 was entirely invalid because it exceeded the scope of the local initiative power. The trial court then enjoined I-27 from being placed on the ballot. This appeal followed.

IV. ARGUMENT

I-27, if allowed on the ballot, would set a dangerous precedent that is extremely likely to injure the public’s health.² The clear purpose of I-27 is to veto an evidence-based epidemic response plan that was

² Amici do not opine on the anticipated effectiveness of supervised injection sites, or any of the Task Force’s other recommendations, at combatting the opioid crisis in King County.

recommended by the Task Force and adopted by the King County Board of Health after a significant deliberative process. I-27 would create a precedent that this type of evidence-based public health decision can be overturned merely by collecting signatures. This precedent would erode the authority given by the Legislature and pose a threat to many other public health policies and response efforts.

A. The Legislature Has Vested County Boards of Health with Authority to Protect Public Health

The Washington legislature expressly provides local boards of health with supervisory authority “over all matters pertaining to the preservation of the life and health of the people within its jurisdiction.” RCW 70.05.060. This broad grant of authority includes the ability to make rules and regulations necessary “to preserve, promote and improve the public health” and to “provide for the control and prevention of any dangerous, contagious or infectious disease” within the jurisdiction. *Id.* The powers of local health officers are similarly broad. RCW 70.05.070.

Because protecting the health of citizens is an “important governmental function,” “public health statutes and the actions of local health boards implementing those statutes are liberally construed.” *Spokane Cnty. Health Dist. v. Brockett*, 120 Wn.2d 140, 149, 839 P.2d 324 (1992). The Court has observed that “[t]he legislatively delegated power

to cities and health boards ... gives them extraordinary power” and has held that “the subject matter and expediency of public health disease prevention measures are beyond judicial control, except as they may violate some constitutional right” *Id.* (internal quotation marks and citation omitted). Indeed, in *Brockett*, this Court held that the local health boards were authorized to institute needle exchange programs in an effort to stop the spread of HIV and AIDS, despite criminal laws that arguably made such programs unlawful. *Id.*

In sum, the breadth of authority granted to public health boards by the Legislature cannot be overstated. And as discussed below, the Legislature’s delegation is not only final, it is based on sound health policy.

B. The Legislature’s Broad Grant of Authority to Local Health Boards Is Based on Sound Public Health Policy

1. Local Health Officials Have Expertise the Electorate Lacks

In the context of public health policymaking, this delegation of authority to local public health boards and local health officers is necessary and appropriate, as they have the expertise to evaluate complex health considerations facing the citizens of their jurisdictions, gather the necessary information from others in the community, and quickly and flexibly enact solutions. It is these officials who are best positioned to

make evidence-based policy after weighing multiple options and taking complex societal factors into account.

Indeed, a local health officer is required to be an “experienced physician” who must also have additional expertise, such as a master’s degree in public health and requisite experience. RCW 70.05.050-55. Local health officers are required to use their expertise, among other things, to “prevent, control or abate nuisances which are detrimental to the public health” and to “take such measures as he or she deems necessary in order to promote the public health.” RCW 70.05.070(5), (9).

This expertise is important. For example, in the event of an outbreak of a contagious disease such as influenza, Ebola, or SARS, public health officials have the expertise to assess the situation and decisively address it, including the authority to impose a medically necessary quarantine to protect the public. And where a nuisance such as a pollutant affects the public health, public health officials may use their medical knowledge to devise a means to address the problem.

By contrast with local health officials, the electorate at large lacks specialized medical, scientific, or public health knowledge. If important public health decisions were left to the people, “there is a significant chance that voters will lack the information necessary to make informed decisions.” Thad Kousser & Mathew D. McCubbins, *Social Choice*,

Crypto-Initiatives, and Policymaking by Direct Democracy, 78 S. CAL. L. REV. 949, 959–61 (2005). Indeed, strong evidence shows that many voters are swayed by the way a title of a particular ballot initiative is framed, rather than understanding the policy question at issue. See Jeff Hastings & Damon Cann, *Ballot Titles and Voter Decision Making on Ballot Questions*, 46 STATE & LOCAL GOV'T REV. 118 (2014).³ Consistent with this evidence, this Court has previously recognized that large portions of the electorate make their decisions about an initiative based *solely* upon the ballot title. See *In re Ballot Title for Initiative 333*, 88 Wn.2d 192, 198, 558 P.2d 248 (1977).

In creating local public health boards and establishing the requisite qualifications for local health officials, the Legislature appreciated the necessity of such expertise. As a matter of wise policy, the Legislature endowed these experts with plenary authority to protect local public health, consistent with state and federal efforts. See RCW 70.01.010.

³ While local public health boards and public health officers are best positioned to make decisions regarding questions of complex, evidence-based public health policy, Amici, of course, do not argue that authority given to local public health boards should be entirely unconstrained by the democratic process. Indeed, in Washington—unlike some other states—local public health boards must be comprised of a majority of elected officials. RCW 70.05.030-.035. The King County Board of Health is comprised of eight elected county and city council members and two citizen health professionals appointed by the Board. See Background and History of the King County Board of Health, *available at* <https://kingcounty.gov/depts/health/board-of-health/background.aspx>.

2. Public Health Crises Often Require a Coordinated Approach

As epidemics do not stop at municipal boundaries, public health officials from multiple jurisdictions are often required to cooperate to create coordinated response plans. *See, e.g.,* U.S. DEP'T OF HEALTH & HUMAN SERVS., *Pandemic Influenza Plan 2017 Update*, at 13, 28, available at <https://www.cdc.gov/flu/pandemic-resources/pdf/pan-flu-report-2017v2.pdf> (noting that in an influenza pandemic, an effective response would require coordination between federal, state, and local governments, as well as various health care institutions and private sector actors).⁴

Additionally, effective response to public health crises may require cooperation and coordination among numerous public and private stakeholders, including media outlets, transportation systems, and healthcare facilities.

The Legislature has recognized the importance of such coordination. Thus, for example, chapter 70.26 RCW requires that local

⁴ *See also* U.S. DEP'T OF HOMELAND SECURITY, *National Response Framework*, at 5 (Jan. 2008), available at <https://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf> (last visited Aug. 3, 2018) (noting local officials “organize and integrate their capabilities and resources with neighboring jurisdictions, the State, NGOs, and the private sector”).

officials develop a pandemic flu preparedness plan based on state standards and “in consultation with appropriate public and private sector partners, including departments of emergency management, law enforcement, school districts, hospitals and medical professionals, tribal governments, and business organizations.” RCW 70.26.040(1). The plan must be “coordinated with state and federal efforts” to detect and analyze reported illness or outbreaks. RCW 70.26.040(1)(b).

Such coordination requires a responsive local health board that has an established means of communication and coordination with other jurisdictions and entities. The Legislature has provided local health boards, which have expertise in matters of public health, with the authority they need to coordinate effective responses to protect public health.

C. I-27 Would Undermine Public Health

Initiatives like I-27 are uniquely unsuited for the creation of evidence-based public health policy. Initiatives attempt to reduce complex policy considerations to simple “yes or no” questions presented to voters without necessary context. Worse, the voters lack the very expertise and ability to coordinate responses to public health crises that the Legislature desired in establishing local health boards and delegating broad authority to regulate public health.

If I-27 were allowed on the ballot, it would set a dangerous precedent that would pose an extreme threat to many other public health policies and response efforts. Strong local public health systems are the foundation for ensuring the health of the community during health crises.⁵ If citizens were permitted to undo evidence-based policies merely by collecting signatures and putting the issue to a vote on the ballot, the ability of local public health officers to respond to health crises would be greatly impaired. The patchwork of local health laws that could result from initiatives like I-27 would interfere with the multi-jurisdictional, coordinated response efforts required when the public health is threatened.

V. CONCLUSION

In conclusion, the King County Board of Health is presently engaged in numerous evidence-based initiatives to protect public health, and it should be able to continue to do so without the fear that its policies will be dismantled if opponents are able to get enough signatures for a

⁵ See U.S. DEP'T OF HOMELAND SECURITY, *National Response Framework*, *supra* note 4, at 5, (“Local police, fire, emergency medical services, public health and medical providers, emergency management, public works, environmental response professionals, and others in the community are often the first to detect a threat or hazard, or respond to an incident. They also are often the last to leave an incident site or otherwise to cope with the effects of an incident.”); see also Lindsay Bosslet, *Public Health Insider*, *Local Public Health Capacity Is Critical in the Response to Global Health Emergencies* (Sept. 28, 2015), available at <https://publichealthinsider.com/2015/09/28/local-public-health-capacity-is-critical-in-the-response-to-global-health-emergencies/> (last visited Aug. 3, 2018).

ballot initiative. I-27 not only exceeds the local initiative power, it represents a significant danger to public health, at odds with the Legislature's intent. Amici respectfully request that the Court affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 3rd day of August, 2018.

McNAUL EBEL NAWROT & HELGREN PLLC

By: s/ Theresa M. DeMonte
Theresa M. DeMonte, WSBA No. 43994
Claire Martirosian, WSBA No. 49528

*Attorneys for Professors of Public Health
and Health Policy*

APPENDIX A

PARTICIPATING PROFESSORS

1.	Margaret Chon Professor Chon is the Donald and Lynda Horowitz Professor for the Pursuit of Justice at Seattle University School of Law and serves as a member of the American Law Institute. She is a graduate of Cornell University and the University of Michigan Law School, and received a Master of Health Services Administration from the University of Michigan School of Public Health.
2.	James Lyman Gale Dr. Gale is a professor emeritus at the University of Washington, Department of Epidemiology, School of Public Health. He has an MD from Columbia and an MS in Preventive Medicine from the University of Washington. His area of expertise is communicable diseases and vaccines. He served as the Health Officer for Kittitas County for 11 years.
3.	King Holmes Dr. Holmes is a Professor of Medicine and Global Health at the University of Washington. He is currently the Director of Research and Faculty Development in the Department of Global Health, is the Director of the University of Washington Center for AIDS and STDs, and Co-Director for the NIH-funded UW/Fred Hutch Center for AIDS Research. He is a graduate of Harvard University and Cornell Medical School and has a PhD from the University of Hawaii.

4.	Judith Wasserheit Dr. Wasserheit, MD, MPH, currently serves as Professor and Chair of the University of Washington Department of Global Health. She has had a major influence on HIV prevention policy and programs worldwide and has served as Chief of the U.S. National Institute of Health’s STD Research Branch, Director of the U.S. Center for Disease Control’s STD Prevention Program, and Director of the HIV Vaccine Trials Network. She is a graduate of Princeton University and Harvard Medical School and received her master’s degree in public health from the Johns Hopkins School of Hygiene and Public Health.
-----------	--

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on August 16, 2018, I caused a copy of the foregoing **BRIEF OF AMICI CURIAE PROFESSORS OF PUBLIC HEALTH AND HEALTH POLICY IN SUPPORT OF RESPONDENT** to be served on the following in the manner indicated

below:

Carlton W.M. Seu, WSBA No. 26830	<input type="checkbox"/>	Via Messenger
Jeff Slayton, WSBA No. 14215	<input type="checkbox"/>	Via U.S. Mail
Attorneys for Respondent City of Seattle	<input type="checkbox"/>	Via Overnight Delivery
Tel: (206) 684-8200	<input type="checkbox"/>	Via Facsimile
carlton.seu@seattle.gov	<input checked="" type="checkbox"/>	Via E-File
jeff.slayton@seattle.gov		
Knoll Lowney, WSBA No. 23457	<input type="checkbox"/>	Via Messenger
Claire Tonry, WSBA No. 44497	<input type="checkbox"/>	Via U.S. Mail
Smith & Lowney, PLLC	<input type="checkbox"/>	Via Overnight Delivery
2317 E. John Street	<input type="checkbox"/>	Via Facsimile
Seattle, WA 98122	<input checked="" type="checkbox"/>	Via E-File
knoll@smithlowney.com		
claire@smithlowney.com		
Jennifer Stacy, WSBA No. 30754	<input type="checkbox"/>	Via Messenger
King County Prosecuting Attorney's Office	<input type="checkbox"/>	Via U.S. Mail
516 Third Avenue, Room W400	<input type="checkbox"/>	Via Overnight Delivery
Seattle, WA 98104-2388	<input type="checkbox"/>	Via Facsimile
Jennifer.stacy@kingcounty.gov	<input checked="" type="checkbox"/>	Via E-File

Mark C. Lamb, WSBA No. 30134
The North Creek Law Firm
12900 NE 180th Street, Suite 235
Bothell, WA 98011
mark@northcreeklaw.com

- Via Messenger
- Via U.S. Mail
- Via Overnight Delivery
- Via Facsimile
- Via E-File

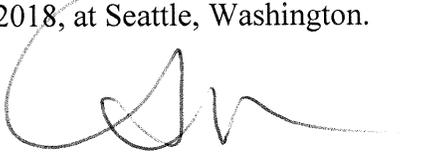
Andrew R. Stokesbary, WSBA No. 46097
Stokesbary PLLC
1003 Main Street, Suite 5
Sumner, WA 98390
dstokesbary@StokesbaryPLLC.com

- Via Messenger
- Via U.S. Mail
- Via Overnight Delivery
- Via Facsimile
- Via E-File

Philip A. Talmadge, WSBA No. 6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
phil@tal-fitzlaw.com

- Via Messenger
- Via U.S. Mail
- Via Overnight Delivery
- Via Facsimile
- Via E-File

DATED: this 3rd day of August, 2018, at Seattle, Washington.

By: 

Thao Do, *Legal Assistant*

MCNAUL EBEL NAWROT AND HELGREN PLLC

August 03, 2018 - 4:27 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95134-9
Appellate Court Case Title: Protect Public Health v. Joshua Freed, et al.
Superior Court Case Number: 17-2-21919-3

The following documents have been uploaded:

- 951349_Briefs_20180803162600SC149935_1014.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was 18-0803 Brief of Amici Curiae Profs of Public Health and Health Policy ISO Respondent.pdf
- 951349_Motion_20180803162600SC149935_8959.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was 18-0802 Motion of Amicus Curiae Profs of Public Health and Health Policy to File Amicus Brief.pdf

A copy of the uploaded files will be sent to:

- carlton.seu@seattle.gov
- claire@smithandlowney.com
- dstokesbary@StokesbaryPLLC.com
- janine.joly@kingcounty.gov
- jeff.slayton@seattle.gov
- jennifer.stacy@kingcounty.gov
- knoll@smithandlowney.com
- lise.kim@seattle.gov
- mark@northcreeklaw.com
- matt@tal-fitzlaw.com
- michael.ryan@seattle.gov
- monica.erickson@kingcounty.gov
- phil@tal-fitzlaw.com

Comments:

Sender Name: Thao Do - Email: tdo@mcnaul.com

Filing on Behalf of: Theresa Demonte - Email: tdemonte@mcnaul.com (Alternate Email: tdo@mcnaul.com)

Address:
600 University Street
Suite 2700
Seattle, WA, 98101
Phone: (206) 467-1816 EXT 362

Note: The Filing Id is 20180803162600SC149935

