COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2013-SC-000023-D

BULLITT FISCAL COURT,
BULLIT COUNTY, KENTUCKY,
CITY OF MT. WASHINGTON,
CITY OF SHEPHERDSVILLE,
CITY OF HILL VIEW,
CITY OF LEBANON JUNCTION,
CITY OF HEBRON ESTATES,
CITY OF HUNTER'S HOLLOW AND
CITY OF FOX CHASE — APPELLANTS

v.

ON DISCRETIONARY REVIEW FROM
THE KENTUCKY COURT OF APPEALS
CASE NO. 2011-CA-001798

BULLITT CIRCUIT COURT
11-CI-00348
HON. RODNEY BURRESS, BULLITT CIRCUIT
JUDGE, DIVISION I

BULLITT COUNTY BOARD OF HEALTH — APPELLEE

BRIEF FOR APPELLEE

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CERTIFICATION

I hereby certify that true and correct copies of the Brief for Appellee were served upon the Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; the Hon. Rodney Burress, Bullitt Circuit Judge, Division I, P.O. Box 97, Shepherdsville, KY 40165; Hon. Monica Robinson, Hon. John Spainhour and Hon. Tammy Baker, Bullitt County Attorney's Office, 300 South Buckman Street, P.O. Box 1446, Shepherdsville, KY 40165, Counsel for Appellants; and Hon. Jack Conway, Kentucky Attorney General, State Capitol, 700 Capitol Avenue, Suite 34, Frankfort, KY 40601, by mailing same, postage prepaid, this 14th day of February 2014.

COUNSEL FOR APPELLEE

STATEMENT CONCERNING ORAL ARGUMENT

While Appellee Bullitt County Board of Health believes the opinion of the Court of Appeals is clear and, moreover, correct in upholding the validity of the smoking regulation, oral argument may be useful to address the arguments raised by Appellants.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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INTRODUCTION

It is undeniable that the regulation of smoking in public places lies at the heart of a government's police power to protect the health and welfare of its citizens. The Kentucky legislature, by enacting KRS 212.230, has bestowed upon local boards of health the primary authority to promulgate regulations necessary to protect public health. In furtherance of this legislatively appointed authority, Appellee, the Bullitt County Board of Health, adopted a regulation banning smoking in public places and places of employment within Bullitt County, Kentucky. This appeal arises from a challenge to this regulation by Appellants, the Bullitt County Fiscal Court and several municipalities within Bullitt County.

Appellants challenge the validity of the Bullitt County Board of Health's regulation banning smoking, not because it is unrelated to the protection of public health, but because they claim the Bullitt County Board of Health had no authority to adopt such a regulation in the first place. While the Bullitt Circuit Court agreed with Appellants and invalidated the regulation, the Kentucky Court of Appeals reversed that decision and held that the regulation was a reasonable exercise of the broad authority granted to the Bullitt County Board of Health by KRS 212.230. In light of this Court's previous cases recognizing the broad scope of authority granted to local boards of health under KRS 212.230, this Court should affirm the decision of the Kentucky Court of Appeals and hold that the Bullitt County Board of Health acted well within its authority to protect the health of the citizens of Bullitt County by regulating smoking.

COUNTERSTATEMENT OF THE CASE

In 2010, the Bullitt County Board of Health (the "BCBH") initiated the process for adopting a regulation to protect public health by regulating smoking in public places and places of employment. The BCBH held four public forums to educate the citizens of Bullitt County, Kentucky about the dangers of second-hand smoke and to solicit public commentary regarding the regulation of smoking.[1] The BCBH read proposed regulation No. 10-01, entitled "A Regulation Related to the Protection of the Public Health and Welfare by Regulating Smoking in Public Places and Places of Employment" (the "Regulation"),[2] to the public for the first time on February 15, 2011.[3] The Regulation was read for a second time on March 22, 2011, adopted by a vote of 7-2 of the members of the BCBH, and was set to take effect on September 15, 2011.[4]

In its final form, the Regulation prohibits smoking in public places, places of employment, private clubs and certain outdoor venues within Bullitt County.[5] The Regulation provides a non-exclusive list of public places in which smoking is banned.[6] Owners, operators and managers of the public places subject to the Regulation are required to post "no smoking signs" and remove ash trays from prohibited areas.[7] The

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[1] Trial Record (T.R.) p. 121.

[2] T.R. pp. 137-147. A copy of the Regulation is provided at Appendix Tab A.

[3] T.R. p. 122.

[4] T.R. p. 122.

[5] T.R. pp. 142-143.

[6] T.R. pp. 142-144.

[7] T.R. p. 144.

Regulation also protects employees seeking to enforce it,[8] and provides a list of penalties and an appeals process for violators.[9]

Four days before the BCBH adopted the Regulation, Appellants filed a Motion for Declaration of Rights (the "Motion for Declaration") before the Bullitt Circuit Court challenging its validity.[10] Appellants demanded that the Bullitt Circuit Court invalidate the Regulation and permanently enjoin the BCBH from adopting, implementing or enforcing it.[11] In support, Appellants claimed that (1) the Regulation infringed upon local legislative authority and exceeded the statutory authority given to the BCBH; (2) the statute under which the Regulation was promulgated, KRS 212.230, was unconstitutional; and (3) the Regulation was preempted by state law.[12]

The BCBH filed an initial response to Appellants' Motion for Declaration on March 25, 2011.[13] The Bullitt Circuit Court established a briefing schedule, and on April 27, 2011, Appellants filed a joint brief in support of their Motion for Declaration. The BCBH filed its brief on May 3, 2011,[14] and filed a response to Appellants' joint brief on May 11, 2011.[15] The Bullitt Circuit Court held a hearing on August 25, 2011 to adjudicate Appellants' Motion for Declaration. In an order dated September 15, 2011

[8] T.R. pp. 144-145.

[9] T.R. pp. 145-146.

[10] T.R. pp. 12-16.

[11] T.R. pp. 12-16.

[12] T.R. pp. 12-16.

[13] T.R. pp. 25-37.

[14] T.R. pp. 121-150.

[15] T.R. pp. 155-164.

(the "Order"), the Bullitt Circuit Court entered a judgment in favor of the Appellants, invalidating the Regulation and permanently enjoining the BCBH from enforcing it.[16] In so holding, the Bullitt Circuit Court concluded that the BCBH exceeded its authority under KRS 212.230 because the Regulation infringed upon the legislative authority of the Appellees.[17]

The BCBH appealed this decision and the Kentucky Court of Appeals reversed the Bullitt Circuit Court, finding that the BCBH acted within the authority granted to it by KRS 212.230.[18] The Court of Appeals further held that the grant of powers by KRS 212.230 was a constitutional delegation of authority by the Kentucky legislature to local boards of health.[19] Finally, the Court of Appeals concluded that, although not raised by Appellants below, the Regulation was "in no meaningful way distinguishable from" a local ordinance banning smoking in public that this Court already determined was reasonable and "related to public health" in *Lexington Fayette Cnty. Food & Beverage Ass'n v Lexington-Fayette Urban Cnty. Gov't*, 131 S.W.3d 745 (Ky. 2004) (the "*LFUCG*" case).[20] Thereafter, Appellants sought discretionary review of the Court of Appeals' decision, which this Court granted.

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[16] T.R. pp. 186-198. Copy attached at Appendix Tab B.

[17] T.R. pp. 186-198.

[18] *See* Opinion Reversing and Remand, Kentucky Court of Appeals ("Ct. App. Op.") at pp. 4-5. The opinion of the Court of Appeals appears in the Appellant's Brief at Appendix Tab A.

[19] *Id.* at p. 7 (citing *Breckenridge Cnty. v. McDonald*, 159 S.W. 549 (1913)).

[20] *Id.* at pp. 7-8.

ARGUMENT

I. SUMMARY OF THE ARGUMENT.

This Court should affirm the Court of Appeals' decision and hold that the Regulation is a reasonable exercise of the authority given to the BCBH to protect the health of Bullitt County citizens by the Kentucky legislature under KRS 212.230. The BCBH's regulation of smoking is well within the statutory authority provided to local boards of health by KRS 212.230. While Appellants have waived any argument to the contrary, the Regulation does in fact "protect of the health of the people" as required by KRS 212.230. Moreover, KRS 212.230 does not unconstitutionally infringe upon the legislative authority reserved to Appellants. Nor is KRS 212.230 preempted by any other state law or regulation. Finally, Appellants have failed to proffer any other valid reason for enjoining the BCBH from implementing the Regulation. As a result, this Court should affirm the decision of the Court of Appeals.

II. STANDARD OF REVIEW.

This appeal principally concerns whether the Regulation adopted by the BCBH exceeds the scope of its enabling statute, KRS 212.230, and whether that statute is itself an unconstitutional delegation of authority by the Kentucky legislature. These questions are matters of law subject to *de novo* review by this Court. *See Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998). To the extent the Appellants' other arguments dispute the BCBH's interpretation of the Regulation, such interpretation is afforded the substantial deference Kentucky law typically awards administrative agencies in the interpretation of their own regulations. *See Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991) ("In most cases, an agency's interpretation of its own regulations is entitled to substantial deference.").

III. KRS 212.230 AUTHORIZES THE BULLITT COUNTY BOARD OF HEALTH TO REGULATE SMOKING.

By enacting KRS 212.230, the Kentucky legislature provided the BCBH with all the authority it needs to adopt the Regulation and prohibit smoking in public places and places of employment. The powers of a board of health and its authority to promulgate regulations are derived from the Commonwealth's police powers to protect the health and welfare of the citizens of Kentucky. *See Commonwealth v. Do, Inc.*, 674 S.W.2d 519, 521 (Ky. 1984). "The state, through the powers delegated by it to any of its political subdivisions, may require citizens to conform to its properly enacted regulations regarding public health." *Id.* (citing *Stephenson v. Louisville & Jefferson Cnty. Bd. of Health*, 389 S.W.2d 637 (Ky. 1965)). Indeed, local boards of health have "broad authority to promulgate rules and regulations concerning public health." *Id.* (citing *Louisville & Jefferson Cnty. Bd. of Health v. Haunz*, 451 S.W.2d 407 (1970)).

Thus, in taking actions pursuant to its own regulations, the BCBH "is actually exercising the police power of the state to protect the public health." *Id.* As a result, a court has jurisdiction to restrain the BCBH from implementing its regulations only if (1) the BCBH exerts authority "not fairly within the power conferred by the [Kentucky legislature through statute]" or (2) if the Regulation is "plainly not needed for the purpose of conserving or protecting the health of the people."[21] *Bd. of Trustees v. McMurty*, 184 S.W. 390, 395 (Ky. 1916).

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[21] As argued *infra* at pp. 10-12, Appellants' have waived any argument that the Regulation does not "protect the health of the people" in its prohibition of smoking in public places and places of employment. As such, the only question addressed in this section of Appellee's Brief is whether the Regulation exceeds the authority provided by KRS 212.230 even if it "protects the health of the people."

Solely on its face, KRS 212.230 authorizes the BCBH to adopt regulations for the protection of public health absent any other enabling legislation. Entitled "Powers and duties of county, city-county, and district health boards," KRS 212.230 affirmatively delegates power to the BCBH (rather than limits it) and enumerates the mandatory powers and duties the BCBH may exercise. Among those "powers and duties," KRS 212.230 provides that a county, city-county, and district board of health *shall*:

> Adopt, except as otherwise provided by law, administrative regulations not in conflict with the administrative regulations of the Cabinet for Health and Family Services necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health.

KRS 212.230(1)(c). The specific enumerated power and duty in question here, KRS 212.230(1)(c), grants local boards of health the authority to enact regulations that, among other possibilities, are "necessary to protect the health of the people." Id.

Kentucky's highest court has previously held that KRS 212.230 delegates local boards of health sufficient independent authority to adopt regulations aimed at protecting public health without need for any other enabling legislation. For example, in *Barnes v. Jacobsen*, 417 S.W.2d 224 (Ky. 1967), two plaintiffs challenged the validity of a regulation adopted by the Boone County Board of Health pursuant to KRS 212.230(1)(c). The regulation provided that "no private sewage disposal system should be installed without a permit first having been obtained from the Boone County Health Department." *Id.* at 227. Citing no other statutory authority, the Court of Appeals (then Kentucky's highest court) concluded that the Boone County Board of Health properly adopted the permitting regulation through its authority granted by KRS 212.230(1)(c). *Id.* at 227-228.

Specifically, the Court in *Barnes* held that:

> The Boone County Board of Health obtained its power from KRS Chapter 212. It was authorized by KRS 212.230(1)(c) to 'Adopt, except as otherwise provided by law, such rules and regulations not in conflict with the rules and regulations of the State Board of Health, as may be necessary to protect the health of the people . . .' Public health is a proper subject of legislation. We hold that such delegation of police power is not contrary to law. The regulation is valid.

Id. at 227 (internal citations omitted).

Kentucky's highest court has also validated administrative regulations adopted pursuant to statutes similar to KRS 212.230 without need for any other enabling legislation. For example, although given short shrift by the Bullitt Circuit Court, this Court in *Haunz*, upheld an administrative regulation adopted solely pursuant to a board of health's authority under KRS 212.350. 451 S.W.2d at 407. In *Haunz*, the Jefferson County Board of Health adopted regulations requiring minimum standards for habitable housing. *Id.* at 407. A landlord in Jefferson County brought an action to enjoin enforcement of those regulations. *Id.* The trial court ruled in favor of the landlord and found that the Jefferson County Board of Health had "unlawfully usurped the lawmaking power of the legislative arm of the government" by adopting the minimum standards as regulations. *Id.*

The Court of Appeals (again, at the time, Kentucky's highest court) reversed the trial court and found that the Kentucky legislature, by enacting KRS 212.350, had clearly permitted the Jefferson County Board of Health to adopt such regulations. It reviewed the enabling statutes giving the board of health the powers to enact the regulations and found:

> The board was created and given broad powers to safeguard the public health by KRS Chapter 212. By KRS 212.350 the board is vested with the authority to:

> "* * * make appropriate rules and regulations and do all things reasonable or necessary effectively to carry out the work and properly to perform the duties intended or required by KRS 212.350 to 212.620. * * *"
>
> By KRS 212.370 and 212.600 it is the duty of the board to make and enforce reasonable regulations controlling or affecting the health of the residents of Jefferson County.

Id.

Although nothing in KRS 212.360 – 212.620 referred to "minimum habitable standards" or to the board of health's ability to enact administrative regulations, the Court in *Haunz* nevertheless held that KRS 212.350 independently authorized the Jefferson County Board of Health to adopt regulations requiring minimum standards of habitability in housing.[22] In reversing the trial court, the Court referred only to the "duty of the board to make and enforce reasonable regulations controlling or affecting the health of the residents of Jefferson County" as authorized by KRS 212.350, and did not refer to any other statutory or enabling legislation supporting its regulations. At the time *Haunz* was decided, KRS 212.350 was closely analogous to the current KRS 212.230(1)(c), *see* KRS 212.350 (1955), and the *Haunz* Court's sole reliance upon KRS 212.350 in reversing the trial court affirms that the BCBH needs no other authority permitting it to adopt regulations pursuant to KRS 212.230(1)(c).[23]

In light of this precedent, Appellants' argument that the BCBH cannot craft "wholly new law" in the form of the Regulation fails because the Regulation is not "wholly new." Appellants argue that KRS 212.230 limits the BCBH to adopt only those regulations which "implement the general policy set forth by the legislature." *See*

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[22] A copy of KRS 212.360 – 620 is attached at Appendix Tab C.

[23] A copy of KRS 212.350 (1955) is attached at Appendix Tab D.

Appellants' Brief at p. 6. KRS 212.230, however, establishes the exact "general policy" needed to adopt the Regulation. This statute enables county boards of health to adopt regulations "necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health." KRS 212.230(1)(c). Simply put, the BCBH cannot "usurp" authority that has already been delegated to it by the General Assembly. As a result, this Court should affirm the Court of Appeals' decision validating the Regulation as a reasonable exercise of the authority expressly granted to the BCBH under KRS 212.230.

IV. APPELLANTS HAVE WAIVED ANY ARGUMENT THAT THE REGULATION DOES NOT MEET THE REQUIREMENTS OF KRS 212.230(1)(C).

Not only do Appellants fail to demonstrate how the Regulation is "not fairly within the power conferred" to the BCBH by KRS 212.230, but Appellants have waived any argument that the Regulation does not serve the purpose of protecting public health as required by that statute. At the outset of this litigation, Appellants assured the Bullitt Circuit Court they would not challenge, for purposes of their Motion for Declaration, whether Regulation's ban on smoking was necessary for the protection of the public health.[24] Appellants affirmed this stance at an evidentiary hearing three days before the Bullitt Circuit Court's August 25 hearing. At that hearing, counsel for Appellants stated:

> We don't think it is an appropriate area of inquiry in the scope of our pleadings, defined by this motion. This motion is a declaration of rights on whether the health department, **assuming that it has medical necessity, that it can show medical necessity**, without conceding

[24] T.R. pp. 64 – 65. For what it's worth, Appellants repeat this admonition in their Brief to this Court. *See* Appellants' Brief at p. 9 ("Whether Regulation 10-01 is meant to protect the health of the people was not at issue at the trial level, nor currently at the appellate level. Appellants take no position on whether Regulation 10-01 is in the interests of public health.").

> whether there is or isn't, it is purely a legal issue. **Does the health department have the authority to promulgate a regulation assuming it finds some health necessity to do so.**[25]

In its Order, the Bullitt Circuit Court recognized the position taken by the Appellants:

> **The issue presented has nothing to do with any determination of the negative consequences of smoking.** The issue before this court is strictly limited to a determination of the authority of the [BCBH] to enact a smoking ban as set forth in [the Regulation]. This court is called on to determine if the [BCBH] has exceeded its legislatively granted power and authority in the adoption of [the Regulation].[26]

This left Appellants in a curious position, as the BCBH adopted the Regulation under the express grant of authority provided by KRS 212.230(1)(c) to protect the public health.

Because Appellants refused to challenge the health-related consequences of smoking, they provided no evidence that prohibiting smoking was not "necessary to protect the health of the people." Appellants made perfectly clear their challenge was solely focused upon who gets to decide whether a limited prohibition on smoking in public places is needed: "[W]e think it is the wrong legislative body who has attempted to promulgate this policy. This is only about who has the right to say so. Not whether it is good or bad, whether it is needed or appropriate."[27] As a result, the Appellants have conceded that, for the purposes of their action and this appeal, the Regulation is "necessary to protect the health of the people," and cannot now argue that the BCBH failed to satisfy the requirements of KRS 212.230(1)(c) when invoking its authority. *See Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980) ("An issue not timely raised before the circuit court cannot be considered as a new argument before this Court.").

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[25] VR 2011-08-22-09.34.30.385.wmv, 08/22/11, 9:40:54-9:41:30 (emphasis added).

[26] T.R. at p. 187 (emphasis added).

[27] VR 2011-08-22-09.34.30.385.wmv, 08/22/211, 09:35:12-09:35:30.

It should be further noted that Appellants' wholesale refusal to address whether the Regulation is "necessary to protect the health of the public" before the Bullitt Circuit Court resulted in the striking of evidence submitted by the BCBH on that point. This evidence was based upon specific studies conducted in Bullitt County demonstrating that second-hand smoke in the places to be regulated was causing significant harm to the health of the citizens of Bullitt County. While noting that the issue is not before this Court on appeal, Appellants appear to simultaneously argue that the Regulation is not properly supported by evidence that second-hand smoke is harming the citizens of Bullitt County. *See* Appellants' Brief at 12 ("There is no showing about public health conditions in Bullitt County."). Appellants cannot be allowed to use gamesmanship in striking evidence from the trial record and then using the absence of the same to "prove" their point on appeal.

Nevertheless, it requires no great effort by this Court to determine that the Regulation indeed satisfies KRS 212.230(1)(c)'s requirement that it "protect the health of the people." The Kentucky Supreme Court has expressly stated that a limited prohibition of smoking in public places is well within the power to protect the health of the public:

> Among the police powers of government, the authority to promote and safeguard public health is a high priority. *Graybeal v. McNevin*, 439 S.W.2d 323 (Ky. 1969). In *Graybeal, supra*, this Court upheld the fluoridation of the public water supply of the City of Somerset. Accordingly, a prohibition on smoking and the accompanying result of second-hand smoke, is well within the traditionally recognized authority of local government as a health matter.

LFUCG, 131 S.W.3d at 749.

Furthermore, Kentucky courts have held that a board of health's authority to regulate is broad and should be construed liberally. In *Bd. of Health of Covington v. Kollman*, 160 S.W. 1052 (Ky. 1913), the Court stated:

> It will be observed that, by the foregoing sections, local boards are empowered, and it is made their duty, to execute such sanitary regulations as the local board may consider expedient . . . . It is well settled that the powers of such boards, conferred for the protection of the public health, should be liberally construed in order to effectuate the purpose of the Legislature.

Id. at 1054. *See also Jefferson Cnty. v. Jefferson Cnty. Fiscal Court*, 108 S.W.2d 181 (Ky. 1937) ("The county board of health is the statutory tribunal upon which is imposed the duty of protecting the general health of the people and the powers conferred upon it should be liberally construed to accomplish its purpose.").

Here, in adopting the Regulation, the BCBH concluded that prohibiting smoking in public places and places of employment was indeed necessary to "protect the health of the people."[28] Given the BCBH's broad authority, and the Court's decision in the *LFUCG* case, the Regulation is clearly a category of health protection "well within the traditionally recognized authority of local government" delegated to boards of health by KRS 212.230(1)(c). *LFUCG*, 131 S.W.3d at 749. Moreover, Appellants would be hard-pressed to argue that the conclusions of the additional studies cited in the Regulation – which provide concrete data demonstrating the dangers of second-hand smoke inhalation – somehow do not apply to the citizens of Bullitt County. Second-hand smoke inhalation presents the same dangers regardless of its geographic location, and Appellants have, again, steadfastly refused to provide any evidence to the contrary.

V. KRS 212.230 DOES NOT VIOLATE THE KENTUCKY CONSTITUTION.

The Kentucky legislature's delegation of authority to the BCBH through KRS 212.230 does not unconstitutionally usurp the authority of county legislative bodies. Having failed to demonstrate that the Regulation exceeds the BCBH's authority under

[28] T.R. p. 42.

KRS 212.230, and having waived any argument that it fails to "protect the health of the people," Appellants are left with no other option but to argue that KRS 212.230 is itself unconstitutional.

In *Se. Displays, Inc. v. Ward*, 414 S.W.2d 573 (Ky. 1967), however, the Kentucky Court of Appeals addressed whether enabling legislation empowering an administrative body to adopt regulations violated the Kentucky Constitution's mandated separation of powers. The enabling legislation at issue in *Ward* required the Commissioner of Highways to prescribe regulations setting standards for advertising signs "designed to protect the safety of the users of the highways and otherwise to achieve the objectives set forth" in the enabling statute. *Id.* In challenging this "billboard law," the appellants argued it violated Sections 27 and 28 of the Kentucky Constitution which prescribe the separation of powers between Kentucky's various branches of government. *Id.* at 575.

The Court in *Ward*, however, disagreed. It stated:

> A reading of the regulation indicates that it[] is in furtherance of the purpose of the legislation which specifically authorizes the adoption of such regulations. In the light of *Butler v. United Cerebral Palsy of Northern Ky., Inc.*, Ky., 352 S.W.2d 203, such regulation is not an unconstitutional delegation of legislative power. Nor is the regulation vague or abstract. It contains various definitions and is specific in its terms in so far as this case is involved.

Id.

Butler v. United Cerebral Palsy of Northern Ky., Inc., the case upon which the Court relied in *Ward*, concerned the validity of KRS 157.305, which in pertinent part, delegated to the Kentucky Board of Education authority to define whether a private school could qualify as a state school for purposes of educating "exceptional children." 352 S.W.2d 203, 204 (Ky. 1961). Like it would later hold in *Ward*, the Court in *Butler* found that the statute did not unconstitutionally delegate legislative authority to another

branch of government. *Id.* at 208. Rather, it held there was nothing *per se* unconstitutional in the legislature delegating authority over specialized matters to some subordinate body. *Id.* at 207-08. It acknowledged that the "members of the legislature . . . have neither the time, facilities, nor qualifications" to perform the delegated action, and that the agency in question was "fully and better qualified than the legislature to establish and carry out whatever further policies and procedures may be necessary or desirable." *Id.* at 208. The Court also stated that the agency in question was unlikely to abuse its authority, and that "any discriminatory treatment is inherently reviewable by the courts." *Id.*

Here, like in *Ward* and *Butler*, the legislature's delegation of authority to the BCBH in matters relating to public health does not violate the Kentucky Constitution's mandate for the separation of powers. On the contrary, this Court has explicitly held that boards of health are empowered to adopt regulations like the one at issue in this appeal because they operate as functional arms of the state. In *Do, Inc.*, (a case relied upon by the Court of Appeals below), this Court examined whether the delegation of authority to boards of health under KRS 212.600 was a proper delegation of legislative authority. 674 S.W.2d at 521. The Court noted that:

> *Stephenson v. Louisville & Jefferson County Board of Health, et al.*, Ky. 389 S.W.2d 637 (1965), held that the Board of Health was a municipal corporation and a subdivision of the state. Consequently, the Board of Health in actions taken pursuant to its own regulations or the laws of other governmental units is actually exercising the police power of the state to protect the public health. ***The state, through the powers delegated by it to any of its political subdivisions, may require citizens to conform to its properly enacted regulations regarding public health***. Such is the case in regard to the enforcement of local lead-poisoning control regulations as they relate to owners of rental property in Jefferson County.

Id. (emphasis added). Accordingly, the Court of Appeals concluded below: "County boards of health, such as the [BCBH], [and] like the Louisville & Jefferson County Board of Health in *Do*, are state subdivisions and 'through the powers delegated by [the legislature] may require citizens to conform to its properly enacted regulations regarding public health.'"[29]

And like in *Ward* and *Butler*, the legislature's delegation of authority over public health regulation to the BCBH makes sense because the BCBH is especially qualified to exercise such authority. County boards of health, like the BCBH, are comprised of specialists from multiple medical fields with expertise that state and local legislatures do not possess. *See* KRS 212.020(1) (describing the requirements for board of health members).[30] Such expertise makes the BCBH better situated than the Kentucky legislature to regulate health matters at the local and county level – a fact the Kentucky legislature expressly acknowledges in delegating authority over such matters in KRS 212.230. Further, there is no evidence that the BCBH has ever previously abused its

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[29] *See* Ct. App. Op. at p. 6 (citing *Do, Inc.*, 674 S.W.2d at 521).

[30] The requirements for county board of health membership, except in rare circumstances where such individuals are not available, are:

> The secretary of the Cabinet for Health and Family Services shall appoint, from a list of nominees, three (3) qualified, licensed, and practicing physicians; one (1) qualified, licensed, and practicing dentist; one (1) qualified, licensed, and practicing registered nurse; one (1) licensed engineer engaged in the practice of civil or sanitary engineering; one (1) qualified, licensed, and practicing optometrist; one (1) qualified licensed and practicing veterinarian; one (1) licensed pharmacist; and one (1) lay person knowledgeable in consumer affairs residing in each county who, together with the county judge/executive and one (1) person appointed by the fiscal court in each county, shall constitute a local board of health for the respective counties in which they reside.
>
> KRS 212.020(1).

authority, and, as noted in *Butler*, review of any such misconduct is available in the courts. Thus, the decision by the legislature to delegate to the boards of health the power to pass regulations "necessary to protect the health of the public" under KRS 212.230 is constitutionally sound.

As a result, Appellants' argument that the Kentucky legislature's delegation of authority in KRS 212.230(1)(c) violates the separation of powers mandated by Kentucky's Constitution, Articles 27 and 28, fails. As held by the Court of Appeals below, this issue was expressly resolved in *Do, Inc.* and *Haunz* for the reasons set forth above.[31] Moreover, as the Court of Appeals stated in *Breckenridge Cnty.*:

> The county boards of health are county officials having duties to perform toward the public within their counties . . . It was competent for the legislature to create these governmental agencies, and to impose upon them the discharge of certain duties to the State and counties. ***If the legislature sees proper to have the police laws of the State looking to the preservation of the health of the public, executed by a body of officials selected and chosen with reference alone to their fitness for that delicate and important task, instead of imposing it on the fiscal courts, or town councils, it is clearly within their power to do so.***[32]

This explanation, emphasized by the Court of Appeals below, not only provides a strong foundation for upholding the constitutionality of the delegation of authority in KRS 212.230 but further emphasizes the logic behind that delegation in the first place. As discussed above, KRS 212.230 demonstrates the BCBH is better suited to (1) the changing understanding of health risks, (2) the policy established by the legislature of protecting the public against those health risks, and (3) the necessary expertise and experience for those regulating local health. Notably, Appellants do not address

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[31] *See* Ct. App. Op. at pp. 6-7.

[32] *See* Ct. App. Op. at p. 7 (citing 159 S.W. at 552) (emphasis in Ct. App. Op.).

Breckenridge in their Brief despite the Court of Appeals prominently citing it when upholding the constitutionality of KRS 212.230.

While failing to mention this Court's holding in *Breckenridge*, Appellants cite both the *LFUCG* case and *Henry v. Parrish*, 211 S.W.2d 418 (Ky. 1948), as support for the proposition that KRS 212.230 unlawfully usurps their inherent (and apparently exclusive) legislative authority to regulate matters of public health. Such argument, however, reaches too far. While the *LFUCG* case holds that a local legislative body *may* regulate smoking, the Court's holding there does not foreclose the possibility of regulation by a local board of health. Further, *Parrish* is similarly inapposite here. In *Parrish*, the plaintiff did not complain "of the requirement . . . that a permit be obtained in order to conduct the business of foods handling or dispensation," or argue that the board of health could not adopt and enforce regulations regarding proper food handling or preparation. 211 S.W.2d at 420. Rather, the issue in *Parrish* was whether the local board of health exceeded its authority to protect public health by charging fees for its services in awarding food-handling permits. *Id.* at 419. Both *LFUCG* and *Parrish*, then, are far removed from the instant case because the Regulation here falls squarely within the constitutional authority afforded by KRS 212.230.

The reasoning set forth in *Breckenridge* and *Butler* also runs counter to Appellants' claim that KRS 212.230 is unconstitutionally vague. Judge Taylor, in dissent below, asserts that KRS 212.230(1)(c) is ambiguous, and, therefore, that the legislative intent behind KRS 212.230 must be ascertained in order to determine its proper application.[33] The grant of authority under KRS 212.230(1)(c), however, is clear and

[33] *See* Order & Op. at p. 12.

unambiguous, and the Regulation falls within the ambit of that provision; however, even if KRS 212.230(1)(c) could be considered ambiguous, the determination of legislative "intent" by the dissent below is impermissibly narrow. Specifically, the dissent found that second-hand smoke inhalation could not possibly have been considered by the legislature when it enacted KRS 212.230 in 1954. However, this is exactly why the legislature would have established the policy of taking actions "necessary to protect the health of the people" rather than specifically outline each subpart of that particular policy – not only do advances in science and general knowledge reveal new threats to the health of the people of, inter alia, Bullitt County, but the duty of promulgating regulations to fulfill the policy of protecting against these evolving threats was placed with the public agency best equipped to dealing with those threats.

Ultimately, the Kentucky legislature saw fit to protect the health of the citizens of Kentucky and delegated authority to promulgate regulations in furtherance of that goal to local boards of health like the BCBH. The expertise, experience, time and resources of these agencies make them especially well suited for such delegation. That judicial review exists to ensure such agencies do not adopt regulations "not fairly within the power conferred by the [Kentucky legislature] or plainly not needed for the purpose of conserving or protecting the health of the people" ensures that the authority delegated is not unfettered. *See McMurty*, 184 S.W. at 395. As a result, KRS 212.230 is a constitutional delegation of legislative authority and does not violate Sections 27 and 28 of Kentucky's Constitution.

VI. THE REGULATION IS NOT PREEMPTED BY KENTUCKY LAW.

Kentucky law does not preempt the BCBH's Regulation prohibiting smoking in public places and places of employment. Generally, a law or regulation is preempted in

three ways. First, preemption occurs when the Kentucky legislature expresses a clear intent to preempt a law. *See, e.g., Southside Real Estate Developers, Inc. v. Pike Cnty. Fiscal Court*, 294 S.W.3d 453, 457-458 (Ky. App. 2009) (applying federal preemption principles). Second, preemption may be implied when a superior scheme of legislation "occupies the field" such as to leave no room for other law. *See id.* Third, preemption applies when conformity with both sets of laws is impossible. *See id.* Appellants argue that the Regulation is preempted by KRS 61.165 and 61.167. *See* Appellants' Brief at p. 15. KRS 61.165 concerns smoking policies in buildings owned by or operated by certain governmental authorities. KRS 61.167 prohibits smoking outside of designated areas in the Capitol or Capitol Annex in Frankfort, Kentucky.

As is evident on by their plain language, neither KRS 61.165 nor 61.167 preempt the Regulation. This is because neither statute contains any express provisions stating they are intended to preempt any other law. As this Court stated in *LFUCG*:

> When the legislature seeks to expressly preempt entire fields of local regulation and ordinance, it does so by clear and unmistakable language. There is no clear expression of prohibition in regard to this case, and there is no implied expression of prohibition which arises to the level of a conflict between the ordinance and state law.

131 S.W.3d at 751 (interpreting KRS 61.165 among others).[34] Although *LFUCG* was decided in the context of an urban county ordinance rather than a board of health

[34] It should be noted that similar arguments regarding preemption were attempted and disposed of in the *LFUCG* case. Although KRS 61.165 and 61.167 may have been slightly altered following the *LFUCG* case, the arguments therein and their result are the same, as the Court of Appeals below agreed. *See* Ct. App. Op. at p. 8 ("The pre-emption issue raised by [Appellants] in this case were similarly disposed of by [the *LFUCG* case]").

regulation, whether an ordinance or regulation is expressly preempted is the same for either.

Furthermore, there are no other statutes or regulations that "occupy the field" of smoking regulation such that no room is left for the Regulation. As set forth by this Court in the *LFUCG* case, "[a]gain, we must agree with the circuit judge that the statutes presented are not a comprehensive system of legislation on smoking but are a collection of various statutes that mention smoking in a specific context." *Id.* at 751. The text of KRS 61.165 and 61.167 do not change that analysis. KRS 61.167 only applies to the Capitol and Capitol Annex and can hardly be considered to "occupy the field" regarding smoking regulations. Similarly, KRS 61.165 merely permits named governmental entities to adopt a smoking policy for *only* their office buildings, workplaces, or facilities, and does not preclude the BCBH from prohibiting smoking elsewhere. Simply put, a "Smoking policy for *governmental office buildings or workplaces*" cannot occupy the entire field of smoking regulation. *See* KRS 61.165 (emphasis added).

The BCBH conceded at trial court level that KRS 61.165 does not allow it to regulate smoking inside of county and city buildings within Bullitt County.[35] It should be noted, however, that KRS 61.165, by its terms, has no effect on any other buildings or public areas, and the limited application of KRS 61.165 certainly does not "occupy the field" of smoking regulation. Section 3 of the Regulation, which makes the Regulation applicable to city and county owned places of employment, can be stricken under the severability clause (Section 17) while allowing the remainder of the Regulation to be enforced.

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[35] T.R. p. 194.

Beyond this very limited exception, no "conflict" exists between KRS 61.165 and 61.167 and the Regulation because conformity with both is possible. Indeed, the Regulation does not purport to extend to the Capitol or the Capitol Annex as those buildings do not lie within Bullitt County, nor does the Regulation conflict with local ordinances regarding city and county-owned buildings, workplaces or facilities because Appellants have thus far declined to promulgate any restrictions under KRS 61.165. Even if they do, the possible conflict would exist only as to those buildings, and the conflicting provision of the Regulation could be stricken under the severability clause. Thus, the third type of preemption would is not applicable because individuals could comply with both the county or city ordinance and the Regulation simultaneously. Moreover, Appellants have identified no other laws that may possibly conflict with the Regulation. No preemption exists under any of the three recognized theories, and the Regulation should be upheld.

VII. KRS 212.230 DOES NOT PERMIT THE BCBH TO REGULATE THE CONSUMPTION OF CHEESEBURGERS OR SODAS.

With no other argument left at their disposal, Appellants resort to the familiar refrain that, should the Regulation stand, it will certainly lead down a "slippery slope" to far worse invasions of personal liberty. For example, Appellants (and the dissent below) fear that, having eliminated smoking, the BCBH might next regulate soft drinks or cheeseburgers.[36] This logical fallacy – that an otherwise valid law may be invalidated solely out of fear that it could one day be applied unlawfully – ignores the restrictions imposed on the Regulation by KRS 212.230(1)(c). Specifically, KRS 212.230(1)(c) that any regulation adopted must protect the health of the people of Bullitt County from the

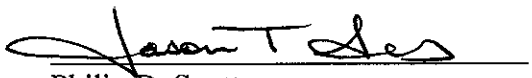
[36] *See* Ct. App. Op. at p. 15.

actions of others, **not** force individual health choices on individual persons. Simply put, the Regulation does not prevent any Bullitt County citizen from smoking. Instead, it restricts the areas in which one may smoke in order to protect others from the health hazards of unwitting exposure to second-hand smoke. While eating too many cheeseburgers or drinking too much soda might be bad for one's health, KRS 212.230 does not permit the BCBH to ban their consumption. Regardless, it is undisputed that prohibiting smoking in public places protects the health of Bullitt County citizens – and it is that issue which the Court of Appeals below recognized when upholding the Regulation. This Court should do the same and hold that the Regulation is a reasonable exercise of the authority granted to the BCBH to protect the public health under KRS 212.230.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Kentucky Court of Appeals and find the Regulation to be valid.

Respectfully submitted,



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