



KANSAS JUSTICE INSTITUTE

Testimony to the Committee on Public Health and Welfare

SB 103: “AN ACT concerning health professions and practices; relating to the regulation of dentists; Kansas dental board; requiring that treating dentist information be given to patients upon request; prohibiting agreements that limit a patient’s ability to file complaints; eliminating the minimum personal presence requirements of licensee in dental office using licensee’s name; amending K.S.A. 65-1430, 65-1435, 65-1436 and 65-1467 and repealing the existing sections.”

By: Samuel G. MacRoberts

Litigation Director and General Counsel
Kansas Justice Institute

Chairwoman Gossage and Members of the Committee:

Kansas Justice Institute¹ supports the elimination of unreasonable occupational barriers. To that end, KJI requests this Committee carefully consider removing the 20% rule as currently set forth in KSA § 65-1435(d).

The 20% rule is unnecessary, unreasonable, outdated, and not appropriately tailored to serve a legitimate public interest.

In our view, the 20% rule could very well violate Kansas Constitution Bill of Rights Section 1, and other provisions not discussed here.² In our view, Section 1 *is* a natural rights clause, but is best understood to protect the right to earn an honest living, free from unreasonable government interference. When “[John] Locke observed that ‘every Man has a Property in his own Person,’”³ he was instead referencing the right to earn an honest living. *See* Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 221 (2003). Perhaps more importantly, Kansas’ natural rights clause was modeled after Thomas Jefferson’s use of the phrase in the Declaration of Independence, and “it is evident that Jefferson’s use of the phrase, ‘life, liberty, and the pursuit of happiness’ was meant to assert this right of livelihood.” *Id.* at 220.

The Kansas founders understood and appreciated the clause’s meaning at the time it was adopted.

Based upon the historical record, caselaw, and common-sense arguments, the right to earn an honest living is a fundamental right and a court should apply strict scrutiny to unreasonable occupational barriers. This right to earn an honest living existed at English common law as far back as the 1600s. *See, e.g., Allen v. Tooley*, 80 Eng. Rep. 1055 (K.B. 1614). But even if a court did not

¹ KJI is a non-profit, public-interest litigation firm committed to protecting individual liberty and the constitutional rights of all Kansans. It is part of Kansas Policy Institute.

² This analysis is not exhaustive.

³ *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 640 (2019).

apply strict scrutiny, some requirements could very well fail under a more deferential standard. The Kansas Constitution forbids unreasonable occupational barriers.

In short, there are several solid reasons to abandon the outdated and arbitrary 20% rule. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam G. MacRoberts". The signature is stylized and cursive.

Samuel G. MacRoberts

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