No. 280PA22 FIFTEEN-A JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

KODY H. KINSLEY, in his official Capacity as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v.

ACE SPEEDWAY RACING, LTD., AFTER 5 EVENTS, LLC, 1804-1814 GREEN STREET ASSOCIATES LIMITED PARTNERSHIP, JASON TURNER, and ROBERT TURNER,

Defendants-Appellees.

From Alamance County
COA 21-428

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS

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The Association of State and Territorial Health Officials ("ASTHO") respectfully submits this *amicus curiae* brief addressing the error below in not determining there was a rational basis supporting Executive Order 141 and the Secretary's Abatement Order and then not determining that the counterclaims of Defendant Ace Speedway Racing, Ltd. ("Ace") should have been dismissed.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

ASTHO is a non-profit professional organization comprising 59 chief health officials from each of the 50 states, Washington, D.C., five U.S. territories, and three Freely Associated States. It supports peer communities of state and territorial health leaders and senior executives in health departments who work with the over 100,000 public health professionals employed at state and territorial public health agencies. ASTHO was legally organized in 1942 and traces its roots to 1879. Its mission is to support, equip, and advocate for state and territorial health officials in their work of advancing the public's health and well-being.[2] ASTHO is vitally interested in the outcome of this appeal because of its potential negative impact upon the ability of public health officials to protect the public and prevent the spread of disease if this Court does not apply long-standing precedent recognizing

[1] No person or entity—other than amicus curiae and its counsel—directly or indirectly wrote this brief or contributed money for its preparation. *See* N.C. R. App. P. 28(i)(2).

[2] https://www.astho.org/about/ (last visited April 22, 2023).

the foundational duty of the state executive branch to protect public health. This case is important not only in North Carolina, but in the nation.

The North Carolina Supreme Court's decision in this case will balance statewide public health interests against the rights of individuals who sustain a measure of economic impact because of public health decisions. This case presents a compelling setting in which to affirm that the individual's rights to self-determination and economic independence sometimes must bend to the exigencies of public health, safety and welfare. This Court should reverse the Court of Appeals and hold that Ace's counterclaims should be dismissed because Executive Order 141 and the Secretary's Abatement Order should be upheld under the rational basis test; the Secretary of Health and Human Services is immune from Appellees' claims; and the necessary impact of Ace's state constitutional rights in order to slow the spread of COVID-19 does not rise to the level of an actionable violation of constitutional rights.

ARGUMENT

I. The Protection of Public Health Is a Foundational Purpose of Government.

In its capacity as a sovereign, the State possesses the police power to, among other things, protect or promote the health, safety, and general welfare of society. *State v. Warren*, 252 N.C. 690, 694, 114 S.E.2d 660, 664 (1960); *see* U.S. Const. amend. X (police powers are part of the sovereign powers retained by the states

under the United States Constitution). As demonstrated during the COVID-19 pandemic, the people of North Carolina expect—even demand—that their government take necessary and reasonable steps to preserve the health of the people of North Carolina.

Individual rights, even those that are constitutionally established, necessarily must yield when government is required to act in order to protect or promote public health. In the context of holding that criminal prosecution of a person for failure to accept a vaccination against smallpox does not violate his federal Constitutional rights, the United States Supreme Court in *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed 643 (1905) appropriately stated:

> Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.'

Id., 197 U.S. 11, 25–27, 25 S. Ct. 358, 361, 49 L. Ed. 643 (1905).

Jacobson highlights that in a civic community, citizens owe it one another to guard against the rampant spread of disease and pestilence. Supreme Court Chief Justice John Roberts' concurring opinion in *South Bay United Pentecostal Church v. Newsom* relied on the principles of *Jacobson*, noting that:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our

> Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U. S. 11, 38, 25 S. Ct. 358, 49 L. Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U. S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

Id. 140 S. Ct. 1613, 1614, 207 L.Ed.2d 154 (2020) (Roberts, C.J., concurring) (emphasis added).

In subsequent orders, the Supreme Court of the United States wrestled with the scope of the pandemic-related restrictions' effect on places of worship, striking down orders that treated religious services differently than secular activity but retaining the core principle that public health officials ought to have broad latitude to protect public health, including placing restrictions on private businesses. *See Roman Catholic Diocese v. Cuomo,* 141 S. Ct. 63, 65, 208 L. Ed. 2d 206 (2020); *and see Tandon v. Newsom,* 141 S. Ct. 1294, 1296, 209 L. Ed. 2d 355 (2021).

II. Executive Order 141 and the Secretary's Abatement Order Were Valid under the Rational Basis Test.

Ace claims its rights under article I, section 1 of the North Carolina Constitution were improperly infringed upon as a result of enforcement by Plaintiff of the Governor's Executive Order 141, through the Secretary's Abatement Order.

However, the enforcement by Plaintiff of the Governor's Executive Order 141, through the Secretary's Abatement Order, was a proper application of the State's police power to protect or promote the health, safety, and general welfare of society—particularly in light of the scope, extent and severity of the COVID-19 Pandemic. *See Warren*, 252 N.C. at 694, 114 S.E.2d at 664 (the State possesses the police power to, among other things, protect or promote the health, safety, and general welfare of society); U.S. Const. amend. X (police powers are part of the sovereign powers retained by the states under the United States Constitution).

In *Treants Enterprises, Inc. v. Onslow County*, this Court established the following framework to review constitutional challenges based upon the rights under Article I, section 1 of the North Carolina Constitution (which include the right of "enjoyment of the fruits of their own labor"):

> Article I, section 1 places among the inalienable rights of the people, "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." Section 19 of the same article provides that no person shall be "deprived of his life, liberty, or property, but by the law of the land." A single standard determines whether the [challenged] ordinance passes constitutional muster imposed by both **section 1** and the "law of the land" clause of section 19: the ordinance must be **rationally related** to a substantial government purpose. This is the requirement article I, section 1 imposes on government regulation of trades and business in the public interest.

320 N.C. 776, 778–79, 360 S.E.2d 783, 785 (1987) (emphasis added).

Thus, this Court's precedent mandates that review of Ace's challenge—through its counterclaims—to Executive Order 141 and the Secretary's Abatement Order must be under the rational basis standard.

The rational basis test "[i]nquiry is thus twofold: (1) is there a proper governmental purpose for the statute, and (2) are the means chosen to effect that purpose reasonable?" *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988). "[T]he rational basis test is the lowest tier of review, requiring a connection between the statute and 'a conceivable,' legitimate governmental interest." *Rhyne v. K-Mart Corp*., 358 N.C. 160, 181, 594 S.E.2d 1, 16 (2004) (internal citation omitted).

In the Court of Appeals' opinion in this case, the Court of Appeals never expressly stated that it engaged in a rational basis review of Executive Order 141 and the Secretary's Abatement Order. Indeed, rather than analyze the rational basis of Executive Order 141 and the Secretary's Abatement Order, the Court of Appeals erroneously focused on the purported reasonableness of the Defendants *in ignoring and violating* the Governor's executive orders:

> An examination of the facts surrounding the COVID-19 pandemic at a later stage of trial may show that Ace's precautionary measures to manage contact tracing of its attendees; install plexiglass, touchless thermometers, six-feet distance markers, and screening booths; and to initiate vigilant cleaning procedures—all in consult with local health officials—were sufficient to combat the spread of COVID-19 within an open-air racetrack in Alamance County.

Kinsley v. Ace Speedway Racing, Ltd., 284 N.C. App. 665, 2022-NCCOA-524, ¶ 29.

Then, in what might have been an implicit attempt to apply the rational basis test, the Court of Appeals stated, "[p]resuming these facts in favor of Ace as the non-movant, the reasonableness of an 'imminent hazard' as justification for the Secretary's actions can be questioned." *Id*. (emphasis added). However, in *Rhyne*, 358 N.C. at 182, 594 S.E.2d at 16, this Court confronted a similar attack as that made by Ace in presenting evidence on the issue of reasonableness ("despite the evidence presented by plaintiffs that the rationality of section 1D–25 is questionable" (emphasis added)), and this Court emphasized the key rational basis point that a challenged governmental action must be upheld if "the question is at least debatable." *Id*. (emphasis added). Therefore, under *Rhyne*, the Court of Appeals' conclusion that "the reasonableness of an 'imminent hazard' as justification for the Secretary's actions can be questioned" required that the validity of Executive Order 141 and the Secretary's Abatement Order be upheld. The Court of Appeals was plainly wrong to thereafter conclude that Ace adequately pled that it had been deprived of its constitutional rights under Article I, section 1 of the North Carolina Constitution. After the Court of Appeals concluded that the basis for the Secretary's actions "can be questioned" (in other words, were "at least debatable"), this Court's opinion in *Rhyne* mandated only one outcome, and that

outcome is upholding the validity of Executive Order 141 and the Secretary's Abatement Order.

Moreover, Executive Order 141 and the Secretary's Abatement Order unquestionably satisfy the rational basis test. Executive Order 141 and the Secretary's Abatement Order sought to achieve a proper governmental purpose because the aim of each was to protect the health, safety and welfare of the people of North Carolina by continuing measures to slow the spread of COVID-19. In addition, Executive Order 141 and the Secretary's Abatement Order were reasonable means to accomplish the State's proper governmental purpose because settings where people were assembled closely to each other posed a heightened risk of contracting and transmitting COVID-19.

III. Affirmance of the Court of Appeals Opinion Will Chill Future Actions of Public Health Officials.

Affirmance of the decision below would send shock waves across the public health profession, where every day, officials make decisions that impact the rights of individuals. The concern of ASTHO is that the Court of Appeals decision, if allowed to stand, establishes a precedent that public health actions are open to second-guessing when severe public health issues have to be addressed immediately. For example, public health officials commonly use abatement orders to close food establishments suspected of contributing to foodborne illness outbreaks. In 2016, several states experienced potential outbreaks of salmonella,

shiga toxin-producing Escherichia coli, and listeria monocytogenes, eventually linked to food sources like chicken, sprouts, and bagged salad. *See* K. Marshall, T. Nguyen, et al., *Investigations of Possible Multistate Outbreaks of Salmonella, Shiga Toxin-Producing Escherichia colia, and Listeria monocytogenes Infections—United States, 2016*, MMWR Surveillance Summaries, at 69(6)1-14 (Nov. 13, 2020) (https://www.cdc.gov/mmwr/volumes/69/ss/ss6906a1.htm?s_ cid=ss6906a1_w) . Identifying, containing, and addressing the outbreak was successful due to close collaboration among federal, state, and local health authorities. *Id*. If the opinion below is affirmed, it would create a chilling effect on public health officers in performing their essential duties, such as exercising its power to temporarily close a business operating in a manner that may spread disease to its patrons.

Public health officials often must take quick action to protect the public's health and safety. In 2014 several West African nations experienced a terrible Ebola outbreak, resulting in the deaths of more than 11,000 people. Ebola is an extremely deadly viral disease that causes fever, unexplained hemorrhaging, bleeding or bruising, and gastrointestinal symptoms like diarrhea and vomiting. Symptoms for Ebola may appear anywhere from 2 to 21 days following contact with the virus, with the virus spread by contact with bodily fluids, infected fruit bats or nonhuman primates, among other means. CDC Ebola Virus Disease (Apr.

27, 2021) (https://www.cdc.gov/vhf/ebola/about.html). The organization Doctors Without Borders deployed medical volunteers from around the world to help control the outbreak, including volunteers from the United States. One of these volunteers, nurse Kaci Hickox, returned from Sierra Leone and was subject to New Jersey's Ebola Preparedness Plan protocols to monitor individuals returning from countries with known Ebola outbreaks. In accordance with the plan, the state quarantined Ms. Hickox due to her close contact with people infected by Ebola virus to determine whether she would develop symptoms of Ebola before allowing her to resume regular activities such as traveling to private businesses or joining crowded areas. Ms. Hickox argued that she should not have been subject to the orders because at the time she was asymptomatic, and she brought claims against various public health officials related to her quarantine. *Hickox v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016). In this case, the court dismissed Ms. Hickox's claims and upheld the government's assertion of qualified immunity finding that "[p]ublic health officials responsible for containing the spread of contagious disease must be free to make judgments, even to some degree mistaken ones, without exposing themselves to judgments for money damages." *Id.*

Similarly, ASTHO is asking this Court to reverse the decision below and protect the powers of the health official to make decisions to prevent the spread of potentially lethal disease to protect the health of the public without exposing them

to judgments for money damages. When encountering a novel virus, public health officials across all levels of government are making decisions based on limited and emerging information about the disease and should be able to make decisions to protect the public without exposing them or their agencies to damages for the loss of business.

Chilling public health actions to mitigate the spread of a potentially lethal disease can have devastating consequences. The consequences of delaying public health interventions was borne out in recent history by the impact of COVID-19 in the Lombardy region of Italy. In early 2020, Italy had the highest number of COVID-19 cases in the world, with 16,994 COVID-19 deaths in the Lombardy region alone as of October 13, 2020. M. Usuelli, *The Lombardy region of Italy launches the first investigative COVID-19 commission*, Lancet, vol. 396, at pp. E86-E87 (Nov. 14, 2020) (https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2932154-1). The Lombardy region has population of approximately 10 million people with a strong healthcare system, which was quickly overwhelmed by COVID-19 cases in early 2020, and is one of the wealthiest areas of Europe. G. Pisano, R. Sadun, M. Zanini, *Lessons from Italy's Response to Coronavirus*, Harvard Business Review (Mar. 27, 2020) (https://hbr.org/2020/03/lessons-from-italys-response-to-coronavirus). Quickly after identifying the first COVID-19 case in the region, Italy closed all non-

essential business activities and implemented a series of restrictions to try and slow the spread of disease in a manner that "followed the spread of the virus rather than prevent[ing] it." *Id.* While there are many factors that led to the high rates of COVID-19 in Italy, the slow action to respond to the disease early and prevent its spread was a significant one.

If this court were to affirm the decision below, it would be setting a new standard with potential to chill the actions of public health officials to prevent the spread of disease. There will be severe danger to the public if public health officials are reluctant—because of the potential liability precedent of this case—to take action to close a business, even temporarily, for public health reasons.

IV. If the Opinion Below Is Affirmed, North Carolina Will Be an Outlier and Essentially Will Stand Alone with respect to Judicial Recognition of the Validity of Governmental Actions to Slow the Spread of COVID-19.

Counsel for ASTHO, to our knowledge, are not aware of any reported cases allowing damage claims for loss of business revenue resulting from COVID-19 public-health restrictions. More broadly as it relates to judicial recognition of the validity of governmental actions to slow the spread of COVID-19, there are numerous court decisions across the country upholding the validity of shutdown orders, mask orders and vaccination orders. *See Friends of Danny DeVito v. Wolf*, 658 Pa. 165, 227 A.3d 872 (2020) (Challenge to Governor's COVID-19 pandemic business-shutdown order did not state claim for ultra vires exercise of power or

deprivation of constitutional rights); *Grisham v. Romero*, 483 P.3d 545 (N.M. 2021) (Order of Governor and Secretary of Department of Health validly imposed restrictions on restaurants and breweries); *Orlando Bar Group, LLC v. DeSantis*, 339 So.3d 487 (Fla. 5th DCA 2022) (Bar operators failed to show that COVID-19 restrictions constituted regulatory taking); *Midway Venture LLC v. County of San Diego*, 60 Cal.App.5th 58, 274 Cal.Rptr.3d 383 (2021) (Applying rational basis test to reverse injunction against COVID-19 shutdown order affecting adult entertainment businesses); *Bentonville School Dist. v. Sitton*, 2022 Ark. 80, 643 S.W.3d 763 (2022) (School mask mandate did not violate parents' constitutional rights to care for their children because mandate had substantial relationship to protecting children's health); *Stand Up Montana v. Missoula County Public Schools*, 409 Mont. 330, 514 P.3d 1062 (2022) (Parents of public school students did not make prima facie showing that mask mandate violated state constitutional rights); *Netzer Law Office v. State by and through Knudsen*, 410 Mont. 513, 520 P.3d 335 (2022) (COVID-19 vaccination mandate did not violate individual's constitutional rights); *Southwestern Ohio Basketball, Inc. v. Himes*, 2021 Ohio 415, 167 N.E.3d 1001 (2021) (Reversing injunction against imposition of penalties for violating public-health COVID-19 order).

Hundreds of businesses closed by public health restrictions nationwide petitioned the courts to overturn the public health restrictions, with the

overwhelming majority of these cases unsuccessful in doing so. *See Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic*, Ballotpedia (https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic). Of the few that were successful, the court granted injunctive relief and did not impose monetary damages. *See, e.g., On Fire Christian Ctr. v. Fischer*, 453 F. Supp. 3d 901, 915 (D.N.M. 2020) (enjoining a city order that would have prohibited drive-in church services on Easter Sunday).

V. Ace's Selective Enforcement Counterclaim Has No Merit.

In the present case, Executive Branch officials were performing their duty to prevent mass gatherings for extended periods, in order to arrest the spread of a virulent disease. Despite Ace's allegations that they were singled out for mistreatment, it is commonly known that, to the contrary, the entire State was impacted by stay-at-home orders.

All across the state and nation, civic-minded businesses cooperated with efforts to stop the spread of COVID-19 by adhering to executive orders to limit contact between individuals. Businesses deemed non-essential were closed, with businesses deemed essential providing critical services such as access to food and supplies. *See Blind Bear Memphis, LLC v. Shelby County Health Dep't*, No. 2:20-cv-02497-JTF2020, WL 9815623 (W.D.Tenn. 2020) (denying a request to enjoin

public health orders that differentiated between limited services restaurants and other restaurants because there was a rational basis for temporarily closing limited services restaurants); *Golden Glow Tanning Salon, Inc. v. City of Columbus,* 52 F.4th 974 (5th Cir. 2022)(affirming a district court decision to uphold a city ordinance closing tanning salons because it did not create an arbitrary distinction between tanning salons and businesses like liquor stores); *PCG-SP Venture I, LLC v. Newsom,* No. EDCV 20-1138 JGB (KKx), 2020 WL 4344631 (C.D.Cal. 2020) (finding that the government declining to enforce gathering restrictions against individuals protesting racial injustice while enforcing restrictions against a large music festival was not 'malicious, irrational or plainly arbitrary.').

Executive Order 141 impacted everyone in North Carolina. It is only because Ace ignored Executive Order 141—when the majority of North Carolinians were abiding by it—that Executive Order 141 had to be enforced specifically against Ace through the Secretary's Abatement Order. Ace's failure to abide by Executive Order 141—which necessitated the Secretary's Abatement Order—should not be rewarded by this Court accepting Ace's contorted contention that it was singled out in trying to prevent the spread of COVID-19.

CONCLUSION

ASTHO respectfully requests that this Court reverse the opinion of the Court of Appeals in this matter.

Respectfully submitted this the 3rd day of May, 2023.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

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