

1975

# Jim Jensen, et al., Blanche Parsons, et al. v. Salt Lake County Board of Commissioners, et al. : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

D Kendall Perkins; Phil L Hansen; Attorneys for Plaintiffs and Respondents.

Carl J Nemelka; Salt Lake County Attorney; Richard S Shepherd; Deputy County Attorney; Attorneys for Appellants .

---

## Recommended Citation

Brief of Respondent, *Jensen v. Salt Lake County*, No. 13682.00 (Utah Supreme Court, 1975).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/81](https://digitalcommons.law.byu.edu/byu_sc1/81)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

1975

IN THE SUPREME COURT

OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

JIM JENSEN, et al.  
Plaintiffs-Respondents,

vs.

SALT LAKE COUNTY BOARD OF  
COMMISSIONERS, et al.,  
Defendants-Appellants,

Case No.

13682

BLANCHE PARSONS, et al.,  
Plaintiffs-Respondents,

vs.

SALT LAKE COUNTY BOARD OF  
COMMISSIONERS, et al.,  
Defendants-Appellants.

FILED  
JUN 10 1974

Clerk, Supreme Court, Utah

BRIEF OF PLAINTIFFS-RESPONDENTS  
BLANCHE PARSONS, et al.

Appeal from the Judgment of the Third District Court  
for Salt Lake County  
Honorable Stewart M. Hanson, District Judge

D. KENDALL PERKINS  
Newhouse Building  
Salt Lake City, Utah

CARL J. NEMELKA  
Salt Lake County Attorney

RICHARD S. SHEPHERD  
Deputy County Attorney  
C-220 Metropolitan Hall of  
Justice

PHIL L. HANSEN  
250 East Third South  
Salt Lake City, Utah

Salt Lake City, Utah 84111

## TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE . . . . .	1
DISPOSITION IN LOWER COURT . . . . .	2
RELIEF SOUGHT ON APPEAL . . . . .	2
STATEMENT OF FACTS . . . . .	3
ARGUMENT . . . . .	4
POINT I:	
THE TRIAL COURT WAS CORRECT IN RULING THE AMENDMENT TO THE COUNTY ORDINANCES IS PRE-EMPTED BY SECTION 58- 1-1.1 OF THE UTAH CODE ANNOTATED, (1953) .	4
POINT II:	
THE ORDINANCE IN QUESTION AFFECTS THE FUNDAMENTAL RIGHT TO WORK AND AS SUCH MUST BE BASED ON A COMPELLING GOVERNMENTAL INTEREST OF WHICH THERE IS NONE. . . . .	16
POINT III:	
THE TRIAL COURT WAS CORRECT IN RULING THE ORDINANCE ARBITRARY, UNCERTAIN AND VAGUE. . . . .	17
POINT IV:	
THE ORDINANCE IS AN IMPROPER ATTEMPT TO DELEGATE A LEGISLATIVE FUNCTION TO A PRIVATE ENTITY . . . . .	18
CONCLUSION . . . . .	20

## AUTHORITIES CITED

	Page
<u>CASES</u>	
<u>Abbott v. City of Los Angeles</u> , 55 Cal 2d G 74 3 Cal Rptr 158, 349 P.2d 974, 82 ALR 2d 385 (1960) . . . . .	10
<u>Clayton v. Bennett</u> , 5 Utah 2d 152, 298 P.2d 531 (1956) . . . . .	18
<u>Corey v. City of Dallas</u> , 352 f.Supp . . . . . 977 (Texas 1972)	4, 16
<u>Salt Lake City v. Kusse</u> , 97 Utah 97 93 P.2d 671 (1938) . . . . .	5

## STATUTES

Utah Code Annotated (1953)	
58-1-1.1 . . . . .	4,6,7,10,14
58-1-7 . . . . .	15
58-24-5(b) . . . . .	13
58-24-9(6) . . . . .	13

## ORDINANCES

Revised Ordinances of Salt Lake County (1966)	
Section 15-18-4(5) . . . . .	2

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

JIM JENSEN, et al., )  
Plaintiffs-Respondents, )

vs. )

SALT LAKE COUNTY BOARD OF )  
COMMISSIONERS, et al., )  
Defendants-Appellants, )

Case No.  
13682

BLANCHE PARSONS, et al., )  
Plaintiffs-Respondents, )

vs. )

SALT LAKE COUNTY BOARD OF )  
COMMISSIONERS, et al., )  
Defendants-Appellants. )

---

RESPONDENTS' BRIEF

---

STATEMENT OF THE CASE

This is an action by massage parlor  
owners and masseuses employed by massage  
parlors for declaratory judgment to

determine the validity of Section 15-18-4(5) of the Revised Ordinances of Salt Lake County 1966, as amended. The amendment added criteria as to experience or educational requirements to qualify for a county business license.

#### DISPOSITION IN LOWER COURT

The matters were consolidated for trial and came on for trial before the Honorable Stewart M. Hanson, Judge of the Third District Court, who granted judgment in favor of the Plaintiff-Respondents, finding the aforesaid section to be null and void and beyond the authority of the Salt Lake County Board of Commissioners to enact.

#### RELIEF SOUGHT ON APPEAL

Respondents seek the affirmation of the trial court's judgment.

## STATEMENT OF FACTS

Respondents agree with the statement of facts as set forth by the Appellant with the addition of the fact that Don W. Wortley (the proper spelling is Wortley) was testifying about training a person to give a therapeutic massage under a physical therapist's guidance and not a superficial relaxation type massage as given in a massage parlor. Captain Nick Morgen, Salt Lake County Sheriff's Office, and Commissioner Pete Kutulas testified that the amendment to the ordinance in question was proposed and passed primarily in an attempt to control prostitution.

Bert F. Kidman also testified that there had been an attempt to have the State Legislature enact legislation to bring the licensing and testing of

masseurs and masseuses under the regulation of the Utah State Department of Registrations which the State Legislature did not do.

## ARGUMENT

### POINT I

THE TRIAL COURT WAS CORRECT IN RULING THE AMENDMENT TO THE COUNTY ORDINANCES IS PRE-EMPTED BY SECTION 58-1-1.1 OF THE UTAH CODE ANNOTATED, (1953).

The Appellant states that the right to pursue a legitimate trade, profession, or occupation is recognized by State law and is implicit in the Fourteenth Amendment to the United States Constitution and cites the case of Corey v. City of Dallas, 352 f.Supp 977 (Texas 1972) as authority therefore, and goes on to say that the right of the State under its police power to regulate same is also recognized. With those statements we are in complete agreement. This case



does not challenge the State's right to regulate trades, professions or occupations; the State has exercised this right and in such exercise said that State regulation "is the most effective and equitable means of providing the necessary protection to the people of the State." 58-1-1.1, Utah Code Annotated (1953). The problem here is that Salt Lake County has attempted to do something the State has declined to do, and has not shown or made any attempt to show that the relative degree of hazard to the public health, safety or welfare exists in the practice of the occupation of massage that must be present before that occupation becomes one that the State will assume to regulate.

The Respondent relies on Salt Lake City v. Kusse, 97 Utah 97, 93 P.2d 671

(1938) as allowing municipal regulation of an area in which the State has acted if the municipal ordinance is not prohibited by statute or inconsistent therewith. It is respectfully submitted that 58-1-1.1, Utah Code Annotated (1953) by its language means that the State has pre-empted the area of regulation of professions, trades and occupations and though not stated intends that uniformity of requirements is important. To allow each county within the State to establish its own criteria for any profession, trade or occupation not specifically regulated under the Utah State Department of Regulation would be to encourage pandemonium. Situations could arise in which a person could qualify to pursue his occupation in Utah County and not in

Salt Lake County and so on.

Chapter 114 Section 1 of the 1957 Utah Session Laws is entitled "Policy for Legislation Regulating Professions, an act defining a legislative policy for the State of Utah in determining the need for regulatory legislation relating to professions, trades and occupations, to be known as Section 58-1-1.1, Utah Code Annotated (1953)."

"Right to engage in lawful profession, trade or occupation - Policy regarding state regulation. The right to engage in any lawful profession, trade or occupation is an inherent right and such right shall not be impaired through state regulation unless the interests of the people of the state generally, as distinguished from those of a particular class, require such regulation and state regulation is the most effective and equitable means of providing the necessary protection to the people of the state. It is further declared that the relative degree of hazard to the public health,

safety or welfare which may result from an unregulated profession, trade or occupation shall be supported by adequate experience and research. Such research shall include, among other things:

1. That the practitioner performs a service for individuals which may directly result in a detrimental effect upon the public health, safety or welfare.
2. The view of the appropriate department concerning the proposed legislation and the recommendations and criticisms submitted by the department.
3. The view of a substantial portion of the people who do not practice these particular professions, trades or occupations.
4. The number of states which have similar regulatory professions (provisions) as those proposed.
5. The view of those who shall be subject to the proposed regulation.
6. That there is sufficient demand for the service for which there is no substitute not likewise regulated and this service is required by a substantial portion of the population.

7. That the profession, trade or occupation requires high standards of public responsibility, character and performance of each individual engaged in such profession, trade or occupation and is so indicated by established and published codes of ethics.

8. That the profession, trade or occupation requires such skill that the public generally is not qualified to select competent practitioners without some visible assurance that he has met minimum qualifications.

9. That professional, trade or occupational associations do not adequately protect the public from incompetent, unscrupulous or irresponsible members of the profession, trade or occupation.

10. That the services of the profession, trade or occupation must be assured the public as a paramount consideration, regardless of cost.

11. That those laws which pertain to public health, safety and welfare generally are ineffective or inadequate. The characteristics of the profession, trade or occupation make it impractical or impossible to prohibit those practices of the profession, trade or occupation

which are detrimental to the public health, safety or welfare.

The language of the first sentence of that statute clearly states that if it is determined that the people of the state need the protection of regulation of the right to engage in any lawful profession, trade, or occupation, that state regulation is the most desirable and just means of providing it. The statute further specifies how to evaluate the existence and degree of any hazard to the public. It is submitted that Section 58-1-1.1 has pre-empted the area of regulating the right to engage in any lawful profession, trade or occupation.

The California case of Abbott v. City of Los Angeles, 55 Cal. 2d G.74, 3 Cal.Rptr. 158, 349 P.2d 974, 82 ALR 2d

385 (1960), heard in Bank, has similar elements. This case involved a situation in which the City of Los Angeles had enacted an ordinance requiring the registration of convicted felons that imposed much more stringent requirements than the statute and indeed required registration in cases where the statute did not.

The California Supreme Court invalidated that ordinance as being an attempt to legislate an area already pre-empted by state law holding, *inter alia*, as follows:

"When there is doubt as to whether an attempted regulation relates to a municipal or to a state matter, or if it be a mixed concern of both, the doubt must be resolved in favor of the legislative authority of the state (*Ex parte Daniels*, 183 Cal. 636, 639-640, 192 P. 442, 21 ALR 1172; *Lossman vs. City of Stockton*, 6 Cal. App. 2d. 324, 44 P.2d 397." 82 ALR 2d 385, 392.

"The denial of power to a local body when the state has pre-empted the field is not based solely upon the superior authority of the state. It is a rule of necessity, based upon the need to prevent dual regulations which could result in uncertainty and confusion." 82 ALR 2d 385, 392.

"Thus whether the state has pre-empted the field to the exclusion of local legislation depends not only upon the language of the statutes adopted, but upon the purpose and scope of the legislative scheme. In applying this rule, . . . (enumerates areas) . . . have all been held to have been pre-empted by the state, to the exclusion of local legislation, state statutes denied the subject matter to local bodies, not because the local body attempted to enact a measure which would do violence to the already existing state provisions, but because there existed a statewide legislative scheme which was intended to occupy the field." Abbott Supra P. 392-393.

Finally, to paraphrase the court's statement on P. 396 of 82 ALR 2d; an ordinance may be beyond the constitutional



(or delegated) power of the city in that it attempts to legislate in a field already pre-empted by the state although the legislature has not in so many words declared such scheme and although the legislative intent is found in several statutes rather than only one.

In the instant case the language of 58-1-1.1 quite clearly states: "State regulation is the most effective and equitable means of providing the necessary protection to the people of the State." This pre-empt's the field of regulation of profession, occupation and trade, when considered with 58-24-5(b) and 58-24-9(6) governing regulation of the practice of physical therapy which sections specifically exclude massage or anyone using massage from regulation under that section would

appear to say that massage has been reviewed and deemed to be a trade or occupation not involving any interests that would require regulation and therefore none is imposed and the counties ordinance is an improper intrusion into an area pre-empted by the State legislature.

Assuming, arguendo, that the County, could properly regulate the right to engage in a lawful profession, trade or occupation the State Legislature in 58-1-1.1, Utah Code Annotated (1953), established procedure that must be followed in determining whether a given profession, trade or occupation involves interests of the public that must be protected by regulation of the right to engage therein. The degree of hazard to the public is to be determined by "adequate experience and research,"

and specifies in eleven paragraphs what the research shall include. It is submitted that the County has no machinery to perform such tasks and for it to attempt to do so would be wasteful duplication.

Section 58-1-7, Utah Code Annotated (1953), creates a duty, for the committees created to regulate the enumerated profession, trades and occupations, to submit standards of qualifications for the foregoing and to further conduct examinations to ascertain the qualifications and fitness of applicants.

If the County Commissioners are to regulate the right to engage in the occupation of masseur or masseus, they would have to not only create proper standards but conduct examinations thereon

as well, something they are not qualified nor equipped to do.

## POINT II

THE ORDINANCE IN QUESTION AFFECTS THE FUNDAMENTAL RIGHT TO WORK AND AS SUCH MUST BE BASED ON A COMPELLING GOVERNMENTAL INTEREST OF WHICH THERE IS NONE.

The Appellant's own case of Corey v. City of Dallas (Supra) states the foregoing propositions in which the United States District Court, Dallas Division, found no compelling governmental interest to exist. The Court saying, at Page 981 of the Pacific Second Reports, that such interest was lacking in that case (wherein an ordinance was enacted prohibiting a person from massaging any one of the opposite sex for the admitted purpose of controlling prostitution), because there were alternate methods the

City of Dallas could have used to achieve the objective of the Ordinances. Since alternate remedies were available, (i.e. statutes prohibiting lewd and immoral conduct) the objectives of the ordinances were not superior to the fundamental rights of those adversely affected by the enforcement of that ordinance, the fundamental rights being those of pursuing a legitimate business.

### POINT III

THE TRIAL COURT WAS CORRECT IN RULING THE ORDINANCE ARBITRARY, UNCERTAIN AND VAGUE.

Title 15, Chapter 18, of the aforementioned ordinance provides for a filing of a certificate with the Salt Lake County License Director, yet there is no showing any where in the Ordinance nor was there at trial, that the requirements to which certification is required have any

rational or reasonable connection toward protecting the public from any harm or hazard.

#### POINT IV

THE ORDINANCE IS AN IMPROPER ATTEMPT TO DELEGATE A LEGISLATIVE FUNCTION TO A PRIVATE ENTITY.

The establishment of criteria for determining the degree of experience and education a person must have to qualify to be licensed in a profession, occupation or trade is a rule making or law making function. (Law = that which is laid down, ordained, or established; that which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Black's Law Dictionary, p. 1028) The case of Clayton v. Bennett, 5 Utah 2d 152, 298 P.2d 531 (1956) cites Powell v. State Board of Agriculture in which

the Court stated:

"...that the legislature may not surrender or delegate its legislative power is elemental. It may, however, provide for the execution through administrative agencies of its legislative policy, and may confer upon such administrative officers certain powers and the duty of determining the question of the existence of certain facts upon which the effect or execution of its legislative policy may be dependent [citing cases]"

The Utah State Department of Registration has been given the powers and duties above mentioned with regard to regulating professions, trades and occupations.

The Salt Lake County Board of Commissioners has not been so empowered and yet that body attempts by its ordinances to bestow such powers upon the Massage and Therapy Association, a private

entity with headquarters outside of the State of Utah. This is most clearly beyond the powers granted by the legislature to the Appellant.

### CONCLUSION

Respondents submit that, for the foregoing reasons, the Trial Court was correct in its findings and its judgment and the same should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Kendall Perkins". The signature is fluid and cursive, with the first letter of each word being capitalized and prominent.

D. KENDALL PERKINS  
716 Newhouse Building  
Salt Lake City, Utah

Attorney for Respondents  
Blanche Parsons et al.