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IN THE CITY OF EMPORIA MUNICIPAL COURT

CITY OF EMPORIA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 20-01615
	)	
DAVID MATT FLOWERS,	)	
	)	
Defendant.	)	
	)	

MOTION TO DISMISS
WITH INCORPORATED MEMORANDUM IN SUPPORT

COMES NOW, the Defendant, by and through counsel, and moves this Court to dismiss the Uniform Complaint in the above-captioned case with prejudice pursuant to K.S.A. 12-4408 and K.S.A. 22-3208. In support of this Motion, the Defendant states the following:

INTRODUCTION AND NATURE OF THE CASE

This matter comes before the Court pled as an alleged violation of Ordinance Number 20-08, which is to be codified at Section 9-17.1 of the City Code of Emporia, Kansas as "Violating a Public Health Order" (hereinafter, "Ordinance 20-08" or "Section 9-17.1"). The Defendant operates a business selling both food and beverages. As of March 31, 2020, the business was a licensed Drinking Establishment and licensed Food Establishment under Kansas law. On May 27, 2020 the Lyon County Board of County Commissioners issued a disaster declaration incorporating Governor Kelly's "Modified Phase 2 of the Ad Astra: A Plan to Re-open Kansas."

The very same day as issuing the disaster declaration, the city issued Defendant a citation for operating his business allegedly in violation of "Modified Phase 2 of the Ad Astra: A Plan to Re-open Kansas." The citation was issued based upon nothing more than a local health department

employee's opinion that the Gym was not a "bar and grill." While doing so, the accusing officer relied on the opinion of an employee of a local health department to determine the business's classification under the just-issued declaration.

As a criminal action, the burden of proof is on the City to prove beyond a reasonable doubt that the Defendant committed a criminal act in this matter. Until that burden is met, the presumption of innocence applies to the Defendant. This principle is fundamental to the administration of justice as noted by the United States Supreme Court:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'

In re Winship, 397 U.S. 358, 363 (1970) *quoting Coffin v. United States*, 156 U.S. 432, 453 (1895). Accordingly, and given the extreme legal deficiencies and constitutional violations associated with this prosecution, there are simply no circumstances whatsoever under which the Defendant can be convicted of the crime charged.

As contained herein, this matter must be dismissed as a matter of law because there was simply no violation of Ordinance 20-08,. the city's disaster declaration was not an actionable "public health order," and this enforcement action violates the Defendant's right to due process under the federal and state constitutions. Finally, allowing a local interpretation of the Governor's Executive Order to operate with the force of law is illegal under the Kansas Rules and Regulations Filing Act.

ARGUMENTS AND AUTHORITIES

I. Defendant Flowers Did Not Violate Ordinance Number 20-08.

a. The Disaster Declaration Was Not a Written Order of the Lyon County Health Officer, Board of Health, or Director of Health.

The citation at issue alleges a violation of Ordinance 20-08 which is codified at Section 9-17.1 of the Emporia City Code. It states, in relevant part:

> It shall be unlawful for any person to violate, refuse, or fail to comply with a written order of the *Lyon County Health Officer*, *Lyon County Board of Health*, or the *Lyon County Director of Health* issued *under their respective authorities*.

Emporia City Code 9-17.1(a) (emphasis added). Notably absent from this list is an "order" or "emergency declaration" of the "Lyon County Board of County Commissioners." To the knowledge of the Defendant, no relevant business-closing order of the Lyon County Health Officer, the Lyon County Board of Health, or the Lyon County Director of Health was in place at the time the citation was issued. As a result, the plain language of the Ordinance 20-08 did not prohibit operation of the Defendant's business at the time of the citation. Furthermore, Ordinance 20-08 specifies that such an order must be issued *in writing* by one of the relevant entities listed. Because no such written order existed, Mr. Flowers cannot be convicted of any crime whatsoever under Ordinance 20-08.

The May 1, 2020 Emergency Order of Local Health Officer expired by its own terms at 12:01 am on Monday, May 18, 2020.[1] The citation in this case was issued May 27, 2020, the same day the Lyon County Board of County Commissioners issued its disaster declaration.[2] *See* Lyon County Disaster Declaration, attached hereto as **Exhibit A** (hereinafter, the "Disaster

[1] A copy of the Order can be viewed at https://lyoncounty.org/index/wp-content/uploads/2020/05/Lyon-County-20-01-order.pdf.

[2] There is no indication that the Disaster Declaration was published prior to the enforcement action at issue or what time the Disaster Declaration was issued in comparison to the time the citation was issued.

Declaration"). The citing officer in this case referenced the Disaster Declaration in his narrative. Accordingly, the Disaster Declaration was the only potentially relevant issuance in effect on the date of the citation, and Ordinance 20-08 did not incorporate such a declaration of the Lyon County Board of County Commissioners in its list of controlling written orders. The Defendant did not and could not violate an ordinance that fails to proscribe his conduct.

b. The Lyon County Disaster Declaration did not Create any Enforceable Mandate. It was merely a recommendation as to Modified Phase 2.

The plain text of the Disaster Declaration reads as follows: "Lyon County will remain in 'Modified Phase 2 of the Ad Astra: A Plan to Re-open Kansas' until the 8th day of June, 2020." The Ad Astra Plan was a general guidance document with various public health recommendations and reopening timeline targets, particularly in Modified Phase 2.[3] The guidance was a mix of some prohibitive language, recommendations and other standards from the Governor's office. Regardless, the Ad Astra Plan was not an Executive Order. As such, the Modified Phase 2 of the Ad Astra Plan was simply not a document that carries the force of law. It is a non-binding guidance document with recommendations for best practices in Phase 2. Had Lyon County desired to establish enforceable prohibitions, it certainly could have done so by incorporating one of the Governor's Executive Orders. But it did not do this. It adopted a general guidance document without further comment or clarification.

Even if a reasonable reader could determine that the Modified Phase 2 had some language that could be interpreted as prohibitory, the particular language relating to bars in Phase 2 are express *recommendations* and not mandates. For example, on Page 9 of the Ad Astra Plan, it refers to "Business restrictions" in Phase 1. Additionally, on Page 15, the Ad Astra Plan states

[3]Ad Astra: A Plan for Reopening Kansas can be found at https://covid.ks.gov/wp-content/uploads/2020/05/Reopen-Kansas-Framework-v7.pdf (last accessed July 27, 2020) (hereinafter, the "Ad Astra Plan").

in Phase 1.5, "[t]he following businesses DO NOT OPEN open [sic] in this phase: Bars and night clubs." Comparatively, Page 18 categorizes "bars and nightclubs" as establishments that "*should* remain closed." Page 21 outlines "Business *Recommendations*" and clearly states "Bars and night clubs […] are *not recommended* to open in this phase." Accordingly, Modified Phase 2 of the Ad Astra Plan did not specifically close "bars" or even mandate the closure of "bars." It is unclear why the City believes it can assign criminal conduct to the failure to follow a recommendation.

Again, the Defendant did not violate the Disaster Declaration as written because the declaration only adopted the Governor's Modified Phase 2 *recommendations* in the Ad Astra Plan and not the Governor's *prohibitive orders* in Executive Order 20-34 ("E.O. 20-34").[4] The actual language of the Disaster Declaration states, "Lyon County will remain in 'Modified Phase 2 of the Ad Astra: A Plan to Re-open Kansas' until the 8th day of June, 2020." Legally, the Ad Astra Plan Documents carry no weight of law and they are recommendations as to Modified Phase 2. Even the prohibitory language in the Ad Astra Plan is legally ineffective except as it is expressed in relevant Executive Orders of the Governor or other legal local orders.

c. Regardless, Mr. Flowers Complied with the Terms of E.O. 20-34.

The Disaster Declaration does not qualify as an actionable "Public Health Order" under Ordinance 20-08 and did not incorporate enforceable mandates. However, even if the Declaration qualified as a Public Health Order and somehow could be interpreted as incorporating E.O 20-34 instead of the Ad Astra Plan, the Defendant complied with E.O. 20-34. E.O. 20-34 states the following:

> *All businesses* not addressed in subparagraph 5.c. or prohibited in subparagraph 5.d below can open if they comply with the following:

[4] Executive Order 20-34 can be accessed at https://governor.kansas.gov/wp-content/uploads/2020/05/EO-20-34-Implementing-Phase-2-Executed.pdf.

i. Maintain at least 6 feet of distance between customers or groups of customers;

1. *Restaurants* or dining establishments may meet this requirement by using physical barriers sufficient to prevent virus spread between seated customers or groups of seated customers;

ii. Follow fundamental cleaning and public health practices detailed on covid.ks.gov; and

iii. Avoid any instances in which groups of more than 15 individuals are in one location and unable to maintain a 6-foot distance with only infrequent or incidental moments of closer proximity. This does not limit the total occupancy of a business, but requires that businesses limit mass gatherings in areas and instances in which physical distancing cannot be maintained, such as at tables or in entrances, lobbies, break rooms, check-out areas, etc.

E.O. 20-34.5.a (emphasis added). In the discovery produced by the City, there was no allegation that social distancing was not being maintained at the Defendant's business or that the Defendant's place of business was not following adequate cleaning procedures. There was solely a statement that the Officer did not see anyone wearing facial coverings but that is irrelevant as to the requirements of E.O. 20-34.

Based on the foregoing, the Defendant's business was allowed to open unless addressed in subparagraph 5.c or prohibited by subparagraph 5.d of E.O. 20-34. None of the businesses listed in subparagraph 5.c would likely relate to the Defendant or his business as this section references gyms, fitness centers, nail salons, tanning salons, state casinos, etc. Therefore, the City must rely on paragraph 5.d of E.O 20-34 to provide the basis for a violation of Ordinance 20-08. Paragraph 5.d of E.O. 20-34 states:

> The following, *unless they are repurposed for use in an essential function under the KEFF as determined under the provisions of paragraph 7 below,* shall be closed to the public:
>
> i. *Bars* and night clubs, excluding already operating curbside and carryout services.

E.O. 20-34.5d (emphasis added). Therefore, the even if the Defendant's business was considered a "bar," which is disputed in this Motion as described herein, the Defendant could "repurpose" as provided by Paragraph 7 of E.O. 20-34, which states:

> 7. Essential Functions:
>
> a. While local governments may implement more restrictive orders or provisions regarding businesses, mass gatherings, or stay-home requirements, local governments must continue to allow the performance of essential functions identified in the Kansas Essential Functions Framework. However, such local orders or provisions may affect or regulate essential functions only so long as they do not significantly disrupt performance of the essential function. The applicable list of essential functions was outlined in Executive Order 20-16 prior to its expiration; while the substantive provisions of that order no longer apply, the KEFF functions listed in Executive Order 20-16 are the essential functions local governments must continue to allow.
>
> b. During the re-opening phases, whether an individual or organization performs an essential function under the KEFF is a decision left to local governments, but any individual or business with previous confirmation from the State that it performs essential functions under Executive Order 20-16 (prior to its expiration) will continue to have those functions deemed essential.

E.O. 20-34.7. Accordingly, the Defendant was able to repurpose his business to meet any essential function allowed under the Kansas Essential Functions Framework (hereinafter, the "KEFF") as described in Executive Order 20-16 (hereinafter, "E.O. 20-16").[5] E.O. 20-16 specifically states that it is "essential" to "[p]roduce and Provide Human and Animal Food Products and Services." E.O. 20-16, 400.6. Accordingly, the Defendant was able to "repurpose" his business to sell food products and services. It should also be noted that under the language quoted in E.O. 20-34, "restaurants"[6] were able to operate on May 27, 2020, as long as they

[5] Executive Order 20-16 can be accessed at https://governor.kansas.gov/wp-content/uploads/2020/03/EO20-16.pdf.
[6] A distinction between "restaurants" and "bars" has existed throughout the KEFF Framework. For instance, "Restaurants and dining establishments" could operate under Executive Order 20-31 ("E.O. 20-31") with certain social distancing procedures which can be accessed at https://governor.kansas.gov/wp-content/uploads/2020/05/EO-

conformed to social distancing and other requirements. Accordingly, if the Defendant's business either qualified as a "restaurant" or provided any "Human Food Products or Services," it was able to operate under the terms of E.O 20-34 and E.O. 20-16. As described herein, the Defendant's business did both.

E.O. 20-16, E.O. 20-31, and E.O. 20-34 do not define "bar," "restaurant,' or state a level of annual revenue needed from food sales to qualify for any such category. However, looking to Kansas liquor laws, a "restaurant" is defined as ***all*** of the following:

> "Restaurant" means:
>
> > (1) In the case of a club, a licensed food service establishment which, as determined by the director, derives from sales of food for consumption on the licensed club premises not less than 50% of its gross receipts from all sales of food and beverages on such premises in a 12-month period;
> >
> > (2) in the case of a drinking establishment subject to a food sales requirement under K.S.A. 41-2642, and amendments thereto, a licensed food service establishment which, as determined by the director, derives from sales of food for consumption on the licensed drinking establishment premises not less than 30% of its gross receipts from all sales of food and beverages on such premises in a 12-month period; ***and***
> >
> > *(3) in the case of a drinking establishment subject to no food sales requirement under K.S.A. 41-2642, and amendments thereto, a licensed food service establishment.*

K.S.A. 41-2601(s)[7] (emphasis added); *see also* K.A.R. 14-21-1(m). While the Defendant does not necessarily concede that the above definition applies, it can be used to provide some level as guidance. Accordingly, all three categories of establishments above qualify as a "restaurant" regardless of any county-level action under K.S.A. 41-2642 as long as it is a "licensed food service establishment." The Defendant obtained a license to operate as a "Food Establishment" from the

20-31-Implementing-Phase-1.5-of-Ad-Astra-Plan-Executed.pdf. In addition, E.O. 20-34 allowed restaurants to operate as described above.

[7] Although not completely applicable here, this definition is incorporated in the Emporia Municipal Code in Section 4-20(2)(d), giving it additional weight for consideration.

Kansas Department of Agriculture which was effective March 31, 2020 until March 21, 2021. (License No. 19936, attached hereto as **Exhibit B**.) Accordingly, the Defendant's business qualifies as a "restaurant" under K.S.A. 41-2601(s)(3) and K.A.R. 14-21-1(m).

Furthermore, the Municipal Code of Emporia includes the following definition of a "restaurant" in Section 13-17:

> Any place in which food is served or is prepared for sale or service on the premises or elsewhere. Such term shall include, but not be limited to, a fixed or mobile restaurant, coffee shop, cafeteria, short order cafe, luncheonette, tearoom, sandwich shop, soda fountain, tavern, private club, roadside stand, industrial feeding establishment, catering kitchen, commissary and any other private, public or nonprofit organization or institution routinely serving food and any other eating or drinking establishment or operation where food is served or provided for the public with or without charge.

Emporia Municipal Code, Section 13-17. There is no question that the Defendant's business meets this definition as well as the Defendant's business was a licensed food establishment. It was serving food after obtaining its license and at the time the citation was issued. Therefore, the Defendant's business was a "restaurant" under the City's own codified definition.

It should also be noted that because this is a criminal enforcement action, the rule of lenity applies as follows:

> A special rule, the rule of lenity, guides us when determining the meaning of an ambiguous criminal statute. When there is a reasonable doubt about the statute's meaning, we apply the rule of lenity and give the statute a narrow construction. *State v. Chavez*, 292 Kan. 464, 468, 254 P.3d 539 (2011); *State v. Reese*, 42 Kan.App.2d 388, 390, 212 P.3d 260 (2009).
>
> Two important policies are served by the rule of lenity. First, people should have fair notice of conduct that is criminal. *Reese*, 42 Kan.App.2d at 390, 212 P.3d 260. Second, narrow interpretation when there is some reasonable doubt about a criminal statute's meaning best respects the legislature's role in defining what constitutes a crime. Kansas has no common-law crimes, K.S.A. 21–3102(1), so something is a crime only if the legislature says so by statute. If the courts broadly interpreted ambiguous criminal statutes, we might inadvertently overstep our role and make something criminal even though the legislature had not intended that result. See *State v. Knight*, 44 Kan.App.2d 666, 681, 241 P.3d 120 (2010), *rev. denied* 292 Kan. 967 (2011).

State v. Braun, 47 Kan. App. 2d 216, 217 (2012). Therefore, to narrowly read Ordinance 20-08, the Court should not apply E.O. 20-34 because it was not incorporated into the Disaster Declaration. However, if the Court does interpret the Disaster Declaration as incorporating E.O. 20-34, the Defendant's business should be categorized as a "restaurant" to narrow the application of Ordinance 20-08 as it relates to the Defendant under the rule of lenity. Accordingly, even if the Court found that an actionable order existed under Ordinance 20-08 and that E.O. 20-34 was somehow incorporated, the Defendant's business is not in violation because the Defendant's business qualified as a "restaurant." Even if the Defendant's business was considered a "bar," it was repurposed to meet KEFF 400.6 in E.O. 20-16 by selling human food products and services. Therefore, no violation of Ordinance 20-08 occurred and this action must be dismissed as a matter of law.

II. The Lyon County Disaster Declaration Does Not Qualify as a Public Health Order.

The Disaster Declaration clearly states that it is issued by Board of County Commissioners of Lyon County. *See supra*, Exhibit A. While the Lyon County Board of Health and the Board of County Commissioners of Lyon County are comprised of the same members, these are two distinct statutory boards with distinct statutory functions and authorities.

County Boards of Health are organized by K.S.A. 65-201; whereas the Board of County Commissioners are organized pursuant to Article 2 of Chapter 19 of the Kansas Statutes. Further, the Boards of County Commissioners derive their powers from K.S.A. 19-212. In particular, the eleventh power listed in this section states that Boards of County Commissioners have the power "*[t]o contract* for the protection and promotion of the public health and welfare. K.S.A 19-212 (emphasis added). Therefore, the Board of County Commissioners is not directly empowered to administer public health under this section but rather to enter into a contract in

order to deal with public health. That is consistent with the organization of County Boards of Health. Under K.S.A. 65-201, the County Board of Health may hire a Local Health Officer to provide for the public health. In the context of infectious diseases, the County Board of Health has concurrent authority to issue certain orders alongside the Local Health Officer when it comes to controlling infectious diseases under Article 1 of Chapter 65 of the Kansas Statutes, particularly in K.S.A. 65-119. However, those references specifically assign the authority is to the County Board of Health not the Board of County Commissioners. The other statutes refenced in most local heath orders issued during the COVID-19 Pandemic also cite to K.S.A. 65-202 and 65-129b but those statutes only grant authority to the Local Health Officer to issue orders and not to the County Board of Health.

By its own language, the Disaster Declaration at issue here was issued pursuant to K.S.A. 48-932 and not pursuant to any authority derived from Chapter 65 which would be more consistent with a "Public Health Order." While the Disaster Declaration states the Board of County Commissioners is "resolved," there is no reference in the Disaster Declaration to an "order." Further, it is unclear if it was issued by the entire Board of County Commissioners or merely "proclaimed" by the Chairman, which is authorized by K.S.A. 48-932. Only in the absence of the Chairman must a majority of the County Commissioners issue a disaster declaration under K.S.A. 48-932(b). Only the Chairman of the Board of County Commissioners signed the Disaster Declaration at issue here, whereas, a majority of the Board of Health would be needed to issue a Public Health Order under Chapter 65 of the Kansas Statutes. Accordingly, the Disaster Declaration issued the same day as the citation in this matter does not qualify as an actionable order under Ordinance 20-08 because it was issued by the Chairman of the Lyon County Board of County Commissioners, not the Lyon County Board of Health.

III. The Lyon County Disaster Declaration is Outside the Scope of the County Board of Health's Authority. It Cannot Shutter Businesses.

Ordinance 20-08 specifically states an actionable order by the Local Health Officer, County Board of Health, or County Public Health Director must be "issued under their respective authorities." Therefore, the City cannot escape the fact that the Disaster Declaration at issue does not qualify as a Public Health Order by claiming that it instead qualifies as an Order by the Lyon County Board of Health because even the Lyon County Board of Health does not have the authority to businesses closed on its own. The Disaster Declaration is insufficient for this purpose because it exceeds the "respective authority" of the County Board of Health for at least three reasons.

First, the County Board of Health does not have the authority to issue an enforceable "Stay at Home Order" or likely even a permutation thereof like a "Business Shut-Down Order." Unlike the broad powers afforded to the Governor by K.S.A. 48-925, to a Local Health Officer under K.S.A. 65-202 to "use all known measures to prevent the spread of any such infectious, contagious or communicable disease," or to isolate/quarantine individuals under K.S.A. 65-129b, the County Board of Health is limited to the authorities listed in K.S.A. 65-119(a), which states in part:

> Any county or joint board of health or local health officer having knowledge of any infectious or contagious disease, or of a death from such disease, within their jurisdiction, shall immediately exercise and maintain a supervision over such case or cases during their continuance, seeing that all such cases are properly cared for and that the provisions of this act as to isolation, restriction of communication, quarantine and disinfection are duly enforced. The county or joint board of health or local health officer shall communicate without delay all information as to existing conditions to the secretary of health and environment. The local health officer shall confer personally, if practicable, otherwise by letter, with the person in attendance upon the case, as to its future management and control. The county or joint board of health or local health officer is hereby empowered and authorized to prohibit public gatherings when necessary for the control of any and all infectious or contagious disease.

K.S.A. 65-119(a). Accordingly, the County Board of Health is authorized to "prohibit public gatherings" but telling individuals to stay in their homes goes beyond the prohibition of public gatherings, because it conceivably prohibits individuals from doing certain things on their own, like running a "non-essential" business. Additionally, because a business can be operated by a single individual and the details of E.O 20-34 are much more complicated than merely "prohibiting public gatherings," the power to enact E.O. 20-34 exceeds that granted by K.S.A. 65-119. For this reason, when done at the county-level, the additional authorities vested by K.S.A. 65-202[8] and K.S.A. 65-129b are also generally invoked for broad orders by Local Health Officers similar to E.O. 20-34, as further described below.

Second, the Board of County Commissioners cannot access the powers granted by the K.S.A. 65-129 series of statutes (hereinafter, the "129 Series of Statutes"). However, even if it were considered an Isolation/Quarantine Order, the Disaster Declaration is insufficient to order a business closed on its own. Generally, the 129 Series of Statutes in Chapter 65 allows a Local Health to isolate or quarantine individuals with certain due process elements in place. The organic authority to issue these orders is contained in K.S.A. 65-129b, which reads in part:

> Notwithstanding the provisions of K.S.A. 65-119, 65-122, 65-123, 65-126 and 65-128, and amendments thereto, and any rules or regulations adopted thereunder, in investigating actual or potential exposures to an infectious or contagious disease that is potentially life-threatening, the local health officer or the secretary:
>
> > (1)(A) May issue an order requiring an individual who the local health officer or the secretary has reason to believe has been exposed to an infectious or contagious disease to seek appropriate and necessary evaluation and treatment;
> >
> > (B) when the local health officer or the secretary determines that it is medically necessary and reasonable to prevent or reduce the spread of the disease or outbreak believed to have been caused by the exposure to an infectious or contagious disease, may order an individual or group of individuals to go to and remain in places of isolation or quarantine until the local health officer or the

[8] As it relates to most local health orders, it should also be noted that K.S.A. 65-202 is not listed in the K.S.A. 65-127 penalty provision.

> secretary determines that the individual no longer poses a substantial risk of transmitting the disease or condition to the public;

K.S.A. 65-129b(a). Only a Local Health Officer or the Secretary of the Kansas Department of Health and Environment have the authority to issue isolation/quarantine orders. As can be seen from the section above, an individual can be ordered to seek treatment, be evaluated, or remain in places of isolation or quarantine; however, there is nothing contained in this statute regarding the ability of a Local Health Officer to order a business closed, which is what the Disaster Declaration was attempting to accomplish. There is no question that the Board of County Commissioners, much less solely the Chairman, or the County Board of Health have the ability to order businesses to close under the 129 Series of Statutes.

Additionally, it should also be noted that the Disaster Declaration cannot qualify as an Isolation/Quarantine Order because it requires additional due process procedures such as the right to a hearing within 72 hours of filing with a Court to contest the Order and certain notice requirements as stated in K.S.A. 65-129c. From the text of the Emergency Declaration, none of these due process requirements were fulfilled. Based on the foregoing, the Emergency Declaration is insufficient to access any powers granted by the 129 series of statutes.

Third, the County Board of Health cannot access the broad reservoir powers granted to a Local Health Officer under K.S.A. 65-202(a), which states in part:

> *Such officer* shall make an investigation of each case of smallpox, diphtheria, typhoid fever, scarlet fever, acute anterior poliomyelitis (infantile paralysis), epidemic cerebro-spinal meningitis and such other acute infectious, contagious or communicable diseases as may be required, *and shall use all known measures to prevent the spread of any such infectious, contagious or communicable disease,* and shall perform such other duties as this act, the county or joint board, board of health or the secretary of health and environment may require.

K.S.A. 65-202(a) (emphasis added). Again, the statue here grants authority to the Local Health Officer and not to the County Board of Health. Because the statutes in Chapter 65 do not neatly

express clear authority to order individuals to stay home or businesses to close, K.S.A. 65-119, K.S.A. 65-129b, and K.S.A. 65-202 should all be invoked to accomplish these ends. However, the County Board of Health does not have the authority to issue an order incorporating E.O. 20-34 and rather such an order should have been issued by the Local Health Officer. Because it was not issued under the respective authority of the County Board of Health, the Disaster Declaration is not an actionable order under Ordinance 20-08, and this action must be dismissed as a matter of law.

IV. Ordinance 20-08 Violates the Defendant's Right to Due Process.

To the extent the Court accepts the argument that an enforceable health order is in place and that the legal predicates exist for its enforcement, Ordinance 20-08 presents numerous violations of the Defendant's right to Due Process under the Fourteenth Amendment of the United States Constitution as well as Section 18 of the Kansas Bill of Rights in the Kansas Constitution. Ordinance 20-08 is unconstitutionally vague and local interpretations adding clarity violate Due Process as well as the Kansas Rules and Regulation Filing Act as described in the next Section. Accordingly, this matter must be dismissed.

a. Ordinance Number 20-08 is Unconstitutionally Vague.

As described above, the Defendant complied with Ordinance 20-08 as he understood it. To the extent his interpretation was reasonable, he should be granted the benefit of the doubt. Furthermore, because numerous interpretations are possible under the Ad Astra Plan and E.O. 20-34, the effect of these documents are unclear. Therefore, Ordinance 20-08 is unconstitutionally vague. The ability to challenge a law as vague has been well litigated in the United States Supreme Court. In *Bradford*, the Kansas Supreme Court outlined many of the most relevant decisions:

> A governmental entity must provide "fair notice" of conduct it has criminalized and for which transgressors may be deprived of their liberty. See *FCC v. Fox Television Stations, Inc.*, 567 U.S. ——, 132 S. Ct. 2307, 2317, 183 L.Ed. 2d 234 (2012) ("A fundamental principle of our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L.Ed. 2d 110 (1972). The Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes a duty of fair notice and, therefore, binds state governments. See *Papachristou*, 405 U.S. at 163; *Cole v. Arkansas*, 333 U.S. 196, 201–02, 68 S. Ct. 514, 92 L.Ed. 644 (1948). If a reasonable person must guess as to what a criminal statute prohibits, the statutory language is too vague to provide constitutionally adequate notice. *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L.Ed. 888 (1939) (A criminal statute is "repugnant" to due process requirements if it fails to "inform[ ] as to what the State commands or forbids," and, thus, offends "ordinary notions of fair play....").

State v. Bradford, 386 P.3d 928, *1 (Kan. 2016) (unpublished). It is also clear under Kansas law that city ordinances can be challenged for vagueness. *See eg. City of Wichita v. Wallace*, 246 Kan. 253 (1990) (finding that a Wichita ordinance regulating exotic dance studios was unconstitutionally vague). More recently, the Kansas Supreme Court summarized its test for vagueness under Kansas law from *State v. McCune* in *State v. Powell* by stating:

> A void for vagueness challenge is based on the due process requirement that a statute's language must convey a sufficient warning of the conduct proscribed when measured by common understanding and practice. *State v. Adams*, 254 Kan. 436, 438, 866 P.2d 1017 (1994). To determine whether a criminal statute is unconstitutionally vague, we employ a two-part test. First, we assess whether the statute gives adequate warning of the proscribed conduct. Second, we determine whether the statute adequately guards against arbitrary and unreasonable enforcement. *Bollinger*, 302 Kan. at 318. See *State v. McCune*, 299 Kan. 1216, 1235, 330 P.3d 1107 (2014).

State v. Powell, 451 P.3d 491, *6 (Kan. 2019) (unpublished). Ordinance 20-08 fails both of these tests as it applies to the Disaster Declaration and any incorporated documents.

On March 24, 2020, the Kansas Attorney General issued a Memorandum to Kansas Prosecutors and Law Enforcement warning them of the pitfalls in enforcing the Governor's "Stay at Home Order" against individuals and businesses. (Attached hereto as **Exhibit C**). In this memorandum the Kansas Attorney General warned of the notice requirements needed prior to

criminal enforcement of orders as follows:

> [A]ny governmental action that deprives persons of life, liberty, or property must satisfy requirements of due process of law. *See* U.S. Const. Amend. 14. Principles of due process require notice of the existence of a law and what conduct the law prohibits before a person may be held liable for violating it. *State v. Cordray*, 277 Kan. 43, 51 (2004). The due process requirement for notice is particularly important in the criminal law, *see, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), because due process demands that persons subject to the law must have "an opportunity … to avoid the consequences of the law." *Lambert v. California*, 355 U.S. 225, 229 (1957). Since orders of the governor have the "effect of law," *see* K.S.A. 48-925, and violations of the orders may give rise to criminal penalties, *see* K.S.A. 48-939, this elementary principle attaches to these executive orders. *See also Alexander v. Adjutant General's Office*, 18 Kan. App. 2d 649 (1993) (an executive order that has force of law "occupies the same position as a statute and may be interpreted" in like manner). While there is room for debate about when orders may become legally in effect, we recommend no *criminal* enforcement of these orders be undertaken until the orders are *published* by the secretary of state in the Kansas Register.7 That approach will provide the same notice that ordinarily is provided with acts of the legislature that affect constitutionally protected life, liberty, or property interests and should minimize due process concerns.

See Exhibit C at 7-8. In footnote 11, the Kansas Attorney General stated that the same publication and notice requirements should be observed by local orders prior to enforcement. *Id*. at 11. As noted above, the Disaster Declaration was issued the same day as the Citation to the Defendant, therefore, publication likely did not occur prior to enforcement.[9] Accordingly, the notice required by Due Process was severely lacking in this matter based on the lack of publication prior to enforcement.

Further, as described above, Ordinance 20-08 did not give adequate notice of the proscribed conduct. Even as the Defendant read E.O. 20-34, he was able to operate his business if he obtained a Food Establishment License and began offering human food products and services. As described above, he did both. To the extent the City interprets the Defendant's conduct as violative of E.O. 20-34, it highlights the vagueness of the ordinance.

[9] Notably, as of July 9, 2020, the Emporia Gazette apparently had no record that the May 27, 2020 Disaster Declaration was ever published .

The Officer's narrative in this matter states that Keena Privat, an employee of the Flint Hills Community Health Center (hereinafter "FHCHC"), Environment Health with no title or authority listed, unilaterally decided that Defendant's business "did not meet the criteria to be considered a bar and grill." As can be gleaned from the arguments and authorities above, nowhere is "bar and grill" referenced as a relevant legal term. Rather, the important legal terms are "restaurant" versus "bar." As described above, if the business was deemed a "restaurant," it could legally operate under E.O. 20-34. If the business was considered a "bar," than the analysis should have shifted to whether or not the "bar" had been repurposed to meet an "essential function" under KEFF. None of these things happened and the City took the uninformed and arbitrary opinion of some employee of the FHCHC.

Additionally, as described above, there is no definition of what constitutes a "restaurant" and what constitutes a "bar." Some definitions were highlighted above from state statute and the City of Emporia Municipal Code but none of them were definitive allowing broad disparity in possible interpretations. Without relevant definitions, E.O. 20-34 allows reasonable individuals to come to different conclusions as to what is actually meant by the terms at issue. Further, this lack of clarity gives individuals no adequate warning of the proscribed conduct.

As to the second test, Ordinance 20-08 provides no guard against arbitrary and unreasonable enforcement as exemplified by Keena Privat's arbitrary determination that the Defendant's business did not qualify as a "bar and grill." This enforcement is *per se* unreasonable because it relies on the predicate that the Defendant's business did not qualify under a definition that exists nowhere in Ordinance 20-08, the Disaster Declaration, the Ad Astra Plan, or E.O. 20-34. In fact, the designation of a "bar and grill" includes the term "bar" which would mean that it could not operate under E.O. 20-34 unless it was repurposed. This is completely contrary to what

Keena Privat was asserting in the first place - that if the Defendant's business was a "bar and grill" it could operate.

As stated above, the Defendant's business qualified as a "restaurant" or was otherwise a "bar" that had been repurposed to provide human food products and services as allowed by KEFF. This enforcement action by its very nature is arbitrary and unreasonable showing that Ordinance 20-08 fails the second test for vagueness. Accordingly, Ordinance 20-08 violates the Defendant's Right to Due Process as it is unconstitutionally vague and therefore this matter must be dismissed.

b. Interpretations of Executive Order 20-34 by the Local Health Officer or an Employee of the FHCHC Violate the Defendant's Right to Due Process.

There is some indication that Keena Privat and the FHCHC and/or the Local Health Officer were working under a definition of "restaurant" or "bar and grill" as described above that was unwritten and unknowable by members of the public, including the Defendant. To the extent such a secret definition existed and was being applied to the Defendant to determine his business was in violation of Ordinance 20-08, the application of this definition violates the Defendant's Right to Procedural Due Process because it used the force of law to cause him to shut down his business and deprive him from the operation of his property or face criminal sanctions without the due protections of the legislative process. This is an unconstitutional delegation of the legislative function as well as a violation of due process because the two are closely linked through caselaw.

> Article 2, Section 1 of the Constitution of the State of Kansas provides: "The legislative power of this state shall be vested in a house of representatives and senate." This constitutional provision presents usurpation of legislative authority by other departments of government as well as by a nongovernmental agency or a private individual. The authority to make obligatory rules and provide penalties for breach of said rules belongs to the legislature. An unlawful delegation of legislative power is contrary to the public policy expressed in the Constitution. *State v. Crawford*, 104 Kan. 141, 177 P. 360, 2 A.L.R. 880 (1919).

Gumbhir v. Kansas State Bd. of Pharmacy, 228 Kan. 579, 581–82 (1980). While the legislature delegated some of its legislative powers to the Governor under the Kansas Emergency Management Act ("KEMA") to author Executive Orders in an emergency under K.S.A. 48-924 and 48-925, such delegation cannot be extended to local agencies without a statutory mechanism in addition to some level of procedural due process similar to the Kansas Rules and Regulations Filing Act found at K.S.A. 77-415 *et seq*. By applying their own definitions to the Ad Astra Plan or Governor's Executive Order, Keena Privat and the FHCHC unlawfully exercised the legislative function and, in doing so, essentially created a new crime as well as depriving the Defendant of his property by ordering him to shut down his business.

In *Taylor v. Kansas Dept. of Health and Environment*, the Kansas Court of Appeals outlined the baseline of procedural due process under federal law:

> As outlined by the United States Supreme Court, constitutionally protected procedural due process requires that a person be afforded a right to be heard in a meaningful way before being deprived of "life, liberty, or property." U.S. Const. amend. XIV, § 1; *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citation omitted.]"); *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (The Due Process Clause "at a minimum" requires that "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). The Kansas Supreme Court similarly defines due process rights. *State v. King*, 288 Kan. 333, 354, 204 P.3d 585 (2009); *Winston v. Kansas Dept. of SRS*, 274 Kan. 396, 409–10, 49 P.3d 1274 (2002).

49 Kan.App.2d 233, 240-241 (2013). To be clear, the issuance of the citation in question was not the violation of the Defendant's Due Process at issue here. Rather, it was the application of an unwritten interpretation of "restaurant" as meaning a "bar and grill" invoking the force of law through criminal enforcement. By using an unknown definition of "restaurant" that equated to a "bar and grill," and because such definition was contained only in Keena Privat's mind, she and

the FHCHC violated the Defendant's right to Due Process by essentially creating law out of thin air without any procedural due process. The *Taylor* Court went on to state:

> The essence of constitutionally protected procedural due process is notification to an individual of the basis for pending government action impairing or extinguishing his or her protected property right or liberty interest and a meaningful opportunity to explain why that action would be improper or erroneous. *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 17–18, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978); *Goldberg*, 397 U.S. at 267–68, 90 S.Ct. 1011; *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 331, 291 P.3d 1056 (2013) ("procedural due process ... requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner"). That is a fundamental right or protection against government overreaching and aims to prevent a wrongful deprivation.

Id. at 242-243. Accordingly, both the legislative process and the Rules and Regulation Filing Act afford the public procedural due process through notice, comment, hearing, and written promulgation. While KEMA grants the Governor limited legislative power to issue Executive Orders in an emergency which are granted the force of law, it does not give local health employees the ability to essentially promulgate regulations or apply their own interpretations to an Executive Order which is what happened in the case at bar.

The Defendant and the general citizenry of Lyon County had no opportunity to be heard on the effect of Keena Privat's mental interpretation of a "restaurant" to actually mean a "bar and grill." Further, they had no notice or opportunity to be heard on the unknown definition of a "bar and grill." To date, Defendant's counsel does not know Keena Privat's exact definition of a "restaurant" such that the Defendant's business ran afoul of it because it exists only in the mind of Keena Privat.

V. Interpretations of Executive Order 20-34 by the Local Health Officer or an Employee of the FHCHC Violate the Kansas Rules and Regulations Filing Act.

Based on Kansas law, Keena Privat and the FHCHC may not give any standard, requirement, or policy binding legal effect unless they have complied with the Kansas Rules and

Regulation Filing Act, which is impossible since they have not been granted the authority to promulgate regulations. K.S.A. 77-415(b) states in relevant part:

> Unless otherwise provided by statute or constitutional provision, each rule and regulation issued or adopted by a state agency shall comply with the requirements of the rules and regulations filing act. Except as provided in this section, *any standard, requirement or other policy of general application may be given binding legal effect only if it has complied with the requirements of the rules and regulations filing act*.

K.S.A. 77-415 (emphasis added). Accordingly, Keena Privat and the FHCHC's interpretation of "restaurant" or application of the "bar and grill" category has no binding legal effect and is legally irrelevant. To the extent that either Keena Privat and the FHCHC issued a standard or policy as to what constitutes a "restaurant," such an issuance also has no binding legal effect and is meaningless. While Keena Privat and the FHCHC could provide general guidance as to their view of the Governor's executive orders, such general guidance could not give rise to any legal right or duty under K.S.A 77-415(b)(2)(D). However, that is not what Keena Privat and FHCHC did in this case, an arbitrary and unfounded interpretation was used to impose a legal duty on the Defendant to shut down his business, contrary to Kansas law.

While not conceded by the Defendant, to the extent that the City cites E.O. 20-34.7.b as granting authority to Keena Privat or the FHCHC to interpret whether or not the Defendant's business was meeting an "essential function" under KEFF, then Keena Privat and FHCHC would then qualify under the definition of "State Agency" under K.S.A. 77-415(c)(7), which states:

> "State agency" means any *officer*, department, bureau, division, board, authority, *agency*, commission or institution of this state, except the judicial and legislative branches, which is authorized by law to promulgate rules and regulations concerning the administration, enforcement *or interpretation of any law of this state*.

K.S.A. 77-415(c)(7) (emphasis added). If E.O. 20-34.7.b. granted this authority, the first sentence of K.S.A. 77- 415(b) would apply and any such an interpretation or determination would then qualify under the definition of "rule and regulation" under the Kansas Rules and

Regulations Filing Act in K.S.A. 77-415(c)(4). Accordingly, to issue interpretations and assessments with the force of law, Keena Privat and the FHCHC would have to fulfill all of the procedural due process requirements of the Kansas Rules and Regulations Filing Act, including but not limited public notice, opportunity for public comment, an opportunity for a public hearing, and written promulgation. Of course, none of these procedural steps occurred with Keena Privat's arbitrary and unfounded interpretation so it has no force of law and was issued in violation of the Kansas Rules and Regulations Filing Act.

VI. Right to Assert Additional Arguments in District Court Reserved.

In addition to the arguments and authorities contained herein, In the event that the matter proceeds and a conviction is ultimately obtained in this Court, the Defendant reserves the right to raise additional defenses on appeal to the District Court. Such additional arguments against Ordinance 20-08 may include, but not be limited to, that the ordinance is unconstitutional as applied under an Equal Protection analysis, Ordinance 20-08 constituted an unlawful taking, Ordinance 20-08 is unconstitutionally overbroad in violation of Due Process, and any other argument that the Defendant wishes to include.

CONCLUSION

There exist numerous problems with the prosecution of this case involving numerous statutory and constitutional issues as described above. Accordingly, for the forgoing reasons, the State's motion to dismiss should and must be granted.

Respectfully submitted,

KRIEGSHAUSER LAW, LLC

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ATTORNEYS FOR THE DEFENDANT

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I filed the foregoing Motion to Dismiss with the Clerk of the Court by email to tpierce@emporia-kansas.gov and pbatiz@emporia-kansas.gov and transmitted the same by email to:

Brandy Roy-Bachman
501 Commercial St.
Emporia, KS 66801-4031
bbachman@emporia-kansas.gov

/s/ Ryan A. Kriegshauser
Attorney for the Defendant

DISASTER DECLARATION LYON COUNTY KANSAS

WHEREAS, on the 27th day of May, 2020, the Chairman of the Board of Lyon County Commissioners of Kansas finds that a disaster has occurred, or the threat thereof is imminent within Lyon County , Kansas as a result of the Coronavirus pandemic (COVID-19) and the confirmed outbreak and person-to-person spread of COVID-19 in the United States and Kansas.

WHEREAS, such conditions remain to create significant impact to everyday life and/or endanger the public health, safety and welfare of persons and property within the borders of Lyon County, Kansas.

WHEREAS, COVID-19, a respiratory disease that spreads easily from person to person and may result in serious illness or death, has been confirmed in Kansas resulting in serious illness and at least one death to date in Kansas.

WHEREAS, to reduce spread of COVID-19, the United States Centers for Disease Control and Prevention (CDC) and the Kansas Department of Health and Environment (KDHE) recommend implementation of community mitigation strategies to increase containment of the virus, including cancellation of large gatherings and social distancing in smaller gatherings; and

WHEREAS, the worldwide outbreak of COVID-19 and the resulting epidemic in Kansas and continue to threaten the life and health of our citizens and visitors as well as the economy and remains a public disaster affecting life, health, property and the public peace.

NOW, THEREFORE, BE IT PROCLAIMED by the Chairman of the Board of Commissioners of Lyon County, Kansas, pursuant to K.S.A. 48-932, and amendments thereto, that:

NOW, THEREFORE BE IT RESOLVED, by the Board of County Commissioners of Lyon County, Kansas:

Lyon County will remain in "Modified Phase 2 of AD ASTRA: A PLAN TO REOPEN KANSAS" until the 8th day of June, 2020

That the response and recovery aspects of all local disaster plans which are applicable to Lyon County, Kansas and shall initiate the rendering of aid and assistance there under.

That any rights or powers lawfully exercised, or any actions taken pursuant to local disaster emergency plans shall continue and have full force and effect as authorized by law unless modified or terminated in the manner prescribed by law.

BY THE BOARD OF COUNTY COMMISSISONERS OF LYON COUNTY,
27th DAY OF May, 2020.

Chairman

ATTEST:

The Kansas Department of Agriculture, Food Safety and Lodging, 1320 Research Park Drive, Manhattan, KS 66502 (785)564-6733

----- ATTENTION -----

This is a two-part document:
The bottom portion of this document is your OFFICIAL AUTHORIZATION from Kansas Department of Agriculture. Your license MUST be displayed in a conspicuous location at your place of business.

GYM (THE)
1516 W 6th
Emporia, KS 66801

Please Display License Below

The Kansas Department of Agriculture, Manhattan, Kansas
certifies

GYM (THE)

License Number : 19936 - Food Establishment
1516 6th
Emporia, KS 66801

Owned by: JUST ONE DUCK LLC
has met the requirements for
Licensing Under the Kansas Food, Drug and Cosmetic Act, KSA 65-619 et. seq.
and is hereby granted
Authority to operate as a Food Establishment

Under Business Registration Number: **19936**

Size: Under 5,000 sq feet

Effective and Expiration Dates:
03-31-2020 03-31-2021

Mike Beam
Secretary of Agriculture

NOTICE: THIS LICENSE IS NOT TRANSFERABLE
The Kansas Department of Agriculture, Food Safety and Lodging, 1320 Research Park Drive, Manhattan, KS 66502 (785)564-6733 www.agriculture.ks.gov

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
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MEMORANDUM

TO: Kansas Prosecutors and Law Enforcement

FR: Attorney General Derek Schmidt

CC: Governor, Adjutant General, KHP Superintendent, KBI Director

DT: March 24, 2020

RE: State and local law enforcement duties and authorities under emergency powers invoked in connection with COVID-19 response

This memorandum responds to requests for information to assist Kansas law enforcement in analyzing the current extraordinary situation in which multiple states of emergency and associated orders have been imposed by various federal, state, and local officials in response to the COVID-19 pandemic.[1] Please be advised the Office of Attorney General does not serve as legal counsel for local law enforcement agencies, local prosecutors' offices, local governments, or individual law enforcement officers. This memorandum is not intended to provide legal advice but instead to provide information about applicable law that may assist in navigating the current extraordinary circumstance. To determine what specific duties or authorities a law enforcement officer may have in any particular circumstance or jurisdiction, the affected law enforcement agency should consult with its own legal counsel.

This memorandum proceeds in three parts. First, it provides an executive summary that may be used for quick reference by law enforcement. Second, it summarizes the current factual and legal situation that has and continues to develop. Third, it provides an overview of legal authorities giving rise to emergency powers and orders.

[1] The attorney general is required by statute to consult with and advise local prosecutors, K.S.A. 75-704, and is the chief law enforcement officer of the state. *State ex rel. Miller v. Rohleder*, 208 Kan. 193, 194 (1971).

Executive summary

The COVID-19 situation is unprecedented and dynamic. While this memorandum provides a comprehensive view of the emergency powers that have been invoked, this executive summary is intended to capture the most salient points that can be implemented by law enforcement authorities.

1. Conflicting orders. If there is a conflict between a lawful executive order issued by the governor and orders from a local entity, the governor's executive order should prevail. Likewise, any municipal ordinance or mayor/commission chairman's directive that conflicts with the Kansas Emergency Management Act, state disaster plan, interjurisdictional disaster plan, or local disaster plan is void.

2. Enforcement. Violations of a lawful order or proclamation issued by the governor under the Kansas Emergency Management Act or a quarantine order issued by the secretary of health and environment or by a local health officer are misdemeanor offenses. All Kansas law enforcement officers should continue to exercise discretion in how and when to enforce violations of these criminal laws. We recommend no criminal enforcement of these orders until they have been properly published. In addition, law enforcement may enforce non-criminal orders if properly ordered to do so by the governor, the secretary of health and environment, or a local health officer.

3. Consultation. Prior to initiation of any non-routine enforcement action, law enforcement officers are advised to consult with their jurisdiction's chief legal officer and prosecuting authority (e.g., county or district attorneys, city attorney, or county counselor).

4. Coordination. Law enforcement should consult with local emergency managers to determine what role law enforcement may have in any local, interjurisdictional, or state disaster plans now in effect.

5. Limits on local authority. Kansas statutes provide significant authority to local health officers to combat the spread of contagious or infectious diseases. However, any local orders that appear to direct the actions of persons not ordinarily subject to the authority of the issuing local jurisdiction, such as state law enforcement officers or officers of other local jurisdictions, should be carefully scrutinized by legal counsel before enforcement.

Current Situation

The spread of COVID-19 has resulted in numerous officials invoking seldom-used legal authority to exercise various emergency powers granted by law. On March 13, 2020, President Donald Trump issued a proclamation declaring a nationwide emergency and has subsequently invoked various authorities pursuant to that declaration. On March 12, 2020, Governor Laura Kelly proclaimed a statewide state of disaster emergency pursuant to the Kansas Emergency Management Act, K.S.A. 48-904 *et seq*. She has subsequently exercised numerous powers available to her under that Act when a state of disaster emergency is in effect. In addition, some counties in Kansas have declared a state of local disaster emergency under the Kansas Emergency Management Act and have invoked various local powers pursuant to such declaration. So, too, have some cities in Kansas. In addition, state and local public health officials have invoked various statutory authorities granting them extraordinary power to address the spread of contagious and infectious diseases.

Law enforcement officers may be empowered to enforce some, but not all, directives arising from these various federal, state, and local actions. As discussed more fully below, it is possible that in some local jurisdictions, law enforcement officers may be subject not only to duties and authorities ordinarily placed upon them by law but also by up to *six additional and separate sources of emergency duties and authorities* imposed by different authorities as a result of the COVID-19 response: (1) federal, (2) state (governor's orders), (3) state (secretary of health and environment's orders), (4) county (commission declaration), (5) county (health officer's orders), and (6) city (mayor's declaration).

The situation is further complicated because there exists a state disaster emergency plan, various interjurisdictional disaster emergency plans, and numerous local disaster emergency plans, all of which now are activated, and any one (or all) of these plans may impose obligations on law enforcement and may displace local ordinances that ordinarily are in effect.

Still further, the rapidly evolving situation with the pandemic is resulting in frequently changing invocations, alterations, or terminations of emergency powers by various federal, state, and local authorities. Nor do the various directives and orders share a uniform termination date, and most or all are subject to extension.

Moreover, the specific interaction of various state statutes and authorities involved is sometimes unclear and has not previously been clarified either by judicial ruling or by formal attorney general opinion.

In brief, the legal situation is extraordinarily complex and fluid. The Office of Attorney General knows law enforcement agencies and officers throughout our state

will carry out both their ordinary and extraordinary lawful duties, professionally and properly enforce the law, and make positive contributions to the overall national, state, and local efforts to slow the spread of COVID-19. This memorandum is intended to assist law enforcement in accomplishing those purposes and to assist legal counsel for law enforcement agencies in advising their clients. It discusses, in general terms, sources of authority that may have been invoked and certain types of orders that may be in effect as of the date of this memorandum. This may not be a complete list, and other atypical sources of authority and additional orders also may apply in particular circumstances.

To determine which emergency authorities are currently in effect in each law enforcement agency's jurisdiction, and what extraordinary duties or authorities are thus imposed on law enforcement officers in that jurisdiction, a law enforcement agency should consult with its legal counsel.

Emergency Proclamations and Legal Authorities

I. Federal-level emergency authorities

As noted above, President Donald Trump declared a nationwide state of emergency to assist in mobilizing a nationwide response to COVID-19. This memorandum does not analyze these federal authorities.

State and local law enforcement should, to the extent reasonably possible, coordinate with federal authorities during this state of emergency. However, most—and perhaps all—atypical duties and authorities placed on Kansas law enforcement will arise from state or local emergency powers, not from federal emergency powers. States possess general police powers (and may delegate those powers to local units of government), but the federal government possesses no general police power and instead may exercise only those limited, enumerated powers granted to it by the federal Constitution. *See, e.g., Bond v. United States*, 572 U.S. 844, 854 (2014). In general, the federal Constitution limits the ability of the federal government to commandeer state and local civilian authorities to carry out duties imposed by federal law. *See, e.g.*, *generally*, *Printz v. United States*, 521 U.S. 898 (1997) (federal law requiring state chief law enforcement officers to enforce federal law is unconstitutional). State law also may *prohibit* state and local law enforcement officers from participating in the enforcement of specific federal laws. *See, e.g.*, K.S.A. 50-1206(b).

II. Governor and local elected official emergency authorities

This memorandum will focus on two sources of state-level emergency authority currently in effect: Powers exercised by the governor pursuant to the Kansas Emergency Management Act, specifically K.S.A. 48-924 and K.S.A. 48-925; and powers exercised by the secretary of health and environment pursuant to the

Infectious Disease Control provisions in article 9 of chapter 65.[2] The governor's proclamation of a state of disaster has activated the disaster response and recovery aspects of the state disaster emergency plan and of local and interjurisdictional disaster plans throughout the state. *See* K.S.A. 48-924(d).[3] To the extent these disaster plans may conflict with municipal ordinances, the local ordinances must yield.[4]

A. Kansas Emergency Management Act – Governor authority

The Kansas Constitution vests in the governor the "supreme executive power" of the state. Kan. Const. Art. I, Sec. 3. The Kansas Emergency Management Act expressly places with the governor the responsibility "for meeting the dangers to the state and people presented by disasters." K.S.A. 48-924(a). Thus, in the current circumstance, the emergency powers exercised by the governor under K.S.A. 48-924 and K.S.A. 48-925 are broad and take precedence over other exercises of state or local emergency power that may conflict with lawful orders of the governor.[5] Put another

[2] Other sources of state-level emergency powers include power vested in the governor under the constitution, statutes, or common law of this state independent of K.S.A. 48-924 and 925, or powers vested by the constitution, statutes or common law in other state officials. This memorandum does not address any of those potential sources of emergency authority.

[3] This memorandum does not address the contents of either the state plan or of any interjurisdictional or local plans. For additional guidance on requirements of the state-level disaster emergency plan that may affect law enforcement, please contact your local emergency manager or the Division of Emergency Management within the Adjutant General's Department, which is charged by law with preparing and maintaining the state disaster emergency plan, *see* K.S.A. 48-926, and with developing and revising any local and interjurisdictional disaster emergency plans. *See* K.S.A. 48-931. A state, local, or interjurisdictional disaster emergency plan may "place reliance upon [police forces] which are available for performance of functions related" to the declared emergency. K.S.A. 48-923(c). To the extent these plans require law enforcement to assist in their lawful execution, law enforcement is required to do so. *See generally* Attorney General Opinion 85-85 (sheriff required to assist in carrying out local emergency plans).

[4] Municipal ordinances authorizing the mayor or other persons to act during a state of disaster emergency "shall be null and void" to the extent they conflict with the state disaster emergency plan, the applicable local disaster emergency plan, or the Kansas Emergency Management Act. K.S.A. 48-935.

[5] This general principle can assist in resolving conflicts between or among emergency directives issued by various government authorities. However, this principle does not mean that the power of the governor is unlimited during a state of disaster emergency. The state and federal constitutions remain in force and effect and may not be suspended. Similarly, to the extent state constitutional, statutory or common law vests particular responsibilities with other officials in state government, the lawfulness of a governor's order in conflict with that law would be suspect. The governor's exercise of power, even during a state of disaster emergency, must remain lawful.

way, to the extent the governor's orders conflict with any local disaster emergency plan or local order, the governor's orders control.

1. Proclamation of a State of Disaster Emergency

The Kansas Emergency Management Act, K.S.A. 48-904 *et seq*., authorizes the governor to proclaim a state of disaster emergency. K.S.A. 48-924(b)(1). The governor must proclaim a state of disaster emergency prior to exercising any of the emergency powers authorized by K.S.A. 48-925, and those powers remain available to the governor only while the state of disaster emergency remains in effect. On March 12, 2020, Governor Kelly proclaimed a state of disaster emergency in response to COVID-19, and it remains in effect statewide. *See* Exhibit 1 attached. The legislature subsequently adopted House Concurrent Resolution 5025, which has extended the state of disaster emergency until May 1, 2020, and establishes a mechanism by which the Legislative Coordinating Council may further extend the state of disaster emergency on a rolling basis for periods not to exceed 30 days each. *See* Exhibit 2 attached. The state of disaster emergency can be terminated by the governor at any time on her own authority or at the direction of the legislature acting through authority it has delegated to the Legislative Coordinating Council.

2. Orders by the Governor during State of Disaster Emergency

During a state of disaster emergency, the governor may exercise certain extraordinary statutory powers set forth in K.S.A. 48-925(c). These specific powers are exercised by the governor through the issuance of orders, "which shall have the force and effect of law" while the state of emergency exists. K.S.A. 48-925(b) and (d). The legislature retains authority to revoke any such order. *See* K.S.A. 48-925(b). In the current instance, the legislature has delegated the authority to revoke the governor's orders to the Legislative Coordinating Council, which must within 30 days review *every* order issued by the governor during the current state of disaster emergency and must review *certain* orders within three days. *See* 2020 HCR 5025.

Each executive order may, by its terms, determine the duration during which it is in effect, not to extend beyond the termination of the proclaimed state of disaster emergency. *See* K.S.A. 48-925(b). The duration of orders that by their terms expire may be extended by the governor so long as the proclaimed state of disaster emergency remains in effect. At the time of issuance of this memorandum, Governor Kelly has issued the following Executive Orders under authority of the March 12, 2020, proclamation of a state of disaster emergency:[6]

[6] These orders are published on the governor's official website at https://governor.kansas.gov/newsroom/executive-orders/ and on the Kansas State Library website at https://kslib.info/Archive.aspx?ADID=553. Because the list of Executive Orders changes frequently,

- Executive Order No. 20-03, Extending states of local disaster emergency relating to COVID-19
- Executive Order No. 20-04, Temporarily prohibiting mass gatherings to limit the spread of COVID-19
- Executive Order No. 20-05, Temporarily prohibiting utility and internet disconnects
- Executive Order No. 20-06, Temporarily prohibiting evictions and foreclosures (Rescinded and replaced by Executive Order No. 20-10);
- Executive Order No. 20-07, Temporarily closing K-12 schools to slow the spread of COVID-19
- Executive Order No. 20-08, Temporarily expanding telemedicine and addressing certain licensing requirements to combat the effects of COVID-19
- Executive Order No. 20-09, Conditional and temporary relief from certain motor carrier rules and regulations in response to the COVID-19 pandemic
- Executive Order No. 20-10, Rescinding Executive Order 20-06 and temporarily prohibiting certain foreclosures and evictions;
- Executive Order No. 20-11, Temporarily requiring continuation of waste removal and recycling services;
- Executive Order No. 20-12, Drivers' license and vehicle registration and regulation during public health emergency;
- Executive Order No. 20-13, Allowing certain deferred tax deadlines and payments during the COVID-19 pandemic.

No statute or constitutional provision expressly states when any such order becomes legally effective. By their terms, the individual orders state they are effective immediately, and a reasonable practice is to take them at face value. However, any governmental action that deprives persons of life, liberty, or property must satisfy requirements of due process of law. *See* U.S. Const. Amend. 14. Principles of due process require notice of the existence of a law and what conduct the law prohibits before a person may be held liable for violating it. *State v. Cordray*, 277 Kan. 43, 51 (2004). The due process requirement for notice is particularly important in the criminal law, *see, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), because due process demands that persons subject to the law must have "an opportunity … to avoid the consequences of the law." *Lambert v. California*, 355 U.S. 225, 229 (1957). Since orders of the governor have the "effect of law," *see* K.S.A. 48-925, and violations of the orders may give rise to criminal penalties, *see* K.S.A. 48-939, this elementary

it is recommended to review the status of any particular Executive Order on a daily basis throughout the state of disaster emergency.

principle attaches to these executive orders. *See also Alexander v. Adjutant General's Office*, 18 Kan. App. 2d 649 (1993) (an executive order that has force of law "occupies the same position as a statute and may be interpreted" in like manner). While there is room for debate about when orders may become legally in effect, we recommend no *criminal* enforcement of these orders be undertaken until the orders are *published* by the secretary of state in the Kansas Register.[7] That approach will provide the same notice that ordinarily is provided with acts of the legislature that affect constitutionally protected life, liberty, or property interests and should minimize due process concerns.[8]

Law enforcement should become familiar with the provisions of these executive orders, some of which are complex or nuanced, just as with statutes.

3. Role for law enforcement in enforcing governor's orders

Law enforcement officers may be under a duty and have authority to enforce certain orders of the governor issued pursuant to K.S.A. 48-925. Sources of that duty and authority include:

First, any "knowing and willful" violation of any "*lawful* order or proclamation" (emphasis added) of the governor issued pursuant to K.S.A. 48-925 is a class A misdemeanor. K.S.A. 48-939. Law enforcement officers have the same duty and authority to enforce these misdemeanors as to enforce any other misdemeanor. *See generally*, K.S.A. 22-2401(c) (discretionary authority for probable cause arrest). Please note that a law enforcement officer's decision regarding whether, how, and when to arrest a person for these misdemeanors remains purely *discretionary*. *Soto v. City of Bonner Springs*, 38 Kan. App. 2d 382, Syl. ¶ 4, 166 P.3d 1056 (2007), aff'd, 291 Kan. 73, 238 P.3d 278 (2010); *see also* K.S.A. 48-934 (providing immunity for law enforcement officers "while engaged in maintaining or restoring the public peace or safety or in the protection of life or property during a state of disaster emergency . . . so long as they act without malice and without the use of excessive or unreasonable force").

Second, under certain circumstances, a law enforcement officer may be called upon and required to assist in enforcing lawful orders of the governor during a state of emergency *even if no crime has been committed*. This is most likely to occur under

[7] The Kansas Register is available at https://www.kssos.org/pubs/pubs_kansas_register.asp.

[8] The Kansas Constitution provides that statutes may take effect only when "published as provided by law." Kan. Const. Art. 2, Sec. 19. Governors have traditionally filed each executive order with the secretary of state—a practice analogous to how acts of the legislature are caused to be published so they may satisfy the constitutional requirement for publication. *See also* K.S.A. 75-430(a)(2) (providing for publication in the Kansas Register of "all executive orders and directives of the governor" filed with the Secretary of State).

provisions of the state, interjurisdictional, or local disaster emergency plans. However, it also is possible that an express directive of the governor could displace or supplement the preexisting disaster plans and impose specific duties or authorities on law enforcement to assist in carrying out the orders of the governor. *See* K.S.A. 48-924(a) (governor "shall be commander-in-chief" of "all *other* forces available for emergency duty") (emphasis added); *see also* K.S.A. 48-925(c)(2) (governor may "utilize all available resources … of each political subdivision … to cope with the disaster"), K.S.A. 48-925(c)(10) (governor may "require and direct the cooperation and assistance of … local governmental agencies and officials"), K.S.A. 48-925(c)(11) (governor may "perform and exercise such other … powers … as are necessary to promote and secure the safety and protection of the civilian population). *See also generally* Attorney General Opinion 81-193 (sheriffs and other officials to comply with governor's directives during state of disaster emergency).

B. Kansas Emergency Management Act–County commission/mayor authority

The Kansas Emergency Management Act contains a separate provision that authorizes the chairman of a board of county commissioners or the mayor of a city to declare a state of local disaster emergency. K.S.A. 48-932. In the current COVID-19 response, the governor has extended the statutory duration of any state of local disaster emergency declaration relating to COVID-19. As a result, all local declarations—absent revocation by local officials—will remain in effect during the governor's proclamation of a state of disaster emergency. *See* Executive Order No. 20-03.

The effect of a declaration of a state of local disaster emergency is more limited than a governor's declaration. The local declaration "shall activate the response and recovery aspects of any and all local and interjurisdictional disaster emergency plans which are applicable to such county or city," K.S.A. 48-932(c), but there is no separate grant of specific statutory authority to local county commission chairpersons or mayors as there is to the governor while the local disaster emergency is in effect. *Compare* K.S.A. 48-925 (granting governor specific powers during state of disaster emergency) *with* K.S.A. 48-932 (no similar provisions for state of local disaster emergency). *See also* Attorney General Opinion 81-130 ("The power granted to the governor is defined by statute, while the powers of local officials are those contained in the applicable disaster emergency plans").

As with a state of disaster emergency proclaimed by the governor, a knowing and willful violation of any lawful state of local disaster declared pursuant to K.S.A. 48-932 is a class A misdemeanor, *see* K.S.A. 48-939, and law enforcement has its ordinary discretionary authority to enforce this misdemeanor provision. In notable contrast with the powers granted to the governor, state law does not grant local county commissioners or mayors additional authority to require law enforcement to enforce

local orders during a state of emergency, except as may be provided in the state, interjurisdictional, or local disaster emergency plans. *See* Attorney General Opinion 84-78 (local disaster declaration cannot suspend regulatory statutes as governor can). However, law enforcement may lawfully be called upon to carry out non-criminal enforcement duties pursuant to a state, interjurisdictional or local disaster plan. *See* Attorney General Opinion 85-85 ("it is clear that the local disaster agency has the authority to require, and indeed, must rely on the services of local officials (including the sheriff) in planning to meet the demands of a disaster").

III. Infectious Disease Control Act authorities

Unlike the federal government, states have broad police power to protect the health and safety of their populations.[9] The state's principal statute conveying authority to address infectious and contagious diseases is found in article 1 of chapter 65 of the Kansas Statutes Annotated.[10] In 2005, the legislature enacted K.S.A. 65-129b, which superimposed broad and modern infectious disease control authorities on top of preexisting statutes, some of which are quite old or specific to particular diseases. The broad new statutory authority, which generally is available both to the secretary of health and environment and to local health officers, includes the following pertinent provision:

> [W]hen the local health officer or the secretary determines that it is medically necessary and reasonable to prevent or reduce the spread of the disease or outbreak believed to have been caused by the exposure to an infectious or contagious disease, [he or she] may order an individual or group of individuals to go to and remain in places of isolation or quarantine until the local health officer or the secretary determines that the individual no longer poses a substantial risk of transmitting the disease or condition to the public. K.S.A. 65-129b(a)(1)(B).

Unlike powers granted to the governor or to other officials under the Kansas Emergency Management Act, the secretary or local health officer's authority to exercise this power is not contingent on a state of local disaster emergency having been declared. Any person who "leaves any … quarantined area without the consent

[9] States may exercise these police powers to stop or impede the spread of infectious or contagious diseases. *See generally Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (recognizing state authority to enact "quarantine laws and health laws of every description")(internal quotations omitted); *Ex parte Irby*, 113 Kan. 565 (1923) (denying habeas corpus relief for person quarantined by order of local health officer); *Ex parte McGee*, 105 Kan. 574 (1919) (same); *but see Moody v. Wickersham*, 111 Kan. 770, 207 P. 847, 849 (1922) (order to confine individual to prevent spread of infectious disease must be lawful and not wanton or inhumane).

[10] Other public health statutes also may be invoked, but the basic principles regarding the role of law enforcement in enforcing orders of the secretary of health and environment or of local health officers are the same.

of the local health officer having jurisdiction, or who evades or breaks quarantine or knowingly conceals a case of infectious or contagious disease" is guilty of a class C misdemeanor. K.S.A. 65-129. Thus, law enforcement has the discretionary duty and authority to enforce criminal violations of such orders in the same manner it ordinarily enforces misdemeanor violations of the law.[11]

In addition, the 2005 statute grants authority to any local health officer or to the secretary of health and environment to "order any sheriff, deputy sheriff or other law enforcement officer of the state or any subdivision to assist in the execution or enforcement of any order issued" pursuant to the above statute. K.S.A. 65-129b(a)(2). Thus, a law enforcement officer may be required to assist in enforcing any lawful orders of the secretary of health and environment or of any local health officer *even if no criminal conduct occurs*. The plain wording of the statute requires the secretary or local health officer to specifically invoke this authority—to order law enforcement to assist—before the statute imposes a duty or grants authority to law enforcement. While this specific statutory provision is new, this general principle—that law enforcement may be required to assist health officials in enforcing requirements during health emergencies even in the absence of any crime—is a longstanding principle that has been upheld by Kansas courts. *See, e.g.*, *Noland v. Gardner*, 156 Kan. 697 (1943) (affirming sheriff's authority to confine in county jail person on order of local health officer); *Ex parte Hoober,* 132 Kan. 224 (1932) (recognizing sheriff's authority to confine person on order of city physician); *Nyberg v. Bd. of Comm'rs of Sedgwick County*, 113 Kan. 758 (1923) (upholding sheriff's duty to enforce order of local health officer).

Although K.S.A. 65-129b on its face appears to grant concurrent authority to both the secretary of health and environment and the local health officer, it is important to note that the two officials may not be able to exercise identical authority. For example, the authority of local health officers generally will be limited to their local jurisdiction, while the secretary's authority may be statewide. Various consequences may follow. For example, the secretary may be able under K.S.A. 65-129b(a)(2) to order law enforcement from anywhere in the state to assist in enforcing his orders, but the local health officer's authority under that section is likely limited to law enforcement within that local jurisdiction. For that reason, we recommend that any local orders that appear to direct the actions of persons not ordinarily subject to the authority of the issuing local jurisdiction, such as state law enforcement officers or officers of other local jurisdictions, should be carefully scrutinized by legal counsel before enforcement.

[11] For the same due process reasons that undergird our recommendation against criminal enforcement of a governor's order unless and until such order has been published in the Kansas Register by the secretary of state, we also recommend against use of the criminal law to enforce orders of local health officers unless and until those orders have been published in a manner substantially similar to how local ordinances ordinarily are published in order to become effective.

Conclusion

In addition to exercising common sense and good judgment, law enforcement officers should coordinate with the local prosecutor regarding how law enforcement should criminally enforce any orders issued pursuant to emergency powers currently in effect in that jurisdiction—for example, whether an arrest warrant or summons should be issued in lieu of a warrantless misdemeanor arrest if and when necessary. Courts have recognized that a county attorney or district attorney is the representative of the State in criminal prosecutions and has broad discretion in controlling those prosecutions. The scope of this discretion extends to the power to investigate and to determine who shall be prosecuted and what crimes shall be charged. *State v. Williamson*, 253 Kan. 163, 165 (1993).

We have not researched whether the rarely used misdemeanor provisions that authorize criminal enforcement of lawful orders of the governor, local officials (through disaster plans), the secretary of health and environment, or local health officers – such as K.S.A. 48-939 and K.S.A. 65-129 – are included in the pertinent statutes and municipal codes and therefore may be enforced in municipal court by municipal prosecutors. If this is an issue of interest locally, we recommend law enforcement coordinate with local county or district attorneys and also with local municipal prosecutors in their jurisdiction.

For guidance on the role of law enforcement in non-criminal enforcement of lawful emergency orders in effect in any particular jurisdiction, law enforcement officers should consult with their agency's legal advisor.

Exhibit 1 **STATE OF DISASTER EMERGENCY PROCLAMATION**

Executive Department
State of Kansas
Topeka, Kansas

By the Governor

By virtue of the authority vested in me by the Kansas Emergency Management Act, Chapter 48, Article 9, of the Kansas Statutes Annotated, to meet the inherent dangers of disasters to which the State and its citizens have been exposed, and upon advice of the State Adjutant General as the Director of the Division of Emergency Management, I hereby proclaim a State of Disaster Emergency as follows:

NATURE OF THE DISASTER:

On March 7, 2020, the Secretary of the Kansas Department of Health & Environment (KDHE) confirmed the first case of novel coronavirus (COVID-19) in the state of Kansas and considers that a public health emergency exists within the state of Kansas. The United States Centers for Disease Control and Prevention (CDC) identifies the potential public health threat posed by COVID-19 both globally and in the United States as "high" and the United States Department of Health & Human Services declared a public health emergency for COVID-19 beginning January 27, 2020. The World Health Organization (WHO) declared a global pandemic on March 11, 2020. The first COVID-related fatality occurred in Kansas on March 12, 2020.

The Kansas Department of Health & Environment (KDHE) is providing guidance and taking measures to minimize the risk of exposure and infection to the state's general public while supporting public health and medical professionals with disease investigation, lab testing, epidemiology surveillance and other activities associated with the control and spread of the virus.

The Kansas Division of Emergency Management (KDEM) is coordinating resources across state government to support local public health and county emergency managers in alleviating the impacts to people, property, and infrastructure and assessing the magnitude and long-term effects of the incident.

DATE THAT DISASTER AFFECTED THE AREA:

March 12, 2020

AREA AFFECTED BY THE DISASTER:

Entire 105 counties in Kansas.

I hereby proclaim, direct and order the Adjutant General of the State of Kansas to activate the disaster response and recovery portions of the Kansas Response Plan. The Adjutant General shall coordinate local and inter-jurisdictional disaster plans applicable to the political subdivisions of areas affected by this Proclamation.

Any or all of the powers conferred upon the Governor by the Kansas Emergency Management Act may be delegated to the Adjutant General as deemed appropriate during this period of proclaimed State of Disaster Emergency. This may be delegated by written orders, or oral orders subsequently reduced to writing with reference to this Proclamation.

I hereby suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the order or rules and regulations of any state agency which implements such statute, if strict compliance with the provisions of such statutes, order or rule and regulation would prevent, hinder, or delay in any way necessary action in coping with the disaster as set forth in KSA 48-925(c)(1).

This Proclamation shall be filed promptly with the Division of Emergency Management, the Office of the Secretary of State and each city clerk or county clerk, as appropriate, in the area to which this Proclamation applies. Further dissemination of this Proclamation shall occur by means calculated to bring its contents to the attention of the general public.

DONE At the Capitol in
Topeka Under the Great Seal of
the State this 12, day of March
A.D., 2020

THE GOVERNOR: Laura Kelly

Scott Schwab
Secretary of State

Darrell Ree
Assistant Secretary of State

Exhibit 2

HOUSE CONCURRENT RESOLUTION No. 5025

A CONCURRENT RESOLUTION ratifying the March 12, 2020, State of Disaster Emergency declaration, subject to limitations, issued by Governor Laura Kelly and providing for the continuation thereof for the entire 105 counties of Kansas through May 1, 2020, subject to additional extensions of time.

WHEREAS, On March 12, 2020, Governor Laura Kelly issued a State of Disaster Emergency declaration in response to confirmed cases of novel coronavirus (COVID-19) in the state of Kansas and considers that a public health emergency exists within the state of Kansas. The United States Centers for Disease Control and Prevention (CDC) identifies the potential public health threat posed by COVID-19 both globally and in the United States as "high," and the United States Department of Health & Human Services declared a public health emergency for COVID-19 beginning January 27, 2020. The World Health Organization (WHO) declared a global pandemic on March 11, 2020: Now, therefore,

Be it resolved by the House of Representatives of the State of Kansas, the Senate concurring therein: That the State of Disaster Emergency declaration issued on March 12, 2020, for the entire 105 counties of Kansas in accordance with K.S.A. 48-924 is hereby ratified and continued in force and effect on and after March 12, 2020, through May 1, 2020, subject to additional extensions by concurrent resolution of the Legislature or as further provided in this concurrent resolution. If the Legislature is not in session:

(1) As described in K.S.A. 48-924(b)(3), upon specific application by the Governor to the State Finance Council, the State Finance Council may authorize once an extension of such state of disaster emergency by affirmative vote of a majority of the legislative members thereof for a specified period not to exceed 30 days; and

(2) following such State Finance Council action, the Legislative Coordinating Council, representing the Legislature when the Legislature is not in session pursuant to K.S.A. 46-1202:

(A) Is authorized to ratify a declaration, terminate a state of disaster emergency, revoke an order or proclamation or assume any other power granted to the legislature pursuant to K.S.A. 48-924 or K.S.A. 2019 Supp. 48-925;

(B) may authorize additional extensions of such state of disaster emergency by a majority vote of five members thereof for specified periods not to exceed 30 days each;

(C) shall meet not less than every 30 days to:

(i) Review the state of disaster emergency;

(ii) consider any orders or proclamations issued since the last Legislative Coordinating Council meeting; and

(iii) consider whether such orders or proclamations, if any, are an exercise of any power listed in K.S.A. 2019 Supp. 48-925(c)(2), (c)(4), (c)(7), (c)(8) or (c)(11); and

(D) shall have the authority to review and revoke all orders and proclamations issued by the governor pursuant to K.S.A. 2019 Supp. 48-925(b). The chairperson of the Legislative Coordinating Council, in consultation with the attorney general, adjutant general and any other parties the chairperson deems necessary, shall determine if an order or proclamation that is an exercise of a power listed in K.S.A. 2019 Supp. 48-925(c)(2), (c)(4), (c)(7), (c)(8) or (c)(11) has been issued. If the chairperson determines that the order or proclamation is an exercise of such power, the Legislative Coordinating Council shall meet to consider such order or proclamation within three calendar days. At such meeting, the Legislative Coordinating Council may revoke such order or proclamation; and

Be it further resolved: That, for the purposes of this ratification, the Governor shall not have the power or authority to temporarily or

permanently seize, or authorize seizure of, any ammunition or to suspend or limit the sale, dispensing or transportation of firearms or ammunition pursuant to K.S.A. 2019 Supp. 48-925(c)(8) or any other executive authority.

I hereby certify that the above CONCURRENT RESOLUTION originated in the HOUSE, and was adopted by that body

_____

HOUSE adopted
Conference Committee Report_____

_____
Speaker of the House.

_____
Chief Clerk of the House.

Passed the SENATE
as amended _____

SENATE adopted
Conference Committee Report_____

_____
President of the Senate.

_____
Secretary of the Senate.