

No. 23-126037-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

**POM OF KANSAS, LLC,
Plaintiff-Appellant**

v.

**KRIS KOBACH, Kansas Attorney General,
Defendant-Appellee,**

**KANSAS RACING AND GAMING COMMISSION
Defendant-Appellee,**

**CHARLES BRANSON, Douglas County District Attorney
Defendant-Appellee,**

**BHCMC, LLC, BOYD GAMING CORPORATION, and
KANSAS ENTERTAINMENT, LLC
Intervenors-Appellees,**

**(KANSAS DEPARTMENT OF REVENUE, DIVISION OF ALCOHOL
BEVERAGE CONTROL),
Defendant-Appellee,**

**(ANTHONY BRIXIUS, Interim Chief of Police of the City of Lawrence, Kansas)
Defendant-Appellee,**

**(RANDY ROBERTS, Douglas County Sheriff)
Defendant-Appellee,**

BRIEF OF PLAINTIFF-APPELLANT

**APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY,
HONORABLE THOMAS G. LUEDKE, JUDGE
DISTRICT COURT CASE NO. 22CV00153**

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Oral Argument Requested: 20 minutes

TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE 1

K.S.A. 21-6403(e)(2)..... 1

K.S.A. 74-8701..... 2

Witschner v. City of Atchison, 154 Kan. 212, 117 P.2d 570 (1941)..... 2

STATEMENT OF THE ISSUES 3

FACTUAL STATEMENT OF THE CASE..... 4

 A. POM owns, develops, manufactures, and distributes a skill-based amusement game for use within Kansas called “Dragon’s Ascent” 4

 B. POM seeks approval from the KRGC to verify Dragon’s Ascent is skill-based and not subject to Kansas’ gambling laws 4

 C. POM provides Dragon’s Ascent to the KRGC for testing and inspection..... 5

 D. The KRGC continues to play Dragon’s Ascent and agrees to issue a report addressing any concerns with the game..... 5

 E. Three weeks later, the KRGC is still “a month away” from providing any comments concerning Dragon’s Ascent 6

 F. POM suggests a friendly seizure of Dragon’s Ascent to determine its legality 6

 G. POM moves forward with introducing Dragon’s Ascent in Kansas due to the KRGC’s inaction..... 6

 H. The KRGC admits they had not even begun evaluating Dragon’s Ascent..... 6

 I. POM demonstrates Dragon’s Ascent at the Kansas Sheriff’s Association convention and to the KABC 7

J.	POM sends a letter to various enforcement parties explaining Dragon’s Ascent is skill-based	8
K.	Reno County enforcement officials respond that they “will welcome use of” Dragon’s Ascent if the KRGC determines it is not an illegal gaming device	8
L.	The KRGC sends a letter to law enforcement officials stating Dragon’s Ascent contains “too many non-skill factors to allow mastery of the game”	9
M.	KABC agents have informed bars not to allow Dragon’s Ascent in their establishments unless the KRGC deems the game legal.....	10
N.	Kansas bars fear prosecution for placing Dragon’s Ascent in their businesses.....	10
O.	An Assistant Attorney General suggests POM file a declaratory judgment action	10
P.	Kansas casinos move to intervene, alleging Dragon’s Ascent is illegal under Kansas law, and sue POM in Wyandotte County alleging Dragon’s Ascent is illegal and tortiously interferes with their casino contracts.....	10
Q.	POM files it Second Amended Petition and dismisses claims against certain parties	11
R.	The KRGC and DA Branson move to dismiss POM’s Second Amended Petition.....	12
S.	The Douglas County District Court dismisses some claims and transfers the case to Shawnee County	12
T.	POM’s claims are dismissed even though the Shawnee County District Court acknowledges the imminent threat of prosecution against POM	13
	ARGUMENTS AND AUTHORITIES	14
I.	When facing a motion to dismiss, a party establishes standing when it alleges a cognizable injury suffered and a causal connection	

between the suffered injury and the challenged conduct. Here, POM alleges that it currently operates Dragon’s Ascent in Kansas, and that its Dragon’s Ascent operations are curtailed and put at risk because of the KRGC’s and AG’s actions and inactions. As such, the Douglas County District Court erred in dismissing POM’s Count 6 seeking a declaration that Dragon’s Ascent is predominantly skill-based..... 14

A. Standard of review and preservation 14

Aeroflex Wichita, Inc. v. Filardo, 294 Kan. 258, 275 P.3d 869 (2012) 14

5B Wright & Miller, Federal Practice and Procedure: Civil § 1351 (3d ed. 2004)..... 14

Kansas Building Industry Workers Compensation Fund v. State, 302 Kan. 656, 359 P.3d 33 (2015) 14

B. Kansas plaintiffs demonstrate standing when (1) they suffer a cognizable injury and (2) there is a causal connection between the injury and the challenged conduct. POM operates Dragon’s Ascent in Kansas, and POM’s operation of Dragon’s Ascent in Kansas is curtailed by the actions and inaction of Kansas agencies, thus giving POM standing to seek declaratory relief 15

Kansas Building Industry Workers Compensation Fund v. State, 302 Kan. 656, 359 P.3d 33 (2015) 15

State ex rel. Morrison v. Sebelius, 285 Kan. 875, 179 P.3d 366 (2008) 15

Kan. Const. art. 3, § 1 15

State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City, 264 Kan. 293, 955 P.2d 1136 (1998)..... 15

State Ass’n of Chiropractors v. Anderson, 186 Kan. 130, 348 P.2d 1042 (1960)..... 16

K.S.A. 60-1713 16

Cady v. Cady, 224 Kan. 339, 581 P.2d 358 (1978)..... 16, 17, 18

Morgan v. City of Wichita., 32 Kan. App. 2d 147, 80 P.3d 407 (2003)..... 16, 17, 18, 19

<i>Robinson v. Kansas State High School Activities Association</i> , 260 Kan. 136, 917 P.2d 836 (1996)	16, 18, 19
<i>Acupuncture Soc. of Kansas v. Kansas State Bd. of Healing Arts</i> , 226 Kan. 639, 602 P.2d 1311 (1979)	16, 17, 18, 19
<i>Phillips v. Vieux</i> , 210 Kan. 612, 504 P.2d 196 (1972)	16, 17, 19
<i>State, ex rel., v. Shanahan</i> , 178 Kan. 400, 286 P.2d 742 (Kan. 1955)	16
<i>Hyde Park Dairies v. City of Newton</i> , 167 Kan. 730, 208 P.2d 221 (Kan. 1949)	16
<i>School District No. 19, etc. v. Sheridan Community High School</i> , 130 Kan. 421, 286 P. 230 (1930)	16
K.S.A. 65-2871	17
<i>Zarda v. State</i> , 250 Kan. 364, 826 P.2d 1365 (1992)	17, 18
<i>Witschner v. City of Atchison</i> , 154 Kan. 212, 117 P.2d 570 (1941)	20, 21
C. Under the heightened, federal standing test, a prosecution threat gives rise to standing where circumstances render the threatened enforcement sufficiently imminent. Here, Appellees made statements showing likely and imminent enforcement, and refused to disclaim enforcement. Even under the heightened, federal standard, POM alleged an imminent prosecution threat and has standing	21
<i>Baker v. USD 229 Blue Valley</i> , 979 F.3d 866 (10th Cir. 2020)	21
i. <i>League of Women Voters of Kansas</i> should not be affirmed by this Court or applied to this case.	21
<i>League of Women Voters of Kansas v. Schwab</i> , 62 Kan. App. 2d 310, 513 P.3d 1222 (2022)	21, 22
K.S.A. 25-2438	22
ii. POM satisfied the federal standing “imminent threat of prosecution” test	22

<i>Susan B. Anthony List v. Driehaus</i> , 573 U.S. 149 (2014)	23
<i>New Hampshire Hemp Council, Inc. v. Marshall</i> , 203 F.3d 1 (1st Cir. 2000).....	23
18 U.S.C. § 1084	23
<i>New Hampshire Lottery Comm’n v. Rosen</i> , 986 F.3d 38 (1st Cir. 2021).....	23, 24
<i>Int’l Game Tech. PLC v. Garland</i> , No. CV 21-463 WES, 2022 WL 4245579 (D.R.I. Sept. 15, 2022).....	24
<i>Aptive Environmental, LLC v. Town of Castle Rock, Colorado</i> , 959 F.3d 961 (10th Cir. 2020)	25
<i>Blum v. Holder</i> , 744 F.3d 790 (1st Cir. 2014).....	25
<i>Seals v. McBee</i> , 898 F.3d 587 (5th Cir. 2018).....	26
<i>Green Party of Tennessee v. Hargett</i> , 791 F.3d 684 (6th Cir. 2015)	26
iii. If a motion to dismiss based on standing is decided without evidentiary hearing, the plaintiff need only make a prima facie showing, and all factual disputes are resolved against the defendant. Here, the Douglas County Court ignored POM’s prima facie showing of a credible threat of prosecution by resolving factual disputes in Appellees’ favor.....	26
<i>Aeroflex Wichita, Inc. v. Filardo</i> , 294 Kan. 258, 275 P.3d 869 (2012).	26, 27, 29
<i>Labette Cnty. Med. Ctr. v. Kansas Dep’t of Health & Env’t</i> , 399 P.3d 292, 2017 WL 3203383 (Kan. Ct. App. 2017).....	27, 28, 29
<i>Parisi v. Unified Gov’t of Wyandotte Cnty.</i> , 429 P.3d 627, 2018 WL 5728439 (Kan. Ct. App. 2018)	29, 30
<i>Pringle v. United States</i> , 208 F.3d 1220 (10th Cir. 2000).....	29, 30

D. A court order’s unambiguous language must be carried out as written by its plain wording. The Douglas County Court’s April 30, 2021 Order did not dismiss POM’s Count 6, seeking a declaration that Dragon’s Ascent is a legally-compliant, skill-

based game. The Shawnee County Court’s determination that this count was previously dismissed was in error	32
<i>Einsel v. Einsel</i> , 304 Kan. 567, 374 P.3d 612 (2016).....	32
<i>Matter of Marriage of Gerleman</i> , 56 Kan.App.2d 578, 435 P.3d 552 (2018)	32
E. Courts have a duty to question subject matter jurisdiction on their own, and to decline jurisdiction where it does not exist. In <i>Three Kings v. Six</i> , the Kansas Court of Appeals determined it has subject matter jurisdiction to entertain disputes over gaming legality. The District Court erred in dismissing POM’s claims.....	34
<i>Bartlett Grain Co., L.P. v. Kansas Corp. Com’n</i> , 292 Kan. 723, 256 P.3d 867 (2011).....	34
<i>Three Kings Holdings, L.L.C. v. Six</i> , 45 Kan. App. 2d 1043, 255 P.3d 1218 (2011).....	34, 35, 36
K.S.A. 21-4302	34, 35
<i>Witschner v. City of Atchison</i> , 154 Kan. 212, 117 P.2d 570 (1941).....	35
<i>Dissmeyer v. State</i> , 292 Kan. 37, 249 P.3d 444 (2011).....	35, 36
<i>State v. Delacruz</i> , 307 Kan. 523, 411 P.3d 1207 (2018)	36
<i>Arbaugh v. Y&H Corp.</i> , 546 U.S. 500 (2006)	36
II. Kansas statutes are unconstitutionally vague where they forbid the doing of an act, in terms “so vague that persons of common intelligence” have to guess at its meaning and differ as to its application. K.S.A. 21-6403 is unconstitutionally vague because its “chance” and “gambling device” definitions cause game operators, like POM, to guess at what percentage of a game’s chance versus skill components make a particular game’s result determined by “chance”	36
A. Standard of review and preservation	36
<i>State v. McLinn</i> , 307 Kan. 307, 409 P.3d 1 (2018)	37

B.	The District Court’s error	37
	<i>State v. McLinn</i> , 307 Kan. 307, 409 P.3d 1 (2018)	37
	<i>City of Wichita v. Wallace</i> , 246 Kan. 253, 788 P.2d 270 (1990)	37, 38
	<i>State v. Adams</i> , 254 Kan. 436, 866 P.2d 1017 (1994).....	37, 38
	<i>State v. Dunn</i> , 233 Kan. 411, 662 P.2d 1286 (1983).....	37, 38
	<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)	37
	K.S.A. 21-3901	38
	<i>State v. Bryan</i> , 259 Kan. 143, 910 P.2d 212 (1996).....	38
	K.S.A. 21-6403	39, 40, 41
	<i>State v. Lee</i> , 45 Kan. App. 2d 1001, 257 P.3d 799 (2011)	40, 41
	Merriam–Webster’s Deluxe Dictionary 1440 (10th Collegiate Edition 1998)	41
	<i>Three Kings Holdings, LLC v. Six</i> , 45 Kan. App. 2d 104, 255 P.3d 1218 (2011)	41
III.	A claim is moot where a judgment would be ineffectual for any purpose, and would not impact the party’s rights. Here, judgment in POM’s favor would be effectual and would impact POM’s rights, including determining issues in the Wyandotte County Action. As such, POM’s Count 1 is not moot	41
A.	Standard of review and preservation	42
	<i>State v. Roat</i> , 311 Kan. 581, 466 P.3d 439 (2020)	42
B.	The Shawnee County District Court erred in dismissing Count 1	42
	K.S.A. 74-8701	42, 46
	K.S.A. 74-8702	42, 43
	<i>Dissmeyer v. State</i> , 292 Kan. 37, 249 P.3d 444 (2011)	43, 45

State v. Roat, 311 Kan. 581, 466 P.3d 439 (2020) 45

State v. Tracy, 311 Kan. 605, 608, 466 P.3d 434 (2020) 45, 46

CONCLUSION 46

CERTIFICATE OF SERVICE 48

STATEMENT OF THE NATURE OF THE CASE

When confronted with sufficient uncertainty over state and local agencies reserving the right to enforce laws and ordinances against business activities, impacted businesses are entitled to seek declaratory relief in the face of administrative ambiguity.

A machine or electronic device is considered an illegal “gambling device” if it delivers “as the result of chance, any money or property. . . .” K.S.A. 21-6403(e)(2). A game is “the result of chance” if chance is the predominant factor over any skill elements.

POM of Kansas, LLC (“POM”) owns, develops, and distributes a legally-compliant, skill-based amusement game called “Dragon’s Ascent”, that awards prizes in the form of credit that can be redeemed for cash. Dragon’s Ascent contains no chance elements.

POM spent many months communicating with Kansas law enforcement officials trying to have Dragon’s Ascent reviewed and approved for use in Kansas. This included communications and demonstrations of the game to the Kansas Attorney General (“AG”), the Kansas Racing and Gaming Commission (“KRGC”), the Kansas Department of Revenue, Division of Alcohol Beverage Control (“KABC”), the Kansas Sheriff’s Association, District Attorneys, and Chiefs of Police.

Ultimately, POM discovered there is no formal process in Kansas to have games reviewed to determine if they are chance-based (and illegal) or skill-based (and legal) under Kansas law. And, no enforcement official would approve the game’s use in Kansas, or disclaim prosecution against POM and third-parties. Despite this, the KRGC sent a letter to the Kansas Sheriff’s Association and others, stating that “[s]everal KRGC staff members played the game over multiple sessions, and those staff members (all non-law enforcement

and non-electronic gaming experts) believed that the game involved some skill, but contained too many non-skill features to allow mastery of the game.”

POM moved forward with introducing Dragon’s Ascent to Kansas bars. However, some bar owners refused to place Dragon’s Ascent in their businesses because they feared prosecution. POM similarly feared it would be prosecuted for distributing the game.

POM filed a *Petition for Declaratory Judgment* and subsequently a *Second Amended Petition for Declaratory Judgment* (“Second Amended Petition”). POM’s Second Amended Petition included various declaratory judgment claims against the Kansas enforcement parties, including the KRGC and the AG. POM’s Count 6 seeks a declaration that Dragon’s Ascent is predominantly skill-based and thus legal under Kansas law.

The defendants moved to dismiss POM’s Second Amended Petition, arguing POM lacked standing, because POM could not prove a credible prosecution threat. POM’s claims were dismissed, and judgment entered in favor of the AG.

In reaching its conclusion, the District Court rejected the long-standing Kansas precedent using declaratory judgment actions to determine a party’s rights before those parties expend substantial additional resources. And, the District Court required POM to prove an “imminent threat of prosecution,” even though the Kansas Supreme Court has not adopted this standard.¹ Finally, the District Court ignored the credible prosecution threats

¹ *Witschner v. City of Atchison*, relied on by the AG and cited by the Douglas County Court, discusses prosecution, but does not articulate an “imminent threat of prosecution” standard. 154 Kan. 212, 117 P.2d 570 (1941). *Witschner* is also factually distinguishable, because the plaintiff in that case had not actually placed any games in Kansas. *See infra* Section I.B.

against POM and third-parties, including the KRGC's letter, and the AG's refusal to disclaim prosecution.

The District Court left POM with an impossible choice — pull Dragon's Ascent from Kansas after expending substantial resources in developing the game, or run the risk of criminal prosecution at any time. Simply put, POM is not required to make that choice.

STATEMENT OF THE ISSUES

1. When facing a motion to dismiss, a party establishes standing when it alleges a cognizable injury suffered and a causal connection between the suffered injury and the challenged conduct. Here, POM alleged cognizable injuries because (1) it operates Dragon's Ascent in Kansas, and (2) POM's Dragon's Ascent operations are curtailed and put at risk because of the KRGC's and AG's actions and inactions. Did the Douglas County District Court err in dismissing POM's Count 6 (seeking a declaration that Dragon's Ascent is a predominantly skill game) due to a perceived lack of standing?

2. A statute is unconstitutionally vague when it forbids the doing of an act, in terms "so vague that persons of common intelligence" have to guess at its meaning and differ as to its application. Here, K.S.A. 21-6403 fails to define what "chance" means and causes game operators, like POM, to guess at what percentage of a game's chance versus skill components make a particular game's result determined by "chance." Did the District Court err in entering judgment in favor of the AG as to Counts 2 and 4?

3. A claim is moot where a judgment would be ineffectual for any purpose, and would not impact any of the parties' rights. Here, judgment for POM on Count 1 (KELA has no application to Dragon's Ascent) would be effectual and would impact POM's rights

including determining issues in a separate action. Did the District Court err in dismissing POM's Count 1 as moot?

FACTUAL STATEMENT OF THE CASE

A. POM owns, develops, manufactures, and distributes a skill-based amusement game for use within Kansas called "Dragon's Ascent."

POM owns, develops, manufactures, and distributes a skill-based amusement game called "Dragon's Ascent." Record on Appeal ("ROA"), Volume ("Vol.") 1 at 196 (¶ 149). Dragon's Ascent possesses no chance elements, and is therefore not an illegal gambling device or an illegal lottery under Kansas law. ROA, Vol. 1 at 199 (¶ 164). The player's objective is to capture dragons flying across the screen in pre-set, repeated, and fixed (not random) sequences, by firing shots via a gun turret. ROA, Vol. 1 at 199 (¶ 165, 166). Capturing dragons results in prizes that can be redeemed for cash. ROA, Vol. 1 at 199 (¶ 167). Accordingly, a patient and skilled player learns the sequence, captures more valuable dragons, and earns larger rewards. ROA, Vol. 1 at 199 (¶ 169). Dragon's Ascent was specifically designed to have "no chance elements." ROA, Vol. 1 at 199 (¶ 170).

B. POM seeks approval from the KRGC to verify Dragon's Ascent is skill-based and not subject to Kansas' gambling laws.

In 2019, POM wanted to introduce Dragon's Ascent to Kansas through bars and other establishments. On March 15, 2019, POM's counsel, Jay Shadwick ("Shadwick") sent an email to KRGC General Counsel, Judy Taylor ("Taylor"), inquiring about Dragon's Ascent approval in Kansas. ROA, Vol. 1 at 168 (¶ 11). On March 20, 2019, Shadwick and Taylor spoke about the KRGC's evaluation and approval to determine illegal gambling

devices and for general advice on navigating how to bring a skill-based game to Kansas. ROA, Vol. 1 at 168 (¶ 12).

C. POM provides Dragon’s Ascent to the KRGC for testing and inspection.

On June 12, 2019, POM met and delivered the Dragon’s Ascent game (at that time known as “Dragon Master”) to the KRGC to allow the KRGC to inspect and play the game. ROA, Vol. 1 at 169 (¶¶ 15-16). At the meeting, POM demonstrated the game, disclosed POM’s business model and practices, and answered KRGC questions. ROA, Vol. 1 at 169 (¶ 17). POM desired the meeting to seek input and discuss concerns about the game’s legality so that POM could address those concerns and comply with Kansas law. ROA, Vol. 1 at 169 (¶ 18).

D. The KRGC continues to play Dragon’s Ascent and agrees to issue a report addressing any concerns with the game.

On June 14, 2019, POM picked up Dragon’s Ascent from the KRGC to update buttons and software. ROA, Vol. 1 at 170 (¶ 21). POM delivered Dragon’s Ascent back to KRGC on or about August 16, 2019, so the KRGC could play and inspect the game. ROA, Vol. 1 at 170 (¶ 22). On August 20, 2019, POM conducted another Dragon’s Ascent demonstration for the KRGC. ROA, Vol. 1 at 170 (¶ 26). On August 20, 2019, Shadwick had a phone conversation with Taylor. Taylor said KRGC would get back to POM in approximately two weeks with a report of any concerns about the game, subject to the availability of Dennis Bachman. ROA, Vol. 1 at 170 (¶ 27). The KRGC apparently played the game so much that POM added a second full “fill” on September 10, 2019, to allow for additional KRGC game play, testing and investigation. ROA, Vol. 1 at 170 (¶ 23).

E. Three weeks later, the KRGC is still “a month away” from providing any comments concerning Dragon’s Ascent.

On September 13, 2019, Shadwick again spoke to Taylor and Taylor said the KRGC could be at least a month away from providing comments. ROA, Vol. 1 at 171 (¶ 30). Shadwick again communicated to Taylor that POM was willing to address any concerns, but absent any KRGC response, POM believes the game is one of skill and not of chance, and planned to move forward in Kansas. ROA, Vol. 1 at 171 (¶ 31).

F. POM suggests a friendly seizure of Dragon’s Ascent to determine its legality.

During the September 13, 2019, conversation, Shadwick and Taylor also discussed the legal process of how a forfeiture/seizure lawsuit works in Kansas and how the KRGC and local law enforcement get involved in such lawsuits. Shadwick asked Taylor if the KRGC was open to a “friendly seizure” action but Taylor was not open to proceeding in that manner. ROA, Vol. 1 at 171 (¶ 32).

G. POM moves forward with introducing Dragon’s Ascent in Kansas due to the KRGC’s inaction.

On October 26, 2019, Shadwick sent Taylor an email advising that POM intended to introduce the Dragon’s Ascent game in Kansas, in part because the KRGC had stopped communicating with POM, and POM had not received a testing update on Dragon’s Ascent. ROA, Vol. 1 at 171 (¶ 34).

H. The KRGC admits they had not even begun evaluating Dragon’s Ascent.

On October 28, 2019, Taylor sent Shadwick an email stating she would “let Dennis [Bachman] know to stop any work on this project.” ROA, Vol. 1 at 172 (¶ 35). Shadwick

responded two minutes later, stating that it “[s]eems appropriate to keep working on [evaluating Dragon’s Ascent] so we at least know KRGC’s position is certain. As we’ve said, if there are any concerns that you have, we want to be able to address them and work with KRGC on a solution. We just can’t keep waiting on KRGC to complete and need to keep moving forward.” ROA, Vol. 1 at 172 (¶ 38).

However, on October 31, 2019, Taylor sent Shadwick an email stating that Dennis Bachman at KRGC had “not yet begun a review of your client’s equipment and cannot project when he will be able to get to the POM review.” ROA, Vol. 1 at 172 (¶ 39).

I. POM demonstrates Dragon’s Ascent at the Kansas Sheriff’s Association convention and to the KABC.

On November 5, 2019, POM representatives attended the Kansas Sheriff’s Association convention. POM demonstrated the game to law enforcement and answered questions about the game. POM also, as a sponsor of the event, made a presentation at the luncheon at the convention hall. ROA, Vol. 1 at 172 (¶ 40).

On November 27, 2019, Shadwick and POM met with the KABC to demonstrate Dragon’s Ascent, including Bart Branyon, the Chief Enforcement Officer and two other KABC agents. ROA, Vol. 1 at 173 (¶ 42).

Shadwick emailed Taylor on November 27, 2019, to inform her of POM’s meeting with the KABC. ROA, Vol. 1 at 173 (¶ 43). On February 13, 2020, Shadwick emailed Taylor to provide the most recent software updates. ROA, Vol. 1 at 173 (¶ 44). On May 7, 2020, Shadwick again emailed Taylor providing more software updates. ROA, Vol. 1 at 173 (¶ 45).

On June 25, 2020, Shadwick e-mailed KRGC Chairman (and Franklin County District Attorney) Brandon Jones to request a meeting to introduce himself and “explain POM’s business model and future plans in the State.” ROA, Vol. 1 at 173 (¶ 46).

On June 26, 2020, POM’s Director of Compliance, Bob Plant, and Shadwick met with KRGC Chairman, Brandon Jones, to discuss the Dragon’s Ascent game, POM’s business model, POM’s past interactions with KRGC, and to ask Jones if he had any questions or concerns about the game. ROA, Vol. 1 at 173 (¶ 47).

J. POM sends a letter to various enforcement parties explaining Dragon’s Ascent is skill-based.

On July 14, 2020, Shadwick sent a letter to Kansas district attorneys, sheriffs, and police chiefs, to introduce POM and explain that Dragon’s Ascent could soon enter their jurisdictions. ROA, Vol. 1 at 174 (¶ 54).

The intent and desire of POM’s and Shadwick’s July 14, 2020 letter, was: (a) to explain to local law enforcement that Dragon’s Ascent was a skill-based game and not an illegal gambling device; (b) to explain POM’s historical and factual dealings with KRGC; and (c) to make themselves available to answer any questions in hope of avoiding a wrongful seizure of the game. ROA, Vol. 1 at 173 (¶ 45).

K. Reno County enforcement officials respond that they “will welcome use of” Dragon’s Ascent if the KRGC determines it is not an illegal gaming device.

On July 22, 2020, law enforcement officials in Reno County, including the Reno County District Attorney, Reno County Sheriff, and Chief of Police of the City of Hutchison notified POM’s counsel that they “will welcome the use of the game in Reno

County if and when the KRGC makes a determination that this is not a gaming device.”
ROA, Vol. 1 at 201 (¶ 183).

L. The KRGC sends a letter to law enforcement officials stating Dragon’s Ascent contains “too many non-skill features to allow mastery of the game.”

On August 10, 2020, Don Brownlee, the KRGC’s Executive Director, sent a letter to the Kansas Sheriff’s Association and others, declining to issue a formal opinion of the game, but stating:

- “Several KRGC staff members played the game over multiple sessions, and those staff members (all non-law enforcement and non-electronic gaming experts) believed that the game involved some skill, but contained too many non-skill features to allow mastery of the game.”
- “One law enforcement agent joined a game and placed a heavy can on the joy stick, which allowed continuous firing, and beat all of the staff members attempting to win with skill.”
- “As with all suspected illegal gambling devices, probable cause must be found before a suspected gambling machine is seized. This requires the officer to play the game, watching for signs that the prize is awarded predominantly as a result of chance. If any of your officers have questions or request guidance upon seeing the machine in their jurisdiction, they may contact Enforcement Agent Jim Root for assistance at (785) 217-4013 or by email at jim.root@krgc.ks.gov.”

ROA, Vol. 1 at 175 (¶ 59).

M. KABC agents have informed bars not to allow Dragon's Ascent in their establishments unless the KRGC deems the game legal.

POM believes that certain KABC agents have informed certain local bars and drinking establishments not to allow customers to play Dragon's Ascent, unless KRGC deems Dragon's Ascent not to be an illegal gaming device. ROA, Vol. 1 at 201 (¶ 184).

N. Kansas bars fear prosecution for placing Dragon's Ascent in their businesses.

Kansas bars and drinking establishments have refused to place Dragon's Ascent in their place of business for fear of being criminally prosecuted. ROA, Vol. 1 at 201 (¶ 185). POM has thus lost revenue as a direct result of the inaction of the KRGC and the AG.

O. An Assistant Attorney General suggests POM file a declaratory judgment action.

On August 11, 2020, Shadwick, along with other POM representatives, met with former AG Derek Schmidt and members of his staff, to discuss a solution to getting Dragon's Ascent deemed a legal game in the State of Kansas. ROA, Vol. 1 at 176 (¶ 63). During the meeting, one of the Assistant Attorney Generals attending the meeting inquired if POM had considered filing a declaratory judgment action. ROA, Vol. 1 at 176 (¶ 64).

Unable to obtain Kansas agency approval, on September 4, 2020, POM filed its *Petition for Declaratory Judgment* in the District Court of Douglas County, Kansas. ROA, Vol. 1 at 24.

P. Kansas casinos move to intervene, alleging Dragon's Ascent is illegal under Kansas law, and sue POM in Wyandotte County alleging Dragon's Ascent is illegal and tortiously interferes with their casino contracts.

BHCMC, LLC (“Boot Hill”), Boyd Gaming Corporation (“Boyd Gaming”), Kansas Entertainment, LLC (“Kansas Entertainment”) (collectively the “Casinos”) moved to intervene, arguing “Dragon’s Ascent is an illegal lottery game and gambling device prohibited by” Kansas law which constitutes “unlawful competition” with their casinos. ROA, Vol. 1 at 60, 94.

On October 29, 2020, the Casinos filed a *Petition for Damages* in the District Court of Wyandotte County, Kansas, Case No. 2020-CV-633 (the “Wyandotte County Action”), alleging that Dragon’s Ascent is an “illegal lottery and gambling device” prohibited by Kansas law. ROA, Vol. 1 at 343-357. The Casinos also alleged POM’s distribution of Dragon’s Ascent was “in contravention of KELA and other applicable law.” ROA, Vol. 1 at 387. The Casinos brought claims against POM for: (1) tortious interference with contracts and business expectancies (based on their casino contracts); and (2) unfair business practices. ROA, Vol. 1 at 387-388.

In the Wyandotte County Action, the Casinos’ pleadings and discovery responses allege that Dragon’s Ascent is illegal pursuant to KELA. ROA, Vol. 2 at 5, 32, 38, 50-51.

Q. POM files its Second Amended Petition and dismisses its claims against certain parties.

On December 7, 2020, POM filed its Second Amended Petition against the AG, the KRGC, the KABC, the Douglas County District Attorney (“DA Branson”), the Douglas County Sheriff, and the City of Lawrence Chief of Police. ROA, Vol. at 1 166-205. POM’s claims now only include six (6) declaratory judgment counts requesting declarations that: (1) KELA has no application to Dragon’s Ascent; (2) Kansas’ “gambling device” definition

is vague and violates POM's due process rights; (3) Kansas' "gambling device" definition is overly broad and violates POM's due process rights; (4) Kansas' "chance" definition is vague and violates POM's due process rights; (5) Kansas' "chance" definition means a game has zero "skill" elements; and (6) Dragon's Ascent is predominantly skill-based.

POM dismissed the KABC, the Douglas County Sheriff, and the City of Lawrence Chief of Police. ROA, Vol. 1 at 84-88; ROA, Vol. 1 at 89-93; ROA, Vol. 4 at 344-345.

R. The KRGC and DA Branson move to dismiss POM's Second Amended Petition.

On December 28, 2020, DA Branson and the KRGC filed a *Second Motion to Dismiss Defendants Branson & Kansas Racing and Gaming Commission*, arguing that POM's Second Amended Petition "is not justiciable" because the defendants "have not threatened to prosecute anyone concerning Dragon's Ascent." ROA, Vol. 4 at 282. POM opposed the motion to dismiss. ROA, Vol. 5 at 1. POM also requested additional time to respond to conduct jurisdictional discovery. ROA, Vol. 5 at 109.

S. The Douglas County District Court dismisses some claims and transfers the case to Shawnee County.

On April 30, 2021, the Douglas County Court dismissed DA Branson and the KRGC, finding there was no "case or controversy" with those parties because "[n]o one in Douglas County or in the Attorney General office has threatened to charge POM with violating the statute" and the "KRGC has not completed an investigation or formed an opinion as to the legality of Dragon's Ascent." ROA, Vol. 1 at 220. However, the Douglas County Court did not dismiss the AG as to any of POM's claims. ROA, Vola. 1 at 221. The Douglas County Court also granted the Casinos leave to intervene, in a limited

capacity, “as to the . . . constitutionality of [K.S.A. 21-6403].” ROA, Vol. 1 at 222. The case was transferred to Shawnee County. ROA, Vol. 1 at 10-17.

T. POM’s claims are dismissed even though the Shawnee County District Court acknowledges the imminent threat of prosecution against POM.

After the case was transferred to Shawnee County, the AG filed a motion to dismiss and motion for judgment on the pleadings concerning POM’s Second Amended Petition. ROA, Vol. 1 at 265-295. POM opposed the AG’s motion. ROA, Vol. 1 at 296-360.

The Shawnee County Court held a hearing on September 28, 2022. At the hearing, the AG’s counsel would not disclaim prosecution as to Dragon’s Ascent, and the Shawnee County Court recognized that POM would run the risk of prosecution if there was no resolution in this case. ROA, Vol. 3 at 13:8-14:5, 14:8-10, 15:12-15.

On November 18, 2022, the Shawnee County Court issued its *Memorandum Decision and Order* dismissing POM’s claims.

The Shawnee County Court held that: (1) POM’s Count 1 for a declaration that KELA does not apply to Dragon’s Ascent is moot; (2) POM’s Count 6 seeking declaratory relief that Dragon’s Ascent is “predominantly skill-based” was already dismissed by the Douglas County Court, even though POM argued the Douglas County Court’s Order was ambiguous as to Count 6; (3) POM’s remaining claims are subject to dismissal or should be decided in favor of the AG; and (4) the “predominant/predominate factor test” determines whether a game is a chance-based under Kansas law. ROA, Vol. 2 at 73-86. POM timely appealed. ROA, Vol. 2 at 87-88.

ARGUMENTS AND AUTHORITIES

I. When facing a motion to dismiss, a party establishes standing when it alleges a cognizable injury suffered and a causal connection between the suffered injury and the challenged conduct. Here, POM alleges that it currently operates Dragon’s Ascent in Kansas, and that its Dragon’s Ascent operations are curtailed and put at risk because of the KRGC’s and AG’s actions and inactions. As such, the Douglas County District Court erred in dismissing POM’s Count 6 seeking a declaration that Dragon’s Ascent is predominantly skill-based.

A. Standard of review and preservation.

This Court reviews de novo a district court’s dismissal on jurisdictional grounds if the district court relied solely upon the parties’ pleadings and affidavits. *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 270, 275 P.3d 869, 879 (2012) (citing 5B Wright & Miller, Federal Practice and Procedure: Civil § 1351 (3d ed. 2004), p. 314). “[A] district court’s dismissal on jurisdictional grounds is reviewed de novo by the court of appeals for errors of law and with regard to the facts if the district court relied solely upon the pleadings and affidavits.” 5B Wright, § 1351, p. 314. Moreover, “[w]hen a district court grants a motion to dismiss based on a lack of standing, the appellate court accepts the facts alleged in the petition as true, and if those facts demonstrate that the appellants have standing to sue, the decision of the district court must be reversed.” *Kansas Building Industry Workers Compensation Fund v. State*, 302 Kan. 656, 676, 359 P.3d 33 (2015).

Here, the KRGC and DA Branson moved to dismiss POM’s Count 6, arguing POM lacked standing. ROA, Vol. 4 at 272-342. The Douglas County Court, reviewing only the pleadings and affidavits submitted, dismissed POM’s Count 6, holding that POM does not

have standing to pursue a declaratory judgment claim that Dragon's Ascent is a predominantly skill game. ROA, Vol. 1 at 214-222.

- B. Kansas plaintiffs demonstrate standing when (1) they suffer a cognizable injury and (2) there is a causal connection between the injury and the challenged conduct. POM operates Dragon's Ascent in Kansas, and POM's operation of Dragon's Ascent in Kansas is curtailed by the actions and inaction of Kansas agencies, thus giving POM standing to seek declaratory relief.**

Kansas' standing requirement "is grounded in the separation of powers doctrine which is implicit in [the Kansas] Constitution." *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 679-80 (citing *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366, 366 (2008)). "Under the traditional [Kansas standing] test . . . a person must demonstrate that [1] he or she suffered a cognizable injury and [2] that there is a causal connection between the injury and the challenged conduct." *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 679-80 (quotations omitted). The Kansas Supreme Court has repeatedly utilized this standing test. *Id.* (citations omitted).

"The Kansas Constitution grants 'judicial power' exclusively to the courts." *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 680 (citing Kan. Const. art. 3, § 1). "And Kansas courts have repeatedly recognized that 'judicial power' is the 'power to hear, consider and determine controversies between rival litigants.'" *Id.* (citing *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 337, 955 P.2d 1136 (1998)). "Given the differences in the genesis of the two systems," Kansas courts are not compelled "to abandon [the] traditional two-part analysis as the definitive test for standing in [Kansas] courts." *Id.*

“It has long been settled courts also have jurisdiction, under the Declaratory Judgment Act, to determine the validity of statutes or ordinances before a party undertakes to act in apparent violation thereof.” *State Ass’n of Chiropractors v. Anderson*, 186 Kan. 130, 135, 348 P.2d 1042, 1047 (1960). “That is the purpose and intent of the remedial relief contemplated by the act.” *Id.* (collecting cases). The Kansas Declaratory Judgment Act “is remedial in nature and its purpose is to settle and provide relief from uncertainty and insecurity with respect to disputed rights, status and other legal relations and should be liberally construed and administered to achieve that purpose.” K.S.A. 60-1713.

K.S.A. 60-1701 (declaratory judgments) “specifically includes controversies involving the validity or interpretation of a statute, [and] a district court is under a duty to proceed with the cause if the petition sets forth facts showing an actual controversy.” *Cady v. Cady*, 224 Kan. 339, 345, 581 P.2d 358, 363 (1978). Indeed, there is a long history of Kansas courts relying on the Kansas Declaratory Judgment Act to determine unsettled interpretations of Kansas laws and regulations, with no mention of an “imminent” threat of criminal or regulatory prosecution. *See, e.g., Morgan v. City of Wichita*, 32 Kan. App. 2d 147, 156, 80 P.3d 407, 413 (2003); *Robinson v. Kansas State High School Activities Association*, 260 Kan. 136, 139-40, 917 P.2d 836, 840-41 (1996); *Acupuncture Soc. of Kansas v. Kansas State Bd. of Healing Arts*, 226 Kan. 639, 646, 602 P.2d 1311, 1316 (1979); *Phillips v. Vieux*, 210 Kan. 612, 614, 504 P.2d 196, 199 (1972); *State, ex rel., v. Shanahan*, 178 Kan. 400, 286 P.2d 742 (Kan. 1955); *Hyde Park Dairies v. City of Newton*, 167 Kan. 730, 208 P.2d 221 (Kan. 1949); *School District No. 19, etc. v. Sheridan Community High School*, 130 Kan. 421, 286 P. 230 (1930).

In *Cady*, the court held that plaintiff's declaratory judgment claim met the "actual controversy" requirement because it required construction of a statute determining taxpayer liability for both federal and state income taxes. 224 Kan. at 345. In *Acupuncture Soc. of Kansas*, the court similarly held that medical practitioners were entitled to a declaratory judgment to determine whether acupuncture qualified as "surgery" under K.S.A. 65-2871, **before they were potentially subjected to criminal prosecution.** 226 Kan. at 647.

Phillips v. Vieux similarly involved the court's determination that a "justiciable controversy" existed where plaintiff sought clarity on a law's meaning (a zoning ordinance) before spending money to build a supermarket. 210 Kan. at 613-14. Finding that a justiciable controversy existed, the *Phillips* court affirmed that the Declaratory Judgment Act "provides a means of determining rights and liabilities before parties are required to **expend substantial sums of money in proceeding to act under questionable circumstances.**" *Id.* at 614.

The Court of Appeals applied the same standard in *Morgan v. City of Wichita*. 32 Kan. App. 2d 147. In that case, Morgan filed a declaratory judgment action seeking judicial determination that he had a vested right to operate his bar as a nonconforming use. *Id.* at 149. The *Morgan* court affirmed denying the motion to dismiss on jurisdictional grounds, holding that Morgan had the right to bring a declaratory judgment action to determine his legal rights, even **before he applied for a conditional use permit that would have essentially conceded that he was operating illegally.** *Id.* at 156. The court went on to cite *Zarda v. State*, for the proposition that:

Where there are no issues raised which lend themselves to administrative determination and the only issues present either require judicial determination or are subject to judicial de novo review, it follows that plaintiffs should be permitted to seek court relief without first presenting the case to the administrative agency.

Morgan, 32 Kan. App. 2d at 156 (citing 250 Kan. 364, 368-69, 826 P.2d 1365 (1992)).

In *Robinson v. KSHSAA, Inc.*, the court similarly held that parents of high school students had standing to sue for declaratory judgment concerning their children’s scholastic athletics eligibility because the children also participated in non-school-sponsored basketball teams or camps. 260 Kan. 136. There, the court found the parents had standing **even though their sons had not yet engaged in the questioned activities and KSHSAA had not yet ruled them ineligible.** *Id.* at 139-40. A justiciable controversy existed because the potential loss of eligibility had curtailed the student-athletes’ participation in non-school activities. *Id.* at 140.

The following table illustrates how Kansas Courts have found standing, applying the two-part test, in the above-referenced cases:

Case	Cognizable injury suffered	Causal connection between injury and challenged conduct
<i>Cady v. Cady</i> , 224 Kan. 339, 581 P.2d 358, 359 (1978)	Husband subject to divorce decree faced potential federal and state tax liability if stock transfer to former wife constituted taxable transfer.	Husband’s potential tax liability caused by dispute with former wife over the nature of stock transfer and interpretation of state law concerning division of marital property.
<i>Acupuncture Soc. of Kansas v. Kansas State Bd. of Healing Arts</i> , 226 Kan. 639, 602 P.2d 1311, 1315 (1979)	Kansas chiropractors conducting acupuncture procedures faced potential criminal prosecution if	Kansas Board of Healing Arts and Kansas legislature failed to define whether acupuncture constituted

	their practices constituted “surgery” under Kansas law.	surgery, thus exposing chiropractor plaintiffs to potential criminal prosecution.
<i>Phillips v. Vieux</i> , 210 Kan. 612, 504 P.2d 196, 198 (1972)	Landowner faced possible loss of highest and best use of real property for commercial development.	Surrounding landowners’ proposed injunction to stop landowner’s commercial use of property required court’s interpretation of zoning ordinance before landowner invested “substantial sums.”
<i>Morgan v. City of Wichita</i> , 32 Kan. App. 2d 147, 80 P.3d 407, 413 (2003)	Bar owner faced loss of his ability to operate drinking establishment at subject location under non-conforming use designation.	City of Wichita’s refusal to grant city liquor license would prevent bar owner’s operation of drinking establishment.
<i>Robinson v. Kansas State High Sch. Activities Ass’n, Inc.</i> , 260 Kan. 136, 917 P.2d 836, 841 (1996)	Kansas youth and scholastic basketball players prohibited from attending certain clinics and camps because of KSHAA rule.	Curtailment of basketball players’ participation in certain camps and clinics direct result of KSHAA rule prohibiting such conduct.

Simply stated, the KRGC’s and AG’s actions and inactions curtailed POM’s ability to place Dragon’s Ascent in Kansas establishments. As in *Robinson*, an actual controversy exists in light of (1) the KRGC’s letter to law enforcement; and (2) business owners’ separate statements of concern about operating the game because of alleged illegality. Moreover, as in *Vieux* and *Morgan*, POM is entitled to a determination of its right to operate Dragon’s Ascent in Kansas before expending additional resources. Just like the *Morgan* plaintiff, POM is not required to wait for the KRGC or any other agency, particularly given

that the KRGC admits that it has no grant of authority to determine that Dragon's Ascent is *not* a gambling device. POM's entitlement to a judicial determination of its rights, in light of Defendants' statements, suggestions, and inaction, creates a justiciable controversy.

The KRGC and DA Branson merely summarized these cases and attempted to distinguish them by claiming "the non-gambling cases cited by the plaintiffs have a claim of an existing cognizable injury or an actual threat of prosecution." ROA, Vol. 4 at 294-96. But none of POM's relied-upon authorities required the federal test of "imminent threat of criminal prosecution." ROA, Vol. 4 at 279 (citing *Baker*).

Moreover, the only **Kansas** authority relied on by the KRGC and DA Branson (and ultimately the District Court) is *Witschner v. City of Atchison*, 154 Kan. 212, 117 P.2d 570 (1941). In *Witschner*, the plaintiff **wanted** to operate pinball machines in the City of Atchison, **but had not yet done so**. 117 P.2d at 571. The plaintiff only alleged a "desire" to install the machines, and that a criminal action "**might**" be instituted if plaintiff actually installed the machines. *Id.* Moreover, plaintiff's evidence was "entirely silent upon the subject of criminal prosecutions or confiscations." *Id.* at 572. But *Witschner* did not hold that the only way to establish an injury in fact is alleging an "imminent threat of criminal prosecution." Indeed, had it done so, the *Acupuncture Society of Kansas* court (and the other cases POM cited) would certainly have stated as much.

And clearly, POM is nothing like the *Witschner* plaintiff because: (1) POM currently distributes Dragon's Ascent in Kansas (ROA, Vol. 1 at 196); and (2) POM alleged the inaction of KRGC and AG has caused local bars and drinking establishments to curtail

POM's operation of Dragon's Ascent in their businesses for fear of being criminally prosecuted (ROA, Vol. 1 at 201, ¶ 185). Simply put, *Witschner* is not applicable. POM is entitled to a judicial determination of its rights.

- C. Under the heightened, federal standing test, a prosecution threat gives rise to standing where circumstances render the threatened enforcement sufficiently imminent. Here, Appellees made statements showing likely and imminent enforcement, and refused to disclaim enforcement. Even under the heightened, federal standard, POM alleged an imminent prosecution threat and has standing.**

The Douglas County Court applied the more stringent federal standing test, citing *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 872 (10th Cir. 2020). ROA, Vol. 1 at 219-20. As explained herein, the Douglas County Court erred by applying the federal standing test, finding that “[n]o one in Douglas County or in the Attorney General office has threatened to charge POM with violating a statute.” (ROA, Vol. 1 at 220, ¶ 41). But even if this Court applies the heightened test, reversal is still warranted, because POM meets that standard.

- i. *League of Women Voters of Kansas* should not be affirmed by this Court or applied to this case.**

Although decided after the Douglas County Court's April 30, 2021 Order, the AG will likely rely on *League of Women Voters of Kansas v. Schwab*, 62 Kan. App. 2d 310, 513 P.3d 1222 (2022), *review granted*, No. 124,378, 2022 WL 17098569 (Kan. Aug. 26, 2022). In *League of Women Voters*, nonprofit organizations which performed voter outreach activities brought an action challenging a statute making it a felony to “knowingly” misrepresent oneself as an election official. The groups consistently denied “knowingly” misrepresenting themselves as election officials, but feared prosecution

because “on occasion an attendee at their events has mistaken one of their volunteers for a county election official.” *Id.* at 313. The Kansas Court of Appeals held plaintiffs lacked standing because they failed to prove “circumstances that render the threatened enforcement sufficiently imminent.” *Id.* at 337.

But *League of Women Voters* was wrongly decided, and is both legally and factually distinguishable. Like the Douglas County Court here, the *League of Women Voters* court incorrectly applied the federal standing test instead of Kansas’ standing test. *Id.* at 317, 333 (Hill, J., dissenting). Moreover, the *League of Women Voters* court relied on federal precedent in requiring an imminent threat of prosecution. *Id.* at 316-19.

And, *League of Women Voters* ultimately hinged on whether the conduct at issue amounted to “knowingly” misrepresenting oneself as an election official. The court determined there was no credible threat of prosecution because the groups were not “knowingly” misrepresenting themselves as election officials. In other words, “appellants do not, nor have they ever, engaged in the conduct prohibited by K.S.A. 2021 Supp. 25-2438. Thus, their concern fails to rise above a mere subjective fear, and such is not sufficient to carry their burden.” *Id.* at 328. Indeed, the AG in that case argued he “does not intend” to prosecute the plaintiffs. *Id.* at 338 (Hill, J., dissenting).

Simply put, *League of Women Voters*, which is currently pending in this Court, was wrongly decided, and is both legally and factually distinguishable.

- ii. **POM satisfied the federal standing “imminent threat of prosecution” test.**

“[T]he threatened enforcement of a law” is sufficient to establish standing, and “[w]hen an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Instead, all that is required are “circumstances that render the threatened enforcement sufficiently imminent.” *Id.* at 159.

“Nevertheless, just how clear the threat of prosecution needs to be turns very much on the facts of the case and on a sliding-scale judgment that is very hard to calibrate.” *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000). Some cases “have seemed to draw a line between a general threat to the world and a specific threat to an individual . . . but in yet other cases the courts are content with any realistic inferences that show a likelihood of prosecution. *Id.* (citations omitted). Indeed, “[t]here may be a trend in favor of such a practical approach.”

To the extent this Court adopts the federal “imminent threat of prosecution” requirement, POM meets that requirement. Two First Circuit cases concerning the Wire Act, 18 U.S.C. § 1084, illustrate POM’s compliance with the more stringent federal “imminent threat of prosecution” standard. In *New Hampshire Lottery Comm’n*, the New Hampshire Lottery Commission and a lottery system operations company brought a declaratory judgment action against the Department of Justice (“DOJ”), arguing the Wire Act did not extend to state-conducted lottery activities, and was instead limited to sports gambling. *New Hampshire Lottery Comm’n v. Rosen*, 986 F.3d 38, 44 (1st Cir. 2021). The plaintiffs served a motion for summary judgment with the complaint. *Id.* at 48. The DOJ

“moved to dismiss the complaint for lack of standing and for failure to state a claim.” *Id.* at 49. The District Court denied the motion, and entered summary judgment for plaintiffs.

On appeal, the First Circuit held “plaintiffs here satisfy the injury-in-fact requirement.” *Id.* at 50. In other words, the DOJ’s conduct in: (1) issuing an opinion letter describing lotteries as illegal, and superseding a previous opinion letter limiting the Wire Act’s application to sports gambling; (2) only providing a limited timeframe forbearing prosecution; and (3) previously prosecuting cases against the same conduct, all made the threat of prosecution credible. *Id.* at 50-52. The court similarly rejected the DOJ’s argument that a later memo clarifying the DOJ “has no position” on legality removes standing. *Id.* at 51-52; *see also Int’l Game Tech. PLC v. Garland*, No. CV 21-463 WES, 2022 WL 4245579 (D.R.I. Sept. 15, 2022).

Here, POM alleged imminent prosecution facts. In POM’s Second Amended Petition and memorandum opposing Appellees’ motion to dismiss, POM alleged:

- “POM’s equipment is under threat of seizure by Defendants.” ROA, Vol. 1 at 168 (¶ 9);
- KRGC and AG are unwilling to authorize Dragon’s Ascent in Kansas. ROA, Vol. 1 at 201 (¶ 181);
- KRGC and AG are unwilling to inform law enforcement that Dragon’s Ascent is legal. ROA, Vol. 1 at 201 (¶ 181);
- KRGC and AG created suspicion about Dragon’s Ascent legality. ROA, Vol. 1 at 201 (¶ 182);

- Reno County law enforcement tell POM’s counsel that they “will welcome the use of the game in Reno County if and when the KRGC makes a determination that this is not a gaming device.” ROA, Vol. 1 at 201 (¶ 183);
- KABC agents instruct bar and drinking establishment operators not to allow customers to play Dragon’s Ascent, unless KRGC deems Dragon’s Ascent legal. ROA, Vol. 1 at 201 (¶ 184);
- Because of law enforcement seizure threats, POM cannot conduct its business throughout Kansas. ROA, Vol. 1 at 201 (¶ 186);
- KRGC sent a letter to law enforcement, reserving the right to find Dragon’s Ascent illegal. (ROA, Vol. 4 at 338-42); ROA, Vol. 4 at 284 (¶ 6); ROA, Vol. 4 at 296 (n. 15); and
- KRGC’s letter to law enforcement questioned whether Dragon’s Ascent is predominantly skill-based and legal. ROA, Vol. 4 at 285 (¶ 8).

Moreover, a failure to disclaim enforcement intentions can amount to a credible prosecution threat. *See Aptive Environmental, LLC v. Town of Castle Rock, Colorado*, 959 F.3d 961, 973-978 (10th Cir. 2020) (finding credible threat of prosecution where town “has not indicated that it would not enforce” the challenged law and “has vigorously sought to uphold” the law in question). “[P]articular weight must be given to the Government disavowal of any intention to prosecute on the basis of the Government’s own interpretation of the statute and its rejection of plaintiffs’ interpretation as unreasonable.” *Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014).

Here, Appellees’ refusal to disavow prosecution should be given great weight. *See Seals v. McBee*, 898 F.3d 587, 590-593 (5th Cir. 2018) (failure to disclaim prosecution of the plaintiff was prominent among the factors relied upon to find standing); *see also Green Party of Tennessee v. Hargett*, 791 F.3d 684, 696 (6th Cir. 2015) (“While defendants have not enforced or threatened to enforce this statute against plaintiffs or any other political party, they also have not explicitly disavowed enforcing it in the future. In such situations, the Supreme Court has held that plaintiffs have standing to challenge statutes.”).

In other words, this case is a problem of Appellees’ own doing. Appellees could simply disclaim enforcement as to Dragon’s Ascent to remove POM’s standing. But Appellees refuse to do so. ROA, Vol. 3 at 14:8-10. Obviously, as succinctly described by the Shawnee County Court, this puts POM in a precarious situation — remove Dragon’s Ascent from Kansas, or “run the risk of . . . getting prosecuted with a crime if there’s no . . . resolution here.” ROA, Vol. 3 at 15:12-15.

For these reasons, a credible threat of prosecution exists such that POM has established standing to proceed with its declaratory judgment claim as to Dragon’s Ascent’s legality.

- iii. If a motion to dismiss based on standing is decided without evidentiary hearing, the plaintiff need only make a prima facie showing, and all factual disputes are resolved against the defendant. Here, the Douglas County Court ignored POM’s prima facie showing of a credible threat of prosecution by resolving factual disputes in Appellees’ favor.**

A district court “may choose from several procedures for handling a motion to dismiss” based on a lack of jurisdiction. *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258,

264, 275 P.3d 869, 876 (2012). “Before trial, the district court may: [1] determine the outcome based on the pleadings; [2] on the basis of affidavits alone; or [3] it may permit discovery in aid of the motion; or [4] it may conduct an evidentiary hearing on the merits of the motion.” *Id.* (quotations omitted). “Additionally, rather than make a pretrial determination, the court may await the trial on the merits with the fact issues being left to the jury for determination.” *Id.* (quotations omitted).

When the motion to dismiss for lack of jurisdiction “is decided before trial on the basis of the pleadings, affidavits, and other written materials and without an evidentiary hearing, any factual disputes must be resolved in the plaintiff’s favor and the plaintiff need only make a prima facie showing of jurisdiction.” *Id.* at 270.

Appellees asked the Douglas County Court to rely on declarations from DA Branson and the KRGC’s General Counsel. ROA, Vol. 4 at 283-286. Appellees also attached a letter from Don Brownlee, the Director of the KRGC, to the President of the Kansas Sheriff’s Association and the President of the Kansas Association of Chiefs of Police. *Id.* The Douglas County Court considered POM’s allegations “in tandem with” the declarations and letters “to see if POM has pleaded facts **or adduced evidence** showing a justiciable case or controversy.” ROA, Vol. 1 at 219 (emphasis added).

In other words, Appellees asked the Douglas County Court to make a jurisdictional determination based on the pleadings and affidavits, without conducting an evidentiary hearing or making the jurisdictional determination at trial. The Douglas County Court was thus required to resolve any factual disputes against Appellees, because POM “need only make a prima facie showing of jurisdiction.” *Aeroflex*, 294 Kan. at 270; *see also Labette*

Cnty. Med. Ctr. v. Kansas Dep't of Health & Env't, 399 P.3d 292, 2017 WL 3203383 at *6 (Kan. Ct. App. 2017) (If the district court does not hold an evidentiary hearing on a motion to dismiss, “the plaintiff only needs to make a prima facie showing of standing.”).

And that’s exactly what POM did. POM, in response, submitted an affidavit from its counsel, Jay Shadwick, and communications between the parties evidencing the imminent threat of prosecution. ROA, Vol. 4 at 209-246.

Appellees’ reliance on Mr. Brownlee’s letter is misplaced. Appellees argued that the letter shows how the KRGC “has not completed an investigation as to whether Dragon’s Ascent is a game [] of chance or skill, or predominately one or the other” and similarly that the KRGC “has no opinion” as to whether it violates criminal statutes. ROA, Vol. 4 at 286. But this simply ignores the portions of the letter that allege Dragon’s Ascent is not predominantly skill-based. For example, the letter states:

- KRGC staff members “believed that the game involved some skill, but contained too many non-skill features to allow mastery of the game”;
- A law enforcement agent “beat all of the staff members attempting to win with skill” by placing a can on the game’s joystick; and
- “As with all suspected illegal gambling devices, probable cause must be found before a suspected gambling machine is seized. This requires the officer to play the game, watching for signs that the prize is awarded predominantly as a result of chance.”

ROA, Vol. 4 at 338-39.

While the KRGC declined to issue a formal ruling on Dragon’s Ascent’s legality, it stated the game “contained too many non-skill features to allow mastery of the game,” and all but invited enforcement officials to make a seizure of any “suspected illegal gambling devices.” *Id.*

POM made a prima facie standing case. The Douglas County Court was required to accept POM’s allegations concerning the imminent threat of prosecution as true, because it did not hold an evidentiary hearing. *See Aeroflex*, 294 Kan. at 278; *see also Labette Cnty.*, 2017 WL 3203383 at *6 (applying *Aeroflex* standard to motion to dismiss based on alleged lack of standing). But even in light of these allegations, the Douglas County Court held that the KRGC “has not completed an investigation or formed an opinion as to the legality of Dragon’s Ascent” and that “any threat of criminal action is speculative or imaginary.” ROA, Vol. 1 at 220. The plain language of the KRGC’s communications rebuts this statement. The Douglas County Court erred in resolving factual disputes against POM.

Moreover, a district court is **required** to hold an evidentiary hearing when the jurisdictional facts are intertwined with the merits of the case. *See Parisi v. Unified Gov’t of Wyandotte Cnty.*, 429 P.3d 627, 2018 WL 5728439, at *8 (Kan. Ct. App. 2018) (“[W]hen a factual question of subject matter jurisdiction is intertwined with the merits of the case, it is not appropriate to make the determination prior to the facts being developed through an evidentiary hearing.”). “[A] factual question of jurisdiction is intertwined with the merits of the case when resolving the jurisdictional question requires resolving a question tied to the substantive claim.” *Id.* (citing *Pringle v. United States*, 208 F.3d 1220, 1223

(10th Cir. 2000)). When the jurisdictional determination is intertwined with a merits decision, the motion is converted to a motion for summary judgment. *Parisi*, 2018 WL 5728439 at *8 (citations omitted).

The *Parisi* court affirmed dismissal of Parisi's claims against Wyandotte County, but reversed dismissal of Parisi's claims against individual county employees. Because there was no statutory pre-filing notice under the Kansas Tort Claims Act, dismissal of claims against Wyandotte County was proper. 2018 WL 5728439 at *6. The *Parisi* court concluded it appropriate to consider an affidavit outside the pleadings, only to prove the jurisdictional issue regarding the required notice. *Id.*

Unlike Parisi's flawed Kansas Tort Claims Act assertions, which never provided the mandatory pre-filing notice, Parisi's claims against individual employees "combin[ed] a question of jurisdiction with a substantial question of the facts of the case," – namely whether police officers were acting outside the scope of their official duties. *Id.* In reversing, the *Parisi* court held that "when a factual question of subject matter jurisdiction is intertwined with the merits of the case, it is not appropriate to make the determination prior to the facts being developed through an evidentiary hearing." *Id.* (citing *Pringle v. United States*, 208 F.3d 1220, 1222-23 (10th Cir. 2000) (subject matter jurisdiction determination should be deferred when question is mixed with merits of the claim)).

Here, the KRGC and DA Branson, citing *Parisi*, asked the court to consider declarations from Judith A. Taylor (KRGC General Counsel) and DA Branson. ROA, Vol. 4 at 278, 333-42. In response, POM requested the Douglas County Court convert their motion to dismiss to a motion for summary judgment, and permit POM the opportunity to

conduct limited discovery, because the question of subject matter jurisdiction was intertwined with the case's merits. ROA, Vol. 5 at 27-33. Indeed, Appellees' determination of whether Dragon's Ascent is a skill-based game is intertwined with both the case's merits and subject matter jurisdiction questions.

The KRGC and DA Branson asked the Court to consider additional facts, requiring the Court to weigh evidence intertwined with merits issues about whether Dragon's Ascent is a skill-based game, including without limitation:

- Controverting POM's allegation that Kansas law enforcement agents have informed bar owners not to place the game in their establishments. *Compare* ROA, Vol. 4 at 283-284 (¶¶ 1-4) *with* ROA, Vol. 1 at 201-02 (¶¶ 183-184);
- Alleging the KRGC began evaluating Dragon's Ascent's legality, but "other pressing agency matters prevented completion of the evaluation," so the KRGC reserved the right to make future determinations about the legality and potential seizure of the game. *Compare* ROA, Vol. 4 at 284 (¶ 6) and ROA, Vol. 4 at 296 (n. 15) *with* ROA, Vol. 1 at 201 (¶¶ 181);
- Alleging the KRGC "determined it was not feasible to give an opinion on" whether Dragon's Ascent's is predominantly skill-based because it can be "easily be changed and downloaded." *Compare* ROA, Vol. 4 at 285 (¶ 8) *with* ROA, Vol. 5 at 8; and
- Denying that third parties have complained to Kansas law enforcement about Dragon's Ascent's legality. *Compare* ROA, Vol. 4 at 283 (¶2); *with* ROA, Vol. 5 at 4-5.

These additional facts are profoundly “intertwined” with resolution of the merits of POM’s claim, and should not have been relied upon by the Douglas County Court.

But the Douglas County Court failed to even address POM’s argument. Instead, it simply considered Appellees’ affidavits, and then impermissibly “resolve[d]” fact disputes against POM. ROA, Vol. 1 at 219.

D. A court order’s unambiguous language must be carried out as written by its plain wording. The Douglas County Court’s April 30, 2021 Order did not dismiss POM’s Count 6, seeking a declaration that Dragon’s Ascent is a legally-compliant, skill-based game. The Shawnee County Court’s determination that this count was previously dismissed was in error.

“[I]n interpreting an order the primary rule is to ascertain the intent of the court.” *Einsel v. Einsel*, 304 Kan. 567, 581, 374 P.3d 612, 620 (2016). “As a general rule, if the language of a written instrument is clear and can be carried out as written, the intent of the maker is made clear and there is no room for rules of construction.” *Id.* (quotations omitted); *see also Matter of Marriage of Gerleman*, 56 Kan.App.2d 578, 589, 435 P.3d 552, 561 (2018) (“The primary rule in interpreting a court order is to ascertain the intent of the court. . . . If . . . the order is ambiguous, this court applies the same rules of construction as for any other written instrument.”).

The AG did not join the KRGC’s and DA Branson’s motion to dismiss. ROA, Vol. 4 at 275. Despite this, after the case was transferred to Shawnee County, the AG then argued that the Douglas County Court “*sua sponte*” dismissed Count 6 as to the AG. ROA, Vol. 2 at 2.

But the Douglas County Court’s Order plainly states that “**[t]he motion to dismiss is denied with respect to the Attorney General.**” ROA, Vol. 1 at 221 (¶ 45) (emphasis added). No additional language qualifies the Court’s Order. Moreover, **the AG did not join in the Douglas County Motion to Dismiss.** ROA, Vol. 4 at 275. Furthermore, despite the AG not moving to dismiss POM’s Second Amended Petition, the Court specifically found that the AG conceded that “POM’s second amended petition . . . raises a justiciable controversy with respect to the Attorney General.” ROA, Vol. 1 at 220 (¶ 40).

In light of the Douglas County Court’s unambiguous findings on this issue, POM argued the AG was still a party in this case with respect to POM’s entire Second Amended Petition, including POM’s Count 6, seeking declaration as to Dragon’s Ascent’s legality. The Shawnee County Court also appeared to be tracking POM’s argument regarding legality. Indeed, when the AG argued “there is no evidence that a credible substantial threat of future prosecution exists,” the Shawnee County Court asked counsel for the AG if “that’s been communicated to [POM], that, you know, we’re not going to prosecute you for marketing this game.” ROA, Vol. 3 at 13:8-14:5.

After the AG clarified its position that “we don’t know whether [it’s] illegal or not,” the Shawnee County Court pointed out that POM “is going to have to run the risk of . . . getting prosecuted with a crime if there’s no . . . resolution here.” ROA, Vol. 3 at 14:8-10, 15:12-15. The Shawnee County Court further stated:

But if there’s a judgment or at least there’s some way to push a decision as to whether or not this game is going to be legal or not, at, at least then they can have that protection.

But until then, they're subject to the risk of getting criminally prosecuted based on a determination that they've tried to at least head off, before, before that happened.

ROA, Vol. 3 at 15:22-16:5. Clearly, the Shawnee County Court believed there was a real threat of prosecution against POM.

However, despite its statements above, the Shawnee County Court concluded in a single sentence with no analysis “the Douglas County Court entered orders dismissing . . . POM’s sixth count, which sought a declaration that Dragon’s Ascent is legal. . . .” ROA, Vol. 2 at 75. In other words, even though the Shawnee County Court believed there was a credible threat of prosecution, it ultimately held the issue was already decided by the Douglas County Court *sua sponte*.

E. Courts have a duty to question subject matter jurisdiction on their own, and to decline jurisdiction where it does not exist. In *Three Kings v. Six*, the Kansas Court of Appeals determined it has subject matter jurisdiction to entertain disputes over gaming legality. The District Court erred in dismissing POM’s claims.

Kansas appellate courts have a duty to question jurisdiction on their own initiative. *Bartlett Grain Co., L.P. v. Kansas Corp. Com’n*, 292 Kan. 723, 726, 256 P.3d 867 (2011). “[I]f a district court lacks jurisdiction to enter an order, [appellate courts] do not acquire jurisdiction over the subject matter on appeal.” *Id.*

In 2011, the Kansas Court of Appeals exercised subject matter jurisdiction over similar legal and factual issues presented here. In *Three Kings v. Six*, the Court of Appeals ruled on whether a card game, Kandu Challenge, was an illegal lottery under K.S.A. 21-4302. 45 Kan.App.2d 1043, 255 P.3d 1218. The owner and licensee of Kandu Challenge sued the AG, the KRGC, the Sedgwick County District Attorney, and the Chief Attorney

for the City of Wichita, seeking a declaratory judgment that Kandu Challenge was not an illegal lottery, and for injunctive relief. *Id.*, 45 Kan.App.2d at 1046. The four defendants sent the licensee a letter ordering it to cease and desist operating Kandu Challenge. *Id.*

The district court rejected plaintiffs' temporary injunction request and held a bench trial on the merits. *Id.* After the district court ruled that Kandu Challenge was an illegal lottery, plaintiffs appealed, and the Court of Appeals reviewed the merits decision. *Id.* The Court of Appeals was obligated to question its jurisdiction. *See Bartlett*, 292 Kan. at 726. The *Three Kings* court never questioned subject matter jurisdiction, necessarily determining that it and the district court possessed such jurisdiction to declare whether Kandu Challenge was an illegal lottery under K.S.A. 21-4302.

The KRGC, AG, and the Sedgwick County District Attorney were all defendants in *Three Kings*, over whom the Kansas Court of Appeals exercised jurisdiction. The AG, and the other state defendants in *Three Kings*, moved to dismiss plaintiffs' claims in that case on similar subject matter jurisdictional grounds. ROA, Vol. 5 at 79-93. And, defendants in that case even relied on the same *Witschner v. City of Atchison* case relied on by the Douglas County Court in this case. ROA, Vol. 5 at 80; ROA, Vol. 1 at 220 (¶ 39). The *Three Kings* trial court denied the state defendants' motion, and the state defendants never raised the subject matter jurisdiction argument on appeal.

In light of this authority, the KRGC and DA Branson argued cases like *Three Kings* and *Dissmeyer v. State*, are “drive-by jurisdictional rulings’ that should be accorded ‘no precedential effect’ on the question whether the court had authority to adjudicate the claim in the suit.” ROA, Vol. 4 at 292 (citing *Dissmeyer v. State*, 292 Kan. 37, 44, 249 P.3d 444,

449 (2011), *State v. Delacruz*, 307 Kan. 523, 532, 411 P.3d 1207 (2018) and *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006)). *Delacruz* and *Arbaugh* are legally and factually distinguishable, and neither case supports the argument that subject matter jurisdiction was improper here, even though the *Three Kings* court exercised subject matter jurisdiction over similar issues and parties.

Delacruz is a criminal case, where the court presumed, without deciding, that the district court *did not* lose its jurisdiction because it submitted a technically deficient journal entry under the criminal contempt statutes. 306 Kan. at 533. The case did not address whether an appellate court's exercise of subject matter jurisdiction, when the issue of subject matter jurisdiction was raised in the trial court, affirms subject matter jurisdiction.

Arbaugh is even more attenuated. Justice Ginsburg merely quoted a Second Circuit Court of Appeals opinion (in dicta), which stated that subject matter jurisdiction holdings are often unclear whether dismissal is granted or denied based on the separate standards for subject matter jurisdiction and failure to state a claim. 546 U.S. at 511.

In light of the Court of Appeals' determination that it had subject matter jurisdiction to adjudicate the game's legality in *Three Kings*, it was improper for the Douglas County Court to dismiss POM's declaratory judgment claim as to legality.

II. Kansas statutes are unconstitutionally vague where they forbid the doing of an act, in terms "so vague that persons of common intelligence" have to guess at its meaning and differ as to its application. K.S.A. 21-6403 is unconstitutionally vague because its "chance" and "gambling device" definitions cause game operators, like POM, to guess at what percentage of a game's chance versus skill components make a particular game's result determined by "chance."

A. Standard of review and preservation.

“Whether a statute is constitutional is a question of law subject to unlimited review.”
State v. McLinn, 307 Kan. 307, 344, 409 P.3d 1, 25 (2018).

Here, the AG moved for judgment on the pleadings for POM’s Count 2 and 4, arguing Kansas’ statutory “gambling device” and “chance” definitions are not vague. ROA, Vol. 1 at 273-75. The Shawnee County Court entered judgment in favor of the AG. ROA, Vol. 2 at 79-82.

B. The District Court’s error.

“A statute is unconstitutionally vague and indefinite ‘unless its language conveys a sufficiently definite warning of the conduct proscribed when measured by common understanding and practice.’” *State v. McLinn*, 307 Kan. at 344-45 (quoting *City of Wichita v. Wallace*, 246 Kan. 253, 258, 788 P.2d 270 (1990)). “‘A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process.’” *State v. Adams*, 254 Kan. 436, 439, 866 P.2d 1017, 1019 (1994) (quoting *State v. Dunn*, 233 Kan. 411, 418, 662 P.2d 1286 (1983)).

Vague laws are prohibited for two reasons: (1) they “may trap the innocent by not providing fair warning;” and (2) they “impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Adams*, 254 Kan. at 439 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, (1972)).

In *Adams*, the Kansas Supreme Court held that the term “official misconduct” in a criminal statute pertaining to law enforcement officers was unconstitutionally vague

because “[m]isconduct is a general term” and “[t]he statute does not specifically enumerate the types of misconduct prohibited.” *Id.* at 441. The statute in question, K.S.A. 21-3901, even defined “official misconduct” in more specific terms within the statutory definitions – but the *Adams* court still held that “[d]ue to the great divergence of opinion held in our society as to what is acceptable or proper behavior, misconduct is in the eye of the beholder.” *Id.* at 444 (citing *State v. Dunn*, 233 Kan. 411, 418, 662 P.2d 1286 (1983)).

In *State v. Bryan*, this Court again found a criminal statute unconstitutionally vague. 259 Kan. 143, 149-51, 910 P.2d 212 (1996). Specifically, the *Bryan* court held the terms “alarms,” “annoys,” and “harasses” rendered a stalking statute unconstitutionally vague, because the statute lacked “any sort of a definition or an objective standard to measure the prohibited conduct.” *Id.* at 151. As in *Adams*, the statute in question provided an additional definition of stalking, to further explain the prohibited conduct. Nevertheless, the court held that the terms were “subject to a wide variety of interpretations, and **unless an objective standard is incorporated into the governing statute, the words are entirely dependent upon the subjective feelings of the victim.**” *Id.* at 149 (emphasis added).

In *Wallace*, a nude-dancing-club operator brought constitutional challenges to a Wichita ordinance regulating exotic dance studios. 246 Kan. at 253, 788 P.2d at 271. The Kansas Supreme Court affirmed the trial court’s ruling that the ordinance was unconstitutionally vague, stating that “the ordinance must specify with detail the conduct that will be prohibited in light of the spontaneous nature of the behavior being addressed [and] [t]he Wichita ordinance failed to do so.” *Id.* at 261.

Here, K.S.A. 21-6403 is similarly vague in how it defines “chance,” and how its “chance” definition renders games “gambling device[s].” The statute provides:

(e)(1) “gambling device” means any:

(A) So-called “slot machine” or any other machine, mechanical device, electronic device or other contrivance an essential part of which is a drum or reel with insignia thereon, and:

(i) Which when operated may deliver, as the result of **chance**, any money or property; or

(ii) by the operation of which a person may become entitled to receive, as the result of **chance**, any money or property;

(B) other machine, mechanical device, electronic device or other contrivance including, but not limited to, roulette wheels and similar devices, which are equipped with or designed to accommodate the addition of a mechanism that enables accumulated credits to be removed, is equipped with or designed to accommodate a mechanism to record the number of credits removed or is otherwise designed, manufactured or altered primarily for use in connection with gambling, and:

(i) Which when operated may deliver, as the result of **chance**, any money or property; or

(ii) by the operation of which a person may become entitled to receive, as the result of **chance**, any money or property;

...

(2) “Gambling device” shall not include:

(A) Any machine, mechanical device, electronic device or other contrivance used or for use by a licensee of the Kansas racing commission as authorized by law and rules and regulations adopted by the commission or by the Kansas lottery or Kansas lottery retailers as authorized by law and rules and regulations adopted by the Kansas lottery commission;

(B) any machine, mechanical device, electronic device or other contrivance, such as a coin-operated bowling alley, shuffleboard, marble machine, a so-called pinball machine, or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling, and:

(i) Which when operated does not deliver, as a result of **chance**, any money; or

(ii) by the operation of which a person may not become entitled to receive, as the result of the application of an element of **chance**, any money;

(C) any so-called claw, crane or digger machine and similar devices which are designed and manufactured primarily for use at carnivals or county or state fairs; or

(D) any machine, mechanical device, electronic device or other contrivance used in tribal gaming;

K.S.A. 21-6403 (emphasis added). A game’s legality or illegality, *i.e.* whether it is a “gambling device,” therefore, hinges on whether its outcomes are the “**result of chance.**” But, the statute nowhere defines “chance,” nor does it explain how much chance renders a game illegal. One percent? Ten percent? Fifty percent? Ninety percent? Just like using terms such as “misconduct” and “annoys,” persons of “common intelligence” have no guidance in determining what “chance” means and whether games are legal or illegal.

The Shawnee County District Court relied on *State v. Lee* to determine “result of chance” is not unconstitutionally vague. 45 Kan. App. 2d 1001, 257 P.3d 799 (2011). In *Lee*, a man was convicted of involuntary manslaughter (unlawful death in the commission of a misdemeanor enacted for the protection of human safety) after his dog mauled a neighbor. *Id.* at 1004. At issue was whether an underlying ordinance was vague which prohibited owning “[a]ny dog which has the appearance and characteristics of being

predominantly of the breeds of Staffordshire bull terrier, American pit bull terrier, American Staffordshire terrier, or any combination of any of these breeds.” *Id.*

Lee argued the word “predominantly” as used in the ordinance was unconstitutionally vague because it “does not provide any criteria for use in determining whether a dog’s appearance qualifies it as one of the breeds listed in the ordinance.” *Id.* at 1008. The *Lee* court rejected the argument, holding that “‘predominantly’ is not a legal term of art; it is a common term used as an adverb and defined by the dictionary to mean ‘for the most part’ or ‘mainly.’” *Id.* (quoting Merriam–Webster’s Deluxe Dictionary 1440 (10th Collegiate Edition 1998)).

But here, the word “predominantly” does not appear in the “chance” definition. The Shawnee County Court acknowledges as much, stating “[n]o Kansas appellate court has clearly ruled that the predominant or predominate factor test is the one to be relied upon in Kansas.” ROA, Vol. 2 at 84. The Shawnee County Court instead reads “predominantly” into the statute based on *Three Kings Holdings, LLC v. Six*, 45 Kan. App. 2d 104, 255 P.3d 1218 (2011), and various non-Kansas precedent, concluding that “there are reasons to believe [the predominant factor test] is the right test.” ROA, Vol. 2 at 84.

Thus, in order to avoid vagueness, it is necessary for this Court to determine that the predominant-factor test applies to K.S.A. 21-6403’s “chance” definition. Anything less would result in the statute being unconstitutionally vague.

III. A claim is moot where a judgment would be ineffectual for any purpose, and would not impact the party’s rights. Here, judgment in POM’s favor would be effectual and would impact POM’s rights, including determining issues in the Wyandotte County Action. As such, POM’s Count 1 is not moot.

A. Standard of review and preservation.

Appellate review over a mootness decision is “unlimited.” *State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439, 446 (2020). Here, the Shawnee County Court dismissed POM’s Count 1 as “moot.” ROA, Vol. 2 at 78-79.

B. The Shawnee County District Court erred in dismissing Count 1.

KELA, K.S.A. 74-8701, *et seq.* regulates: (1) games authorized and connected to the State’s central computer (*i.e.* machines operated in a casino or lottery facility); and (2) “Gray machines” as defined in K.S.A. 74-8702(g). An “electronic gaming machine” is defined by KELA as:

[A]ny electronic, electromechanical, video or computerized device, contrivance or machine **authorized by the Kansas lottery** which, upon insertion of cash, tokens, electronic cards or any consideration, is available to play, operate or simulate the play of a game authorized by the Kansas lottery pursuant to the Kansas expanded lottery act, including, but not limited to, bingo, poker, blackjack, keno and slot machines, and which may deliver or entitle the player operating the machine to receive cash, tokens, merchandise or credits that may be redeemed for cash. Electronic gaming machines may use bill validators and may be single-position reel-type, single or multi-game video and single-position multi-game video electronic game, including, but not limited to, poker, blackjack and slot machines. **Electronic gaming machines shall be directly linked to a central computer at a location determined by the executive director for purposes of security, monitoring and auditing.**

K.S.A. 74-8702(c) (emphasis added).

Thus, by definition, an “electronic gaming machine” is a casino-operated machine, linked to the State’s “central computer” and which can be monitored and audited under KELA and other Kansas regulations. Because Dragon’s Ascent is not located in Kansas

casinos, nor connected to a central computer monitored by the Kansas Lottery, it cannot be an “electronic gaming machine.”

KELA defines any games **not** so authorized by the State or connected to the State’s central computer system as “Gray machines,” under K.S.A. 74-8702(g):

(g) “Gray machine” means any mechanical, electro-mechanical or electronic device, capable of being used for gambling, that is: (1) **Not authorized by the Kansas lottery;** (2) **not linked to a lottery central computer system;** (3) available to the public for play; or (4) capable of simulating a game played on an electronic gaming machine or any similar gambling game authorized pursuant to the Kansas expanded lottery act.

K.S.A. 74-8702(g) (emphasis added). The Kansas Supreme Court deemed KELA’s “gray machine” definition unconstitutionally overbroad in 2011, and the legislature has not since redefined “gray machines.” *Dissmeyer v. State*, 292 Kan. 37, 44249 P.3d 444, 449 (2011).

POM’s Count 1 is a declaratory judgment action alleging KELA has no application to Dragon’s Ascent because: (1) Dragon’s Ascent is not an “electronic gaming machine;” and (2) KELA’s “gray machine” definition is unconstitutionally overbroad and unenforceable (as decided in *Dissmeyer*). ROA, Vol. 1 at 177-179. The AG moved to dismiss Count 1, agreeing that KELA does not apply to Dragon’s Ascent, but alleging there was no case or controversy. ROA, Vol. 1 at 271-273. The Casinos concurred with the AG, arguing “nobody has claimed” KELA applies to Dragon’s Ascent. ROA, Vol. 1 at 364.

The Shawnee County Court held a hearing on September 28, 2022, on the AG’s motion to dismiss. At the hearing, the Casinos’ counsel denied having “argued that KELA [] applies to [Dragon’s Ascent]”, characterizing that as “absolutely not true”, and further stating the Casinos “would be insane to argue that.” ROA, Vol. 3 at 82:15-19.

But lost on the Casinos is the fact that they argued KELA applies to Dragon's Ascent in the Wyandotte County Action. Indeed, the Casinos sued POM in the District Court of Wyandotte County – alleging that POM's operation of Dragon's Ascent tortiously interferes with the Casinos' management contracts. The very basis of the claims in the Wyandotte County Action is that Dragon's Ascent is not authorized by KELA:

Defendants have, without proper justification and in contravention of KELA and other applicable law, interfered with the Agreement and Plaintiffs' reasonable expectancy of future economic benefit thereunder by manufacturing, selling, leasing, distributing, possessing, operating, or collecting revenue from illegal gambling devices or lottery games.

ROA, Vol. 2 at 5, 32 (emphasis added).

Moreover, in the Wyandotte County Action, POM served an interrogatory asking the Casinos to identify any material facts supporting their allegation that POM's "distribution and operation of Dragon's Ascent improperly and illegally infringes upon [the Casinos'] expectations. . . ." ROA, Vol. 2 at 37-38, 50.

After asserting various objections, the Casinos responded as follows:

Without waiving these objections, and subject thereto, the reference to two lottery gaming facilities should be four lottery gaming facility since all of the lottery gaming facility managers are now plaintiffs in this lawsuit. The Kansas Constitution limits the ownership and operation of gaming, also referred to as the lottery, in Kansas to the State of Kansas. When the Kansas Expanded Lottery Act ("KELA") was enacted, there were only to be four lottery gaming facility managers in Kansas that would manage, on behalf of the Kansas Lottery, all electronic gaming machine (as defined by KELA) play in Kansas. All gaming on electronic gaming machines is strictly limited to the four lottery gaming facility locations. Moreover, KELA, in addition to each of the Lottery Gaming Facility management Contracts with each of the four plaintiffs in this lawsuit, have a provision that prohibits the state from authorizing or allowing additional locations where games of chance may be offered to the public. Specifically, the provision states: "Prohibiting the state, until July 1, 2032, from . . . designating

additional areas of the state where operation of lottery gaming facilities or similar gaming facilities would be authorized” **The placement of Dragon’s Ascent games, which are electronic gaming machines, at facilities around the State of Kansas violates the restrictions intended by the legislature, as well as the legislative intent to highly regulate gambling using electronic gaming machines.**

ROA, Vol. 2 at 38, 50-51 (emphasis added). In other words, the Casinos’ assertions they “would be insane” to argue KELA applies to Dragon’s Ascent rings hollow. The fact is, they **explicitly argued as much** in the Wyandotte County Action, calling Dragon’s Ascent an “electronic gaming machine,” which is defined by KELA. *Id.* The Shawnee County Court ultimately held that POM’s Count 1 is moot, because the Kansas Supreme Court already decided the issue in *Dissmeyer*. ROA, Vol. 2 at 78-79.

Mootness is a “jurisdictional question” and part of the “constitutional case-or-controversy requirement.” *State v. Roat*, 311 Kan. at 586. Mootness “must be exercised with caution and only upon due consideration of the wide variety of interests a party asserts.” *Roat*, 311 Kan. at 591. “Litigants must have some effective means to vindicate injuries suffered to their rights without being shut out of court.” *Id.* “In other words, individuals are entitled to their day in court.” *Id.* (quotations omitted). An issue is not moot unless “it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties’ rights.” *State v. Tracy*, 311 Kan. 605, 608, 466 P.3d 434 (2020).

The Shawnee County Court erred in dismissing POM’s Count 1 as moot. POM brought its Count 1 claim, in part, to address the Casinos’ allegations that Dragon’s Ascent is an illegal “electronic gaming machine” under KELA. While POM has raised this defense

in the Wyandotte County Action, it also asks for a declaration in *this* case (filed prior to the Wyandotte County Action), so that the order is binding on the Casinos, the AG, and any other party which could claim Dragon’s Ascent violates KELA.

Clearly, judgment in POM’s favor would be effectual and would impact POM’s rights. *See Tracy*, 311 Kan. at 608. The fact is, the Casinos argue either that Dragon’s Ascent is an “electronic gaming machine” or that Dragon’s Ascent is not an “electronic gaming machine” whenever each argument benefits them more. This inconsistency is precisely why Count 1 of the Second Amended Petition presents a justiciable controversy. In Count 1, POM requests, in part, a judgment declaring that “K.S.A. 74-8701, *et seq.* has no application to Dragon’s Ascent because Dragon’s Ascent is not an ‘electronic gaming machine’” ROA, Vol. 1 at 179. Such a declaration from this Court would resolve all or part of the Casinos’ dispute with POM, both in the Wyandotte County Action and here, and would prohibit the AG from prosecuting POM on the basis that Dragon’s Ascent violates KELA because it is an “electronic gaming machine.”

And, to the extent the AG and the Casinos agree that Dragon’s Ascent is not subject to KELA, the Shawnee County Court should have entered judgment in favor of POM as to Count 1, rather than dismissing Count 1.

CONCLUSION

The District Court erroneously dismissed POM’s claims. This Court should:

(1) Reverse the Douglas County District Court’s April 30, 2021 order dismissing POM’s Count 6 due to a lack of standing; and

(2) Reverse the Shawnee County District Court's November 18, 2022 order entering judgment in favor of the AG for POM's Counts 2 and 4;

(3) Reverse the Shawnee County District Court's November 18, 2022 order dismissing POM's Count 1 as moot; and

(4) enter such other relief as the Court deems proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th day of June, 2023, the foregoing was electronically filed with the Clerk of the Appellate Court pursuant to Kan. Sup. Ct. R. 1.14(a), and a true and correct copy of the foregoing was served by electronic mail to the following:

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UNPUBLISHED OPINIONS ATTACHED PURSUANT TO
KAN. SUP. CT. R. 7.04(g)(C)

2022 WL 4245579

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United States District Court, D. Rhode Island.

INTERNATIONAL GAME TECHNOLOGY
PLC, and IGT Global Solutions Corp., Plaintiffs,

v.

Merrick B GARLAND and The United
States Department of Justice, Defendants.

C.A. No. 21-463 WES

|

Signed September 15, 2022

Synopsis

Background: Gaming company that provided lottery services and its foreign parent brought action against the Attorney General and the Department of Justice (DOJ) seeking declaratory judgment that the DOJ could not prosecute them for non-sports betting under the Wire Act. Attorney General and DOJ moved to dismiss, and gaming company and parent moved for summary judgment.

Holdings: The District Court, William E. Smith, J., held that:

matter was ripe for adjudication;

threat of prosecution was credible enough to meet requirements for an injury-in-fact for standing; and

entering declaratory judgment was warranted.

Motion for summary judgment granted; motion to dismiss denied.

Procedural Posture(s): Motion for Summary Judgment; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

WILLIAM E. SMITH, District Judge.

*1 The substantive question of statutory interpretation at the center of this case – whether the Wire Act of 1961¹ reaches non-sports betting – has been definitively decided in the First Circuit. See N.H. Lottery Comm'n v. Rosen, 986 F.3d 38, 45 (1st Cir. 2021) (“NHLC II”). Plaintiffs, International Game Technology PLC (“IGT PLC”) and IGT Global Solutions Corporation (“IGT GS Corp.”) (together, “IGT”), seek for themselves what the plaintiffs in NHLC II obtained: a declaratory judgment that the Department of Justice may not prosecute them for non-sports betting under the Wire Act. See id.; Compl. ¶ 60, ECF No. 1. In response, Defendants Attorney General Merrick Garland and the U.S. Department of Justice (“DOJ”) moved to dismiss under Rule 12(b)(1), arguing that the expiration of a DOJ forbearance period without like prosecutions and the existence of the NHLC II decision itself render the threat of future prosecutions too speculative an injury to confer Article III standing.

Before the Court are Defendants’ Motion to Dismiss for Lack of Jurisdiction, ECF No. 14, and Plaintiffs’ Cross-Motion for Summary Judgment, ECF No. 16. For the reasons that follow, Defendants’ Motion to Dismiss is DENIED, and Plaintiffs’ Motion for Summary Judgment is GRANTED.

I. BACKGROUND

A. Plaintiffs’ Operations

Based in London, England, Plaintiff IGT PLC is the world's largest end-to-end gaming company. Compl. ¶¶ 5, 25.² Plaintiff IGT GS Corp. is its wholly owned U.S. subsidiary and the largest provider of gaming and lottery services in the United States. Id. ¶ 6. IGT GS Corp. is organized under the laws of Delaware and has its principal place of business in Providence, Rhode Island. Id. It provides technical support, equipment, and management services to thirty-seven out of forty-six state lotteries, including three states which sell tickets through the internet (“iLottery”). Id. IGT's data center in Rhode Island is the primary or secondary data center for seven state lotteries. Id. ¶ 28. IGT is also a leading manufacturer and operator of casino-style gaming machines,

like slot machines. *Id.* ¶ 33. Some of these gaming machines allow for the pooling of jackpots across multiple casinos using a data network. *Id.* ¶ 34(c). Finally, IGT offers internet-based gambling, so-called “iGaming”, in the six states in which it is legal to do so for money. *Id.* ¶¶ 36-37. iGaming, like these other services, requires the use of wires to transmit data across state lines, and thus perhaps falls within the reach of the Wire Act. *Id.* ¶ 38.

B. Shifting Interpretations of the Wire Act

IGT’s standing hinges, in large part, on the likelihood of its criminal prosecution under the Wire Act. It is necessary, therefore, to recount in some detail the history of the DOJ’s shifting interpretations as to the scope of Wire Act and the NHLC litigation which precedes this case.

*2 The relevant section of the Wire Act includes four related clauses. Each prohibits different aspects of making bets and wagers using wire communications that cross state lines.³ The second prohibitional phrase is explicitly limited to “bets or wagers on any sporting event or contest.” See 18 U.S.C. § 1084(a). The pivotal question at issue in various DOJ opinions and in *NHLC II* was whether the whole statute is limited to sports betting, or whether the limiting language applies only to the second prohibition, such that the rest of the statute criminalizes non-sports betting. *NHLC II*, 986 F.3d at 45 (“The question the parties present to us is whether the phrase ‘on any sporting event or contest’ (the ‘sports-gambling qualifier’) qualifies the term ‘bets or wagers’ as used throughout section 1084(a).”).

Until 2011, the DOJ took the position “that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling.” See *Whether the Wire Act Applies to Non-Sports Gambling*, 35 Op. O.L.C. 134, 136 (2011) (“2011 OLC Opinion”); *NHLC II*, 986 F.3d at 45-46. This was not merely an academic question. Between 2005 and 2011, the DOJ prosecuted at least seventeen cases of non-sports betting under the Wire Act. *NHLC II*, 986 F.3d at 50. In 2009, the DOJ responded to inquiries from New York and Illinois about their plans to use IGT’s internet-based lottery systems. *Id.* at 45; see also Compl. ¶ 48. It made clear that under its view of the Wire Act, these systems were criminal. *NHLC II*, 986 F.3d at 45-46.

At the same time, the DOJ Criminal Division recognized a tension between its position on state lotteries and specific statutory carve outs for state lotteries created by Congress in

a 2006 statute.⁴ As a result, it sought further guidance from the DOJ’s Office of Legal Counsel (“OLC”) as to whether the Wire Act reached internet-connected state lotteries. *Id.* The OLC responded by reversing its prior position about the scope of the Wire Act. It concluded that “the Wire Act does not reach interstate transmissions of wire communications that do not relate to a ‘sporting event or contest.’ ” 2011 OLC Opinion 151. In other words, it determined the Wire Act only prohibits sports betting; the state lotteries, along with other forms of non-sports, interstate gambling, were safe from prosecution.

IGT, and the gaming and lottery industry more broadly, relied on this guidance as their business developed. Compl. ¶¶ 48-51. As noted, many aspects of IGT’s business now involve non-sports betting, including its land-based gaming machines, iGaming, iLottery systems, and even its more traditional state lotteries, which verify and authorize ticket purchases through interstate wire transmissions. *Id.* ¶¶ 40-47.

In 2017, the DOJ Criminal Division asked the OLC to reconsider its position. See *NHLC II*, 986 F.3d at 46. OLC did so, and ultimately reverted to its pre-2011 position, concluding that the Wire Act reached non-sports betting, like lotteries and internet-connected slot machines. See Pls.’ Statement Undisp. Facts Supp. Cross-Mot. Summ. J. ¶ 1 (“Pls.’ SUF”), ECF No. 16-2 (citing *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. —, 2018 WL 7980165 (Nov. 2, 2018) (“2018 OLC Opinion”). In this latest opinion, the OLC “justified its reversal on the grounds that the 2011 Opinion did not devote adequate attention to either the text of the statute or the canons of statutory construction, was ‘of relatively recent vintage,’ and departed from DOJ’s former position.” *NHLC II*, 986 F.3d at 46 (citing 2018 OLC Opinion 14). The Deputy Attorney General adopted this opinion as the DOJ’s position on January 15, 2019. Pls’ SUF ¶ 2.

C. NHLC Litigation

*3 In response to the 2018 OLC Opinion, the New Hampshire Lottery Commission and its vender, NeoPollard (an IGT competitor), sought both a declaratory judgment that the Wire Act applied only to sports betting and an order under the Administrative Procedure Act (“APA”) setting aside the 2018 OLC Opinion.⁵ See *N.H. Lottery Comm’n v. Barr*, 386 F. Supp. 3d 132, 136 (D.N.H. 2019) (“*NHLC I*”), *aff’d in part, vacated in part sub nom. N.H. Lottery Comm’n v. Rosen*, 986 F.3d 38 (1st Cir. 2021). In a thorough order,

the district court held that the threat of prosecution was significant enough to confer standing, *id.* at 140-45, and that, as a matter of statutory interpretation, the Wire Act only criminalizes sport betting, *id.* 147-57. As a remedy, the court entered a declaratory judgment that “binds the United States vis-à-vis NeoPollard and the [NHLC] everywhere the plaintiffs operate or would be otherwise subject to prosecution,” and ordered that the 2018 OLC Opinion be set aside under the APA. *id.* at 158-159.

On review, the First Circuit upheld the district court's order as to standing and its interpretation of the Wire Act. *NHLC II*, 986 F.3d at 54-62; *id.* at 61-62 (“Like the Fifth Circuit, and the district court in this case, we therefore hold that the prohibitions of section 1084(a) apply only to the interstate transmission of wire communications related to any ‘sporting event or contest.’”). However, it vacated the relief granted under the APA, concluding that declaratory relief was an adequate remedy under the circumstances. *Id.* Within the First Circuit therefore, the ping-ponging question of the Wire Act's proper scope has been definitively answered. That decision is of course binding on this Court, and independently compelling. See *NHLC II*, 986 F.3d at 54-62 (closely analyzing text, competing statutory canons, evident purpose, and legislative history to construe the Wire Act).

After the 2018 OLC Opinion was first challenged in the NHLC litigation, the DOJ announced two separate forbearance periods. The first pertained to the potential prosecution of state lotteries and their vendors. It was set to expire ninety days after the DOJ issued additional guidance on whether it believes the Wire Act applies to state lotteries. Pls.’ *SUF* ¶ 4. Even today, that promised guidance has not arrived, so state lotteries and their vendors (including IGT) operate within this indefinite forbearance period. *Id.*

The second forbearance period concerned the DOJ's announcement that it would not bring Wire Act prosecutions for non-lottery gambling under the 2018 OLC Opinion until sixty days after the entry of final judgment in the NHLC litigation. *Id.* ¶ 5. IGT argues this period expired on August 20, 2021, sixty days after the expiration of the DOJ's deadline to seek an en banc rehearing of the First Circuit's decision or to seek certiorari. See Pls.’ *Mem. Supp. Cross-Mot. Summ. J.* (“Pls.’ *SJ Mem.*”) 15-16, ECF No. 16-1. (It sought neither.) The DOJ notes that entry of final judgment in the district court case would have put the expiration date much sooner, and points to subsequent forbearance period extensions issued by

the Deputy Attorney General. See Defs.’ *Reply Mem. Supp. Mot. Dismiss and Opp'n Pl's Cross-Mot. Summ. J.* (“Defs.’ *Reply*”) 5, ECF No. 19. The last of these memoranda was issued on June 11, 2020, and extended the moratorium to December 1, 2020, with no sixty-day qualification. *Id.* While the Court concludes that the DOJ has the better reading of its own memoranda, and therefore the non-lottery forbearance period ran on December 1, 2020, this dispute ultimately matters little.

II. LEGAL STANDARD

*4 When considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Court “must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff.”

Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996). The Court also “may consider whatever evidence has been submitted in the case.” *Acosta-Ramirez v. Banco Popular de Puerto Rico*, 712 F.3d 14, 18 (1st Cir. 2013). The burden of demonstrating subject matter jurisdiction falls on the plaintiffs. *Justimano v. Sec. Sec. Admin.*, 876 F.3d 14, 21 (1st Cir. 2017).

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

III. DISCUSSION

A. Standing

The government contends that IGT does not face a credible threat of prosecution and therefore lacks standing, both because the DOJ has not brought like prosecutions after the non-lottery forbearance period ran out, and because *NHLC II* makes a successful prosecution of IGT impossible in the First Circuit. Neither argument is persuasive.

The doctrine of standing gives shape to Article III's case-or-controversy requirement by helping “identify those disputes which are appropriately resolved through the judicial process.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To prove standing, the party invoking a court's jurisdiction must show, with evidence appropriate to the stage of the proceeding, that it “(1) suffered an injury in fact, (2) that is fairly traceable to

the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016). As in *NHLC II*, there is “no question that injury, if any, can be traced directly to the government’s threatened enforcement of the Wire Act and can be redressed in this action.” 986 F.3d at 50.

So, the pivotal inquiry becomes whether Plaintiffs can show an injury in fact. In general, an injury in fact “must be concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (internal quotation marks and citations omitted). This requirement ensures “a plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *Warth v. Seldin*, 422 U.S. 490, 498–99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

1. Threatened Prosecution as an Imminent Injury

In the right circumstances, the threatened enforcement of a criminal law may be sufficiently “imminent” to constitute an Article III injury in fact. *Reddy*, 845 F.3d at 500. “When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (“*SBA List*”); see also *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007) (“[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.”).

But plaintiffs so threatened must show more than that they intend to violate or are violating an existing law; they must also show that the threat of prosecution is sufficiently real to provide standing. “[J]ust how clear the threat of prosecution needs to be turns very much on the facts of the case and on a sliding-scale judgment that is very hard to calibrate.” *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000). “Courts have variably described the requisite likelihood of enforcement

as ‘sufficiently imminent,’ ‘credible,’ ‘substantial,’ and ‘realistic.’ ” *NHLC I*, 386 F. Supp. 3d at 141 (collecting cases).

*5 Context matters in this sliding-scale inquiry. As evidence that a threatened prosecution is realistic and credible, courts have considered whether the plaintiff was previously threatened with arrest and prosecution by the law’s enforcer, see, e.g., *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (specific threat of arrest and prosecution gave pre-enforcement standing), a history of like prosecutions, see *Holder v. Humanitarian L. Project*, 561 U.S. 1, 16, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010); *SBA List*, 573 U.S. at 164, 134 S.Ct. 2334, (“Past enforcement against the same conduct is good evidence that the threat of enforcement is not ‘chimerical.’ ”), and a background “assumption that the state will enforce its own non-moribund criminal laws, absent evidence to the contrary,” *NHLC II*, 986 F.3d at 51 (quoting *Blum v. Holder*, 744 F.3d 790, 798 n.11 (1st Cir. 2014)).

Threat of prosecution may be too illusory to support standing when there is an unequivocal statement disavowing the government’s right to prosecute, *Blum*, 744 F.3d at 798 (“Particular weight must be given to the Government disavowal of any intention to prosecute ... because it does not think [plaintiff’s conduct] is prohibited by the statute.”), a significant history of declining to prosecute easily discovered conduct, *id.* (emphasizing “the lack of a history of enforcement of the challenged statute to like facts, [and] that no enforcement has been threatened as to plaintiffs’ proposed activities”), or when a third-party’s actions are a precondition of prosecution, and it is speculative as to whether that precondition will occur, *Reddy*, 845 F.3d at 502–03 (threat of prosecution too speculative when contingent on abortion clinics exercising statutory right to post “free speech buffer zones,” something they had never done and represented that they did not intend to do because of intervening Supreme Court precedent).

2. IGT’s Threat of Prosecution

In the NHLC litigation, the DOJ contested standing before both the district court and the First Circuit. Given the close parallels between that case and this one, any discussion of

standing here should begin with the First Circuit's standing analysis in NHLC II. Much of that analysis applies directly, and thus the Court has little difficulty concluding IGT has standing, despite the DOJ's attempts to distinguish the case.⁶

In NHLC II, the court began by noting that the plaintiffs were openly engaging in conduct branded as criminal by the DOJ's adoption of the 2018 OLC Opinion. NHLC II, 986 F.3d at 50. In those circumstances, any threat of prosecution does not have the added uncertainty of whether a plaintiff will follow through on a stated intention to violate the law; it is doing so already. Here, broad swaths of IGT's business run afoul of the DOJ's latest interpretation of the Wire Act. See id. (noting 2018 OLC Opinion "expressly mentioned [state] lotteries, suggesting that Congress need amend the statute if it wishes to protect reliance interests" and referring to memo that required DOJ attorneys to "adhere" to this view); Compl. ¶¶ 40-47 (detailing IGT operations that use wire communication to place non-sports bets across state lines). Like the NHLC plaintiffs, IGT "already ha[s] it all on the line, so to speak." NHLC II, 986 F.3d at 51. And while the parties dispute how long ago the DOJ's forbearance period for non-lottery enforcement expired, they agree that it has. Thus, unlike the NHLC plaintiffs, IGT could be indicted tomorrow for its non-lottery business. For its lottery business, IGT stands in the same position as the plaintiffs in NHLC; it could be prosecuted for its state lottery operations within ninety days of the DOJ announcing its new policy.

*6 The DOJ argues that IGT's continued, open violation of the law (as the DOJ now describes it) implies that even IGT does not think a prosecution is imminent. That is not necessarily true. IGT's continued operation without the protection of a formal forbearance directive makes a prosecution more possible, not less. And the fact that IGT has not proactively dismantled most of its business in response to the legal uncertainty created by the DOJ's waffling should not be held against it. That IGT chose one prong of a harsh dilemma (the costs of drastically reconfiguring its business versus risking prosecution) does not mean that the threat of prosecution is a fiction. See NHLC II, 986 F.3d at 51 ("The rule that a plaintiff must destroy a large building, bet the farm, or ... risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III." (quoting MedImmune, 549 U.S. at 134, 127 S.Ct. 764)).

In concluding that the NHLC plaintiffs had standing, the First Circuit also relied on record evidence that the "DOJ

affirmatively warned a state that it believed selling lottery tickets over the internet violated the Wire Act and, in the lead-up to the 2011 Opinion, provided similar advice to inquiring authorities from two states." Id. at 51. The court directly compared these warnings to those issued by the Drug Enforcement Agency ("DEA") in Hemp Council, pointing out that it "found pre-enforcement standing because the DEA had expressed its view that the conduct [the plaintiff] sought to engage in violated federal law." Id. (citing Hemp Council, 203 F.3d at 5).

The DOJ's warnings to New York and Illinois have even more heft here, because those states partnered with IGT for the systems the DOJ was reviewing. See Compl. ¶ 48. In other words, the last time the DOJ held the position it now espouses, it specifically told two of IGT's state partners that IGT's state lottery business was criminal conduct. And while the DOJ represents that it is actively pondering this question, there is little mystery as to why IGT finds the DOJ's protracted private musings to be cold comfort. These direct statements about IGT's business, which align precisely with the formally adopted 2018 OLC Opinion, strongly support the conclusion that IGT faces a realistic and substantial threat of prosecution for its lottery business.

Finally, the NHLC II court supported its conclusion that threat of prosecution was credible by noting that "when DOJ attorneys last held the view expressed in the 2018 Opinion (between 2005 and 2011), DOJ had prosecuted seventeen cases involving non-sports betting under the Wire Act." Id. at 50. The DOJ asks the Court to disregard these prosecutions, arguing that "[t]he landscape of past enforcement actions is ... entirely different" because there is no evidence that it brought prosecutions in the "nearly one year during which DOJ attorneys were not barred by any forbearance directives from prosecuting non-sports betting." Mem. Supp. Defs.' Mot. Dismiss for Lack Jurisdiction ("Mot. Dismiss") 10-11, ECF No 14-1. To be sure, this brief period during which the DOJ could have prosecuted non-sports, non-lottery betting but did not, lessens the weight of its pre-2011 prosecutions, but only to a point. It does not constitute an "entirely different" landscape. Even several years of declined prosecutions is hardly a "realistic basis for a suggestion that the statutory provision ... has fallen into desuetude." NHLC II, 986 F.3d at 51 (quoting R.I. Ass'n of Realtors, 199 F.3d at 32). The Court has no trouble concluding that the DOJ's pre-2011 prosecutions reinforce that IGT has standing here, even if the

brief deferral period noted by the DOJ undercuts the strength of that support.

While all this points to a rather straightforward application of the standing analysis in NHLC II to the facts here, the DOJ makes one other argument that the Court must address. The DOJ contends that the very existence of NHLC II as a precedent distinguishes IGT's situation from that of the NHLC plaintiffs. This is so, the DOJ argues, because the holding in NHLC II prevents any threat of IGT's successful prosecution anywhere in the First Circuit, including in Rhode Island. See Mot. Dismiss 9-10 (quoting NHLC II, 986 F.3d at 62) (“IGT faces no threat of successful prosecution in this District (or, for that matter, in any other District within the First Circuit) absent an overruling of [NHLC II], because the First Circuit already has held that ‘the Wire Act applies only to interstate wire communications related to sporting events or contests.’”).

*7 This argument misses the mark. The relevant test is whether IGT faces a realistic threat of prosecution, not whether it faces the threat of successful prosecution here. And while the DOJ's concerns about “extending the benefit of ... First Circuit precedent,” Mot. Dismiss 1, might present a prudential reason for the Court to decline to exercise its discretion to issue a declaratory judgment (discussed infra), there is no requirement for standing purposes that an injury occur in the district where relief is sought, or indeed, even in the United States at all. See Cardenas v. Smith, 733 F.2d 909, 913 (D.C. Cir. 1984) (“[T]he location of the injury does not affect [plaintiff's] satisfaction of the Article III standing requirement.... An injury endured abroad is not less of an injury for Article III standing purposes because it happened on foreign soil.”); see also Siegel v. United States Dep't of Treasury, 304 F. Supp. 3d 45, 52 (D.D.C. 2018) (“The deprivation of property, even when that property is held abroad, constitutes a concrete and particularized injury in fact.”). Indeed, in Lujan, one of the Supreme Court's seminal standing cases, nothing suggested that a district court in Minnesota could not consider harm to the plaintiff's ability to observe elephants and leopards in Sri Lanka or crocodiles in Egypt because of the locations of those injuries. See Lujan, 504 U.S. at 563–64, 112 S.Ct. 2130 (1992). Rather, the Court found a lack of standing because it was too speculative that the plaintiffs would return to those far-flung locations. Id.

Furthermore, the DOJ has provided no authority for its contention that this general proposition – that the location of an Article III injury is irrelevant for assessing standing – changes when that injury is a threatened prosecution by a federal agency against a company operating across many states. This Court has found no authority for that proposition, nor is there any contention that venue is improper in Rhode Island. See Pls.’ Reply Supp. Cross-Mot. Summ. J. 3, ECF No. 20. Threatened prosecution anywhere, if likely enough, is a direct harm to these Plaintiffs, who are properly before this Court. And indeed, far from being a “concerned bystander[],” there is no question IGT has a sizable “direct stake in the outcome.” Diamond v. Charles, 476 U.S. 54, 62, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986).

For all these reasons, the Court holds that the threat of prosecution faced by IGT, both for its lottery and non-lottery businesses, is credible enough to meet the requirements of proving an injury-in-fact. The DOJ's Motion to Dismiss, ECF No. 14, is therefore DENIED.

B. Discretion under the Declaratory Judgment Act

“Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.” Wilton v. Seven Falls Co., 515 U.S. 277, 286, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). Despite an otherwise “‘virtually unflagging obligation’ to exercise the jurisdiction conferred on them by Congress,” id. at 284, 115 S.Ct. 2137 (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)), the Supreme Court has held that “[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration,” id. at 288, 115 S.Ct. 2137.

Courts have considered a broad array of factors in guiding the exercise of this discretion,⁷ but often distill the inquiry down to two “principal criteria”: “(1) [whether] the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) [whether] it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.” 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2759 (4th ed.) (collecting cases).

*8 The DOJ argues that “IGT asks this Court to determine the rights of the parties solely as they exist outside the First Circuit,” Defs.’ Reply 8, and that “any entity that could satisfy the jurisdictional requirements to seek a declaratory judgment in the First Circuit could obtain the benefit of First Circuit precedent outside of the First Circuit, as well, thereby insulating itself from successful prosecution for any non-sports gambling conduct in other jurisdictions.” Mot. Dismiss 1 n.1. While irrelevant to standing,⁸ the Court concludes this argument is better considered as going to the prudence of the Court entering a declaratory judgment. But even in this more favorable context, the Court ultimately finds the argument unpersuasive.

First, there is nothing uncommon about a declaratory judgment binding the parties beyond the geographical confines of the district in which it enters. This is often true, especially when a court sits in diversity, and therefore courts necessarily issues judgments that affect entities in other states. That both parties here operate nationwide does not turn a declaratory judgment between the parties into a nationwide injunction against the DOJ generally, prevent the DOJ from prosecuting any non-party, or necessarily arrest the development of the law in other circuits.

Furthermore, the DOJ’s shift in positions has created substantial uncertainty for broad swaths of IGT’s business, which developed under the 2011 OLC Opinion. Pls.’ SUF ¶¶ 11-13. That uncertainty ripples outward. Should the DOJ issue guidance ending its deferral period for state lotteries, IGT would have ninety days to substantially revamp or end state lotteries in thirty-seven states. *Id.* ¶¶ 13-14. The First Circuit noted of the lottery in New Hampshire:

A state-wide operation integrating over a thousand retailers and multi-state relationships to produce almost 100 million dollars in net revenue does not strike us as an operation that can be easily wound-up in ninety days. Nor can a state legislature plan sensibly if such a relied-upon revenue stream finds itself suddenly subject to a three-month closure notice.

NHLC II, 986 F.3d at 52. The same concerns echo here, multiplied across thirty-seven states and involving some significant portion of the 25.3 billion dollars that state lotteries generate for state budgets annually. *See* Compl. ¶ 51.

Given these concerns, there is no question that a judgment “will serve a useful purpose in clarifying and settling the legal relations in issue” and afford significant relief “from the uncertainty, insecurity and controversy giving rise to the proceeding.” *Wright and Miller*, *supra*, § 2759. Like the NHLC plaintiffs, IGT “should not have to operate under a dangling sword of indictment while DOJ purports to deliberate without end the purely legal question it had apparently already answered and concerning which it offers no reason to expect an answer favorable to the plaintiffs.” *NHLC II*, 986 F.3d at 53. Indeed, the dilemma IGT faces – “between abandoning [its] rights or risking prosecution – is a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.” *MedImmune*, 549 U.S. at 129, 127 S.Ct. 764 (internal quotation marks and citation omitted); *see also* *NHLC I*, 386 F. Supp. 3d at 157 (“[W]here an agency has made a definitive interpretation of a criminal law, the Declaratory Judgment Act provides ‘a way to resolve the legal correctness of [the] position without subjecting an honest businessman to criminal penalties.’” (quoting *Hemp Council*, 203 F.3d at 5)).

*9 For these reasons, the Court decides that granting relief here is appropriate. As for the scope of that relief, both parties have been clear that the relief sought by IGT is the same as that afforded in the NHLC litigation, and thus a declaratory judgment will bind the United States “everywhere [P]laintiffs operate or would be otherwise subject to prosecution.” *NHLC I*, 386 F. Supp. 3d at 158.⁹ Because the Court finds there is no dispute of material fact, judgment shall enter as a matter of law, and Plaintiffs’ Cross-Motion for Summary Judgment is GRANTED.

IV. CONCLUSION

For all these reasons, Defendants’ Motion to Dismiss, ECF No. 14, is DENIED and Plaintiffs’ Cross-Motion for Summary Judgment, ECF No. 16, is GRANTED. The Court declares that, as to the parties now before it, the Wire Act applies only to “bets or wagers on any sporting event or contest.”

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2022 WL 4245579

Footnotes

1 See 18 U.S.C. § 1084(a).

2 To color the background of the case, the Court draws on the well-pleaded facts of the Complaint and the undisputed facts submitted for summary judgment, and takes notice of some relevant procedural history discussed in N.H. Lottery Comm'n v. Rosen, 986 F.3d 38 (1st Cir. 2021).

3 The statute provides:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of [1] bets or wagers or [2] information assisting in the placing of bets or wagers on any sporting event or contest, or [3] for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or [4] for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a).

4 The Unlawful Internet Gambling Enforcement Act (" UIGEA"), 31 U.S.C. §§ 5361-5367.

5 The relevant portion of the APA states that a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law." 5 U.S.C. § 706(2)(A).

6 While the justiciability of this conflict is pitched by the parties in terms of standing, the Court must also assure itself that the matter is ripe. "In the pre-enforcement context ... the doctrines of standing and ripeness tend to overlap, so the Court's standing analysis largely applies here too." NHLC II, 986 F.3d at 52 (internal quotation marks omitted). In any event, ripeness requires a court to consider fitness and hardship. "Fitness involves issues of 'finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed,' while hardship 'typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties.'" Id. at 53 (quoting R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 33 (1st Cir. 1999)). The Court finds this matter to be ripe. The necessary facts are sufficiently developed and definite to render a proper judgment, and the threatened prosecution of much of its business operations poses an immediate dilemma for IGT.

7 See, e.g., Sherwin-Williams Co. v. Holmes Cnty., 343 F.3d 383, 388 (5th Cir. 2003) (analyzing seven, non-exhaustive factors: "(1) whether there is a pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping in bringing the suit; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist; (5) whether the federal court is a convenient forum for the parties and witnesses; (6) whether retaining the lawsuit would serve the purposes of judicial economy; and (7) whether the federal court is being called on to construe a state judicial

decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.”).

- 8 While the government has only made this argument as to standing, the Court must still independently determine, as a prudential matter, whether a declaratory judgment is appropriate here.
- 9 On appeal, the First Circuit upheld the scope of the relief in NHLC II, noting that it was “responsive to the pleadings and issues presented.” NHLC II, 986 F.3d at 62. Here, both parties have understood the nationwide effect of the relief sought, throughout their pleadings and presentation of the issues.

399 P.3d 292 (Table)

Unpublished Disposition

This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION

Court of Appeals of Kansas.

LABETTE COUNTY MEDICAL
CENTER, d/b/a Labette Health, Appellant,

v.

KANSAS DEPARTMENT OF HEALTH
AND ENVIRONMENT, Appellee.

No. 116,416

|

Opinion filed July 28, 2017.

Appeal from Shawnee District Court; REBECCA W. CROTTY, judge.

Attorneys and Law Firms

Michael F. Saunders, Blane R. Markley, and Katlyrn G. Lee, of Spencer Fane LLP, of Overland Park, for appellant.

Brian M. Vazquez and Eugene Lueger, of Kansas Department of Health & Environment, for appellee.

Before LEBEN, P.J., GARDNER, J., and WALKER, S.J.

MEMORANDUM OPINION

Per Curiam:

*1 Labette County Medical Center (Labette Health) appeals from the district court's order dismissing its lawsuit against the Kansas Department of Health & Environment (KDHE) and its finding that Labette Health had no standing to sue. Because we find that the district court erred by granting the motion to dismiss, we reverse and remand the case for further proceedings.

FACTS

Labette Health is a Kansas-licensed hospital with its main location in Parsons, Kansas. In addition to inpatient care offered at its primary location in Parsons, Labette Health also provides outpatient and home health care in southeast Kansas.

Approximately 14 to 15 percent of Labette Health's inpatient admissions are residents of Independence, Kansas. Labette Health also operates an outpatient clinic in Independence, where it treats around 800 patients each month. Additionally, Labette Health has a rural health clinic and imaging center in Cherryvale, Kansas, which is roughly 10 miles east of Independence.

Kansas-licensed hospitals are required by law to provide emergency services at their hospitals. K.S.A. 65-431(d). Many Kansas hospitals, including Labette Health, receive no payment for the costly emergency services they provide to indigent patients. To remedy this problem, Medicare provides a process by which a hospital can charge higher inpatient fees for services provided at outpatient facilities of that hospital. To be registered as a "provider-based" facility and receive these higher fees, the outpatient clinic must be within 35 miles of the hospital's main facility. Labette Health's Cherryvale health clinic has been certified by KDHE as a provider-based clinic, and Labette Health has applied to have its current outpatient facility in Independence certified as a provider-based clinic as well. This certification would permit Labette Health to charge higher fees for standard health care services to help cover the cost of the emergency services it provides at its main facility for no charge.

In October 2015, the community hospital in Independence closed, leaving its residents without local access to emergency services. In response, Labette Health decided to open a new facility in Independence to provide local emergency health services to residents in that area. Specifically, Labette Health planned to build a hospital emergency department, as well as a rural health clinic, that would provide both primary and specialty health care. To meet this goal, Labette Health purchased 9.98 acres of land in Independence for \$300,000. Labette Health also spent \$250,000 for architectural and engineering work and budgeted \$5.6 million to build its facilities. Work on the facility was supposed to begin in July 2016 and be completed by July 2017. When the facility is completed, Labette Health plans to apply for a provider-based status.

Following the closure of the community hospital in Independence in 2015, on April 19, 2016, KDHE and its equivalent Oklahoma agency, the Oklahoma State Department of Health (OSDH), entered into a Memorandum of Understanding (MOU). Under this agreement, KDHE agreed to allow the Oklahoma-based Bartlesville Hospital to operate an outpatient imaging center in Independence under

its Oklahoma hospital license. The MOU also permitted the outpatient imaging center operated by Bartlesville Hospital to be certified as a provider-based clinic.

*2 Shortly after the MOU was entered, Labette Health filed a petition for declaratory and injunctive relief against KDHE. Labette Health claimed that KDHE lacked the authority to authorize Bartlesville Hospital to operate its imaging clinic in Kansas without being subject to Kansas state hospital licensing requirements and without requiring that Bartlesville Hospital provide emergency services to Kansas residents. Labette Health also argued that KDHE was improperly conferring a financial advantage on Bartlesville Hospital that it denied to Labette Health (*i.e.*, allowing Bartlesville to charge higher fees to Kansas patients to defray emergency room costs at its Oklahoma hospital) and that allowing Bartlesville Hospital to open an outpatient facility in Independence would cause Labette Health financial harm by eroding its patient base.

On May 11, 2016, Labette Health filed a motion asking the district court to issue a temporary restraining order prohibiting KDHE from performing its duties under the MOU until the legality of the contract was determined. The district court held an evidentiary hearing on the matter on June 16, 2016. At the hearing, Brian Williams, the president and CEO of Labette Health, testified about the financial harm that would result if Bartlesville Hospital were permitted to operate an imaging center in Independence. Specifically, Williams stated that Bartlesville Hospital would operate in Labette Health's primary service area where the patient base is already declining. This would cause Labette Health's patient base to erode, which in turn would cause irreparable financial harm to Labette Health and jeopardize its ability to provide an emergency room in Parsons. Furthermore, Williams explained, this financial harm would also threaten Labette Health's ability to complete its planned project in Independence.

Angela Jirik, the survey manager for KDHE, also testified at the hearing. Jirik's job duties included licensing and certifying hospitals. Jirik testified about licensing procedures and requirements in Kansas, and she explained that the Bartlesville Hospital imaging center in Independence would not need a license to operate because hospital licenses are not required for outpatient clinics. Thus, under Kansas law, the Bartlesville Hospital imaging center would not require a Kansas license, and instead it would operate under its Oklahoma hospital license.

After the evidentiary hearing was concluded, but before the district court ruled on the temporary restraining order, KDHE filed a motion to dismiss for lack of jurisdiction and failure to state a claim. Specifically, KDHE argued that Labette Health did not file the action under the Kansas Judicial Review Act, Labette Health lacked standing, and KDHE did not have the capacity to sue or be sued. KDHE also claimed that Labette Health failed to state a claim because KDHE was authorized to enter into interstate agreements. Labette Health filed a response, arguing that the Kansas Judicial Review Act was not applicable, Labette Health had standing, KDHE was without authority to enter into the MOU, and KDHE could sue and be sued.

On June, 27, 2016, the district court denied Labette Health's motion for a temporary restraining order. The court found that Labette Health had not demonstrated a substantial likelihood of being able to establish that it had standing.

On July 29, 2016, the district court ruled on KDHE's motion to dismiss without further hearing. The court first found that Labette Health failed to establish a cognizable injury because its alleged injuries were too abstract and hypothetical. The district court next found that Labette Health also failed to show a causal connection between "the business viability" of Labette Health's planned facility in Independence and the certification of Bartlesville Hospital's imaging center. Thus, the district court ultimately granted KDHE's motion to dismiss for lack of subject matter jurisdiction on the grounds that Labette Health did not have standing. Labette Health timely appealed.

ANALYSIS

*3 Labette Health filed suit against KDHE seeking both declaratory and injunctive relief. In Kansas, declaratory relief is only available if there is an actual controversy between the plaintiff and the adverse party. *In re Estate of Keller*, 273 Kan. 981, 984-85, 46 P.3d 1135 (2002). Similarly, "a court's jurisdiction to issue an injunction is dependent upon the existence of an actual case or controversy." *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 165, 210 P.3d 105 (2009). To issue a declaratory judgment or an injunction, Kansas courts require that (1) the parties have standing, (2) the issues are not moot, (3) the issues are ripe and not "nebulous and contingent," and (4) the issues do not present a political question. See *Shipe*, 289 Kan. at 165-66;

Baker v. City of Overland Park, No. 101,371, 2009 WL 3083843, at *3 (Kan. App. 2009) (unpublished opinion).

The district court here first refused to issue an injunction or declaratory judgment and later granted KDHE's motion to dismiss after concluding that Lafayette Health lacked standing. Whether standing exists is a question of law over which this court has unlimited review. *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 751, 189 P.3d 494 (2008).

“[S]tanding is ‘one of the most amorphous concepts in the entire domain of public law.’ [Citations omitted.]” *Shipe*, 289 Kan. at 166. As explained by our Supreme Court, “[s]tanding is a jurisdictional question whereby courts determine ‘whether the plaintiff has alleged such a personal stake in the outcome of a controversy as to warrant invocation of jurisdiction and to justify exercise of the court's remedial powers on his or her behalf.’” *Bremby*, 286 Kan. at 750-51.

Although the general rule is that standing rules are relaxed in declaratory judgment cases, there still must be an actual case or controversy. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897-98, 179 P.3d 366 (2008); see also *Baker*, 2009 WL 3083843, at *4 (“[W]hile a plaintiff seeking declaratory relief is not required to ‘have suffered the full harm expected,’ the requirement of standing still must be satisfied for a justiciable controversy to exist.”).

Under Kansas' traditional test for whether standing exists, the plaintiff must establish that he or she suffered a cognizable injury and that there is a causal connection between the injury and the defendant's conduct. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33 (2015). Kansas courts have on occasion cited to and applied the standing requirements utilized by federal courts. Specifically, the federal test for standing—which stems from the United States Constitution's “case or controversy” requirement in Article III—requires that (1) the plaintiff suffered an injury in fact or there is a concrete and particularized actual or imminent injury, (2) there is a causal connection between the injury and the complained-of conduct, and (3) the injury can likely be redressed by a favorable decision. *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 679 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 119 L.Ed. 2d 351 [1992]).

But our Supreme Court made clear in *Kansas Bldg. Industry Workers Comp. Fund* that Kansas courts still utilize the traditional two-part test:

“This court has occasionally cited to the federal constitutional standing requirements. [Citation omitted.] But we have not explicitly abandoned our traditional state test in favor of the federal model. Moreover, as opposed to the United States Constitution, our State Constitution contains no case or controversy provision. The Kansas Constitution grants ‘judicial power’ exclusively to the courts. [Citation omitted.] And Kansas Courts have repeatedly recognized that ‘judicial power’ is the “ ‘power to hear, consider and determine controversies between rival litigants.’” [Citations omitted.] Given the differences in the genesis of the two systems, we do not feel compelled to abandon our traditional two-part analysis as the definitive test for standing in our state courts.” 302 Kan. at 679-80.

*4 Thus, to succeed on its claim, Lafayette Health must show that it has suffered a cognizable injury and that there is a causal connection between its injury and KDHE's conduct.

The legal standard for ruling on a prediscovery motion to dismiss

On appeal, Lafayette Health first argues that the district court applied the incorrect legal standard when ruling on KDHE's motion to dismiss. The district court applied the preponderance of the evidence standard and concluded that Lafayette Health failed to prove by a preponderance of the evidence that it suffered a cognizable injury. Instead, Lafayette Health argues, because the district court was considering whether standing existed based solely on KDHE's motion to dismiss, and on which no hearing was held, the court was required to “accept as true the factual allegations” contained in Lafayette Health's pleadings and “draw reasonable inferences from it.”

KDHE disagrees, pointing to the fact that although the standing issue was considered at the motion to dismiss stage, the district court applied the correct legal standard because there was “a verified petition filed, substantial briefing submitted, and an evidentiary hearing ... that covered [the] standing issues held.” As this was not a “bare bones pre-discovery stage,” KDHE asserts that the district court correctly applied the correct legal standard.

Moreover, KDHE argues, even if the district court should have used Lafayette Health's “suggested review standard,”

Labette Health's claim of error is still unpersuasive because the district court did “provide[] [Labette Health] the fullest possible benefit of all favorable inferences.” Thus, according to KDHE, any alleged error in granting the motion to dismiss was harmless.

In *Families Against Corporate Takeover v. Mitchell*, 268 Kan. 803, 809, 1 P.3d 884 (2000), our Supreme Court has given ample warning of the dangers inherent in granting a motion to dismiss at an early stage of litigation:

“Under K.S.A. 1999 Supp. 60-208, pleadings are to be given a liberal construction. We note that at the time the K.S.A. 60-212(b)(6) motion to dismiss was granted there had been no discovery. The record suggests that no factual matters outside the pleadings were presented to or considered by the district court. We have previously set out the scope of review for a motion to dismiss. See *Bruggeman v. Schimke*, 239 Kan. 245, 247-48, 718 P.2d 635 (1986). The concept of notice pleading relies on its companion, discovery, to fill the gaps. [Citation omitted.] ... *Dismissal of a petition on a K.S.A. 60-212(b)(6) motion before utilization of discovery is seldom warranted.* [Citation omitted.] Following the teaching of *Bruggeman* we have a duty to determine if the pleaded facts and inferences state a claim on any possible theory. [Citation omitted.]” (Emphasis added.)

We are well aware that standing is not merely a pleading requirement. “‘Each element must be proved in the same way as any other matter and with the degree of evidence required at the successive stages of the litigation.’” *KNEA v. State*, 305 Kan. 739, 746, 387 P.3d 795 (2017). But this case came to us after the district court granted KDHE's motion to dismiss before discovery and *without a hearing on the motion*. The general rule is that “[w]hen a district court grants a motion to dismiss based on a lack of standing, the appellate court accepts the facts as alleged in the petition as true, and if those facts demonstrate that the appellants have standing to sue, the decision of the district court must be reversed.” *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 676.

*5 It is relatively unclear exactly what legal standard the district court applied in ruling on the motion to dismiss. In its memorandum decision, the court stated that Labette Health “must show by a preponderance of the evidence that it has standing when viewed in the light most favorable to the Plaintiff.” The court had previously stated that “[i]n a pre-discovery Motion to Dismiss based on claimed standing

deficits in a petition ... the Court must review the challenged petition and draw reasonable inferences from it,” and it was required to accept the facts alleged in Labette Health's petition as true.

However, at another point in its memorandum decision, the district court stated that Labette Health could not show a causal connection by a preponderance of the evidence. Then, at the end of its decision, the court ruled: “In summation, the Plaintiff has failed to demonstrate either a cognizable injury or a causal connection between any such injury and the Defendant's MOU when viewed in the light most favorable to the Plaintiff.” Thus, the district court—in the same decision—appeared to apply the standard advocated for by Labette Health, the preponderance of the evidence standard, and some hybrid of the two. KDHE says this confusion of standards is ultimately harmless error in the context of this case. We disagree.

We believe the correct standard which the district court should have applied is the one enunciated by our Supreme Court in *Bremby*, 286 Kan. at 751:

“Additionally, we must bear in mind that this case comes before us after the district court granted [a defendant's] motion to dismiss. The district court's ruling was made before commencement of discovery. Under these circumstances, we accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom. If those facts and inferences demonstrate that the appellants have standing to sue, the decision of the district court must be reversed. [Citation omitted.]”

In *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 259, 275 P.3d 869 (2012), the Kansas Supreme Court was tasked with deciding which legal standard to apply to a standing determination at the motion to dismiss stage after discovery but prior to an evidentiary hearing. The appellee, Tel-Instrument Electronic Corp., cited to cases from other jurisdictions and argued that the district court should have applied the preponderance of the evidence standard. The appellant, Aeroflex, asserted that it only needed to present a prima facie case and the district court should have considered the record in the light most favorable to it when ruling on the motion to dismiss.

The Kansas Supreme Court agreed with Aeroflex, noting that “[t]he various federal cases on which Aeroflex relie[d] represent ‘[t]he most common formulation found in the

[federal] judicial opinions,' which is that the plaintiff 'needs only make a prima facie showing when the district judge restricts her review of the [motion to dismiss] solely to affidavits and other written evidence.' " 294 Kan. at 266. The Kansas Supreme Court went on to explain that the most common approach in federal courts and other jurisdictions is that the preponderance of the evidence standard only applies if the district court has held an evidentiary hearing. 294 Kan. at 267.

"As one court stated, it is only when the court conducts an evidentiary hearing to determine disputed issues of fact and weighs credibility that the burden 'quite properly increases' to 'the same standard that would obtain if the matter were deferred to trial: the preponderance of the evidence.' [Citations omitted.] ...

*6

"... We have generally applied a preponderance of the evidence standard where the district court has the power to weigh and evaluate the evidence in the same manner as if it were adjudicating the case on the merits and making findings of fact based on a weighing of the credibility of the evidence....

....

"Hence, we reject TIC's arguments and conclude that, even though there was discovery, when a defendant's ... motion to dismiss for lack of personal jurisdiction is decided before trial on the basis of the pleadings, affidavits, and other written materials and without an evidentiary hearing, any factual disputes must be resolved in the plaintiff's favor and the plaintiff need only make a prima facie showing of jurisdiction." 294 Kan. at 267-70.

Thus, it appears that the determining factor for the appropriate legal standard is whether the district court held an evidentiary hearing in connection with the motion to dismiss. If it did not, then the plaintiff only needs to make a prima facie showing of standing. If, however, there was an evidentiary hearing on the motion (presumably with an opportunity first for at least limited discovery), then the burden increases to the preponderance of the evidence.

We acknowledge that the district court did hold an evidentiary hearing on Labette Health's request for a temporary restraining order, which is also considered a temporary

injunction. But the legal criteria a district court must employ at such a hearing are far different from those to be considered in ruling on a prediscovery motion to dismiss.

The prerequisites for obtaining a temporary injunction are: a substantial likelihood that the party seeking the temporary injunction will eventually prevail on the merits; a showing that the movant will suffer irreparable injury unless the order issues; proof that the threatened injury to movant outweighs whatever damage a proposed temporary injunction may cause the opposing party; and a showing that the injunction, if issued, will not be adverse to the public interest. *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 22 Kan. App. 2d 537, Syl. ¶ 2, 921 P.2d 821 (1996).

By ruling serially on the temporary injunction evidence and then denying the plaintiff's motion to dismiss on the basis of pleadings alone, without offering the parties a hearing, it appears likely that the district court effectively bootstrapped the evidence from the first hearing into the second without notifying the parties of its intent to do so.

Although it looks as though the district court applied the incorrect legal standard here, KDHE argues that this error is not fatal because any error on the part of the district court was harmless. We need not consider the harmless error issue, however, because we must review the standing issue on our own, anyway: "[T]he existence of standing is a question of law over which [an appellate] court's scope of review is unlimited." *Bremby*, 286 Kan. at 751. Because the district court decided the issue without an evidentiary hearing on the motion to dismiss, there are no factual findings of the district court to which we would owe deference. We proceed, then, with our independent review of the standing issue.

Cognizable injury

*7 The district court addressed both the cognizable injury element of standing and the requirement that issues must be ripe in order to obtain declaratory or injunctive relief at the same time in its memorandum decision. The court then dismissed the case because of Labette Health's lack of standing and the "unripe nature of [its] claimed injuries."

On appeal, the parties are at odds as to whether Labette Health has standing. While similar in nature, the ripeness requirement is distinct from the cognizable injury element of a standing inquiry. See *Shipe*, 289 Kan. at 161 (holding that while appellants had standing, the issue was nonetheless not ripe for adjudication). Therefore, we will only consider

whether Labette Health has standing, specifically addressing whether Labette Health has established a cognizable injury. Moreover, it seems as though in using the term “ripe,” the district court was actually asserting that Labette Health cannot show that it suffered a cognizable injury because it is only claiming a hypothetical future injury.

Having determined the correct legal standard, we now turn to whether Labette Health established that it suffered a cognizable injury. Again, because the existence of standing is a question of law, this court exercises unlimited review. *Bremby*, 286 Kan. at 751.

Labette Health argues that it has established a cognizable injury—namely, “threatened and actual financial harm.” Specifically, Labette Health claims that KDHE has conferred a financial benefit on Bartlesville Hospital that will cause “irreparable financial harm” to Labette Health because: (1) Bartlesville Hospital will be able to charge substantially higher rates for services than those charged at Labette's imaging center; (2) the existence of Bartlesville Hospital will “erode[] its patient base in Kansas by transferring limited financial resources” to Oklahoma; and (3) the financial harm to Labette Health will “threaten[] its ability to provide emergency services” in the areas it serves.

Although KDHE does not directly address Labette Health's arguments, it does claim that because Labette Health has not started operating its facility in Independence, “any financial injury or threat to the viability of [the] future medical facility is speculative.”

In passing, we note that in the district court, Labette Health also argued that Bartlesville Hospital would receive an unfair advantage because it will be able to circumvent Kansas licensing requirements, while Labette Health would remain subject to them. Labette Health seems to have abandoned this argument on appeal. As noted in their brief: “Labette Health's alleged injuries, therefore, do not depend on whether any Kansas statute requires the Bartlesville Hospital to obtain a Kansas license.”

“To establish a cognizable injury, a party must establish a personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct. [Citation omitted.]” *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360 (2013). The Kansas Supreme Court has referred to the cognizable injury requirement as “an injury in fact,” and has on occasion cited

to the federal standing requirement that an injury must be concrete, particularized, and actual or imminent. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014).

*8 Mere allegations of possible future injury do not meet the requirements of standing and instead, any threatened injury must be certainly impending. *Sierra Club*, 298 Kan. at 33 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L.Ed. 2d 135 [1990]); see also *Baker*, 2009 WL 3083843, at *5 (“[A]n action seeking [declaratory relief] must, at the very least, establish that the ordinance ‘will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in the near future.’”).

Labette Health first claims that KDHE is conferring a financial advantage on Bartlesville Hospital because it is permitting Bartlesville Hospital to operate in Independence, Kansas, as a provider-based outpatient clinic, and charge higher rates than those charged at Labette Health's clinics. It is unclear exactly how this constitutes a cognizable injury because the rates charged at the Bartlesville Hospital have no effect on Labette Health. Labette Health has no personal interest in the rates charged by Bartlesville Hospital, and Labette Health has provided no explanation of how it will suffer an actual injury if Bartlesville Hospital is permitted to charge more for services than it can.

Labette Health next claims that allowing Bartlesville Hospital to operate in Independence will cause financial harm to Labette Health by generally eroding Labette Health's patient base in the Independence area. As we have already noted, Labette Health presented evidence that Independence is already part of its primary service area, with 14% to 15% of Labette Health's inpatient visits coming from Independence residents and with 800 patients per month being treated at Labette Health's clinic in Independence. Labette Health also showed that the population base in the area is declining. In the face of this declining population based, Labette Health has invested substantial amounts toward its Independence expansion. It is in this context that Labette Health's claims must be evaluated on a motion to dismiss.

Labette Health makes at least two specific claims in support of its claim that it will lose business. First, it argues that Kansas patients who use the Bartlesville Hospital imaging center will be referred to the hospital's main facility in Oklahoma for follow-up treatment and additional medical services. In

support, Labette Health cites to 42 C.F.R. 413.65(d)(2)(vi) (2016), which governs provider-based facilities and states that “patients treated at the facility or organization who require further care [shall] have full access to all services of the main provider and are referred *where appropriate* to the corresponding ... department or service of the main provider.” (Emphasis added.) Second, Labette Health argues that if Bartlesville Hospital opens an imaging center, it will erode its patient base because patients will seek treatment at the outpatient clinic operated by Bartlesville Hospital. This, Labette Health claims, will “transfer limited financial resources out of its primary service area in Kansas to Oklahoma.” As Williams testified at the evidentiary hearing:

“[Bartlesville Hospital is] directly in our primary service area. We have a clinic there already today. We're planning to expand those services to meet the needs of the community. The population is decreasing at a rate of approximately half a percent. So there is going to be fewer patients, it's either the 74th or 75th poorest county in the State of Kansas, there's limited resources. So if we allow —if we allow the things that we do that have some profit margin in them to be exported to another state where then they can build buildings and hospitals in Tulsa and other places, we're not reinvesting in our communities. So it hurts Labette Health specifically, because it's our primary service area.”

*9 In addition, Labette Health alleged in its verified petition that allowing the Bartlesville Hospital to operate in Independence would cause financial harm to Labette Health.

While Labette Health has not completed its planned emergency department and rural health clinic in Independence, it already operates a clinic there and has invested more than half a million dollars toward its Independence expansion plan. In addition, Labette Health already has an imaging center 10 miles east of Independence. So while Labette Health is still only claiming a future injury, it is based on facts and evidence, as well as an expansion plan that is already underway.

We recognize that a threatened or future injury “must be ‘certainly impending’ and not merely speculative. [Citation omitted.] A claimed injury that is contingent upon speculation or conjecture is beyond the bounds of a ... court's jurisdiction.”

Tandy v. City of Wichita, 380 F.3d 1277, 1283-84 (10th Cir. 2004). Labette's claim may border on the speculative, but the case is before us on a motion to dismiss before

discovery. At this stage of the litigation, we cannot say that liberal construction of the plaintiff's amended petition definitely rules out any possibility of proving Labette Health's legal claim through discovery. We are reminded again of the compelling instructions emanating from *Bruggeman v. Schimke*, 239 Kan. 245, 247, 718 P.2d 635 (1986), over 30 years ago:

“ ‘The question for determination is whether in the light most favorable to plaintiff and *with every doubt resolved in plaintiff's favor*, the petition states any valid claim for relief. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim.’ [Citation omitted.]

“ ‘In considering a motion to dismiss for failure of the petition to state a claim for relief, a court must accept the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom.’ ” (Emphasis added.)

The threat of future injury because of the possibility that Labette Health's patient base will erode if Bartlesville Hospital opens an imaging center in Independence is an issue which can be tested out in the real world through discovery. Labette Health's claims are based upon the undisputed facts that Bartlesville Hospital will be opening an imaging center in Independence, as made possible by KDHE's agreement with the State of Oklahoma. We believe Labette Health's contentions that their patient base will erode, that Bartlesville Hospital will operate in their primary service area, and that the population is decreasing have sufficient gravitas to take them outside the realm of pure speculation. This is particularly true given Labette's commitment to a major construction project in Independence. Later discovery may betray Labette Health's claims, but we conclude Labette Health should be able to pursue them at this time.

Finally, Labette Health claims cognizable injury because it may become financially unable to provide emergency services at some locations. On this point, Labette Health is attempting to assert the rights of those who may be denied emergency care at some point in the future because of Labette Health's speculative future financial injury.

*10 It is a well-recognized rule that the “plaintiff generally must assert his [or her] own legal rights and interests, and cannot rest his [or her] claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422 U.S. 490,

499, 95 S. Ct. 2197, 45 L.Ed. 2d 343 (1975). Furthermore, an injury must be more than a generalized grievance common to all members of the public. *Gannon*, 298 Kan. at 1123.

Courts permit a plaintiff to assert the rights of others if it can make two additional showings: First, that the party asserting the right has a close relationship with the person who possesses that right; and second, that there is some hindrance to the possessor's ability to protect his own interests. *Kowalksi v. Tesmer*, 543 U.S. 125, 130, 125 S. Ct. 564, 160 L.Ed. 2d 519 (2004). Labette Health makes neither of these showings, so we have not based our ruling in Labette Health's favor on this argument.

Causal connection between KDHE's actions and Labette Health's injuries

Finally, we must consider whether Labette Health has established a causal connection between KDHE's actions and its claimed injuries. Although Kansas courts use the traditional Kansas two-part test for standing, our Supreme Court explained that in determining whether there is a causal connection between the defendant's actions and the plaintiff's injuries, it "borrowed" the federal definition of causal connection. *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 681, 359 P.3d 33 (2015).

To establish a causal connection, " 'the injury must be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' " 302 Kan. at 681 (quoting *Lujan*, 504 U.S. at 560).

This is not a high bar:

" 'Such a nexus is most easily shown if there is a direct relationship between the plaintiff and the defendant with respect to the conduct at issue. However, while the "indirectness" of an injury " 'may make it substantially more difficult' " to show the "fairly traceable" element of ... standing, ... indirectness is "not necessarily fatal to standing," ... because the fairly traceable standard is lower than that of proximate cause.' [Citations omitted.]" *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 681-82.

Put otherwise, standing "does not require proximate causation, it suffices that the injury flow indirectly from the challenged conduct." 302 Kan. at 682 (citing *Focus on the*

Family v. Pinellas Suncoast Transit, 344 F.3d 1263, 1273-74 [11th Cir. 2003]).

Labette Health claims that the district court's conclusion that it could not establish a causal connection was based on an erroneous interpretation of Kansas law; Labette Health is correct. The district court stated that "when 'the defendant's actions are the very last step in the chain of causation,' the injury cannot be fairly traceable to the defendant," citing *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 682. This statement is incorrect.

In *Kansas Bldg. Industry Workers Comp. Fund*, the Kansas Supreme Court stated: "It is wrong to equate injury 'fairly traceable' ' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." 302 Kan. at 682 (quoting *Bennett v. Spear*, 520 U.S. 154, 168-69, 117 S. Ct. 1154, 137 L.Ed. 2d 281 [1997]). Contrary to the district court's interpretation, this means that even if the defendant's actions are not the "very last step in the chain of causation," the plaintiff's injury nonetheless can still be fairly traceable to the defendant's conduct.

*11 Here, although KDHE's actions would not be the very last step in the chain of causation, Labette Health's alleged future injuries are fairly traceable to KDHE's conduct. Labette Health claimed that it would suffer irreparable financial harm if Bartlesville Hospital were to open an outpatient facility in Independence. According to Labette Health's allegations, Bartlesville Hospital could not operate as a provider-based outpatient facility of an Oklahoma hospital in Kansas without the agreement of KDHE to certify compliance in Kansas with various federal regulations and provide that information to Oklahoma authorities. The Oklahoma authorities would then report the overall compliance of the Bartlesville Hospital, including its Kansas operation, to federal authorities. Thus, Labette Health's claimed injuries are fairly traceable to KDHE's execution of the MOU with Bartlesville Hospital because without the MOU under which the KDHE provides these services, there would be no threat of financial harm to Labette Health. For this reason, the district court incorrectly determined that Labette Health could not satisfy the causal connection element of the standing requirement.

In summary, we find that Labette Health has, through its pleadings, met the threshold burden of demonstrating standing under the holdings of *Bremby*, *Families Against Corporate Takeover*, *Bruggeman*, and similar cases so as to survive a motion to dismiss. We conclude that Labette

Health's pleadings sufficiently support the inference that it may suffer cognizable injuries in the future and that there is a causal connection between the actions of KDHE and those potential injuries. For these reasons, the district court's dismissal of Labette Health's claim for lack of standing must be reversed.

Reversed and remanded with directions to vacate the order dismissing Labette Health's claim and for proceedings consistent with this order.

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429 P.3d 627 (Table)

Unpublished Disposition

This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION

Court of Appeals of Kansas.

Douglas PARISI, Appellant/Cross-appellee,

v.

UNIFIED GOVERNMENT OF WYANDOTTE COUNTY, Kansas, Kansas City, Kansas Police

Department, Rodney Smith, Terry Ziegler, Kevin Steele, Michael Vivian, Pamela Waldeck, and Kelly Herron, Appellees/Cross-appellants.

No. 118,284

|

Opinion filed November 2, 2018.

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Review Denied June 24, 2019

Appeal from Wyandotte District Court; ROBERT P. BURNS, Judge.

Attorneys and Law Firms

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Before Hill, P.J., Pierron and Malone, JJ.

MEMORANDUM OPINION

Per Curiam:

*1 Because the law requires notice to be given to a unit of government *and its employees* before a lawsuit may be filed seeking redress under the Kansas Tort Claims Act, we agree with the district court and affirm its dismissal of Douglas

Parisi's lawsuit against the Unified Government of Wyandotte County/Kansas City, Kansas, and the Kansas City, Kansas Police Department (collectively the Unified Government) because he failed to give it notice. But we hold the court went too far when it dismissed the claims against the employees. If the employees were acting outside the course and scope of their employment or acted wantonly and maliciously against Parisi, the Unified Government would not be liable under the Tort Claims Act and no prior notice to the employees would be legally required. At this early stage of the litigation, we cannot say if this is true. Therefore, we reverse that ruling and remand for further proceedings.

Parisi loses his job as a police officer.

Because of the procedural posture of this case that the court ruled it had no subject matter jurisdiction, we deem the following allegations made in Parisi's original petition to be true.

Parisi began his career in 1994 as a police officer in Wyandotte County. While he was employed, he maintained his primary residence in Wyandotte County. He received commendations and promotions for his work and he was never the subject of an internal affairs investigation. But that changed in 2014.

In August that year, Deputy Police Chief Kevin Steele asked Parisi to investigate a claim that the Humane Society of Wyandotte County owed the County a sum of money. Parisi did so. Through his investigation, he discovered an apparent problem with the Humane Society's Ray of Hope Program—a program created to increase adoptions of animals and decrease euthanasia rates.

Parisi discovered that Karen Sands was the director of the Ray of Hope Program from 2009 to 2012. Rodney Smith was the animal control commander from 2009 to 2011. Then Smith, in 2011 Smith, in 2011, became the head of the internal affairs department of the police. Smith and Sands informed the County that the Humane Society had a one percent euthanasia rate that was attributable to the Ray of Hope Program. Smith and Sands had also requested that the County increase the licensing fee to increase the funding for the Ray of Hope Program.

According to Parisi, Smith and Sands failed to disclose important information to the County. First, Smith and Sands were engaged in a romantic affair. They would meet in Smith's office and used a County vehicle to engage in their

relationship. Also, Smith and Sands did not disclose that the Humane Society had been the subject of an investigation by the Kansas Department of Agriculture. The Department's investigation was linked to an investigation by the Missouri Department of Agriculture. The Missouri Department of Agriculture investigated Last Chance Black Dog Rescue and discovered that the rescue group had received dogs that were connected with the Ray of Hope Program. The Kansas Department of Agriculture's investigation showed that the Humane Society was improperly transporting dogs across state lines.

*2 Additionally, the records of dogs entering and leaving the Humane Society's care were not accurate. Intake dates for certain dogs had been altered in a way to bypass a mandatory retention period for the animals. Finally, the Humane Society did not euthanize dogs that had been diagnosed with distemper. Instead, those dogs were transferred to different facilities. Ultimately, Sands was dismissed from her position based upon the Kansas Department of Agriculture's investigation.

Then, in September, Parisi disclosed his findings to Police Chief James Brown. Parisi raised a concern about Sands' and Smith's use of funding. At some point, Smith learned about Parisi's investigation and report. He opened an internal affairs investigation against Parisi that related to Parisi's permanent residence. Parisi maintained a permanent residence in Wyandotte County, but had a second property in Overland Park, Kansas. When he purchased the second property, he informed other members of the police and they raised no concerns about his residency.

The internal affairs investigation was thorough. From October 2014 through January 2015 the police sought information about Parisi's residence. The department used stakeouts, watched Parisi's movements, conducted trash pulls, examined the contents of his trash, and conducted covert surveillance. The police received assistance from the Federal Drug Enforcement Agency to conduct surveillance of Parisi. Further, the police used the National Crime Information Center database to look up information relating to a license plate they had observed while surveilling Parisi's ex-wife's home. This information is supposed to be used by the police only during a criminal investigation. But the police officers denied that there was a criminal investigation of Parisi.

Based upon the investigation, Smith concluded that Parisi was not actively residing in Wyandotte County—a violation of

police regulations. Various parties now named as defendants wrote memoranda that detailed the facts that Smith used for his conclusion. Ultimately, in February 2015, Police Chief Terry Ziegler sent a termination letter to Parisi, stating that he had committed major violations.

Parisi sought reinstatement as a police officer by filing a grievance statement in which he denied any wrongdoing and requested reinstatement. His grievance was denied. Then, Parisi sent a letter to County Administrator Doug Bach, in which Parisi requested reinstatement. Finally, in July 2015, the County informed Parisi that his termination was permanent.

Parisi takes legal action.

Parisi, in February 2017, sued the Unified Government of Wyandotte County and Kansas City, its police department, and various members of the police force. He claimed:

- The Unified Government wrongfully terminated his employment;
- various police officers employed by the County abused their power;
- the defendants deprived him of a liberty interest in violation of due process; and
- the police officers were engaged in a civil conspiracy against him.

Based upon the due process claim, the defendants removed the suit to federal court. Parisi amended his complaint to allege a due process violation under the Kansas Constitution only. The parties subsequently agreed to remand the suit to Wyandotte County District Court. The defendants sought a dismissal of the suit.

In ruling on the motion to dismiss, the court considered an affidavit submitted by the defendants. It was an affidavit from Bridgette Cobbins—the Clerk of the Unified Government. Cobbins is the custodian of all official documents for the Unified Government and all documents filed with the Unified Government's Clerk's Office. In this affidavit, Cobbins stated that she had reviewed the notices of claims that had been filed between January 1, 2015, and April 5, 2017, and found no notice of any claim filed by Parisi.

*3 Parisi argued that considering the affidavit was erroneous because in a motion to dismiss the district court should look

to the facts contained within the complaint and accept them as true to determine if there is a valid claim. Parisi argued that his claim that all conditions precedent to filing the suit had been completed was sufficient to avoid dismissal. In Parisi's view, considering the affidavit would turn the motion to dismiss into a motion for summary judgment. Further, he asked the court to delay ruling on the motion until after discovery had been completed. Additionally, Parisi claimed that he alleged the firing was on July 8, 2015, and had sent a notice of claim to the County on April 11, 2017. Parisi requested that the district court stay its ruling on the motion to dismiss to allow him to file an amended complaint following a denial of his claim by the County.

In response to Parisi's reply, the defendants submitted a copy of Parisi's letter to County Administrator Bach.

The court dismissed Parisi's suit because it lacked subject matter jurisdiction. The court found that Parisi had not complied with the notice provision of K.S.A. 12-105b(d), and this failure deprived the court of subject matter jurisdiction.

In this appeal, Parisi contends the court erred when it ruled that it lacked subject matter jurisdiction. The court should have granted his request for discovery prior to dismissing the case. Finally, the court should have granted his request for a stay of the dismissal order so he could file an amended petition which would be within the court's jurisdiction. We will address the issues in that order.

We find no error in dismissing some of Parisi's claims.

We must first look at the procedure followed by the district court when it examined this issue. Parisi argues that the district court was limited to considering the allegations within the complaint. The defendants claim it is proper for a district court to consider information outside of the complaint when there is a factual challenge to the existence of subject matter jurisdiction for a claim.

Generally, the cases hold that when the district court determines a prediscovery motion to dismiss, it must look at the facts contained within the complaint, accept those facts as true, and determine if the plaintiff has a valid claim. See *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 676, 359 P.3d 33 (2015).

While Kansas courts have not addressed this exact question, our Supreme Court has addressed a substantially similar question concerning the consideration of information outside the pleadings when addressing a motion to dismiss for lack of *personal jurisdiction*. See *Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 263-65, 275 P.3d 869 (2012). In *Aeroflex*, an out-of-state company challenged whether a Kansas district court had personal jurisdiction to hear a claim. The district court concluded that it did not have jurisdiction over the out-of-state company. In reaching this conclusion, the district court relied upon documents and affidavits outside of the facts contained within the complaint. Relying upon federal caselaw, our Supreme Court determined that it is permissible for a district court to consider facts outside of the pleadings when determining if personal jurisdiction exists. Our Supreme Court found the following principle applies to Kansas cases: “Before trial, the district court may determine the outcome based on the pleadings; ‘on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.’” [Citations omitted.] 294 Kan. at 264-65.

That analysis is helpful in determining whether the district court erred here when it considered an affidavit outside of the pleadings to determine if subject matter jurisdiction existed. Like a determination of personal jurisdiction under K.S.A. 2017 Supp. 60-212(b)(2), the statutory authority for dismissing for lack of subject matter jurisdiction does not indicate whether the decision must be limited to the pleadings. See *Aeroflex*, 294 Kan. at 264. Under K.S.A. 2017 Supp. 60-212(d), when the district court determines a motion under K.S.A. 2017 Supp. 60-212(b)(6) or K.S.A. 2017 Supp. 60-212(c) and considers information outside of the pleadings, the motion is transformed into a motion for summary judgment.

*4 But, as the *Aeroflex* ruling indicates, this does not hold true when the motion is based upon the district court's jurisdiction. 294 Kan. at 264. Because the issue is not absolutely clear from our statutes, we turn to federal decisions concerning Rule 12 of the Federal Rules of Civil Procedure for guidance. See *Back-Wenzel v. Williams*, 279 Kan. 346, 349, 109 P.3d 1194 (2005).

Basically, the different federal circuit courts vary in their approach to the determination of a motion for a lack of subject matter jurisdiction under Rule 12(b)(1). While there is some slight variance, the circuit courts do agree that a district

court has discretion to use facts outside of the pleadings to determine the existence of subject matter jurisdiction. The majority of federal courts make a distinction between a facial and a factual challenge to subject matter jurisdiction when determining a motion to dismiss for lack of subject matter jurisdiction. E.g., *GBForefront L.P. v Forefront Management Group, Inc.*, 888 F.3d 29, 35 (3d Cir. 2018); *Feldman v. Federal Deposit Insurance Corporation*, 879 F.3d 347, 351 (D.C. Cir. 2018); *Katz v. Donna Karan Company, L.L.C.*, 872 F.3d 114, 119 (2d Cir. 2017); *Laurens v. Volvo Cars of North America, LLC*, 868 F.3d 622, 624-25 (7th Cir. 2017); *Hartig Drug Company Inc. v. Sejun Pharmaceutical Co. Ltd.*, 836 F.3d 261, 268-69 (3d Cir. 2016); *Douglas v. United States*, 814 F.3d 1268, 1274-75 (11th Cir. 2016); *Adkisson v. Jacobs Engineering Group, Inc.*, 790 F.3d 641, 647 (6th Cir. 2015); *Paper, Allied-Industrial, Chemical and Energy Workers Intern. Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292-93 (10th Cir. 2005).

While the remaining circuit courts may not make the same distinction between a factual and facial challenge, they do permit the district court to look at facts outside of the pleadings when determining motions to dismiss for lack of subject matter jurisdiction. E.g., *Schaeffler v. United States*, 889 F.3d 238, 242 (5th Cir. 2018); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 654 (4th Cir. 2018) (Floyd, J., dissenting); *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 163 (1st Cir. 2007);

Only when a party makes a facial challenge to subject matter jurisdiction are they challenging whether the complaint itself establishes subject matter jurisdiction. In these instances, the district court is limited to the pleadings and considers whether the well-pled facts establish subject matter jurisdiction. E.g., *Continental Carbon Co.*, 428 F.3d at 1292. When a party raises a factual challenge to subject matter jurisdiction, that party is asserting that the facts themselves do not establish the existence of subject matter jurisdiction. In a factual challenge, the district court is permitted to make a factual determination about the existence of subject matter jurisdiction. E.g., *Forefront Management Group*, 888 F.3d at 35. In making that determination, the district courts can look to matters outside of the complaint itself. *Continental Carbon Co.*, 428 F.3d at 1292; see also *Schaeffler*, 889 F.3d at 242 (holding the district court may decide a question of subject matter

jurisdiction based upon the complaint alone, the complaint supported by uncontested facts, or the complaint supported by disputed but resolved facts). The district courts are afforded wide discretion in determining what evidence to consider and the procedure to present that evidence. The district court may allow documentary evidence, allow limited discovery on the jurisdictional facts at issue, or hold an evidentiary hearing. See *Davis v. Anthony*, 886 F.3d 674, 677 (8th Cir. 2018); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

*5 We find those cases persuasive. Here, the defendants raised a factual challenge to subject matter jurisdiction. *K.S.A. 2017 Supp. 12-105b(d)* requires a claimant to provide notice to a municipality when the claim could affect them under the Kansas Tort Claims Act, *K.S.A. 75-6101 et seq.* *K.S.A. 2017 Supp. 12-105b(d)* provides that no claim may be brought without first providing notice to the municipality. This notice gives the municipality an opportunity to resolve the dispute without litigation. See *Continental Western Ins. Co. v. Shultz*, 297 Kan. 769, 778, 304 P.3d 1239 (2013).

Noncompliance with the statute means subject matter jurisdiction does not exist over the claim, because compliance is a prerequisite to filing a claim. *Sleeth v. Sedan City Hospital*, 298 Kan. 853, 854, 317 P.3d 782 (2014). Through the Cobbins affidavit, the defendants challenged whether this notice was actually provided. Thus, this is a factual challenge to whether there is subject matter jurisdiction.

Based upon this persuasive federal authority and our Supreme Court's holding in *Aeroflex*, we hold the district court is permitted to consider facts outside of the pleadings in making a determination of subject matter jurisdiction when there is a factual challenge to subject matter jurisdiction. Parisi is incorrect when he asserts that the consideration of additional evidence converts the motion to dismiss to a motion for summary judgment. See *Holt*, 46 F.3d at 1003. Under our statutory scheme, a motion to dismiss is converted to a motion for summary judgment when information outside of the pleadings is considered in deciding a motion to dismiss based upon *K.S.A. 2017 Supp. 60-212(b)(6)* or *K.S.A. 2017 Supp. 60-212(c)*. See *K.S.A. 2017 Supp. 60-212(d)*. When there is a factual challenge regarding jurisdiction, the motion to dismiss is not usually converted to a motion for summary

judgment. The district court should have wide discretion to consider affidavits and other documentary evidence to determine the factual issue. E.g., *Davis*, 886 F.3d at 677; see *Aeroflex*, 294 Kan. at 265.

Because we are adopting the same principles used in *Aeroflex*, it is reasonable for us to adopt the same procedures used concerning the burden of persuasion and the degree of proof necessary. Because Parisi's petition was dismissed based upon the pleadings and an affidavit, Parisi had a burden to present a prima facie showing of subject matter jurisdiction with any factual discrepancies resolved in his favor. See *Aeroflex*, 294 Kan. at 268-70.

A brief review of the Kansas Tort Claims Act is helpful at this point. Under the Act, a person may bring an action against a municipality or governmental body for the torts of its employees when those employees are working in the course and scope of their employment. The governmental body is liable for those torts for which the employees would be personally liable. K.S.A. 2017 Supp. 75-6103(a).

Obviously, K.S.A. 2017 Supp. 12-105b(d) limits the district court's subject matter jurisdiction in cases involving the Kansas Tort Claims Act: "Any person having a claim against a municipality or against an employee of a municipality which could give rise to an action brought under the Kansas tort claims act shall file a written notice as provided in this subsection before commencing such action." Further, after notice has been filed, the claimant cannot commence an action until the municipality has denied the claim or has been deemed to have denied the claim. K.S.A. 12-105b(d). In *Sleeth*, our Supreme Court stated that the filing of notice and a subsequent denial of the claim by the municipality is necessary for the district court to gain subject matter jurisdiction over the claim. 298 Kan. at 854, 870-71.

*6 Here, the defendants presented the Cobbins affidavit that stated the governing body did not receive the required notice. Parisi bears the burden of presenting a prima facie case that there is subject matter jurisdiction. This could have been accomplished through an affidavit or other documentary evidence. Any discrepancy between the defendants' documentary evidence and Parisi's documentary

evidence must be resolved in Parisi's favor. See *Aeroflex*, 294 Kan. at 270.

Parisi came forward with no evidence. There is no affidavit or document in the record that shows Parisi substantially complied with the provisions of K.S.A. 2017 Supp. 12-105b(d). In arguments on the defendants' motion to dismiss, Parisi argued that the grievance procedure, which included a letter to County Administrator Bach and a grievance statement from Parisi complied with the notice requirement. We have access to the letter from Parisi to County Administrator Bach; however, Parisi did not present the grievance statement to the district court, and it is not the record on appeal.

The required content of the notice is set out in K.S.A. 2017 Supp. 12-105b(d):

"The notice shall be filed with the clerk or governing body of the municipality and shall contain the following: (1) The name and address of the claimant and the name and address of the claimant's attorney, if any; (2) a concise statement of the factual basis of the claim, including the date, time, place and circumstances of the act, omission or event complained of; (3) the name and address of any public officer or employee involved, if known; (4) a concise statement of the nature and the extent of the injury claimed to have been suffered; and (5) a statement of the amount of monetary damages that is being requested. In the filing of a notice of claim, substantial compliance with the provisions and requirements of this subsection shall constitute valid filing of a claim."

The purpose of the provision is to provide the municipality the opportunity to resolve valid claims without litigation. *Continental Western*, 297 Kan. at 778. Strict compliance with the provisions is not required; however, the party must substantially comply with the provisions. Substantial compliance means "compliance in respect to the essential matters necessary to assure every reasonable objective of the statute. [Citations omitted.]" *Sleeth*, 298 Kan. at 865.

In enacting K.S.A. 12-105b(d) the Legislature had three primary objectives; (1) advise the municipality of the time and place of the injury; (2) allow the municipality to ascertain the character and extent of the injury; and (3) allow for the early investigation and resolution of claims. *Continental Western*, 297 Kan. at 778. Our review of whether the

documents in the record constitute substantial compliance is a question of law subject to de novo review. ¶ *Sleeth*, 298 Kan. at 863.

From the evidence within the record, we cannot conclude that Parisi substantially complied with the notice requirement. We do not have access to the grievance statement to determine whether it could be construed to satisfy the substantial compliance requirement. The only evidence we have that could potentially be construed as substantial compliance is the letter to County Administrator Bach.

Viewing that letter in the light most favorable to Parisi, it fails to establish substantial compliance with the notice requirement. First, the notice must be served on either the clerk or governing body of the municipality. Parisi's letter was sent to a County Administrator. Parisi does not present any document or affidavit that Administrator Bach is either a clerk or part of the governing body of the municipality. Parisi claims that the court in *Sleeth* held that it was permissible to serve notice upon a hospital administrator to invoke subject matter jurisdiction. *Sleeth* did not directly answer this question; rather, the court assumed for the sake of the analysis that notice to a hospital administrator met the requirement. ¶ 298 Kan. at 867.

*7 Second, the content of the letter does not substantially comply with the notice requirements. Under *Sleeth*, a notice must have a claim for monetary damages to substantially comply with the notice provision of ¶ K.S.A. 12-105b(d). ¶ 298 Kan. at 866. Here, the letter provides some of the information required by the notice—i.e., the name and address of the plaintiff and some details about the event. However, the letter does not make any claim for monetary damages. Without such a claim, the letter does not substantially comply with the notice requirement of the statute. From the plain language of the letter, its purpose was to advance the grievance procedure with the goal of having a review board “reconsider the termination and reinstate Mr. Parisi.” A letter seeking reinstatement is not the same as a notice of a claim for monetary damages. In the light most favorable to Parisi, this letter does not establish that he substantially complied with the notice provisions of ¶ K.S.A. 2017 Supp. 12-105b(d).

Because the defendants presented a valid challenge to the district court's subject matter jurisdiction, Parisi is required

to come forward with some type of documentary or affidavit evidence that would support a prima facie showing that subject matter jurisdiction existed. Parisi did not come forward with the requisite evidence to overcome this minimal burden.

Finally, we are unpersuaded by Parisi's argument that the Cobbins affidavit only shows the clerk did not receive notice but it does not show that he did not provide notice to the governing body. First, the affidavit states that the clerk was the custodian for all documents of the Unified Government in addition to documents filed with the clerk's office. Thus, her statement indicates that neither the clerk nor the governing body received notice of Parisi's claim. Second, this is an attempt to shift the burden of persuasion away from himself. Once there is a factual challenge to subject matter jurisdiction, the burden of persuasion is placed upon the plaintiff to establish a prima facie showing of subject matter jurisdiction. See ¶ *Aeroflex*, 294 Kan. at 274. Parisi needed to present some evidence to controvert the defendants' claim that subject matter jurisdiction did not exist, and he failed to do so.

At least for the claims against the Unified Government, the district court did not err in dismissing the case for a lack of subject matter jurisdiction. The Cobbins affidavit tends to show that Parisi did not substantially comply with the notice provision of ¶ K.S.A. 2017 Supp. 12-105b(d). But, having said that, there are additional considerations when we examine the question about the individuals.

The Tort Claims Act now requires prior notice claims against public employees, as well.

In *Whaley v. Sharp*, 301 Kan. 192, 343 P.3d 63 (2014), our Supreme Court interpreted ¶ K.S.A. 2013 Supp. 12-105b(d) prior to the 2015 amendments to the Act. Prior to the amendments, the statute read: “Any person having a claim against a municipality which could give rise to an action brought under the Kansas tort claims act shall file a written notice as provided in this subsection before commencing such action.” ¶ K.S.A. 2013 Supp. 12-105b(d). The Supreme Court interpreted this language to unambiguously apply to only lawsuits against municipalities and not suits against government employees. 301 Kan. at 201-02. Failing to comply with the statute did not deprive the district court of jurisdiction over a lawsuit against a municipal employee for personal liability.

The Legislature reacted to *Whaley* by enacting the 2015 amendments. The Act now requires notice for any claim “against an employee of a municipality which could give rise to an action brought under the Kansas tort claims act.” L. 2015, ch. 28, § 2. By adding this language, the Legislature required notice when the municipality could be vicariously liable for the actions of its employees due to the Kansas Tort Claims Act.

*8 We hold that Parisi is incorrect in his assertion that the notice requirement only applies if the action is actually brought under the Kansas Tort Claims Act. In other words, notice is clearly required if the claim could give rise to an action under the Kansas Tort Claims Act. ¶ K.S.A. 2017 Supp. 12-105b(d). Essentially, notice is required for all instances in which liability could attach to the municipality and its employees. For the purpose of this appeal, the question of whether the claim could give rise to an action under the Kansas Tort Claims Act is a question of whether the police officers were working within or outside of the course and scope of their employment. This question combines a question of jurisdiction with a substantial question of the facts of the case.

When we look at caselaw from the federal courts, it appears that when a factual question of subject matter jurisdiction is intertwined with the merits of the case, it is not appropriate to make the determination prior to the facts being developed through an evidentiary hearing. See ¶ *Pringle v. United States*, 208 F.3d 1220, 1222-23 (10th Cir. 2000); see also ¶ *Land v. Dollar*, 330 U.S. 731, 735, 67 S. Ct. 1009, 91 L. Ed. 1209 (1947) (indicating that the determination of subject matter jurisdiction should be deferred when that question is mixed with the merits of the claim). A factual question of jurisdiction is intertwined with the merits of the case when resolving the jurisdictional question requires resolving a question tied to the substantive claim. ¶ *Pringle*, 208 F.3d at 1223. When the jurisdiction determination is intertwined with a decision upon the merits, the motion is converted into a motion for summary judgment. ¶ *Holt*, 46 F.3d at 1003.

If the employees here were acting outside of the course and scope of their employment and acted wantonly and maliciously against Parisi, his claim would not give rise to a cause of action under the Kansas Tort Claims Act, thus no notice would be necessary. See K.S.A. 2017 Supp. 75-6103(a). In contrast, if the employees were acting within

the course and scope of their employment, the claim would give rise to an action under the Kansas Tort Claims Act, thus notice would be necessary. This determination means the jurisdictional question is intertwined with the merits of the case. Thus, the motion to dismiss as it pertains to the employees must be treated as a motion for summary judgment.

But the district court here was in no position to grant summary judgment on this claim. Summary judgment is appropriate when uncontested material facts show that the movant is entitled to judgment as a matter of law. ¶ K.S.A. 2017 Supp. 60-256(c)(2). Additionally, summary judgment is usually inappropriate prior to the completion of discovery. ¶ *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013). The facts here do not show that the employee defendants were entitled to judgment as a matter of law because there is not enough factual support to conclude that they either were or were not acting within the course and scope of their employment. The grant of dismissal against the employee defendants is reversed and the case is remanded for further proceedings.

We find no error in the district court denying discovery prior to dismissing a case where it had no jurisdiction.

Parisi contends that the district court abused its discretion in denying discovery prior to dismissing his claims for lack of subject matter jurisdiction. He argues that it was unreasonable to dismiss his claims prior to allowing him to conduct discovery on the issue of substantial compliance. We are not so persuaded.

Parisi compares his case to an unpublished case — ¶ *Merryfield v. Kansas Dept. for Aging & Disability Svcs.*, No. 116,392, 2017 WL 1105712 (Kan. App. 2017) (unpublished opinion). In *Merryfield*, the district court erred because it unilaterally dismissed a claim for lack of subject matter jurisdiction. The panel opined that the district court should have obtained input from the parties prior to making its ruling, including permitting discovery. ¶ 2017 WL 1105712, at *2. Here, the case is different, because the basis for dismissing the case was the defendants' motion to dismiss for lack of subject matter jurisdiction that was supported by the Cobbins affidavit that tended to show Parisi did not provide sufficient notice of his claim. Parisi was given an opportunity to respond to the defendants' motion with documentation and affidavits that would support substantial compliance, but he

did not do so. Without any additional information from Parisi, the district court made a reasonable determination to dismiss the case without discovery.

We find no error in the court denying Parisi a stay order.

*9 Parisi argues the district court abused its discretion by not permitting him to file an amended petition to allege facts to establish subject matter jurisdiction. Parisi raises two arguments:

- The district court improperly required a fact pleading instead of a notice pleading; and
- the district court acted unreasonably by not allowing Parisi to amend the petition to include the notice of a claim provided to the Unified Government on April 11, 2017.

The decision to permit or deny a plaintiff the opportunity to amend a complaint is a discretionary action of the district court. *Smith v. Phillip Morris Companies*, 50 Kan. App. 2d 535, 586, 335 P.3d 644 (2014). We will only overturn the action of the district court if it abused its discretion. An abuse of discretion occurs when the district court acts unreasonably, makes an error of law, or makes an error of fact.

Wiles v. American Family Life Assurance Co., 302 Kan. 66, 74, 350 P.3d 1071 (2015). The party asserting an abuse of discretion bears the burden of proving the abuse of discretion.

ONEOK, 296 Kan. at 935.

Parisi's first challenge—that the district court made an error of law by requiring a fact pleading instead of a notice pleading—is simply incorrect. The resolution of a factual challenge to the existence of subject matter jurisdiction can be resolved through a motion to dismiss. Requiring the plaintiff to make a prima facie showing of subject matter jurisdiction does not violate Kansas' notice pleading principles. We hold the procedure used by the district court here is a permissible way to resolve challenges under K.S.A. 2017 Supp. 60-212(b)(1). The district court did not abuse its discretion.

Next, Parisi argues the district court's action was unreasonable. Basically, he is saying that he provided proper notice of his claim on April 11, 2017, after he had filed his lawsuit, because it was given allegedly within the 2-year statute of limitations to bring the action. Thus, he should have been permitted to file an amended petition to preserve his claims.

He cites two cases to support his argument. Neither appear to be relevant. The first, *Martin v. Board of Johnson County Comm'rs*, 18 Kan. App. 2d 149, 154-58, 848 P.2d 1000 (1993), involved a question of statutory interpretation as it applied to the extension of the statute of limitations when a notice is timely filed under K.S.A. 12-105b(d). The holding simply has no impact on a district court's decision to dismiss an action when that court determines that it lacks subject matter jurisdiction over the case because notice was not filed prior to the plaintiff initiating the action.

Next, he relies on *J.P. Asset Co. v. City of Wichita*, 31 Kan. App. 2d 650, 70 P.3d 711 (2003), in support of his position. First, the holding in *J.P. Asset Co.* was disapproved by our Supreme Court in *Cummings v. City of Lakin*, 276 Kan. 858, 864-65, 80 P.3d 356 (2003), so the case is of minimal persuasive value. Second, and more important, the initial suit in *J.P. Asset Co.* was filed under a contract theory. After filing the suit for breach of contract, the plaintiff sent a notice of claim under a tort theory to the municipality. After the municipality denied the tort claim, the plaintiff amended its petition. Because the first suit was based upon a contract theory, there was no need for notice to be given under K.S.A. 12-105b(d). Clearly, this case is substantially different because Parisi's initial filing was under a tort theory that required notice under K.S.A. 2017 Supp. 12-105b(d) for the district court to have subject matter jurisdiction. See *Steeth*, 298 Kan. at 854.

*10 Even if Parisi is correct in his contention that the statute of limitations had not expired prior to the notice he provided on April 11, 2017, the district court's action was not unreasonable. When a court lacks subject matter jurisdiction the proper remedy is dismissing the suit. Our code of civil procedure states: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." K.S.A. 2017 Supp. 60-212(b)(3). The use of the word "must" makes dismissal mandatory upon a determination that subject matter jurisdiction is lacking. A district court following the Legislature's requirement to dismiss a case for lack of subject matter jurisdiction is not an unreasonable decision. Filing notice with the municipality under K.S.A. 2017 Supp. 12-105b(d) is a prerequisite to filing a tort claim against a municipality. Because Parisi did not substantially comply with the notice requirement, the district court did not

have subject matter jurisdiction and was required to dismiss his suit.

Parisi has failed to show that the district court abused its discretion on this point.

We affirm the district court's grant of summary judgment in favor of the Unified Government. As to Parisi's claims against

the individual employees, we reverse and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded with directions.

All Citations

429 P.3d 627 (Table), 2018 WL 5728439

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