Testimony before House Judiciary Committee
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HB 2416 – KEMA
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Written-only testimony - neutral

Mr. Chairman and members of the Committee

Thank you for the opportunity to provide input and suggestions regarding legislation relating to the Covid-19 response in Kansas. You have been briefed regarding some of the statutes in play and the executive branch actions in response to this unprecedented health emergency.

KPI and KJI stand ready to assist lawmakers with the challenges we currently face during the Covid-19 pandemic, government's response to those challenges, and permanent solutions to ensure legislative oversight and protection of personal freedoms in the area of emergency management.

Background

While the existing Kansas statutory framework is helpful and provides a basis for action, it still does not address some procedural, practical and constitutional issues that have arisen in the wake of this current health challenge.

It's important to note that statewide disasters, including health pandemics, are apolitical. They don't discriminate based on party affiliation. The statutory framework for responses must be tailored, applied and analyzed without regard to who occupies the Governor's office or who controls either chamber of the Legislature. Clearly the Legislature has historically intended that the Governor play a significant role in addressing "disasters" within the state. Unlike the Legislature, the Governor's office operates fulltime and has a variety of resources available to provide advice and expertise to inform decisions necessary to respond to statewide emergencies such as the current one. That said, it's equally important to understand that the legal framework to address statewide (and even local disasters) is a <u>legislative</u> function.

The executive branch has only those powers derived from the Kansas Constitution or expressly delegated by the Legislature. The Kansas Constitution vests the executive power of the state in the Governor, "who shall be responsible for the enforcement of the laws of this state." (Kansas Constitution, Art. 1, Sec. 3.) Art. 1 does not, for example, grant general executive power to issue executive orders, other than executive reorganization orders, which are specifically authorized

under Sec. 6. The Governor's power to issue orders to carry out her responsibility to enforce the laws of the state are those powers which have, from time to time, been delegated to her by law, passed by the Legislature and signed into law by the Governor.

In enacting what is commonly referred to as the Kansas Emergency Management Act (K.S.A. 48-904 *et seq.)*, the Legislature created a framework for dealing with a variety of "disasters" by enacting procedures and delegating authority to various state officials, including, but not limited to, the Governor. All executive power contained in the Act is power specifically authorized by the Legislature, including all limitations on that power.

Throughout this Covid-19 state response, K.S.A. 48-924 and 48-925 have been primarily cited as the authority under which the Governor has acted to help deal with the Covid-19 health emergency. K.S.A. 48-924 sets out the authority for the Governor to declare a state of emergency and K.S.A. 48-925 sets forth a list of actions the Legislature saw fit to delegate to the Governor to implement by executive order.

It is helpful to review what transpired after the Governor initiated her first Covid-19 related emergency declaration. Pursuant to K.S.A. 48-924 the order could not last past 15 days unless ratified by the Legislature by concurrent resolution, with the exception that the Governor could once apply to the State Finance Council for a single extension of not more than 30 days. Further, the law provided that the Legislature may terminate a disaster declaration at any time by concurrent resolution. The Legislature did, in fact, while still in session, pass a concurrent resolution extending the emergency declaration.

The HCR also put in place a procedure for LCC (Legislative Coordinating Council) oversight of orders issued pursuant to K.S.A. 48-925. However, due to the manner in which the HCR was worded, LCC action was conditioned on the State Finance Council meeting as provided for in K.S.A 48-924. Because the HCR extended the emergency declaration by its own terms, there was no need to convene a meeting of the State Finance Council.

Accordingly, the emergency declaration, as extended by action of the Legislature in the HCR, ended on May 1, 2020. Here is where the flaw in the law became apparent. There was no authority in the Act for the Governor to extend emergency declarations on her own, nor was there any authority in the Act for the Governor to issue successive emergency declarations based on the same emergency. The Governor, as we know, in fact issued a second emergency declaration, wherein she acknowledged the lack of an "effective mechanism for additional extensions of the State of Disaster Emergency other than passage of another concurrent resolution through each legislative chamber." (EO 20-28) Because the Legislature was not then

in session, the Governor determined that she would simply issue a new emergency declaration and re-issue certain prior Executive Orders related to the original emergency declaration.

Unfortunately, there was no authority in Kansas law for the Governor's actions in that regard. We say "unfortunately" because there is a good argument to be made that such authority should, under proper circumstances, exist. We know from prior Kansas case law that the Governor does not have the authority to "fill in the gaps" in a statute. In *State ex rel. Stephan v. Finney,* 251 Kan. 559 (1992) the Kansas Supreme Court struck down the Governor's unilateral approval of Indian gaming compacts.

There, Governor, Finney, also acknowledging the lack of any clear law allowing her action, relied on K.S.A. 75-107 which provided that "The Governor shall transact all the business of the state, civil and military, with the general government, except in cases otherwise specially provided by law." The Court had little difficulty rejecting her argument stating:

> *"The carte blanche interpretation asserted by the Governor herein is massive in its implication and, additionally, would have serious problems if challenged on grounds that it constitutes an impermissible delegation of the legislature's law-making powers."*

In addition, Governor Finney, like Governor Kelly, relied heavily on expediency as a basis for her authority to act. Finney contended that the State was required to negotiate with a tribe and the time restraints in the federal act made the Governor's office the only feasible party to such negotiations. The Court noted, however, that

> *"Any argument of expediency has a certain practical appeal. However, expediency cannot grant a power to the executive branch which the Kansas Constitution has denied it."*

The Court in *Finney* specifically mentioned K.S.A. 48-924 and 48-925 and the powers the Legislature granted the Governor there but noted: *This limited delegation of legislative power to the Governor is effective only during a period of disaster...."*

Finally, the *Finney* Court stated, quoting 38 Am Jur. 2d, Governor, Sec. 4, pp 934-35:

> *"Since the Governor is a mere executive officer, his [or her] general authority is narrowly limited by the constitution of the state, and he [or she] may not exercise any legislative function except that granted to him [or her] expressly by the terms of the constitution."*

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The Special Session of 2020 swiftly addressed a number of these issues, at least on a temporary basis, such that there was a mechanism in place to extend emergency declarations, subject to legislative oversight, until the 2021 Legislature convened. Among other provisions, Coronavirus relief funds were addressed. The Governor's extension/new emergency declaration, which was legally suspect, was ratified and extended and the Governor's subsequent disaster declaration powers were limited. A temporary provision dealing with the ordering of business closures or cessation of activity was limited to 15 days with extensions overseen by the SFC. Those provisions, among others, sunset Jan. 26, 2021.

Targeted business and medical liability protection provisions were passed. Certain licensing requirements and regulations were relaxed with a Jan. 26, 2021 sunset. The courts were granted temporary authority to amend deadlines, etc. Covid-related unemployment legislation was put in place consistent with CARES Act funding, etc.

KSA 48-924 was amended to provide a procedure for potential successive emergency declarations not to exceed 30 days, upon application by the Governor and approval by the SFC. That provision sunsets Jan. 26, 2021. KSA 48-925 was amended to state that the Governor may issue orders to exercise the powers conferred by subsection (c) that have the force and effect of law but must seek SFC counsel approval within 24 hours. Language was added to (c)(11) to add a requirement of conformity with the constitution and bill of rights and a new subsection was added to deny the governor the power to seize firearms or ammunition. A requirement was added requiring the Governor to specify the specific subsection relied upon for the exercise of power. County Commission Boards were granted the ability to issue less restrictive provisions upon a statement of certain specific findings.

KSA 48-932 was amended to provide that, in the case of local disaster declarations, such declaration must be approved by the Board at the next meeting. KSA 48-939 was amended to reduce criminal provisions for violations, substituting civil fines and a process for enjoining violations.

KSA 65-201 was amended to provide that any order issued by a local health officer, including one in response to an EO of the Governor, must be approved by the Board of County Commissioners. KSA 65-202 was amended to provide the same requirement for Board approval of a local health officer order.

Now that the 2021 session has convened, there is a need to address emergency management on a more permanent basis, including additional provisions to protect the rights of Kansans and Kansas entities.

1. **Proposal to amend K.S.A. 48-924(b)(4)**

Going forward, there is actually a simple amendment that could be made to K.S.A. 48-924 that would serve the interests of both the Governor and the Legislature. For whatever reason, the Legislature saw fit in passing KEMA to make a distinction between the ability to extend emergency orders dealing with human epidemics and those involving domestic animals. (See K.S.A. 48-924(b)(2) and (4).) Under current law, but for the temporary fix in HB 2016, the Governor's emergency declaration involving a human contagious disease epidemic can be extended but once, unless the Legislature happens to be in session and can pass a concurrent resolution. However, if it's an emergency declaration involving domestic animal contagious diseases, K.S.A. 48-924(b)(4) allows for successive extensions of 30 days each upon application to the State Finance Council. By striking the first sentence of that subsection, the ability to extend emergency declarations in 30 day increments would apply to the current emergency and any future ones.

One other change to consider is the nature of the group providing necessary legislative oversight when the Legislature is not in session. The State Finance Council is mentioned. Actually, it would be best to have the entity be comprised of legislators only, as this is ultimately a legislative function. There has been concern that SFC and LCC, comprised of legislative leaders, may not be and often is not geographically balanced. When dealing with statewide disaster declarations, geographic balance would be ideal. We would suggest a new emergency management joint committee to deal with these issues during times the legislature is not in session.

2. **Proposal to amend K.S.A. 48-925**

Once a state of emergency has been declared, the Governor's power to issue Executive Orders addressing the emergency are contained in this statute, along with a provision that states that they are void after the expiration date of the emergency order and one stating that orders may be revoked at any time by concurrent resolution of the legislature.

Technically, K.S.A. 48-925(b) contains a provision that may well be unconstitutional as an unlawful delegation of the Legislature's law-making powers. It provides that "the governor may issue orders and proclamations <u>which shall have the force and effect of law</u> during the period of a state of emergency..." It is a general rule of law that the legislature "may not delegate its power

to make laws, but may enact a law in general terms which confers upon an officer or board administrative duties to enforce and apply the law." *State ex rel. Anderson v. Fadely,* 180 Kan. 652 (1957). (See also, *Finney,* supra) The provision above would seem to confer law-making power to the executive, in contravention of law and the separation of powers doctrine.

The fact that this law has not been challenged to date is not an indication of its lawfulness. Rather than delegating law-making authority to the Governor, the statute should have delegated authority to the Governor to investigate and make recommendations regarding the laundry list of potential actions contained in K.S.A. 48-925(c)(1-11) and submit them to the Legislature for the Legislature to approve and the Governor to administer. This is not a policy suggestion, but rather a suggestion to ensure the law is constitutional. The A.G. has voiced similar concerns. The statute could be amended to provide that the Governor may propose any of the items on the laundry list and within 24 hours the legislature or legislative interim body shall consider and take whatever action they deem appropriate. The relaxing of statutory requirements and regulations during a time of a statewide emergency declaration is usually good, but, technically, this is a legislative function for which the Governor can be a helpful resource.

If the desire is to have LCC be the interim body, the LCC statutes (K.S.A. 46-1201 *et seq*), could be amended to accomplish this. For example, revoking an emergency declaration while in session is not an act of law-making. Concurrent resolutions do not make law but are, nevertheless, legal actions prescribed by law. In the case of KEMA, concurrent resolutions are utilized to extend or end emergency declarations and executive orders.

It is clear that the Legislature may, without running afoul of "unlawful delegation" arguments, appoint the LCC to act as the Legislature's representative when the Legislature is not in session. (See *Fadely,* supra) It is not an unlawful delegation because the Legislature is not delegating legislative power to another branch of government. The LCC is a legal extension of the Legislature. The term "represent" in K.S.A. 46-1202 is not limited to court cases. K.S.A. 48-924(c) contains a provision allowing the Lt. Governor to act in the Governor's absence. Adding LCC representation during times when the Legislature is not in session is a similar accommodation.

It would also be prudent to take this opportunity to clear up confusion about the meaning of the term "session". Depending on the context, "session" may be deemed to mean from the second Monday in January until adjournment *sine die.* In the context of our current discussion, i.e., during the existence of a statewide emergency declaration, "session" should mean anytime the Legislature is adjourned. The irony of our current situation is that it affected the ability of the Legislature, as a body, to be in "session", in fact, even though the Legislature was not adjourned *sine die.*

If there is consensus that the Governor should have the power to issue executive orders having the "force and effect of law" during statewide emergency declarations, there must be a mechanism for timely and decisive legislative oversight.

One other potential amendment deals with the power of local boards of county commissions to take action to adopt restrictions that are less restrictive than the EO. We suggest that when a statewide EO is issued, county commission boards should be required to meet to either approve, reject, or modify the effect of the EO in their county. This is an important transparency piece similar to provisions requiring them to take affirmative action to raise property taxes rather than allowing taxes to rise automatically based solely on increases in assessed value.

3. **Educational opportunity protection**

Much concern has been expressed by parents of school-aged children with the status of in-person education during this health emergency. Decisions about school attendance center closures or limited access have, ultimately, been left up to the State Board and local boards of education, resulting in a disparity in educational opportunity across the state. Questions have arisen about the actual, if not constructive, abrogation of the statutory requirements for hours of instruction. Virtual and hybrid learning has had mixed results and reactions, depending on the individual student. Again, a one-size-fits-all approach does individual students and their families a disservice.

The bottom line is that children and parents have the right to equal educational opportunity, whether at their assigned public school or elsewhere. There should be required fact-based findings as a condition of limiting attendance center access. Provisions should be enacted to ensure that parents have the ability to move their children to the most effective learning environments, public or private, if their local school is closed or where remote or hybrid learning is ineffective. Funding should follow the student. This can be accomplished with ESA's. We believe this should be a policy without regard to the current health emergency, but it should definitely be implemented during this time of ongoing emergency declarations that have the effect of jeopardizing our children's educations.

There have been questions raised and concerns expressed about KSHAA's role in making decisions on who gets to attend events. Their authority needs to be reviewed in light of current events.

4. **Constitutional amendment regarding virtual voting**

As your Revisor has opined, Kansas, by virtue of the language in its constitution, prohibits efforts to provide for remote voting outside of Topeka during this or similar emergency declarations. The A.G. recently opined on this as well. Other states are not so restricted. We presume there would be sufficient votes to get a change in this law on the ballot. Even post-Covid, there may be a reason to get this glitch taken care of so that the Legislature has the flexibility other states have. While there would certainly need to be a discussion of how to ensure the security and integrity of such voting provisions, the issue warrants discussion and possible action.

5. **Proposal to amend powers of local health officials**

Related directly to the issue of executive power, the existence of this current statewide emergency declaration has placed a great deal of power in the hands of local health officials, pursuant to K.S.A. 65-101 *et seq.* Specifically, K.S.A. 65-119 allows counties or local health officials to "prohibit public gatherings when necessary for the control of any and all infectious or contagious disease." K.S.A. 65-129b delegates power to local health officials to issue quarantine orders, subject to due process hearing rights of those affected pursuant to K.S.A. 65-129c. Local health officials are given authority under K.S.A. 65-202 to "use all known measures to prevent the spread of any such infection, contagious or communicable diseases..." These are, on their face, broad and potentially far-reaching. What does the phrase "all known measures" mean? This is a legislative decision, not one that should be left up to ad hoc subjective determination at the local level.

Indeed, when a statewide emergency was declared in March, many local health officials acted quickly to issue a broad range of orders. Many were patently overbroad, to the extent that, fortunately, the Governor intervened with Executive Orders of her own that superseded and limited local orders.

A problem with the current statewide emergency is that the power to limit "public gatherings" has been interpreted by the executive branch and other governmental entities to encompass the power to bring private sector businesses and the activities of other non-business entities to a standstill or significantly impact their ability to survive economically or fulfill their missions or mandates. It is unlikely that the Legislature, in referring to "public gatherings" in the law, could foresee or have intended the problems that undefined phrase would cause in 2020. (K.S.A. 65-119 was enacted in 1901.) The term "public gatherings" should not include businesses or other non-business entities where less intrusive options are available, such as reasonable and adequate safety and sanitary protocols.

Arguments abound as to the necessity of forcing an economic shutdown or slow down of businesses and other legitimate non-business activity in order to combat Covid-19. There has been and will continue to be litigation relating to the scope and breadth of orders having the effect of shuttering of business, limiting or prohibiting lawful non-business pursuits and causing widespread unemployment. The Governor and health officials need to be able to respond and administer the law the Legislature passed to deal with such emergencies. However, orders may not infringe upon constitutional rights of Kansans and should not cripple the economy and damage the quality of life if that can be avoided in a less intrusive manner.

The Legislature should extend the due process rights and access to *habeas corpus* contained in K.S.A. 65-129c to those who, while they have not been individually and specifically quarantined, have been prohibited from visiting family, working, attending church or school, or operating their businesses, etc., by state action.

A review of the current provisions of KSA 65-129c demonstrates that government acknowledges and places great value on the rights of individuals who have been told to "go to and remain in places of isolation or quarantine...." Those individuals so affected have the right to access the courts for relief. They get a hearing within 72 hours. What we have with the current Covid-19 crisis is, effectively, a reverse-quarantine. Businesses and other non-business entities are constructively quarantined by an order preventing their customers, patrons, students, members, etc., from accessing their premises, either at all, or only during certain times. Those affected should have the same access to due process under KSA 65-129c.

KSA 65-129c does have some helpful and instructive language. One of the main faults with the blanket, one-size-fits-all state and local orders we have seen is that they are overbroad and not based on any evidence that the particular entity affected is in the known causal chain of infection. For example, an account of students at a certain bar being exposed results in a blanket ban affecting all bars. This is nonsense, unless causation can be established as to a particular venue. The 6-prong test in KSA 65-129c is worth looking at and applied to protect against blanket orders that are not based on fact and a demonstrated causal connection. Add to that a requirement of taking into account all preventative measures proposed or in place to mitigate risk and a requirement that government must consider the least restrictive alternative before issuing blanket orders shuttering or severely limiting the affected entities' pursuits.

Consideration should be given to providing due process provisions for EO's if it is determined that there is insufficient legislative oversight enacted. In addition, there are numerous references to the authority of the "secretary" in emergency management law. Staff should be requested to

brief you on this authority. Does it derive from action by the Governor? Is it independent of the Governor's ability to act? Is it exercised in conjunction with local orders? Depending on the answers, provisions may need to be added to address limitations or clarification of that authority.

6. **Proposal to amend K.S.A. 48-933 and KSA 77-701 *et seq.***

Finally, orders depriving businesses and other entities of the use of their property should entitle them to compensation, since such state action constructively constitutes a "taking". The vehicle for this remedy would be K.S.A. 48-933, which provides for compensation to property owners under certain circumstances relating to disaster emergencies. An additional vehicle would be KSA 77-701 *et seq.*, the Private Property Protection Act. Specifically, KSA 77-703 defines "taking" to mean "due to a governmental action, private property is taken or its use is restricted or limited by a government action such that compensation to the owner is required by the fifth or 14th amendment of the constitution of the United States or section 18 of the bill of rights of the constitution of the state of Kansas." (emphasis added)

In the alternative, the Legislature should consider other measures aimed at providing relief from the effects of government action impacting livelihoods. Measures have been taken to assist the unemployed. Employers who have not been benefitted or have not been adequately benefitted by relief funds should get tax credits, tax moratoriums, business interruption grants, or other forms of tangible relief due to government action. While most if not all businesses carry insurance that includes "business interruption" coverage, it is rare that the policy would cover damages from a government-initiated business closure in the absence to actual physical damage to the covered premises. We do not advocate that this burden be shifted to insurance carriers by way of mandated coverage. These are not "acts of God", but, rather are acts of government and should be compensated, in proper cases, by government.

As you know, there is litigation pending on this issue of compensation. A Sedgwick Co. Judge has granted a stay of that litigation at the request of Plaintiff's counsel and Attorney General Schmidt in order to allow time for the Legislature to consider the public policy.

State and local decisions need to be weighed and balanced against the potential that government may have to compensate for those decisions. Such a balancing of interests should inform and influence the nature and scope of emergency orders, since the overriding consideration should be for government to do what needs to be done to protect against the spread of disease while doing as little harm to Kansans and their livelihoods as possible. It will do Kansans little good to survive the virus but succumb to economic and social ruin where that can be avoided by

employing a corroborative process between the executive and legislative branch, one that values due process rights and basic common sense.

Kansas Policy Institute's mission is to engage citizens and policy makers with research and information to enact public policy solutions that protect the constitutional right to freedom of all Kansans, give them greater access to better educational opportunities, and allow them to keep more of what they earn. By protecting and promoting freedom. We will improve everyone's quality of life, make Kansas more competitive with other states, and attract new citizens and businesses.

Kansas Justice Institute is a public-interest litigation center with a mission to protect individual liberty and the constitutional rights of all Kansans. The areas of work include the protection of property rights, the right to earn a living, free speech, and association, school choice, student's right to an education, and criminal justice reform.