

To: House Judiciary Committee

From: John Goodyear, General Counsel

Date: February 16, 2022

RE: Opposition Testimony on HB 2640 – Written Only

We want to thank Chairman Patton and the members of the Committee for affording the League of Kansas Municipalities the opportunity to provide testimony in opposition to HB 2640.

This bill creates the criminal forfeiture act. In doing so, the bill does not repeal, but it essentially replaces the civil process for asset forfeiture that has been used in Kansas since 1994. Current law regarding asset forfeiture, through the established civil proceedings, provides due process, notice to those affected, and ample opportunity to be heard. HB 2460, as drafted, serves to confuse this process by adding the forfeiture proceeding to the criminal case.

One way in which this bill will confuse matters is the differing standards of proof that are used in criminal proceedings and civil proceedings. Section 15 of the bill is the most demonstrative of this dichotomy. Under this section, property may be forfeited only where a conviction is secured AND the state establishes that the property is an instrumentality of or proceeds of the crime. The League is opposed to provisions requiring conviction to order forfeiture, but perhaps the bigger issue here is the confusion added in this two-step process. To convict, the state must prove the elements of the underlying crime beyond a reasonable doubt, but the standard of proof for the property determination is, harkening back to a civil proceeding, a preponderance of the evidence.

Taking a closer look at the second part of this new standard, the legislation refers to instrumentalities. The bill defines “instrumentality” as a property that is otherwise lawful to possess that is used in the commission of a crime. In the definition, a list of properties included in the definition is given, but it is limited in scope. Further, the definition of “proceeds” is limited to currencies obtained from the sale of property or contraband. There are crimes subject to forfeiture, such as human trafficking, where the criminal behavior is not the sale of property. Would the proceeds from these unlawful exchanges be subject to forfeiture, or would the bad actor be allowed

to retain this money? If an item not listed is utilized in the commission of the crime, would that item be subject to forfeiture, or does the definition of “instrumentality” truly have that narrow of a scope? In summary, if these are the only items that can be forfeited under this act, then the state and its agencies are limited in a way that they are not in the current civil process.

The purpose of the League’s testimony on this bill was to call attention to some of the questions that are presented and left unanswered by this bill as drafted. These questions, and others not brought up in my testimony, should be answered before the bill is considered further. The League would respectfully ask that this Committee not recommend this bill favorably and would suggest that perhaps it should be the subject of an interim study by the Judicial Council.