

**Testimony before Senate Judiciary Committee  
SB 273 – KEMA provisions  
Mike O’Neal on behalf of Kansas Policy Institute & Kansas Justice Institute  
Written-only testimony in support**

**Madam Chair and members of the Committee**

On behalf of the Kansas Policy Institute, thank you for the opportunity to provide our input relating to the Covid-19 response in Kansas. We previously provided comprehensive recommendations early in the session (Jan. 12, 2021) when you considered legislation extending some of the temporary deadlines and provisions carried over from last session. We appreciate the fact that many of our suggestions are found, in one form or another, in SB 273 and for that reason, we stand in support of the bill.

It’s important to repeat 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 legislative 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.

In the aftermath of what all transpired last year, we know that 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, procedurally 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."*

Now that the 2021 session has convened, and you have extended the January timeline in last year's legislation, 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.

We support clarifying the Governor's important role in the area of public health emergencies. We also support the creation of a joint committee on emergency management instead of using the State Finance Council or LCC. 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 health disaster declarations, geographic balance would be ideal.

We also support provisions distinguishing between types of emergency declarations, since the Covid response has taught us that the current statutory structure begs for a different process for health emergencies (pandemics).

We support language that places the burden on government to make a strong case (show its work) for taking any action that substantially impedes Kansans lives and livelihoods. Actual causation should be required. In other words, government should be required to clearly "connect the dots" between proposed actions that limit Kansans and the real vs. imagined likelihood that the action is necessary as to the specific individuals or entities affected. For example, the fact that there may be positive cases reported in one area of the state or in one type of business or undertaking should never be an excuse to promiscuously limit or shut down activity or freedoms in another area or in similar types of businesses or organizations in the absence of a direct causal connection.

We also support provisions that provide for local control and decision making. Provisions related to the power of local governing boards and local school boards regarding circumstances in their jurisdictions recognize the importance of avoiding a “one-size-fits-all” approach to health emergencies that have in the past, and would in the future, cause unintended and harmful consequences. We would, however, recommend that any executive orders issued affecting persons or entities within a county be affirmatively and publicly voted up or down by the local board or modified by affirmative vote.

We support the amendments to the current KEMA law regarding executive powers. K.S.A. 48-925(b) currently contains a provision that is probably unconstitutional as an unlawful delegation of the Legislature’s law-making powers. It provides that “the governor may issue orders and proclamations which shall have the force and effect of law 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 confers law-making power to the executive, in contravention of law and the separation of powers doctrine.

Rather than delegating law-making authority to the Governor, we recommended that the statute should delegate authority to the Governor to evaluate 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 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.

We support the clarification of what is meant by 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.

We strongly support provisions in SB 273 that guarantee due process protections to those affected by proposed or declared governmental action. These are fundamental rights where personal liberties are at stake and the lack of meaningful due process provisions has proven to be a key flaw in existing law in the wake of government’s response to the Covid-19 pandemic.

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”. While we understand this bill does not address compensation or economic assistance to those affected by governmental action, the Legislature should consider separate legislation this session to address this need. A vehicle or model 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 14<sup>th</sup> 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. The expectation is that the Legislature will address this issue this session.

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 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, students right to an education, and criminal justice reform.***

***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.***