

To: Senate Judiciary Committee

From: John Goodyear, General Counsel

Date: March 7, 2022

RE: Opponent Testimony on SB 541

We want to thank Chairwoman Warren and the members of the Committee for affording the League of Kansas Municipalities the opportunity to provide testimony opposing SB 541.

Cities have been empowered by the people of Kansas with the ability to make laws. Cities utilize this power when they pass ordinances aimed at protecting the health, safety, and welfare of city residents. It is more than fair to expect cities to consider all the evidence available and make the best-informed decisions that they can – which they do. However, we must allow cities to make decisions, especially in emergencies – it is what city officials are elected to do. The League opposes SB 541 as a limit on cities’ abilities to respond to public health emergencies.

Section 1 of this bill seeks to provide a cause of action under which a person could seek compensation where government action restricts the use of property. It should be noted that the U.S. Constitution already provides for this in certain circumstances: the Takings Clause protects against the appropriation of private property without just compensation. However, SB 541 expands this ability to recover in a way that is not consistent with law or actual circumstances. “Governmental action” is defined to include restrictions on use that would qualify as takings under law but would also include masking requirements. These actions or limitations are not on the same plane. Unless a business has been forced to enforce a mask mandate, it can hardly be said that a masking requirement has altered the function of their business.

Section 2 of the bill would require a 30-day sunset or mandatory review for any ordinance or action related to a contagious disease. Additionally, the section allows “aggrieved” parties to bring a claim in district court to challenge the validity of city action that mandates masking, limits the size of gatherings, restricts the operation of business, controls the movement of persons, or limits religious gatherings. In order for an ordinance or local action to be valid, SB 541 imposes a strict

scrutiny standard – the ordinance would have to be narrowly tailored to the proposed purpose and use the least restrictive means to achieve that aim. At the very least, these limits on home rule power and the heightened standard created in this section presents constitutional questions – this section may run afoul of the home rule amendment.

As a final point, while aimed at Covid-19, SB 541 will inhibit the ability of cities to respond to all future emergencies. We do not know what crisis may come next year, much less in 50 years. SB 541 will serve to hinder cities' responses to emergencies for as long as it is law, limiting the ability of governing bodies to respond to the needs of their cities or to act in ways reasonably calculated to protect the public.

The League is opposed to SB 541 and urges the Committee to not recommend it favorably for passage.