



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

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# MEMORANDUM

TO: Kansas Prosecutors and Law Enforcement  
FR: Attorney General Derek Schmidt  
CC: Governor, Adjutant General, KHP Superintendent, KBI Director  
DT: March 24, 2020  
RE: State and local law enforcement duties and authorities under emergency powers invoked in connection with COVID-19 response

This memorandum responds to requests for information to assist Kansas law enforcement in analyzing the current extraordinary situation in which multiple states of emergency and associated orders have been imposed by various federal, state, and local officials in response to the COVID-19 pandemic.<sup>1</sup> Please be advised the Office of Attorney General does not serve as legal counsel for local law enforcement agencies, local prosecutors' offices, local governments, or individual law enforcement officers. This memorandum is not intended to provide legal advice but instead to provide information about applicable law that may assist in navigating the current extraordinary circumstance. To determine what specific duties or authorities a law enforcement officer may have in any particular circumstance or jurisdiction, the affected law enforcement agency should consult with its own legal counsel.

This memorandum proceeds in three parts. First, it provides an executive summary that may be used for quick reference by law enforcement. Second, it summarizes the current factual and legal situation that has and continues to develop. Third, it provides an overview of legal authorities giving rise to emergency powers and orders.

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<sup>1</sup> The attorney general is required by statute to consult with and advise local prosecutors, K.S.A. 75-704, and is the chief law enforcement officer of the state. *State ex rel. Miller v. Rohleder*, 208 Kan. 193, 194 (1971).

## Executive summary

The COVID-19 situation is unprecedented and dynamic. While this memorandum provides a comprehensive view of the emergency powers that have been invoked, this executive summary is intended to capture the most salient points that can be implemented by law enforcement authorities.

1. Conflicting orders. If there is a conflict between a lawful executive order issued by the governor and orders from a local entity, the governor's executive order should prevail. Likewise, any municipal ordinance or mayor/commission chairman's directive that conflicts with the Kansas Emergency Management Act, state disaster plan, interjurisdictional disaster plan, or local disaster plan is void.
2. Enforcement. Violations of a lawful order or proclamation issued by the governor under the Kansas Emergency Management Act or a quarantine order issued by the secretary of health and environment or by a local health officer are misdemeanor offenses. All Kansas law enforcement officers should continue to exercise discretion in how and when to enforce violations of these criminal laws. We recommend no criminal enforcement of these orders until they have been properly published. In addition, law enforcement may enforce non-criminal orders if properly ordered to do so by the governor, the secretary of health and environment, or a local health officer.
3. Consultation. Prior to initiation of any non-routine enforcement action, law enforcement officers are advised to consult with their jurisdiction's chief legal officer and prosecuting authority (e.g., county or district attorneys, city attorney, or county counselor).
4. Coordination. Law enforcement should consult with local emergency managers to determine what role law enforcement may have in any local, interjurisdictional, or state disaster plans now in effect.
5. Limits on local authority. Kansas statutes provide significant authority to local health officers to combat the spread of contagious or infectious diseases. However, any local orders that appear to direct the actions of persons not ordinarily subject to the authority of the issuing local jurisdiction, such as state law enforcement officers or officers of other local jurisdictions, should be carefully scrutinized by legal counsel before enforcement.

## Current Situation

The spread of COVID-19 has resulted in numerous officials invoking seldom-used legal authority to exercise various emergency powers granted by law. On March 13, 2020, President Donald Trump issued a proclamation declaring a nationwide emergency and has subsequently invoked various authorities pursuant to that declaration. On March 12, 2020, Governor Laura Kelly proclaimed a statewide state of disaster emergency pursuant to the Kansas Emergency Management Act, K.S.A. 48-904 *et seq.* She has subsequently exercised numerous powers available to her under that Act when a state of disaster emergency is in effect. In addition, some counties in Kansas have declared a state of local disaster emergency under the Kansas Emergency Management Act and have invoked various local powers pursuant to such declaration. So, too, have some cities in Kansas. In addition, state and local public health officials have invoked various statutory authorities granting them extraordinary power to address the spread of contagious and infectious diseases.

Law enforcement officers may be empowered to enforce some, but not all, directives arising from these various federal, state, and local actions. As discussed more fully below, it is possible that in some local jurisdictions, law enforcement officers may be subject not only to duties and authorities ordinarily placed upon them by law but also by up to *six additional and separate sources of emergency duties and authorities* imposed by different authorities as a result of the COVID-19 response: (1) federal, (2) state (governor's orders), (3) state (secretary of health and environment's orders), (4) county (commission declaration), (5) county (health officer's orders), and (6) city (mayor's declaration).

The situation is further complicated because there exists a state disaster emergency plan, various interjurisdictional disaster emergency plans, and numerous local disaster emergency plans, all of which now are activated, and any one (or all) of these plans may impose obligations on law enforcement and may displace local ordinances that ordinarily are in effect.

Still further, the rapidly evolving situation with the pandemic is resulting in frequently changing invocations, alterations, or terminations of emergency powers by various federal, state, and local authorities. Nor do the various directives and orders share a uniform termination date, and most or all are subject to extension.

Moreover, the specific interaction of various state statutes and authorities involved is sometimes unclear and has not previously been clarified either by judicial ruling or by formal attorney general opinion.

In brief, the legal situation is extraordinarily complex and fluid. The Office of Attorney General knows law enforcement agencies and officers throughout our state

will carry out both their ordinary and extraordinary lawful duties, professionally and properly enforce the law, and make positive contributions to the overall national, state, and local efforts to slow the spread of COVID-19. This memorandum is intended to assist law enforcement in accomplishing those purposes and to assist legal counsel for law enforcement agencies in advising their clients. It discusses, in general terms, sources of authority that may have been invoked and certain types of orders that may be in effect as of the date of this memorandum. This may not be a complete list, and other atypical sources of authority and additional orders also may apply in particular circumstances.

To determine which emergency authorities are currently in effect in each law enforcement agency's jurisdiction, and what extraordinary duties or authorities are thus imposed on law enforcement officers in that jurisdiction, a law enforcement agency should consult with its legal counsel.

## **Emergency Proclamations and Legal Authorities**

### **I. Federal-level emergency authorities**

As noted above, President Donald Trump declared a nationwide state of emergency to assist in mobilizing a nationwide response to COVID-19. This memorandum does not analyze these federal authorities.

State and local law enforcement should, to the extent reasonably possible, coordinate with federal authorities during this state of emergency. However, most—and perhaps all—atypical duties and authorities placed on Kansas law enforcement will arise from state or local emergency powers, not from federal emergency powers. States possess general police powers (and may delegate those powers to local units of government), but the federal government possesses no general police power and instead may exercise only those limited, enumerated powers granted to it by the federal Constitution. *See, e.g., Bond v. United States*, 572 U.S. 844, 854 (2014). In general, the federal Constitution limits the ability of the federal government to commandeer state and local civilian authorities to carry out duties imposed by federal law. *See, e.g., generally, Printz v. United States*, 521 U.S. 898 (1997) (federal law requiring state chief law enforcement officers to enforce federal law is unconstitutional). State law also may *prohibit* state and local law enforcement officers from participating in the enforcement of specific federal laws. *See, e.g., K.S.A. 50-1206(b)*.

### **II. Governor and local elected official emergency authorities**

This memorandum will focus on two sources of state-level emergency authority currently in effect: Powers exercised by the governor pursuant to the Kansas Emergency Management Act, specifically K.S.A. 48-924 and K.S.A. 48-925; and powers exercised by the secretary of health and environment pursuant to the

Infectious Disease Control provisions in article 9 of chapter 65.<sup>2</sup> The governor's proclamation of a state of disaster has activated the disaster response and recovery aspects of the state disaster emergency plan and of local and interjurisdictional disaster plans throughout the state. *See* K.S.A. 48-924(d).<sup>3</sup> To the extent these disaster plans may conflict with municipal ordinances, the local ordinances must yield.<sup>4</sup>

### **A. Kansas Emergency Management Act – Governor authority**

The Kansas Constitution vests in the governor the “supreme executive power” of the state. Kan. Const. Art. I, Sec. 3. The Kansas Emergency Management Act expressly places with the governor the responsibility “for meeting the dangers to the state and people presented by disasters.” K.S.A. 48-924(a). Thus, in the current circumstance, the emergency powers exercised by the governor under K.S.A. 48-924 and K.S.A. 48-925 are broad and take precedence over other exercises of state or local emergency power that may conflict with lawful orders of the governor.<sup>5</sup> Put another

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<sup>2</sup> Other sources of state-level emergency powers include power vested in the governor under the constitution, statutes, or common law of this state independent of K.S.A. 48-924 and 925, or powers vested by the constitution, statutes or common law in other state officials. This memorandum does not address any of those potential sources of emergency authority.

<sup>3</sup> This memorandum does not address the contents of either the state plan or of any interjurisdictional or local plans. For additional guidance on requirements of the state-level disaster emergency plan that may affect law enforcement, please contact your local emergency manager or the Division of Emergency Management within the Adjutant General's Department, which is charged by law with preparing and maintaining the state disaster emergency plan, *see* K.S.A. 48-926, and with developing and revising any local and interjurisdictional disaster emergency plans. *See* K.S.A. 48-931. A state, local, or interjurisdictional disaster emergency plan may “place reliance upon [police forces] which are available for performance of functions related” to the declared emergency. K.S.A. 48-923(c). To the extent these plans require law enforcement to assist in their lawful execution, law enforcement is required to do so. *See generally* Attorney General Opinion 85-85 (sheriff required to assist in carrying out local emergency plans).

<sup>4</sup> Municipal ordinances authorizing the mayor or other persons to act during a state of disaster emergency “shall be null and void” to the extent they conflict with the state disaster emergency plan, the applicable local disaster emergency plan, or the Kansas Emergency Management Act. K.S.A. 48-935.

<sup>5</sup> This general principle can assist in resolving conflicts between or among emergency directives issued by various government authorities. However, this principle does not mean that the power of the governor is unlimited during a state of disaster emergency. The state and federal constitutions remain in force and effect and may not be suspended. Similarly, to the extent state constitutional, statutory or common law vests particular responsibilities with other officials in state government, the lawfulness of a governor's order in conflict with that law would be suspect. The governor's exercise of power, even during a state of disaster emergency, must remain lawful.

way, to the extent the governor's orders conflict with any local disaster emergency plan or local order, the governor's orders control.

### 1. Proclamation of a State of Disaster Emergency

The Kansas Emergency Management Act, K.S.A. 48-904 *et seq.*, authorizes the governor to proclaim a state of disaster emergency. K.S.A. 48-924(b)(1). The governor must proclaim a state of disaster emergency prior to exercising any of the emergency powers authorized by K.S.A. 48-925, and those powers remain available to the governor only while the state of disaster emergency remains in effect. On March 12, 2020, Governor Kelly proclaimed a state of disaster emergency in response to COVID-19, and it remains in effect statewide. *See Exhibit 1 attached.* The legislature subsequently adopted House Concurrent Resolution 5025, which has extended the state of disaster emergency until May 1, 2020, and establishes a mechanism by which the Legislative Coordinating Council may further extend the state of disaster emergency on a rolling basis for periods not to exceed 30 days each. *See Exhibit 2 attached.* The state of disaster emergency can be terminated by the governor at any time on her own authority or at the direction of the legislature acting through authority it has delegated to the Legislative Coordinating Council.

### 2. Orders by the Governor during State of Disaster Emergency

During a state of disaster emergency, the governor may exercise certain extraordinary statutory powers set forth in K.S.A. 48-925(c). These specific powers are exercised by the governor through the issuance of orders, "which shall have the force and effect of law" while the state of emergency exists. K.S.A. 48-925(b) and (d). The legislature retains authority to revoke any such order. *See K.S.A. 48-925(b).* In the current instance, the legislature has delegated the authority to revoke the governor's orders to the Legislative Coordinating Council, which must within 30 days review *every* order issued by the governor during the current state of disaster emergency and must review *certain* orders within three days. *See 2020 HCR 5025.*

Each executive order may, by its terms, determine the duration during which it is in effect, not to extend beyond the termination of the proclaimed state of disaster emergency. *See K.S.A. 48-925(b).* The duration of orders that by their terms expire may be extended by the governor so long as the proclaimed state of disaster emergency remains in effect. At the time of issuance of this memorandum, Governor Kelly has issued the following Executive Orders under authority of the March 12, 2020, proclamation of a state of disaster emergency:<sup>6</sup>

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<sup>6</sup> These orders are published on the governor's official website at <https://governor.kansas.gov/newsroom/executive-orders/> and on the Kansas State Library website at <https://kslib.info/Archive.aspx?ADID=553>. Because the list of Executive Orders changes frequently,

- Executive Order No. 20-03, Extending states of local disaster emergency relating to COVID-19
- Executive Order No. 20-04, Temporarily prohibiting mass gatherings to limit the spread of COVID-19
- Executive Order No. 20-05, Temporarily prohibiting utility and internet disconnects
- Executive Order No. 20-06, Temporarily prohibiting evictions and foreclosures (Rescinded and replaced by Executive Order No. 20-10);
- Executive Order No. 20-07, Temporarily closing K-12 schools to slow the spread of COVID-19
- Executive Order No. 20-08, Temporarily expanding telemedicine and addressing certain licensing requirements to combat the effects of COVID-19
- Executive Order No. 20-09, Conditional and temporary relief from certain motor carrier rules and regulations in response to the COVID-19 pandemic
- Executive Order No. 20-10, Rescinding Executive Order 20-06 and temporarily prohibiting certain foreclosures and evictions;
- Executive Order No. 20-11, Temporarily requiring continuation of waste removal and recycling services;
- Executive Order No. 20-12, Drivers' license and vehicle registration and regulation during public health emergency;
- Executive Order No. 20-13, Allowing certain deferred tax deadlines and payments during the COVID-19 pandemic.

No statute or constitutional provision expressly states when any such order becomes legally effective. By their terms, the individual orders state they are effective immediately, and a reasonable practice is to take them at face value. However, any governmental action that deprives persons of life, liberty, or property must satisfy requirements of due process of law. *See* U.S. Const. Amend. 14. Principles of due process require notice of the existence of a law and what conduct the law prohibits before a person may be held liable for violating it. *State v. Cordray*, 277 Kan. 43, 51 (2004). The due process requirement for notice is particularly important in the criminal law, *see, e.g., Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015), because due process demands that persons subject to the law must have “an opportunity ... to avoid the consequences of the law.” *Lambert v. California*, 355 U.S. 225, 229 (1957). Since orders of the governor have the “effect of law,” *see* K.S.A. 48-925, and violations of the orders may give rise to criminal penalties, *see* K.S.A. 48-939, this elementary

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it is recommended to review the status of any particular Executive Order on a daily basis throughout the state of disaster emergency.

principle attaches to these executive orders. *See also Alexander v. Adjutant General's Office*, 18 Kan. App. 2d 649 (1993) (an executive order that has force of law “occupies the same position as a statute and may be interpreted” in like manner). While there is room for debate about when orders may become legally in effect, we recommend no *criminal* enforcement of these orders be undertaken until the orders are *published* by the secretary of state in the Kansas Register.<sup>7</sup> That approach will provide the same notice that ordinarily is provided with acts of the legislature that affect constitutionally protected life, liberty, or property interests and should minimize due process concerns.<sup>8</sup>

Law enforcement should become familiar with the provisions of these executive orders, some of which are complex or nuanced, just as with statutes.

### 3. Role for law enforcement in enforcing governor's orders

Law enforcement officers may be under a duty and have authority to enforce certain orders of the governor issued pursuant to K.S.A. 48-925. Sources of that duty and authority include:

*First*, any “knowing and willful” violation of any “*lawful* order or proclamation” (emphasis added) of the governor issued pursuant to K.S.A. 48-925 is a class A misdemeanor. K.S.A. 48-939. Law enforcement officers have the same duty and authority to enforce these misdemeanors as to enforce any other misdemeanor. *See generally*, K.S.A. 22-2401(c) (discretionary authority for probable cause arrest). Please note that a law enforcement officer's decision regarding whether, how, and when to arrest a person for these misdemeanors remains purely *discretionary*. *Soto v. City of Bonner Springs*, 38 Kan. App. 2d 382, Syl. ¶ 4, 166 P.3d 1056 (2007), *aff'd*, 291 Kan. 73, 238 P.3d 278 (2010); *see also* K.S.A. 48-934 (providing immunity for law enforcement officers “while engaged in maintaining or restoring the public peace or safety or in the protection of life or property during a state of disaster emergency . . . so long as they act without malice and without the use of excessive or unreasonable force”).

*Second*, under certain circumstances, a law enforcement officer may be called upon and required to assist in enforcing lawful orders of the governor during a state of emergency *even if no crime has been committed*. This is most likely to occur under

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<sup>7</sup> The Kansas Register is available at [https://www.kssos.org/pubs/pubs\\_kansas\\_register.asp](https://www.kssos.org/pubs/pubs_kansas_register.asp).

<sup>8</sup> The Kansas Constitution provides that statutes may take effect only when “published as provided by law.” Kan. Const. Art. 2, Sec. 19. Governors have traditionally filed each executive order with the secretary of state—a practice analogous to how acts of the legislature are caused to be published so they may satisfy the constitutional requirement for publication. *See also* K.S.A. 75-430(a)(2) (providing for publication in the Kansas Register of “all executive orders and directives of the governor” filed with the Secretary of State).



provisions of the state, interjurisdictional, or local disaster emergency plans. However, it also is possible that an express directive of the governor could displace or supplement the preexisting disaster plans and impose specific duties or authorities on law enforcement to assist in carrying out the orders of the governor. *See* K.S.A. 48-924(a) (governor “shall be commander-in-chief” of “all *other* forces available for emergency duty”) (emphasis added); *see also* K.S.A. 48-925(c)(2) (governor may “utilize all available resources ... of each political subdivision ... to cope with the disaster”), K.S.A. 48-925(c)(10) (governor may “require and direct the cooperation and assistance of ... local governmental agencies and officials”), K.S.A. 48-925(c)(11) (governor may “perform and exercise such other ... powers ... as are necessary to promote and secure the safety and protection of the civilian population). *See also generally* Attorney General Opinion 81-193 (sheriffs and other officials to comply with governor’s directives during state of disaster emergency).

### **B. Kansas Emergency Management Act—County commission/mayor authority**

The Kansas Emergency Management Act contains a separate provision that authorizes the chairman of a board of county commissioners or the mayor of a city to declare a state of local disaster emergency. K.S.A. 48-932. In the current COVID-19 response, the governor has extended the statutory duration of any state of local disaster emergency declaration relating to COVID-19. As a result, all local declarations—absent revocation by local officials—will remain in effect during the governor’s proclamation of a state of disaster emergency. *See* Executive Order No. 20-03.

The effect of a declaration of a state of local disaster emergency is more limited than a governor’s declaration. The local declaration “shall activate the response and recovery aspects of any and all local and interjurisdictional disaster emergency plans which are applicable to such county or city,” K.S.A. 48-932(c), but there is no separate grant of specific statutory authority to local county commission chairpersons or mayors as there is to the governor while the local disaster emergency is in effect. *Compare* K.S.A. 48-925 (granting governor specific powers during state of disaster emergency) *with* K.S.A. 48-932 (no similar provisions for state of local disaster emergency). *See also* Attorney General Opinion 81-130 (“The power granted to the governor is defined by statute, while the powers of local officials are those contained in the applicable disaster emergency plans”).

As with a state of disaster emergency proclaimed by the governor, a knowing and willful violation of any lawful state of local disaster declared pursuant to K.S.A. 48-932 is a class A misdemeanor, *see* K.S.A. 48-939, and law enforcement has its ordinary discretionary authority to enforce this misdemeanor provision. In notable contrast with the powers granted to the governor, state law does not grant local county commissioners or mayors additional authority to require law enforcement to enforce

local orders during a state of emergency, except as may be provided in the state, interjurisdictional, or local disaster emergency plans. *See* Attorney General Opinion 84-78 (local disaster declaration cannot suspend regulatory statutes as governor can). However, law enforcement may lawfully be called upon to carry out non-criminal enforcement duties pursuant to a state, interjurisdictional or local disaster plan. *See* Attorney General Opinion 85-85 (“it is clear that the local disaster agency has the authority to require, and indeed, must rely on the services of local officials (including the sheriff) in planning to meet the demands of a disaster”).

### III. Infectious Disease Control Act authorities

Unlike the federal government, states have broad police power to protect the health and safety of their populations.<sup>9</sup> The state’s principal statute conveying authority to address infectious and contagious diseases is found in article 1 of chapter 65 of the Kansas Statutes Annotated.<sup>10</sup> In 2005, the legislature enacted K.S.A. 65-129b, which superimposed broad and modern infectious disease control authorities on top of preexisting statutes, some of which are quite old or specific to particular diseases. The broad new statutory authority, which generally is available both to the secretary of health and environment and to local health officers, includes the following pertinent provision:

[W]hen the local health officer or the secretary determines that it is medically necessary and reasonable to prevent or reduce the spread of the disease or outbreak believed to have been caused by the exposure to an infectious or contagious disease, [he or she] may order an individual or group of individuals to go to and remain in places of isolation or quarantine until the local health officer or the secretary determines that the individual no longer poses a substantial risk of transmitting the disease or condition to the public. K.S.A. 65-129b(a)(1)(B).

Unlike powers granted to the governor or to other officials under the Kansas Emergency Management Act, the secretary or local health officer’s authority to exercise this power is not contingent on a state of local disaster emergency having been declared. Any person who “leaves any ... quarantined area without the consent

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<sup>9</sup> States may exercise these police powers to stop or impede the spread of infectious or contagious diseases. *See generally Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (recognizing state authority to enact “quarantine laws and health laws of every description”)(internal quotations omitted); *Ex parte Irby*, 113 Kan. 565 (1923) (denying habeas corpus relief for person quarantined by order of local health officer); *Ex parte McGee*, 105 Kan. 574 (1919) (same); *but see Moody v. Wickersham*, 111 Kan. 770, 207 P. 847, 849 (1922) (order to confine individual to prevent spread of infectious disease must be lawful and not wanton or inhumane).

<sup>10</sup> Other public health statutes also may be invoked, but the basic principles regarding the role of law enforcement in enforcing orders of the secretary of health and environment or of local health officers are the same.

of the local health officer having jurisdiction, or who evades or breaks quarantine or knowingly conceals a case of infectious or contagious disease” is guilty of a class C misdemeanor. K.S.A. 65-129. Thus, law enforcement has the discretionary duty and authority to enforce criminal violations of such orders in the same manner it ordinarily enforces misdemeanor violations of the law.<sup>11</sup>

In addition, the 2005 statute grants authority to any local health officer or to the secretary of health and environment to “order any sheriff, deputy sheriff or other law enforcement officer of the state or any subdivision to assist in the execution or enforcement of any order issued” pursuant to the above statute. K.S.A. 65-129b(a)(2). Thus, a law enforcement officer may be required to assist in enforcing any lawful orders of the secretary of health and environment or of any local health officer *even if no criminal conduct occurs*. The plain wording of the statute requires the secretary or local health officer to specifically invoke this authority—to order law enforcement to assist—before the statute imposes a duty or grants authority to law enforcement. While this specific statutory provision is new, this general principle—that law enforcement may be required to assist health officials in enforcing requirements during health emergencies even in the absence of any crime—is a longstanding principle that has been upheld by Kansas courts. *See, e.g., Noland v. Gardner*, 156 Kan. 697 (1943) (affirming sheriff’s authority to confine in county jail person on order of local health officer); *Ex parte Hooper*, 132 Kan. 224 (1932) (recognizing sheriff’s authority to confine person on order of city physician); *Nyberg v. Bd. of Comm’rs of Sedgwick County*, 113 Kan. 758 (1923) (upholding sheriff’s duty to enforce order of local health officer).

Although K.S.A. 65-129b on its face appears to grant concurrent authority to both the secretary of health and environment and the local health officer, it is important to note that the two officials may not be able to exercise identical authority. For example, the authority of local health officers generally will be limited to their local jurisdiction, while the secretary’s authority may be statewide. Various consequences may follow. For example, the secretary may be able under K.S.A. 65-129b(a)(2) to order law enforcement from anywhere in the state to assist in enforcing his orders, but the local health officer’s authority under that section is likely limited to law enforcement within that local jurisdiction. For that reason, we recommend that any local orders that appear to direct the actions of persons not ordinarily subject to the authority of the issuing local jurisdiction, such as state law enforcement officers or officers of other local jurisdictions, should be carefully scrutinized by legal counsel before enforcement.

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<sup>11</sup> For the same due process reasons that undergird our recommendation against criminal enforcement of a governor’s order unless and until such order has been published in the Kansas Register by the secretary of state, we also recommend against use of the criminal law to enforce orders of local health officers unless and until those orders have been published in a manner substantially similar to how local ordinances ordinarily are published in order to become effective.

## Conclusion

In addition to exercising common sense and good judgment, law enforcement officers should coordinate with the local prosecutor regarding how law enforcement should criminally enforce any orders issued pursuant to emergency powers currently in effect in that jurisdiction—for example, whether an arrest warrant or summons should be issued in lieu of a warrantless misdemeanor arrest if and when necessary. Courts have recognized that a county attorney or district attorney is the representative of the State in criminal prosecutions and has broad discretion in controlling those prosecutions. The scope of this discretion extends to the power to investigate and to determine who shall be prosecuted and what crimes shall be charged. *State v. Williamson*, 253 Kan. 163, 165 (1993).

We have not researched whether the rarely used misdemeanor provisions that authorize criminal enforcement of lawful orders of the governor, local officials (through disaster plans), the secretary of health and environment, or local health officers – such as K.S.A. 48-939 and K.S.A. 65-129 – are included in the pertinent statutes and municipal codes and therefore may be enforced in municipal court by municipal prosecutors. If this is an issue of interest locally, we recommend law enforcement coordinate with local county or district attorneys and also with local municipal prosecutors in their jurisdiction.

For guidance on the role of law enforcement in non-criminal enforcement of lawful emergency orders in effect in any particular jurisdiction, law enforcement officers should consult with their agency's legal advisor.

# Exhibit 1

## STATE OF DISASTER EMERGENCY PROCLAMATION

Executive Department  
State of Kansas  
Topeka, Kansas

### By the Governor

By virtue of the authority vested in me by the Kansas Emergency Management Act, Chapter 48, Article 9, of the Kansas Statutes Annotated, to meet the inherent dangers of disasters to which the State and its citizens have been exposed, and upon advice of the State Adjutant General as the Director of the Division of Emergency Management, I hereby proclaim a State of Disaster Emergency as follows:

#### **NATURE OF THE DISASTER:**

On March 7, 2020, the Secretary of the Kansas Department of Health & Environment (KDHE) confirmed the first case of novel coronavirus (COVID-19) in the state of Kansas and considers that a public health emergency exists within the state of Kansas. The United States Centers for Disease Control and Prevention (CDC) identifies the potential public health threat posed by COVID-19 both globally and in the United States as “high” and the United States Department of Health & Human Services declared a public health emergency for COVID-19 beginning January 27, 2020. The World Health Organization (WHO) declared a global pandemic on March 11, 2020. The first COVID-related fatality occurred in Kansas on March 12, 2020.

The Kansas Department of Health & Environment (KDHE) is providing guidance and taking measures to minimize the risk of exposure and infection to the state’s general public while supporting public health and medical professionals with disease investigation, lab testing, epidemiology surveillance and other activities associated with the control and spread of the virus.

The Kansas Division of Emergency Management (KDEM) is coordinating resources across state government to support local public health and county emergency managers in alleviating the impacts to people, property, and infrastructure and assessing the magnitude and long-term effects of the incident.

#### **DATE THAT DISASTER AFFECTED THE AREA:**

March 12, 2020

#### **AREA AFFECTED BY THE DISASTER:**

Entire 105 counties in Kansas.

I hereby proclaim, direct and order the Adjutant General of the State of Kansas to activate the disaster response and recovery portions of the Kansas Response Plan. The Adjutant General shall coordinate local and inter-jurisdictional disaster plans applicable to the political subdivisions of areas affected by this Proclamation.

Any or all of the powers conferred upon the Governor by the Kansas Emergency Management Act may be delegated to the Adjutant General as deemed appropriate during this period of proclaimed State of Disaster Emergency. This may be delegated by written orders, or oral orders subsequently reduced to writing with reference to this Proclamation.

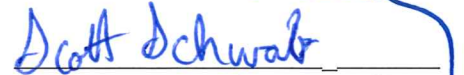
I hereby suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the order or rules and regulations of any state agency which implements such statute, if strict compliance with the provisions of such statutes, order or rule and regulation would prevent, hinder, or delay in any way necessary action in coping with the disaster as set forth in KSA 48-925(c)(1).

This Proclamation shall be filed promptly with the Division of Emergency Management, the Office of the Secretary of State and each city clerk or county clerk, as appropriate, in the area to which this Proclamation applies. Further dissemination of this Proclamation shall occur by means calculated to bring its contents to the attention of the general public.

DONE At the Capitol in  
Topeka Under the Great Seal of  
the State this 12, day of March  
A.D., 2020

THE GOVERNOR:

  
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Secretary of State

  
\_\_\_\_\_

Assistant Secretary of State

## Exhibit 2

### HOUSE CONCURRENT RESOLUTION No. 5025

A CONCURRENT RESOLUTION ratifying the March 12, 2020, State of Disaster Emergency declaration, subject to limitations, issued by Governor Laura Kelly and providing for the continuation thereof for the entire 105 counties of Kansas through May 1, 2020, subject to additional extensions of time.

WHEREAS, On March 12, 2020, Governor Laura Kelly issued a State of Disaster Emergency declaration in response to confirmed cases of novel coronavirus (COVID-19) in the state of Kansas and considers that a public health emergency exists within the state of Kansas. The United States Centers for Disease Control and Prevention (CDC) identifies the potential public health threat posed by COVID-19 both globally and in the United States as "high," and the United States Department of Health & Human Services declared a public health emergency for COVID-19 beginning January 27, 2020. The World Health Organization (WHO) declared a global pandemic on March 11, 2020: Now, therefore,

*Be it resolved by the House of Representatives of the State of Kansas, the Senate concurring therein:* That the State of Disaster Emergency declaration issued on March 12, 2020, for the entire 105 counties of Kansas in accordance with K.S.A. 48-924 is hereby ratified and continued in force and effect on and after March 12, 2020, through May 1, 2020, subject to additional extensions by concurrent resolution of the Legislature or as further provided in this concurrent resolution. If the Legislature is not in session:

(1) As described in K.S.A. 48-924(b)(3), upon specific application by the Governor to the State Finance Council, the State Finance Council may authorize once an extension of such state of disaster emergency by affirmative vote of a majority of the legislative members thereof for a specified period not to exceed 30 days; and

(2) following such State Finance Council action, the Legislative Coordinating Council, representing the Legislature when the Legislature is not in session pursuant to K.S.A. 46-1202:

(A) Is authorized to ratify a declaration, terminate a state of disaster emergency, revoke an order or proclamation or assume any other power granted to the legislature pursuant to K.S.A. 48-924 or K.S.A. 2019 Supp. 48-925;

(B) may authorize additional extensions of such state of disaster emergency by a majority vote of five members thereof for specified periods not to exceed 30 days each;

(C) shall meet not less than every 30 days to:

(i) Review the state of disaster emergency;

(ii) consider any orders or proclamations issued since the last Legislative Coordinating Council meeting; and

(iii) consider whether such orders or proclamations, if any, are an exercise of any power listed in K.S.A. 2019 Supp. 48-925(c)(2), (c)(4), (c)(7), (c)(8) or (c)(11); and

(D) shall have the authority to review and revoke all orders and proclamations issued by the governor pursuant to K.S.A. 2019 Supp. 48-925(b). The chairperson of the Legislative Coordinating Council, in consultation with the attorney general, adjutant general and any other parties the chairperson deems necessary, shall determine if an order or proclamation that is an exercise of a power listed in K.S.A. 2019 Supp. 48-925(c)(2), (c)(4), (c)(7), (c)(8) or (c)(11) has been issued. If the chairperson determines that the order or proclamation is an exercise of such power, the Legislative Coordinating Council shall meet to consider such order or proclamation within three calendar days. At such meeting, the Legislative Coordinating Council may revoke such order or proclamation; and

*Be it further resolved:* That, for the purposes of this ratification, the Governor shall not have the power or authority to temporarily or

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permanently seize, or authorize seizure of, any ammunition or to suspend or limit the sale, dispensing or transportation of firearms or ammunition pursuant to K.S.A. 2019 Supp. 48-925(c)(8) or any other executive authority.

I hereby certify that the above CONCURRENT RESOLUTION originated in the HOUSE, and was adopted by that body

\_\_\_\_\_  
HOUSE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*Speaker of the House.*

\_\_\_\_\_  
*Chief Clerk of the House.*

Passed the SENATE  
as amended \_\_\_\_\_

SENATE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*President of the Senate.*

\_\_\_\_\_  
*Secretary of the Senate.*