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ATTORNEY GENERAL OPINION NO. 2020- 6

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Hon. Kristey Williams
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Re: Militia, Defense and Public Safety—Emergency Preparedness for Disasters—Disasters; Responsibilities of Governor; State of Disaster Emergency; Powers of Governor During State of Disaster Emergency; Orders and Proclamations; Penalty for Violation of Act or Rules and Regulations, Orders or Proclamations Thereunder

Synopsis: A state of disaster emergency declaration may be ratified by concurrent resolution of the Legislature pursuant to K.S.A. 48-924.

A second or subsequent successive disaster emergency declaration arising from the same ongoing disaster is legally suspect, but whether a new state of emergency arises from a disaster will depend on the facts.

Constitutional concerns with K.S.A. 2019 Supp. 48-925(b) include the language that purports to authorize the legislature, by concurrent resolution, to ratify a governor's emergency order to keep it in effect after the period of disaster emergency expires; the language that purports to authorize the Legislature, by concurrent resolution, to revoke emergency orders of the governor at any time; and the broad delegation of legislative power in that subsection and also K.S.A. 2019 Supp. 48-925(c)(11). Under a severability analysis, any of these issues could be grounds to invalidate the broader legislative enactment if the provisions are inextricably bound with each other.

Criminal prosecutions under K.S.A. 48-939 are proper only if the conduct prohibited by an executive order was committed knowingly and willfully, during a properly declared state of disaster emergency, and the executive order was lawful because it had proper statutory authority and does not violate any constitutional or statutory provision. Constitutional concerns regarding an emergency order include the due process void-for-vagueness doctrine and whether the order impermissibly burdens constitutional rights. Constitutional concerns regarding the statute relied upon as authority for an executive order include whether it is an unlawful delegation of legislative power. Cited herein: K.S.A. 2019 Supp. 8-15,103; 17-12a508; 21-5101; 21-5103; 21-5402; 21-5405; 21-5924; 21-6423; 21-6602; 21-6611; 31-150a; 44-636; 44-719; K.S.A. 44-1020; 48-904; 48-924; K.S.A. 2019 Supp. 48-924a; 48-925; K.S.A. 48-939; 48-3017; 75-430; 77-415; 77-420; Kan. Const. art. 1, § 2.

* * *

Dear District Attorney Schroeder, Senator Hilderbrand and Representatives Arnberger, Erickson, Humphries, Landwehr, Wasinger, and Williams:

In your respective official capacities, you request our opinion¹ on multiple questions related to the Kansas Emergency Management Act (KEMA), K.S.A. 48-904 *et seq.*, and various orders and proclamations issued under authority of KEMA by Governor Laura Kelly in response to the current novel coronavirus disease (COVID-19) pandemic. Generally, your questions regard the extraordinary powers that temporarily reside with the governor during a declared state of disaster emergency to both make law and execute it, two powers that our constitution purposely separated between the legislative and executive branches. The district attorney in particular presents questions specifically

¹ Letter to the Attorney General from Keith E. Schroeder, District Attorney for Reno County, dated April 27, 2020. (hereafter, "Schroeder letter."); letter to the Attorney General from Representatives Arnberger, Erickson, Humphries, Landwehr, Wasinger, and Williams dated May 12, 2020; and three letters to the Attorney General from Senator Richard Hilderbrand, each dated May 14, 2020.

relating to the authority in K.S.A. 48-939 to criminally enforce² orders issued by the governor³ under authority of K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925 during the COVID-19 pandemic (hereafter, “emergency orders” or “orders”).⁴ The district attorney seeks our opinion with “a sense of urgency, based on the unique facts facing prosecutors in Kansas.”⁵ This is because in making enforcement decisions, he wishes “to avoid any unlawful arrests or convictions stemming from the disputed nature and authority of the Governor’s Executive Orders.”⁶

Because your various questions are closely related and overlapping, we are consolidating your requests and combining your questions. Several of your questions explicitly or implicitly ask whether the KEMA provisions themselves or any particular use of those provisions offends the federal or state constitutions. We will address your questions as follows:

1. Was Governor Kelly’s First Disaster Declaration of March 12, 2020, valid for more than fifteen days, and if so, when did it expire?
2. Was Governor Kelly’s Second Disaster Declaration of April 30, 2020, valid, and if so, when does it expire?
3. Is K.S.A. 2019 Supp. 48-925 facially unconstitutional?
4. Assuming a state of disaster emergency is in effect and K.S.A. 2019 Supp. 48-925 is facially constitutional, are individual emergency orders issued under that statutory authority valid and enforceable through criminal prosecution under K.S.A. 48-939?

² Our analysis addresses criminal enforcement of a governor’s emergency orders by prosecutors bringing charges for violation of K.S.A. 48-939. Alternate methods of enforcing valid emergency orders of the governor may be authorized by the KEMA but are outside the scope of this opinion. See, e.g., K.S.A. 2019 Supp. 48-925(d) (adjutant general “shall administer such orders”); K.S.A. 2019 Supp. 48-925(a) (governor is “commander-in-chief of the organized and unorganized militia and of all other forces available for duty”); K.S.A. 2019 Supp. 48-925(c)(10) (governor may “require and direct the cooperation and assistance of state and local governmental agencies and officials”).

³ We focus on enforcement of orders of the governor issued pursuant to a state of disaster emergency proclaimed under K.S.A. 48-924. On its face, K.S.A. 48-939 applies more broadly to certain “violation[s] of any provision of this act or any rule and regulation adopted by the adjutant general under this act or any lawful order or proclamation issued under authority of this act whether pursuant to a proclamation declaring a state of disaster emergency under K.S.A. 48-924 or a declaration of a state of local disaster emergency under K.S.A. 48-932.”

⁴ We confine our analysis to powers authorized by K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925. We do not analyze any other emergency authorities or powers, including any executive authority of the governor derived directly from the Kansas constitution rather than from statute. You do not seek our opinion on any emergency powers exercised by local authorities.

⁵ Schroeder letter at p. 1.

⁶ *Id.* at p. 5.

Before addressing each of those questions, we provide some background on the KEMA and the exercise of statutory emergency powers under K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925 during the COVID-19 pandemic.

Background

On March 11, 2020, the World Health Organization declared a global pandemic in connection with the spread of COVID-19.⁷ On March 12, 2020, the same day the first COVID-19-related fatality occurred in Kansas, Governor Kelly declared a statewide state of disaster emergency under authority of the KEMA.⁸ On March 13, 2020, President Donald J. Trump proclaimed a nationwide emergency⁹ and on March 20, 2020, the President granted the State of Kansas an Emergency Declaration.¹⁰ On March 19, 2020, the legislature adopted House Concurrent Resolution 5025 related to the governor's March 12, 2020, disaster declaration and extended that state of disaster emergency through May 1, 2020.¹¹ On March 29, 2020, President Trump declared the existence of a major disaster in the State of Kansas based on COVID-19 beginning January 20, 2020, and continuing.¹² On April 30, 2020, Governor Kelly declared a second statewide state of disaster emergency beginning March 12, 2020, and continuing.¹³ On May 13, 2020, the state finance council rejected the governor's application to extend the April 30, 2020, disaster declaration for 30 additional days and instead voted to extend the governor's April 30, 2020 disaster declaration only through May 26, 2020.

To date, the governor has issued an unprecedented 31 emergency orders¹⁴ to exercise emergency powers under K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925 in less than 10 weeks since a state of disaster emergency related to COVID-19 was initially declared. Although typically used for disasters such as severe weather, fires or floods and not

⁷ <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19> (last accessed May 5, 2020).

⁸ Kansas State of Disaster Emergency Proclamation (March 12, 2020) (on file with the Office of the Secretary of State); <https://governor.kansas.gov/wp-content/uploads/2020/03/2020-03-12-Proclamation.pdf> (State of Disaster Emergency Proclamation) (last accessed May 12, 2020).

⁹ Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9994, 85 C.F.R. 15337 (2020); <https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/> (Stafford Act) (last accessed May 5, 2020).

¹⁰ Disaster Declarations of Economic Injury for the Coronavirus (COVID-19); Administrative Declarations of Economic Injury Disasters for the Entire United States and U.S. Territories, 85 Fed. Reg. 20015 (April 9, 2020) (Referencing Declaration 13685, KS00132); <https://www.federalregister.gov/documents/2020/04/09/2020-07501/disaster-declarations-of-economic-injury-for-the-coronavirus-covid-19-administrative-declarations-of> (last accessed May 18, 2020).

¹¹ 2020 House Concurrent Resolution 5025, 39 Kan. Reg. 13, 340 (March 26, 2020).

¹² FEMA-4504-DR; President Donald J. Trump Approves Major Disaster Declaration for Kansas; <https://www.fema.gov/news-release/2020/03/30/president-donald-j-trump-approves-major-disaster-declaration-kansas-0> (last accessed May 18, 2020).

¹³ Kansas State of Disaster Emergency Proclamation (April 30, 2020) (on file with the Office of the Secretary of State).

¹⁴ See Executive Orders 20-03 (dated March 16, 2020) through 20-34 (dated May 19, 2020), except Executive Order 20-30 (dated May 6, 2020) was not an exercise of emergency powers under authority of KEMA.

specifically designed for public health emergencies,¹⁵ those statutes nonetheless impose a general responsibility on the governor to “meet[] the dangers to the state and people presented by disasters,”¹⁶ which include epidemics and contagious and infectious diseases.¹⁷ As relevant here, the statutes establish a two-part procedure for the exercise of emergency powers. First, if the governor finds “that a disaster has occurred or that occurrence of the threat thereof is imminent,” the governor “shall issue a proclamation declaring a state of disaster emergency.”¹⁸ That state of disaster emergency continues until the governor finds that the danger has passed or that an emergency no longer exists, at which time the governor terminates it by proclamation.¹⁹ If after 15 days the governor has not terminated the state of disaster emergency, it nevertheless ends by operation of law unless either (a) the legislature ratifies it by concurrent resolution or (b) the state finance council extends it a single time for not more than 30 additional days.²⁰

Second, during the time while a proclaimed state of disaster emergency is in effect — and only during that time — K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925 authorize the governor to exercise extraordinary powers.²¹ The governor exercises these powers by issuance of orders.²² These orders, which in practice typically are styled as executive orders, “shall have the force and effect of law during the period of a [declared state of] disaster emergency” but “shall be null and void thereafter.”²³ The legislature may revoke these orders at any time by concurrent resolution.²⁴

Relevant specifically to the district attorney’s questions, K.S.A. 48-939 provides that the “knowing and willful violation of any provision of a ... lawful order ... issued ... pursuant to a proclamation declaring a state of disaster emergency under K.S.A. 48-924 ... shall constitute a class A misdemeanor and any person convicted of such violation shall be

¹⁵ In 2002, the legislature amended K.S.A. 48-924 specifically to address the spread of contagious and infectious diseases among domestic animals and, in so doing, altered some of the mechanisms for ensuring legislative oversight of emergency executive actions during an extended animal health emergency when the legislature is not in session. See K.S.A. 48-924(b)(2) and (4). However, those mechanisms apply only to emergencies involving the spread of disease among domestic animals, not among humans.

¹⁶ K.S.A. 48-924(a).

¹⁷ K.S.A. 48-904(d).

¹⁸ K.S.A. 48-924(b)(1).

¹⁹ K.S.A. 48-924(b)(3).

²⁰ K.S.A. 48-924(b)(3). Separately, K.S.A. 48-924(b)(5) authorizes the legislature at any time by concurrent resolution to require the governor to terminate the state of disaster emergency.

²¹ See K.S.A. 2019 Supp. 48-925(a), (b) and (c); see also *State ex rel. Dodrill v. Scott*, 352 S.E.2d 741, 747-48 (W. Va. 1986) (absent declared state of emergency required by statute, governor’s statutory emergency orders are invalid); *Worthington v. Fauver*, 440 A.2d 1128, 1135 (N.J. 1982) (finding an executive order valid because it was within statutory authority).

²² K.S.A. 2019 Supp. 48-925(b) and (d).

²³ K.S.A. 2019 Supp. 48-925(b). Such orders may not continue in force and effect after the state of disaster emergency has ended “unless ratified by concurrent resolution of the legislature.” *Id.* We doubt the validity of this provision that purports to allow orders to remain in force and effect after a state of disaster emergency has ended. See Question 3 below.

²⁴ K.S.A. 2019 Supp. 48-925(b).

punished as provided by law therefor.”²⁵ Under Kansas law, prosecuting attorneys, including county and district attorneys, are responsible for determining whether to bring charges alleging violations of the criminal laws of this state,²⁶ including K.S.A. 48-939.

With that background in mind, we turn to specific questions.

Question 1: Was Governor Kelly’s Disaster Declaration of March 12, 2020, valid for more than fifteen days, and if so, when did it expire?

Answer: Governor Kelly’s proclamation of a state of disaster emergency issued March 12, 2020, was extended by concurrent resolution of the legislature and expired May 1, 2020.

On March 12, 2020, Governor Kelly proclaimed a State of Disaster Emergency²⁷ (hereafter, “First Disaster Proclamation”).²⁸ The First Disaster Proclamation cited generally as its legal basis “the authority vested in me by the Kansas Emergency Management Act, Chapter 48, Article 9, of the Kansas Statutes Annotated.”²⁹ By operation of law, that state of disaster emergency could last no more than 15 days unless extended as provided by law.³⁰ K.S.A. 48-924 makes available two separate and distinct methods of extending beyond 15 days a state of disaster emergency: (a) ratification by concurrent resolution of the legislature, or (b) extension only once by the state finance council for a specified period not to exceed 30 days beyond such 15-day period.³¹ The plain language of the statute applies the 30-day limitation only to the single extension that may be approved by the state finance council; the statute is silent as to the number or duration of any extensions that may be accomplished by concurrent resolution of the legislature.

²⁵ K.S.A. 48-939. The penalty for conviction of a Class A misdemeanor is up to one years’ confinement in the county jail, a fine of up to \$2,500, or both. See K.S.A. 2019 Supp. 21-6602(a)(1) and K.S.A. 2019 Supp. 21-6611(b)(1).

²⁶ See K.S.A. 22-2202(q); see also Kansas Rule of Professional Conduct 3.8(a) and Comment 1 (Special Responsibilities of a Prosecutor).

²⁷ Kansas State of Disaster Emergency Proclamation (March 12, 2020) (on file with the Office of the Secretary of State); <https://governor.kansas.gov/wp-content/uploads/2020/03/2020-03-12-Proclamation.pdf> (last accessed May 12, 2020).

²⁸ For purposes of this question, we will assume without deciding that the effective date is March 12, 2020, as stated by the governor.

²⁹ See <https://governor.kansas.gov/wp-content/uploads/2020/03/2020-03-12-Proclamation.pdf> (last accessed May 12, 2020).

³⁰ K.S.A. 48-924(b)(3).

³¹ Compare K.S.A. 48-924(b)(3) with K.S.A. 48-924(b)(2) and (4) and K.S.A. 2019 Supp. 48-924a. The provisions in K.S.A. 48-924(b)(3) for extending a state of disaster emergency apply to the March 12, 2020, declaration, which is neither “to prevent the spread among domestic animals of any contagious or infectious disease,” see K.S.A. 48-924(b)(2) and (4), nor “involving the severe weather disaster of May 4, 2007,” see K.S.A. 2019 Supp. 48-924a.

On March 19, 2020, the legislature unanimously adopted the conference committee report on House Concurrent Resolution 5025 (HCR 5025).³² That concurrent resolution contained the following provision:

[T]he 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.

Thus, the state of disaster emergency proclaimed by the governor on March 12, 2020, was ratified by concurrent resolution of the legislature as provided by K.S.A. 48-924(b)(3), and by terms of HCR 5025 that state of disaster emergency was extended and in effect through May 1, 2020.³³

Question 2: Was Governor Kelly's Second Disaster Declaration of April 30, 2020, valid, and if so, when does it expire?

Answer: The KEMA does not authorize a governor to continue to access to statutory emergency powers by proclaiming a second or succeeding state of disaster emergency arising from the same continuing disaster. Whether a new state of emergency arises from the same continuing disaster is a question of fact.

On April 30, 2020, Governor Kelly proclaimed a second state of disaster emergency related to COVID-19³⁴ (hereafter, "Second Disaster Proclamation"). The Second Disaster Proclamation cites generally as its authority "the authority vested in me by the Kansas Emergency Management Act, Chapter 48, Article 9, of the Kansas Statutes Annotated."³⁵ It purports to be effective when issued on April 30, 2020,³⁶ and thus overlapped for two days with the First Disaster Proclamation.³⁷ By law, a proclamation of a state of disaster

³² The vote in the Senate was 39-0 and in the House of Representatives, 115-0.

³³ K.S.A. 48-924 also provides that a state of disaster emergency shall be terminated by the governor when the danger has passed or emergency conditions no longer exist, K.S.A. 48-924(b)(3), or "at any time" by concurrent resolution of the legislature, K.S.A. 48-924(b)(5). Neither of those actions to terminate the March 12, 2020, state of disaster emergency prior to May 1, 2020, occurred. Although K.S.A. 48-924 does not expressly authorize the legislature to limit the duration for which it ratifies a state of disaster emergency by concurrent resolution, since both the authority to "ratif[y]" and the authority to require termination "at any time" are exercised by concurrent resolution, see K.S.A. 48-924(b)(3) and K.S.A. 48-924(b)(5), we see nothing preventing the legislature from doing both in a single concurrent resolution as it did in HCR 5025.

³⁴ Kansas State of Disaster Emergency Proclamation, issued by Governor Laura Kelly, April 30, 2020 (on file with the Office of the Secretary of State). (Hereafter "Second Disaster Proclamation").

³⁵ Second Disaster Proclamation, Paragraph 1.

³⁶ For purposes of this question, we will assume without deciding that the effective date is April 30, 2020, as stated by the governor.

³⁷ As explained in Question 1, the First Disaster Proclamation was purportedly in effect through May 1, 2020. Thus, on April 30, 2020, and May 1, 2020, both the First Disaster Proclamation and the Second Disaster Proclamation concurrently claimed effect.

emergency must indicate: (a) the nature of the disaster; (b) the area or areas threatened or affected by the disaster; and (c) the conditions which have brought about the state of disaster emergency.³⁸ Both disaster proclamations describe the nature of the disaster as materially the same involving the COVID-19 pandemic and beginning with confirmation by the Secretary of Health and Environment on March 7, 2020, that a case of COVID-19 was confirmed in Kansas and a public health emergency exists in the state.³⁹ Both proclamations describe the area affected by the disaster as all 105 counties in Kansas.⁴⁰ In addition, both proclamations state the date the disaster affected the area as March 12, 2020, although the Second Disaster Proclamation further describes the disaster as beginning March 12 “and continuing.”⁴¹ On May 13, 2020, the state finance council met and rejected the governor’s application to extend for 30 additional days the state of emergency declared by the Second Disaster Proclamation, and instead voted to extend it through May 26, 2020.⁴²

To determine whether KEMA authorizes issuance by the governor of the Second Disaster Proclamation to succeed the First Disaster Proclamation, we must interpret K.S.A. 48-924 using the approach of Kansas courts to statutory interpretation. The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.⁴³ That intent is to be ascertained in the first instance from the statutory language enacted, giving common words their ordinary meanings.⁴⁴ Only if a statute’s language is unclear or ambiguous does a court apply canons of construction or rely on legislative history to discern the legislature’s intent.⁴⁵

The plain language of K.S.A. 48-924 authorizes the governor to proclaim only one state of disaster emergency arising from the same continuing disaster

Through K.S.A. 48-924(a), the legislature has placed responsibility on the governor “for meeting the dangers to the state and people presented by disasters,”⁴⁶ and K.S.A. 2019 Supp. 48-925 makes available certain emergency powers the governor may exercise in fulfilling that responsibility. But the legislature also has placed strict limits on the governor’s ability to access those emergency powers and has reserved for itself

³⁸ K.S.A. 48-924(b)(6).

³⁹ Compare First Disaster Proclamation “Nature of the Disaster” with Second Disaster Proclamation “Nature of the Disaster”. The Second Disaster Proclamation contains more-detailed descriptions of events that occurred after the First Disaster Proclamation was issued. Neither proclamation contains a separate section setting forth the conditions which have brought about the state of disaster emergency, and it is presumed that statutory requirement is subsumed in the “Nature of the Disaster” section of each proclamation.

⁴⁰ The Second Disaster Proclamation also adds the four resident Tribes to the area affected.

⁴¹ Second Disaster Proclamation “Date that Disaster Affected the Area.”

⁴² State Finance Council meeting, Wednesday, May 13, 2020. <http://sg001-harmony.sliq.net/00287/Harmony/en/PowerBrowser/PowerBrowserV2/20200513/-1/9539> (recording of meeting) (last accessed May 18, 2020).

⁴³ *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659 (2016).

⁴⁴ *Ullery v. Othick*, 304 Kan. 405, 409 (2016).

⁴⁵ *Id.*

⁴⁶ K.S.A. 48-924(a).

significant oversight of both the governor's ongoing access to and exercise of those emergency powers.⁴⁷ K.S.A. 48-924(b)(1) sets forth the exclusive⁴⁸ means for the governor to access the statutory emergency powers authorized by K.S.A. 2019 Supp. 48-925 as proclaiming a state of disaster emergency as authorized by that statute. Specifically, the statute provides that the governor "upon finding that a disaster has occurred or that occurrence or the threat thereof is imminent, shall issue a proclamation declaring a state of disaster emergency."⁴⁹ Importantly, the plain language of that sentence is entirely in the singular: when the governor finds "a disaster" has occurred the governor shall issue "a proclamation" declaring "a state of disaster emergency."⁵⁰ The legislature could as readily have written that sentence in the plural, such as providing when "any" disaster has occurred the governor shall issue "proclamations" declaring "one or more states of disaster emergency." The legislature's use of the pronoun "a" to modify singular nouns⁵¹ throughout that sentence describing the *governor's* authority is in contrast with how the same statutory section describes the *legislature's* authority by concurrent resolution to extend by ratification a state of disaster emergency.⁵² It is presumed "that the legislature intended a different meaning when it used different language in the same connection in different parts of a statute."⁵³

Moreover, that statutory language written in the singular — which refers to one disaster, one proclamation, and one state of emergency — is consistent with the provision of K.S.A. 48-924(b)(3). That provision states that "the" disaster (also in the singular) continues until the "threat or danger of disaster has passed" or "emergency conditions no longer exist," and specifically contemplates a state of disaster emergency may be ended by operation of law even before "the" disaster may have ended.⁵⁴

⁴⁷ The legislature allows authorizes the governor's access to the delegated emergency powers in K.S.A. 2019 Supp. 48-925 only through a state of disaster emergency that remains in effect for a maximum of 15 days absent action by the legislature or the state finance council. See K.S.A. 48-924(b)(3). The state finance council may extend the state of disaster emergency, but only once and then not for more than an additional 30 days beyond the initial 15 days. See *id.* Otherwise, only the full legislature, acting by concurrent resolution, see *id.*, or by enactment of a statute, see e.g., K.S.A. 2019 Supp. 48-924a, may further extend a state of disaster emergency.

⁴⁸ K.S.A. 48-924(b)(2) is not relevant to our analysis. It applies only when "a quarantine or other regulations are necessary to prevent the spread *among domestic animals* of any contagious or infectious disease." K.S.A. 48-924(e) also is not relevant because it applies only to a state of *drought*, not a state of *disaster* emergency, and does not enable the governor to access the emergency powers in K.S.A. 2019 Supp. 48-925.

⁴⁹ K.S.A. 48-924(b)(1).

⁵⁰ K.S.A. 48-924(b)(1) (emphasis added).

⁵¹ When used as an indefinite article in the manner applicable here, "a" modifies singular nouns. See <https://www.merriam-webster.com/dictionary/a> ("used as a function word before singular nouns when the referent is unspecified") (last accessed May 19, 2020).

⁵² Compare K.S.A. 2019 Supp. 48-924(b)(1) (governor for "a" disaster shall issue "a" proclamation declaring "a" state of disaster emergency) with K.S.A. 48-924(b)(3) (no article preceding "concurrent resolution").

⁵³ *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 245-46 (1992).

⁵⁴ K.S.A. 48-924(b)(3).

Thus, the plain language of K.S.A. 48-924(b)(1) limits the governor to proclaiming a single state of disaster emergency for any single disaster and then retains exclusively for the legislature or the state finance council authority to decide whether that state of disaster emergency is to be continued. It is a question of fact whether the First Disaster Proclamation and the Second Disaster Proclamation arise from the same continuing disaster, as opposed to different disasters, but several factors suggest strongly that they do: first, as described above, both proclamations set forth materially the same facts of the COVID-19 pandemic, merely updated to reflect the passage of time. Second, they both identify the events that justify the proclamation as originating with the March 7, 2020, confirmation by the Secretary of Health and Environment of COVID-19 in Kansas. Third, they both identify March 12, 2020, as the date disaster affected the area, and the Second Disaster Proclamation by its terms describes that disaster as “continuing.” Fourth, the two proclamations overlapped by two days — April 30 and May 1, 2020 — and it strains credulity to conclude that two separate COVID-19 disasters existed in Kansas necessitating two separate states of disaster emergency on those two days. Fifth, the governor’s Executive Order 20-28 explicitly recognizes that “under the Kansas Emergency Management Act there is currently no effective mechanism for additional extensions of the State of Disaster Emergency other than passage of another concurrent resolution through each legislative chamber.”⁵⁵ The governor then identified that “the clearest available mechanism to ensure the continued effectiveness and validity of emergency measures ... including emergency executive orders ... is to issue a new State of Disaster Declaration.”⁵⁶

Even if K.S.A. 48-924 is ambiguous, the rules of statutory construction counsel for the same conclusion that a governor may not issue rolling proclamations of a state of emergency arising from the same continuing disaster

We think the relevant statutory language is plain and does not provide for successive declarations of a state of disaster emergency arising from the same continuing disaster, but even if the statutory language were found to be ambiguous, a proper construction of the statute would lead to the same result. “When appellate courts embark upon statutory interpretation and construction, the most fundamental rule is that the legislature’s intent governs if it can be ascertained.”⁵⁷ If the plain language of the statute does not reveal the legislature’s intent, then “the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain the statute’s meaning.”⁵⁸

We think at least three factors preclude interpreting K.S.A. 48-924 to grant the governor authority to issue successive states of disaster emergency for the same ongoing disaster.

⁵⁵ Executive Order 20-28 (dated April 30, 2020).

⁵⁶ Executive Order 20-28 (dated April 30, 2020).

⁵⁷ *State v. Soto*, 310 Kan. 242, 257 (2019) (citation and internal punctuation omitted).

⁵⁸ *Miller v. Bd. of Cty. Commissioners, Wabaunsee Cty.*, 305 Kan. 1056, 1059 (2017) (citations omitted).

First, under the *in pari materia* canon of statutory construction,⁵⁹ the provisions of K.S.A. 48-924 must be read together and in harmony.

The statutory architecture of K.S.A. 48-924 is replete with mechanisms designed to ensure ongoing oversight and limitation on the duration of time a governor may exercise emergency powers⁶⁰ by proclaiming a state of disaster emergency. A state of disaster emergency ends by operation of law after 15 days unless permitted to continue by action of the legislature or the state finance council.⁶¹ The state finance council may extend the state of disaster emergency, but only once and then not for more than an additional 30 days beyond the initial 15 days.⁶² Otherwise, only the full legislature, acting by concurrent resolution⁶³ or by enactment of statute,⁶⁴ may authorize further extension of a state of disaster emergency. Moreover, the legislature expressly reserved to itself the authority to require, “at any time” by concurrent resolution, the governor to terminate a state of disaster emergency.⁶⁵ To interpret K.S.A. 48-924 in a manner allowing a governor to issue new declarations of states of disaster emergencies that would, *de facto*, extend beyond the time period authorized by statute, the state finance council, or concurrent resolution of the legislature, clearly cuts against this overall statutory scheme. Moreover, this sort of ongoing legislative oversight may be constitutionally required: “Absent a liberal interpretation of the Legislature’s ability to continually oversee the Governor’s exercise of delegated Legislative authority, the structure of KEMA itself risks violating the constitutional demand of separate powers.”⁶⁶

Second, the legislature has created statutory mechanisms for extending a state of disaster emergency in two specific contexts inapplicable to the COVID-19 pandemic and made a similar attempt in response to the COVID-19 pandemic. In 2002, the legislature recognized that the spread of contagious or infectious disease among domestic animals could require a state of disaster emergency that would last beyond a legislative session, and enacted a mechanism for the state finance council to grant rolling extensions.⁶⁷ And after the Greensburg tornado in 2007, the legislature recognized a similar issue and enacted specific authority for rolling extensions of that state of disaster emergency by the

⁵⁹ *Pankratz Implement Co. v. Citizens Nat. Bank*, 281 Kan. 209, 215 (2006).

⁶⁰ Further indicating an intent to maintain oversight of use of the emergency powers in K.S.A. 2019 Supp. 48-925, the legislature also reserved for itself the authority to revoke by concurrent resolution individual orders and proclamations of the governor that exercise emergency powers during a state of disaster emergency. See K.S.A. 2019 Supp. 48-925(b).

⁶¹ K.S.A. 48-924(b)(3).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See, e.g., K.S.A. 2019 Supp. 48-924a.

⁶⁵ K.S.A. 2019 Supp. 48-924(b)(5).

⁶⁶ *Kelly v. Legislative Coord. Council*, 460 P.3d 832, 841 (Kan. 2020) (Stegall, J., concurring).

⁶⁷ K.S.A. 48-924(b)(4).

state finance council.⁶⁸ The legislature made a similar but ultimately unsuccessful attempt by concurrent resolution during the COVID-19 pandemic.⁶⁹ Those specific mechanisms would have been unnecessary if the governor already possessed authority to extend a state of emergency for the same continuing disaster merely by issuing successive new proclamations, and they are strong evidence that the statute vests no such authority with the governor.

Third, interpreting K.S.A. 48-924 to authorize the Second Disaster Proclamation would produce the absurd result that all of the carefully constructed limitations on a governor's access to statutory emergency powers were mere suggestions. Kansas courts "always strive[] for a reasonable interpretation or construction that avoids an unreasonable or absurd result."⁷⁰ But if the governor had authority to issue the Second Disaster Proclamation, then nothing in the text or structure of K.S.A. 48-924 would act to limit a third or fourth or subsequent proclamation. That would mean a governor could continue unilaterally granting herself or himself access to emergency powers by issuing rolling proclamations of a state of disaster emergency every 15 days,⁷¹ at least while the legislature is out of session and unable to end the state of emergency by concurrent resolution or by enactment of law. There is nothing to suggest the legislature intended the statute to operate in that manner, effectively vesting in the governor, not the legislature or the state finance council, control over access to delegated emergency powers.⁷² The Wisconsin Supreme Court recently rejected a similarly expansive view of executive branch authority to extend its own access to emergency powers through successive states of emergency,⁷³ and at least one justice of the Kansas Supreme Court has suggested that such a result could raise constitutional concerns about the KEMA itself.⁷⁴ We think the rule that Kansas courts interpret statutes to avoid unreasonable or absurd

⁶⁸ K.S.A. 2019 Supp. 48-924a.

⁶⁹ See 2020 House Concurrent Resolution 5025; *Kelly*, 460 P.3d 832.

⁷⁰ *Baker v. State*, 297 Kan. 486, 488 (2013).

⁷¹ During the May 13, 2020, meeting of the state finance council, the governor's chief counsel expressed a similarly expansive view of the governor's statutory authority, stating that if a state of emergency was not extended by the state finance council or the legislature the governor could again – for a third time – proclaim a new state of disaster emergency. State Finance Council meeting, Wednesday, May 13, 2020. <http://sg001-harmony.sliq.net/00287/Harmony/en/PowerBrowser/PowerBrowserV2/20200513/-1/9539> (last accessed May 18, 2020).

⁷² Courts in other states have recognized that under emergency-powers statutes, disasters may not be limited to storms, floods, pandemics and other natural occurrences. See, e.g., *California Corr. Peace Officers Assn. v. Schwarzenegger*, 77 Cal. Rptr. 3d 844 (Cal. Ct. App. 2008) (stating that the governor of California can proclaim a state of emergency under Emergency Services Act based upon an inmate overcrowding condition in a state prison); *Worthington v. Fauver*, 440 A.2d 1128 (N.J. 1982) (stating that prison overcrowding was an "emergency" under the state Disaster Control Act and was thus a proper subject of emergency executive action). The definition of "disaster" in KEMA is broad and "not limited to" specific subjects. See K.S.A. 48-904(d).

⁷³ See generally *Wisconsin Legislature v. Palm*, 2020 WL 2465677 (Wisc. 2020).

⁷⁴ *Kelly*, 460 P.3d at 841 (Stegall, J, concurring) ("Absent a liberal interpretation of the Legislature's ability to continually oversee the Governor's exercise of delegated Legislative authority, the structure of KEMA itself risks violating the constitutional demand of separate powers.").

results⁷⁵ precludes concluding that K.S.A. 48-924 authorized the Second Disaster Proclamation.

On balance, we think the validity of the Second Disaster Proclamation is doubtful, but we recognize that there are questions of fact that must be analyzed as well as opposing arguments,⁷⁶ and we cannot predict with certainty how a court might rule on these matters. To minimize the risk of legal challenges to executive orders issued or other emergency actions after May 1, 2020, authorized under the Second Disaster Proclamation, we recommend that the legislature by statute expressly approve the state of disaster emergency that began on March 12, 2020, similar to the statutory approval enacted for the state of disaster emergency after the 2007 Greensburg tornado.⁷⁷

Question 3: Is K.S.A. 2019 Supp. 48-925 facially unconstitutional?

Answer: Three specific portions in the language of K.S.A. 2019 Supp. 48-925(b) are constitutionally suspect on their face. The legislature should examine them carefully to determine whether they accurately reflect the legislature’s intent. If one or more is invalid, it would become necessary to determine whether the invalid portion is severable from the remainder of the statute.

In general, “[i]t is difficult for a challenger to succeed in persuading a court that a statute is facially unconstitutional. Such challenges are disfavored, because they may rest on speculation, may be contrary to the fundamental principle of judicial restraint, and may threaten to undermine the democratic process.”⁷⁸ We recognize also that the constitutionality of a statute is presumed.⁷⁹ Nevertheless, provisions of K.S.A. 2019 Supp. 48-925 cause us concern under prevailing Kansas law.

The first suspect statutory language is in K.S.A. 2019 Supp. 48-925(b) and purports to authorize emergency orders to remain in effect with the “force and effect of law” after a state of disaster emergency has ended. In particular, that language provides that emergency orders “shall have the force and effect of law during the period of a state of disaster emergency” but “shall be null and void thereafter *unless ratified by concurrent resolution of the legislature.*”⁸⁰ This language contains no limitation, in either time or subject matter, on the continuation of emergency orders having the “force and effect of law” once a disaster has ended so long as the order is “ratified by concurrent resolution of the legislature.” But under the Kansas Constitution, that is not how laws are made. To

⁷⁵ *State v. Arnett*, 307 Kan. 648, 654 (2018).

⁷⁶ One notable contrary point is that the legislature appears not to have objected to the Second Disaster Proclamation — indeed, the State Finance Council voted 6 to 3 to extend the state of disaster emergency declaration through May 26, 2020. State Finance Council meeting, Wednesday, May 13, 2020. <http://sg001-harmony.sliq.net/00287/Harmony/en/PowerBrowser/PowerBrowserV2/20200513/-1/9539> (last accessed May 18, 2020).

⁷⁷ See K.S.A. 2019 Supp. 48-924a.

⁷⁸ *State v. Bollinger*, 302 Kan. 309, 318-19 (2015).

⁷⁹ *Watson*, 273 Kan. 426, 429 (2002).

⁸⁰ K.S.A. 2019 Supp. 48-925(b) (emphasis added).

the contrary, “[n]o law shall be enacted except by bill,”⁸¹ and neither an executive order of the governor nor a concurrent resolution of the legislature is a bill.⁸² The procedure in K.S.A. 2019 Supp. 48-925(b) to convert an emergency order into potentially permanent law is inconsistent with that prescribed by Article 2 of the Kansas Constitution. This procedure established by K.S.A. 2019 Supp. 48-925(b) is inconsistent with Article 2 of the Kansas Constitution.

The second constitutionally suspect language in K.S.A. 2019 Supp. 48-925(b) purports to authorize “revok[ing] at any time by concurrent resolution of the legislature” emergency orders of the governor. This mechanism appears dangerously similar to a legislative veto by concurrent resolution. This statutory language was enacted in 1975, nine years before our Supreme Court ruled that a similar mechanism by which the legislature sought to retain authority to revoke regulations promulgated by administrative agencies violated the separation of powers and presentment required by the Kansas Constitution.⁸³ “The legislature cannot pass an act that allows it to violate the constitution.”

We recognize it may be possible to distinguish the use of a concurrent resolution to revoke emergency orders of the governor from revoking ordinary administrative regulations of an executive agency, but we are nonetheless concerned about this provision.

The third concerning language in K.S.A. 2019 Supp. 48-925(b) appears on its face to sweepingly and without any textual limitation in subsection (b) authorize the governor to “issue orders and proclamations which shall have the force and effect of law during the period of a state of disaster emergency.”⁸⁴ If that is read as a delegation of authority not limited to the powers enumerated in K.S.A. 2019 Supp. 48-925(c), it would represent an unconstrained delegation of legislative power to the executive branch of government.⁸⁵

⁸¹ Kan. Const. art. 2, § 20.

⁸² *Stephan v. House of Representatives*, 236 Kan. 45, 64 (1984) (stating “a resolution is essentially legislative where it affects the legal rights, duties and regulations of persons outside the legislative branch and therefore must comply with the enactment provisions of the constitution”). Bills “may originate in either house” of the legislature but not in an executive order of the governor. Kan. Const. art. 2, § 12. A bill has only one subject. Kan. Const. art. 2, § 16. When a bill amends an existing statute, it must “contain the ... section or sections amended, and the section or sections so amended shall be repealed,” Kan. Const. art. 2, § 16, but “it is axiomatic that a legislative concurrent resolution cannot amend a statute.” *Kelly*, 460 P.3d at 840 (Biles, J., concurring). Bills “may be amended” by either house of the legislature, Kan. Const. art. 2, § 12, and upon passage shall be presented to the governor for approval or veto. Kan. Const. art. 2, § 14. “Legislation becomes law when it is passed by majority votes of both houses of the Legislature and presented to the Governor, who must sign it or allow it to become law without signing it. If the bill is vetoed by the Governor, it can still become law if that veto is overridden by two-thirds majorities in both houses.” *Kelly*, 460 P.3d at 840 (Biles, J., concurring) (citations omitted).

⁸³ *Stephan v. House of Representatives*, 236 Kan. 45, 64-65 (1984) (finding an impermissible legislative veto where legislature passed a concurrent resolution to modify, reject, or revoke an agency’s regulation that the agency adopted under authority granted it by the legislature); see also *Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan.*, 264 Kan. 293, 313-16 (1998).

⁸⁴ K.S.A. 2019 Supp. 48-925(b).

⁸⁵ See generally, *Gundy v. United States*, 139 S. Ct. 2116’ (2019).

The Kansas Constitution vests “[t]he legislative power of this state” in the legislature.⁸⁶ Kansas courts have explained that the legislature may delegate *administrative* power to the executive branch of government but generally may not delegate its *legislative* power. The Kansas Supreme Court has explained the difference between the two:

Legislative power is the power to make a law, as opposed to the power to enforce a law. A legislature may try to delegate the legislative power to make a law. Such a delegation is improper, unless specific constitutional authority allows the legislature to delegate its legislative power to a different branch of government. If the constitution does not authorize a delegation of such legislative power, then the delegation is improper as a violation of the separation of powers doctrine and art. 2, § 1, which vests legislative power with the legislature only. However, a legislature may delegate an administrative power to a different branch of government. Administrative power is the power to administer or enforce a law, as opposed to the legislative power to make a law. The legislature does not need constitutional authority to delegate administrative power because it is not delegating a power reserved for its branch of government under art. 2, § 1.

It is often difficult to determine if the legislature has delegated the legislative power to make a law or the administrative power to administer a law. The difference between the two types of delegated powers depends upon the amount of specific standards included within the delegation. If the legislature has included specific standards in a delegation, then it has already enacted the law and it is simply delegating the administrative power to administer the law, based on the standards included in the delegation. On the other hand, if the legislature has not included specific standards within a delegation, then the legislature has delegated the legislative power to make the law. Such delegation is improper without constitutional authorization.

A delegated power constitutes administrative power if the delegation contains sufficient policies and standards to guide the nonlegislative body in exercising the delegated power. In other words, the legislature may enact general provisions and delegate to an administrative body the discretion to ‘fill in the details’ if the legislature establishes reasonable and definite standards to govern the exercise of such authority.⁸⁷

Thus, if K.S.A. 2019 Supp. 48-925(b) operates to impermissibly delegate legislative authority to the governor, it is likely unconstitutional. But a statute that delegates administrative authority to the governor is permissible, if “the legislature establishes reasonable and definite standards to govern the exercise of such authority” and leaves it

⁸⁶ Kan. Const. art. 2, § 1.

⁸⁷ *Tomasic*, 264 Kan. at 303-04 (internal citations and quotation marks omitted).

to the executive branch to “fill in the details.”⁸⁸ If not limited to exercising the powers enumerated in subsection (c), K.S.A. 2019 Supp. 48-925(b) itself contains *no standards whatsoever* to guide the governor’s issuance of orders and proclamations that “shall have the force and effect of law.”

Nothing in the plain text of K.S.A. 2019 Supp. 48-925(b) limits the orders and proclamations it authorizes to the subject matter enumerated in K.S.A. 2019 Supp. 48-925(c). And the powers enumerated in subsection (c) are, by their terms, “*in addition* to any other powers conferred upon the governor by law,”⁸⁹ and not a *limitation* on the power granted in K.S.A. 2019 Supp. 48-925(b). Subsection (d) states that subsection (c) confers powers on the governor but says nothing about limiting power under subsection (b).⁹⁰

Even if the authority in K.S.A. 2019 Supp. 48-925(b) to issue orders with the “force and effect of law” is restricted to exercise of the eleven enumerated powers in subsection (c), that may be insufficient limitation because subsection (c)(11) broadly authorizes the governor to “perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population.” While subsection (c)(11), unlike subsection (b), does provide *some* standards to govern the exercise of emergency powers — the exercise must be “necessary to promote and secure the safety and protection of the civilian population” — it is at least a reasonable concern whether that standard is sufficiently “reasonable and definite” to ensure the legislature’s delegation of authority to the governor remains lawful.⁹¹

⁸⁸ *Id.* at 304. *Ex parte McGee*, 105 Kan. 574 (1919) is an example of such an administrative delegation. There, the Legislature delegated authority to the state board of health to make regulations concerning, *inter alia*, procedures for isolation and quarantine, and the state board of health adopted a regulation which specified that persons infected with venereal diseases be quarantined at one of two locations. The Kansas Supreme Court held that the statute was not an unlawful delegation of legislative authority because it set out specific means — quarantine and isolation — by which the state board of health could act to protect public health from dangerous communicable diseases.

⁸⁹ K.S.A. 2019 Supp. 48-925(c) (emphasis added).

⁹⁰ K.S.A. 2019 Supp. 48-925(d).

⁹¹ More than 60 years ago, the Kansas Supreme Court upheld a statute that authorized the state finance council to determine how certain public funds were to be distributed and, in so doing, explained that “when the discretion to be exercised related to a police regulation for the protection of ... health ... legislation conferring such discretion may be valid and constitutional without such restrictions and limitations.” *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 665 (1957). But in that case, the “only legislative power involved” was the appropriation of funds and was “exercised by the legislature”; the “duties imposed upon the finance council were administrative in character, *i.e.*, to ascertain the facts and conditions upon which the statutes were declared to operate, and, when so ascertained, to allocate funds for the purposes specified.” *Id.* at 548. But here, the emergency powers delegated to the governor under the unrestrained language of K.S.A. 2019 Supp. 48-925(b), or under the somewhat more restrained language of K.S.A. 2019 Supp. 48-925(c)(11), include the plainly legislative power to issue orders with the “force and effect of law.” Those delegated powers have been exercised during the COVID-19 pandemic in a manner that criminalizes the otherwise-lawful conduct of citizens whose fundamental liberty interests may be implicated, see discussion in Question 4 below, and are not confined to the administrative role of deciding how appropriated funds are to be distributed to benefit public health.

If any language in K.S.A. 2019 Supp. 48-925 is facially unconstitutional, is that language severable from the statute or is the entire statute constitutionally infirm?

If any specific provisions of K.S.A. 2019 Supp. 48-925 are facially unconstitutional, the question arises whether the invalid provisions are severable or whether the remainder of the statute is invalid as well. Kansas courts apply a two-part test for whether unconstitutional provisions may be severed while leaving the remainder of a statute intact.

Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that the act would have been passed without the objectionable portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand.⁹²

In declining to sever unconstitutional provisions but instead invalidating a much broader legislative enactment, the Kansas Supreme Court recently reaffirmed that rule: “[I]f the void and valid parts of the statute are so connected with each other in the general scheme of the act that they cannot be separated without violence to the evident intent of the legislature, the whole must fail. These rules are of everyday enforcement in the courts.”⁹³

To determine whether any of the above language, if unconstitutional, may be severed from the remainder of K.S.A. 2019 Supp. 48-925 requires analysis of whether doing so would do “violence to the evident intent of the legislature” or whether the act “would have been passed without the objectionable portion.”⁹⁴

In summary, we recommend the legislature review these three specific provisions and determine whether they are written in a manner that accurately and precisely reflects the intent of the legislature.

Question 4: Assuming a state of disaster emergency is in effect and K.S.A. 2019 Supp. 48-925 is facially constitutional, are individual emergency orders issued under that statutory authority valid and enforceable through criminal prosecution?

Answer: The validity and enforceability of individual emergency orders must be determined on a case-by-case review of the content of the order and, in a criminal prosecution, its application to a particular set of facts involving a particular defendant.

The use of K.S.A. 48-939 to criminalize violations of emergency orders requires analysis through a criminal-law lens. Because K.S.A. 48-939 is an unusual criminal statute, law enforcement officers and prosecutors must carefully analyze case-by-case how it may lawfully be applied before using it to criminally enforce a governor’s emergency order. We

⁹² *Brennan v. Kansas Ins. Guar. Ass’n*, 293 Kan. 446, 463 (2011).

⁹³ *Gannon v. State*, 304 Kan. 490, 526 (2016) (quoting *State v. Smiley*, 65 Kan. 240, 247 (1902)).

⁹⁴ *Id.*

will first provide background on criminal-law principles that inform our analysis and then will set forth a recommended framework for any prosecutors considering bringing criminal charges under authority of K.S.A. 48-939.

Background on criminal statutes

In Kansas, “criminal statutes are generally strictly construed against the State, [although] this principle is subordinate to the rule that judicial interpretation must be reasonable and sensible to effectuate the legislative design and the true intent of the law.”⁹⁵ The general rule is “that all crimes are established by legislative act.”⁹⁶ The Kansas Criminal Code provides that “[n]o conduct constitutes a crime against the state of Kansas unless it is made criminal in this code or in another statute of this state.”⁹⁷ Likewise, “[i]t is also the rule in this state that a criminal statute will not be extended by courts to embrace acts or conduct not clearly included within its prohibitions.”⁹⁸ A person commits a violation of K.S.A. 48-939 by committing a “knowing and willful violation of any provision of ... a lawful order ... issued under ... a proclamation declaring a state of disaster emergency under K.S.A. 48-924.” We first examine the peculiarities of the statute and then discuss each of the requirements for its violation.

Since it was enacted 45 years ago, K.S.A. 48-939 rarely has been used. We have located no appellate or reported district court cases interpreting K.S.A. 48-939 and only two prior attorney general opinions that mention the statute, but without any analysis or interpretation.⁹⁹ Our inquiries discovered only six convictions and two additional arrests not resulting in conviction since the statute took effect July 1, 1975.¹⁰⁰ During the current COVID-19 pandemic, public reports indicate criminal charges have been threatened against a Junction City church¹⁰¹ and were filed but later dismissed against a McPherson barber.¹⁰²

To secure a conviction under K.S.A. 48-939, a prosecutor must prove beyond a reasonable doubt that a person acted knowingly and willfully in violation of an emergency order.¹⁰³ Under the Kansas Criminal Code, “[a] person acts ‘knowingly’ or ‘with knowledge’ with respect to the nature of such person’s conduct or to circumstances

⁹⁵ *State v. Barlow*, 303 Kan. 804, 813 (2016) (citations omitted).

⁹⁶ *State v. Sexton*, 232 Kan. 539, 542 (1983).

⁹⁷ K.S.A. 2019 Supp. 21-5103(a).

⁹⁸ *Id.* at 543 (citing *State v. Doyen*, 224 Kan. 482, 488 (1978)).

⁹⁹ See Attorney General Opinion Nos. 81-193 and 95-75.

¹⁰⁰ In response to our request, the Kansas Bureau of Investigation identified two convictions in 2019 (both in Sheridan County), one in 2018 (Sheridan County), and three in 2016 (two in Lyon County and one in Ness County). It also identified two arrests but no convictions in 2018 in Marion County, both involving violations of a burning ban ordered by the governor under KEMA.

¹⁰¹ *First Baptist Church v. Kelly*, 2020 WL 1910021, at *2 (Kan. April 18, 2020).

¹⁰² Chance Swaim and Johnathan Shorman, Kansas AG questions Governor’s authority after charges dropped against barber, *Wichita Eagle*, May 11, 2020, available at <https://www.kansas.com/news/coronavirus/article242647601.html> (last accessed May 18, 2020).

¹⁰³ K.S.A. 2019 Supp. 21-5202.

surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist.”¹⁰⁴ This is a familiar standard to prosecutors. Because of the unusual structure and workings of K.S.A. 48-939, however, a prosecutor must first ensure that he or she understands the contours of the order's prohibitions before bringing a charge under that statute.

Unlike most criminal statutes, K.S.A. 48-939 does not itself set forth the conduct that constitutes a crime, and not all conduct of a defendant that must be proven by the state is described within that statute.¹⁰⁵ Rather, K.S.A. 48-939 criminalizes conduct that is defined by *separate* instruments — emergency orders of the governor — and essentially incorporates those emergency orders by reference into the criminal statute itself. While rare, Kansas does have other criminal statutes that penalize conduct defined in separate instruments, but K.S.A. 48-939 differs from even those few other statutes in one important regard: only K.S.A. 48-939 requires, by its plain terms, that the separate instrument setting forth the prohibited conduct itself be “lawful.”¹⁰⁶ This textual difference cannot be overlooked. “It is presumed that the legislature understood the meaning of the words it used and intended to use them.”¹⁰⁷ The legislature's unusual action of expressly limiting the application of K.S.A. 48-939 to violations of “lawful” emergency orders without doing the same in other criminal statutes that operate in a similar manner may reasonably be explained by the fact that the separate instruments referenced in other statutes were created by judicial process¹⁰⁸ or regulatory processes¹⁰⁹ that by law incorporate principles of due process such as notice and an opportunity to be heard.¹¹⁰ In contrast, a governor's emergency order circumvents all ordinary procedures for exercising legislative or administrative power — it is, after all, an *emergency* order — and arguably has undergone

¹⁰⁴ K.S.A. 2019 Supp. 21-5202(i).

¹⁰⁵ Most criminal statutes are self-contained. For example, K.S.A. 2019 Supp. 21-5402(a)(1) sets forth fully and completely the conduct constituting one of the state's most serious crimes, premeditated murder in the first degree, as “the killing of a human being committed ... [i]ntentionally, and with premeditation.” At trial, “each of the following claims must be proved: (1) The defendant intentionally killed [insert name]. (2) The killing was done with premeditation. (3) This act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.” See Pattern Instructions Kansas Criminal 54.110 (4th ed.) (Sept. 2019 update). Definitions of the terms “intentional” and “premeditation” found at PIK 4th 54.150 typically also would be included with this instruction.

¹⁰⁶ Compare K.S.A. 48-939 (criminalizing violations of “lawful” orders) *with*, e.g., K.S.A. 2019 Supp. 21-5924 (violation of a protective order), K.S.A. 2019 Supp. 21-6423 (violation of a consumer protection order), K.S.A. 2019 Supp. 44-719(c) (criminalizing violations of certain Department of Labor regulations), and K.S.A. 2019 Supp. 17-12a508(a) (criminalizing violations of certain securities regulations) (each containing no express requirement that judicial order or regulation that is violated be “lawful”).

¹⁰⁷ *State v. Robinson*, 261 Kan. 865, 875 (1997) (quoting *Bank of Kansas v. Davison*, 253 Kan. 780, 788 (1993)).

¹⁰⁸ See, e.g., K.S.A. 2019 Supp. 21-5924 (criminalizing violation of a civil protective order) and K.S.A. 21-6423 (criminalizing violation of a civil consumer protection order).

¹⁰⁹ See, e.g., K.S.A. 2019 Supp. 44-719(c) (criminalizing violation of certain provisions of employment security act and regulations) and K.S.A. 2019 Supp. 17-12a508(a) (criminalizing violation of certain securities rules or orders).

¹¹⁰ The Due Process clause of the Fourteenth Amendment generally requires at a minimum that the government afford persons notice and an opportunity to be heard before depriving them of a protected liberty or property interest. *State v. Hurley*, 303 Kan. 575, 582 (2016).

*no process*¹¹¹ that ordinarily is due before the government criminalizes the conduct of its citizens. Because emergency orders are not subject before issuance to the ordinary processes of deliberative governance, the lawfulness of the order cannot as readily be presupposed but is reasonably subject to question. In light of the rare requirement that only willful and knowing violations of provisions of “lawful” emergency orders be punished criminally,¹¹² prosecutors considering bringing charges under authority of K.S.A. 48-939 should specifically analyze the lawfulness of any individual order before bringing charges.¹¹³

Bearing the above in mind, we offer the following framework to aid prosecutors in that case-by-case analysis to assist, as requested, in “avoid[ing] any unlawful arrests or convictions stemming from the disputed nature and authority of the Governor’s Executive Orders.”¹¹⁴

¹¹¹ The Kansas Constitution, for example, ordinarily requires that laws, including those that require or prohibit certain conduct of citizens under pain of criminal conviction, be adopted by both houses of the Legislature upon public vote of a quorum and be presented to the governor. See Kan. Const. art. 2, §§ 10, 13, 14(a). But those procedures are bypassed by K.S.A. 48-939, which leaves entirely to the governor to define prohibited criminal conduct through the issuance of an emergency order that is never reviewed or voted upon by the legislature.

¹¹² The only other statutes we have located that expressly criminalize a “lawful” external instrument have significant limitations. K.S.A. 8-1503 (misdemeanor to willfully refuse to comply with “lawful order” of police officer or fireman”) has been applied by courts only in strictly limited manners, see *State v. Greene*, 5 Kan. App. 2d 698 (1981), and K.S.A. 31-150a(a) (misdemeanor to violate any “lawful order” of the state fire marshal) applies only to regulations that have undergone a legally required process and scrutiny before issuance.

¹¹³ See Kansas Rule of Professional Conduct 3.8(a) (prosecutor shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause); *State v. Abbott*, 277 Kan. 161, 164 (2004) (“probable cause is the reasonable belief that a specific crime has been committed and that the defendant committed the crime”). At a minimum, prosecutors must be prepared to rebut a defendant’s challenge to an order’s lawfulness. A close analogy may be drawn to involuntary manslaughter as defined by K.S.A. 21-5405(a)(4), which prohibits “the killing of a human being committed ... during the commission of a lawful act in an unlawful manner.” The Pattern Instructions Kansas Criminal for that crime provide the state “must ... prove[] ... [t]he killing was done ... during the commission of a *lawful* act.” PIK 54.180 (4th ed.) (emphasis added), and the Kansas Supreme Court has recognized that in that manslaughter statute whether an act was “lawful” is a fact question for the jury that must be proven by evidence. *State v. Gregory*, 218 Kan. 180, 184-86 (1975). Although the statute requires the act be “lawful,” and the PIK states that juries are typically instructed accordingly, in practice the lawfulness of the act usually is presented by the State only after a defendant has raised the issue. There is some case law suggesting that other statutes requiring by their terms that a separate instrument be “lawful” the state may bear the initial burden of proving an order’s lawfulness as part of its case-in-chief. See, e.g., *Greene*, 5 Kan. App. 2d at 704-05 (narrowly construing the meaning of “lawful order” of a police officer or fireman in K.S.A. 8-1503); *State v. Anthony*, 798 A.2d 1099, 1101-02 (Me. 1983) (finding that state failed to prove lawfulness of order, necessary to convict for “defiance of a lawful order”); *People v. Leonard*, 62 N.E. 2d 831, 836 (N.Y. Ct. App. 1984); *Scriber v. State*, 86 A.3d 1260 (Md. Ct. App. 2014) (considering “lawful order or direction of a police officer”).

¹¹⁴ Schroeder letter at p. 5.

Recommended framework for evaluating “lawfulness” of an emergency order¹¹⁵

In the COVID-19 state of disaster emergency, the number and complexity of emergency orders has been unprecedented; as a result, in any enforcement action under K.S.A. 48-939 law enforcement and prosecutors must take great care to ensure they can properly identify what conduct constitutes a crime and what elements must be proven.

Given the unusual nature of K.S.A. 48-939, we recommend that before commencing any criminal enforcement action under authority of K.S.A. 48-939, prosecutors conduct a specific analysis of the lawfulness of the order they propose to act upon.¹¹⁶ K.S.A. 48-939 has three elements: (1) “the knowing and willful violation of (2) any provision of a lawful order ... (3) issued under ... a proclamation declaring a state of disaster emergency under K.S.A. 48-924.” To be “lawful” within the meaning of K.S.A. 48-939, an emergency order, in addition to ordinary requirements that would attach to the filing of criminal charges, should satisfy at least the following five inquiries:

- 1. Was a state of disaster emergency in effect at the time of the conduct alleged to violate an emergency order?*

An emergency order issued outside a state of disaster emergency properly in effect pursuant to K.S.A. 48-924 is not lawful. The status of any state of disaster emergency since March 12, 2020, is discussed above in Questions 1 and 2. A prosecutor should become satisfied a proper state of disaster emergency was in effect at the time of the alleged violation of an emergency order before bringing charges under authority of K.S.A. 48-939.

A prosecutor also should analyze case-by-case whether the state of disaster emergency has at least *some* articulable factual basis as applied to the local jurisdiction where the conduct giving rise to criminal enforcement under K.S.A. 48-939 occurs. To illustrate the point with a hypothetical example, it is questionable whether a Missouri River flood in Doniphan County could form the basis for proclaiming a statewide state of disaster emergency that would enable criminal charges under K.S.A. 48-939 for violating an emergency order applied in Morton County.

The existence, geographic scope, and duration of a state of disaster emergency¹¹⁷ are predicated on findings of facts such as whether a disaster “has occurred,” is “imminent,”

¹¹⁵ The issues presented here are intended to illustrate some of the novel analysis that would attach to a prosecution under K.S.A. 48-939 and not to be an exhaustive list of issues a prosecutor must consider in filing criminal charges under that statute.

¹¹⁶ This recommended analysis is intended to address specific issues present in K.S.A. 48-939 and would be in addition to any other analysis law enforcement or prosecutors ordinarily would conduct before effecting a criminal enforcement action.

¹¹⁷ Under K.S.A. 48-924, a state of disaster emergency must be connected to a “disaster,” K.S.A. 48-924(a) and (b)(1), as defined in K.S.A. 48-904(d) as “the occurrence or imminent threat of widespread or severe damage, injury or loss of life or property resulting from any natural or manmade cause, including, but not limited to, fire, flood, earthquake, wind, storm, epidemics, contagious or infectious disease, air

“has passed,” or “emergency conditions no longer exist” in the “area or areas threatened or affected.” The statute directs the governor to “find[]” those facts.¹¹⁸ The governor’s discretion in that regard is vast, and local authorities, including prosecutors, may not second-guess the decision of the governor to declare a state of disaster emergency under K.S.A. 48-924. But in an extreme case, even involving emergency powers, discretion can be abused,¹¹⁹ so a prosecutor responsible for filing criminal charges under authority of K.S.A. 48-939 should include this inquiry in the analysis.

2. Was the emergency order properly published as required by statute and by principles of due process?

An order issued but not properly published is not lawful for purposes of criminal prosecution.¹²⁰ Principles of due process require that a criminal defendant have notice of what conduct is prohibited before being prosecuted for engaging in that conduct, and that principle generally requires publication before statutes or regulations can become effective, and service before judicial or administrative orders may be enforced.¹²¹ Although the issue of when an emergency order may become legally effective may be subject to debate, we recently recommended that no *criminal* enforcement of executive orders be undertaken until *after* the order is published by the Secretary of State in the Kansas Register.¹²² That approach will provide the same notice that ordinarily is provided

contamination, blight, drought, infestation, explosion, riot, terrorism or hostile military or paramilitary action.” The statute contemplates that a state of disaster emergency be confined to “the area or areas threatened or affected by the disaster.” K.S.A. 48-924(b)(6). The statute authorizes and directs the governor to determine whether, K.S.A. 48-924(b)(1), and where, K.S.A. 48-924(b)(6) (proclamation must contain “the area or areas threatened or affected by the disaster”), a disaster exists, and the statute also requires the state of disaster emergency continue only until “the threat or danger of disaster has passed, or the disaster has been dealt with to the extent that the emergency conditions no longer exist.” K.S.A. 48-924(b)(3). If the requisite conditions no longer exist, then the governor “shall terminate the state of disaster emergency.” K.S.A. 48-924(b)(3).

¹¹⁸ K.S.A. 48-924(b)(1) and (b)(3).

¹¹⁹ *Nat’l Tax-Limitation Com. v. Schwarzenegger*, 8 Cal. Rptr. 3d 4 (Ct. App. 2003) (unpublished).

¹²⁰ The Kansas Constitution provides that statutes may take effect only when “published as provided by law.” Kan. Const. Art. 2, § 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).

¹²¹ 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. 2019 Supp. 48-925, and violations of the orders may give rise to criminal penalties, see K.S.A. 48-939, this elementary 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).

¹²² Memorandum to Kansas Prosecutors and Law Enforcement re: State and Local Law Enforcement Duties and Authorities under Emergency Powers Invoked in Connection with COVID-19 Response (March 24, 2020) at 8, available at https://ag.ks.gov/docs/default-source/publications/ag-memo-to-kansas-law-enforcement-and-prosecutors.pdf?sfvrsn=1979ac1a_4. This memorandum explained provisions of emergency powers statutes but did not address issues of constitutionality. See *id.* fn. 2.

with acts of the legislature that affect constitutionally protected life, liberty, or property interests.¹²³

In addition, K.S.A. 2019 Supp. 48-925 by its terms requires specific distribution of proclamations declaring a state of disaster emergency. “[E]ach such 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 the case may be, in the area to which such proclamation applies.*”¹²⁴ In the case of the March 12, 2020, and April 30, 2020, state of disaster emergency proclamations that apply statewide, the statute by its plain terms requires those proclamations be “filed” with every county and city clerk in Kansas — more than 700 in total.¹²⁵ Before filing criminal charges under authority of K.S.A. 48-939 in any local jurisdiction, a prosecutor should confirm the requisite state of disaster emergency proclamation was on file with the appropriate county clerk and any city clerk where the violative conduct is alleged to have occurred.

3. Does the plain text of K.S.A. 2019 Supp. 48-925 grant authority for the particular emergency order at issue?

An emergency order that exceeds the authority of its authorizing statute is not lawful. K.S.A. 2019 Supp. 48-925 delegates authority to the governor to issue emergency orders under the KEMA that have the “force and effect of law,”¹²⁶ and emergency orders draw their authority from that statute. Therefore, the authority for any particular emergency order must be found in K.S.A. 2019 Supp. 48-925 or the order cannot be “lawful.”¹²⁷ Analyzing whether a particular emergency order falls within its statutory authority is similar to analyzing whether a regulation issued by an administrative agency is authorized by statute.¹²⁸ Just as “[r]ules or regulations of an administrative agency, to be valid, must be

¹²³ The Kansas Constitution provides that statutes may take effect only when “published as provided by law.” Kan. Const. art. 2, § 19. 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). The Kansas Register is available at https://kssos.org/pubs/pubs_Kansas_register.asp. K.S.A. 48-924(b)(6) requires that “[e]ach such proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and, unless the circumstances attendant upon the disaster prevent the same, each such 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 the case may be, in the area to which such proclamation applies.”

¹²⁴ K.S.A. 48-924(b)(6) (emphasis added).

¹²⁵ Kansas has 105 counties and more than 600 cities.

¹²⁶ We confine our analysis here to the bases for emergency orders enumerated in K.S.A. 2019 Supp. 48-925(c)(1) through (c)(11). As discussed in Question 3 above, K.S.A. 2019 Supp. 48-925(b) contains a much broader delegation of authority, but because that delegation of authority contains no standards or guidelines for its use and on its face is essentially unlimited we think it is unconstitutional.

¹²⁷ As discussed in Question 3 above, the plain language of K.S.A. 48-925(b) may on its face authorize emergency orders that go beyond the powers enumerated in K.S.A. 2019 Supp. 48-925(c). But that would present serious questions about the constitutionality of the statute. Therefore, we will assume here that the proper analysis is confined to the powers enumerated in subsection (c).

¹²⁸ We recognize the governor has separate constitutional and common law executive authority upon which she may draw. Our analysis in this opinion is limited to the application of K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925.

within the statutory authority conferred upon the agency,”¹²⁹ so too with emergency orders authorized by K.S.A. 2019 Supp. 48-925. “[R]ules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency, have been found void.”¹³⁰

But there is a critical procedural difference between analyzing whether a rule or regulation exceeds statutory authority and whether an emergency order does: by law, the legality of a rule or regulation has been examined and approved *before* it is published,¹³¹ but emergency orders are published without any requirement for review and approval of their legality. A prosecutor, therefore, before commencing enforcement under authority of K.S.A. 48-939 should carefully analyze whether the particular emergency order is authorized by K.S.A. 48-925(c).

K.S.A. 2019 Supp. 48-925(c)(1) through (c)(10) enumerate specific powers the governor may exercise under authority of that statute. It is well established that the starting point for interpreting statutes is “the plain language of the statute, giving common words their ordinary meaning. If the plain language of a statute is unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.”¹³²

In analyzing whether any particular emergency order is within the authority granted by the statute, it is necessary to find plain language in the statute granting that authority. Since the COVID-19 state of disaster emergency was proclaimed March 12, 2020, and through the date of this opinion, the governor has issued 31 executive orders related to the pandemic under authority of K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925.¹³³ By their terms, these orders do not specify the statutory subsection or subsections from which they draw authority but only generally invoke “authority granted ... by K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925.” Therefore, in determining whether each order is “lawful” it is necessary for a prosecutor to search the statute and make a determination whether it is authorized by the plain language of any statutory provision. The statutory authority for some of these orders may not be readily apparent in the specific statutory language of subsections (c)(1) through (10).

For example, Executive Order 20-05 orders “all Kansas utility providers not under the jurisdiction of the Kansas Corporation Commission temporarily [to] suspend the practice of disconnecting service to Kansas citizens for non-payment”¹³⁴ and Executive Order 20-06 “direct[s] and order[s] all financial institutions operating in Kansas to temporarily suspend the initiation of any mortgage foreclosure efforts or judicial proceedings and any

¹²⁹ *Malone Oil Co. v. Dep’t of Health & Env’t*, 234 Kan. 1066, 1068 (1984).

¹³⁰ *Id.*

¹³¹ K.S.A. 77-420.

¹³² *Univ. of Kansas Hosp. Auth. v. Bd. of Cty. Comm’rs of Unified Gov’t of Wyandotte Cty./Kansas City*, 301 Kan. 993, 998-99 (2015) (citations and internal quotation marks omitted).

¹³³ See Executive Orders 20-03 (dated March 16, 2020) through 20-34 (dated May 19, 2020).

¹³⁴ Executive Order 20-05 (dated March 17, 2020).

commercial or residential eviction efforts or judicial proceedings.”¹³⁵ But no enumerated power granted by K.S.A. 2019 Supp. 48-925(c)(1) through (c)(10) can reasonably be construed as plainly authorizing those actions.¹³⁶ Executive Order 20-08 presents a different issue. That order appears, *inter alia*, to suspend several statutes, rules and regulations governing telemedicine,¹³⁷ and K.S.A. 2019 Supp. 48-925(c)(1) does specifically authorize suspending statutes, rules and regulations. But the authority granted by subsection (c)(1) is restricted by its plain language; it does *not* authorize suspension of *any* statute, rule or regulation, but only of provisions of (a) a *regulatory* statute that (b) “prescrib[es] the procedures for conduct of state business” and even then only (c) “if strict compliance with the provisions of such statute ... would prevent, hinder or delay in any way necessary action in coping with the disaster.”¹³⁸ For purposes of determining whether violations of Executive Order 20-08 may be prosecuted as a violation of K.S.A. 48-939, therefore, a prosecuting attorney must make a determination whether the statutory language authorizes the suspension in that order.

Even if none of the specifically enumerated authorities set forth in subsection (c)(1) through (10) applies, an emergency order might be said to draw statutory authority from the broad language in K.S.A. 2019 Supp. 48-925(c)(11).¹³⁹ But even that subsection has *some* limits apparent from its plain language, which authorizes exercise of only those functions, powers and duties that are “necessary to promote and secure the safety and protection of the civilian population.” For some of the emergency orders issued during the COVID-19 emergency, it is at least questionable whether they are “necessary” to “promote and secure the safety and protection” of persons.¹⁴⁰ Also, the various provisions of K.S.A. 2019 Supp. 48-925 must be read in harmony.¹⁴¹ An order would be suspect if it is in conflict with other provisions of the statute or other legal authority. For example, Executive Order 20-27 states as its purpose to “safely allow for the sale and consumption of unconsumed alcoholic liquor through takeout or curb-side delivery during this COVID-19 pandemic.”¹⁴² It accomplishes that purpose by suspending certain statutory provisions that restrict the carry-out sale of certain alcoholic beverages¹⁴³ and then creating new

¹³⁵Executive Order 20-06 (dated March 17, 2020). Executive Order 20-10 (dated March 24, 2020) rescinded Executive Order 20-06 and replaced it with modified provisions addressing the same subject matter.

¹³⁶ See *Oakland State Bank v. Bolin*, 141 Kan. 126 (1935); *Langworthy v. Kadel*, 141 Kan. 250 (1935).

¹³⁷ See Executive Order 20-08 (dated March 20, 2020) at para. 1.

¹³⁸ K.S.A. 2019 Supp. 48-925(c)(1).

¹³⁹ *But see* Question 3 above, discussing concern about the facial validity of K.S.A. 2019 Supp. 48-925(c)(11).

¹⁴⁰ See, e.g., Executive Order 20-20 (dated April 9, 2020) (altering rules for notaries public); Executive Order 20-05 (dated March 17, 2020) (prohibiting disconnection of utility and internet services); Executive Order 20-27 (dated April 22, 2020) (permitting restaurants to serve alcoholic beverages for carry-out consumption).

¹⁴¹ *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 925-30 (2013) (construing statute to determine which of three subsections of K.S.A. 55-1210 most specifically addressed the situation before the court).

¹⁴² Executive Order 20-27 (dated April 22, 2020) at p. 2.

¹⁴³ *Id.* at p. 2, paragraph 1. Notably, K.S.A. 2019 Supp. 48-925(c)(1) authorizes the governor to suspend certain statutes, but it is not certain this suspension satisfies the three-part test in that statute as described

restrictions governing those carry-outs.¹⁴⁴ The apparent authority for this order is K.S.A. 2019 Supp. 48-925(c)(11), since it does not readily fit within any of the 10 specifically enumerated powers. Yet, one of those enumerated powers — K.S.A. 2019 Supp. 48-925(c)(8) — expressly authorizes just the opposite: the governor may “suspend or limit the sale, dispensing or transportation of alcoholic beverages.” It is questionable whether a general provision of law like K.S.A. 2019 Supp. 48-925(c)(11) can authorize actions that appear directly contrary to what a specific provision contemplates.¹⁴⁵ Similarly, the executive orders restricting foreclosures¹⁴⁶ are in tension with decisions of the Kansas Supreme Court during the Great Depression that specifically invalidated an attempt by the legislature to delegate to the governor power to extend a moratorium on foreclosures.¹⁴⁷

4. *Is the emergency order unconstitutionally vague in violation of due process?*

For criminal enforcement purposes, an emergency order is not lawful if it is unconstitutionally vague. Kansas courts use a two-prong inquiry to determine whether a statute is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

First, the ordinance must give adequate notice to those tasked with following it. More specifically, the ordinance must convey sufficient definite warning and fair notice as to the prohibited conduct in light of common understanding and practice. We have recognized that an ordinance that requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. But on the other hand, Kansas has long held that an ordinance is not unconstitutionally vague if it employs words commonly used, previously judicially defined, or having a settled meaning in law.

In the second prong of our inquiry, we require that an ordinance's terms must be precise enough to adequately protect against arbitrary and discriminatory action by those tasked with enforcing it. We acknowledge that a law is invalid if it violates either prong. However, the more important aspect of the vagueness doctrine is not actual notice but the other principal element of the doctrine — the requirement that a legislature establish

above. Thus, it is likely this Executive Order draws authority at least in part from the catchall provision, K.S.A. 2019 Supp. 48-925(c)(11).

¹⁴⁴ The new restrictions are established by paragraph 2 of Executive Order 20-27 (dated April 22, 2020) at p. 2.

¹⁴⁵ “It is a general rule of statutory interpretation that, when both a general statute and a specific statute govern the same topic, the specific statute controls.” *Kelly*, 460 P.3d at 839 (quoting *Merryfield v. Sullivan*, 301 Kan. 397, 398 (2015)). See also *Northern Natural Gas Co.*, 296 Kan. at 925-30.

¹⁴⁶ Executive Order 20-06 (dated March 17, 2020) replaced by Executive Order 20-10 (dated March 23, 2020).

¹⁴⁷ See *Oakland State Bank v. Bolin*, 141 Kan. 126 (1935); *Langworthy v. Kadel*, 141 Kan. 250 (1935).

minimal guidelines to govern law enforcement. And in analyzing this second prong for vagueness, we are further mindful that the standards of certainty in an ordinance punishing criminal offenses are higher than in those depending primarily upon civil sanctions for enforcement.¹⁴⁸

A prosecutor considering criminal enforcement under K.S.A. 48-939 should carefully determine whether the emergency order at issue satisfies both prongs of the vagueness inquiry: Does the emergency order give fair notice as to the prohibited conduct, and are its terms precise enough to adequately protect against arbitrary and discriminatory enforcement? If an emergency order fails either prong, then criminal enforcement is constitutionally impermissible. In making that determination, a prosecutor should bear in mind several characteristics of emergency orders issued since the March 12, 2020, proclamation of a state of disaster emergency related to the COVID-19 pandemic.

First, many of these orders, particularly the various versions of stay-home orders and the orders restricting mass gatherings, underwent multiple updates and replacements since a state of disaster emergency first was proclaimed on March 12. In many instances, subsequent orders by their terms required that they be “read in conjunction with previous executive orders responding to the COVID-19 pandemic” or that provisions in a new order supersede “any contrary or less restrictive language” in prior orders without more precisely specifying which provisions were superseded and which remained in effect.¹⁴⁹

¹⁴⁸ *City of Lincoln Ctr. v. Farmway Co-Op, Inc.*, 298 Kan. 540, 545-46 (2013) (internal citations, quotation marks and punctuation omitted).

¹⁴⁹ To illustrate, consider the progression of the principal orders that have restricted the mobility of Kansans since a state of disaster emergency was proclaimed March 12, 2020 the mass-gathering orders and the stay-home orders. Executive Order 20-04 was the first to restrict mass gatherings. See Executive Order 20-04 (dated March 17, 2020). It was modified by reference in Executive Order 20-07, the order closing schools, which provided that “[a]ny contrary or less restrictive language in EO 20-04 is superseded by this order,” without specifying which provisions of the prior order might be superseded. See Executive Order 20-07 (dated March 17, 2020). Executive Order 20-14 then rescinded Executive Order 20-04 and replaced it with a more-restrictive mass gathering restriction that enumerated 27 types of gatherings exempt from the limitation but defined no terms used in those exemptions. See Executive Order 20-14 (dated March 24, 2020). Executive Order 20-15 soon followed, establishing the Kansas Essential Functions Framework (KEFF) that set forth in general terms various categories of activities that would be exempt from local governments’ stay-home orders. See Executive Order 20-15 (dated March 24, 2020). Soon thereafter Executive Order 20-16 established a statewide stay-home order that directed “all individuals within the state of Kansas ... to stay in their homes or residences unless performing an essential activity,” and proceeded to set forth various essential activities including those identified in the KEFF. To determine whether one could leave one’s home for a particular activity, the enumeration of essential activities set forth in Executive Order 20-16 had to be “read in conjunction with previous executive orders responding to the COVID-19 pandemic” because “[a]ny contrary provision in previous executive orders, including Executive Order 20-15 ... is superseded by this order.” See Executive Order 20-16 (March 28, 2020). Days later, Executive Order 20-18 “rescinded and replaced” Executive Order 20-14 and established still more-restrictive mass gathering requirements; the new order required that it “be read in conjunction with previous executive orders responding to the COVID-19 pandemic” and that “[a]ny less restrictive provision in previous executive orders is superseded by this order” but gave no further indication of which provisions of prior orders survived, which were superseded, and which might operate in conjunction with provisions in the new executive order. See Executive Order 20-18 (dated April 7, 2020). Executive Order 20-24 then extended Executive Order 20-16 “in its entirety” through May 3, 2020, see Executive Order 20-24 (dated April 16,

As a result, there are significant practical difficulties in determining which provisions of which of these orders were in effect and which had been suspended or superseded at any given point in time.

Second, material terms used in the various stay-home and mass-gathering orders are undefined and may be less precise than terms ordinarily used in criminal statutes, thus rendering difficult a determination of what conduct is subject to the order and what is exempt. Even a term as fundamental as “mass gathering” has been redefined and means something materially different in more recent orders than it did in earlier orders.¹⁵⁰ Consider, for example, the broad exemptions to restrictions on citizens’ mobility set forth in the Kansas Essential Functions Framework, which throughout most of the COVID-19 emergency has been a key determinant of the purposes for which a person could lawfully leave home or gather with others.¹⁵¹ Exempt from those restrictions were purposes such as providing cable access network services, distributing electricity, conducting elections, and exploration and extraction of fuels, all of which were undefined. Recognizing this imprecision, a mechanism was established by which a business uncertain whether it performed an essential function and thus was exempt from the stay-home provision could

2020), and the next day Executive Order 20-25 rescinded the most-recent previous mass-gatherings order, Executive Order 20-18, and replaced it with new restrictions on mass gatherings that also were to be “read in conjunction with previous executive orders responding to the COVID-19 pandemic—including Executive Order 20-16” and again providing that “[a]ny less restrictive provision in previous executive orders is superseded by this order,” without further specifying what might constitute a “less restrictive provision.” See Executive Order 20-25 (dated April 17, 2020). The state of disaster emergency then expired on May 1, and all existing order thus became null and void by operation of law. For that reason, executive order 20-28 re-issued by reference some, but not all, previous executive orders, although the stay-home order (Executive Order 20-16) and the most recent mass gatherings orders (Executive Orders 20-16 and 20-24) were extended only through May 3. See Executive Order 20-28 (dated April 30, 2020). Executive Order 20-29 provided that the prior stay-home and mass-gathering orders (Executive Orders 20-16, 20-24 and 20-25) were “no longer in effect” after May 3, replacing them with new restrictions on mass gatherings and businesses, education, activities and venues, while still requiring that the requirements of the new order “be read in conjunction with other executive orders responding to the COVID-19 pandemic that are still in effect and supersedes any contrary provisions of previous orders.” See Executive Order 20-29 (dated April 30, 2020). Executive Order 20-31 rescinds and replaces Executive Order 20-29 but also requires the provisions of Executive Order 20-31, including mobility restrictions, be “read in conjunction with other executive orders responding to the COVID-19 pandemic that are still in effect and supersedes any contrary provisions of previous orders.” See Executive Order 20-31 (dated May 14, 2020). Five days after Executive Order 20-31 was issued, it was rescinded and replaced by Executive Order 20-34, which states it also should be read in conjunction with prior orders “that are still in effect and supersedes any contrary provisions of previous orders.” See Executive Order 20-34 (dated May 19, 2020).

¹⁵⁰ Compare Executive Orders 20-18 and 20-25 (defining “mass gathering” as “any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together more than 10 people in a confined or enclosed space at the same time”) with Executive Orders 20-29 and 20-31 (defining “mass gathering” as “instances in which individuals are in one location and are unable to maintain a 6-foot distance between individuals ... with only infrequent or incidental moments of closer proximity”). See *also* Executive Order 20-34 (increasing mass-gathering limit to 15 individuals but otherwise maintaining revised definition of “mass gathering”).

¹⁵¹ See Executive Order 20-15, Executive Order 20-16, Executive Order 20-24, and Executive Order 20-29. Other executive orders regarding mass gatherings include a list of exempt activities or facilities that were apparently considered essential by the governor. See EO 20-04; 20-14; 20-18.

contact a government official for an individualized determination,¹⁵² a procedure quite unusual in determining who may be subject to criminal liability under a statute and that may lend itself to arbitrary or discriminatory enforcement. Similar issues arising from a lack of definition persist. Thus, prosecutors considering criminal enforcement of these orders under authority of K.S.A. 48-939 should carefully consider whether both prongs of the vagueness analysis are satisfied.

5. *Does the emergency order impermissibly burden constitutional or statutory rights?*

An emergency order is not lawful if it impermissibly infringes on federal or state constitutional rights or on applicable statutory rights. As one federal court recently expressed the principle, “There is no pandemic exception to the Constitution of the United States.”¹⁵³ While governments generally are afforded significant latitude to respond to emergencies,¹⁵⁴ constitutional and statutory rights are not suspended and emergency restrictions may not impermissibly burden fundamental rights nor may they be applied or enforced unevenly or unfairly.¹⁵⁵ Thus, even during an emergency—perhaps particularly then—prosecutors should carefully determine whether applying a particular emergency order to a particular defendant by means of criminal prosecution under K.S.A. 48-939 would violate the defendant’s constitutional or statutory rights. Neither benevolent intentions by the government, nor public fear and discontent during an emergency, nor public support for a government action can save an unconstitutional governmental intrusion on the rights of citizens.¹⁵⁶

The current COVID-19 response has required unprecedented use of emergency powers under K.S.A. 48-924 and K.S.A. 2019 Supp. 48-925. Never before have *all* Kansans been subject for an extended time to such intrusive restrictions ordered by their government. Under various emergency orders, it became a crime for Kansans to leave home without government approval, to gather more than 10 people at a time except for government-

¹⁵² See Executive Order 20-16 paragraph 9(b). The Kansas Division of Emergency Management issued guidance seeking to clarify Executive Order 20-16. See EO 20-16 -1 Guidance – Essential Activities and Essential Functions; EO 20-16-2 Guidance Clarifying that Restaurants and Bars May Not Reopen for Dine-In Service, available at <https://governor.kansas.gov/essential-functions-guidance/> (last accessed May 12, 2020).

¹⁵³ *Berean Baptist Church v. Cooper*, No. 4:20-CV-81D (E.D.N.C. May 16, 2020).

¹⁵⁴ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding mandatory vaccination requirements).

¹⁵⁵ See *First Baptist Church*, 2020 WL 1910021 (granting temporary restraining order to prevent enforcement of governor’s emergency order found likely to unconstitutionally burden free exercise of religion).

¹⁵⁶ Well-intended or popular emergency actions taken during times of crisis have produced some of liberty’s great historical errors. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding presidential executive order during World War II requiring Japanese-Americans to move into relocation camps), *Youngstown Sheet & Tube Co. v. Sawyer*, 43 U.S. 579 (1952) (reversing presidential executive order during Korean War directing Secretary of Commerce to seize and operate steel mills), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (invalidating military commission procedure used in connection with detention of alleged terror suspect).

approved purposes, or to operate businesses or organizations without government approval. Quite obviously, these sorts of restrictions burdened fundamental rights — such as religion,¹⁵⁷ assembly,¹⁵⁸ and movement¹⁵⁹ — that are constitutionally protected.

In general, the United States Constitution “specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”¹⁶⁰ State actions that “impinge on [fundamental] personal rights protected by the [U.S.] Constitution” are “subjected to strict scrutiny” as to their validity.¹⁶¹ The strict scrutiny test typically is described as follows: “[T]he Government must demonstrate that it is the least restrictive means to achieve a compelling governmental interest.”¹⁶² State constitutional or statutory limits¹⁶³ also may apply to constrain the use of emergency orders.

To date nationwide, legal challenges to emergency orders have alleged unlawful infringement on religious rights, free speech rights, and assembly rights, among others. Courts have struck down some orders as unconstitutional¹⁶⁴ and upheld others.¹⁶⁵ In Kansas, the only constitutional challenge to date of a governor’s emergency order succeeded¹⁶⁶ as did a constitutional challenge to a local order.¹⁶⁷

Before filing charges under authority of K.S.A. 48-939, prosecutors should carefully determine the appropriate level of scrutiny that would adhere and analyze the application of the particular order accordingly.

Conclusion

For the reasons set forth above, we conclude that several unique legal hurdles exist in any criminal prosecution for violation of an executive order under authority of K.S.A. 48-

¹⁵⁷ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (strict scrutiny applies to burdens on religion unless neutral and generally applicable).

¹⁵⁸ *Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460-62 (1958).

¹⁵⁹ *Shapiro v. Thompson*, 394 U.S. 618 (1969) (recognizing fundamental right to travel).

¹⁶⁰ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations and quotation marks omitted).

¹⁶¹ *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

¹⁶² *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 749 (2014) (Kennedy, J., concurring) (citation and quotation marks omitted).

¹⁶³ See Memorandum from Attorney General Derek Schmidt to Kansas Prosecutors and Law Enforcement (Addendum 1), April 8, 2020, available at https://ag.ks.gov/docs/default-source/documents/addendum-1-to-law-enforcement-duties-and-authorities-memo.pdf?sfvrsn=7a60ac1a_2 (last accessed May 6, 2020).

¹⁶⁴ *Berean Baptist Church*, No. 4:20-CV-81D (finding likelihood of success on the merits and granting a temporary restraining order); *Maryville Baptist Church, Inc. v. Beshear*, No. 20-5427, slip op. at 10 (6th Cir. May 2, 2020) (enjoining state from enforcing orders prohibiting drive-in church service); *Tabernacle Baptist Church, Inc. of Nicholasville, Ky. v. Beshear*, No. 3:20-CV-00033-GFVT, slip op. at 12 (E.D. Ky. May 8, 2020) (granting statewide temporary restraining order enjoining the state from enforcing the prohibition on mass gatherings with respect to in-person religious services).

¹⁶⁵ See, e.g., *Friends of Danny DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100 (Pa. Apr. 13, 2020).

¹⁶⁶ See *First Baptist Church*, 2020 WL 1910021 (TRO entered April 18, 2020, emergency order withdrawn).

¹⁶⁷ *Taylor v. Allen*, No. 2:20-CV-2238-HLT-ADM (D. Kan. filed May 10, 2020) (local order withdrawn).

939. Because this statute is unusual, we recommend prosecutors and law enforcement who may be considering criminal enforcement actions under authority of K.S.A. 48-939 proceed with caution and deliberation to ensure all applicable requirements for bringing and sustaining criminal charges are satisfied. We specifically recommend no criminal charges be filed until a prosecutor has exercised due diligence in addressing the questions presented in this opinion, specifically in Question 4 above, and is satisfied that the particular order at issue is lawful and may be lawfully applied to the defendant.

We also recommend the legislature carefully review the KEMA and consider reforming any provisions that are constitutionally suspect, clarifying any provisions that are ambiguous, ensuring the statute properly limits delegated powers, and ensuring a sufficient mechanism exists for effective and ongoing oversight of the executive's exercise of statutory emergency powers. The legislature also should by law confirm the existence of a lawful state of disaster emergency at least since April 30, 2020, and enact an unclouded method for future extensions of a state of disaster emergency during the current COVID-19 pandemic.

Sincerely,

/s/Derek Schmidt

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/s/Athena Andaya

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