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IN THE DISTRICT COURT OF SALINE COUNTY, KANSAS

City of SALINA, KANSAS, a municipal corporation,	)	
Plaintiff,	)	
v.	)	Case No: 2021-CV-160-OT
KEVIN KORB,	)	
Defendant	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant Kevin Korb, by and through counsel Joshua A. Ney of Kriegshauser Ney Law Group, and in response to the Plaintiff's Motion for Summary Judgment and Memorandum in Support thereof and states as follows:

INTRODUCTION

Summary judgment is not ripe because Defendant's answer is not yet due. But if the court proceeds to consider the merits of Plaintiff's Motion for Summary Judgment, Plaintiff's claims fail based on existing case law interpreting Kan. Const. Art. 12, § 5 and K.S.A. 12-3013. Each standard will be discussed in turn below.

However, as a matter of judicial discretion, the Court should hold its ruling on Plaintiff's Motion for Summary Judgment in abeyance until after the conclusion of the November 2, 2021

election. In the eleventh hour of the referendum process, after ballots have been printed and mailed, the Plaintiffs seek expedited relief prior to the outcome of the public vote. Advance voting ballots were mailed as early as September 17, 2021 (nearly two weeks ago). *See* K.S.A. 25-1220 (requiring UOCAVA ballots to absentee military voters to be mailed at least 45 days prior to an election). A pre-election judicial determination occurring before election day but after other voters have already cast their mail ballots would affect the outcome of the vote in a similar fashion as an "October Surprise."[1]

This lawsuit and the Plaintiff's Motion for Summary Judgment are unfortunately timed in such a way as to directly affect the outcome of the upcoming general local election on November 2, 2021. Regardless of the content of the Court's eventual ruling, issuing an appealable legal decision regarding a ballot initiative just weeks before election day, and especially after advance mail voting has already started, will have a direct chilling effect on voters' understanding of the ballot initiative. Regardless of the district court's ruling in this matter, two things are certain: 1) the referendum is on the ballot; and 2) the novel legal issues in this case will ultimately be resolved on appeal. There are multiple opportunities for relief for either party to challenge a

[1]See, e.g., October Surprise, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/October%20surprise (last visited Sept. 25, 2021) ("October Surprise: a significant revelation or event in the month prior to an election that has the potential to shift public opinion about an election . . . that is often orchestrated to influence the election's outcome."); David A. Strauss, What's the Problem? Ackerman and Ayres on Campaign Finance Reform, 91 Cal. L. Rev. 723, 737 (2003) ("[T]he October surprise—a last-minute action or allegation by a candidate that is made just before election day and is designed to sway voters without being subject to critical scrutiny. The October surprise is . . . a subversion of democratic deliberation, because it is designed to provoke a hasty and ill-considered response by voters."); Dennis F. Thompson, Two Concepts of Corruption: Making Campaigns Safe for Democracy, 73 Geo. Wash. L. Rev. 1036, 1067 (2005) ("A dramatic media report just before election day can disrupt the balance of the campaign and adventitiously affect the outcome. Even if the information revealed is relevant to the voting decision, it may have influence beyond what it merits because the candidate who is the target does not have a chance to respond adequately, or simply because the revelation remains so vivid in the minds of voters as they go to the polls."); Cath. Leadership Coal. of Texas v. Reisman, 764 F.3d 409, 431 (5th Cir. 2014) ("After all, October Surprises are not called October Surprises because they happen in June. In such situations, 'timing is of the essence.'")

district court legal determination at the appellate level. However, there is only one vote, the outcome of which is unchallengeable on the merits.

Plaintiff was fully within its legal rights to file this action in the month leading up to the commencement of advance voting. Nothing can nor should be done to change the effect that "pending litigation" may have on voters' decisions regarding the referendum. However, Defendant respectfully contends that it is inappropriate for an initial district court decision to be handed down after some voters have *already voted by mail* while many others will vote on election day in a few weeks. Defendant respectfully requests the court take this matter under advisement until after all votes are cast in the November 2, 2021 election.

FACTUAL BACKGROUND

Defendant Korb circulated a petition (the "Petition") throughout the City of Salina (the "City"). Summarized, the ordinance proposed in the Petition "prevents the City of Salina Governing Body from enacting any ordinance, in response to a public emergency, that imposes restrictions on businesses or citizens, leaving that responsibility to Saline County and subject to the Kansas Emergency Management Act." *See* Petition for Declaratory Judgment and Injunctive Relief ("Petition"), Exhibit A. Defendant's Petition garnered substantial support and thousands of signatures were collected under the appropriate statutory referendum procedure. *See* K.S.A. 12-1303, 25-3601, and 25-3602. The Saline County Clerk and County Election Officer subsequently certified these signatures and the petition. Despite certification of the signatures, the City declined to pass the ordinance, and instead placed the matter on the November 2021 general election ballot pursuant to City Resolution No. 21-7979 and K.S.A. 12-3013. *See id.* Petition, Exhibit B (City Resolution).

On August 27, 2021, the City petitioned this Court for declaratory judgment that "[t]he Ordinance Petition prepared by Mr. Korb is an attempt to enact an ordinance limiting the current and future authority of the governing body of the City of Salina to respond to 'states of emergency declared at the County or State level,' and to cede such authority to Saline County." Petition, at ¶ 10. The City concluded the circulated petition and its accompanying ordinance improperly constrained the City's general "Home Rule Powers" conferred by Art. 12, § 5 of the Kansas Constitution and K.S.A. 12-101, restricted future City governing bodies, and violated K.S.A. 12-3004's one-subject rule and title requirements. *Id.* at ¶ 13(a)-(c).

Shortly thereafter, on September 8, 2021, the City followed its initial pleading with its Motion for Summary Judgment and a Memorandum in Support. The City raises a litany of legal arguments. These new causes of action either reiterate and expand the reasoning initially provided in its Petition, or provide new grounds suggesting the Petition and its Ordinance are legally infirm. Moreover, the City ultimately admits that: (1) Defendant Korb collected the requisite number of signatures under K.S.A. 12-3013, 25-3601, and 25-3602 and followed the statutory procedure to require the City to place the initiative on the November 2, 2021 general election ballot; (2) the city council placed the matter on the November general election ballot, after declining to pass the ordinance based on the reason articulated in City Resolution No. 21-7979. *Memorandum in Support of Motion for Summary Judgment* ("Memorandum"), at § II ¶¶ A(1)-(8).

ARGUMENTS & AUTHORITIES

A. This matter is not ripe for summary judgment.

Plaintiff has prematurely moved the court for summary judgment prior to the resolution of Defendant's motion to dismiss or the filing of an answer in this matter. *See* K.S.A. 60-212(b);

Miles v. Shawnee County, 481 P.3d 195 (Kan. App. 2021) ("K.S.A. 2020 Supp. 60-212(b) allows a defendant to file various motions instead of an answer, including a motion to dismiss for failure to state a claim upon which relief can be granted."). Defendant's *pro se* Motion to Dismiss substantially raises affirmative defenses of lack of jurisdiction, statute of limitations, and failure to state a claim. *See* K.S.A. 60-212(b); *see e.g. Fisher v. DeCarvalho*, 260 P.3d 1218 (Kan. App. 2011), *rev'd on other grounds by* 314 P.3d 214 (Kan. 2013) (Defendant surgeon did not have to make special appearance in order to raise affirmative defenses of improper service of process, lack of personal jurisdiction, and expiration of statute of limitations *prior to filing his answer*.). These defenses can be easily recognized in the Defendant's *pro se* pleading. *See State v. Gilbert*, 326 P.3d 1060, 1061, Syl. ¶ 4 (Kan. 2014) ("Pro se pleadings are liberally construed, giving effect to the pleading's content rather than the labels and forms used to articulate the arguments. A defendant's failure to cite the correct statutory grounds for a claim is immaterial.").

This matter is not ripe for summary judgment because Defendant's full time to file an answer has not yet run. A district court may grant summary judgment:

> when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling [is] sought. When opposing summary judgment, a party must product evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the convulsive issue in the case.

GFTLenexa v. City of Lenexa, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

Defendant Korb filed a motion to dismiss constituting an initial responsive pleading under K.S.A. 60-212(b) for purposes of statutory response deadlines on September 9, 2021. The City responded on September 15, 2021. This court has yet to rule on this matter, and as a result, Defendant's answer is not due at this time. *See* K.S.A. 60-212(a)(2) ("Unless the court sets a

different time, serving a motion under this section alters [the period of time to filing an answer] as follows: (A) If the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action[.]"). Summary *judgment* issuing the Plaintiff's requested declaratory and permanent injunctive relief (versus temporary injunctive relief) is not appropriate prior to the Defendant filing an answer in this matter. *See e.g. Kern v. Miller*, 533 P.2d 1244, 1245 (Kan. 1975) ([Summary judgment] must be "based upon the pleadings of the parties and matters established by affidavits, depositions, answers to interrogatories and requests for admissions. (K.S.A. 60-256(c).) Here, we have the [petition and answer] only.").

B. The Proposed Ordinance Complies with Kansas Constitutional and Statutory Law

The City argues the Petition and Ordinance impermissibly "limit[] the City Commission's [Home Rule] authority," under Art. 12, § 5 of the Kansas Constitution. *Memorandum*, at 13. However, the City recognizes that while city councils receive broad "home rule" authority under the Kansas Constitution, ordinances passed under this authority *may be limited* by the Kansas legislature via laws of unifrom applicability. *See*, *Id.* at 13-14. Yet City nevertheless cites *Solomon v. State*, 512, 524, 364 P.3d 536 (2015) by way of analogy in support of its claim that the Kansas Constitution does not provide "for the direct limitation of municipal power via initiative petition." *Id.* at 14.

The City's reliance on *Solomon* is misplaced. In *Solomon*, the Kansas Supreme Court struck down as unconstitutional the Kansas Legislature's attempt to require district chief judges to be elected by district court judges because Article 3 Section 1 of the Kansas Constitution vested the Supreme Court with general administrative authority over all Kansas courts. *Memorandum*, at 16; *Solomon* 303 Kan. at 532. The City argues that the constitutionally suspect

statute at issue in the *Solomon* is analogous to the Proposed Ordinance, except that the Proposed Ordinance's limitations would apply "on a broader scale." *Memorandum*, at 16. It argues the Proposed Ordinance "attempts to make a wholesale removal of crucial police powers conferred upon the City by Article 12, Section 5 of the Kansas Constitution." *Id.*

However, the City wholly ignores that the powers constitutionally conferred on cities *and the people* under the Home Rule Amendment (Article 12, Section 5) expressly include the power to limit actions of a city governing body by referendum. The initiative and referendum process is not statutory leftovers; it is baked into the constitutional cake. The Home Rule Amendment expressly grants the legislature the power to "prescribe . . . referendums" by statute. Thus the power of city governing bodies to "determine their local affairs and government" is constitutionally subject to such "referendums . . . prescribed by the legislature." *See* Kan. Const. Art. 12, § 5.

The City's argument is akin to saying the Governor has constitutionally delegated powers and thus a legislative impeachment proceeding would encroach on those powers. Like the constitutional source of Governor's executive powers, the City has *constitutionally delegated* home rule authority. But like constitutional source of the Legislature's impeachment power, the electors of Salina have a *constitutionally delegated* check on the exercise of that power through referendum as further provided by the legislature.

Under the framework of the Home Rule Amendment, the City's home rule powers are shared with a co-ordinate legislative "body": the people through referendum. The very definition of the constitutional referendum process is a temporary limitation on the *City's* exercise of its limited home rule powers.

Later in its *Memorandum in Support*, the City revisits this issue, but attacks Home Rule from a statutory angle. It claims the Proposed Ordinance violates K.S.A. 12-101, which provides a similar statutory basis for "Home Rule." *Memorandum*, at 17. More specifically, the statute provides that cities may "[m]ake all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers" and further, that cities may "[e]xercise such other and further powers as may be conferred by the constitution or statutes of this state." K.S.A. 12-101; *Memorandum*, at 17. According to the City, the Proposed Ordinance "conflicts" with these two subsections "by attempting to restrict the City's administrative powers over its staff and property and by attempting to limit the City's police power." *Id.* at 17. While consideration of whether the ballot initiative is a legislative or administrative function will be addressed more fully below, the Plaintiff's characterization of K.S.A. 12-101 of an impenetrable, unchecked source of police powers for cities ignores other statutory provisions that limit those police powers. While K.S.A. 12-101 confers the ability for cities engage in general administration of the city and to exercise other powers as conferred by the constitution or other statutes, those powers are *checked* by the constitutional referendum process. They are checked by other statutes of general applicability.

An example of constitutionally contemplated statutory limitations on the general home rule authority of cities was considered in *City of Lenexa v. City of Olathe*, 620 P.2d 1153 (Kan. 1980 when considering analogous annexation powers.

> [T]he *constitutional amendment granting home rule authority to cities expressly reserves annexation matters to the state and the legislature has expressly provided by statute who can challenge an annexation proceeding*. In addition, the authority over annexation reserved by Art. 12 § 5 must be read as effectively recognizing and preserving the inherent power of the state in this area. . . . Such a result is not surprising when a municipality's home rule powers are considered in conjunction with the intent of the home rule amendment. Home rule is intended to give cities flexibility in their local affairs and government. Home rule allows a city to respond

> to a local problem with a local solution without the necessity of seeking authorization from the legislature *unless a specific statute of general application prevents action*. [citations omitted] . . . But home rule cannot be construed as authority for one municipality to determine its relationships with other municipalities through the use of court actions challenging the annexation of corporate existence of the others. *Questions concerning the relationships between cities call for statewide action. Art. 12 §5 and K.S.A. 12-520 provide the answer for annexation challenges.*

See City of Lenexa v. City of Olathe, 620 P.2d 1153, 1159 (Kan. 1980), on reh'g, 625 P.2d 423 (Kan. 1981) (emphasis added). In the case at hand, as in *City of Lenexa*, "questions concerning the relationships between [the City of Salina and the people through referendum] call for statewide action. Art. 12 § 5 [and K.S.A. 12-3013] provide the answer for [initiative and referendum matters]."

Kansas Constitution Article 12, Section 5—the "Home Rule" Amendment—"empowered local governments to determine their local affairs and government by ordinance." *Dwagfys Manufacturing, Inc. v. City of Topeka*, 309 Kan. 1136, 1139, 443 P.3d 1052 (2019) (citing *Steffes v. City of Lawrence*, 284 Kan. 380, 385, 160 P.3d 843 [2007]). Upon the Home Rule Amendment's passage, "cities no longer had to rely on the Legislature to specifically authorize the exercise of a particular power or action via statute." *Id.* at 1339-40. The authority conferred under the Home Rule Amendment is construed liberally to provide cities with the largest amount of self-governance possible. *See id.*; Kan. Const. Art. 12, 5(d).

Yet after the Home Rule Amendment (Kan. Const. Art. 12, § 5) was adopted, the Kansas Legislature also codified the general ordinance and referendum processes into statute, as contemplated by the constitutional language. K.S.A. 12-101 explains that the Home Rule Amendment "empowers cities to determine their local affairs and government *by ordinance* and enables the legislature to enact laws governing cities." K.S.A. 12-101 (emphasis added). Much like any other quasi-legislative process, cities and municipalities must follow certain statutory

procedure to enact lawful ordinances. This procedure is outlined in K.S.A. 12-3001, *et. seq.* Among these procedure statues, K.S.A. 12-3013 details the process for a citizen-led "Petition Proposed Ordinance," like the Proposed Ordinance here. *See* K.S.A. 12-3013.

Because Defendant's merely challenge the effect of the Proposed Ordinance and not the process followed by Defendant, extensive discussion of the statutory referendum process is not necessary. However, it is important to note that a referendum process only *temporarily* binds future city councils for up to 10 years. Pursuant to K.S.A. 12-3013(c):

> If a majority of the qualified electors voting on the proposed ordinance votes in favor thereof, *such ordinance shall thereupon become a valid and binding ordinance of the city.* Any ordinance proposed by a petition as herein provided and passed by the governing body or adopted by a vote of the electors, *shall not be repealed or amended except (1) by a vote of the electors, or (2) by the governing body, if the ordinance has been in effect for 10 years* from the date of publication, if passed by the governing body, or from the date of the election, if adopted by a vote of the electors.

(emphasis added). The statutory process for ordinance by referendum results in a "valid and binding ordinance of the city" that "[cannot] be repealed or amended" except by either a subsequent vote of the people or, after 10 years have elapsed, by the city council. If Plaintiff has a problem with the "valid and binding" nature of referendums on future city councils in the next 10 years, their problem is with the express constitutional authority for K.S.A. 12-3013, not with the Proposed Ordinance itself.

C. Jayhawk *and* Imming *affirm the constitutional and statutory referendum process as a legal means of temporarily binding future city councils*

1. *Jayhawk* affirmed *Imming* and ultimately the referendum process

An understanding of two recent cases is necessary to outline the metes and bounds of Kansas Constitutional and Statutory Home Rule by ordinance and/or referendum. Very recently, the Kansas Supreme Court published *Jayhawk Racing Properties, LLC v. City of Topeka*, 313

Kan. 149, 484 P.3d 250 (2021). In *Jayhawk*, the Court addressed whether a contract to renovate a speedway was binding on the City of Topeka. *Id.* at 150-52. The Court debated whether the city revenue project was either a governmental/legislative function or an administrative/proprietary function. *Id.* at 152-154. The Court held the project to renovate the speedway "exercise[d] . . . government policy-making powers, including the policies of whether to promote economic growth through the mechanism of a revitalized speedway and whether to fund such revitalization through particular revenue-raising mechanisms." *Id.* at 153. This distinction was important because "such government functions cannot be contracted away and that one legislative body cannot bind a successor legislative body to its policy commitments." *Id.*

After describing a city's ability to issue bonds for projects, the *Jayhawk* Court explained the City of Topeka used this special statutory authority to issue bonds for the raceway project. *Id.* at 154. Then, the Court proceeded to describe factors which it used to determine whether a city function was governmental or administrative. *Id.* at 155 (describing the four-factor test from *McAlister v. City of Fairway*, 289 Kan. 391, 399, 212 P.3d 184 [2009]).

Importantly, the *Jayhawk* Court affirmed the second case key to the analysis at hand—*City of Topeka v. Imming*, 51 Kan. App. 2d 247, 261-69, 344 P.3d 957 (2015). The Court explained that in *Imming*, the Kansas Court of Appeals resolved a similar issue—"whether [an] Ordinance . . . was a governmental or a propriety matter—but in a different posture." *Id.* at 155. The Kansas Supreme Court found *Imming*'s reasoning persuasive. *Id.* It explained that the Court of Appeals applied the *McAlister* factors and found the *Imming* Ordinance to be governmental/legislative. *Id.* at 155-56. The *Jayhawk* Court explained *Imming*'s conclusion:

> Governmental functions are those that are performed for the general public with respect to the common welfare for which no compensation or particular benefit is received, while proprietary functions are exercised when an enterprise is

> commercial in character, is usually carried on by private individuals, or is for the profit, benefit, or advantage of the governmental unit conducting an activity. . . .
>
> One difference between the two functions has been enunciated in a treatise on municipal government: A contract to pay a specified sum over a specified period of time is binding on the successors of the municipal officials who made the contract. But the power to levee a tax belongs to the class of legislative and governmental power. In the first instance, the successors may be bound; in the other case they cannot be. . . . In the present case, Jayhawk specifically seeks to enforce an agreement to levee a particular kind of tax, which is power that falls squarely within the governmental function of city authority. . . .
>
> As we ascertain . . . the development, introduction, or improvement of services are, by and large, considered governmental. The routine maintenance of the resulting services is deemed proprietary. Although the MOU in the present case calls for some routine maintenance, it emphasizes major reconstruction and new development, typical of a governmental function. We conclude that the Ordinance in the present case served a governmental or legislative function, meaning that parties contracting with the City could not sue for breach of contract when the new City Council decided not to proceed with the agreed courses of action.

Id. at 156-58. (internal citations omitted).

After determining the decision was a governmental/legislative function, the Court then expounded that as "an exercise of governmental power, . . . the MOU does not subject the City to a legally enforceable obligation. This is because one *city council* may not bind a subsequent one to its political decisions." *Id.* at 161 (emphasis added). It is on this single sentence Plaintiff hangs its proverbial hat, claiming the Proposed Ordinance cannot bind a future city counsel from making political decisions. *See also, Board of Education v. Phillips*, 67 Kan. 549, Syl. ¶ 2, 73 P. 97 (1903), ("One legislature has no power by the enactment of laws to prohibit a subsequent legislature from the full performance of its duties in the enactment of such laws as in its judgment are demanded for the public safety or general welfare of the public.").

The Plaintiff in the present action completely ignores the crucial distinction between *Jayhawk* and *Imming* that is directly applicable to this case: the constitutional referendum process as further defined by law *can* bind a future city council. In *Jayhawk*, two actions of

successive elected city councils were at issue. In *Imming*, the issue of the correct *referendum* process used by the people to undo or otherwise check the power of a city council action was at issue. *Jayhawk* affirmed *Imming*, and the clear difference between the two cases is the correct constitutional mechanism to *bind* a future city council. In *Jayhawk*, no constitutional mechanism allowed one city council to bind a future city council. In *Imming*, as here, the referendum process provided for in the Home Rule Amendment itself is the constitutional mechanism (as further provided by law) by which the people may *bind* a future city council. *See* Kan. Const. Art. 12, 5(d). Furthermore, while *Imming* ultimately determined that the citizens in that case had selected the wrong *statutory* referendum process, it affirmed the citizens' ability to bind a city council for up to 10 years had the correct statutory referendum process been used.

The Kansas Supreme Court held that the City of Topeka was not obligated to act under the contract, and that although "this rule appears unfair to parties that dive into the murky waters of municipal contracts . . . it must be remembered that the plaintiff entered into the contract under the laws of the State of Kansas, and the law in this State . . . is that legislative bodies may not bind future legislative bodies on their governmental decisions." *Id.* at 162.

Plaintiff cites *Jayhawk* for the proposition that K.S.A. 12-3013 referendum process cannot "bind future [city councils] on their governmental decisions," despite the express statutory language that such referendums are "valid and binding" for up to ten years after being approved by the voters. Yet Plaintiff's one-to-one comparison with *Jayhawk*'s facts is a sleight of hand. *Jayhawk* expressly noted—and followed with several other Kansas cases—that "one *city council* may not bind a *subsequent one* to its political decisions." *Jayhawk*, 313 Kan. at 161 (emphases added). This direct holding is entirely irrelevant here. In the present action, the Defendant is not seeking to force a current city council to limit its successor in any way.

Defendant has availed himself of the referendum process as the correct constitutional method to temporarily bind a city council.

An ordinance passed through the K.S.A. 12-3013 procedure does not follow the same strictures detailed in *Jayhawk*. *Imming* further explains this distinction and *Jayhawk* expressly affirmed *Imming*'s holding. *Jayhawk*, 313 Kan. at 156 ("The reasoning of *Imming* is persuasive."). Due to *Jayhawk*'s affirmation of *Imming*, one may restate *Jayhawk*'s holding in another way: the law in this State is that a constitutional referendum process *may* temporarily bind future legislative bodies on their governmental decisions.

2. *Imming* affirmed that a successful referendum is binding on future city councils

Imming involved very similar, but separate facts from *Jayhawk*. In *Imming*, the Topeka City Council adopted Ordinance No. 199915 in 2014 to approve a Memorandum of Understanding, amend the speedway's STAR bond project by doubling the surrounding redevelopment district, and issue an additional $5 Million in new STAR Bonds. *Imming*, 51 Kan. App. 2d at 249. Later that year, in October 2014, Topekan Christopher Imming filed a petition titled "A Petition for a New City of Topeka, Kansas Ordinance Relating to Heartland Park Redevelopment District and Additional Bond Authority." *Id.* The petition "called for either the repeal of Ordinance No. 19915 or submission of the question of repeal to the voters at a municipal election." *Id.* Imming gathered almost 4,000 signatures and cited K.S.A. 12-3013 as authority for the referendum petition. *Id.*

After the Imming Petition's success, the Topeka City Council met and discussed its course of action. *Id.* at 249. A Topeka City Councilman moved to adopt a resolution directing the city attorney not to pursue litigation challenging Imming's Petition or its proposed ordinance. *Id.*

at 249-50. The motion failed and the Topeka City Manager filed suit the next day and Imming counterclaimed shortly thereafter. *Id.* at 250.

The district court split the baby, finding partially for Imming and partially for the City of Topeka. *Id.* at 251. Imming raised four issues on appeal. *Id*. Relevant here, the Panel held Ordinance No. 19915 was legislative under Imming's second claim. *Id.* at 256. Below, the district court incorrectly found the Ordinance to be administrative, and thus exempt from the referendum process under K.S.A. 12-3013(e)(1) ("The provisions of this section shall not apply to . . . [a]dministrative ordinances"). *Id.* at 257. The Panel cited the *McAlister* factors discussed in *Jayhawk*:

> The *McAlister* court refined the test for determining whether an ordinance is administrative or legislative in nature by establishing these guidelines:
>
> > 1. An ordinance that makes new law is legislative; while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.
> >
> > 2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.
> >
> > 3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of policy.
> >
> > 4. If the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy, the action receives an 'administrative' characterization.

Id. at 257–58.

Regarding the first factor, the Panel held Ordinance No. 19915 created a new law by doubling the size of the raceway redevelopment district, acquiring Jayhawk Racing's racetrack interest, and eliminating debtors. *Id.* at 258 A statement of public policy made in the Ordinance likewise suggested a legislative purpose under the second factor. *Id.* The Panel ultimately held "[a]fter applying the tests found in *McAlister* and considering" a significant number of cases, "Ordinance No. 19915 is legislative and not administrative" and the district court erred when it held the Imming Petition was administrative. *Id.* at 261.

Next, the *Imming* Panel confronted whether Ordinance No. 19915 was subject to the K.S.A. 12-3013 initiative and referendum process, or if Imming's Ordinance was exempt from its procedure. To achieve this, the *Imming* Panel examined two procedures—the general referendum procedure in K.S.A. 12-3013, and the STAR bond procedure in K.S.A. 12-17,169(b)(2):

> First, the initiative and referendum law sets out when and how the initiative petition procedure is to be used. The statute allows the citizens of the city to petition the city council to adopt a proposed ordinance. Once a proper petition is presented, the city council may choose to adopt it by a majority vote of the council within 20 days of its proper submission or, if it fails to pass it within 20 days, the city council must submit the ordinance to a vote of the qualified voters in the city. K.S.A. 12–3013(a). The statute also makes it clear when the initiative and referendum process cannot be used. K.S.A. 12–3013(e)(3) states: 'O]rdinances subject to referendum or election under another statute' cannot be the subject of an initiative and referendum petition.'
>
> This leads us to the second statute we must consider. K.S.A.2014 Supp. 12–17,169(b)(2) creates the procedure for challenging the issuance of STAR bonds. The statute states that the bonds will issue unless a 'protest petition signed by 3% of the qualified voters of the city is filed.' If a protest petition with sufficient signatures is submitted within the time allowed, 'no full faith and credit tax increment bonds shall be issued until the issuance of the bonds is approved by a majority of the voters voting at an election thereon.' K.S.A.2014 Supp. 12–17,169(b)(2).

Id. at 262.

Accordingly, these battling provisions posed the question "whether Ordinance No. 19915 is subject to referendum or election under K.S.A. 2014 Supp. 12-17,169(b)(2). If it is, then it cannot also be subject to the initiative process under K.S.A. 12-3013." *Id.* The *Imming* Panel explained and the *Jayhawk* Court confirmed that "[b]y exempting ordinances subject to referendum or election under another statute, from the initiative process, the legislature has declared that such questions are to be decided by using the more specific statutory provision. In this case, the STAR bond protest process governs." *Id.* at 263.

The Panel explained that K.S.A. 2014 Supp. 12-17,169(b)(2) set up a parallel referenda process for STAR Bond-specific issues, so it was the more specific statute, and ruled the referenda process for STAR Bond-related petitions. *Id.* at 263-65. Accordingly, Imming's STAR-bond petition was exempted from the normal K.S.A. 12-3013 initiative and referendum process under K.S.A. 12-3013(e)(3) because it was subject to an "election under another statute"—K.S.A. 2014 Supp. 12-17,169(b)(2)—"as contemplated by the legislature." *Id.* at 265.

With an understanding of the mechanisms at play, the Proposed Ordinance clearly complies with both the Kansas Constitution and other Statutes. As discussed above, *Jayhawk* held that City Councils may not bind future *City Councils* from performing governmental/legislative acts. *See*, *Jayhawk*, 313 Kan. at 161. This does not prevent a referendum from binding a City Council under K.S.A. 12-3013 and *Imming.*

Accordingly, the Proposed Ordinance may be valid if it has a legislative and not administrative purpose. *See*, *Imming*, 51 Kan. App. 2d at 257; K.S.A. 12-101; K.S.A. 12-3013(a)-(d). Moreover, (and pragmatically) this makes simply makes sense. If Plaintiff is correct and referenda cannot bind anybody from making legislative/governmental decisions and cannot legislatively bind those same bodies from performing administrative functions under *Imming*,

then essentially *no* topic is *ever* ripe for review by the people through the K.S.A. 12-3013 process.

In the present matter, applying the *McAlister* factors, the Proposed Ordinance is clearly legislative in nature. First, the Proposed Ordinance *poses new* restrictions on the ability of City Councils to require or prohibit certain actions during times of emergency. The Proposed Ordinance *does not* execute an existing law. This factor indicates the Proposed Ordinance is legislative.

The Proposed Ordinance also contains a statement of public purpose—much like the *Imming* Ordinance. Further, the Proposed Ordinance deals with the "entire" topic of emergency management, not "a small segment of an overall policy question." Thus, the second prong likewise indicates the Proposed Ordinance is legislative. *See id.*

The Proposed Ordinance does not "require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city to make a rational choice." *See, Id.* The Proposed Ordinance simply prohibits the City from closing businesses during a declared emergency, or the requiring of face masks or other medical equipment. Clearly this this a legislative purpose.

Finally, cities receive no special dispensation for these policies under Kansas statute and no other more-specific referendum statute exists on this topic. The Fourth factor likewise indicates a legislative purpose. *See, Id.* As such, the purpose of the Proposed Ordinance is legislative in nature and is proper under K.S.A. 12-3013.

Lastly, *Imming*'s most specific holding—that another referendum statute exempted the STAR Bond issue from K.S.A. 12-3013 under (e)(3) and provided a new more-specific procedure under K.S.A. 12-169(b)(2)—does not apply here. Plaintiff does not provide a more-

specific referendum statute dealing with matter discussed in the Proposed Ordinance. Because no such statute exists, the Kansas Legislature has not indicated its intention to remove that subject matter from the general referendum process described in K.S.A. 12-3013. *See*, *Imming*, at 265.

Even the recently passed 2021 Senate Bill 40, which granted localities certain authority to *pass* certain health related measures is inapplicable. Nothing in that statute *removes* any topic from the general referendum process described in K.S.A. 12-3013. *See generally*, 2021 SB 40 (creating a statutory scheme for certain local government units to pass COVID-19 remediation, but not removing any of these topics from the K.S.A. 12-3013 referendum process by explicit mention or by creating a newer, more-specific referenda mechanism.) To hold otherwise would contradict both *Imming* and *Jayhawk*.

3. Defendant's own cited authorities recognize referendum as distinct from the effect of actions of current city councils on future city councils

Lastly, Defendant's argument that Proposed Ordinance illegally binds future city councils is without merit, even under Defendant's own cited persuasive authorities. The Home Rule Amendment expressly grants the legislature the power to "prescribe . . . referendums" by statute. *See* Kan. Const. Art. 12, §5. Thus, the power of city governing bodies to "determine their local affairs and government" is constitutionally subject to such "referendums . . . prescribed by the legislature." *Id.*

Plaintiff's citation to a general legal treatise, although not binding authority, is nevertheless in harmony with Kansas' constitutionally prescribed legislative power and thus contradicts Plaintiff's own argument: "*Unless authorized by statute* . . . a municipal corporation . . . cannot surrender any of its legislative and governmental functions and powers, including a

partial surrender of such powers." See *Memorandum*, at 19 (citing Motion to for Surrender of municipal powers, 2A McQuillin Mun. Corp., § 10:43 (3d ed.) (emphasis added).

There is no constitutional provision or state law that, in McQuillin's language, authorizes a city council to partially surrender its governmental functions and powers. That was the limited import of *Jayhawk*: city councils cannot bind future city councils on legislative or governmental policy issues. However, as recognized by *Imming*, there *are* constitutional and statutory provisions that expressly authorize citizens to limit a city's legislative functions for a time through a referendum process.

Plaintiff's conflation of the referendum process as a simple "stand in" for a city council's is the source of their error. The referendum process is not simply legislation *in loco parentis*. Rather, the referendum process is a check on the power of the city council and is expressly constitutionally and statutorily authorized to bind future city councils for up to 10 years regarding legislative policy.

C. The Proposed Ordinance Does Not Violate the Clear Title Rule nor the Single-Subject Rule.

The City claims the Ordinance "misstates its true nature" and runs afoul of the One-Subject Rule. *Memorandum*, at 20. More specifically, the City forwards that the Ordinance violates K.S.A. 12-3003 in that it contains more than a single subject and the "distinctive title" requirement of K.S.A. 25-3602. *Id.*

As to the former, the City argues the Ordinance contains two separate subjects—the first being the regulation of otherwise lawful activities in response to county-wide or State-wide emergency declarations under § 2, ¶ 1, and the second prevents the City from requiring face coverings or medical protective equipment on public property under § 2, ¶ 2. *Memorandum*, at

21-22. The City highlights what it believes a significant difference in the scope of the two provisions—"health orders" vs. "states of emergency"—which it believes are materially disparate in scope. *Id.* at 22.

As to the latter, the City complains the proposed Ordinance's title is "inaccurate" and therefore "void." *Id*. at 22. The title reads:

> AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON *BUSINESSES* AND *CITIZENS* RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL[.]

(emphasis added). The City elaborates that the terms "businesses" and "citizens" as defined in the Ordinance are significantly broader than their common definitions, which is misleading to the reader and this violates K.S.A. 12-3004. *Id.* at 22-24.

These arguments attack the statutory construction of the proposed ordinance. The lodestar of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659, 367 P.3d 282 (2016). Legislative intent can be ascertained through the enacted statutory language, giving common words their ordinary meanings. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). When a statute is plain an unambiguous, a court need not speculate on the legislative intent behind such clear language. Further, courts should not read further into unambiguous text something which is not readily found in its words. *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016). Unambiguous statutes do not require canons of statutory construction to glean legislative intent. *Nauheim*, 309 Kan. at 150.

1. The Proposed Ordinance Contains a Single Subject.

The plain and unambiguous meaning of the ordinance dispels any doubt of multiple subjects. The City claims paragraphs 1 and 2 of Section 2 regard different subjects. When read together and in context, these provisions clearly relate to the same matters—things the City cannot do during emergencies. The title of Section 2 reads "Limitations on power of Governing Body to impose restrictions during emergency." Each item then enumerated under that section is a limitation on the City's ability to take certain remedial measures during emergencies. Each item is a different restraint on the City's authority during an emergency, but they all share the same categorization as a "restriction during [an] emergency."

The City argues paragraph 1, which prevents restrictions imposed on businesses, is of an entirely different topic than paragraph 2, which prevents the City from enforcing a face mask requirement. While prohibitions on business restrictions and individual face mask requirements do not restrict the same thing, these two items share the same categorization of "things the City is not allowed to restrict when an emergency is in place." Were both paragraphs to restrict the same things, they would be redundant, as paragraph 1 clearly covers the entire umbrella of business-related conduct—"shall not impose any restrictions on businesses."

In the alternative, even if these two interpretations of the Ordinance's measures are both reasonable due to ambiguity, the very presence of such ambiguity precludes summary judgment because there are contested material facts.

2. The Proposed Ordinance Meets the Clear Title Requirement.

The City paints itself into a similar corner with its title argument and provides a substantial basis for this court to deny its motion for summary judgment. The City offers up several dictionary definitions for the terms "business" and "citizen." *Memorandum*, at 24-25.

The City asks this court to make a *factual* determination—*i.e.*, whether a jury or factfinder would believe the terms "business" and "citizen" are overbroad compared to their common understandings—which inherently requires a determination of the "common" definitions of those terms. The City provides several Merriam-Webster.com definitions in support. *See Memorandum*, at 24-25.

For "citizen," the City complains the ordinance definition is too broad because includes *all persons* present in a city and not just its inhabitants. *Id.* at 24. Similarly, the City states the ordinance definition of "business" includes private endeavors, such as churches, private clubs, etc., and not just commercial, for-profit establishments. *Id.* In response, Defendant Korb offers the following definitions which include those contested provisions:

- Business: "a person, partnership, or corporation engaged in commerce, manufacturing, *or a service*; profit-seeking enterprise or concern." *Dictionary.com*, https://www.dictionary.com/browse/business (last visited Sep. 23, 2021) (emphasis added).
- "What is a Business? The term business refers to an organization or enterprising entity engaged in commercial, industrial, or professional activities. *Businesses can be for-profit entities or they can be non-profit organizations that operate to fulfill a charitable mission or further a social cause*. Businesses range in scale from sole proprietorships to international corporations and can range in size from small to large." *Investopedia.com*, https://www.investopedia.com/terms/b/business.asp (last visited Sep. 23, 2021) (emphasis added).
- "A business [entity] is an organi[z]ation or any other entity engaged in commercial, professional, *charitable* or industrial activities. *It can be a for-profit entity or a not-for-*

profit entity and may or may not have a separate existence from the people/person controlling it." *Freedough.com*, https://www.feedough.com/what-is-business-definition-concept-types/ (last visited Sep. 23, 2021) (emphases added).

- A Citizen is "[a] native, inhabitant, or *denizen* of any place." *Yourdictionary.com*, https://www.yourdictionary.com/citizen (last visited Sep. 23, 2021) (emphasis added).
- Defining "citizen" as "[a] *civilian*" or "[a] native, inhabitant, or *denizen* of a particular place." *TheFreeDictionary.com*, https://www.thefreedictionary.com/citizen (last visited Sep. 23, 2021) (emphases added).
- A citizen is someone "relating to a member of the public." *MacMillianDictionary.com*, https://www.macmillandictionary.com/us/dictionary/american/citizen (last visited Sep. 23, 2021).

That this court is being asked to choose between these sources proves summary judgment is not appropriate on this ground because doing so would usurp the role of a jury—the appropriate body in resolving disputes of material fact.

Moreover, the "title inaccuracies" raised by the City as analogous to the proposed Ordinance are distinguishable. The City also fails to fully explain the holdings of these cases. In *State ex rel v. Kirchner*, 182 Kan. 622, 322 P.2d 759 (1958), the Kansas Supreme Court compared whether the subject of an act—"the imposition of an annual privilege tax upon every person engaging or continuing within this state in the business of producing, or severing oil or gas" was clearly expressed in the title of the act: "An Act providing for the assessment, levy and collection of a tax upon the gross value of certain products and providing for the disposition of revenues received from such tax; and providing penalties for the violations of the act." *Kirchner*, 182 Kan. at 623-24. Ultimately, the *Kirchner* Court held that the subject of the act was not

clearly in the title because "[t]he title merely refer[ed] to the level of a 'tax upon the gross value of certain products'" without indicating "what products [were] to be taxed." *Id.* at 625-26.

In much the same way, *State ex rel. Moore v. City of Wichita*, 184 Kan. 196, 335 P.2d 786 (1959) is equally distinguishable. The *Moore* court examined a city ordinance creating licensure requirements for certain occupations in Wichita. *Moore*, 184 Kan. at 197. The ordinance's title conferred the ability to "license" trades, but the ordinance's body also granted taxing power to the city. *Id.* at 198.

The *Moore* Court ultimately boiled the question at issue as follows: "Does the power to *license* operations, as expressed in the title of the act, authorize the imposition of an occupation tax as the ordinance contemplates?" *Id.* at 200. The Court concluded no because no reasonable person could conclude that licensing for regulatory purposes was accompanied by a taxing authority for revenue purposes. *Id.* at 200-01.

Such is not the case here and both *Kirchner* and *Moore* are distinguishable. The Proposed Ordinance here is unlike the law in *Kirchner* because it clearly indicates what is seeks to do (limit the power of the City to restrict certain actions during declared emergencies) and how it seeks to do it (prevent the City from limiting business functions and prohibit requiring masks or similar medical devices.) *See*, Ordinance § 2 ¶¶ 1-2. This is not a situation where an ordinance's title does not indicate the means to its end. *See Kirchner*, 182 Kan. at 625-26.

Much the same, *Moore* is distinguishable because the power sought within the title of section 2 is the same power being exercised within the body of the ordinance. Unlike the *Moore* ordinance, which sought authority to *license* in the title, but included *taxing* authority, the proposed order here seeks to limit the power of the City to impose restrictions during declared emergencies and effectuates that same goal by clawing back the City's authority to restrict or

close businesses and to require face masks. *Compare Moore*, 184 Kan. at 198-201 *with* Proposed Ordinance § 2 ¶¶ 1-2. Unlike the *Moore* ordinance, a reasonable reader could read the Section 2's title and agree the provisions therein are "[l]imitations on [the] power of" the City "to impose restrictions during [an] emergency." *See, Moore*, 184 Kan. at 200-01. As a result, the Proposed Ordinance meets the clear title requirement.

CONCLUSION

Summary judgment is not appropriate for at least four reasons. First, summary judgment is not ripe until resolution of the pending motion to dismiss and the Defendant's answer filing. Second, issues of controverted material facts remain. If Defendant is not successful on his Motion to Dismiss, a full review of potential controverted material facts will be examined initially by Defendant in preparing his Answer with counsel. Moreover, full discovery will likely be discovered regarding the "administrative" functions allegedly implicated by the Proposed Ordinance, as otherwise argued and pled by Plaintiff. Finally, Defendant's legal claims are without merit under current case and statutory law, the Proposed Ordinance complies with all Kansas Constitutional and Statutory provisions.

WHEREFORE, Defendant respectfully requests the Court: 1) hold any ruling on Plaintiff's Motion for Summary Judgment in abeyance until after the November 2, 2021 election; and 2) ultimately deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted this 29th day of September 2021.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing system, which will send a notice of electronic filing to counsel of record.

/s/ Joshua A. Ney
Joshua A. Ney