

CLARK, MIZE & LINVILLE, CHTD.
129 S. 8th Street, P.O. Box 380
Salina, Kansas 67402-0380
Ph: (785) 823-6325/Fax: (785) 823-1868

IN THE DISTRICT COURT OF SALINE COUNTY, KANSAS

CITY OF SALINA, KANSAS, a municipal)	
corporation,)	
)	
Plaintiff,)	
v.)	Case No. 2021-CV-000160-OT
)	
KEVIN KORB,)	
)	
Defendant.)	
)	

(Pursuant to K.S.A. Chapter 60)

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff, the City of Salina, Kansas, (the “City”) by and through its attorneys, Jacob E. Peterson and Greg A. Bengtson of Clark, Mize & Linville, Chartered, and for its memorandum in support of its motion for summary judgment, states as follows.

I.

NATURE OF THE MATTER

The City of Salina filed this declaratory judgment and injunctive relief action due to substantive defects associated with a proposed ordinance submitted to the City by Mr. Korb (the “Proposed Ordinance”) under K.S.A. 12-3013 – the municipal initiative and referendum statute. The Proposed Ordinance attempts to limit the authority of current and future governing bodies, and attempts to limit the authority of government entities to manage their employees and properties:

The Governing Body of the City of Salina shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level.

....

The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County.

Proposed Ordinance, Section 2, Paragraphs 1-2, attached as Exhibit 1b. These provisions attempt to modify the powers granted by the people of Kansas to the City under Article 12, Section 5 of the Kansas Constitution. By extension, they violate the statutory codification of those powers at K.S.A. 12-101. And irrespective of Home Rule powers, they attempt to surrender legislative power and bind current and future city commissions of the City of Salina (“City Commission(s)”) – something no legislative body can do.

The Proposed Ordinance also fails to disclose its true nature through its title and contains two subjects: limitations upon the power of the City to legislate, and limitations on the power of government entities to manage its staff and properties. Finally, due to its interference with City management of its staff and properties (and government management, more generally), the Proposed Ordinance is impermissibly administrative, and not eligible for adoption under the initiative and referendum procedures at K.S.A. 12-3013.

The Court should declare that the Proposed Ordinance conflicts with and does not comply with Kansas law. For those reasons, it is void, and the Court should enjoin the Proposed Ordinance from becoming effective, valid, or binding.

II.

STATEMENT OF FACTS

The City submits its statement of facts solely for the purpose of this memorandum under Kansas Supreme Court Rule 141. The City reserves the right to controvert each and every fact at any subsequent proceedings, should those occur.

A. Defendant Korb presented an initiative petition to the City Commission for consideration under K.S.A. 12-3013 and garnered enough signatures to require the City Commission to place the initiative petition on the November 2, 2021, general election ballot pursuant to K.S.A. 12-3013.

1. Mr. Korb circulated and collected the requisite number of signatures on an initiative petition invoking K.S.A. 12-3013, K.S.A. 25-3601, and K.S.A. 25-3602 (the “Ordinance Petition”). (Affidavit of JoVonna Rutherford, City Clerk of the City of Salina, ¶¶ 5-6, 9, attached as Exhibit 1.)

2. Those signatures have been certified by the Saline County Clerk and Election Officer. (Affidavit of JoVonna Rutherford, City Clerk of the City of Salina, ¶ 6, attached as Exhibit 1; *see also* Saline County Clerk and Election Officer certification, attached as Exhibit 1a.)

3. A certified copy of the Ordinance Petition was hand-delivered to the City Clerk by the Saline County Clerk and Election Officer on August 9, 2021. (Affidavit of JoVonna Rutherford, City Clerk of the City of Salina, ¶ 3, attached as Exhibit 1.)

4. A complete, true, and accurate reproduction of the terms of the Ordinance Petition (and, by extension, the Proposed Ordinance) is attached as Exhibit 1b, and was attached to the Petition for Declaratory Judgment and Injunctive Relief as Exhibit A. (*See* Affidavit of JoVonna Rutherford, City Clerk of the City of Salina, ¶ 7, attached as Exhibit 1; *see also* Ordinance Petition, attached as Exhibit 1b; Petition for Declaratory Judgment and Injunctive Relief, Exhibit A.)

5. On August 23, 2021, the current City Commission declined to pass the Proposed Ordinance but submitted the matter to the Saline County Clerk and Election Officer to be placed upon the November general election ballot for the reasons described in Resolution No. 21-7979, attached as Exhibit 1c. (Affidavit of JoVonna Rutherford, City Clerk of the City of Salina, ¶ 8, attached as Exhibit 1; *see also* Resolution No. 21-7979, attached as Exhibit 1c.)

6. Specifically, the City Commission wished to exercise its rights to pursue the Court's judgment while complying with the statutory requirements of K.S.A. 12-3013 and avoiding the public expense and delay associated with calling a special election outside of the upcoming November special election. (Affidavit of JoVonna Rutherford, City Clerk of the City of Salina, ¶ 8, attached as Exhibit 1; *see also* Resolution No. 21-7979, attached as Exhibit 1c.)

7. The City filed the Petition initiating this action on Friday, August 27, 2021. (*See* Court file.)

8. The upcoming general election is on November 2, 2021.

B. The text of the Proposed Ordinance.

9. The full text of the Proposed Ordinance is provided in Exhibit 1b, and is provided below for the Court's convenience:

**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**

**BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF
SALINA, KANSAS:**

Section 1. Definitions

"Business" means any organization or entity, whether open to the public or a private entity operating within the city limits of the City of Salina, Kansas.

"Citizen" for the purpose of this ordinance means any person residing in, or being present in the city at any time.

"Restriction" means any limitations on movement, behavior, business operation or general liberty that is imposed on businesses or citizens and is or would be reasonably perceived as a reaction to an "emergency state" that is declared at the State of Kansas or Saline County level[.]

"Governing Body" means the City Commission of the City of Salina, Kansas[.]

Section 2. Limitations on power of Governing Body to impose restrictions during emergency.

[Paragraph 1] The Governing Body of the City of Salina shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level. Examples of restrictions include but are not limited to: Limitations on business capacity, limitations on business hours, Forcing a business to close, Restricting what may be bought or sold, Restrictions on citizens leaving their residence, Restrictions on citizens being in public places, Curfews applying to citizens, Forced medical treatment of any kind such as mandatory vaccines or the mandatory wearing of face coverings or other medical protective equipment.

[Paragraph 2] The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County.

[Paragraph 3] The purpose of this ordinance is to defer any such restrictions to Saline County to impose at its discretion and subject to the framework of the "Kansas Emergency Management Act" (Kansas Statutes Annotated, Chapter 48, Article 9).

Section 3. Effective This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

This ordinance 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 the county and subject to the Kansas Emergency Management Act. A complete copy of the ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge.

C. City staff includes hundreds of employees in widely varying occupations and circumstances, and the City owns dozens of properties of widely varying characteristics – all of which are overseen by the City Manager.

10. The City Manager of the City of Salina is generally charged with the management of City staff, properties, and facilities. (Affidavit of Michael Schrage, ¶ 4, attached as Exhibit 2.)

11. The City currently employs over 400 employees. (Affidavit of Michael Schrage, ¶ 5, attached as Exhibit 2.)

12. The City's number of employees and general makeup of occupations has not changed significantly in the past 15 years, and it is anticipated that neither the number nor general makeup of occupations will change significantly in the future. (Affidavit of Michael Schrage, ¶ 6, attached as Exhibit 2.)

13. The City employs a wide variety of individuals with varying roles and occupations, including but not limited to public works staff, administrative staff, law enforcement, fire fighters, and emergency medical technicians, among many others. (Affidavit of Michael Schrage, ¶ 7, attached as Exhibit 2.)

14. City staff positions also vary widely regarding exposure to potential illness, exposure to the public, the facilities in which they work, the ability to physically separate from others at their typical work location, and the ability and opportunity to work inside or out. (Affidavit of Michael Schrage, ¶ 8, attached as Exhibit 2.)

15. Public works staff, for example, often works outside and rarely interacts with the public. (Affidavit of Michael Schrage, ¶ 9, attached as Exhibit 2.)

16. Administrative staff, by contrast, works inside and frequently interacts with the public. (Affidavit of Michael Schrage, ¶ 10, attached as Exhibit 2.)

17. Fire fighters live together in communal accommodations and frequently interact with the public. (Affidavit of Michael Schrage, ¶ 11, attached as Exhibit 2.)

18. Law enforcement officers and staff have widely varying roles, which may include indoor and outdoor activity, interactions with the in-custody population at the Saline County Jail, or interactions with other law enforcement agencies, and currently have special mask-wearing protocols in place depending upon their specific circumstances. (Affidavit of Michael Schrage, ¶¶ 12 and 19, attached as Exhibit 2).

19. Emergency medical technicians, by their very occupation, are tasked with treating patients in medical distress, which frequently requires close contact with patients who may transmit COVID or be vulnerable to COVID. (Affidavit of Michael Schrage, ¶ 13, attached as Exhibit 2.)

20. In the past year, the City's youngest non-seasonal employee was 19 and the City's oldest employee was 72, and City employees have widely varying health conditions and statuses. (Affidavit of Michael Schrage, ¶ 14, attached as Exhibit 2.)

21. The City also occupies at least 30 discrete publicly owned facilities and properties. (Affidavit of Michael Schrage, ¶ 15, attached as Exhibit 2.)

22. Like City of Salina employees, City of Salina facilities and properties are diverse, and vary widely regarding their size, purpose, location, and day-to-day staffing. (Affidavit of Michael Schrage, ¶ 16, attached as Exhibit 2.)

23. Those facilities include water treatment facilities (one of which is a rural facility not within the contiguous corporate limits of the City) that are generally inaccessible to the public. (Affidavit of Michael Schrage, ¶ 17, attached as Exhibit 2.)

24. Those facilities also include the Tony's Pizza Event Center, a large indoor entertainment venue, and outdoor parks, among many others. (Affidavit of Michael Schrage, ¶ 18, attached as Exhibit 2.)

25. Decisions about whether mask wearing (or other protective measures) should be required among City employees and the associated deployment of staff and resources requires consideration of any number of factors, including employees' exposure to the general public and co-workers, employees' potential for social distancing, vaccination rates, the likelihood of compliance, methods of enforcement of such policies, the risks and benefits of such enforcement, the potential drain on City resources associated with enforcing such policies, and the possibility of service disruption to the public, among others. (Affidavit of Michael Schrage, ¶ 20, attached as Exhibit 2.)

26. Implementing mask wearing requirements also requires consultation with administrative staff, the City's human resources department, other City department heads, and the advisory employee counsel, among others. (Affidavit of Michael Schrage, ¶ 21, attached as Exhibit 2.)

D. Numerous government entities own or occupy property and facilities inside the corporate limits of the City of Salina.

27. Saline County, Unified School District 305, Kansas State University, the state of Kansas, and the Federal Government (among other government entities) all own or occupy facilities within the corporate limits of the City. (Affidavit of Michael Schrage, ¶ 22, attached as Exhibit 2.)

28. As more specific examples, those government facilities on publicly owned property include but are not limited to the following:

- a. Saline County:
 - i. Administrative offices in the City-County Building at 300 W. Ash, Salina, Kansas; and
 - ii. The Saline County Sheriff's Office at 251 N. Tenth St., Salina, Kansas.
- b. Unified School District 305, as the public school system serving students within the corporate limits of the City of Salina, owns any number of elementary schools, middle schools, high schools, and administrative facilities.
- c. Kansas State University's Aerospace and Technology Campus at 2310 Centennial Road, Salina, Kansas.
- d. Federal Government:
 - i. United States Postal Service Post Office, 211 E. Ash St., Salina, Kansas; and
 - ii. United States Army Reserve at 1700 S. Broadway Boulevard, Salina, Kansas 67401.

(Affidavit of Michael Schrage, ¶ 23, attached as Exhibit 2.)

III.

STATEMENT OF ISSUES

1. Whether the Proposed Ordinance is void due to its attempts to limit the City's Home Rule powers conferred by the people of Kansas through Article 12, Section 5 of the Kansas Constitution?

2. Whether the Proposed Ordinance is void due to its attempt to limit the City's Home Rule powers codified by the Kansas Legislature at K.S.A. 12-101?

3. Whether the Proposed Ordinance is void due to its attempt to exceed municipal legislative authority by limiting the police powers of current and future City Commissions of the City of Salina?

4. Whether the Proposed Ordinance is void due to inaccurate references in its title to the regulation of "businesses" and "citizens," where the Proposed Ordinance a) defines these terms so broadly that they are inconsistent with their commonly accepted meanings, and b) attempts to govern how public entities, such as the City of Salina and State of Kansas manage their properties and employees?

5. Whether the Proposed Ordinance is void under the one-subject rule due to its inclusion of both a) a limitation on the City Commission's ability to restrict "otherwise lawful activity in response to a state of emergency on the County or State level," and b) its prohibition on "face coverings or other medical protective equipment" on "public owned property" except in accordance with a "county health order"?

6. Whether the Proposed Ordinance is "administrative" – and thus not eligible to become law under K.S.A. 12-3013 – when it attempts to intrude upon City management of

hundreds of City employees with widely diverse roles and characteristics, attempts to intrude upon the management of dozens of City-occupied public properties with widely varying characteristics, attempts to restrict how other public entities manage their employees and properties, and clearly bears on matters of statewide concern related to the ongoing pandemic?

7. Whether the Court should enjoin the Proposed Ordinance from becoming a valid and binding ordinance where it is clearly void and where allowing the Proposed Ordinance to come into effect could severely affect the City Commission's ability to respond in a timely fashion to emergent circumstances and fulfill its governing responsibilities?

IV.

ARGUMENTS AND AUTHORITIES

A. This matter is ripe for summary judgment.

The only matters to be resolved are questions of law regarding the language, effect, and nature of the Proposed Ordinance. Given the upcoming election and those issues, an early dispositive motion is appropriate. Because matters outside the pleadings are submitted for the Court's consideration via affidavit, and because summary judgment motions may be filed at any time until the close of discovery approaches, K.S.A. 60-256(c), the City filed this summary judgment motion as opposed to another dispositive motion, such as a motion for judgment on the pleadings. *See* K.S.A. 60-212(c), (d).

As the Court is undoubtedly aware, K.S.A. 60-256 provides that a party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Here, there is no dispute as to the

language of the Proposed Ordinance, and there is no discovery to be done. The matter is ripe for summary judgment. *Beshears By & Through Reiman v. U.S.D.* 305, 261 Kan. 555, 559, 930 P.2d 1376 (1997); *Geren v. Geren*, 29 Kan. App. 2d 565, 569, 29 P.3d 448 (2001) (“[Q]uestions of law are made to order for disposition by summary judgment.”).

The Proposed Ordinance suffers from several defects rendering it void. First, it attempts to limit the powers that can be exercised by current and future legislative bodies – something that violates Article 12, Section 5 of the Kansas Constitution; that violates K.S.A. 12-101; and that no legislature has the power to do. Its title does not accurately inform about the actual content of the Proposed Ordinance, which is far more expansive than suggested and includes two separate subjects. Finally, it dictates decisions regarding government employees and publicly owned property (including but not limited to City, State, and Federal property) to such a degree that the Proposed Ordinance must be considered “administrative” and ineligible to become effective, valid, and binding by virtue of K.S.A. 12-3013.

B. The Court should assess the Proposed Ordinance “with a considerable degree of strictness” for compliance with Kansas law.

The Proposed Ordinance does not comply and conflicts with Kansas constitutional and statutory law. Generally, legislative compliance with constitutional provisions has been assessed by Kansas courts with a fair degree of deference. *See, e.g., City of Wichita v. Wallace*, 246 Kan. 253, 257, 788 P.2d 270 (1990); *but see Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 611, 673-74, 440 P.3d 461 (2019) and *Hilburn v. Enerpipe Ltd*, 309 Kan. 1127, 1132, 442 P.3d 509 (2019) (*de novo* review of legislation for certain constitutional provisions). But it is also important to keep in mind that proposals pursuant to the initiative and referendum statute at K.S.A. 12-3013 have been reviewed by Kansas courts with a considerable degree of scrutiny.

In Kansas, the initiative and referendum process under K.S.A. 12–3013 has long been judged on a more demanding basis than in some other locales. See *McArdle*, 214 Kan. at 870, 522 P.2d 420 (“[W]e have never adopted a ‘liberal’ view of the matters which should be subject to initiative and referendum, but quite the contrary.”); *State, ex rel., v. City of Kingman*, 123 Kan. 207, 209, 254 P. 397 (1927) (“The tendency seems to be to confine the operation of similar referendum statutes with a considerable degree of strictness to measures which are quite clearly and fully legislative and not principally executive or administrative.”).

McAlister v. City of Fairway, 289 Kan. 391, 401, 212 P.3d 184 (2009). Standards for compliance with other statutory provisions will be discussed in greater detail below.

C. The Proposed Ordinance impermissibly attempts to limit City Commission police power authority, contrary to Home Rule under Article 12, Section 5 of the Kansas Constitution and entrenched precedent.

The result of the Proposed Ordinance is clear: it limits the City Commission’s authority to “impose... restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful....” (Proposed Ordinance, Section 2, Paragraph 1, SOF 9.) That is a direct, blatant attempt to divest City Commission authority. As a result, the Proposed Ordinance conflicts with the powers conferred upon the City under the Kansas Constitution, conflicts with Kansas statute, and conflicts with established legislative power under Kansas law and the common law more broadly.

1) *The Proposed Ordinance limits the authority conferred upon the City Commission by the Kansas Constitution.*

In 1961, the people of Kansas conferred constitutional Home Rule powers upon Kansas cities: “Cities are hereby empowered to determine their local affairs and government....” Kansas Constitution, Article 12, Section 5; *Steffes v. City of Lawrence*, 284 Kan. 380, 386, 160 P.3d 843 (2007) (“Because of its appearance in a constitutional amendment, the city Home Rule power is considered to be granted directly by the people.”). Home Rule powers are to “be liberally

construed for the purpose of giving to cities the largest measure of self-government,” Kansas Constitution, Article 12, Section 5, and include general police powers “for the health, safety, and general welfare of the public.” *Blevins v. Hiebert*, 247 Kan. 1, 5, 795 P.2d 325 (1990) (discussing how the exercise of Home Rule by a municipality includes the “police power for the health, safety, and general welfare of the public.”), *disapproved on other grounds by Dwagfys Mfg., Inc. v. City of Topeka*, 309 Kan. 1336, 1342-43, 443 P.3d 1052 (2019); Michael R. Heim, *Legal Article: Home Rule: A Primer*, J. Kan. B. Ass'n, January 2005, at 26, 29 (“It is obvious, although not explicitly stated in the city home rule amendment, that the home rule power encompasses broad police powers.”).

Admittedly, however, Home Rule powers are not unlimited. Kansas cities are still subject to uniformly applicable enactments by the Kansas Legislature. That is provided by the Kansas Constitution. Article 12, Section 5. Ordinances enacted by cities are also subject to referenda “only in such cases as prescribed by the legislature.” *Id.* That is provided by the Kansas Constitution.

What the Kansas Constitution *does not* provide is a carve-out for the direct limitation of municipal power via initiative petition. Yet that is precisely what the Proposed Ordinance does. It is a bare attempt to strip the City Commission of Home Rule police powers by limiting how and when those powers are exercised: “The Governing Body of the City of Salina *shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level.*” (Proposed Ordinance, Section 2, Paragraph 1, SOF 9 (emphasis added).) As such, it is an attempt to modify those powers granted directly by the Kansas Constitution.

Once again, how Home Rule powers may be restricted is clearly defined under Kansas law.

The Legislature can only restrict city home rule powers consistent with the constitutional grant.... Because of its constitutional origins, only the voters of Kansas have the ability to repeal city home rule and voters may do this only after two-thirds of both houses of the Kansas Legislature have adopted a concurrent resolution calling for the amendment or repeal of the home rule provision.

Michael R. Heim, *Home Rule Power for Cities and Counties in Kansas*, J. Kan. B. Ass'n, JANUARY 1997, at 26, 27 (citing Kansas Constitution, Article 14, Section 1).

Constitutional supremacy is a bedrock principle of Kansas law and our nation more broadly.

- “It has been settled law in this state that where there is direct conflict between a statutory and a constitutional provision, the latter will prevail.”

In re Rome, 218 Kan. 198, 203, 542 P.2d 676 (1975).

- “ ‘Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the constitution is void.

“ ‘This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.’ ” (Emphasis added.) 68 Kan. at 90–91, 74 P. 640 (quoting *Marbury v. Madison*, 5 U.S. [1 Cranch] 137).

Gannon v. State, 298 Kan. 1107, 1167–68, 319 P.3d 1196 (2014) (quoting *Atkinson v. Woodmansee*, 68 Kan. 71, 74 P. 640 (1903)).

- “ ‘An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.’ ” *Wyandotte Co. v. K. C., F.S. & M. Rld. Co.*, 5 Kan. App. 43, 44, 47 P. 326 (1896) (quoting *Norton v. Shelby Cty.*, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 [1886]).

Gannon v. State, 303 Kan. 682, 744, 368 P.3d 1024 (2016).

- The written constitution is paramount law because it emanates directly from the people. *In re Tax Application of Lietz Constr. Co.*, 273 Kan. 890, 903, 47 P.3d 1275 (2002). As a general rule, the legislature may enact legislation

to facilitate or assist in the operation of a constitutional provision, but such legislation must be in harmony with and not in derogation of the constitution. *State ex rel. Miller v. Board of Education*, 212 Kan. 482, 488, 511 P.2d 705 (1973).

Solomon v. State, 303 Kan. 512, 524, 364 P.3d 536 (2015).

Accordingly, attempts to legislatively divest authority conferred by the Kansas Constitution are void. In *Solomon v. State*, for example, the Legislature attempted to require that judicial district chief judges be elected by the other district court judges. *Id.* at 517, 364 P.3d 536. Article 3, Section 1 of the Kansas Constitution, however, provided that “the supreme court shall have general administrative power over all courts in this state.” *Id.* at 515, 364 P.3d 536. Given this constitutionally delegated authority and concerns over separation of powers, the Kansas Supreme Court found that the legislation “asserted significant control over a constitutionally established essential power of the Supreme Court,” and found the law unconstitutional. *Id.* at 532, 364 P.3d 536.

The Proposed Ordinance operates in a similar fashion with the City’s Home Rule powers, but on a broader scale. 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, much like the legislation in *Solomon*. The Kansas Legislature could not do it in *Solomon* and the petitioners cannot do it here.

Unlike those acts that may be the subject of initiative and referenda under K.S.A. 12-3013 by enacting policies affecting the City at large, the Proposed Ordinance is squarely and directly aimed at limiting the City Commission’s Home Rule powers. *That is the sole purview of the Kansas Constitution and Kansas Legislature.*

The City's Home Rule Powers cannot be limited by the Proposed Ordinance. The Proposed Ordinance conflicts with the Kansas Constitution and is void for that reason.

- 2) *For similar reasons, the Proposed Ordinance conflicts with Kansas statutory law.*

Kansas municipalities are also empowered to exercise Home Rule by statute. More specifically, K.S.A. 12-101 provides:

Article 12, section 5 of the constitution of Kansas empowers cities to determine their local affairs and government by ordinance and enables the legislature to enact laws governing cities. Each city being a body corporate and politic, may among other powers –

....

Fourth. Make 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.

....

Sixth. Exercise such other and further powers as may be conferred by the constitution or statutes of this state.

The Proposed Ordinance conflicts with subsections Fourth and Sixth by attempting to restrict the City's administrative powers over its staff and property and by attempting to limit the City's police powers.

The test used to assess conflicts between Kansas statutes and municipal ordinances is an intuitive one:

A test frequently used to determine whether conflict in terms exists is whether the ordinance permits or licenses that which the statute forbids or prohibits that which the statute authorizes; if so, there is conflict, but where both an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition but not counter to the prohibition in the statute, and the city does not attempt to authorize by the ordinance that which the legislature has forbidden, or

forbid that which the legislature has expressly authorized, there is no conflict (see 56 Am.Jur.2d, Municipal Corporations, Etc., s 374, p. 408-409).

Junction City v. Lee, 216 Kan. 495, 501, 532 P.2d 1292 (1975). “As with all things home rule, our consideration of whether there is a conflict must be informed with the constitutional command to ‘liberally construe[]’ the home rule power so as to give ‘to cities the largest measure of self-government.’” *Dwagfys Mfg., Inc. v. City of Topeka*, 309 Kan. 1336, 1344, 443 P.3d 1052 (2019) (edits in original).

As described above when directly considering constitutional Home Rule powers, the Proposed Ordinance is a clear attempt to restrict that which is authorized by Article 12 Section 5, and by extension, K.S.A. 12-101. Indeed, K.S.A. 12-101 cross references those powers “conferred by the constitution.” K.S.A. 12-101, Sixth. The Kansas Constitution and K.S.A. 12-101 authorize the City to exercise police powers for the health, safety, and well-being of those within the City and to manage its staff and facilities. The Proposed Ordinance, by its explicit terms, is an attempt to forbid or prohibit the exercise of those powers under Section 2, Paragraphs 1 and 2: “The Governing Body of the City of Salina *shall not impose any restrictions....* The wearing of face coverings or other medical protective equipment *may not be required on any public owned property....*” (Proposed Ordinance, Section 2, Paragraphs 1 and 2, SOF 9 (emphasis added).)

Thus, it conflicts with K.S.A. 12-101, and is void for that reason.

- 3) *The Proposed Ordinance is an impermissible attempt to enact a permanent restriction upon the City Commission’s current and future authority via municipal legislation.*

Irrespective of Home Rule powers, “legislative bodies may not bind future legislative bodies to their governmental decisions.” *Jayhawk Racing Properties, LLC v. City of Topeka*, 313

Kan. 149, 162, 484 P.3d 250 (2021); *State ex rel. Hawks v. City of Topeka*, 176 Kan. 240, 253, 270 P.2d 270 (1954).

Unless authorized by statute or charter, a municipal corporation, in its public character as an agent of the state, cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender of such powers. The principle is fundamental and rests upon policies the soundness of which has never been seriously questioned. Its application has been considered in a large number of judicial decisions involving a great variety of subjects and matters.

Surrender of municipal powers, 2A McQuillin Mun. Corp., § 10:43 (3d ed.).

And initiative and referendum petitions are very much limited by the constraints of local legislation:

The power of initiative or referendum may be conferred by the sovereignty upon a municipality with respect to any matter, legislative or administrative, within the realm of local affairs; and often the power, as conferred, is extensive, including all ordinances and resolutions and practically all actions that might be taken by a municipal council. *The power, however, cannot be unlimited. It is restricted to legislation within the power of the municipality to enact or adopt.*

Measures submissible, 5 McQuillin Mun. Corp., § 16:52 (3d ed.) (emphasis added). Modes of exercising power—Submission—Prior adjudication of validity, 5 McQuillin Mun. Corp., § 16:68 (3d ed.) (“[A]n ordinance submitted must be of the nature that the legislative body has power to pass.”). In short, “[t]he electorate has no greater power to legislate than the municipality itself. A defective ordinance cannot be cured by having it submitted to and approved by the electorate.” Electors' power directly legislate, 5 McQuillin Mun. Corp., § 16:47 (3d ed.).

There is no question that the Proposed Ordinance, if passed by the City Commission, would be invalid. It – like all other legislatures – cannot bind future legislatures or divest such legislatures of the legislative power to act. But that is precisely what the Proposed Ordinance does. The

Proposed Ordinance fails to comply with Kansas law and is void for that reason, as well, and should not be permitted to come into effect or become valid, binding law.

4) *Conclusion.*

The Proposed Ordinance conflicts with the Kansas Constitution and Kansas statutes and is an attempt to do what no legislature can do – surrender legislative power and bind future bodies. The Proposed Ordinance conflicts with the Kansas Constitution, conflicts with Kansas statutes, and does not comply with established legislative law. It is void and should not be permitted by the Court to become a valid or binding ordinance, or to take effect.

D. The Proposed Ordinance violates statutory prerequisites for valid municipal ordinances.

The title of the Proposed Ordinance misstates its true nature, and the Proposed Ordinance itself contains two subjects, violating the title and single subject requirements at K.S.A. 12-3003 and K.S.A. 25-3602. The Proposed Ordinance fails to comply with Kansas law relating to valid and binding municipal ordinances, and is void for those reasons, as well.

1) *The clear title requirement and the single subject rules are not mere trivialities – they serve crucial purposes for those reading ordinances.*

There are two separate statutory sources bearing on the number of subjects and title of the Proposed Ordinance. The first is at K.S.A. 12-3003. It provides: “No ordinance shall contain more than one subject, which shall be clearly expressed in its title....” That statute is applicable to all municipal ordinances. The Proposed Ordinance is also subject to single subject and “distinctive title” requirements at K.S.A. 25-3602. These provisions are vitally important to ensure transparent, straightforward municipal legislation:

[The purposes of the one-subject rule and the clear title requirement] include the prevention of a matter of legislative merit from being tied to an unworthy matter,

the prevention of hodge-podge or logrolling legislation, the prevention of surreptitious legislation, and the lessening of improper influences which may result from intermixing objects of legislation in the same act which have no relation to each other.

Garten Enterprises, Inc. v. Kansas City, 219 Kan. 620, 622, 549 P.2d 864 (1976) (referencing the constitutional provisions after which K.S.A. 12-3003 was modeled); *see also Kansas Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 753, 387 P.3d 795 (2017) (discussing the purpose of the one subject rule).

- 2) *The Proposed Ordinance contains two different subjects with distinct goals and distinct triggering events.*

The test for compliance with the one subject rule is straightforward: legislation is legitimate unless “invalidity is manifest,” and the subjects “have no legitimate connection with each other.” *Cf. Kansas One-Call Sys., Inc. v. State*, 294 Kan. 220, 228, 274 P.3d 625 (2012) (construing constitutional requirements for state legislation). Nevertheless, the Proposed Ordinance runs afoul of the one subject rule at K.S.A. 12-3003 and K.S.A. 25-3602.

Section 2, Paragraph 1 of the Proposed Ordinance attempts to limit the police powers of the City Commission to regulate “otherwise lawful” activities “in response to any state of emergency declared at the County or State level.” (Proposed Ordinance, Section 2, Paragraph 1, *see* SOF 9.) That is a general restriction of the City’s authority to regulate *any* “otherwise lawful” activity upon a very specific event – states of emergency declared by Saline County or the State of Kansas.

The trigger of Section 2, Paragraph 2 is quite different. It treads into administrative territory by preventing the City of Salina and other government entities from “requiring” “face coverings” or “other medical protective equipment” on “any public owned property, such as parks

and other facilities operated by the City of Salina.” That language affects both a) the City’s ability to control and regulate its own properties, and b) the regulation of its own employees.

The scope and applicability of Paragraphs 1 and 2 further highlight their separation. Paragraph 2 is specifically targeted at “face coverings” or “other medical protective equipment” on “any public [sic] owned property,” whereas the first is targeted at “restrictions” “imposed” by the City upon “activities that are otherwise lawful,” without geographic limitation. Paragraph 2 turns upon “health orders” “in effect for Saline County,” whereas Paragraph 1 is dependent upon “states of emergency declared at the County or State level.”

These differences between Paragraphs 1 and 2 of Section 2 are material and different in scope. The Proposed Ordinance should be declared non-compliant with Kansas law and void as they address different subjects.

- 3) *The Proposed Ordinance contains an inaccurate title and is void for that reason.*

The title of the Proposed Ordinance is, in its entirety,

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[.]

The definitions of both “businesses” and “citizens” in the text of the Proposed Ordinance are much more expansive than the generally understood meanings of those terms. As a result, the title is both incomplete and inaccurate.

Once again, Kansas statutes provide that the subject of an ordinance must be “clearly expressed in its title.” K.S.A. 12-3004. This requirement mirrors language that was provided by Article 2, Section 16 of the Kansas Constitution regarding acts of the legislature before it was

amended in 1974. David E. Pierce, *Void Enactments of the Kansas Legislature*, J. Kan. B. Ass'n, July/August 2011, at 28, 32. Accordingly, the Kansas Supreme Court's discussion of the "clear" title requirement prior to the 1974 amendment is instructive:

The constitutions of some states provide merely that the subject of an act be 'expressed' in the title. Ours provides that the subject shall be *clearly* expressed. The use of the word 'clearly' is entitled to significance and weight, and it means just what it says. The use of the word requires greater precision and clarity in the title of an act than would be necessary were it omitted, and when, as here, the constitution requires the subject of an act to be *clearly* expressed in its title the subject matter is not to be dubiously or obscurely indicated, but rather, the connection must be so obvious and clear that resort to ingenious reasoning aided by superior rhetoric will not be necessary in order to ascertain it.

State ex rel. Dole v. Kirchner, 182 Kan. 622, 625, 322 P.2d 759 (1958). "The court has held these purposes are fulfilled even though a city ordinance does not include in its title all the details of the provisions of the ordinance. It is sufficient if the title is broad enough to indicate in general terms the provisions of the ordinance." *Garten Enterprises, Inc. v. Kansas City*, 219 Kan. 620, 622, 549 P.2d 864 (1976) (citations omitted).

Here, although the City does not believe that the drafting error was intentional, the title is inaccurate to the point of being misleading. While the words in the first paragraph of Section 2 are largely consistent with the title, Paragraph 1 of Section 2 is much more expansive than the title indicates due to the Proposed Ordinance's expansive definitions.

The title refers to "businesses" as a specific kind of entity, and common understanding would indicate that such entity is "a commercial or sometimes an industrial enterprise." "*Business*" *Definition*, 1(b), MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/business> (last visited September 3, 2021). Given that commonly understood meaning, the title indicates

that the Proposed Ordinance only restricts the City’s ability to regulate activities of “commercial” or “industrial” enterprises.

But that is most assuredly *not* an accurate description of what the Proposed Ordinance does, in light of the definition of “business” provided by Section 1: “*any* organization or entity, whether open to the public or a private entity operating within the City of Salina, Kansas.” (Proposed Ordinance, SOF 9.) (emphasis added). The Proposed Ordinance’s definition of “businesses” includes many other “organizations” and “entities” that are not “businesses” by any normal construction of the term: churches, non-profit organizations, private clubs, associations, and, of course, public entities.

The use of “citizen” in the title causes the same problems. Given the reference to the “City of Salina” in the title, one would assume “citizens” to refer to citizens *of the City of Salina*. Indeed, that is the first definition of “citizen” given by Merriam-Webster: “an inhabitant of a city or town.” “*Citizen*” Definition, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/citizen> (last visited September 3, 2021). Once again, however, the definition of “citizen” in the Proposed Ordinance is much more expansive: “‘Citizen’ for the purpose of this ordinance means any person residing in, or being present in the city at any time.” (See Proposed Ordinance, Section 1, SOF 9.) That definition of “citizen” does not align with the first definition of citizen (discussed above), nor any of the other common understandings of the term:

- 2 a : member of a state
- b : a native or naturalized person who owes allegiance to a government and is entitled to protection from it
- 3 : a civilian as distinguished from a specialized servant of the state

“*Citizen*” Definition, MERRIAM-WEBSTER.COM (examples omitted).

The Kansas Supreme Court has invalidated state legislation with similar title inaccuracies. In *State ex rel. Dole v. Kirchner*, 182 Kan. 622, 322 P.2d 759 (1958), for example, the Kansas Supreme Court invalidated an act providing a “privilege tax on those persons engaging in severing oil or gas” based upon the value of the oil and gas produced because the title “merely refer[red] to the levy of ‘a tax upon the gross value of certain products.’” *Id.* at 625-26, 322 P.2d 759. In *State ex rel. Moore v. City of Wichita*, 184 Kan. 196, 335 P.2d 786 (1959), as well, the Court held that portions of legislation conferring authority to tax occupations for revenue purposes were void because the title merely referred to the power “to license,” and contained no mention of “‘revenue’ or ‘taxation’ or to ‘levy and collect an occupation tax.’” *Id.* at 200-01, 335 P.2d 786.

Similarly here, the title does not describe the true nature of the Proposed Ordinance. It does not give a fair sense of the scope of limitations being proposed. It does not indicate that the Proposed Ordinance would limit City Commission authority relating to any *entity* or any *person* finding themselves in the City of Salina. It does not disclose the nature of the second paragraph of Section 2, either: restricting the ability of government entities in the City of Salina – all government entities in the City of Salina – from requiring “face coverings” or “other medical protective equipment” on “public owned” property. It instead refers to the ability to regulate “businesses” and “citizens” – terms with established, limited, common meanings.

The *whole point* of the title of an ordinance is to fairly apprise the public and whoever is legislating (in this case, the electors of the City of Salina) about the content of the Proposed Ordinance. The title of the Proposed Ordinance does not accomplish its goal, does not comply with Kansas law, and renders the entire Proposed Ordinance void.

E. The administrative aspects of the Proposed Ordinance prevent its adoption pursuant to K.S.A. 12-3013 and render it void.

As discussed above, Section 2, Paragraph 2 of the Proposed Ordinance quite clearly attempts to restrict the City's ability to regulate its own buildings and employees and other government entities' ability to do the same. These provisions are impermissibly administrative and render the Proposed Ordinance void for failure to comply with K.S.A. 12-3013.

- 1) *The Proposed Ordinance is not entitled to deference from the Court when considering whether it is "administrative."*

K.S.A. 12-3013(e)(1) prohibits the enactment of "administrative" ordinances via initiative and referendum. "[C]ourts must determine the essential character of a proposed ordinance from the facts found in each case and then confine the operation of the initiative and referendum statute with a considerable degree of strictness to those measures that are quite clearly and fully legislative and not principally executive or administrative," but a proposed ordinance does not need to be solely legislative. *McAlister v. City of Fairway*, 289 Kan. 391, 402-03, 212 P.3d 184 (2009) (internal quotation marks omitted). It is also important to keep in mind that

[i]n Kansas, the initiative and referendum process under K.S.A. 12-3013 has long been judged on a more demanding basis than in some other locales. See *McArdle*, 214 Kan. at 870, 522 P.2d 420 ("[W]e have never adopted a 'liberal' view of the matters which should be subject to initiative and referendum, but quite the contrary."); *State, ex rel., v. City of Kingman*, 123 Kan. 207, 209, 254 P. 397 (1927) ("The tendency seems to be to confine the operation of similar referendum statutes with a considerable degree of strictness to measures which are quite clearly and fully legislative and not principally executive or administrative.").

Id. at 401, 212 P.3d 184. Failure to comply with K.S.A. 12-3013 renders the Proposed Ordinance void. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 668, 367 P.3d 282 (2016).

The Kansas Supreme Court has provided four guidelines to evaluate when considering the legislative and administrative¹ character of an ordinance:

1. An ordinance that makes new law is governmental; an ordinance that executes an existing law is proprietary. Permanency and generality are key features of a governmental ordinance.
2. Acts that declare a public purpose and provide ways and means to accomplish that purpose generally may be classified as governmental. Acts that deal with a small segment of an overall policy question generally are proprietary.
3. Decisions that 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 proprietary, 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]² characterization. 289 Kan. at 403-04, 212 P.3d 184.

Jayhawk Racing Properties, LLC v. City of Topeka, 313 Kan. 149, 155, 484 P.3d 250 (2021).

No single guideline controls, and “the weight given to any one guideline may be enough under a particular factual situation to decide that a proposed ordinance intrudes too far into a city's administrative arena. That is a matter best determined in each case.” *McAlister*, 289 Kan. at 405, 212 P.3d 184. Indeed, the Kansas Supreme Court in *McAlister* found that the petition at issue was “legislative” under three of the four factors above, yet still determined that the ordinance was best characterized as “administrative.” *Id.* at 411, 212 P.3d 184.

¹ For the purposes of this test, “governmental” is interchangeable with “legislative” and “proprietary” is interchangeable with “administrative.” *Jayhawk Racing Properties, LLC v. City of Topeka*, 313 Kan. 149, 152, 484 P.3d 250 (2021).

² The bracketed language is an effort to correct what appears to be a clerical error by the Court. The *Jayhawk Racing* court analyzed this fourth factor as if the exercise of delegated authority on a matter of statewide concern indicated an administrative finding, and the *McAlister* court (which is quoted and cited after the four-factor test in *Jayhawk Racing*) indicates that such considerations point to an “administrative” rather than “governmental” finding. See *McAlister*, 289 Kan. at 404, 212 P.3d 184.

There is no question that the Proposed Ordinance makes new law via Section 2, Paragraph 1. It also declares a public purpose – preventing the exercise of the City Commission’s Home Rule powers and surrendering those decisions to the County. Proposed Ordinance, Section 2, Paragraph 3. The question for the Court turns on the weight of the third and fourth factors:

- a) Whether the Proposed Ordinances’ restrictions on City authority to control the wearing of “face coverings” or “other medical protective equipment” on its own property and by its own employees is one requiring “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;” and
- b) Whether the language attempting to restrict the wearing of “face coverings” and other “medical protective equipment” on “any public owned property” implicates matters of statewide concern regarding the decision-making power of other government entities.

The restrictions upon the City’s authority as an employer and as a property owner most assuredly implicate administrative concerns to a considerable degree. And the attempt to regulate or restrict properties controlled by other government entities also create matters of statewide concern. The Proposed Ordinance is not eligible to create valid law under K.S.A. 12-3013.

- 2) *Analysis of the plain language of the Proposed Ordinance is what should be considered, and the plain language attempts to restrict City authority regarding its employees and properties and attempts to restrict other government entities from doing the same.*

The City anticipates that Mr. Korb will argue that the City is reading the Proposed Ordinance too broadly, and that the Proposed Ordinance was never designed to prohibit City administration from regulating its employees or non-publicly accessible property, and was never designed to restrict what other government entities do with their staff and properties. That may very well be true. But the Proposed Ordinance must be construed by its plain language. *See McAlister*, 289 Kan. at 412, 212 P.3d 184 (construing a petition indicating that “the City of Fairway

shall not allow... eminent domain use” to indicate that the City of Fairway should actively prevent other government agencies from exercising their eminent domain powers, despite the petitioners’ arguments to the contrary). Indeed, the first step in any analysis of the Proposed Ordinance, should it be adopted and permitted to take effect, is to consider and construe its plain language. *See, e.g., N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013).

The plain language of Section 2, Paragraph 2 broadly prohibits “[t]he wearing of face coverings or other medical protective equipment” on “any public owned property.” That prohibition ostensibly prevents the City, Saline County, U.S.D. 305, the State of Kansas, Kansas State University, or the United States government from making such requirements on properties they own, whether relating to employees or otherwise. The Proposed Ordinance should be analyzed with that in mind.

- 3) *The Proposed Ordinance’s deep intrusions upon issues requiring specialized management knowledge of City staff and facilities, and its attempts to limit other government entities’ management of their properties make it ineligible to become valid and binding under K.S.A. 12-3013.*

The Proposed Ordinance’s intrusions on the City’s control of its employees and properties is so significant and its overreaching attempt to tread upon other government authority is so broad that it can no longer be considered “clearly and fully legislative” rather than “principally administrative.” As such it cannot become law via an initiative petition pursuant to K.S.A. 12-3013.

Where administrative concerns relating to specialized knowledge about management of city staff, resources, and facilities are sufficiently significant, they alone make a proposed ordinance “administrative” under the initiative process. In *McAlister*, two initiative petitions were presented to the City of Fairway council, one of which prevented the City from relocating its city

hall to certain locations within the City of Fairway. *McAlister*, 289 Kan. at 393, 212 P.3d 184. Upon the advice of counsel that the petition was administrative in nature, the City did not pass the proposed ordinance, nor did it submit it to the city's electors. *Id.* at 395-96, 212 P.3d 184. The petitioners responded by filing suit against the city for a declaratory judgment that the proposed ordinance was legislative and also sought an injunction, mandamus, and monetary damages under 42 U.S.C. 1983. *Id.* at 396, 212 P.3d 184.

After the district court ruled in the City's favor, the Kansas Supreme Court undertook the four-factor analysis described above. *See id.* at 393, 212 P.3d 184. Three of the four factors were found to weigh in favor of a legislative determination: the proposed ordinance created new law or policy regarding the location of city hall, the proposed ordinance declared a public purpose and the means to effectuate it, and did not address matters of statewide concern. *Id.* at 405-10, 212 P.3d 184.

However, the Court found that determining the city hall's location "necessarily require[d] specialized knowledge and expertise." *Id.* at 408, 212 P.3d 184. That specialized knowledge was further accentuated by the city's input from "architects, engineers, financial consultants, police officers, and city officials" on the location of the city hall and the consideration of the city's "operations, associated, space, safety and regulatory issues." *Id.* The Court further noted that the scope of the restrictions on the proposed ordinance spoke to its administrative character:

[W]e find the wide-scale extent of the requested restriction in this proposed ordinance converts it from one that simply eliminates a few locations from the City's consideration to one that effectively makes the location decision for the City. To impose such a restrictive choice upon the City makes the character of this proposed ordinance administrative under our third guideline.

Id. at 409, 212 P.3d 184.

The Court went on to consider the four factors together, and felt that the significant overreach and intrusion into matters that are typically considered by city administrators outweighed the other three factors, and that the proposed ordinance was “principally executive or administrative in nature”:

[W]e find it is principally executive or administrative in nature. We do so even though we find it legislative in character under three of our four guidelines. This is because its prohibition against locating the city hall facilities is so extensive that it makes unavailable more than 90 percent of the City's geographic territory. This has the practical effect of dictating where the City locates its city hall facilities. Such a restriction necessarily limits and intrudes to a substantial extent into areas of city administration requiring specialized knowledge about city affairs, regulatory requirements, long-range planning, and financing. These are all subject matters typically left to city administrators. We find this intrusion into the efficient administration of the City's operations is so overreaching that it outweighs the three guidelines that arguably appear to have more legislative character to them.

Id. at 411, 212 P.3d 184.

The Proposed Ordinance in this case intrudes on administrative matters even further than *McAlister*. First are the practical considerations associated with management of City employees and City-occupied, publicly owned property. Whether to require “face coverings” or “medical protective equipment” in light of guidance regarding social distancing recommendations for City employees and publicly owned property in the midst of a pandemic is a function of numerous factors. High atop that list is the nature of employee occupations and their relative exposure to the public.

The City currently employs at least 400 employees. (SOF 11.) City employees hold positions that vary widely. (SOF 13-14.) They include public works staff, who often work outside and rarely interact with the public. (SOF 15.) They include administrative staff in the City-County Building, who work inside and frequently interact with the public. (*See* SOF 16.) They include

fire fighters who live together in communal accommodations and frequently interact with the public. (SOF 17.) They include law enforcement officers at the Saline Police Department, some of whom have roles that require interactions both indoors and out; some of whom frequently interact with the public and some of whom who do not; some of whom work frequently with departments outside the City, such as the Saline County Sherriff's Office, and some of whom do not; some of whom interact with isolated, in-custody populations (such as those housed in the Saline County Jail), and some of whom do not. (SOF 18.) And perhaps most importantly, City employees also include emergency medical technicians who render *medical treatment* to COVID patients. (SOF 19.)

The City also occupies at least 30 discrete publicly owned facilities and properties. (*See* SOF 21.) Those public properties occupied by the City are similarly diverse, ranging from water treatment facilities without public access outside the primary contiguous corporate limits of the City; to large indoor entertainment venues; to public, open-air spaces like parks. (SOF 22-24.)

Consideration of mask wearing also requires an evaluation of the risks, benefits, and guidance associated with that practice. It requires an evaluation of the practical potential for social distancing, given various positions and public foot traffic. It requires an evaluation of the exposure levels an employee may face given their job. It requires consideration of employees' relative risk factors associated with COVID: Do employees in certain departments skew younger or older? Are they generally healthier, or is the City aware of health conditions that would place employees at a higher risk if COVID is contracted? It requires consideration of the political realities associated with such restrictions: How much compliance will there be with these restrictions? How and when does the City enforce them? Is the potential political blowback and associated drain on resources to respond worth the benefits that these restrictions are likely to generate? (*See* SOF 25.)

And the list could go on. The specific knowledge needed to adequately assess these questions – and the complete removal of City discretion under the Proposed Ordinance – most certainly indicates that the Proposed Ordinance is administrative. *See also City of Lawrence v. McArdle*, 214 Kan. 862, 871, 522 P.2d 420, 427 (1974) (“In the case at bar, personnel matters are handled in practice on an administrative basis by the city manager who is selected for his expertise in such matters.” (citing now repealed statute regarding city manager authority). Notably, such management decisions are generally in the purview of the city manager. (SOF 10.) K.S.A. 12-1040 (“(c) The city governing body shall appoint a city manager to be responsible for the administration and affairs of the city.... (d) The city manager shall appoint and remove all heads of departments and all subordinate officers and employees of the city.”); *see also* Salina City Code Section 2-38, Duties and functions of the city manager (“the city manager shall be responsible for: (1) Management of all administrative affairs of the city... (4) Appointment, supervision, and removal of all heads of departments and all subordinate officers and employees of the city...)).

But Section 2, Paragraph 2 of the Proposed Ordinance goes even further than affecting City management of its employees and properties. It imposes obligations on *any* “public owned” properties in the corporate limits of the City, which could include Saline County facilities, U.S.D. 305 schools, the Kansas State Aerospace and Technology Campus, the Post Office, or the United States Army Reserve offices, and potentially others. (SOF 9, 27-28.) Such intrusions upon matters that are squarely in the arena of other government entities’ authority also speaks to the Proposed Ordinance’s overridingly administrative character. *See McAlister v. City of Fairway*, 289 Kan. 391, 417, 212 P.3d 184 (2009) (the second petition’s obligations on the City of Fairway to prevent other government entities from exercising eminent domain powers delegated by legislature speak

to statewide, administrative concern). Those other governmental entities have their own authority under state and federal law, and may generally exert that power over their facilities. *See, e.g.*, K.S.A. 19-101, 101a (county Home Rule powers); K.S.A. 72-1138(e) (school district Home Rule powers).

The wearing of “face coverings” or “other medical protective equipment” is also clearly a matter of state-wide (if not national) concern by any measure. The powers of government entities to impose restrictions on “otherwise lawful activity” is one that recently received a great deal of attention from the Governor, the Kansas Legislature, and is the subject of a current pending Supreme Court matter, albeit under a different statutory scheme. *See, e.g.*, Kansas Lawmakers revoke governor’s statewide mask order, KWCH 12 (April 1, 2021, at 10:31 AM CDT), <https://www.kwch.com/2021/04/01/gov-laura-kelly-issues-new-mask-order-for-kansas/>; *Butler et al., v. Shawnee Mission School District Board of Education*, Kansas Supreme Court Case No. 124205; Tim Carpenter, Kansas Supreme Court issues stay of lower court’s rejection of emergency management law, <https://www.wibw.com/2021/08/24/kansas-high-court-allows-officials-enforce-limits-govs-covid-19-powers/>, 13 WIBW (August 24, 2021 at 10:54 AM CDT).

The administrative questions in the Proposed Ordinance are significant, and it cannot become effective, valid, and binding law through the initiative and referendum process at K.S.A. 12-3013. Although the Proposed Ordinance presents legislative policy questions, its plain language restricts the City’s ability to control its own properties and address its own needs as an employer, which require significant, and specialized knowledge about City operations. The Proposed Ordinance also attempts to restrict and regulate what other government entities can do with their own properties and employees. The administrative concerns in the Proposed Ordinance

are so significant that the Proposed Ordinance cannot be considered “clearly and fully legislative” rather than “principally administrative.” The Proposed Ordinance does not comply with Kansas law, and is void for this reason, as well.

F. Injunctive relief is warranted.

For all of the reasons stated above, the City is entitled to declaratory judgment. The Proposed Ordinance should not be permitted to take effect or become a valid and binding ordinance, and the Court should issue a permanent injunction.

Quite simply, invalid laws are ripe for injunction. *See Gannon v. State*, 303 Kan. 682, 744, 368 P.3d 1024 (2016) (“[B]ecause an unconstitutional system is invalid, efforts to implement it can be enjoined.”); *cf.* Form and Scope of Order, K.S.A. 60-906, 5 Kan. Law & Prac. (5th ed.). The Proposed Ordinance is invalid as discussed above and cannot be allowed to take effect or to become a valid and binding law. That should end the Court’s analysis, and the Court should issue an injunction.

Typically, however, Kansas courts engage in a multi-factor analysis to assess whether an injunction is warranted. Those four factors are satisfied here.

Permanent injunctions are generally considered a form of equitable relief that are issued when money damages would be inadequate. *See, e.g., Bd. of Cty. Comm'rs of Reno Cty. v. Asset Mgmt. & Mktg. L.L.C.*, 28 Kan. App. 2d 501, 506, 18 P.3d 286 (2001). Instances of “prospective injury” (as is the case here, given that the Proposed Ordinance has not been adopted at this time) also require a showing of “threatened injury.” *See, e.g., Sampel v. Balbernie*, 20 Kan. App. 2d 527, 531, 889 P.2d 804 (1995). That threatened injury is present, given that Mr. Korb has collected enough signatures to force the City to submit it to the electors under K.S.A. 12-3013. (SOF 2-3.)

In evaluating the appropriateness of an injunction, Kansas courts generally consider whether the requesting party has satisfied four factors to assess whether injunctive relief should be granted:

- [1] that the absence of an injunction would lead to irreparable harm;
- [2] that no adequate legal remedy exists to address the person's claim;
- [3] that the person's injury would outweigh the harm any injunction may cause to the opposing party; and
- [4] that the injunction, if issued, would not be adverse to the public interest.

Roll v. Howard, 59 Kan. App. 2d 161, 175, 480 P.3d 192 (2020), *review granted* (Mar. 25, 2021) (quote separated for ease of analysis).

If the Proposed Ordinance is permitted to take effect, it would severely restrict the power and authority of the governing body of the City of Salina, causing irreparable harm. It could potentially prevent the City Commission from adequately responding to emergent circumstances in the public interest. That risk is especially heightened in the context of a global pandemic, where infection rates, illness, and death have the tendency to make rapid swings in severity. But it could also be implicated in cases of natural disasters, civil unrest/riots, or any number of other scenarios. In short, without an injunction (and assuming it is adopted by the City's electors), the Proposed Ordinance has the real potential of tying the hands of the City Commission when action is needed most.

Furthermore, there is no adequate legal remedy available to the City. This suit is not about compensation for harm to a specific individual or entity. This suit is about an attempt to limit constitutional Home Rule power. Money damages cannot restore the authority that would be lost if the Proposed Ordinance were allowed to take effect.

By contrast, the harm Mr. Korb and petitioners suffer is significantly less. In absence of the Proposed Ordinance, they are subject to the Home Rule police powers they always have been. If they are dissatisfied with the decisions of the governing body, they have ways of addressing their grievances: electing members of the governing body that more accurately represent their views or challenging the propriety of the City Commission's specific actions in Court. *See, e.g.*, Requisites for validity, 6A McQuillin Mun. Corp., § 24:51 (3d ed.).

What they cannot do is stand in the stead of the Kansas Legislature or the people of the entire state of Kansas to take away the City Commission's authority granted by Article 12, Section 5 of the Kansas Constitution. An injunction would certainly be in the public interest and would clearly outweigh any harm that Mr. Korb would suffer by virtue of the injunction, especially considering the avenues he has to address perceived infringements upon his rights.

The City is clearly entitled to a declaratory judgment that the Proposed Ordinance is void because it conflicts with and does not comply with Kansas law. An injunction is necessary to effectuate the Court's ruling and to eliminate the potential for imminent, serious harm that cannot be remedied through damages.

V.

CONCLUSION

The Proposed Ordinance clearly violates Kansas law. It attempts to modify the Home Rule powers conferred by Article 12, Section 5 of the Kansas Constitution. It conflicts with the codification of those powers under K.S.A. 12-101. And it attempts to bind current and future legislative bodies through a legislative limitation of power. No municipal legislation has the authority to accomplish those objectives.

Moreover, the title of the Proposed Ordinance indicates that it limits the City Commission's power to regulate "businesses" and "citizens," while the operative language of the Proposed Ordinance is much, much broader. The Proposed Ordinance also contains a second subject – limitation of masking requirements associated with "any" public property.

Finally, the Proposed Ordinance is impermissibly administrative under the municipal initiative statute, as it seriously intrudes upon the City's management of its employees and properties, attempts to regulate other governmental property within the City, and addresses matters of statewide concern. It is void for that reason, as well.

The Court should enter declaratory judgment that the Proposed Ordinance conflicts and fails to comply with Kansas law, and as a result, is void. The Court should further enjoin the Proposed Ordinance from taking effect and from becoming a valid and binding ordinance of the City.

Respectfully submitted,

/s/ Jacob E. Peterson

Jacob E. Peterson, KS #25534

Greg A. Bengtson, KS #10695

CLARK, MIZE & LINVILLE, CHARTERED

129 South 8th Street, P.O. Box 380

Salina, Kansas 67402-0380

Ph: (785) 823-6325

Fax: (785) 823-1868

jepeterson@cml-law.com

gabengtson@cml-law.com

Attorneys for the City of Salina, Kansas

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of September 2021, I presented the foregoing to the clerk of the court for filing and uploading to the e-flex electronic court filing system which will send a notice of electronic filing to all counsel of record, and provided a copy via regular mail and email to:

Kevin Korb
600 Upper Mill Heights Dr.
Salina, KS 67401
kkorb78@gmail.com

And a chambers' copy via email to:

Hon. Paul J. Hickman
District Court Judge
rita.mclain@saline.org

/s/ Jacob E. Peterson

Jacob E. Peterson, KS #25534

Attorney for the City of Salina, Kansas

EXHIBIT 1

IN THE DISTRICT COURT OF SALINE COUNTY, KANSAS

CITY OF SALINA, KANSAS, a municipal corporation,)	
)	
Plaintiff,)	
v.)	Case No. 2021-CV-000160-OT
)	
KEVIN KORB,)	
Defendant.)	
)	

(Pursuant to K.S.A. Chapter 60)

AFFIDAVIT OF JOVONNA RUTHERFORD

STATE OF KANSAS)	
)	ss:
COUNTY OF SALINE)	

JoVonna Rutherford, being first duly sworn, on her oath, states:

1. I am currently the City Clerk for the City of Salina, Kansas (“City of Salina”) and have held that position at all times discussed below.

2. As part of my duties as City Clerk, I receive initiative petitions submitted for the consideration of the governing body of the City of Salina (“City Commission”), am the official custodian of records of the City Commission, and attest all resolutions and ordinances passed by the City Commission.

3. A certified copy of an initiative and referendum petition (“Ordinance Petition”) was hand-delivered by the Saline County Clerk and County Election Officer on August 9, 2021. (*See* Certification Letter from Jamie Doss, Saline County Clerk and County Election Officer, dated August 9, 2021, attached as Exhibit 1a.)

4. I have also attended City Commission meetings in my capacity as City Clerk at which the City Commission considered the Ordinance Petition.

5. Mr. Korb circulated and collected signatures on the Ordinance Petition, and is the primary petitioner in support of the Ordinance Petition.

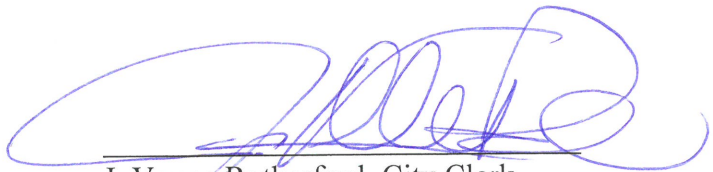
6. A complete, true, and accurate copy of the certification provided by the Saline County Clerk and Election Officer regarding the signatures attached to the Ordinance Petition is attached to this affidavit as Exhibit 1a.

7. A complete, true, and accurate copy of the operative language of the Ordinance Petition (and, by extension, the ordinance proposed by the Ordinance Petition) is attached as Exhibit 1b.

8. The City Commission declined to pass the Proposed Ordinance contained within the Ordinance Petition, but has submitted the matter to the Saline County Clerk and Election Officer to be placed upon the November general election ballot for the reasons described in Resolution No. 21-7979. A complete, true, and accurate copy of Resolution No. 21-7979 is attached as Exhibit 1c.

9. A complete, true, and accurate copy of the first page of signatures associated with the Ordinance Petition and certified by the Saline County Clerk and Election Officer is attached as Exhibit 1d.

Further affiant saith not.



JoVonna Rutherford, City Clerk
City of Salina, Kansas

On this 7th day of September, 2021, before me, the undersigned, a notary public in and for the county and state aforesaid, personally appeared JoVonna Rutherford, City Clerk of the City of Salina, Kansas, known to me to be the person who executed the within instrument in writing and acknowledged to me that she executed the same for the purposes therein stated.



Ashley Russell
Notary Public

My appointment expires:

August 30, 2022

EXHIBIT 1a

Saline County Clerk/Election Office



Jamie R Doss – County Clerk/Election Officer

Phone: (785) 309-5820

300 W Ash St, Rm 215

FAX: (785) 309-5826

P.O. Box 5040

E-mail: Jamie.Doss@saline.org

Salina, KS 67402-5040

www.saline.org

August 9, 2021

JoVonna Rutherford, Salina City Clerk
City of Salina
300 W. Ash St, Room 206
Salina, KS 67401

Re: Certified Copy of the Petition for Proposed 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.

Dear JoVonna:

The petition for the proposed ordinance was filed to our office on July 23, 2021. Such petition shall be signed by electors equal in number to at least 25% in cities of the first class of the electors who voted at the last preceding regular city election as shown by the poll books. The 2019 City Election voter turnout was 6,527, which equates to the required signatures of 1,632.

Pursuant to Kansas Statute K.S.A. 12-3013, 25-3602(b)(4), and Notarial Statute 53-501, et. seq., as Saline County Election Officer, I am hereby certifying 1,662 signatures, as placed on the "Petition for the Limitations on power of Governing Body to impose restrictions during emergency.

The circulators registrations and signatures were checked and the proper notarizations were verified.

On August 6, 2021, Kevin Korb submitted a letter requesting I send the City of Salina a certified copy of the petition. I am hand delivering the certified copy as well as his letter authorizing me to submit the petition. Please submit a letter or email me a confirmation receipt.

Sincerely,

Jamie R Doss
Saline County Clerk/County Election Officer

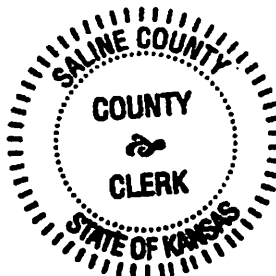


EXHIBIT 1b

Shall the following ordinance become effective?

Summary of the proposed ordinance:

This ordinance 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.

Complete Text of the proposed ordinance:

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

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SALINA, KANSAS:

Section 1. Definitions

"Business" means any organization or entity, whether open to the public or a private entity operating within the city limits of the City of Salina, Kansas.

"Citizen" for the purpose of this ordinance means any person residing in, or being present in the city at any time.

"Restriction" means any limitations on movement, behavior, business operation or general liberty that is imposed on businesses or citizens and is or would be reasonably perceived as a reaction to an "emergency state" that is declared at the State of Kansas or Saline County level

"Governing Body" means the City Commission of the City of Salina, Kansas

Section 2. Limitations on power of Governing Body to impose restrictions during emergency.

The Governing Body of the City of Salina shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level. Examples of restrictions include but are not limited to: Limitations on business capacity, Limitations on business hours, Forcing a business to close, Restricting what may be bought or sold, Restrictions on citizens leaving their residence, Restrictions on citizens being in public places, Curfews applying to citizens, Forced medical treatment of any kind such as mandatory vaccines or the mandatory wearing of face coverings or other medical protective equipment.

The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County.

The purpose of this ordinance is to defer any such restrictions to Saline County to impose at its discretion and subject to the framework of the "Kansas Emergency Management Act" (Kansas Statutes Annotated, Chapter 48, Article 9)

Section 3. Effective This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

This ordinance 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 the county and subject to the Kansas Emergency Management Act. A complete copy of the ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge.

RECEIVED

JUL 23 2021

**SALINE COUNTY
CLERK / ELECTION**

Instructions for petition signers and circulators:

You must be a registered voter and reside in Salina, KS in order to sign this petition

The petition must be signed in the presence of the circulator

You must not sign the petition more than once

You cannot sign for another person

A circulator cannot sign the same petition they carry

Print clearly using ink and make sure all information is accurate and that the address you write matches your voter registration

If you make a mistake, cross out the entire line and complete a new line

Each circulator must attest to each copy of the petition in the presence of a notary. Once attested, no additional signatures may be added to that copy.

Applicable law:

This petition was prepared in accordance with K.S.A. 12-3013, K.S.A 25-3601 and K.S.A. 25-3602

EXHIBIT 1c

RESOLUTION NUMBER 21-7979

A RESOLUTION AUTHORIZING THE CITY'S LEGAL COUNSEL TO FILE SUIT IN THE SALINE COUNTY DISTRICT COURT SEEKING DECLARATORY JUDGMENT AND ASSOCIATED LEGAL REMEDIES REGARDING THE VALIDITY AND STATUS OF AN INITIATIVE AND REFERENDUM PETITION AND PROPOSED ORDINANCE AND EXPRESSING THE INTENT OF THE CITY'S GOVERNING BODY, BY SEPARATE ORDINANCE, TO SUBMIT THE PROPOSED ORDINANCE TO THE VOTE OF THE ELECTORS OF THE CITY OF SALINA, KANSAS, AT THE NOVEMBER 2, 2021 CITY GENERAL ELECTION, WHILE RESERVING THE CITY'S RIGHTS TO PURSUE DECLARATORY JUDGMENT AND ASSOCIATED LEGAL REMEDIES REGARDING THE VALIDITY AND STATUS OF THE PETITION AND PROPOSED ORDINANCE.

WHEREAS, the Saline County Clerk/Saline County Election Officer has certified that a petition and proposed ordinance submitted pursuant to the initiative and referendum statute (K.S.A. 12-3013) under the title of: "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" is signed by the required number of electors qualified to sign;

WHEREAS, in that event, K.S.A. 12-3013 provides, in part, that "the governing Body shall either (a) pass such ordinance without alteration within 20 days after attachment of the clerk's certificate to the accompanying petition or (b) if not passed within 20 days, forthwith call a special election, unless a regular city election is to be held within 90 days thereafter, and at such special or regular city election submit the ordinance, without alteration, to the vote of the electors of the city;"

WHEREAS, (a) the Governing Body does not intend to enact the proposed ordinance without alteration and (b) a regular city election is going to be held within 90 days on November 2, 2021;

WHEREAS, the Governing Body wishes to exercise its right to pursue declaratory judgment and any other appropriate legal remedies in the Saline County District Court regarding the validity and status of the petition and proposed ordinance;

WHEREAS, at the same time, the Governing Body also wishes to submit the proposed ordinance to the vote of the electors at the November 2, 2021 city general election in order to (a) comply with K.S.A. 12-3013 and (b) to avoid the public expense and delay associated with the special election potentially necessary if submission of the proposed petition to the vote of the electors is deferred pending the court's judgment.

THEREFORE, BE IT RESOLVED by the Governing Body of the City of Salina, Kansas:

Section 1. The Governing Body authorizes the City's legal counsel, the law firm of Clark, Mize

& Linville, Chartered ("Legal Counsel"), to file suit in the Saline County District Court seeking declaratory judgment and associated legal remedies regarding the validity and status of the initiative and referendum petition and proposed ordinance under the title of: "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."

Section 2. The declaratory judgment action is intended to address the validity and status of the petition and proposed ordinance based upon the following potential issues:

"Home rule." Under Article 12, Section 5 of the *Kansas Constitution*, cities in Kansas have been granted "home rule" powers since July 1, 1961, following approval by voters at the November 1960 general election. Because the petitioned ordinance limits the ability of the current and future governing bodies of the City of Salina in the exercise of the City's constitutional home rule authority to act in the interest of the public health, safety, and welfare of its citizens, the issue is raised of whether the petitioned ordinance is unconstitutional under the *Kansas Constitution*.

Administrative aspect. Section 2 of the petitioned ordinance first prohibits restrictions on businesses or citizens in response to any state of emergency declared at the County or State level. The second paragraph of Section 2 provides: "The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County." Because that provision regulates the City's operation of its own property and facilities, it raises the issue of whether the petitioned ordinance is administrative in nature, thus disqualifying the ordinance from consideration under the initiative and referendum process.

Single subject and title. Two separate and distinct statutes speak to the number of subjects and the title of the petition. First, Kansas law (K.S.A. 12-3004) provides, in part: "No ordinance shall contain more than one subject, which shall be clearly expressed in its title . . ." Second, and specifically in the initiative and referendum context, the "sufficiency of petitions" statute (K.S.A. 25-3602(a)) requires that: "Each petition shall consist of one or more documents pertaining to a single issue or proposition under one distinctive title." The subjects included under Section 2 of the petitioned ordinance and the exclusion of any reference in the title of the petitioned ordinance to the limitations placed upon the City in relation to the operation of its publicly owned and operated facilities raises the issue of whether the petitioned ordinance complies with K.S.A. 12-3004 and K.S.A. 25-3602(a).

Section 3. Legal Counsel is authorized to further evaluate the issues outlined above and any others relevant to the validity and status of the petition and proposed ordinance and, based upon that evaluation, to prepare and file appropriate pleadings in the Saline County District Court requesting the Court's determination of matters deemed in Legal Counsel's discretion to warrant consideration by the Court.

Section 4. The Governing Body intends by separate ordinance to submit to the vote of the electors of the City of Salina, Kansas, at the November 2, 2021 city general election the question presented by the proposed ordinance, while reserving its rights to pursue declaratory judgment and any other appropriate remedies in Saline County District Court regarding the validity and status of the petition and proposed ordinance.

Section 5. This resolution shall be in full force and effect from and after its adoption.

Adopted by the Board of Commissioners and signed by the Mayor this 23rd day of August 2021.

(SEAL)


Melissa Rose Hodges, Mayor

ATTEST:


JoVonna A. Rutherford, City Clerk

EXHIBIT 1d

Summary of the proposed ordinance:

This ordinance 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.

I have personally signed this petition. I am a registered elector of the state of Kansas and of the City of Salina and my residence address is correctly written after my name.

1	Printed Name: <u>Scott Merritt</u> Signature: <u>Scott Merritt</u>	Residence Street Address : <u>1232 Meyer Drive</u> City: <u>Salina</u>	Date Signed: <u>5/21/2021</u>
2	Printed Name: <u>Joyce Keyser</u> Signatures: <u>Joyce Keyser</u>	Residence Street Address : <u>1410 Adam Travis Ct</u> City: <u>Salina</u>	Date Signed: <u>5/28/21</u>
3	Printed Name: <u>David Keyser</u> Signature: <u>David Keyser</u>	Residence Street Address : <u>1410 Adam Travis Ct</u> City: <u>Salina</u>	Date Signed: <u>5/29/21</u>
4	Printed Name: <u>Sara Dutton</u> Signature: <u>Sara Dutton</u>	Residence Street Address : <u>1405 Adam Travis Ct</u> City: <u>Salina</u>	Date Signed: <u>6/3/21</u>
5	Printed Name: <u>Gary Dutton</u> Signature: <u>Gary Dutton</u>	Residence Street Address : <u>1405 Adam Travis Ct</u> City: <u>Salina</u>	Date Signed: <u>6/3/21</u>
6	Printed Name: <u>Jerald Barnett</u> Signature: <u>Jerald Barnett</u>	Residence Street Address : <u>838 Custer St.</u> City: <u>Salina</u>	Date Signed: <u>6/1/2021</u>
7	Printed Name: <u>Constance M Hemmer</u> Signature: <u>Constance M Hemmer</u>	Residence Street Address : <u>2302 Village Lane</u> City: <u>Salina</u>	Date Signed: <u>6/15/21</u>
8	Printed Name: <u>Mary C Verboort</u> Signature: <u>Mary C Verboort</u>	Residence Street Address : <u>613 Hurlst Cir</u> City: <u>Salina</u>	Date Signed: <u>6/16/21</u>
9	Printed Name: <u>Rita R Cross</u> Signature: <u>Rita R Cross</u>	Residence Street Address : <u>201 E Key</u> City: <u>Salina</u>	Date Signed: <u>6/18/2021</u>
10	Printed Name: <u>Tamie Bright</u> Signature: <u>Tamie Bright</u>	Residence Street Address : <u>110 W. Bay Ave</u> City: <u>Salina</u>	Date Signed: <u>6/18/2021</u>

AFFIDAVIT OF CIRCULATOR

I am the circulator of this petition and I am qualified to circulate this petition and I personally witnessed the signing of the petition by each person whose name appears thereon.

[Signature]

(Signature of circulator)

600 Upper Mill Heights Dr.

(Circulator's residence address)



(SEAL)

STATE OF KANSAS, COUNTY OF SALINE

Subscribed and sworn to before me this

19th day of July, 2021
(day) (month)

[Signature]

Signature (and Title) of Official Administering Oath

My Commission Expires: 8-3-2022

EXHIBIT 2

CITY OF SALINA, KANSAS, a municipal
corporation,

Plaintiff,

v.

KEVIN KORB,

Defendant.

(Pursuant to K.S.A. Chapter 60)

STATE OF KANSAS)
COUNTY OF SALINE) ss:

1. I am currently the City Manager of the City of Salina, Kansas, ("City of Salina") and have held that position for approximately two-and-a-half (2.5) years.

2. Before serving as the City Manager of the City of Salina, I served as the interim City Manager of the City of Salina and the Deputy City Manager for a combined total of thirteen-and-a-half (13.5) years.

3. In my capacities as City Manager, interim City Manager, and Deputy City Manager, I am knowledgeable of the City of Salina's staff and facilities, and also the presence and locations of properties and facilities occupied by government agencies separate and apart from the City of Salina within the corporate limits of the City of Salina.

4. In my capacity as City Manager, I am generally charged with the management of City staff, properties, and facilities.

5. The City of Salina currently employs over 400 employees.

6. The City of Salina's number of employees and general makeup of occupations has not changed significantly in the past 15 years, and it is not anticipated that the number or general makeup of occupations will change significantly in the future.

7. The City of Salina employs a wide variety of individuals with varying roles and occupations, including but not limited to public works staff, utilities staff, administrative staff, law enforcement, fire fighters, and emergency medical technicians, among many others.

8. City staff positions also vary widely regarding exposure to the public, the facilities in which they work, the likelihood of exposure to illness, the ability to physically separate from others at their typical work location, and whether they work inside or out.

9. Public works staff, for example, often works outside and rarely interacts with the public.

10. Administrative staff, by contrast, works inside and frequently interacts with the public.

11. Fire fighters live together in communal accommodations and frequently interact with the public.

12. Law enforcement officers and staff have widely varying roles, which may include indoor and outdoor activity, interactions with the in-custody population at the Saline County Jail, or interactions with other law enforcement agencies.

13. Emergency medical technicians, by their very occupation, are tasked with treating patients in medical distress, which frequently require close contact with patients who may transmit COVID or be vulnerable to COVID.

14. In the past year, the City's youngest non-seasonal employee was 19 and the City's oldest employee was 72, and City employees have widely varying health conditions and statuses.

15. The City also occupies at least 30 discrete publicly owned facilities and properties.

16. Like City of Salina employees, City of Salina facilities and properties are diverse, and vary widely regarding their size, purpose, location, and day-to-day staffing.

17. Those facilities include water treatment facilities (one of which is a rural facility not within the contiguous corporate limits of the City) that are generally inaccessible to the public.

18. Those facilities also include the Tony's Pizza Event Center, a large indoor entertainment venue, and outdoor parks, among many others.

19. Masks are not generally required for City employees, but some limited mask wearing protocols are in place, such as a requirement that law enforcement officers wear masks when interacting with COVID-positive individuals indoors.

20. Decisions about whether mask wearing (or other protective measures) should be required among City employees and the associated deployment of staff and resources requires consideration of any number of factors, including employees' exposure to the general public and co-workers, employees' potential for social distancing, vaccination rates, the likelihood of compliance, methods of enforcement of such policies, the risks and benefits of such enforcement, the potential drain on City resources associated with enforcing such policies, and the possibility of service disruption to the public, among others.

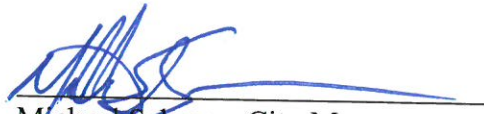
21. Implementing mask wearing requirements requires consultation with administrative staff, the City's human resources department, other City department heads, and the advisory employee counsel, among others.

22. Saline County, Unified School District 305, Kansas State University, the State of Kansas, and the Federal Government (among other government entities) all own or occupy facilities within the corporate limits of the City of Salina.

23. As more specific examples, other government facilities on publicly owned property include but are not limited to the following:

- a. Saline County:
 - i. Administrative offices in the City-County Building at 300 W. Ash, Salina, Kansas; and
 - ii. The Saline County Sheriff's Office at 251 N. Tenth St., Salina, Kansas.
- b. Unified School District 305, as the public school system serving students within the corporate limits of the City of Salina, owns any number of elementary schools, middle schools, high schools, and administrative facilities.
- c. Kansas State University's Aerospace and Technology Campus at 2310 Centennial Road, Salina, Kansas.
- d. Federal Government:
 - i. United States Postal Service Post Office, 211 E. Ash St., Salina, Kansas; and
 - ii. United States Army Reserve at 1700 S. Broadway Boulevard, Salina, Kansas 67401.

Further affiant saith not.


Michael Schrage, City Manager
City of Salina, Kansas

On this 8 day of September, 2021, before me, the undersigned, a notary public in and for the county and state aforesaid, personally appeared Michael Schrage, City Manager of the City of Salina, Kansas, known to me to be the person who executed the within instrument in writing and acknowledged to me that he executed the same for the purposes therein stated.

Linda K. Lockhart
Notary Public

My appointment expires:

10-18-2021

