

**Testimony before Senate Assessment & Taxation Committee
SB 286 – Compensation for businesses affected by Covid orders
Mike O’Neal on behalf of Kansas Policy Institute
Written-only testimony in support**

March 11, 2021

Madam Chair & members of the Committee

On behalf of the Kansas Policy Institute, I appreciate the opportunity to provide testimony in support of legislation aimed at providing relief to businesses from the effect of Covid-19 related orders that impact their economic wellbeing.

During the course of this 2021 legislative session, we have provided recommendations to both the House & Senate Judiciary Committees as they worked to reform the Kansas Emergency Management Act and related statutes. Among the many recommendations we made, we stressed the need to provide for a compensation or relief mechanism. Specifically we stated as follows:

“Orders depriving businesses and other entities of the use of their property should entitle them to compensation, since such state action constructively constitutes a “taking”. The vehicle for this remedy would be K.S.A. 48-933, which provides for compensation to property owners under certain circumstances relating to disaster emergencies. An additional vehicle would be KSA 77-701 et seq., the Private Property Protection Act. Specifically, KSA 77-703 defines “taking” to mean “due to a governmental action, private property is taken or its use is restricted or limited by a government action such that compensation to the owner is required by the fifth or 14th amendment of the constitution of the United States or section 18 of the bill of rights of the constitution of the state of Kansas.” (emphasis added)

In the alternative, the Legislature should consider other measures aimed at providing relief from the effects of government action impacting livelihoods. Measures have been taken to assist the unemployed. Employers who have not been benefitted or have not been adequately benefitted

by relief funds should get tax credits, tax moratoriums, business interruption grants, or other forms of tangible relief due to government action. While most if not all businesses carry insurance that includes "business interruption" coverage, it is rare that the policy would cover damages from a government-initiated business closure in the absence to actual physical damage to the covered premises. We do not advocate that this burden be shifted to insurance carriers by way of mandated coverage. These are not "acts of God", but, rather are acts of government and should be compensated, in proper cases, by government.

As you know, there is litigation pending on this issue of compensation. A Sedgwick Co. Judge has granted a stay of that litigation at the request of Plaintiff's counsel and Attorney General Schmidt in order to allow time for the Legislature to consider the public policy.

State and local decisions need to be weighed and balanced against the potential that government may have to compensate for those decisions. Such a balancing of interests should inform and influence the nature and scope of emergency orders, since the overriding consideration should be for government to do what needs to be done to protect against the spread of disease while doing as little harm to Kansans and their livelihoods as possible. It will do Kansans little good to survive the virus but succumb to economic and social ruin where that can be avoided by employing a corroborative process between the executive and legislative branch, one that values due process rights and basic common sense."

With those recommendations in mind, we view SB 286 as a reasonable approach to this complicated subject. We take no position on the mechanics of calculating tax credits. The method established in Sec. 5 of the bill is one option but we can imagine others. For example, the 1/12th and 1/48th calculations for every 30 days an operation was shut down could be based on a revenue comparison rather than tax liability. Accordingly, we leave it up to the wisdom of the Committee to determine the ultimate mechanism. Suffice it to say, however, that a mechanism for compensation should and must be provided Kansans this session.

Kansas Policy Institute's mission is to engage citizens and policy makers with research and information to enact public policy solutions that protect the constitutional right to freedom of all Kansans, give them greater access to better educational opportunities, and allow them to keep more of what they earn. By protecting and promoting freedom. We will improve everyone's quality of life, make Kansas more competitive with other states, and attract new citizens and businesses.

Kansas Justice Institute is a public-interest litigation center with a mission to protect individual liberty and the constitutional rights of all Kansans. The areas of work include the protection of property rights, the right to earn a living, free speech, and association, school choice, student's right to an education, and criminal justice reform.