



**Senate Judiciary Committee  
Proponent Testimony SB 286  
Scott J. Schneider, Hinkle Law Firm  
May 3, 2021**

Chair and Members of the Committee, I am Scott Schneider and I represent the Kansas Restaurant and Hospitality Association. We are here today asking for relief because the Governments' police powers in Kansas have become unbalanced. The government sphere in Kansas has never been larger than in 2020. This measure would require elected officials to balance using their government police powers against their own interest in generating tax revenue.

No one sought out this pandemic, but our industry, being the most directly affected and often vilified, maintains the boundaries and limitations our Constitutions provided to our government leaders as guardrails were largely ignored.

Last year, we represented one half of every licensed restaurant in the State. Since then, we have suspended association dues, given restaurants free memberships so they have access to our resources, suspended insurance premiums for our workers compensation fund participants, and at the same time worked harder than imaginable chasing units of governments around educating them as best as possible on their many novel new ideas. The COVID pandemic has caused chaos in our industry.

Here is an example of a single County's HB 2016 COVID emergency declarations.

Sedgwick County:

- Emergency Public Health Order (July 8, 2020)
- Emergency Public Health Order (July 9, 2020)
- Emergency Public Health Order (July 21, 2020)
- Resolution Amending Emergency Public Health Order (July 22, 2020)
- Resolution Rescinding Emergency Public Health Order (July 24, 2020)
- Emergency Public Health Order (August 18, 2020)
- Emergency Public Health Order (September 3, 2020)
- Resolution Amending Emergency Public Health Order (September 14, 2020)
- Emergency Public Health Order (September 17, 2020)
- Emergency Public Health Order (October 16, 2020)
- Emergency Public Health Order (October 20, 2020)
- Emergency Public Health Order (November 10, 2020)
- Emergency Public Health Order (November 13, 2020)

Emergency Public Health Order (November 24, 2020)  
Emergency Public Health Order (December 8, 2020)  
Emergency Public Health Order (January 6, 2021)  
Emergency Public Health Order (February 2, 2021)  
Emergency Public Health Order (February 26, 2021)  
Emergency Public Health Order (March 15, 2021)

The United States Constitution enshrines the Fifth Amendment that states: “No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The Fifth Amendment is meant to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.<sup>1</sup>

I’m not asking you to be the court, others will pursue a more narrowly focused legal remedy. I am pursuing a legislative remedy and am asking you to decide **“how much is too much.”** The revered Supreme Court justice, Oliver Wendell Holmes, is often cited when describing a regulatory taking:

“Property must not be taken without compensation, but with the help of a phrase, (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much.”<sup>2</sup>

We are not arguing whether government has the power to restrict businesses during a pandemic. Governments have well-established broad police powers to initiate the various emergency orders to restrict mass gatherings. Keep in mind, these police powers are also often seen to be unconstitutional legislative acts, but which are believed to be necessary.<sup>3</sup> However, if they choose to exercise these powers, fairness dictates they should also adjust their taxing obligations at the same time.

Please know SB 286 is not a complete remedy. A Yale Law Review more fully describes a remedy this way, “Moreover, owners whose property had been taken temporarily for example, owners whose land or buildings had been taken over by the federal government to be used in the war effort during World War I could recover just compensation for the period when they had been dispossessed, even after the government returned possession to them.”<sup>4</sup> In fact, a full remedy is our interest in the market value our individual stores lost. In March alone, Kansas Restaurants lost over \$325 million in sales. **Sedgwick County has released a statement their**

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<sup>1</sup> Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)

<sup>2</sup> Springer v. Government of the Philippine Islands. 277 U.S. 189. 209-10 (1928) (Holmes. J.. dissenting).

<sup>3</sup> *Holmes, Cooley*, A Treatise on the Constitutional Limitations, supra note 24. at 268. 269.

<sup>4</sup> 350. See, e.g., Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. General Motors Corp., 323 U.S. 373 (1945).



**exposure is more than \$50 million dollars. That exposure largely equates to the private sector's value lost directly attributable to their directives.**

The lost business opportunity when compared to the amount of time government has restricted our right to conduct business and generate income is significantly higher.

The Kansas Legislature has the ability to pass laws righting an injustice. I am simply leaning on your understanding of fairness. Passing this legislation would make clear to Government that they also have a financial stake in their decisions and the obligations placed upon some should be borne by the public as a whole. What Governments did to Kansas restaurants was simply, "too much."

### **COVID-19 Restaurant Impact Survey – April 2021**

United States

#### **Restaurant Business Conditions**

- Although total sales trended higher in recent weeks, business conditions remain far from normal for most restaurants. Overall, 65% of restaurant operators say their total sales volume in March 2021 was lower than it would normally be in the absence of COVID-19. Only 19% of operators reported higher-than-normal sales during the month, while 16% say their sales were close to normal in March.
- On average across all survey respondents, sales were 19% below normal levels in March 2021.
- Restaurant operators have a mixed outlook for sales growth during the next three months. 44% of operators expect their average sales during the next three months (April – June) will be higher than it was in March

2021. 21% think their average sales will be lower during the next 3 months, while 35% expect their sales will be about the same as it was in March.

#### **Restaurant Jobs**

- Restaurants continued to restore some of the jobs lost during the pandemic, but overall staffing levels remain well below normal. 84% of operators say their current staffing level is lower than what it would normally be in the absence of COVID-19. 47% of operators are currently more than 20% below normal staffing levels.
- Most restaurant operators do not expect a return to normal staffing any time soon. Among



restaurant operators that are currently below normal staffing levels, 28% think it will be 7-12 months before staffing levels return to normal for their restaurant. 20% think it will take more than a year to return to normal staffing levels. 10% of operators say staffing levels will never return to normal for their restaurant.

- 82% of operators say they currently have job openings that are difficult to fill, and most do not expect labor challenges to ease after the pandemic is over. In fact, 90% of operators say recruiting and retaining employees will likely be more difficult after the pandemic is over than it was before the pandemic started.

### **Costs Are Up – Profit is Down**

- Food, labor and occupancy costs are the largest line items for restaurants – combining to account for roughly 70 cents of every dollar of sales during normal times. For a majority of restaurant operators, these 3 categories are making up a larger share of sales than they did before the pandemic.

- 67% of operators say their total food costs (as a percent of sales) are higher than they were prior to the COVID-19 outbreak. Only 8% say their food costs make up a smaller proportion of sales.
- 58% of operators say their total labor costs (as a percent of sales) are higher than they were prior to the COVID-19 outbreak. 23% of operators say their labor costs declined as a percent of sales.
- 52% of operators say their total occupancy costs are higher than they were prior to the COVID-19 outbreak. Only 10% say their total occupancy costs are lower.
- For the vast majority of restaurant operators, profitability is down from pre-pandemic levels. 76% of operators say their profit margin is lower than it was prior to the COVID-19 outbreak. Only 9% of operators say their profit margin is higher.

Source: National Restaurant Association, national survey of 2,500 restaurant operators conducted April 1-14, 2021