IN THE SUPREME COURT OF KANSAS

GOVERNOR LAURA KELLY, in her official Capacity *Petitioner,* vs. LEGISLATIVE COORDINATING COUNCIL, KANSAS HOUSE OF REPRESENTATIVES, and KANSAS SENATE, *Respondents.*	Case No. 122,765

RESPONDENTS' JOINT RESPONSE TO PETITIONER'S PETITION IN QUO WARRANTO AND MEMORANDUM IN SUPPORT

The issue here is whether the Kansas Legislature can effectively exercise its constitutional and statutory power to check the emergency authority it has delegated to the Governor. As part of a compromise extending the Legislature's delegation of authority to the Governor until May 1, 2020, the Legislature and Governor agreed just a few weeks ago that the Legislature would assign and exercise its own power of oversight through its own Legislative Coordinating Council—the very body the Legislature had created decades ago to act for it when it is not in session. Here, at the Governor's urging, the Legislature then went out of session. As the Governor knew and accepted until her precipitous decision three days ago, the Legislature is and has been exercising its power—and duty—to oversee the Governor's use of emergency legislative power through its LCC. The Governor has no reason to

complain about the Legislature's decisions on its own internal operations; in the first place, her office never had a right to interfere in the Legislature's decisions—purely matters of its own discretion not reviewable in any Court—to revoke particular gubernatorial orders. The Governor's real complaint is that the Legislature disapproved of her sudden decision three days ago, during a holy time for people of many faiths, to target religious institutions with criminal penalties for conduct—individuals standing within 6 feet of each other in a group of more than ten—that is perfectly acceptable to the Governor in bars, restaurants, libraries, malls, and starting on April 11, 2020, farmers' markets. As right as the governor may be in urging the population to engage in social distancing, that is no basis for her to thwart the legislative checks and balances and undermine fundamental notions of separation of powers, or indeed rights expressly granted by the Constitution.

For these reasons and the reasons further discussed below, Respondents jointly oppose[1] Petitioner's Petition in Quo Warranto for the reasons that follow.

[1] Respondents were served just over 18 hours ago (at 4:30 p.m., via email, which is not a recognized form of service), with legal papers that had clearly been prepared over an extended period, and well before the actions of the Governor which triggered this purported constitutional crisis.

I. The Legislative Coordinating Council Had Statutory Authority to Revoke EO-2018

A. The Legislature Followed the Plain Text of its Emergency Statutes in Deciding How to Exercise its Reserved Powers, Internal to the Body, in a Time of Emergency

The Kansas Emergency Management Act, K.S.A. 48-904 *et seq.*, ("KEMA") is a delicately balanced statutory regime that gives the governor broad authority in disaster emergencies, but also includes critical checks on that authority to ensure that the legislature may constrain excessive exercises of that authority. When a governor a declares a state of disaster emergency pursuant to K.S.A. 48-924(b)(2), that declaration may not "continue for longer than 15 days unless ratified by concurrent resolution of the legislature" (subject to an exception involving the state finance council not at issue here). K.S.A. 48-924(b)(3), (4).

The statute underscores that, "***[a]t any time***, the legislature by concurrent resolution may require the governor to terminate a state of disaster emergency" (emphasis added). K.S.A. 48-924(b)(5). Moreover, while "the governor may issue orders and proclamations which shall have the force and effect of law" during the emergency, those "orders and proclamations may be revoked ***at any time*** by concurrent resolution." K.S.A. 48-925(b) (emphasis added).

Governor Kelly initially issued a State of Disaster Emergency on March 12, 2020. Shortly before the declaration was about to expire, the legislature issued a concurrent resolution to extend the declaration until May 1, but only on the condition that the LCC had the authority to revoke any of the governor's orders and

proclamations. HCR 5025 § 2(D). When the governor issued her latest executive order on April 8 (EO 20-18), which, *inter alia*, criminalized parishioners from worshipping together inside a church or other religious institution, the LCC determined that the order needed to be stricken. *See* K.S.A. 48-939, which make violating a lawful order issued pursuant to a declaration of state of disaster emergency a Class A misdemeanor.

In revoking the governor's action against religious institutions and the free exercise of religion, the LCC merely exercised the power the legislature reserved for itself to quickly review and, if necessary, check the governor's use of legislatively delegated authority. That is why KEMA expressly authorizes the legislature to exercise this revocation power without presentment of a "bill" to the Governor; the revocation is simply the legislature's withdrawal of some of the legislative power it had delegated to the Governor during an emergency. Crucially, the Governor admits that she has no problem (nor could she) with that overall balance of power: a legislative delegation by statute, but the policing of that delegation by action that is internal to the legislature. Instead, the Governor's attack is focused solely on how the legislature has, within its own dominion, decided to run its operations during a time of emergency. Here, the legislature has, using an almost-unanimous, bipartisan concurrent resolution, decided that the LCC should exercise its organic power to act for the legislature when it is not in session due to the very emergency that triggered the delegation to the Governor. The Governor is not truly injured by the legislature's near-unanimous decision on how to operate its own body in this emergency, as the

Governor could never in any event have interjected herself into the legislature's deliberations in revoking her orders.

Petitioner maintains, however, that the authority the legislature assigned to its LCC in HCR 5025 § 2(D) is invalid because it contravenes the Kansas Constitution's requirement that any statutory amendment must proceed by the introduction of a bill and gubernatorial presentment. Petitioner's argument actually rests on the assumption that HCR 5025 violates the plain text of a statute—whether it is found in KEMA or in the LCC's organic statutes.

Petitioner is wrong. HCR 5025 does not violate the plain text of any statute. First, nothing in KEMA provides that a "revocation" can be accomplished *only* by concurrent resolution, or that a concurrent resolution must by its own terms complete the revocation of a given order, rather than specifying some further act or judgment (that of the LCC) necessary to effectuate a completion. In any event, though, in this case, the legislature acted fully consistent with K.S.A. 48-924(b)(5) and 48-925(b). It adopted a concurrent resolution to extend the disaster emergency, just as the statutes envision; it simply made that concurrent resolution conditional. Or, viewed another way, the legislature *did* in this case treat the issue of revocation of a governor's acts by a concurrent resolution; it accepted that internal, reserved legislative power, and then further specified how it would be used during a time when it could not be in session. Providing procedures for the operation of the legislature's own internal affairs is not some sort of sinister or extra-legal grasp for the power of a coordinate branch. Instead, it is routine legislative activity that is normally insulated from

judicial review. "[T]he legislature is free to act except as it is restricted by the state constitution." *Sedlak v. Dick*, 256 Kan. 779, 790, 887 P.2d 1119, 1128 (1995).

Additionally, as noted above, Petitioner's argument ignores the importance of the language in K.S.A. 48-924(b)(5) and 48-925(b) that the governor's orders and proclamations may be revoked *at any time* by concurrent resolution. This statutory language encompasses periods both when the legislature is *in session* and when it is *out of session*.

By insisting on the "at any time" language in both K.S.A. 48-924(b)(5) and 48-925(b), the legislature sought to preserve the checks and balances inherent in those statutes. It envisioned a process by which gubernatorial actions deemed excessive by the legislature could be reined in even when the full body is not in session. If the Petitioner's position here were to be embraced, it would mean that the governor's power is unfettered in the context of disaster emergencies unless the entire recessed legislature is called back (a particularly ironic argument for the governor to advance in this litigation given that she urged the legislature to recess early and avoid congregating in mass due to COVID-19 pandemic concerns).[2] That would not only be

[2] At the time HCR 5025 was passed, Petitioner was vocally calling for the legislature to wrap up its work early and go home. Indeed, the Statehouse had been shut down to visitors at that time to avoid the spread of COVID-19. Even the Secretary of the Department of Health and Environment publicly remarked that it was not safe for the legislators to be in such close quarters in the building. What this means is that, because legislators took the governor's advice and fled the Statehouse, she essentially inoculated herself – at least under her theory in this case – against the only mechanism by which her extraordinary exercise of the powers under the Emergency Management Act could be checked.

extremely dangerous, but it would be manifestly inconsistent with the legislature's intent.

B. The Legislature Acted Properly in Using a Concurrent Resolution to Assign a Constituent Body, the LCC, to Exercise its Powers in a Time of Emergency

If the legislature can revoke the governor's actions via a concurrent resolution (as K.S.A. 48-924(b)(5) and 48-925(b) clearly contemplate), then the legislature can assign that function (again, by concurrent resolution) to its own LCC when it is out of session. Legislative assignments to the LCC are quite common, especially when the legislature is out of session. Indeed, the "LCC is a creature of statute. Its authority and power to act on behalf of the legislature are clearly delineated by the legislature." *Legislative Coordinating Council v. Frahm*, 262 Kan. 144, 148 (1997).

The LCC wields broad authority to "represent the legislature when the legislature is not in session." K.S.A. 46-1202. It is composed entirely of the elected leadership of the Kansas legislature. *See* K.S.A. 46-1201. In addition to the few specific duties that the Petitioner acknowledges in her brief, the LCC has vast responsibility for ensuring the continued operation of the legislative branch when the legislature is not in session:

> The legislative coordinating council shall have general authority over all legislative services and such authority shall be exercised by such council as it shall determine, except as otherwise provided by chapter 46 of Kansas Statutes Annotated. The legislative coordinating council shall represent the legislature when the legislature is not in session…When the legislature is not in session, the legislative coordinating council shall govern the mechanics and procedure of all legislative committee work and activities, except that of the interstate cooperation commission, legislative post-audit committee, state finance council and the ways and

> means of the senate and the committee on appropriations of the house of representatives...

K.S.A. 46-1202.

Importantly, the statutory text requiring the LCC to "represent the legislature when the legislature is not in session" authorizes the LCC to act as the legislature's proxy during an adjournment. This language was added to the statute in 1973 following an attorney general's opinion which opined that the powers of the LCC were limited to carrying out necessary services for the continued function of the legislature. *See Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 708, 957 P.2d 379, 393 (1998) (citing VII Opinions of the Attorney General, p. 718). The Report on Legislative Interim Studies following the above attorney general's opinion demonstrates that the legislature sought to clarify the powers of the LCC in response to the opinion:

> The particular need for these two amendments arose from adverse opinions of the Attorney General concerning action taken by the Legislative Coordinating Council to represent the interests of the legislature in reapportionment cases, *but other matters may arise requiring prompt action by the Legislative Coordinating Council when the legislature is not in session.*

Id. (citing Report on Kansas Legislative Interim Studies to the 1973 Legislature, Part 1, p. 220.) (emphasis added).

"It seems clear beyond dispute that the legislature intended by these amendments to confer the broad power and discretion in the LCC to act on the legislature's behalf when it was not in session." *Id.* In *Stanley*, the Court held that because the legislature was unquestionably authorized to pay attorneys' fees in an election contest, "[p]ayment by the LCC when the legislature is not in session is...

also authorized. If the legislature wishes to restrict the powers clearly conferred upon the LCC it may do so by statute. Suffice it to say that to date, the legislature has sought only to expand and clarify the broad power and discretion of the LCC, not restrict them." *Stanley*, 264 Kan. at 708-09.

The legislature has unquestionable authority to revoke an order made by the Governor during a state of disaster emergency, and it may do this by its own internal act rather than by passing a bill and presenting it to the Governor. K.S.A. 48-925(b). The legislature's concurrent resolution assigned the LCC – a constituent part of the legislature composed entirely of legislators – the authority to exercise that power of revocation while the legislature was not in session, as it is authorized to do by statute. *See* K.S.A. 46-1202 ("The legislative coordinating council shall represent the legislature when the legislature is not in session."). In doing so, the legislature chose not to place restrictions on the LCC's authority to exercise those powers, instead embracing the "broad power and discretion of the LCC." *See Stanley*, 264 Kan. at 708-9. The exercise of oversight power by the LCC, a power clearly conferred on the legislature, requires neither an amendment of K.S.A. 46-1201 *et seq.* nor a delegation of power to a different branch of government. Rather, the LCC's exercise of the legislative oversight power is precisely the method by which the legislature and the laws of the state of Kansas permit the LCC to operate when the legislature is not in session.

C. "Delegation" is a Misnomer; HCR 2025 "Delegates" no Legislative Power.

Finally, the Governor incorrectly argues that the assignment of authority within the legislature to the LCC was an unconstitutional delegation of power. But as the authority cited by the Governor actually makes clear, delegation doctrine applies to the wrongful assignment of legislative powers among the branches of government or even to private parties—not to the internal operation of the legislature when it is undertaking legislative acts that do not require presentment to the Governor.

In *Sedlak,* the Court considered the delegation of legislative authority to a private entity. *Sedlak v. Dick*, 256 Kan. 779, 802-03, 887 P.2d 1119, 1135 (1995). *Tomasic* discussed the delegation of administrative power from the legislative branch to an independent public body, as opposed to the legislature delegating authority to a smaller subset of itself, which is what occurred here. *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty/Kansas City, Kan.,* 264 Kan. 293, 305, 955 P.2d 1136, 1149 (1998). The *Fatzer* case, meanwhile, considered whether the legislature could create a law that permitted a City to delegate some authority granted to it under that law. *State ex rel. Fatzer v. Urban Renewal Agency of Kansas City*, 179 Kan. 435, 440, 296 P.2d 656, 660-61 (1956).

The *Tomasic* Court explained that, absent constitutional authority permitting otherwise, the legislature is prohibited from delegating its legislative powers to another branch of government as doing so would violate the separation of powers

doctrine. *Tomasic,* 264 Kan. at 303. The legislature is also prohibited from delegating its authority to private entities or organizations. *Id.* at 302. Absent those prohibitions, though, the legislature may delegate its authority. In fact, the legislature enjoys "[g]reat latitude . . . to delegate certain functions to the administrative branch of government." *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty/Kansas City, Kan.,* 265 Kan. 779, 795, 962 P.2d 543, 556 (1998). If the legislature is permitted to delegate its authority to an administrative agency, surely it is permitted to assign its authority—at least not when it is passing laws—to one of its own constituent bodies.

In fact, the true separation of powers issue in this case is not the Legislature's internal operations. Rather, it is the Governor's attempt to erode the careful balance of powers, and the give-and-take in the exercise of legislative emergency power the legislature has delegated to the executive under KEMA. The Governor's legislative power during a period of disaster is meant to be limited. *State ex. Rel. Stephan v. Finney*, 251 Kan. 559, 573, 836 P.2d 1169, 1179 (1992). Knowing the legislative body would be absent during a period of disaster, the legislature adopted a resolution assigning its authority to the LCC, ensuring the legislative check on gubernatorial authority would survive. That point is further discussed in the next section.

II. HCR 2025 § (2)(D) Is Not Severable Because the Disaster Emergency Authority Extension Hinged on HCR 2025 Compromise

Even if the Petitioner is correct about the legislature's power to act through its LCC when it is out of session, the consequence is not (as she hopes) that she somehow received an extension of her delegated emergency powers until May 1, but without

any of the legislative oversight that was a necessary condition of the delegation in the first place. Instead, the entire concurrent resolution (HCR 2025) fails. That is, her ability to enjoy the exercise of extraordinary emergency powers *fails* when the constraints that were supposed to contain those powers *also fail*. The legislature's delegation to the executive, and the legislature's means of controlling that delegation when it is out of session, rise and fall together. Having been rushed into effect when the Governor had no delegated power, then, EO 20-18 is null and void.

This is a question of severability. Under Kansas law, a legislative measure containing an unconstitutional provision is wholly void *unless* it can be said from an examination of the measure that (1) the measure "would have been passed without the objectionable portion *and*" (2) the measure would still operate effectively to carry out the legislature's intent after striking the offending provision. *Brennan v. Kansas Ins. Guar. Ass'n*, 293 Kan. 446, 463, 264 P.3d 102 (2011) (emphasis in original) (quoting *Felten Truck Line v. State Bd. of Tax Appeals,* 183 Kan. 287, 300, 327 P.2d 836 (1958)). For severance to be proper, the "remainder [absent the stricken provision] must 'function in a *manner* consistent with the intent of [the legislature].'" *Gannon v. State,* 304 Kan. 490, 519 (2016) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)). Whether a provision is severable thus turns on the legislature's intent.[3] *Gannon*, 304 Kan. at 519-20. The measure should be viewed as a whole, and

[3] It is not unprecedented for a high court to apply severability analysis to joint legislative resolutions that were not enacted bills. *See, e.g., Ethics Com'n of State of Okl. V. Cullision,* 850 P.2d 1069 (Okla. 1993).

"[a]n automatic or too cursory severance . . . risks rewriting [the provision] and giving it an effect altogether different from that sought by the measure viewed as a whole." *Id.* at 518-19. Here, neither of the two necessary severability prongs is satisfied and severing Section 2(D) would yield an effect altogether different from that sought by HCR 5025 as a whole.

As shown immediately below, the legislature plainly intended HCR 5025 to do more than ratify the Governor's emergency declaration. As enacted, it evinces a plain intent to place essential conditions on that ratification. One essential condition was a provision affecting the internal operation of the legislature, without which the just-adjourned body would have been unable to effectively exercise its undisputed power of revocation during the extended period: the Section (2)(D) in question here. HCR 5025 also evinces a clear intent, via Section 2(D), to permit the legislature to exercise that limitation on the governor's power (through the LCC) during this very specific crisis, during which the legislature is not in session and the very nature of the COVID-19 crisis renders legislative session impracticable and unsafe.

The legislative intent behind HCR 5025, then, is plainly greater than merely ratifying the governor's declaration of emergency: the remainder cannot "stand alone as a complete expression of the intention of the legislature." *Felten Truck Line, Inc.*, 183 Kan. at 301. That greater intent cannot be carried out in full absent Section 2(D). The provision in question is not merely a superfluous sentence. Rather, it embodies a core thrust of the legislature's intent. Had the legislature nkown that the

objectionable sentence was unconstitutional, it would not have ratified HCR 5025. *C.f. Felten Truck Line, Inc.*, 183 Kan. at 301.

All of this is plain from the text of HCR 2025. But the legislative history behind HCR 2025 further illuminates why the actions of the LCC here were emphatically contemplated and agreed to by all parties involved, including Petitioner. On March 13, the House of Representatives passed a "clean" resolution authorizing an extension of the disaster emergency through May 1.[4] When the matter moved to the Senate, that body opted to impose an array of restrictions on the governor's authority during the emergency. *See* note 2. This triggered extraordinary frustration by the governor, who then sent a delegation to negotiate with senior members of the legislature. The ensuing discussions resulted in a compromise to which all parties – i.e., the legislators and the governor's team – agreed: the disaster emergency would be extended until May 1, but *only upon the condition that the LCC could revoke any gubernatorial orders or proclamations within three days of their issuance.* See HCR 2025 § 2(D). With this agreement in hand, the conference committee finalized the language of HCR 2025 and it passed nearly unanimously (only two nay votes in the Senate and none in the House). The conference committee report then passed unanimously in both houses.

Now, having agreed to a compromise that her own staff helped broker and that passed the legislature with virtual unanimity, the governor seeks to jettison all of the conditional requirements imposed on the disaster emergency extension. But there

[4] *See* http://www.kslegislature.org/li/b2019_20/measures/hcr5025/

never would have even been an extension in the absence of that compromise. Furthermore, the governor's staff (her Chief of Staff, legal counsel, and Secretary of the Department of Health & Environment) has actively and consistently participated in LCC meetings that reviewed prior executive orders connected to this disaster declaration, and never once objected to those proceedings. Only now – when, for the first time the LCC revoked her EO 20-18 – does she raise a legal objection. The Court should not countenance the governor's power grab here, particularly in light of her unclean hands. Instead, it should affirm the check and balance that undergirds the KEMA, as carried out by the legislature through HCR 2025.

III. EO 20-18 Is Not Valid Until Published in Kansas Register

EO 20-18 is also invalid because it contains criminal provisions that have never been published in a manner that afford citizens their fundamental due process right to adequate notice of restrictions on conduct that may impair their liberty. Admittedly, no statute or constitutional provision expressly state when an executive order becomes legally effective. By their terms, the individual orders state they are effective immediately, and a reasonable practice is to take them at face value. But any governmental action that deprives an individual of life, liberty, or property must satisfy requirements of due process of law. *See* U.S. Const. Amend. 14.

Principles of due process require notice of the existence of a law and what conduct the law prohibits before a person may be held liable for violating it. *State v. Cordray*, 277 Kan. 43, 51 (2004). The due process requirement for notice is particularly important in the criminal arena, *see, e.g., Johnson v. United States*, 135

S. Ct. 2551, 2557 (2015), because due process demands that persons subject to the law must have "an opportunity ... to avoid the consequences of the law." *Lambert v. California*, 355 U.S. 225, 229 (1957). Since orders of the governor have the "effect of law," *see* K.S.A. 48-925, and violations of such orders may give rise to criminal penalties, *see* K.S.A. 48-939, this elementary principle applies with considerable force to EO 20-18. *See also Alexander v. Adjutant General's Office*, 18 Kan. App. 2d 649 (1993) (an executive order that has force of law "occupies the same position as a statute and may be interpreted" in like manner). Thus, unless and until EO 20-18 is published by the secretary of state in the Kansas Register, due process dictates that no criminal provisions in that order be enforced against any individual.

IV. EO 20-18 Contravenes the Religious Liberty Rights of Kansas Citizens

Assuming the Court determines that the HCR 5025 was not a valid exercise of legislative power, the application of EO 20-18 would unconstitutionally infringe on individual's religious liberties in violation of both the Kansas state constitution and state statute. Each independently would serve to prohibit the governor from criminalizing participation in worship gatherings via executive order as she has done here.

A. Kansas Preservation of Religious Freedom Act

The Kansas Preservation of Religious Freedom Act, K.S.A. Supp. 60-5301 *et seq.*, ("Religious Freedom Act") provides: "Government shall not substantially burden a person's civil right to exercise of religion even if the burden results from a rule of general applicability, unless such government demonstrates, by clear and convincing

evidence, that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." K.S.A. 60-5303(a). The Religious Freedom Act applies to restrain actions by the "government," which specifically includes both the state executive branch and local governments and officials. K.S.A. 60-5302. It protects the "exercise of religion," which is defined broadly and expressly includes "the right to act . . . in a manner substantially motivated by a sincerely-held religious tenet or belief," which certainly includes attending church, synagogue, temple, or mosque for the purpose of worship. K.S.A. 60-5302(c). And it prohibits the government from "directly or indirectly constrain[ing], inhibit[ing], curtail[ing], or den[ing]" the religious exercise without a compelling governmental interest and in the least restrictive means to further the interest. *See* K.S.A. 60-5302(a) (definition of "burden"). Importantly, "burden" specifically includes "assessing criminal ... penalties." K.S.A. 60-5302(a). There can be no doubt that imposing a criminal penalty of up to one year in jail and/or a $2,500 fine constitutes a "substantial[]" burden.

EO 20-18 thus substantially burdens many Kansans' right to exercise religion. Because the Religious Freedom Act applies to provisions of EO 20-18 that impose restrictions on religious facilities, services, or activities, the penalties for violating those provisions can survive scrutiny only if the government demonstrates that the application of EO 20-18 to persons gathering in such facilities or for such services or activities:

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

See K.S.A. 60-5303(a). This is a "strict scrutiny" standard of review, which is the highest standard applied in the law and which governments rarely satisfy.

The restrictions on religious gatherings in EO 20-18 may serve a compelling governmental interest of protecting the public health by slowing the spread of COVID-19. But the executive order also must be the "least restrictive means" of furthering that compelling interest. And the burden is on the government to prove by clear and convincing evidence that no less-restrictive means is available. *See* K.S.A. 60-5303(a). The government can meet that burden here.

First, the government cannot show by clear and convincing evidence that it is currently necessary to subject every church or other religious services or activities throughout the state to the requirements in EO 20-18 to slow the spread of COVID-19. Even the guidance issued by the Centers for Disease Control for faith-based organizations recommends a graduated approach based on community risk.[5] That individually tailored least-restrictive means is absent from the blanket statewide approach of EO 20-18.

Second, EO 20-18 exempts 26 categories of activities or facilities from its mass gathering prohibitions, *see* EO 20-18 (paragraph 2.a-z), just as the prior version of

[5] See "Guidance Highlights for Community- and Faith-Based Organizations, available at https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/index.html (last accessed April 9, 2020).

the mass-gatherings order (EO 20-14) had also exempted religious activities. Indeed, only religious activities (and non-religious funerals) are singled out for increased regulation under EO 20-18 – while other indoor gatherings that invite similar interpersonal interaction and thus pose similar public health risk (such as gathering in shopping malls or other retail establishments or in libraries) remain unregulated except by the less-restrictive means of general social distancing and hygiene guidelines.

Third, EO 20-18 offers no justification for why voluntary compliance had failed to satisfy the compelling public health interest or why criminal penalties are now necessary to promote compliance by Kansans engaged in religious services or activities (but not, e.g., by those engaged in shopping, child care, providing government or legal services, or being detoxified). Indeed, the continued reliance on social-distancing and hygiene restrictions for mass gatherings in at least 26 other categories suggests the new burdens on religious services or activities – under penalty of arrest, imprisonment or criminal fine – are not the least-restrictive option to satisfy the State's compelling interest.

B. Article VII of Kansas Constitution

The governor's EO 20-18 is equally infirm under the Kansas Constitution's Bill of Rights. Indeed, the religious freedom protections in our state constitution exceed the religious freedom protections in the federal Constitution. *See State v. Smith*, 155 Kan. 588, 127 P.2d 518 (1942); *see also generally Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 440 P.3d 461 (2019) (recognizing that the Kansas

Constitution's limits on government action may exceed federal limits). Section 7 of the Kansas Bill of Rights provides:

> *The right to worship God according to the dictates of conscience shall never be infringed*; nor shall any person be compelled to attend or support any form of worship; *nor shall any control of or interference with the rights of conscience be permitted*, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief.

Kan. Const., Bill of Rights, § 7 (emphasis added). Kansas courts interpreting this provision have adopted a version of a strict scrutiny test substantially similar to that in the Religious Freedom Act. *See Stinemetz v. Kansas Health Policy Auth.*, 45 Kan. App. 2d 818, 849-50, 252 P.3d 141 (2011).

In short, even if this Court were to conclude that the legislature did not have the authority via HCR 5025 to EO 20-18, the provisions of that Executive Order denying individuals their legally protected rights to worship together in a religious institution would have to be stricken as violative of both the Religious Freedom Act and the Kansas Constitution.

Conclusion

In conclusion, Petitioner's action in quo warranto should be dismissed for at least three reasons.

First, as Respondents showed in Part I, the legislature properly assigned to its own LCC its reserved power to revoke the Governor's emergency executive orders, which were themselves merely exercises of delegated legislative power. The

legislature's action is consistent both with KEMA and with the LCC's organic statute, was properly effectuated by a concurrent resolution affecting the legislature's own internal exercise of a legislative function, and is not a "delegation" at all.

Second, if for any reason the legislature's assignment and exercise of authority through its LCC during this emergency is invalid, then all of HRC 2025—the means by which the legislature acted to both extend the Governor's powers and preserve its essential oversight power by the only means available while out of session—is invalid. *See* Part II, supra. This Court cannot sever the legislature's power of overseeing and checking the Governor's exercise of delegated legislative emergency authority from the delegation itself. Doing so would simply enact the Court's own legislation—powers the Governor wanted but was not granted. In the absence of HRC 2025, then the Governor's emergency powers were never extended pursuant to KEMA, and EO 20-18 is null and void.

Third, the part of EO 20-18 that is actually in dispute—the criminalization of meetings of more than 10 worshipers in religious institutions, even where they maintain social distancing of 6 feet, while identical conduct is condoned within bars, restaurants, libraries, and malls—is itself unenforceable and unconstitutional. *See* Part III.

For all of these reasons, this Court should dismiss the Petition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April 2020, I electronically filed the foregoing Respondents' Response to Petitioner's Petition in Quo Warranto and Memorandum in Support with the Clerk of the Court.

/s/ Edward D. Greim