IN THE SUPREME COURT OF KANSAS

GOVERNOR LAURA KELLY, in her official capacity,	)	
Petitioner,	)	Case No. 122, 765
v.	)	
LEGISLATIVE COORDINATING COUNCIL, KANSAS HOUSE OF REPRESENTATIVES and KANSAS SENATE,	)	
Respondents.	)	

PETITIONER'S REPLY

1. **The Governor has standing.**

Governor Kelly has standing. Under Kansas law, to establish standing a party must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. *Sierra Club v. Moser*, 298 Kan. 22, 33 (2013).

The Governor meets this standard. Governor Kelly suffers a cognizable legal injury. Under K.S.A. 48-923(d), Governor Kelly retains the authority to "exercise any other powers vested in the governor under the constitution, statutes or common law of this state independent of, or in conjunction with, any provision of this act." Moreover, she has the statutory duty "to promote and secure the safety and protection of the civilian population." K.S.A. 48-925(c)(11). In furtherance of these duties, she issued EO 20-18. The LCC's attempt to revoke EO 20-18 injures her ability to fulfill these legal duties under 48-923 and 48-925. The LCC and the houses of the Legislature are causally linked to this injury. The challenged HCR 5025 § (2)(D), which attempts to reallocate the Legislature's K.S.A. 48-925(b) power to revoke emergency orders

to the LCC, is causally connected to the LCC's action attempting to void EO 20-18. As such, Governor Kelly has standing.

2. The plain text of K.S.A. 48-925(b) limits the revocation of any emergency executive order to the Legislature as a whole acting by concurrent resolution.

The plain text of K.S.A. 48-925(b) controls, barring the LCC from revoking EO 20-18. The statute states that "[gubernatorial emergency executive] orders and proclamations [issued under the act] may be revoked at any time by concurrent resolution of the legislature." The Governor fully complies with, and endorses, this important separation of powers component of the Kansas Emergency Management Act.

The LCC, standing the plain text of the statute on its head, misconstrues the act. The LCC argues that the phrase "at any time" in 48-925(b) can be twisted to empower the LCC, acting alone, to revoke EO 20-18. *See* Joint Resp. at 6. The LCC errs.

The plain text of the provision limits the revocation power to "concurrent resolution of the legislature." K.S.A. 48-925(b). When a statute's text is plain and unambiguous, as it is here, the plain language controls. *See, e.g., In re K.M.H.*, 285 Kan. 53, 79 (2007). There is no English language construction of 48-925(b) that would construe a vote of the 7-person LCC as equivalent to a "concurrent resolution of the legislature." As such, the LCC argument must fail.

Similarly, the LCC errs when it argues that because the Legislature holds great discretion in the governing of its internal affairs, it can transfer the power to issue concurrent resolutions to the LCC. *See* Joint Resp. at 11. As noted, K.S.A. 48-925(b) limits revocations of gubernatorial executive orders to concurrent resolution of the legislature. The LCC, it would appear, contends that the Legislature can delegate this concurrent resolution authority to the LCC because the LCC is composed entirely of members of the Legislature. But, the Legislature, like the Governor and the Judiciary, is limited by the Constitution and statute.

First, the Constitution bars such a reallocation of authority. The Kansas Constitution Article 2, § 12 limits the issuance of a concurrent resolution to "either house." The plain text of our Constitution, therefore, bars any subset of the Legislature from issuing any concurrent resolution. As such, the LCC is constitutionally prohibited from exercising K.S.A. 48-925(b) authority.

Second, the statute bars such reallocation of authority to the LCC. "The LCC is an administrative agency created by statute. Its power and authority are defined by law." *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 706, 957 P.2d 379, 392 (1998). "As we stated in *Pork Motel, Corp. v. Kansas Dept. of Health & Environment,* 234 Kan. 374, 378, 673 P.2d 1126 (1983): 'Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.'" *Id.* As discussed in the original memorandum in support, K.S.A. 46-1201 *et seq*. does not empower the LCC to exercise this type of authority. This underlying statute would have to be amended in order for the LCC to wield the power of concurrent resolution, even if the exercise of such power was not contrary to the Kansas Constitution.

3. Section (2)(D) of HCR 5025 is Severable.

This Court may sever HCR 5025 § (2)(D) from the remainder of the concurrent resolution. The Governor agrees with the LCC that in a severability analysis, intent of the legislature controls. *Brennan v. Kansas Ins. Guar. Ass'n*, 293 Kan. 446, 463 (2011). The LCC errs, however, when it turns to recounting the personal, subjective intentions of individual legislators when looking to determine legislative intent. *See* Resp. at 14-15.

This Court finds legislative intent, not from individual legislators' subjective beliefs, but from the text of the document itself, giving common words their common meaning. *O'Brien v. Leegin Creative Leather Prod., Inc.*, 294 Kan. 318, 331, 277 P.3d 1062 (2012).

> When interpreting statutes, we begin with the fundamental rule that courts give effect to the legislature's intent as it is expressed in the statute. Courts must apply a statute's language when it is clear and unambiguous, rather than determining what the law should be, speculating about legislative intent, or consulting legislative history.

State v. Collins, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015) (internal quotations omitted). Moreover, this Court "may look into the existing conditions--the causes which impelled its adoption and the objective sought to be attained." *State ex rel. Jordan v. City of Overland Park*, 215 Kan. 700, 713 (1974). Finally, "'[t]his court will assume severability if the unconstitutional part can be severed without doing violence to legislative intent.'" *Thompson v. K.F.B. Ins. Co.*, 252 Kan. 1010, 1023, 850 P.2d 773 (1993) (quoting *Felten Truck Line v. State Board of Tax Appeals,* 183 Kan. 287, 300, 327 P.2d 836 (1958)); *see also State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 913, 179 P.3d 366, 391 (2008).

There is nothing in the text of HCR 5025 that limits its application to the existence of section (2)(D). To the contrary, in the face of the global COVID-19 pandemic, the Legislature ratified the Governor's emergency declaration and extended its operative force until May 1, 2020. *See* HCR 5025 ¶ 2. This ratification is not textually delimited to the existence of § (2)(D) nor is the technical operation of this ratification contingent upon the existence of § (2)(D). Similarly, the Legislature clearly intends to bar the Governor from seizing, or limiting the sale of, firearms and ammunition. *See* HCR 5025 ¶ 9. This ban is not textually linked to the existence of (2)(D) nor is the technical operation of this ban contingent upon the existence of § (2)(D). In this same vein, the Legislature clearly intends to authorize the State Finance Council, pursuant to K.S.A. 46-924(b)(3), to reauthorize the state of disaster emergency order. *See* HCR

5025 § 1. A statutory power not linked in the concurrent resolution to the existence of (2)(D) nor is the technical operation of this provision contingent upon the existence of § (2)(D). Finally, if the entire HCR 5025 is struck, the state may well lose millions of federal disaster relief dollars. In looking at the circumstances that impelled the adoption of HCR 5025, *State ex rel. Jordan*, 215 Kan. at 713, no objective intent could be divined from the text that the Legislature chooses to not ratify the proclamation of emergency disaster and thus forego millions of dollars in federal funds during this global plague.

4. EO 20-18 Took Effect Immediately.

EO 20-18 took immediate legal effect. K.S.A. 48-925(b) provides that emergency executive orders have "have the force and effect of law during the period of a state of disaster emergency declared under subsection (b) of K.S.A. 48-924." The LCC, therefore, errs in believing the statute requires publication for efficacy. *See* Resp. at 15-16. If there are due process concerns requiring such publication as a predicate for criminal prosecution, as the LCC suggests, that due process argument can be made during the criminal proceeding by the criminal defendant who would have standing to make it. The LCC lacks such standing.

5. K.S.A. 60-5301, the Kansas RFRA, does not invalidate EO 20-18.

Respondent argues in error that K.S.A. 60-5301 *et seq.* (Kansas RFRA) renders EO 20-18 invalid and thus supports the LCC's action. The LCC argument falls short on two grounds. First, the validity of EO 20-18 is not at issue in this petition for quo warranto. And second, even if the Kansas RFRA applies, EO 20-18 is not in conflict with it.

A. The validity of EO 20-18 issue is not before the Court.

To begin, the Governor's petition attacks only the constitutionality of HCR 5025 § (2)(D) and the follow-along LCC action as unconstitutional. The validity or invalidity of EO 20-18 does

not affect that legal analysis. To be sure, the validity of EO 20-18 is important. The question of its validity may well be a political motivating factor for the LCC's actions. But the constitutionality of HCR 5025 § (2)(D) would be equally suspect if EO 20-18 was found invalid as if it were found valid. The constitutionality of reallocating revocation authority to the LCC is entirely legally distinct from the validity of EO 20-18. Thus, this quo warranto petition did not put this issue before the Court.

Moreover, the LCC lacks standing to challenge the validity of EO 20-18. The LCC and the Legislature do not argue that they, as institutions, are not attending a mass gathering because of EO 20-18. And, as noted, the LCC's defense in this action is not predicated, as a legal matter, upon the invalidity of EO 20-18. As such, any discussion of the EO 20-18's validity in this matter risks becoming an advisory opinion. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659, 367 P.3d 282 (2016) ("Kansas courts do not issue advisory opinions.").

B. Even under the Kansas RFRA, EO 20-18 Remains Valid.

Even if this Court found that the Kansas RFRA applies in this petition, it would not bar EO 20-18's validity. The Kansas RFRA applies only if the government action substantially burdens religion. K.S.A. 60-5303(a). A governmental action does not substantially burden religion if there are reasonable alternatives for the church activity. *See Roman Catholic Archdiocese of Kansas City in Kansas v. City of Mission Woods*, 337 F. Supp. 2d 1122, 1135 (D. Kan. 2018) (Crabtree, J.) (citing *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007).

The Respondents gloss over this issue by focusing on the penalty for violating an executive order instead of focusing on the actual restrictions under the mass gathering order. *See* Resp. at 17. The restrictions in EO 20-18 leave available many significant reasonable alternatives for churches during this global pandemic. Churches could meet outside, if congregants maintain social

distance. Congregants can have church service in parking lots with people in their cars. Churches can hold online services. Churches may use the radio. Additionally, the order does not prevent those actually performing the service from meeting in the same building if fewer than 10 people attend. Because these and many other reasonable alternatives exist for churches in this emergency period, EO 20-18 does not present a substantial burden. As the Attorney General stated in his Memorandum this week, "The Office of the Attorney General strongly encourages all Kansans participating in religious services or activities to voluntarily comply with the new restrictions on religious mass gatherings in order to protect public health." Attorney General Derek Schmidt, State of Kansas, Office of the Attorney General, April 8, 2020.[1]

Should this Court disagree and find that EO 20-18 does impose a substantial burden, the order still complies with the Kansas RFRA. Under the Kansas RFRA, the government action stands if there is (1) a compelling government interest; and (2) the government order constitutes the least restrictive means. K.S.A. 60-5303(a).

The Governor agrees with the LCC that the government has a compelling government interest in mandating social distancing during this pandemic. *See* Resp. at 18.

[1] Examples abound: First Presbyterian Church of Topeka - http://www.fpctopeka.org/ - "We have canceled all in-person worship services and activities through May 9, but church is not cancelled!"; Temple Beth Shalom Topeka - https://templebethsholomtopeka.org/ (Shabbat services streamed live on FB); Fellowship Bible Church https://www.fbctopeka.com/event/1770331-2020-04-12-easter-services-2020/; St. Pius X Catholic Church: https://www.piusxparish.org/; First Christian Church Topeka: https://www.fcctopeka.org/ - "As a way to practice God's radical love towards our neighbors and one another, we invite you to worship online with us at 9:30 a.m. on Sunday."; First United Methodist Church: https://www.forthegoodofthecity.org/ - Live stream "due to concerns regarding the spread of Covid-19."; First Congregational Church – United Church of Christ: www.embracethequestions.com – "While the Shelter-In-Place order is ACTIVE, First Congregational Church will be hosting church services online. Videos of the sermons or events will be available on our "Videos" tab."

The LCC errs, however, when it urges that the Governor cannot show by clear and convincing evidence that limiting most gatherings, including religious ones, of more than ten people is the least restrictive means of battling the COVID-19 pandemic in Kansas. The Governor rests on the factual statements made in her various executive orders, as well as the summary of the facts made in her petition as satisfying this standard. And, the governor contends that what constitutes clear and convincing evidence during an emergency global pandemic situation may well require more leniency than what would satisfy that standard otherwise. Indeed, what could previously have been considered a less-restrictive means must now be reexamined as a consequence of the deadly pandemic in which we are living. The restrictions in EO 20-18 are the least restrictive when one considers the potential deadly consequences of not following that order. To consider this legal test without Covid-19 as the backdrop is impossible with the paramountcy of public safety in mind.

6. Kansas Constitutional Law does NOT strike EO 20-18

Although Section 7 of the Kansas Bill of Rights may provide greater protections concerning the free exercise of religious beliefs than the federal Constitution, the test is substantially similar to the federal strict scrutiny test. See *Stinemetz v. Kansas Health Policy Auth.*, 45 Kan. App. 2d 818, 849-50, 252 P.3d. 141 (2011); *State ex rel Pringle v. Heritage Baptist Temple*, 236 Kan 544, 693 P.2d 1163 (1985). As such, the Governor addresses the underlying constitutional free exercise issue in terms of U.S. Supreme Court jurisprudence.

Before its decision in *Employment Division v. Smith*, 494 U.S. 872, (1990), the United States Supreme Court interpreted the Free Exercise Clause to require application of the strict-scrutiny standard whenever religious exercise was substantially burdened by governmental action. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *see also* 42 U.S.C. § 2000bb(b) (stating

that the purpose of the federal Religious Freedom Restoration Act was "to restore the compelling interest test as set forth in" *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The Court's pre-*Smith* free-exercise decisions make clear that strict scrutiny, while an exacting standard, is not "fatal in fact" (*cf. Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003) (regarding race discrimination)). And they routinely denied religious exemptions from laws that, like the order here, were tailored to protect public health from serious threats.

A compelling interest is one "of the highest order." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 505, 546 U.S. 520 (1993). The government has a compelling interest in protecting the health and safety of the public; and in particular, it has a compelling interest in preventing the spread of disease. *See Sherbert*, 374 U.S. at 402–03; accord *Yoder*, 406 U.S. at 230 & n.20; *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 655–56 (4th Cir. 1995). Indeed, an extensive body of case law reflects the overriding importance of the government's interest in combating communicable diseases.

The Supreme Court has reaffirmed that public-health measures like mandatory immunizations that burden religious exercise withstand strict scrutiny. *See Sherbert*, 374 U.S. at 402–03 (citing mandatory vaccinations in *Jacobson* as an example of burden on religion that is permissible under strict scrutiny); *Yoder*, 406 U.S. at 230. Lower federal courts have also routinely recognized that the governmental interest in preventing the spread of communicable disease is compelling. *See, e.g., Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353–54 (4th Cir. 2011) ("[T]he state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest."); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (4th Cir. 1997) ("[T]he prison's interest in preventing the spread of tuberculosis, a highly contagious and deadly disease, is compelling."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089–90 (S.D. Cal. 2016) (collecting

cases showing compelling governmental interest in fighting the spread of contagious disease). The County's interest here in stanching the spread of COVID-19 is no less compelling. And it calls for limiting all gatherings, including religious ones, because all gatherings necessarily undermine the government's interest in reducing transmission.

"A [law] is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808–10 (1984)); accord *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984).

Even "[a] complete ban can be narrowly tailored . . . if each activity within the proscription's scope is . . . appropriately targeted." *Frisby*, 487 U.S. at 487; see *Roberts*, 468 U.S. at 628–29 (ban on all gender discrimination is narrowly tailored to combatting evil of gender discrimination). Accordingly, the Supreme Court (see *Jacobson*, 197 U.S. at 26–27) and many other courts (see, e.g., Whitlow, 203 F. Supp. 3d at 1089–90 (collecting cases)) have upheld against strict judicial review blanket prohibitions on refusing immunizations.

No vaccine for COVID-19 yet exists, so the only way to slow its spread is to limit the number of opportunities for person-to-person transmission. Temporarily barring all in-person gatherings and enforcing social-distancing guidelines is essential to achieving that objective. The order is no broader than necessary to ensure that physical gatherings that create opportunities for transmission of the virus are curtailed.

Conclusion

The only issues before the Court are the constitutionality of HCR 5025 § (2)(D) and the validity of the LCC's attempt to revoke EO 20-18. Respondents cannot escape the plain language of K.S.A. 48-925(b)'s requirement that emergency executive orders can be revoked only by

"concurrent resolution of the legislature." The other arguments Respondents raise cannot rescue the LCC's illegitimate attempt to exercise a power the law vests only in the Legislature as a whole. The Court should find that HCR 5025 § (2)(D) is an unconstitutional attempt to amend a statute through a resolution and that the LCC's action to revoke EO 20-18 is void.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I certify that the foregoing will be served on counsel for each party through the Court's electronic filing system, which will send a "Notice of Electronic Filing" to each party's registered attorney. Parties for whom an attorney has yet to enter an appearance will receive a copy of the foregoing via electronic mail and U.S. mail at the address below and mailed on April 10, 2020.

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