

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

**ANSWER OF THE LEGISLATIVE COORDINATING COUNCIL,
KANSAS HOUSE OF REPRESENTATIVES, AND KANSAS SENATE
TO THE PETITION IN QUO WARRANTO OF GOVERNOR LAURA KELLY**

COMES NOW Respondents, the Legislative Coordinating Counsel, Kansas House of Representatives, and Kansas Senate, through her undersigned counsel, and respectfully Answer the Petition in quo warranto of Kansas Governor Laura Kelly.

As required by an emergency order of this Court, Respondents are filing this Answer and their Memorandum in Opposition to the Governor's Petition by 11:00 a.m., on Friday, April 10, 2020, after being served with Petitioner's papers at approximately 4:30 p.m. of the previous day and receiving ex parte orders from the Court setting a schedule well into the night of Thursday, April 9, 2020, when religious services and other observances were underway across Kansas. Given that

only two business hours were available for the preparation and filing of these papers, Respondents have been unable to provide verifications, affidavits, and other exhibits that would normally supplement the record in a case such as this, where Petitioner relies primarily on internet links, fails to attach as an exhibit the challenged action of the LCC, and the facts are very much in dispute. This only underscores the fact that resolution of this issue—if indeed it demands resolution by this Court—should follow normal judicial forms, including a fair opportunity for each party to present arguments and evidence.

There is no true emergency: the Governor decided to abruptly issue an Executive Order that changed almost nothing in a prior, well-reasoned Executive Order dealing with the pandemic. The Governor's last-minute revisions primarily target religious institutions during a time of long-planned religious observance,¹ and preparations for litigation were clearly underway long before the Order was sprung. For the reasons below, this Court should dismiss the Petition.

Parties

1. Laura Kelly is the Governor of Kansas.

ANSWER: Admitted.

2. The Legislative Coordinating Council ("LCC") is created by K.S.A. 46-1201.

The LCC is composed of seven members, including the "president of the senate, the speaker of the house of representatives, the speaker pro tem of

¹ The Court can take judicial notice that the Paschal Triduum in some Christian denominations comprises Holy Thursday (or Maundy Thursday), Good Friday, and Holy Saturday. The following day is Easter Sunday. In Orthodox Christian churches, Holy Week takes place on the following week. The eight days of the Jewish Passover began at sundown on Wednesday, April 8, 2020. Slightly more time is available before the beginning of the month of Ramadan on April 23, 2020.

the house of representatives, the majority leader of the senate, the majority leader of the house of representatives, the minority leader of the senate, and the minority leader of the house of representatives." *Id.*

ANSWER: Admitted.

3. The Kansas Senate comprises one house of the Kansas Legislature, as created by the Kansas Constitution Art. 2, § 1.

ANSWER: Admitted.

4. The Kansas House of Representatives comprises one house of the Kansas Legislature, as created by the Kansas Constitution Art. 2, § 1.

ANSWER: Admitted.

Jurisdiction

5. This is an original action in quo warranto pursuant to K.S.A. 60-1201, *et seq.*

ANSWER: This is a legal assertion to which no response is required, but to the extent the Court requires an answer, Respondents deny that this action sounds in quo warranto or that Petitioner has standing.

6. The Kansas Constitution Art. 3, § 3 vests original jurisdiction for such actions in this Court. Similarly, K.S.A. 60-1202 also vests original jurisdiction in this Court.

ANSWER: This is a legal assertion to which no response is required, but to the extent the Court requires an answer, it is denied.

7. This Court should exercise its concurrent original jurisdiction over this matter because adequate relief is not available to Petitioners in the district

courts. *See* Sup. Ct. R. 901 (b) (Kan. S. Ct. R. at p. 58- 59). Further, the extraordinary issues of public health raised here constitute a matter of great public importance and resolution in this Court will provide speedy adjudication of these important questions and provide much needed guidance to Kansans across the state.

ANSWER: Respondents deny all of the factual and legal averments in this paragraph. Further answering, Petitioner's pleading is devoid of explanation or facts detailing the precise public health issue raised by Respondent Legislative Coordinating Council's revocation of the Petitioner's Executive Order because of its infringement on the Kansas Constitution and Religious Freedom Restoration Act. Specifically, the Respondent Council revoked a surprise revision to a prior order that removed an exemption for religious institutions. Under the previous order, more than ten faithful could come together to worship inside of a religious institution so long as they remained at least six feet apart. Under the prior order and today, libraries, malls, and even bars and restaurants may remain open. However, in sharp contrast to these institutions, which do not involve the provision of medical or food supplies or care, and do not involve religious exercise, religious institutions were abruptly targeted during Holy Week for harsh treatment—including, as the Attorney General has pointed out, possible jail terms for worshipers—that is utterly illogical and likely in violation of the First Amendment, Kansas Constitution, and Kansas law. Many or most religious institutions

have already decided to conduct virtual services, and there was no reason to believe that any remaining Holy Week and Easter services would spread Covid-19 where libraries, bars, and malls would not. Petitioner simply sought to target religious institutions and thereby generate a political and legal fight during Holy Week. Were the LCC's action stand, the Governor's other, pre-existing orders combatting Covid-19 will remain in place.

8. For reasons further described in the Memorandum in Support that accompanies this Petition, this Court should exercise its discretion to grant *quo warranto* relief here because the case raises legal issues of significant public concern; the material facts are not in dispute and are established by the supporting documentary evidence and Exhibits; and there is a compelling need for an expeditious and authoritative ruling on the important legal issues presented. *See* Sup. Ct. R. 901 (b) (Kan. S. Ct. R. at p. 58- 59).

ANSWER: Denied. The material facts were not pled, and are very much in dispute. There is no need for an expedited ruling on a narrow application of the Petitioner's Order, and Petitioner has purposely created the appearance of an emergency by choosing Holy Week to renege on her prior agreements regarding Respondents' authority and common-sense religious exemptions. Having carefully prepared her lawsuit and strategically chosen her time to attack, Petitioner is asking this Court to issue a lightning-quick decision on constitutional claims after allowing Respondents only a few hours to prepare responsive papers.

Count I - Quo Warranto

([Purported] Unconstitutional Delegation of Authority)

1. According to federal Centers for Disease Control (“CDC”), COVID-19 is a virus that attacks the respiratory system. There is no vaccine. There is no anti-viral treatment. While most who are infected with COVID-19 suffer mild to moderate symptoms, some "patients have pneumonia in both lungs, [and] multi-organ failure" that leads to death. *See* Centers for Disease Control, "What you need to know about coronavirus disease 2019 (COVID-19)," available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf> (last visited April 8, 2020).

ANSWER: The facts alleged in Paragraph 1 are admitted as general background, but, further answering, Respondents note that nowhere does Petitioner identify the precise public health issue relating to COVID-19, or the precise health, epidemiological, policy, or political calculations, that led her to target religious institutions in an allegedly emergency Executive Order that Petitioner abruptly decided to make effective on Wednesday of the Christian Holy Week and at the start of Passover, just 24 hours before a series of religious services culminating on Easter Sunday. The Governor had previously discussed this issue and negotiated with the Respondents regarding religious exemptions (among the many other exemptions in her orders). Additionally, the Kansas Governor’s latest order is substantially similar to a series of other Executive Orders requiring social distancing and limiting public gatherings, but unlike those other orders, which allowed exemptions for gatherings of more than 10 within religious institutions

where worshipers stayed at least 6 feet apart, the latest order removed that exemption. Thus, although the Governor would allow patrons to drink at bars so long as their barstools are 6 feet apart, she will not allow Kansans to worship at churches so long as they stay 6 feet apart. Upon information and belief, the Governor made the decision to target religious institutions just before Easter in order to trigger emergency legal action directly in this Court, and not to advance public health and welfare.

2. COVID-19 presents a global pandemic. As of this filing, the world has suffered more than 1.4 million COVID-19 infections this spring alone. *See* "Coronavirus: US records highest death toll in single day," British Broadcasting Corporation (April 8, 2020), available at <https://www.bbc.com/news/world-us-canada-52209954> (last visited April 8, 2020).

ANSWER: The facts alleged in Paragraph 2 are admitted as general background, but nowhere does Petitioner identify the precise public health issue related to COVID-19, or the precise health, epidemiological, policy, or political calculations, that led her to target religious institutions in her just-issued Executive Order.

3. As of April 8, 2020, the CDC reported that COVID-19 had infected approximately 395,000 Americans, causing nearly 13,000 American deaths. *See* <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited April 8, 2020).

ANSWER: The facts alleged in Paragraph 3 are admitted as general background, but nowhere does Petitioner identify the precise public health issue related to COVID-19, or the precise health, epidemiological, policy, or political calculations, that led her to target religious institutions in her just-issued Executive Order.

4. As of April 8, 2020, Kansas has seen 1,046 cases of COVID-19 across 57 counties. See https://public.tableau.com/profile/kdhe.epidemiology#!/vizhome/COVID-19Data_15851817634470/KSCOVID-19CaseData (last visited April 8, 2020).

ANSWER: The facts alleged in Paragraph 4 are admitted as general background, but nowhere does Petitioner identify the precise public health issue related to COVID-19, or the precise health, epidemiological, policy, or political calculations, that led her to target religious institutions in her just-issued Executive Order.

5. As of April 8, 2020, thirty-eight Kansans have died as a result of COVID-19. *Id.*

ANSWER: The facts alleged in Paragraph 5 are admitted as general background, but nowhere does Petitioner identify the precise public health issue related to COVID-19, or the precise health, epidemiological, policy, or political calculations, that led her to target religious institutions in her just-issued Executive Order.

6. Facing this pandemic, pursuant to K.S.A. 48-924, Governor Kelly proclaimed a State of Disaster Emergency within Kansas relating to COVID-19 on March 12, 2020. A true and correct copy of the Proclamation of a State of Disaster Emergency is attached hereto as Exhibit A.

ANSWER: Respondents admit that Exhibit A is a true and correct copy of the State of Disaster Emergency issued by Petitioner on March 12, 2020. Respondents deny all other facts or characterizations in Paragraph 6.

7. Similarly, on March 13, 2020, the President of the United States pursuant to Sections 201 and 301 of the National Emergencies Act, 50 U.S.C. § 1601, et seq. and consistent with Section 1135 of the Social Security Act, as amended (42 U.S.C. § 1320b-5), declared a national emergency related to the COVID-19. A true and correct copy of the Declaration a National Emergency is attached hereto as Exhibit B.

ANSWER: Respondents admit that the President issued the Declaration set forth as Exhibit B under his lawful authority, but further answering, Petitioner has alleged no facts about anything in Exhibit B that led her to target religious institutions in her just-issued Executive Order—a step not taken by President Trump.

8. On March 19, 2020, the Kansas Senate adopted the Kansas House of Representatives' HCR 5025 ("HCR 5025"). A true and correct copy of HCR 5025 is attached hereto as Exhibit C.

ANSWER: Admitted.

9. Pursuant to K.S.A. 48-924(b)(3), the Legislature ratified the Governor's emergency declaration and extended its operative force until May 1, 2020. *See* HCR 5025 ¶ 2 (beginning "*Be it resolved . . .*").

ANSWER: Admitted that the Legislature ratified the Governor's emergency declaration and extended its operative force until May 1, 2020 by virtue of a resolution, HCR 5025, that as an integral part of that ratification, in subparts to ¶2, imposed the condition that Respondent, the Legislative Coordinating Council, "shall have the authority to review and revoke all orders and proclamations issued by the governor pursuant to K.S.A. 2019 Supp. 48-925(b)." Further answering, Respondents aver that they would not have ratified the Governor's declaration or extended its operative force until May 1, 2020, had the Legislative Coordinating Council not received the power to review and revoke all orders and proclamations issued by the governor. In fact, Respondents negotiated with the Governor at length over the content of HCR, and the Governor knew and approved of this provision. Further, the Governor negotiated with all Respondents about her actions over the following days until she abruptly issued an Executive Order targeting religious institutions just before Easter, having already planned for emergency litigation.

10. The CDC's guidance is that "[l]imiting face-to-face contact with others is the best way to reduce the spread of coronavirus disease 2019 (COVID-19)." *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited April 8, 2020).

ANSWER: Admitted, but further answering, Petitioner's Executive Orders have granted a laundry list of exemptions for a variety of institutions so long as 6-foot-social-distancing is observed. The CDC's guidance does not say that the spread of coronavirus can be effectively reduced by regulations that allow patrons to linger and drink inside of bars and restaurants so long as their barstools and tables are 6 feet apart, but that prohibit the faithful from entering places of worship even if they maintain a 6-foot distance.

11. Stating that it is a "matter of life and death," President Trump instructed all Americans to practice social distancing (namely, dramatically limiting in-person contact with others) through at least April 30, 2020. *See Cassidy Morrison, "A matter of life and death': Trump calls for social distancing for next month," The Washington Examiner (March 31, 2020), available at <https://www.washingtonexaminer.com/news/a-matter-of-life-and-death-trump-calls-for-socialdistancing-for-next-month> (last visited April 8, 2020).*

ANSWER: Admitted, but further answering, Petitioner's Executive Orders have granted a laundry list of exemptions for a variety of institutions so long as 6-foot-social-distancing is observed. President Trump has never approved of orders like the Petitioner's that target religious institutions, and has never said that the spread of coronavirus can be effectively reduced by regulations that allow patrons to linger and drink inside of bars and restaurants so long as their barstools and tables are 6 feet apart, but that prohibit the faithful from entering places of worship even if they maintain a 6-foot distance.

12. Pursuant to the Kansas Emergency Management Act, K.S.A. 48-925, on April 7, 2020, Governor Kelly issued Executive Order No. 20-18 (hereinafter “EO 20-18”), which temporarily prohibits mass gatherings of more than 10 people to limit the spread of COVID-19 and rescinds Executive Order 20-14. A true and correct copy of EO 20-18 is attached hereto as Exhibit D.

ANSWER: Admitted, but Petitioner fails to note that her prior order, Executive Order 20-14, also temporarily prohibited mass gatherings of more than 10 people to limit the spread of COVID-19, and did so without targeting religious institutions while continuing to allow much more dangerous interactions within, for example, bars, restaurants, malls, and airports.

13. K.S.A. 48-925(c) explicitly authorizes the issuance of EO 20-18. K.S.A. 48-925(c)(7) (“During a state of disaster emergency declared under K.S.A. 48-924 . . . the governor may . . . control . . . the movement of persons . . . within the [disaster] area.”); K.S.A. 48-925(c)(11) (governor may “perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population”).

ANSWER: This is a legal assertion to which no response is required, but to the extent the Court requires an answer, it is denied. EO 20-18 could not have occurred under KSA 48-925 alone, as by the time it was issued, over 15 days had passed since Petitioner’s declaration of emergency. Rather, the legislature had to act by concurrent resolution, and in this case, its concurrent resolution included a

means by which the legislature could exercise its power of reviewing and, from time to time, revoking the Petitioner's orders.

14. The Kansas Emergency Management Act grants the Legislature three checks upon gubernatorial emergency power.

ANSWER: This is a legal assertion to which no response is required, but to the extent the Court requires an answer, it is denied. The Kansas Emergency Management Act reserves various oversight powers to the Legislature in case the governor exercises delegated legislative power in an emergency, but it is not limited to three powers.

15. First, K.S.A. 48-924(b)(5) states that "[a]t any time, **the legislature by concurrent resolution** may require the governor to terminate a state of disaster emergency." (Emphasis added.)

ANSWER: This is a legal assertion to which no response is required. Paragraph 15 accurately cites the law, but it is not "first" of any series.

16. Second, K.S.A. 48-925(b) states that the Governor's orders issued under the act may be revoked at any time by **concurrent resolution of the legislature.**" (Emphasis added.)

ANSWER: This is a legal assertion to which no response is required. Paragraph 16 is missing a quotation in its attempt to cite the statute. It is not "second" in any series.

17. And third, K.S.A. 48-924(b)(3) provides that "governor shall terminate the state of disaster emergency by proclamation . . . [and that] no state of disaster

emergency may continue for longer than 15 days unless ratified by **concurrent resolution of the legislature**, that upon specific application by the governor to the state finance council and an affirmative vote of a majority of the legislative members thereof, a state of disaster emergency may be extended once for a specified period not to exceed 30 days." (Emphasis added).

ANSWER: This is a legal assertion to which no response is required.

Paragraph 17 accurately cites the statute. It is not "third" in any series.

18. Nevertheless, HCR 5025 § (2)(D) attempts to reallocate to the LCC the authority to revoke gubernatorial emergency orders without a concurrent resolution in direct violation of the plain text of K.S.A. 48-925(b).

ANSWER: Denied. The plain text of KSA 48-925(b) provides that a concurrent resolution is a means, not the only means, by which the legislature may revoke gubernatorial orders issued as delegations of legislative authority.

19. Rather than exercise this check upon gubernatorial emergency authority by concurrent resolution of the Legislature as K.S.A. 48-925(b) requires, HCR 5025 § (2)(D) instead attempts to reallocate this power in the 7-person LCC.

ANSWER: This is a legal assertion to which no response is required. Denied.

20. The Kansas Constitution Art. 2, §§ 14 and 20, however, mandate that statutes may only be amended by the introduction of a bill, and presentment to the governor.

ANSWER: This is a legal assertion to which no response is required. Denied, in that the Kansas Constitution is not implicated because the Respondents did not amend any statute.

21. HCR 5025 § (2)(D) is not a bill as defined by the Kansas Constitution Art. 2, § 20.

ANSWER: This is a legal assertion to which no response is required.

22. The Legislature did not present HCR 5025 § (2)(D) to Governor Kelly pursuant to the Kansas Constitution Art. 2, § 14.

ANSWER: Admitted. Further answering, although presentment was unnecessary, Respondents actually did negotiate all of HCR 5025, including but not limited to Section (2)(D) of Paragraph 2, with the Petitioner, and reached an agreement to extend Petitioner's authority to May 1 in exchange for the right to review and revoke her orders using the Legislative Coordinating Council while the legislature was out of session. Governor Kelly, in fact, told the legislature it should leave Topeka and not remain in session, Accordingly, Section (2)(D) was necessary as the legislature's only available means for enforcing its rights to revoke her orders while not in session. Without Section (2)(D), the legislature would not have passed HCR 5025 and extended the Petitioner's authority.

23. HCR 5025 § (2)(D) and its attempted reallocation of authority to the LCC violates the plain text of the Kansas Constitution, Art. 2, §§ 14 and 20. *See, e.g., State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 64, 687 P.2d 622 (1984) (holding unconstitutional a statute allowing the legislature to adopt,

modify, or revoke regulations by concurrent resolution without acting by the introduction of a bill followed by gubernatorial presentment).

ANSWER: Denied.

24. Nevertheless, on April 8, 2020, the LCC attempted to revoke Governor Kelly's EO 20-18 under its presumed HCR 5025 § (2)(D) reallocated authority. *See* <http://sg001harmony.sliq.net/00287/Harmony/en/PowerBrowser/PowerBrowserV2/20200408/-1/9503> (last visited April 9, 2020).

ANSWER: Denied. The LCC revoked Petitioner's EO 20-18 because it removed the previous exemption, which allowed gatherings in religious institutions of more than 10 individuals so long as they kept a 6-foot distance, but the previous EO, not having been terminated, remained in place.

25. An action in quo warranto lies, therefore, against all Respondents. *See* K.S.A. 60-1202(1) (providing that an action in quo warranto may be brought when "any person shall usurp, intrude into or unlawfully hold or exercise any public office, or shall claim any franchise within this state, or any office in any corporation created by authority of this state.").

ANSWER: Denied. Respondents have simply exercised the power the legislature reserved to itself to revoke emergency orders by the governor that are themselves an exercise of delegated legislative power.

DEFENSES

1. The Governor lacks standing to object to legislative deliberations regarding the Legislature's own internal acts—including concurrent

resolutions—that do not require a bill or presentment to the Governor. In no case could the Governor have intervened in the Legislature’s deliberations on how it will apportion and exercise authority within the branch during a time of emergency. The Governor’s injury, if any, is political rather than in the loss of any power proper to the executive branch.

2. The Governor acquiesced in the Legislature’s apportionment and exercise of power within the branch, by expressly agreeing to the Legislature’s reliance on its LCC, and by then negotiating with the LCC on several matters before the Governor’s current action.
3. If Petitioner is correct that HCR 5025 § (2)(D) is invalid, then it is not severable from the body of HCR 5025, and as a result, the Petitioner’s authority was never extended to May 1, 2020, and she lacks standing to argue regarding the effectiveness of EO 20-18, which she promulgated abruptly and by surprise during the period of the extension.
 - a. On March 13, the House of Representatives passed a “clean” resolution authorizing an extension of the disaster emergency through May 1.²
 - b. 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.

² *See* http://www.kslegislature.org/li/b2019_20/measures/hcr5025/

- c. This triggered extraordinary frustration by the governor, who then sent a delegation to negotiate with senior members of the legislature.
- d. 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).
- e. 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).
- f. The conference committee report then passed unanimously in both houses.
- g. 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.
- h. But there never would have even been an extension in the absence of that compromise.
- i. Furthermore, the governor’s staff 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.

- j. Only now – when, for the first time the LCC revoked her EO 20-18 – does she raise a legal objection.

4. Respondents object to the expedited nature of this proceeding. The Petitioner has obtained this Court’s order for expedited proceedings by falsely representing that Kansas’ entire program of response to the Covid-19 pandemic hinges on the effectiveness of EO 20-18, issued just three days ago and made effective only two days ago. In fact, EO 20-18 is substantially similar to earlier executive orders, except that it targets religious institutions and worshipers with a potential prison sentence for gathering in a group of more than 10, even where worshipers keep 6 feet apart. The same conduct is not criminalized where no religious exercise takes place but the risk of transmission is at least as great, such as in bar patrons lingering at the bar, or restaurant patrons dining 6 feet apart, or library or mall patrons moving about in enclosed spaces. If 20-18 is invalidated, then Kansas will still have effective prior orders that did not target religious worshipers for criminal prosecution, and that maintained reasonable restrictions commensurate with bars, restaurants, libraries, and malls.

WHEREFORE, Respondents seek an order dismissing the Petition in Quo Warranto and granting such other and further relief as this Court deems just and proper.

Respectfully Submitted,

/s/ Bradley J. Schlozman (KS Bar # 17621)

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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