

IN THE SUPREME COURT OF THE STATE OF KANSAS

Governor Laura Kelly,)
In Her Official Capacity,)
)
Petitioner,)
)
v.)
)
Legislative Coordinating Council,)
Kansas House of Representatives,)
and Kansas Senate,)
)
Respondents.)

Case No. 20-122765-S

FILED
APR 10 2020
DOUGLAS T. SHIMA
CLERK OF APPELLATE COURTS



RESPONSE OF ATTORNEY GENERAL TO COURT'S ORDER

The attorney general respectfully submits this response to the Court's April 9, 2020, order directing the attorney general to seek to appear or intervene no later than 11 a.m. on April 10, 2020, if he intends to do so pursuant to K.S.A. 75-764. Based on information currently available, the attorney general does not seek to appear or intervene in this case because the case has not presented a dispute about the validity of any statute or constitutional provision. The governor's pleadings filed April 9 challenge only the validity of a concurrent resolution by which the legislature seeks to govern its operations, and the legislature's response has not yet been filed.

Of course, the state is interested in this dispute between its governor and its legislature and thus the attorney general wishes to be of assistance to the Court in resolving the matter. *See* K.S.A. 75-702. The Court is being asked to determine vital constitutional and public health matters without the benefit of ordinary briefing,

and relevant information may not appear in the pleadings or other filings of the parties. Thus, it is possible that as this expedited proceeding proceeds, other issues may be presented on which the attorney general might be of assistance to the Court in evaluating the dispute. Particularly in light of the extremely limited record in this case, the attorney general may be able to assist in furthering the Court's understanding of the context in which the current dispute between the governor and the legislature has arisen. If so, and upon further direction of the Court, the attorney general stands ready to file as a friend of the court, in support of neither party, such further information as the Court may request.

For the reasons above, at this time the attorney general shows the Court the following, all of which he has expressed to the parties at various times since the current state of disaster emergency began on March 12, 2020:

1. Since the current state of disaster emergency related to COVID-19 was declared by the Governor on March 12, 2020, the attorney general has repeatedly engaged with the governor, the legislature and many other officials in state and local government to assist them in the exercise of emergency powers in a manner consistent with the constitutional and other civil liberties of Kansans. The attorney general understands the critical importance of executive power in response to this emergency but also is keenly mindful that the exercise of unchecked executive powers during times of emergency has too often resulted in deeply regrettable violations of Americans' liberties. *See, e.g., Korematsu v. United States*, 323 U.S. 214

(1944) (upholding presidential executive order during World War II requiring Japanese-Americans to move into relocation camps), *Youngstown Sheet & Tube Co. v. Sawyer*, 43 U.S. 579 (1952) (reversing presidential executive order during Korean War directing Secretary of Commerce to seize and operate steel mills), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (invalidating military commission procedure used in connection with detention of alleged terror suspect).

2. While the exercise of emergency powers during disasters is a frequent occurrence in Kansas, the current COVID-19 emergency has resulted in emergency powers being exercised in a manner that is unprecedented in its combination of geographic scope, intrusiveness upon citizens, disruption of government and private sector operations, and duration. In short, we all are in uncharted waters that may test the limits of emergency powers.
3. The attorney general has concerns about the validity of certain provisions of the Kansas Emergency Preparedness Act, K.S.A. 48-904 *et seq.* (“the Act”), at least in particular applications. For example, and by way of illustration only, the Act’s mechanisms for extending state of emergency declarations, revoking emergency orders of the governor, revoking state of emergency declarations, and extending orders of the governor past the expiration of the emergency, all by concurrent resolution of the legislature, were enacted in 1975 and have not been subject to judicial scrutiny in light of this Court’s decision in *State ex rel. Stephan v. House of Representatives*, 236 Kan. 45 (1984) (holding

unconstitutional legislative veto of regulations by concurrent resolution (holding unconstitutional legislative veto of regulations by concurrent resolution).

4. For the reasons above, the attorney general has persistently advised caution and urged both the governor and the legislature to work cooperatively in order to avoid disputes that could present those types of difficult and unresolved issues. Until the dispute in this case, the governor and the legislature have largely heeded that advice.
5. The attorney general has been particularly concerned about those provisions of the Act that appear to delegate to the governor authority to enter emergency orders that (1) apply to regulate the conduct of individual citizens (as opposed to governmental entities), (2) have the force of law, *see* K.S.A. 48-925(b), and (3) violations of which may be punished by fines or imprisonment, *see* K.S.A. 48-939. When that power is exercised, law enforcement authorities statewide are left to determine, in a time of tremendous uncertainty, how they should approach the enforcement of newly declared crimes. *See, e.g.*, Executive Order 20-16 (ordering citizens statewide to stay at home but with numerous exceptions). For that reason, the attorney general on March 24, 2020, provided a memorandum to assist prosecutors and law enforcement statewide statewide in performing these duties. *See* Exhibit A. That memorandum counseled discretion in criminal enforcement of crimes established by emergency executive orders.

6. The attorney general's concerns are heightened when any new crimes declared by emergency executive order may burden the fundamental liberties of citizens. But on contrast to EO 20-05, 20-14 and 20-16, EO 20-18 specifically determined that certain regulations on religious gatherings should be punishable *as crimes*.
7. To provide guidance to law enforcement statewide as they determine how to implement EO 20-18, the attorney general on April 8, 2020, issued Addendum 1 to his March 24 memorandum. See Exhibit B. In it, he recommends Kansans comply with the order but that law enforcement encourage cooperative compliance and avoid resort to criminal enforcement of any violations. Contrary to some public mischaracterizations, the attorney general did not recommend the order be disregarded or left unenforced. Non-criminal enforcement, such as through judicially supervised injunction, would remain available should extreme circumstances of noncompliance arise.
8. The attorney general's recommendations to law enforcement and prosecutors to avoid criminal enforcement of the religious gatherings restrictions in EO 20-18 remains in effect and is not challenged in this lawsuit.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
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/s/ Brant M. Laue

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As to Respondents

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¹ The attorney general is required by statute to consult with and advise local prosecutors, K.S.A. 75-704, and is the chief law enforcement officer of the state. 208 Kan. 193, 194 (1971).

Executive summary

The COVID-19 situation is unprecedented and dynamic. While this memorandum provides a comprehensive view of the emergency powers that have been invoked, this executive summary is intended to capture the most salient points that can be implemented by law enforcement authorities.

1. Conflicting orders. If there is a conflict between a lawful executive order issued by the governor and orders from a local entity, the governor's executive order should prevail. Likewise, any municipal ordinance or mayor/commission chairman's directive that conflicts with the Kansas Emergency Management Act, state disaster plan, interjurisdictional disaster plan, or local disaster plan is void.
2. Enforcement. Violations of a lawful order or proclamation issued by the governor under the Kansas Emergency Management Act or a quarantine order issued by the secretary of health and environment or by a local health officer are misdemeanor offenses. All Kansas law enforcement officers should continue to exercise discretion in how and when to enforce violations of these criminal laws. We recommend no criminal enforcement of these orders until they have been properly published. In addition, law enforcement may enforce non-criminal orders if properly ordered to do so by the governor, the secretary of health and environment, or a local health officer.
3. Consultation. Prior to initiation of any non-routine enforcement action, law enforcement officers are advised to consult with their jurisdiction's chief legal officer and prosecuting authority (e.g., county or district attorneys, city attorney, or county counselor).
4. Coordination. Law enforcement should consult with local emergency managers to determine what role law enforcement may have in any local, interjurisdictional, or state disaster plans now in effect.
5. Limits on local authority. Kansas statutes provide significant authority to local health officers to combat the spread of contagious or infectious diseases. However, any local orders that appear to direct the actions of persons not ordinarily subject to the authority of the issuing local jurisdiction, such as state law enforcement officers or officers of other local jurisdictions, should be carefully scrutinized by legal counsel before enforcement.

Current Situation

The spread of COVID-19 has resulted in numerous officials invoking seldom-used legal authority to exercise various emergency powers granted by law. On March 13, 2020, President Donald Trump issued a proclamation declaring a nationwide emergency and has subsequently invoked various authorities pursuant to that declaration. On March 12, 2020, Governor Laura Kelly proclaimed a statewide state of disaster emergency pursuant to the Kansas Emergency Management Act, K.S.A. 48-904 *et seq.* She has subsequently exercised numerous powers available to her under that Act when a state of disaster emergency is in effect. In addition, some counties in Kansas have declared a state of local disaster emergency under the Kansas Emergency Management Act and have invoked various local powers pursuant to such declaration. So, too, have some cities in Kansas. In addition, state and local public health officials have invoked various statutory authorities granting them extraordinary power to address the spread of contagious and infectious diseases.

Law enforcement officers may be empowered to enforce some, but not all, directives arising from these various federal, state, and local actions. As discussed more fully below, it is possible that in some local jurisdictions, law enforcement officers may be subject not only to duties and authorities ordinarily placed upon them by law but also by up to *six additional and separate sources of emergency duties and authorities* imposed by different authorities as a result of the COVID-19 response: (1) federal, (2) state (governor's orders), (3) state (secretary of health and environment's orders), (4) county (commission declaration), (5) county (health officer's orders), and (6) city (mayor's declaration).

The situation is further complicated because there exists a state disaster emergency plan, various interjurisdictional disaster emergency plans, and numerous local disaster emergency plans, all of which now are activated, and any one (or all) of these plans may impose obligations on law enforcement and may displace local ordinances that ordinarily are in effect.

Still further, the rapidly evolving situation with the pandemic is resulting in frequently changing invocations, alterations, or terminations of emergency powers by various federal, state, and local authorities. Nor do the various directives and orders share a uniform termination date, and most or all are subject to extension.

Moreover, the specific interaction of various state statutes and authorities involved is sometimes unclear and has not previously been clarified either by judicial ruling or by formal attorney general opinion.

In brief, the legal situation is extraordinarily complex and fluid. The Office of Attorney General knows law enforcement agencies and officers throughout our state

will carry out both their ordinary and extraordinary lawful duties, professionally and properly enforce the law, and make positive contributions to the overall national, state, and local efforts to slow the spread of COVID-19. This memorandum is intended to assist law enforcement in accomplishing those purposes and to assist legal counsel for law enforcement agencies in advising their clients. It discusses, in general terms, sources of authority that may have been invoked and certain types of orders that may be in effect as of the date of this memorandum. This may not be a complete list, and other atypical sources of authority and additional orders also may apply in particular circumstances.

To determine which emergency authorities are currently in effect in each law enforcement agency's jurisdiction, and what extraordinary duties or authorities are thus imposed on law enforcement officers in that jurisdiction, a law enforcement agency should consult with its legal counsel.

Emergency Proclamations and Legal Authorities

I. Federal-level emergency authorities

As noted above, President Donald Trump declared a nationwide state of emergency to assist in mobilizing a nationwide response to COVID-19. This memorandum does not analyze these federal authorities.

State and local law enforcement should, to the extent reasonably possible, coordinate with federal authorities during this state of emergency. However, most—and perhaps all—atypical duties and authorities placed on Kansas law enforcement will arise from state or local emergency powers, not from federal emergency powers. States possess general police powers (and may delegate those powers to local units of government), but the federal government possesses no general police power and instead may exercise only those limited, enumerated powers granted to it by the federal Constitution. *See, e.g., Bond v. United States*, 572 U.S. 844, 854 (2014). In general, the federal Constitution limits the ability of the federal government to commandeer state and local civilian authorities to carry out duties imposed by federal law. *See, e.g., generally, Printz v. United States*, 521 U.S. 898 (1997) (federal law requiring state chief law enforcement officers to enforce federal law is unconstitutional). State law also may *prohibit* state and local law enforcement officers from participating in the enforcement of specific federal laws. *See, e.g., K.S.A. 50-1206(b)*.

II. Governor and local elected official emergency authorities

This memorandum will focus on two sources of state-level emergency authority currently in effect: Powers exercised by the governor pursuant to the Kansas Emergency Management Act, specifically K.S.A. 48-924 and K.S.A. 48-925; and powers exercised by the secretary of health and environment pursuant to the

Infectious Disease Control provisions in article 9 of chapter 65.² The governor's proclamation of a state of disaster has activated the disaster response and recovery aspects of the state disaster emergency plan and of local and interjurisdictional disaster plans throughout the state. *See* K.S.A. 48-924(d).³ To the extent these disaster plans may conflict with municipal ordinances, the local ordinances must yield.⁴

A. Kansas Emergency Management Act – Governor authority

The Kansas Constitution vests in the governor the “supreme executive power” of the state. Kan. Const. Art. I, Sec. 3. The Kansas Emergency Management Act expressly places with the governor the responsibility “for meeting the dangers to the state and people presented by disasters.” K.S.A. 48-924(a). Thus, in the current circumstance, the emergency powers exercised by the governor under K.S.A. 48-924 and K.S.A. 48-925 are broad and take precedence over other exercises of state or local emergency power that may conflict with lawful orders of the governor.⁵ Put another

² Other sources of state-level emergency powers include power vested in the governor under the constitution, statutes, or common law of this state independent of K.S.A. 48-924 and 925, or powers vested by the constitution, statutes or common law in other state officials. This memorandum does not address any of those potential sources of emergency authority.

³ This memorandum does not address the contents of either the state plan or of any interjurisdictional or local plans. For additional guidance on requirements of the state-level disaster emergency plan that may affect law enforcement, please contact your local emergency manager or the Division of Emergency Management within the Adjutant General's Department, which is charged by law with preparing and maintaining the state disaster emergency plan, *see* K.S.A. 48-926, and with developing and revising any local and interjurisdictional disaster emergency plans. *See* K.S.A. 48-931. A state, local, or interjurisdictional disaster emergency plan may “place reliance upon [police forces] which are available for performance of functions related” to the declared emergency. K.S.A. 48-923(c). To the extent these plans require law enforcement to assist in their lawful execution, law enforcement is required to do so. *See generally* Attorney General Opinion 85-85 (sheriff required to assist in carrying out local emergency plans).

⁴ Municipal ordinances authorizing the mayor or other persons to act during a state of disaster emergency “shall be null and void” to the extent they conflict with the state disaster emergency plan, the applicable local disaster emergency plan, or the Kansas Emergency Management Act. K.S.A. 48-935.

⁵ This general principle can assist in resolving conflicts between or among emergency directives issued by various government authorities. However, this principle does not mean that the power of the governor is unlimited during a state of disaster emergency. The state and federal constitutions remain in force and effect and may not be suspended. Similarly, to the extent state constitutional, statutory or common law vests particular responsibilities with other officials in state government, the lawfulness of a governor's order in conflict with that law would be suspect. The governor's exercise of power, even during a state of disaster emergency, must remain lawful.

way, to the extent the governor's orders conflict with any local disaster emergency plan or local order, the governor's orders control.

1. Proclamation of a State of Disaster Emergency

The Kansas Emergency Management Act, K.S.A. 48-904 *et seq.*, authorizes the governor to proclaim a state of disaster emergency. K.S.A. 48-924(b)(1). The governor must proclaim a state of disaster emergency prior to exercising any of the emergency powers authorized by K.S.A. 48-925, and those powers remain available to the governor only while the state of disaster emergency remains in effect. On March 12, 2020, Governor Kelly proclaimed a state of disaster emergency in response to COVID-19, and it remains in effect statewide. *See Exhibit 1 attached.* The legislature subsequently adopted House Concurrent Resolution 5025, which has extended the state of disaster emergency until May 1, 2020, and establishes a mechanism by which the Legislative Coordinating Council may further extend the state of disaster emergency on a rolling basis for periods not to exceed 30 days each. *See Exhibit 2 attached.* The state of disaster emergency can be terminated by the governor at any time on her own authority or at the direction of the legislature acting through authority it has delegated to the Legislative Coordinating Council.

2. Orders by the Governor during State of Disaster Emergency

During a state of disaster emergency, the governor may exercise certain extraordinary statutory powers set forth in K.S.A. 48-925(c). These specific powers are exercised by the governor through the issuance of orders, "which shall have the force and effect of law" while the state of emergency exists. K.S.A. 48-925(b) and (d). The legislature retains authority to revoke any such order. *See K.S.A. 48-925(b).* In the current instance, the legislature has delegated the authority to revoke the governor's orders to the Legislative Coordinating Council, which must within 30 days review *every* order issued by the governor during the current state of disaster emergency and must review *certain* orders within three days. *See 2020 HCR 5025.*

Each executive order may, by its terms, determine the duration during which it is in effect, not to extend beyond the termination of the proclaimed state of disaster emergency. *See K.S.A. 48-925(b).* The duration of orders that by their terms expire may be extended by the governor so long as the proclaimed state of disaster emergency remains in effect. At the time of issuance of this memorandum, Governor Kelly has issued the following Executive Orders under authority of the March 12, 2020, proclamation of a state of disaster emergency:⁶

⁶ These orders are published on the governor's official website at <https://governor.kansas.gov/newsroom/executive-orders/> and on the Kansas State Library website at <https://kslib.info/Archive.aspx?ADID=553>. Because the list of Executive Orders changes frequently,

- Executive Order No. 20-03, Extending states of local disaster emergency relating to COVID-19
- Executive Order No. 20-04, Temporarily prohibiting mass gatherings to limit the spread of COVID-19
- Executive Order No. 20-05, Temporarily prohibiting utility and internet disconnects
- Executive Order No. 20-06, Temporarily prohibiting evictions and foreclosures (Rescinded and replaced by Executive Order No. 20-10);
- Executive Order No. 20-07, Temporarily closing K-12 schools to slow the spread of COVID-19
- Executive Order No. 20-08, Temporarily expanding telemedicine and addressing certain licensing requirements to combat the effects of COVID-19
- Executive Order No. 20-09, Conditional and temporary relief from certain motor carrier rules and regulations in response to the COVID-19 pandemic
- Executive Order No. 20-10, Rescinding Executive Order 20-06 and temporarily prohibiting certain foreclosures and evictions;
- Executive Order No. 20-11, Temporarily requiring continuation of waste removal and recycling services;
- Executive Order No. 20-12, Drivers' license and vehicle registration and regulation during public health emergency;
- Executive Order No. 20-13, Allowing certain deferred tax deadlines and payments during the COVID-19 pandemic.

No statute or constitutional provision expressly states when any such 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. However, any governmental action that deprives persons 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 law, *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 the orders may give rise to criminal penalties, *see* K.S.A. 48-939, this elementary

it is recommended to review the status of any particular Executive Order on a daily basis throughout the state of disaster emergency.

principle attaches to these executive orders. *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). While there is room for debate about when orders may become legally in effect, we recommend no *criminal* enforcement of these orders be undertaken until the orders are *published* by the secretary of state in the Kansas Register.⁷ That approach will provide the same notice that ordinarily is provided with acts of the legislature that affect constitutionally protected life, liberty, or property interests and should minimize due process concerns.⁸

Law enforcement should become familiar with the provisions of these executive orders, some of which are complex or nuanced, just as with statutes.

3. Role for law enforcement in enforcing governor's orders

Law enforcement officers may be under a duty and have authority to enforce certain orders of the governor issued pursuant to K.S.A. 48-925. Sources of that duty and authority include:

First, any “knowing and willful” violation of any “*lawful* order or proclamation” (emphasis added) of the governor issued pursuant to K.S.A. 48-925 is a class A misdemeanor. K.S.A. 48-939. Law enforcement officers have the same duty and authority to enforce these misdemeanors as to enforce any other misdemeanor. *See generally*, K.S.A. 22-2401(c) (discretionary authority for probable cause arrest). Please note that a law enforcement officer's decision regarding whether, how, and when to arrest a person for these misdemeanors remains purely *discretionary*. *Soto v. City of Bonner Springs*, 38 Kan. App. 2d 382, Syl. ¶ 4, 166 P.3d 1056 (2007), *aff'd*, 291 Kan. 73, 238 P.3d 278 (2010); *see also* K.S.A. 48-934 (providing immunity for law enforcement officers “while engaged in maintaining or restoring the public peace or safety or in the protection of life or property during a state of disaster emergency . . . so long as they act without malice and without the use of excessive or unreasonable force”).

Second, under certain circumstances, a law enforcement officer may be called upon and required to assist in enforcing lawful orders of the governor during a state of emergency *even if no crime has been committed*. This is most likely to occur under

⁷ The Kansas Register is available at https://www.kssos.org/pubs/pubs_kansas_register.asp.

⁸ The Kansas Constitution provides that statutes may take effect only when “published as provided by law.” Kan. Const. Art. 2, Sec. 19. Governors have traditionally filed each executive order with the secretary of state—a practice analogous to how acts of the legislature are caused to be published so they may satisfy the constitutional requirement for publication. *See also* K.S.A. 75-430(a)(2) (providing for publication in the Kansas Register of “all executive orders and directives of the governor” filed with the Secretary of State).

provisions of the state, interjurisdictional, or local disaster emergency plans. However, it also is possible that an express directive of the governor could displace or supplement the preexisting disaster plans and impose specific duties or authorities on law enforcement to assist in carrying out the orders of the governor. *See* K.S.A. 48-924(a) (governor “shall be commander-in-chief” of “all *other* forces available for emergency duty”) (emphasis added); *see also* K.S.A. 48-925(c)(2) (governor may “utilize all available resources ... of each political subdivision ... to cope with the disaster”), K.S.A. 48-925(c)(10) (governor may “require and direct the cooperation and assistance of ... local governmental agencies and officials”), K.S.A. 48-925(c)(11) (governor may “perform and exercise such other ... powers ... as are necessary to promote and secure the safety and protection of the civilian population). *See also generally* Attorney General Opinion 81-193 (sheriffs and other officials to comply with governor’s directives during state of disaster emergency).

B. Kansas Emergency Management Act—County commission/mayor authority

The Kansas Emergency Management Act contains a separate provision that authorizes the chairman of a board of county commissioners or the mayor of a city to declare a state of local disaster emergency. K.S.A. 48-932. In the current COVID-19 response, the governor has extended the statutory duration of any state of local disaster emergency declaration relating to COVID-19. As a result, all local declarations—absent revocation by local officials—will remain in effect during the governor’s proclamation of a state of disaster emergency. *See* Executive Order No. 20-03.

The effect of a declaration of a state of local disaster emergency is more limited than a governor’s declaration. The local declaration “shall activate the response and recovery aspects of any and all local and interjurisdictional disaster emergency plans which are applicable to such county or city,” K.S.A. 48-932(c), but there is no separate grant of specific statutory authority to local county commission chairpersons or mayors as there is to the governor while the local disaster emergency is in effect. *Compare* K.S.A. 48-925 (granting governor specific powers during state of disaster emergency) *with* K.S.A. 48-932 (no similar provisions for state of local disaster emergency). *See also* Attorney General Opinion 81-130 (“The power granted to the governor is defined by statute, while the powers of local officials are those contained in the applicable disaster emergency plans”).

As with a state of disaster emergency proclaimed by the governor, a knowing and willful violation of any lawful state of local disaster declared pursuant to K.S.A. 48-932 is a class A misdemeanor, *see* K.S.A. 48-939, and law enforcement has its ordinary discretionary authority to enforce this misdemeanor provision. In notable contrast with the powers granted to the governor, state law does not grant local county commissioners or mayors additional authority to require law enforcement to enforce

local orders during a state of emergency, except as may be provided in the state, interjurisdictional, or local disaster emergency plans. See Attorney General Opinion 84-78 (local disaster declaration cannot suspend regulatory statutes as governor can). However, law enforcement may lawfully be called upon to carry out non-criminal enforcement duties pursuant to a state, interjurisdictional or local disaster plan. See Attorney General Opinion 85-85 (“it is clear that the local disaster agency has the authority to require, and indeed, must rely on the services of local officials (including the sheriff) in planning to meet the demands of a disaster”).

III. Infectious Disease Control Act authorities

Unlike the federal government, states have broad police power to protect the health and safety of their populations.⁹ The state’s principal statute conveying authority to address infectious and contagious diseases is found in article 1 of chapter 65 of the Kansas Statutes Annotated.¹⁰ In 2005, the legislature enacted K.S.A. 65-129b, which superimposed broad and modern infectious disease control authorities on top of preexisting statutes, some of which are quite old or specific to particular diseases. The broad new statutory authority, which generally is available both to the secretary of health and environment and to local health officers, includes the following pertinent provision:

[W]hen the local health officer or the secretary determines that it is medically necessary and reasonable to prevent or reduce the spread of the disease or outbreak believed to have been caused by the exposure to an infectious or contagious disease, [he or she] may order an individual or group of individuals to go to and remain in places of isolation or quarantine until the local health officer or the secretary determines that the individual no longer poses a substantial risk of transmitting the disease or condition to the public. K.S.A. 65-129b(a)(1)(B).

Unlike powers granted to the governor or to other officials under the Kansas Emergency Management Act, the secretary or local health officer’s authority to exercise this power is not contingent on a state of local disaster emergency having been declared. Any person who “leaves any ... quarantined area without the consent

⁹ States may exercise these police powers to stop or impede the spread of infectious or contagious diseases. See generally *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (recognizing state authority to enact “quarantine laws and health laws of every description”)(internal quotations omitted); *Ex parte Irby*, 113 Kan. 565 (1923) (denying habeas corpus relief for person quarantined by order of local health officer); *Ex parte McGee*, 105 Kan. 574 (1919) (same); but see *Moody v. Wickersham*, 111 Kan. 770, 207 P. 847, 849 (1922) (order to confine individual to prevent spread of infectious disease must be lawful and not wanton or inhumane).

¹⁰ Other public health statutes also may be invoked, but the basic principles regarding the role of law enforcement in enforcing orders of the secretary of health and environment or of local health officers are the same.

no criminal conduct occurs.

even if

Ex parte Hooper,
Sedgwick County,

See, e.g., Noland v. Gardner,
Nyberg v. Bd. of Comm'rs of

Exhibit 1

This Proclamation shall be filed promptly with the Division of Emergency Management, the Office of the Secretary of State and each city clerk or county clerk, as appropriate, in the area to which this Proclamation applies. Further dissemination of this Proclamation shall occur by means calculated to bring its contents to the attention of the general public.

DONE At the Capitol in
Topeka Under the Great Seal of
the State this 12, day of March
A.D., 2020

THE GOVERNOR: Laura Bell
Scott Schwab
Secretary of State
Danett Re
Assistant Secretary of State

Exhibit 2

HOUSE CONCURRENT RESOLUTION No. 5025

A CONCURRENT RESOLUTION ratifying the March 12, 2020, State of Disaster Emergency declaration, subject to limitations, issued by Governor Laura Kelly and providing for the continuation thereof for the entire 105 counties of Kansas through May 1, 2020, subject to additional extensions of time.

WHEREAS, On March 12, 2020, Governor Laura Kelly issued a State of Disaster Emergency declaration in response to confirmed cases of novel coronavirus (COVID-19) in the state of Kansas and considers that a public health emergency exists within the state of Kansas. The United States Centers for Disease Control and Prevention (CDC) identifies the potential public health threat posed by COVID-19 both globally and in the United States as "high," and the United States Department of Health & Human Services declared a public health emergency for COVID-19 beginning January 27, 2020. The World Health Organization (WHO) declared a global pandemic on March 11, 2020: Now, therefore,

Be it resolved by the House of Representatives of the State of Kansas, the Senate concurring therein: That the State of Disaster Emergency declaration issued on March 12, 2020, for the entire 105 counties of Kansas in accordance with K.S.A. 48-924 is hereby ratified and continued in force and effect on and after March 12, 2020, through May 1, 2020, subject to additional extensions by concurrent resolution of the Legislature or as further provided in this concurrent resolution. If the Legislature is not in session:

(1) As described in K.S.A. 48-924(b)(3), upon specific application by the Governor to the State Finance Council, the State Finance Council may authorize once an extension of such state of disaster emergency by affirmative vote of a majority of the legislative members thereof for a specified period not to exceed 30 days; and

(2) following such State Finance Council action, the Legislative Coordinating Council, representing the Legislature when the Legislature is not in session pursuant to K.S.A. 46-1202:

(A) Is authorized to ratify a declaration, terminate a state of disaster emergency, revoke an order or proclamation or assume any other power granted to the legislature pursuant to K.S.A. 48-924 or K.S.A. 2019 Supp. 48-925;

(B) may authorize additional extensions of such state of disaster emergency by a majority vote of five members thereof for specified periods not to exceed 30 days each;

(C) shall meet not less than every 30 days to:

(i) Review the state of disaster emergency;

(ii) consider any orders or proclamations issued since the last Legislative Coordinating Council meeting; and

(iii) consider whether such orders or proclamations, if any, are an exercise of any power listed in K.S.A. 2019 Supp. 48-925(c)(2), (c)(4), (c)(7), (c)(8) or (c)(11); and

(D) 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). The chairperson of the Legislative Coordinating Council, in consultation with the attorney general, adjutant general and any other parties the chairperson deems necessary, shall determine if an order or proclamation that is an exercise of a power listed in K.S.A. 2019 Supp. 48-925(c)(2), (c)(4), (c)(7), (c)(8) or (c)(11) has been issued. If the chairperson determines that the order or proclamation is an exercise of such power, the Legislative Coordinating Council shall meet to consider such order or proclamation within three calendar days. At such meeting, the Legislative Coordinating Council may revoke such order or proclamation; and

Be it further resolved: That, for the purposes of this ratification, the Governor shall not have the power or authority to temporarily or

Chief Clerk of the House.



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TO: Kansas Prosecutors and Law Enforcement
FR: Attorney General Derek Schmidt
CC: Governor, Adjutant General, KHP Superintendent, KBI Director
DT: April 8, 2020
RE: Addendum 1 to March 24, 2020, law enforcement duties and authorities memorandum regarding restrictions on religious facilities, services or activities set forth in EO 20-18

This memorandum provides assistance to state and local law enforcement in determining their duties and authorities related to churches and other religious facilities, services or activities under specific provisions of Executive Order 20-18, which was issued by the governor on April 7, 2020. This new order must be read in conjunction with Executive Order 20-16, which continues to define the performance of or attendance at religious or faith-based services or activities as an essential function exempt from “stay-home” requirements.

The application of “mass gathering” restrictions to religious facilities, services or activities gives rise to legal concerns not presented in prior executive orders related to COVID-19.¹ Kansas statutory and constitutional law, which remain in effect, provide substantially more protection for Kansans’ fundamental religious freedoms than does federal law. These state legal protections for religious freedom cast serious doubt on the lawfulness of any threatened or actual arrest, prosecution or punishment for violating these newly ordered limitations on religious facilities, services or activities. Therefore,

¹ EO 20-18 also contains new requirements for non-religious funerals. This memorandum does not address those provisions of EO 20-18.

we strongly recommend Kansas law enforcement encourage cooperative compliance with these public health limitations, rather than criminally enforce them. During the current COVID-19 pandemic, most Kansas religious leaders already have canceled in-person group activities and worship services or have replaced them with online, remote services. Public health officials continue to urge religious organizations to cancel or strictly limit in-person meetings, including worship services, so as not to further the spread of the virus. Kansas has not experienced the sorts of cases, well-publicized in other states, where a few religious leaders willfully defied public health guidance and exposed their congregants to COVID-19.

EO 20-18, which by its terms takes effect today,² revises guidance for religious gatherings while it remains in effect. Its key changes are:

- “Churches or other religious facilities” are now expressly covered by the prohibition on “mass gatherings” rather than being exempted as they were previously.
- More than 10 people are prohibited from convening “in a confined or enclosed space at the same time,” including in churches or other religious facilities.
- “Churches or other religious services or activities” are prohibited from having more than 10 congregants or parishioners in the same building or confined or enclosed space, but a larger number of persons who are conducting the service itself may gather provided social distancing and similar requirements are maintained.

It should be noted that EO 20-18 does not prohibit Kansans from leaving their homes to perform or attend religious or faith-based services or activities,³ nor does it impose the new prohibition on gatherings exceeding 10 persons on religious gatherings that are not in “the same building or confined or enclosed space” (*e.g.*, outdoors).⁴ While compliance previously was voluntary, by virtue of the exercise of the governor’s emergency powers under K.S.A. 48-925(c) EO 20-18 on its face makes violation of these new limitations on certain religious gatherings that exceed 10 persons punishable by imprisonment and/or a fine. *See* K.S.A. 2019 Supp. 48-939.

² As we advised in our March 24, 2020, memorandum, due process considerations counsel that no criminal enforcement of any executive order issued under authority of K.S.A. 48-924 and 48-925 should be considered until such order is published in the Kansas Register in the same manner that acts of the legislature may be published to attain the force of law.

³ Executive Order 20-16 remains unchanged and continues to define performing or attending religious or faith-based services or activities as an essential function exempt from stay-home requirements although still subject to social distancing, hygiene and other COVID-19 prevention measures.

⁴ Requirements for social distancing, hygiene and other COVID-19 prevention measures remain in effect for all gatherings, including religious gatherings not subject to the new 10-person limitation.

The Office of 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. Nevertheless, for the legal reasons set forth below, we also strongly discourage law enforcement from attempting to enforce the requirements of EO 20-18 as violations of the criminal law.⁵

Analysis

In our view, Kansas statute and the Kansas Constitution's Bill of Rights⁶ each forbid the governor⁷ from criminalizing participation in worship gatherings by executive order.⁸ The Kansas Preservation of Religious Freedom Act, K.S.A. 2019 Supp. 60-5302 *et seq.*, ("Religious Freedom Act" or "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." *See* K.S.A. 2019 Supp. 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. *See* K.S.A. 2019 Supp. 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. *See* K.S.A. 2019 Supp. 60-5302(c). It restrains government from "substantially burden[ing]" the exercise of religion,

⁵ Violation of a lawful order issued pursuant to the emergency powers granted to the governor by K.S.A. 48-925, is a class A misdemeanor, which is punishable by up to 1 year of imprisonment in the county jail and/or up to a \$2,500 fine. *See* K.S.A. 48-939.

⁶ The First Amendment to the United States Constitution and/or federal statutes may also restrict or prohibit these provisions (and give rise to a claim for plaintiff's attorney fees), but this memorandum will confine its analysis to state-law limitations.

⁷ A similar analysis would apply to any similar order that burdened religious gatherings, such as a local order or an order of the Secretary of Health and Environment.

⁸ There exists a more fundamental question whether, or to what extent, the Kansas Constitution allows the legislature to delegate its law-making power to the governor as contemplated by K.S.A. 48-924 and 48-925. This memorandum does not address that question but observes that exercises of any such power by the governor (such as provisions in EO 20-18) that are in tension with the fundamental rights of Kansans protected by the people themselves through the Kansas Constitution's Bill of Rights and/or by separate legislative enactment such as the Kansas Preservation of Religious Freedom Act at a bare minimum strain the limits of the validity of any such delegation. *See, generally* Kan.Const.Art.2, §1 (vesting legislative power in the legislature); *see also generally* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

and “burden” specifically includes “assessing criminal ... penalties.” See K.S.A. 2019 Supp. 60-5302(a). There can be no doubt that imposing a criminal penalty of up to 1 year in jail and/or a \$2,500 fine constitutes a “substantial[]” burden.

Thus, EO 20-18 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 2019 Supp. 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. As described above, we have no doubt 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). It is doubtful 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. Current Centers for Disease Control guidance for faith-based organizations recommends a graduated approach based on community risk.⁹ That individually tailored less-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 the mass-gatherings order (Executive Order 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

⁹ 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 7, 2020).

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.

Separate from the Religious Freedom Act, the Kansas Supreme Court has recognized similar religious freedom protections in the Kansas Constitution’s Bill of Rights that 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 Authority*, 45 Kan. App. 2d 818, 849-50, 252 P.3d 141 (2011).

Conclusion

To help prevent the spread of COVID-19, the Office of the Attorney General advises Kansans to adhere to the limitations on religious and faith-based gatherings set forth in Executive Order 20-18. However, for the reasons set forth above, the provisions of the governor’s order that purport to *criminalize* certain gatherings for religious services or activities likely violate both state statute and the Kansas Constitution, which would render them void and unenforceable. Because no Kansan should be threatened with fine or imprisonment, arrested, or prosecuted for performing or attending church or other religious services (which even during the current state of disaster emergency remain an “essential function” recognized by EO 20-16), law enforcement officers are advised to encourage cooperative compliance with the new provisions of EO 20-18 and to avoid engaging in criminal enforcement of its limitations on religious facilities, services or activities.