

IN THE SUPREME COURT OF KANSAS

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

**MEMORANDUM IN SUPPORT
PETITION IN QUO WARRANTO**

INTRODUCTION

In the midst of the global COVID-19 pandemic that has already taken the lives of thousands of Americans, and with recent estimates from the President of the United States that as many as 240,000 Americans could die from this modern-day plague,¹ Governor Kelly proclaimed a State of Disaster Emergency within Kansas relating to COVID-19 on March 12, 2020. *See* Exhibit A. President Trump, similarly, declared a national emergency on March 13, 2020. *See* Exhibit B. The federal Centers for Disease Control'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)."² 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,

¹ Phillip Rucker and William Wan, "Trump projects up to 240,000 coronavirus deaths in U.S., even with mitigation efforts," *The Washington Post* (March 31, 2020), available at https://www.washingtonpost.com/politics/trump-white-house-projects-up-to-240000-coronavirus-deaths-in-us-even-with-mitigation-efforts/2020/03/31/62df5344-7367-11ea-87da-77a8136c1a6d_story.html (last visited April 8, 2020).

² *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited April 8, 2020).

2020.³ To implement these lifesaving, social distancing rules, on April 7, 2020, Governor Kelly issued Executive Order No. 20-18 (EO 20-18), which temporarily prohibits mass gatherings of more than 10 people to limit the spread of COVID-19. *See* Exhibit D.

The Kansas Legislature, in response to EO 20-18, seeks to circumvent the plain text of the Kansas Emergency Management Act—namely, K.S.A. 48-925(b)—by issuing Kansas House of Representatives' Concurrent Resolution 5025 § (2)(D) (HCR 5025). *See* Exhibit C. The Kansas Emergency Management Act empowers the legislative branch of government with three distinct checks upon gubernatorial authority in the time of an emergency, including the power to revoke a governor's emergency order.⁴ Per statutory mandate, however, these legislative oversight powers must be exercised by the Legislature as a whole by concurrent resolution or once by the legislative members of State Finance Council. *See* K.S.A. 48-924(b)(3); 48-924(b)(5); 48-925(b).

HCR 5025 § (2)(D), however, attempts to reallocate the power to revoke emergency order, which is held only by the legislature as a whole, to the 7-person Legislative Coordinating Council (LCC). Purporting to exercise this reallocation of authority, the LCC on April 8, 2020 stated that it had revoked EO 20-18—a reckless act that thwarts President Trump and the CDC's lifesaving guidance on the need for social distancing. *See* Exhibit E.

Not only does this action threaten the lives of Kansans, it runs directly contrary to the Kansas Constitution. If the Legislature seeks to amend the Kansas Emergency Management Act, it must do so by way of the constitutionally prescribed legislative process—not by mere concurrent

³ 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-social-distancing-for-next-month> (last visited April 8, 2020).

⁴ First, K.S.A. 48-924(b)(5) states that "[a]t any time, the legislature by HRC may require the governor to terminate a state of disaster emergency." Second, K.S.A. 48-925(b) states that "[the Governor's emergency] orders and proclamations may be revoked at any time by HRC of the legislature." And third, K.S.A. 48-924(b)(3) provides "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."

resolution. Article 2, § 20 of the Kansas Constitution requires that the Legislature proceed with legislation by the introduction of bills. *See* Kan. Const. art. 2, § 20 ("No law shall be enacted except by bill."). HCR 5025 § (2)(D) is not a bill. Article 2, § 14 of the Kansas Constitution requires presentment of a bill to the governor in order to amend existing statutes. *See* Kan. Const. art. 2, § 14(a) ("every bill shall be . . . presented to the governor."). HCR 5025 § (2)(D) was not so presented to any Kansas governor. As such, any attempt to exercise revocation authority over Governor Kelly's emergency orders, which Kansas statutes explicitly vest with the Legislature as a whole or the Kansas Finance Council, by the LCC is unconstitutional. *See, e.g., State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 64 (1984).

This constitutional infirmity, coupled with magnitude of flaunting the social distancing rules prescribed by the CDC and President Trump, demand that the Governor seek this quo warranto action as a matter of original jurisdiction in this Court. *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."). The Governor respectfully requests that this Court declare that § (2)(D) of HCR 5025 violates the Kansas Constitution; void the LCC's April 8, 2020 Statement; and enjoin the LCC from taking any future action under HCR 5025 § (2)(D)'s presumed reallocation of authority.

STATEMENT OF FACTS

According to the federal CDC, COVID-19 is a virus that attacks the respiratory system.⁵ There is no vaccine. *Id.* There is no anti-viral treatment. *Id.* While most who are infected with COVID-19 suffer mild to moderate symptoms, some "patients have pneumonia in both lungs,

⁵ 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).

[and] multi-organ failure" that leads to death. *Id.* Because of the exceptionally high rate of infection, many hospitals have become overrun with COVID-19 patients, leading the hardest hit locations to consider triage protocols.⁶

The numbers are staggering. To date, the world has suffered more than 1.4 million COVID-19 infections this spring alone.⁷ As of April 8, 2020, the CDC reported that COVID-19 had infected approximately 395,000 Americans, causing nearly 13,000 American deaths.⁸ Moreover, April 7, 2020 was the United States' worst death toll date so far, with more than 1800 Americans dying from COVID-19 complications on that date alone.⁹

As of this filing, Kansas has suffered 1,046 COVID-19 cases, with 38 deaths.¹⁰ It is believed that the peak of infections in Kansas will occur on approximately April 18, 2020.¹¹ With strict social distancing rules in place, it is believed that Kansas will not overrun its hospitals and that the state will still suffer a devastating 300 COVID-19-related deaths by August. *Id.* Experts warn, however, that "the trajectory of the pandemic will change – and dramatically for the worse – if people ease up on social distancing or relax with other precautions. Our projections are strengthened by the new downturns in more regions. This is evidence that social distancing is crucial. Our forecasts assume that social distancing remains in place until the end of May." *Id.*

⁶ See Mike Baker and Sheri Fink, "At the Top of the Covid-19 Curve, How Do Hospitals Decide Who Gets Treatment?," The New York Times, available at <https://www.nytimes.com/2020/03/31/us/coronavirus-covid-triage-rationing-ventilators.html> (last visited April 8, 2020).

⁷ "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).

⁸ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited April 8, 2020).

⁹ See *supra* note 7.

¹⁰ See https://public.tableau.com/profile/kdhe.epidemiology#!/vizhome/COVID19Data_15851817634470KSCOV19CaseData (last visited April 8, 2020); see also "Coronavirus in the U.S.: Latest Map and Case Count", The New York Times, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited April 8, 2020).

¹¹ "When will COVID-19 peak in Kansas? Institute for Health Metrics and Evaluation updates model," KSN.com News (April 6, 2020), available at <https://www.ksn.com/news/health/coronavirus/coronavirus-in-kansas/when-will-coronavirus-peak-in-kansas-institute-for-health-metrics-and-evaluation-updates-model/> (last visited April 8, 2020).

Indeed, 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)."¹²

Facing this global pandemic, pursuant to K.S.A. 48-924(b), on March 12, 2020, Governor Kelly proclaimed a State of Disaster Emergency within Kansas relating to COVID-19. *See* Exhibit A. President Trump, similarly, declared a national emergency on March 13, 2020. *See* Exhibit B. On March 19, 2020, the Kansas Senate adopted the Kansas House of Representatives' HCR 5025. *See* Exhibit C. 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 . . .*").

Pursuant to K.S.A. 48-925, on April 7, 2020, Governor Kelly issued EO No. 20-18, which temporarily prohibits mass gatherings of more than 10 people to limit the spread of COVID-19. *See* Exhibit D. As the CDC¹³ and President Trump¹⁴ have made clear, social distancing until at least April 30, 2020, is a public health imperative. Governor Kelly's order follows this federal guidance.

In addition to ratifying Governor Kelly's disaster proclamation, HCR 5025 § (2)(D) attempts to reallocate authority to revoke gubernatorial emergency orders to the LCC. 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* Exhibit E.

The Governor filed this quo warranto action on April 9, 2020.

¹² *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited April 8, 2020).

¹³ *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited April 8, 2020).

¹⁴ 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-social-distancing-for-next-month> (last visited April 8, 2020).

ARGUMENTS AND AUTHORITIES

A. The Kansas Constitution Article 3, § 3 and K.S.A. 60-1201 Vest this Court with Original Jurisdiction.

This is an original action in quo warranto pursuant to K.S.A. 60-1201, *et seq.* The Kansas Constitution Art. 3, § 3 vests original jurisdiction for such actions in this Court. Similarly, K.S.A. 60-1202 also places original jurisdiction in this Court. *See, e.g., State ex rel. Schmidt v. Kelly*, 309 Kan. 887, 890 (2019). 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.

B. Standard of Review.

As in any matter, this Court holds plenary power when interpreting statutes and constitutional provisions in this original proceeding. *Cf. Kansas One-Call System v. State*, 294 Kan. 220, 225 (2012); *Most Worshipful Grand Lodge v. Board of Shawnee County Comm'rs*, 259 Kan. 510, 514–15 (1996).

Relief in quo warranto is discretionary. *State ex rel. Schmidt*, 309 Kan. at 890. This Court should exercise its discretion to provide relief in this matter for two reasons. First, Petitioner asserts that she believes the material facts as stated in the Petition and this memorandum in support are not in dispute, rendering this case appropriate for this Court's original jurisdiction. *Cf. Sedlak v. Dick*, 256 Kan. 779, 782 (1995) (noting that the lack of a material factual dispute of importance in original jurisdiction cases). Second, this Court hears quo warranto proceedings only if it determines the issue is of sufficient public concern. *State ex rel. Schmidt*, 309 Kan. at 890. This

Court found this standard met in *State ex rel. Schmidt* when facing the issue of the timeliness of an appellate judge's appointment. *Id.* at 890–91. Here, the state faces a global pandemic with the Governor and the LCC providing contrary emergency orders. Under the *State ex rel. Schmidt* standard, this matter is of sufficient public concern.

C. HCR 5025 § (2)(D) Attempts to Amend the Kansas Emergency Management Act in Violation of the Kansas Constitution Article 2, § § 14(a) and 20.

Quo warranto relief lies in this case. An action in quo warranto demands that an individual or entity show by what authority it has engaged in the challenged action. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 656, (2016). Further, K.S.A. 60-1202(1) provides an action in quo warranto may be brought in the Supreme Court: “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.” As this Court has held, a K.S.A. 60-1201 writ of quo warranto “may issue when it is alleged that the separation of powers doctrine has been violated. A violation of the separation of powers doctrine can result when legislation permits one branch of government to usurp or intrude into the powers of another branch of government.” *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 880 (2008).

Here, Governor Kelly challenges the Legislature's attempt to reallocate its emergency management oversight powers codified in K.S.A. 48-925(b) to the LCC and the LCC's subsequent statement attempting to revoke EO 20-18. The Legislature and the LCC lack authority to take these actions because they violate the Kansas Constitution's requirement that statutory amendment proceed by the introduction of a bill and gubernatorial presentment. *See* Kan. Const. art. 2, §§ 14 and 20.

Fundamentally, this case boils down to following the provisions of Kansas statute and respect for the rule of law. Governor Kelly has rigorously adhered to the text of the Kansas

Emergency Management Act during the COVID-19 pandemic. Pursuant to explicit statutory authority in K.S.A. 48-924(b)(1), the Governor issued a State of Disaster Emergency proclamation. *See* Exhibit A. Following this proclamation, the Legislature ratified her proclamation and extended the disaster declaration until May 1, 2020. *See* Exhibit C. After this legislative ratification, the Governor, again pursuant to explicit statutory authority, in EO 20-18 limited gatherings of more than 10 people within the disaster area. *See* 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."). In these many actions, the Governor's "authority is at its maximum," when, as here, she "acts pursuant to an express . . . authorization of" the legislature as embodied in statute. *See Youngstown Sheet & Tube Company v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (addressing emergency action taken by the federal chief executive that lacked statutory authorization during the Korean War); *see also State ex rel. Morrison*, 285 Kan. at 883 (citing and applying Justice Jackson's concurring opinion in a quo warranto, separation of powers opinion).

In hewing closely to the statutory text, one sees that while our Kansas constitution and the Kansas Emergency Management Act vest great authority in the Governor during a time of emergency, they are not blank checks. The plain text of the Kansas Emergency Management Act empowers the Legislature to check potential abuses of executive authority in three meaningful ways.

Indeed, the Kansas Emergency Management Act could not be clearer. First, K.S.A. 48-924(b)(5) provides that "[a]t any time, the **legislature by concurrent resolution** may require the governor to terminate a state of disaster emergency." (Emphasis added). Moreover, K.S.A. 48-925(b) states that "[the Governor's emergency] orders and proclamations may be revoked at any

time **by concurrent resolution of the legislature.**" (Emphasis added). As yet a further check upon the executive, KSA 48-924(b)(3) provides that "no state of disaster emergency may continue for longer than 15 days unless ratified **by concurrent resolution of the legislature,** with the single exception 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).

Despite this plain text, HCR 5025 § (2)(D) attempts to reallocate authority to revoke gubernatorial emergency orders to the LCC, stating that the LCC, when the Legislature is not in session, "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)." This attempted reallocation constitutes a direct violation of the plain text of K.S.A. 48-925(b), which limits such revocation power to the Legislature as a whole via concurrent resolution. Indeed, rather than exercise these checks upon gubernatorial emergency authority by concurrent resolution of the Legislature, as required by statute, HCR 5025 § (2)(D) attempts to vest this power in the 7-person LCC.

The Legislature may no more ignore the plain text of a Kansas statute than the Governor or the Judiciary. As this Court has often held, 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). Thus, the carefully crafted statutory plan codified at K.S.A. 48-924 and 48-925 controls. These provisions provide that executive oversight in emergencies must be done by the legislature as a whole via concurrent resolution or by the legislative members of the Kansas Finance Council. The statute simply does not provide other options.

As the Legislature may not simply choose to ignore the plain text of Kansas statutory law, the only possible reading of HCR 5025 § (2)(D) is that it constitutes a full-throated attempt to

amend to the legislative oversight provisions of the Kansas Emergency Management Act. 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. The Legislature has complied with **none** of these rules here.

Article 2, § 20 of our state Constitution requires that the Legislature enact statutes by the introduction of a bill. *See* Kan. Const. art. 2, § 20 ("No law shall be enacted except by bill."). HCR 5025 § (2)(D) is not a bill as defined by the Kansas Constitution Art. 2, § 20. This point is evidenced by the fact that our Constitution treats bills and concurrent resolutions separately throughout the document. *See, e.g.*, Kan. Const. art. 2, § 8 ("Bills and concurrent resolutions under consideration by the legislature upon adjournment..."); art. 2, § 10 ("The affirmative and negative votes upon the final passage of every bill and every concurrent resolution..."); art. 2, § 12 ("Bills and concurrent resolutions may originate in either house, but may be amended or rejected by the other.").

Article 2, § 14(a) of the state Constitution requires that bills be presented to the governor before enactment. *See* Kan. Const. art. 2, § 14(a) ("every bill shall be . . . presented to the governor."). The Legislature did not present HCR 5025 § (2)(D) to Governor Kelly pursuant to the Kansas Constitution Art. 2, § 14.

As a result, the plain language of K.S.A. 48-924(b) and 48-925 control the legislative revocation of the Governor's emergency orders, because the Legislature may not amend the Kansas Emergency Management Act by way of HCR 5025 § (2)(D). This Court's holding are clear and unambiguous on this point. "Article 2, s 20, of the Kansas Constitution is a restriction upon the legislature's power to make a new law except in the manner prescribed." *State v. Kearns*, 229 Kan. 207, 209 (1981). Substantial compliance with, or "close enough" approaches to, the dictates of

Article 2, § 20 do not suffice. *Id.*¹⁵ This Court has often held that statutes may not be functionally amended by concurrent resolution. *See, e.g., State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 64 (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). This Court, applying *Stephan*, more recently also held that changes to legislative plans require reenactment of a statute through the entry of a bill and eventual presentment—mere concurrent resolution cannot suffice to alter statutory provisions. *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 264 Kan. 293, 316 (1998). As such, the Legislature may not constitutionally alter the legislative oversight plan embodied in the Kansas Emergency Management Act by way of HCR 5025 § (2)(D).

D. HCR 5025 § (2)(D) is Not a Valid Delegation of Authority to the LCC Because the Legislature Lacks Out-of-Session Oversight Authority in the First Instance and Because the LCC Lacks Statutory Authority to Exercise Such Policymaking Power.

The inevitable conclusion that HCR 5025 § (2)(D) attempts to unconstitutionally amend the Kansas Emergency Management Act cannot be avoided by construing the concurrent resolution as a delegation of authority from the Legislature to the LCC. First, delegation of authority can only occur when the Legislature has authority in the first instance that it can delegate. Here, the revocation power in HCR 5025 § (2)(D) is predicated upon the Legislature not being in session: "the Legislative Coordinating Council, representing the Legislature when the Legislature is not in session . . . 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)." Nothing in K.S.A. 48-924(b)(3), 48-924(b)(5), or 48-925(b) speak to legislative oversight of the Governor's emergency

¹⁵ This Court's opinion in *State, ex rel. v. Knapp*, 102 Kan. 701 (1918) could be seen as inconsistent with this plain meaning of the Kansas Constitution Article 2, § 20. "To the extent that [this understanding of *Knapp*] is inconsistent with this [plain-meaning of Article 2, § 20] holding, our opinion in *Knapp* is overruled." *Kearns*, 229 Kan. at 209.

orders when the legislature is not in session.¹⁶ There is simply no out-of-session power for the HCR 5025 § (2)(D) to delegate. As such, there is no other conclusion than that HCR 5025 § (2)(D) is an attempt to unconstitutionally amend the Kansas Emergency Management Act.

Second, even if this Court were to conclude that the Kansas Emergency Management Act had some unstated, out-of-session, legislative oversight power, it could not be delegated to the LCC. The LCC has "authority over . . . legislative services" only. K.S.A. 46-1202. While the LCC does "represent the legislature when the legislature is not in session," it does so in the limited capacity of ensuring the continued delivery of legislative services. *Id.* The LCC's duties are thus limited to governing "the mechanics and procedure of all legislative committee work and activities" when the Legislature is not in session. *Id.* To this end, the LCC may purchase personal property or arrange for service contracts on the Legislature's behalf. K.S.A. 46-1204. Similarly, the LCC may appoint committees of various types, K.S.A. 46-1205, commission legislative studies, K.S.A. 46-1206, and sell copies of its publications, K.S.A. 46-1207a.

What the LCC's organic statute does not authorize, however, is for the LCC to exercise the general policymaking functions of the Legislature, such as conducting executive emergency order oversight, when the Legislature is not in session. Moreover, HCR 5025 § (2)(D) cannot remedy this lack of LCC authority precisely because in order for the LCC to exercise this type of power, K.S.A. 46-1201 *et seq.* would have to be amended. But, as discussed above, such amendment requires conformity with the Kansas Constitution Article 2, §§ 14(a) and 20 requirements that are lacking here.

¹⁶ K.S.A. 48-924(b)(4) does speak to oversight when the Legislature is not in session. But this provision applies only to animal-borne contagions, and it vests this in-recess oversight power in the Finance Council. As such, it is not applicable here.

And, third, even if this Court held that the LCC could exercise emergency order revocation authority under K.S.A. 46-1201 *et seq.*, such a delegation of policymaking authority would be unconstitutional. This Court has consistently held that "the legislature may not abdicate its function and delegate that power to a governmental agency, official, board, or to a private organization or person." *Sedlak v. Dick*, 256 Kan. 779, 798 (1995); *see also State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 264 Kan. 293, 303 (1998) ("If the constitution does not authorize a delegation of such legislative power, then the delegation is improper as a violation of the separation of powers doctrine and art. 2, § 1, which vests legislative power with the legislature only."); *State ex rel. Fatzer v. Urban Renewal Agency of Kansas City*, 179 Kan. 435, 440 (1956) (similar). Given the nature of the oversight power at issue in the revocation of a governor's emergency order, this function is one that would be improper to delegate as a matter of separation of powers. *See Tomasic*, 264 Kan. at 303.

E. Section (2)(D) of HCR 5025 is Severable for the Remainder of the Resolution.

HCR 5025 § (2)(D) may be severed from the rest of the resolution. Petitioner does not believe this Court has previously addressed whether a severability analysis, which normally applies in the case of statutes suffering from constitutional infirmities, applies equally to a concurrent resolution such as 5025 § (2)(D). Assuming that such an analysis does apply, section (2)(D) is readily severable from the resolution.

This Court applies the following severability standard.

Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that the act would have been passed without the objectionable portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand. Whether the legislature had provided for a severability clause is of no importance. This court will assume severability if the unconstitutional part can be severed without doing violence to legislative intent.

Brennan v. Kansas Ins. Guar. Ass'n, 293 Kan. 446, 463, 264 P.3d 102, 114–15 (2011) (internal quotations omitted).

In applying this standard, it is clear that the Legislature intends the remainder of HCR 5025 to apply. First, in the face of the global COVID-19 pandemic, the Legislature clearly intended to ratify the Governor's emergency declaration and extended its operative force until May 1, 2020 in line with the President's call for social distancing until at least April 30, 2020, regardless of who conducts oversight and revocation of emergency gubernatorial orders. *See* HCR 5025 ¶ 2. Similarly, regardless of who conducts oversight and revocation of emergency gubernatorial orders, the Legislature clearly intends to bar the Governor from seizing, or limiting the sale of, firearms or ammunition. *See* HCR 5025 ¶ 9. In this same vein, regardless of who conducts oversight and revocation of emergency gubernatorial orders, 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. These remaining provisions, moreover, operate effectively to carry out the Legislature's intent even with the excision of § (2)(D). As such, this Court's general assumption of severability should apply as "no violence" will have been done to the overall legislative intent.

CONCLUSION

This Court should grant the Governor's quo warranto action and requested relief. HCR 5025 § (2)(D) is either a blatant act of disregard of the plain text of the Kansas Emergency Management Act or an unconstitutional attempt to amend it. Similarly, HCR 5025 § (2)(D) cannot be squared as a delegation of legislative power to the LCC. And, finally, § (2)(D) is readily severable from the remainder of the resolution. The Governor respectfully requests, therefore, that this Court declare that § (2)(D) of HCR 5025 violates the Kansas Constitution; void the LCC's

April 8, 2020 action; and enjoin the LCC from taking any future action under HCR 5025 § (2)(D)'s presumed reallocation of authority.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I certify that on April 9, 2020, a true and correct copy of the above filing was served in accordance with Kansas Supreme Court Rule 9.01 and K.S.A. 60-205, on Respondents by e-mail with additional courtesy copies by personal service at the addresses of Respondents' state offices listed below, and further additional courtesy copies by personal service to Respondent's residences, not listed for privacy reasons to:

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