

TO: Representative Fred Patton, Chairman
Ranking Minority Member John Carmichael
Members of the House Judiciary Committee

FROM: Will Lawrence, Chief of Staff, Governor Laura Kelly

DATE: May 18, 2020

RE: Kansas Emergency Management Act and Governor Kelly's Emergency Declarations Regarding COVID-19

Chairman Patton, Ranking Member Carmichael, and Members of the Committee:

Thank you for the opportunity to testify on behalf of Governor Kelly regarding the Kansas Emergency Management Act ("KEMA") and Governor Kelly's Emergency Declarations issued regarding COVID-19. In my testimony, I have been asked to address three points:

- (1) What is the current status of the Governor's emergency declaration?
- (2) Under current law, what happens moving forward with the current declaration and what happens once the current declaration expires? How does this impact federal funding and emergency orders?
- (3) Any recommended changes to current law and/or concerns with making changes? (Short-term only. A more comprehensive review would need to be done in a future legislative session).

I will address each of these questions in turn below.

1. The current status of the Governor's Emergency Declaration.

Governor Kelly issued an emergency declaration on March 12, 2020 ("March 12 Emergency Declaration"), declaring an emergency existed in Kansas related to COVID-19. On March 13, 2020, the President of the United States declared an ongoing COVID-19 pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia pursuant to Section 501 (b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121-5207 (the "Stafford Act"). Additionally, on the same day, the President of the United States declared that the COVID-19 outbreak in the United States constitutes a national emergency beginning March 1, 2020, 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). The March 12 Emergency Declaration was extended by HCR 5025 to May 1, 2020, in accordance with K.S.A. 48-924.

While HCR 5025 did allow for additional extensions of the March 12 Emergency Declaration by the State Finance Council (“SFC”) and the Legislative Coordinating Council (“LCC”), those mechanisms were called into question by Justice Biles and Justice Stegall in their concurring opinions¹ striking down the LCC’s action to revoke the Governor’s Executive Order 20-18. Given those infirmities, discussion between the Governor’s Office and Legislative Leadership determined that requesting an extension by SFC to “trigger” the LCC authorities until HCR 5025 would be problematic. Therefore, the legislature needed to return prior to May 1, 2020, to remedy the issue with the expiring May 12, 2020 declaration.

The LCC met on April 22, 2020, to determine if the legislature would reconvene on April 27, 2020, for the regularly scheduled Veto Session. At the April 22, 2020, meeting, I appeared on behalf of Governor Kelly and was asked to explain the status of the March 12 Emergency Declaration and what was at risk related to its expiration.² I discussed some examples of the activities being conducted under the declaration that would need to continue for a period longer than May 1, 2020, and expressed concern that we were unsure what would happen with our federal assistance. Tom Day provided some important statistics to Legislative Leadership regarding the make-up of the legislature. According to Mr. Day, 30 of the 40 senators and 78 of the 125 representatives are considered “at-risk” of contracting COVID-19.³ Mr. Day stated that this means 65.5% of legislators are “at-risk.” Based on that information, the LCC took unanimous action to delay the reconvening of the legislature from April 27, 2020, because it was unsafe to do so, and directed the LCC to review the status of the pandemic on May 6, 2020, to determine if the legislature could safely return.

It is also important to note that both Speaker Ryckman and Senate President Wagle opined in the April 22, 2020, LCC meeting that while Governor Kelly could not extend the March 12 Emergency Declaration, that the Governor could avoid the issues I raised by issuing a new emergency declaration.⁴ Given that the legislature had taken the action to not reconvene prior to May 1, 2020, to resolve the issue regarding extending the March 12 Emergency Declaration, Governor Kelly reviewed her legal options regarding the possibility of issuing a new emergency declaration. First, and foremost, pursuant to Article 1, Section 3 of the Kansas Constitution, the governor is “. . . responsible for the enforcement of the laws of this state.” KEMA provides that the governor is “. . . responsible for meeting the dangers to the state and the people presented by disasters.” K.S.A. 48-924(a). KEMA also requires that the governor “. . . upon finding that a disaster has occurred or that occurrence or the threat thereof is imminent, **shall issue** a proclamation declaring a state of emergency.” K.S.A. 48-924(b)(1) (emphasis added). When an emergency exists, the governor has no choice – she must declare an emergency

¹ *Kelly v. Leg. Coordinating Council*, 460 P.3d 832 (Kan. 2020).

² Legislative Coordinating Council Meeting, April 22, 2020, at 15 minute and 45 second mark, retrievable at <http://sg001-harmony.sliq.net/00287/Harmony/en/PowerBrowser/PowerBrowserV2/20200422/1/9511>

³ Id., at 10 minute and 30 second mark.

⁴“House Speaker Ron Ryckman and Senate President Susan Wagle, two Republicans on the LCC, said the governor could retain all her emergency authority by issuing a new disaster declaration. The process doesn’t allow her to simply extend the existing order.” See <https://www.cjonline.com/news/20200422/kansas-coronavirus-update-legislative-session-delayed-two-thirds-of-lawmakers-at-risk-of-contracting-virus>

and fulfill her statutory and constitutional responsibility to “[meet] the dangers to the state and the people.”

Given those responsibilities, and assurances from our federal partners that issuing a second declaration would not jeopardize our federal resources, Governor Kelly issued a second emergency declaration on April 30, 2020, for an additional 15-day period under KEMA. She then requested SFC ratify a 30-day extension pursuant to the same act. The SFC met on May 13, 2020, to consider Governor Kelly’s request. The SFC approved extending the April 30 Emergency Declaration to May 26, 2020, to provide the legislature time to either extend the declaration by joint resolution or implement statutory changes to KEMA. This is where we currently stand with the April 30 Emergency Declaration.

2. Under current law, what happens moving forward with the current declaration and what happens once the current declaration expires? How does this impact federal funding and emergency orders?

As stated above, the current April 30 Emergency Declaration is in effect until May 26, 2020. It is incumbent on the legislature to ensure that this declaration does not expire and is, instead, extended. While we have been given assurances from our federal partners such as FEMA and the National Guard Bureau that our federal resources will continue, there have been discussions that the Stafford Act does require a state declaration to be in effect. are not in jeopardy under the current April 30 Emergency Declaration, the Stafford Act requires a state declaration to be in place in order for significant federal support to continue. In addition to federal resources, there are many state resources that local communities rely on that can only be provided under a state declaration. 99.9% of state declared emergencies do not require executive orders to be issued. We are truly in the 0.01% of state emergencies with the COVID-19 pandemic. While there are many executive orders that are non-controversial and extremely important across the state, there are many other reasons to maintain the state declaration.

The state response plan, which can only be implemented and followed pursuant to a state declaration, requires that all requests for supplies and resources from local communities go through their local emergency management system, which is triggered once the local county declares an emergency for their county. In that scenario they are required to exhaust their local resources and then come to the state for additional resources. The state cannot provide those resources to local communities without a state declaration. On several occasions, we have extended a state declaration for the remainder of the year due to these issues. Most recently, the legislature extended Governor Kelly’s emergency declaration related to the 2019 flood response for the remainder of the 2019 calendar year through the first week of the 2020 legislative session. Similarly, this was done during the Greensburg tornado response in 2007. K.S.A. 48-924a. Last year, KDEM was engaged in hauling drinking water to a community in Jefferson County through most of last year because flooding had displaced their water management system. That could not have continued without the state declaration.

KDHE, KDEM and KSNG are all working under the current state declaration to do community-based testing throughout the state, assist in distribution of food to local communities, provide supplies such as PPE to local health departments, local hospitals, first responders, other

healthcare providers such as dentists, and other essential critical infrastructure employees when available. We are also providing non-congregate housing across the state for employees working in our meat packing and processing plants so they have somewhere to reside without risking exposure their families and further spreading COVID-19. This is extremely important as we continue to re-opening the state. Additionally, given the status of the rate of COVID-19 cases in our correctional facilities such as Lansing, we need to have access to the state declaration to bring personnel from our local communities into those facilities to assist with staffing. These are just a few examples of the activities occurring that need to continue to happen and those can only happen under a state declaration.

3. Recommended short-term changes to current law and/or concerns making such changes

While there have been some concerns raised about KEMA in the current emergency response, it is important that significant changes not be rushed through without proper vetting. There is no question that a comprehensive review and study of the response to COVID-19 is necessary and Governor Kelly supports undergoing that review. However, making sweeping changes to KEMA during the middle of the emergency response to the COVID-19 pandemic will undoubtedly cause unforeseen issues that will likely jeopardize the health and safety of everyday Kansans. Even as we are carefully re-opening the state, there have been many reports of the potential for a second wave of COVID-19 in the fall. The state must be able to continue to plan for this and continue to identify and obtain resources to be prepared. Those preparations are necessary to ensure that Kansas does not have to do the type of things it did with the initial onset of COVID-19.

The most prudent approach to handling this situation would be for the legislature to extend the April 30 Emergency Declaration by a joint resolution. The original HCR 5025 that was passed by the House 116-0 on March 13, 2020, accomplished this by extending the March 12 Emergency Declaration to January 25, 2021, once the legislature could return and review whether the declaration needed to continue or could be allowed to expire. However, if the legislature intends to make changes to KEMA on Sine Die, it is imperative that any attempts to make those changes be done through a bill and not through a concurrent resolution. The use of a concurrent resolution as contemplated under KEMA is the tool used by the legislature to extend a governor's emergency declaration. One of the major issues with HCR 5025 was that it attempted to make changes to the statute through a concurrent resolution that is not presented to the governor for signature as contemplated by the *Kansas Constitution*. While HCR 5025 was an effort to reach consensus among members of the legislature before leaving town due to the threat of COVID-19, it went beyond what can be done by a legislative resolution.

With that being said, there are limited changes to KEMA that Governor Kelly supports. K.S.A. 48-924(b)(2) was implemented in relation to quarantine to prevent the spread among domestic animals of any contagious or infectious disease and provides under K.S.A. 48-924(b)(4) the SFC the authority to do additional 30-day extensions by specific application of the Governor. This certainly makes sense given that preventing the spread of contagious or infectious disease may take longer than the typical emergency response related to wild fires, floods and tornadoes. This procedure provides an important review of the status of the

emergency every 30 days by the SFC and would likely eliminate the need of the legislature to extend a declaration for long periods such as last year and in 2007. It would be most appropriate to use the SFC for this mechanism given that it is the entity that is currently contemplated by KEMA. KEMA requires that a majority of the legislative members approve the governor's application for extension which maintains the important checks and balances.