



KANSAS JUSTICE INSTITUTE

April 8, 2020

The Honorable Laura Kelly
Governor of the State of Kansas
Capitol, 300 SW 10th Avenue, Suite 241S
Topeka, Kansas 66612

Dear Governor Kelly,

Executive Order 20-14 exempted faith-based services or activities from mass gathering bans so long as precautionary measures were taken. The exemption was reasonable, appropriate, and in our view, constitutional.

The Kansas Constitution Bill of Rights provides even greater free-exercise protection than the First Amendment to the United States Constitution. *Stinemetz v. Kansas Health Policy Auth.*, 45 Kan.App.2d 818 (2011). Any executive order¹ that substantially burdens the free exercise of religion must pass strict scrutiny, the most stringent review possible. It requires the government to prove, by clear and convincing evidence, a compelling justification for the burden imposed; and, that the government has used the “least restrictive means” possible to accomplish that purpose.² The government must meet this burden even during a pandemic.

Yesterday, Executive Order 20-18 rescinded Executive Order 20-14 while leaving in place Executive Orders 20-15 and 20-16.³

EOs 20-15 and 16 did not explicitly define, or reference⁴ “shopping malls” as essential businesses or activities. And yet, EO 20-18 specifically exempted “shopping malls” from the mass gathering ban.⁵ EO 20-18, § 2.n.

EOs 20-15 and 16 did not explicitly define or reference “libraries” as essential businesses or activities. And yet, EO 20-18 specifically exempted libraries from the mass gathering ban. EO 20-18, § 2.q.

¹ Executive orders have the “force and effect” of law during a disaster. KSA § 48-925.

² See “Kansas Preservation of Religious Freedom Act” at KSA 60-5301 et seq.; *See also Stinemetz*.

³ Notably, EO 20-16 “superseded” any contrary provisions in the previous orders. EO 20-16, § 4. All executive orders should be read, to the extent possible, “in conjunction with” all previous orders. EO 20-18, § 4.

⁴ Given the rapidly developing situation, if this is incorrect, please immediately advise.

⁵ “Mass gathering” means “any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together more than 10 people in a confined or enclosed space at the same time.” EO 20-18, § 1.a.

The point is, under EO 20-16, libraries and shopping malls were not defined as essential businesses or activities, but EO 20-18 exempted them from the mass gathering limitation. In contrast, religious institutions are defined as essential activities, but EO 20-18 specifically imposed a mass gathering limitation.

Although not exhaustive, these examples help illustrate how the executive orders do not appear to be generally applicable, and do not appear to use the least restrictive means possible in attempting to achieve the public health goals. A less restrictive option should first be considered, *i.e.*: imposing precautionary measures such as requiring gloves, masks, additional social distancing beyond 6-feet, prohibit handshakes, etc. At the very least, clarity is needed.

In these trying times, vigilance is paramount. Flattening the curve is laudable and necessary. Reasonable action should be taken to ensure the public's safety. As written, EO 20-18 strikes us as unreasonable and in our view, unconstitutional.

Respectfully,



Samuel G. MacRoberts
Kansas Justice Institute
12980 Metcalf Avenue, Suite 130
Overland Park, Kansas 66213
(913) 213-5018
Sam.MacRoberts@KansasJusticeInstitute.org

Cc: Legislative Coordinating Council