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Testimony in support of House Concurrent Resolution 5014

**Presented to the Senate Committee on the Judiciary
By Derek Schmidt, Kansas Attorney General**

March 2, 2022

Chair Warren and Members of the Committee:

Thank you for the opportunity to submit testimony in support of House Concurrent Resolution 5014.

The proposal before you today would amend the Kansas Constitution by granting the Legislature the authority to establish a process by which the Legislature could suspend or revoke rules and regulations issued by executive branch agencies or officials. This resolution is identical to Senate Concurrent Resolution 1618, which this committee heard two weeks ago. I have attached a copy of my testimony on SCR 1618 to this testimony, which addresses the background behind this proposal.

I would encourage you to pass the House Concurrent Resolution unamended and send this proposed amendment to the voters. Thank you again for your consideration.

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Testimony in Support of Senate Concurrent Resolution 1618
A proposition to amend article 1 of the constitution of the state of Kansas by adding a new section thereto, concerning oversight by the legislature of certain executive branch actions.

Presented to the Senate Committee on the Judiciary
By Kansas Attorney General Derek Schmidt

February 16, 2022

Chair Warren and Members of the Committee:

Thank you for the opportunity to appear today in support of Senate Concurrent Resolution 1618.

The proposal before you today would amend the Kansas Constitution by granting the Legislature the authority to establish a process by which the Legislature could suspend or revoke rules and regulations issued by executive branch agencies or officials. This procedure could be done through a concurrent resolution, without requiring presentment to the Governor. The proposed amendment is permissive, not mandatory, and if it were adopted by Kansas voters, then implementing legislation would be necessary to bring it into effect.

This type of mechanism for the Legislature to be able to override executive branch actions, commonly referred to as a “legislative veto,” is not a new concept. On the federal level, such a provision was included in many statutes between the 1930s and 1980s. Many state statutes in Kansas and other states also included this type of oversight authority during that time period. However, in 1983, the U.S. Supreme Court in *Immigration and Naturalization Service v. Chadha*, found the legislative veto authority in violation of the presentment provisions of the U.S. Constitution. Following the *Chadha* decision, similar statutes Kansas and several other states also were struck down¹. In response to these court decisions, some states, continuing to believe such legislative oversight authority to be good policy, adopted the authority in their state constitutions.

Regulatory reform has been a major topic of discussion within the Kansas Legislature for many years. This legislative session, numerous proposals seek to modify the procedures through which rules and regulations are promulgated and reviewed². And, it is no wonder why regulatory reform proposals have caught the attention of many members of the Legislature. According to a

¹ *Stephan v. House of Representatives*, 236 Kan. 45, 64 (1984)

² See Senate Bill 34 and House Bill 2087.

policy brief by James Broughel, Senior Research Fellow at the Mercatus Center at George Mason University, in 2019 the Kansas Administrative Regulations contained 70,969 regulations and 3.2 million words. His analysis stated that it would take the average person 4.5 weeks to read the state's entire regulatory code.

Legislative proposals to reform the regulatory process are well-intended, and may be good policy, but they fall short because under the current constitutional interpretation, the Legislature ultimately lacks the authority to suspend or revoke executive branch rules and regulations. Under the current rule and regulation process, the attorney general's office reviews each new proposed rule and regulation for legality, but that is the extent of our review. The Joint Committee on Administrative Rules and Regulations also reviews proposed regulations, but the maximum penalty for an agency head who proposes regulations that the committee dislikes is a strongly worded letter placed in the proposed regulation's comment file.

Passage of SCR 1618 would allow us to put to the Kansas voters whether they want the power to make law by regulation to remain solely with executive branch agencies and officials or whether they want their elected lawmakers in the legislature to have the ability to check and balance that power. Adoption of the amendment by the voters would return lawmaking authority to the lawmaking branch of government, the branch closest to the people.

I believe this is a good public policy proposal whose time has come, and I encourage you to recommend the resolution favorably for passage.

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