

February 3, 2025

Statement of Pacific Legal Foundation before the House Committee on Judiciary in support of HCR 5008, *Proposing a constitutional amendment to provide for legislative oversight of rules and regulations adopted by executive branch agencies and officials*

Chair Humphries and members of the Committee:

My name is James Manley, and I am State Policy Chief at Pacific Legal Foundation. PLF is a nonprofit public interest law firm dedicated to defending Americans' liberties when threatened by government overreach. For 50 years, we have been helping Americans fight for their constitutional rights in courthouses and legislatures nationwide. We have won 18 cases at the United States Supreme Court, and helped enact more than three dozen laws in legislatures across the country.

Thank you for the opportunity to testify in support of HCR 5008. The amendment it proposes will restore the constitutional separation of powers by ensuring that the people's elected representatives—not unelected bureaucrats—make the most consequential decisions in Kansas.

The constitutional separation of powers is the most secure guarantee of individual rights. As Federalist No. 51 emphasized: "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The U.S. and Kansas Constitutions do this by dividing the powers of government among the three branches.

But the rise of the administrative state has handed unelected bureaucrats the power of the legislature *and* the governor. As you well know, along the journey from bill to law, committee chairs, legislative leadership, or the governor can easily kill a bill. Making laws is hard. That's a feature of our constitutional system of government—not a bug. Laws can deprive people of their property or even their freedom. They should be well-thought-out, debated, and voted on by the people's representatives.

But many times, when legislatures pass laws, it is impractical to include every detail to make the execution of the law workable. For that reason, agencies tasked with carrying out the will of the legislature are given authority to make regulations to fill in the gaps. Those regulations have the same force and effect as law. Importantly, agencies only have the authority to make regulations that the legislature provides—and the legislature should be able to take back that delegated authority when it is abused.



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Unfortunately, the combination of vague laws, courts deferring to agencies' interpretations of statutes and regulations, and courts undermining the nondelegation doctrine has moved regulations out of the realm of gap-filling to policy creation. In other words, agency employees are singlehandedly creating laws that can deprive people of property and liberty.

At the federal level, we've seen the Supreme Court attempt to walk some of these missteps back by overturning agency deference in the *Loper Bright* decision and reinvigorating the nondelegation doctrine through the major questions doctrine.

The Kansas Legislature took an important first step in restoring democratic accountability in rulemaking by passing H.B. 2648 last session. This REINS Act-style reform—short for “Regulations from the Executive in Need of Scrutiny”—requires that new regulations with an economic impact greater than \$1,000,000 over five years must be approved by the legislature. Florida and Wisconsin have had REINS Acts for years. Indiana joined Kansas in passing their REINS Act reforms in 2024. Other states like Idaho and West Virginia legislatively review all agency rulemaking.

H.B. 2648 gives agencies the freedom to promulgate gap-filling regulations to make laws workable, while ensuring that any major regulations are aligned with the will of the legislature.

However, H.B. 2648 does not give the legislature the power to review rules once they go into effect. Runaway agency interpretations of old rules or, unanticipated applications of rules approved under H.B. 2648 invite the expansion of the administrative state—eroding the Legislature's role as lawmaking authority beholden to the people.

HCR 5008's expansion of H.B. 2648 to include old rules will further restore democratic accountability by making sure that those who create binding rules answer directly to voters. It curbs arbitrary regulatory power, ensuring that Kansans are governed by laws enacted through a transparent, deliberative, democratic process. Finally, it strengthens constitutional governance by reaffirming the legislature's primary role in lawmaking.

By adopting HCR 5008, Kansas will join a growing movement to rein in executive overreach and protect the separation of powers. The people's representatives, not unelected regulators, should decide the policies that shape their state. I urge you to support this resolution and give the people the opportunity to return lawmaking power where it belongs—with the legislature.

Thank you, and I am happy to answer any questions.

Respectfully,

James M. Manley
State Policy Chief