**IN THE UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF KENTUCKY**

| | | |
|---|---|---|
| Matt Schweder,<br><br>Larry Nichols, Joshua Nichols,<br><br>Wesley Anglin,<br>Frank Anglin and Maggie Anglin,<br><br>Robin Harbolt,<br><br>Charles w. (Jeep) Burton,<br><br>Kenneth L. Kearns II, and<br><br>JANE AND JOHN DOES 1-100,<br><br>Plaintiffs,<br><br>vs.<br><br>GOVERNOR ANDREW GRAHAM BESHEAR<br><br>KENTUCKY DEPARTMENT OF PUBLIC HEALTH COMMISSIONER STEVEN J. STACK,<br><br>CABINET FOR HEALTH AND FAMILY SERVICES SECRETARY ERIC C. FRIEDLANDER<br><br>JANE AND JOHN DOES 1-20,<br><br>Defendants. | ) | Case No.: 3:21-cv-00019-GFVT |

* * * * *

**MOTION FOR TEMPORARY RESTRAINING ORDER**
**and**
**MOTION FOR PARTIAL SUMMARY JUDGMENT**

Come now Plaintiffs, by and through counsel, and respectfully request this Court immediately grant a Temporary Restraining Order against Defendants Beshear, Stack and

Friedlander, restraining them from further burdening the Plaintiffs and, by extension, the Commonwealth of Kentucky, from further executive orders, mandates or regulations of any kind whatsoever on the pretext that a state of emergency exists.

In support of these Motions, Plaintiffs reference Defendant Beshear's recent shocking admission, contained in Executive Order 2021-386 and dated June 11,[1] that in effect, *no state of emergency exists* and the only reason for extending the perpetual and so-called "state-of-emergency" which he arbitrarily and preemptively declared in March 2020, is to wring a few more federal dollars from "***various federal funding opportunities that require a state of emergency declaration***".[2] A copy of Executive Order 2021-386 is attached hereto and incorporated herein as "Exhibit A".

Since Defendant Beshear has publicly admitted (1) that no emergency exists, and (2) he intends to squeeze money from the Federal Government on the pretext of a non-existent emergency, the Temporary Restraining Order and Summary Judgment should be a foregone conclusion. Especially given that Defendants Stack and Friedlander possess no authority to continue to burden Plaintiffs outside that authority lent to them by Defendant Beshear's under the pretext of a perpetual "emergency declaration".

However, since a Motion for Summary Judgment has certain response and reply delays built into it by the Federal Rules of Civil Procedure; and since the harm to the Plaintiffs and the Commonwealth is ongoing ***and*** irreparable as a matter of fact ***and*** law; Plaintiffs therefore seek the imposition of an immediate Temporary Restraining Order while the procedural time limits expire within the Summary Judgment context.

---

[1] http://web.sos.ky.gov/execjournalimages/2021-MISC-2021-0386-274584.pdf

[2] *Id*. @ paragraph 5. (emphasis added)

**LAW AND ANALYSIS for TEMPORARY RESTRAINING ORDER**

"The basis for injunctive relief in the federal courts has always been irreparable harm and the inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959), quoted in *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Grasso Enterprises, LLC v. Express Scripts, Inc.*, 809 F.3d 1033, 1039 (8th Cir. 2016); *Odebrecht Const., Inc. v. Sec'y, Florida Dep't of Transp.*, 715 F.3d 1268, 1288 (11th Cir. 2013). However, the court has "considerable discretion…in determining whether the facts of a situation require it to issue an injunction." *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (internal quotations and citations omitted).

Under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) and FRCP 65, the standard for preliminary injunction is showing: 1) a strong likelihood of success on the merits; 2) the possibility of irreparable injury; 3) the balance of hardships in its favor; 4) the advancement of public interest. While the burden of persuasion remains with the Plaintiffs, the "burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espírita Beneficente Uniã do Vegetal*, 546 U.S. 418, 428–30 (2006).

For purposes of a preliminary injunction, this burden of proof can be shifted to the party opposing the injunctive relief after a prima facie showing, and the movant should be deemed likely to prevail if the non-movant fails to make an adequate showing. (*Id.)*

**I. Likelihood of Success on the Merits:**

Parties "are not required to prove their claim, but only to show that they [are] likely to succeed on the merits." *Glossip v. Gross*, 135 S. Ct. 2726, 2792 (2015); *Winter*, 555 U.S. at 22. Plaintiffs are not merely likely to succeed on their claim that no emergency exists, they

are ***certain*** to succeed since Defendant Beshear also has now publicly asserted that his sole reason for perpetuating his original emergency declaration from over fifteen (15) months ago is to extract money from the federal government. Since all parties agree on the fact that no emergency exists, this Court is free to apply the law.

As noted above, Executive Order 2021-386 rescinds numerous emergency orders, and then states:

> In order to ensure Kentucky remains eligible for various federal funding opportunities that require a state of emergency declaration, the state of emergency declared in Executive Order 2020-215 remains in place. (*See* Exhibit A).

In this shocking admission, Defendant Beshear, for the first time in over fifteen (15) months, drops all pretense of a medical or scientific support for his emergency declaration and openly admits that the only reason, as of June 11, for perpetuating his original emergency declaration is a federal money grab. One can't help but wonder if this abrupt change in tack has anything to do with the Boone Circuit Court Order issued by the Hon. Richard A. Brueggemann three days prior, which declared that all executive orders by the three defendants in this case and all continuations of orders in violation of HB 1, SB 1, SB 2, and HJR 77, as passed in the 2021 Regular Session of the General Assembly, are "unconstitutional, void, and without any legal effect, to the extent that the same are in conflict with, or otherwise contrary to" the above-referenced bills and resolutions.[3] (Judge Bruggeman's Order is attached hereto and incorporated herein as "Exhibit B").

Whatever the Defendants' motive, Judge Brueggemann's decision bears heavily and directly on the likelihood of success on the merits here. The *Ridgeway* decision was entered

[3] *Ridgeway Properties, LLC and Commonwealth of Kentucky ex rel. Attorney General Daniel Cameron v. Hon. Andy Beshear, Governor, et al., Boone Circuit Court Case No. 20-CI-00678 (June 8, 2021).*

after testimony and argument from the Defendants in this case and many hours of opposing testimony from expert witnesses whose qualifications are described in detail within the attached order. Although the *Ridgeway* order is not controlling upon this Court, this Court may certainly take judicial notice that the plaintiffs in *Ridgeway* prevailed on many claims that are identical to many of the claims made here, *including that no emergency exists*.

Given Defendant Beshear's admission that no emergency exists, a state circuit court order reaching the same conclusion may seem superfluous, but Plaintiffs would be remiss if they failed to notify this honorable Court that this claim (among others) was recently vigorously litigated to the Defendants' resounding defeat. In any event, Plaintiffs in this case have more than a great likelihood of prevailing on the merits of their original claim that no state of emergency exists within the Commonwealth.

**II. Possibility of Irreparable Injury:**

The Plaintiffs, as the moving party, must "demonstrate that irreparable injury is **likely** in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis added). Irreparable injury can be shown through the lens of four questions:

1) Is the type of injury actually irreparable?

2) Is it likely the movant will suffer this injury before a trial on the merits?

3) Are the defendant's actions the cause of the injury? And,

4) Is there an adequate alternative remedy for damages as opposed to the injunctive remedy at law?

1) ***Infringement of First Amendment Rights is irreparable by definition***. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (*per curiam*), quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("***The loss of First***

***Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.***") (Emphases added).

Plaintiffs alleged numerous First Amendment violations including, but not limited to, a summary provided in paragraph 193 of the Complaint in this action, which states,

> 193. As a direct and proximate result of the Emergency Mandates, Plaintiffs Larry Nichols, Joshua Nichols, Wesley Anglin, Frank Anglin, Maggie Anglin, Robin Harboldt and her minor child P, and Charles W. Burton have been burdened in the free exercise of their faith, and related rights of association.

In addition, as set forth in paragraphs 198-199,

> 198. Plaintiff Matt Schweder and P, therefore seek a Declaratory Judgment that the Defendants have violated their First Amendment rights to peaceable assembly and related freedom of association, and deprived them of the equal protection of the laws under the Equal Protection Clause of the 14th Amendment.
>
> 199. Plaintiffs Larry Nichols, Joshua Nichols, Wesley Anglin, Frank Anglin, Maggie Anglin, Robin Harboldt and her minor child P, and Charles W. Burton therefore also seek a Declaratory Judgment that the Defendants have violated their First Amendment rights to peaceable assembly and related freedom of association, and deprived them of the equal protection of the laws under the Equal Protection Clause of the 14th Amendment.

2) Movants have been suffering and will continue to suffer injuries to their freedom of religious expression, peaceable assembly, and freedom of association, and other rights before a trial on the merits.

3) Defendants' actions are the complete cause of the injuries.

4) Damages cannot be calculated for irreparable harm.

In *Sampson v. Murray,* 415 U.S. 61, 90 (1974), the US Supreme Court highlighted:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of

> irreparable harm. (emphasis in original)(internal quotations and citations omitted).

Because Plaintiffs *have suffered* and *are suffering* irreparable harm as defined by the Supreme Court in *Cuomo*, and since damages can never compensate for any infringement of First Amendment Rights, no matter how small, the Plaintiffs have demonstrated that irreparable injury, absent the relief requested, is not merely likely, but rather inevitable as a matter of law.

Plaintiff's also ask the Court to note that despite the "rollbacks" of certain executive orders, the rollbacks are limited and conditional, and are subject to reinstatement or even being renewed with increased impact on both the Plaintiffs and the Commonwealth, generally. Defendants cannot argue that the limited and conditional rollbacks somehow moot the necessity for the relief requested, because the specter of renewed restrictions and Constitutional deprivations hang over the Commonwealth like the Sword of Damocles, ready and able to plunge anew into the heart of its citizens and the businesses by which their families and the Commonwealth itself derive their existence. This looming threat is real, as the Defendants' behavior has evidenced over the last 15 months.

Plaintiffs stress that what the Defendants have done in no way constitutes a complete cessation of the various Constitutional deprivations that they have piled onto the Plaintiffs and the Citizens of the Commonwealth over the last 15 months. The infringements against the First Amendment, for example, continue. And if they are partly abated, the law of the land is that *any infringement at all constitutes irreparable harm*. (*Cuomo,* supra).

However, even if the infringements were all abated and had ceased, this would not moot the necessity of the relief requested. In Home Building and Loan Association v.

Blaisdell, 290 U.S. 398 (1934), the U.S. Supreme Court stated: "Whether an emergency exists upon which the continued operation of the law depends is always open to judicial inquiry." 290 U.S. at 442, citing Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924).

In Sinclair, the Supreme Court stated: "A law depending upon the existence of emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change." 264 U.S. at 547.

Both Blaisdell and Sinclair are clear authority that an emergency and the rules promulgated thereunder must end when the facts of the situation no longer support the continuation of the emergency.

**III. Balance of Hardships:**

The balance of hardships test tilts only in favor of the Plaintiffs. The Defendants can make no argument that Plaintiffs' free exercise of Constitutional rights will create any hardship for them or for the public.

By contrast, it appears Defendants' best argument is set forth in paragraph 5 of the Executive Order attached as Exhibit A. If Defendants are subjected to a temporary restraining order and summary judgment in this case, Defendants may theoretically lose whatever federal money they intended to grab.

Such an argument is without merit, however. The *Code of Ethics for Government Service*, (adopted by Congress on July 11, 1958, with the Senate Concurring), states in relevant part that:

> **ANY PERSON IN GOVERNMENT SERVICE SHOULD…**
>
> **II. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion….**

> **VII. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties….**
>
> **X. Uphold these principles, ever conscious that public office is a public trust.**
>
> ***House Document 103, 86th Congress, 1st Session – Passed by the Congress of the United States on July 11, 1958.***[4]

While the *Code of Ethics for Government Service* is no longer required to be posted in every federal building housing more than 20 employees, as it was for almost 20 years,[5] neither has it been rejected as the gold standard to which citizen government servants should be held. In fact, only the display requirement was repealed[6] and the *Code* stands today as it has since 1958.

With regard to number II of the *Code of Ethics* above, Defendants can hardly be said to be upholding the Constitution or the laws or the legal regulations of governments within the United States when they perpetuate an executive order in defiance of the laws of the Commonwealth of Kentucky which were found Constitutional by a Court of competent jurisdiction, which Court also found Defendants' executive orders against such laws to be void and of no legal effect. Further, while it is not clear what money Defendants hope to take from the federal government by unlawfully declaring a continued state of emergency while admitting that none exists, the action can hardly be considered consistent with the "conscientious performance of Defendants' governmental duties". In short, Defendants in this matter are not upholding the principles established in the *Code of Ethics for*

[4] https://nlpc.org/code-ethics-government-service/
[5] 96 P.L. 303, 94 Stat. 855, 96 P.L. 303, 94 Stat. 855
[6] OFFICE OF GOVERNMENT ETHICS AUTHORIZATION ACT OF 1996, 1996 Enacted H.R. 3235, 104 Enacted H.R. 3235, 110 Stat. 1566, 104 P.L. 179, 1996 Enacted H.R. 3235, 104 Enacted H.R. 3235

*Government Service* and appear to be unconscious of the truth that their public office is a public trust.

In any event, the loss of opportunity to strip money from the federal government under false pretenses can hardly be considered a legitimate argument to tip the balance of hardships toward the Defendants by even a scintilla.

**IV. Advancement of the Public Interest:**

The Supreme Court has stated that a motion for pretrial injunctive relief must show "that an injunction is in the public interest." (*Winter*, 555 U.S. at 20.)

> [T]he court should weigh the public interest in light of the likely consequences of the injunction. Such consequences must not be too remote, insubstantial, or speculative and must be supported by evidence. (*Id*.)

In addition, ***"[the] court must ask whether the preliminary injunction is in the public interest, which entails taking into account any effects on non-parties.***" *Courthouse News Service v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018) (emphasis added).

As Chief Justice Roberts held in *S. Bay United Pentecostal Church v. Newsom*, (2021 U.S. LEXIS 758 * 4):

> [T]he Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States. ***But the Constitution also entrusts the protection of the people's rights to the Judiciary***—not despite judges being shielded by life tenure, but because they are. Deference, though broad, has its limits. (emphasis added)

The *Ridgeway* order, attached hereto as Exhibit B, describes the impact on the people of the Commonwealth of Kentucky with poignant clarity:

> It is obvious from even a cursory review that the orders issued over the past fifteen months "attempt to control" and seek "to form and determine future rights and duties" of Kentucky citizens. These included ordering the

> closure of all businesses, except those the Governor deemed essential. He ordered churches closed, prohibited social gatherings, including at weddings and funerals, prohibited travel, and through CHFS, even prohibited citizens from receiving scheduled surgeries and access to medical care. And then there is the order that everyone wear a mask. These are, undeniably, attempts to control, set policy, and determine rights and duties of the citizenry.
>
> […]
>
> [*Defendants' arguments do not*] minimize the impact on those who lost their businesses as a result, or those in nursing homes condemned to spend their final hours alone, deprived of the comfort from loved ones (or even any real contact with humanity), or those citizens who the Governor prohibited from celebrating their wedding day with more than ten persons, or those he forced to bury their dead alone, without the consoling presence of family and friends (and who likewise were deprived of paying their final respects), or those persons who were barred from entering church to worship Almighty God during Holy Week, and even Easter Sunday, or those persons who were denied access to health care, including cancer-screenings, or those denied entry into government buildings (which they pay for with their taxes) in order to obtain a necessary license, and who were forced to wait outside for hours in the sweltering heat, or rain, purportedly to keep them from getting sick.
>
> ***What the people have endured over the past fifteen months***—to borrow a phrase from United States District Judge Justin R. Walker—"***is something this Court never expected to see outside the pages of a dystopian novel***." (Exhibit B, pp. 26-28.)

The Merriam Webster Dictionary defines DYSTOPIA as "an imagined world or society in which people lead wretched, dehumanized, fearful lives."[7]

Pursuant to this fourth prong, Plaintiffs urge this Court to consider the grim consequences to the citizens of the Commonwealth, if the relief requested in these motions is not provided. The dehumanizing, ongoing, and unlawful violations of the Constitutional rights of the citizens of the Commonwealth cannot continue. The Commonwealth can

[7] https://www.merriam-webster.com/dictionary/dystopia

endure no more. The General Assembly has spoken, and the Judiciary has declared any perpetuation of these executive orders to be unlawful. Defendants' perpetuated the Emergency Declaration anyway, solely to obtain federal funds. However, the Supreme Court in *Sampson v. Murray* clarified the priorities within this test, and economic gain does not outweigh Constitutional deprivations. To put it bluntly, economic damages can wait, while Constitutional rights cannot. (415 U.S. 61, at 90).

The unusual and shocking nature of Defendant Beshear's admission that he is only maintaining a state of emergency to qualify for federal funds cannot be overstated.

18 U.S.C. §1040 defines criminal fraud in connection with major disaster or emergency benefits as:

> (a) Whoever, in a circumstance described in subsection (b) of this section, knowingly—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device any material fact; or
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation, in any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191), or in connection with any procurement of property or services related to any emergency or major disaster declaration as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, shall be fined under this title, imprisoned not more than 30 years, or both.

The Section above appears relevant to Executive Order 2021-386, which states that the reason for perpetuating the emergency declaration is predicated on a profit motive. We remind the Court that an act of fraud is always outside the scope of authority of office

holders of State agencies. While the Plaintiffs do not suppose themselves to be in a position to prosecute any such fraud, and are not specifically accusing any Defendant of fraud at this time, they nevertheless suggest to this Court that it is in the public interest to protect the Commonwealth against any appearance of such, and to restrain enforcement of any unlawful executive order predicated on perpetuation of a declared state of emergency, pending a complete examination of the facts after full discovery is made in this case.

**WHEREFORE**, because all four prongs of the test are completely satisfied in Plaintiffs' favor alone, and because Defendant Beshear has admitted that no emergency exists, Plaintiffs respectfully request that this Court grant a Temporary Restraining Order enjoining Defendants from taking any further actions including, without limitation, issuing or enforcing orders, rules, mandates, regulations, and the like, which are predicated upon Defendant Beshear's Declaration of a State of Emergency until the question of whether a state of emergency exists in the Commonwealth of Kentucky has been ruled upon by this Court.

## LEGAL STANDARD AND ANALYSIS for SUMMARY JUDGMENT

Plaintiffs incorporate the arguments, authority, and attachments set forth in the preceding motion as if fully reiterated within this Motion for Summary Judgment.

Summary Judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule. Civ. Proc. 56(a). "A 'judge's function' in evaluating a motion for summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Salazar-Limon* v. *Houston,* 581 U.S. ___, ___, 137 S.Ct. 1277, 1280, 197 L.Ed.2d 751 (2017), quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct.

2505, 91 L.Ed.2d 202 (1986). "The question at summary judgment is whether a jury should resolve the parties' differing versions of the truth at trial." *Salazar-Limon, supra,* at 1280-81 (quotations and citations omitted).

Here, a jury is clearly unnecessary to declare what both parties now agree to, namely, that no emergency exists within the Commonwealth. Executive Order 2021-386 has undeniably dropped any pretense of predicating the state of emergency on any sort of health crisis, and for the first time speaks only of the money possible to get from the federal government. Plaintiffs spent dozens of pages in their Complaint detailing and supporting the very claim this Executive Order now confirms: there is no current State of Emergency. Regardless of how the Court rules on this Motion, Plaintiffs ask the Court to take note, in an abundance of caution, that they retain the request for a Jury Trial against the Defendants made in their original Complaint.

**WHEREFORE,** because there are no differing truths for a jury to sort, and because parties agree that no state of emergency exists, and for the other reasons set forth in these motions above, and based upon the authorities cited; Plaintiffs respectfully demand the immediate entry of Partial Summary Judgment declaring once and for all that no state of emergency exists in the Commonwealth of Kentucky, and that any actions by the Defendants including, without limitation, issuing or enforcing orders, rules, mandates, regulations, and the like, whenever created, which are predicated upon Defendant Beshear's Declaration of a State of Emergency, or perpetuation thereof, are void and of no force and effect *nunc pro tunc* as of June 11, 2021. This being a Motion for Partial Summary Judgment, the question of how far back in time beyond June 11, 2021 the State of

Emergency ceased to exist remains an open question to be decided in the course and fullness of this litigation.

RESPECTFULLY SUBMITTED this 6th day of July, 2021.

BY: /s/ Michael A. Hamilton

Michael A. Hamilton, Esq. (KY Bar No. 89471)
HAMILTON & ASSOCIATES
1067 N. Main St, PMB 224
Nicholasville, KY 40356
Tel. 859-655-5455
*Attorneys for Plaintiffs*

AND: Thomas Renz, Esq. (Ohio Bar No. 98645)
RENZ LAW, LLC
1907 W. State Street, Suite 162
Fremont, OH 43420
Tel. 419-351-4248
*Attorneys for Plaintiffs*
*(Pro Hac Vice)*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion for Temporary Restraining Order and Motion for Partial Summary Judgment was delivered electronically on July 6, 2021.

/s/ Michael A. Hamilton

# EXHIBIT A

**ANDY BESHEAR**
**GOVERNOR**

# EXECUTIVE ORDER

**Secretary of State**
**Frankfort**
**Kentucky**

**2021-386**
**June 11, 2021**

## STATE OF EMERGENCY

The novel coronavirus (COVID-19) is a respiratory disease causing mild to very severe illness, including death, and many cases of COVID-19 have been confirmed in the Commonwealth. While Kentucky has experienced far too many tragic losses due to COVID-19, we have fared far better than many of our neighbors thanks to the hard work and sacrifices of Team Kentucky.

The three FDA-approved COVID-19 vaccines have been proven through numerous studies to be both safe and highly effective in preventing the deleterious health effects associated with COVID-19. As of today, over 58% of Kentucky's adult population has received at least one dose of a vaccine and over 82% of Kentuckians who are 65 years of age and older have received at least one dose of a vaccine. These numbers are anticipated to continue to increase. Children age 12 and older are also now eligible to receive one vaccine and may in the future be eligible for other vaccines. Thanks to this great success, several of the previously necessary public health measures are no longer required to prevent the health care system from being overwhelmed.

**NOW, THEREFORE,** I, Andy Beshear, Governor of the Commonwealth of Kentucky, by virtue of authority vested in me pursuant to the Constitution of Kentucky and KRS Chapter 39A, do hereby Order and Direct the following:

1. Executive Orders 2020-243, 2020-257, 2020-323, 2020-396, 2020-398, 2020-881, 2020-1041, and 2021-326 are hereby rescinded. All Orders of the Cabinet for Health and Family Services implementing these Executive Orders and requirements for specific sectors, businesses, and entities are hereby rescinded.

2. The Healthy At Work requirements, as well as the Healthy At Work website, are hereby rescinded. Best practices and recommendations for preventing COVID-19, as well as the latest information on the pandemic, remain available at KYCOVID19.ky.gov.

**ANDY BESHEAR**
**GOVERNOR**

**EXECUTIVE ORDER**

**Secretary of State**
**Frankfort**
**Kentucky**

**2021-386**
**June 11, 2021**

3. For the purposes of this order, a "face covering" is a material that covers the nose and mouth and is secured to the head with ties, straps, or loops over the ears, or is wrapped around the lower face. It can be made of a variety of materials, including cotton, silk, or linen, and ideally has two or more layers.

4. Individuals are not required to wear a face covering, with the exception of the following:

    i. Any person riding on planes, buses, trains, and other forms of public transportation traveling into, within, or out of the United States and in U.S. transportation hubs such as airports and stations shall wear a face covering.

    ii. Any person in a healthcare setting shall wear a face covering.

    iii. Any person in a long-term care setting shall wear a face covering.

    iv. Additionally, it is recommended that face coverings be worn by any person: in a correctional facility; in a homeless shelter; or who is immune-compromised, is exhibiting symptoms of COVID-19, or has tested positive for COVID-19 in the prior ten (10) days.

5. In order to ensure Kentucky remains eligible for various federal funding opportunities that require a state of emergency declaration, the state of emergency declared in Executive Order 2020-215 remains in place.

6. All local, county, and city government offices and agencies are encouraged to adopt or incorporate the requirements provided in this Order.

7. Nothing in this Order should be interpreted to interfere with or infringe on the powers of the legislative and judicial branches, or other constitutional officers to perform their constitutional duties or exercise their authority. However, the legislative and judicial branches, and other constitutional officers, are encouraged to adopt or incorporate the requirements provided in this Order.

**ANDY BESHEAR**
**GOVERNOR**

**EXECUTIVE ORDER**

**Secretary of State**
**Frankfort**
**Kentucky**

**2021-386**
**June 11, 2021**

8. This Order is effective at 1:00 p.m. on June 11, 2021.

ANDY BESHEAR, Governor
Commonwealth of Kentucky

MICHAEL G. ADAMS
Secretary of State

# EXHIBIT B

**COMMONWEALTH OF KENTUCKY**
**BOONE CIRCUIT COURT**
**DIVISION I**
**CASE NO. 20-CI-00678**

**RIDGEWAY PROPERTIES, LLC**
*dba Beans Café & Bakery* **PLAINTIFF**

**AND**

**COMMONWEALTH OF KENTUCKY,**
***ex rel.* ATTORNEY GENERAL DANIEL CAMERON** **INTERVENING PLAINTIFF**

**VS.**

**HON. ANDREW BESHEAR, GOVERNOR,**
**COMMONWEALTH OF KENTUCKY, *et al.*,** **DEFENDANTS**

## JUDGMENT AND ORDER

This matter is before the Court for final adjudication. But it comes thus in a bit of a tangle. Despite its recent vintage, this case has an appellate and procedural history that is both extensive and unusual.[1] The Court conducted an evidentiary hearing on May 17, 2021, and

[1] On July 2, 2020, this Court entered a Temporary Injunction against Governor Beshear and other executive agencies enjoining the enforcement of certain orders issued in the wake of the Governor's declaration of emergency. That same day, the Court also allowed Attorney General Daniel Cameron to intervene as Plaintiff on behalf of the people of the Commonwealth of Kentucky, who sought a wider injunction against all of the Governor's orders as offensive to their constitutional rights. Following this Court's initial Order enjoining enforcement, Governor Beshear and other executive agencies petitioned the Kentucky Court of Appeals for a writ of prohibition to prohibit the grant of such relief. That case was captioned, *Hon. Andrew Beshear, et al., v. Hon. Richard A. Brueggemann, et al.*, Ky. Ct. App. No. 2020-CA-834-OA. On July 13, 2020, in an opinion by the Hon. Glenn Acree, the Kentucky Court of Appeals denied the writ. Defendants then filed an original action in the Kentucky Supreme Court, petitioning that it mandate Judge Acree to prohibit this Court from acting, or otherwise for the higher court to directly prohibit this Court from acting. That case was captioned, *Hon. Andrew Beshear, et al., v. Hon. Glenn E. Acree, et al*., Ky. S. Ct. 2020-SC-313-OA.

On July 16, 2020, this Court held an evidentiary hearing on whether further temporary injunctions should issue. At the conclusion of that hearing, this Court stated that it was granting the full relief sought by Plaintiffs and Intervening Plaintiff, *ex rel.* Attorney General Daniel Cameron, and that an order with its findings and conclusions would be entered in due course. In an Order entered July 17, 2020, the Kentucky Supreme Court directed this Court to proceed and issue the findings of fact and conclusions of law it found appropriate. However, the Supreme Court also stayed all injunctions previously imposed in the matter and prohibited the issuance of any new injunctive relief "until the full record of proceedings below is reviewed . . . and [the Kentucky Supreme Court] issues a final order."

On July 20, 2020, this Court entered an Order with findings and conclusions that all of the emergency orders issued by the governor and executive agencies violated the constitutional rights of Kentuckians and that, but for the Kentucky Supreme Court's July 17, 2020 Order, would have been enjoined during the pendency of this action. The Kentucky Supreme Court then considered the matter as on appeal in the case captioned as a writ.

pursuant to an agreed briefing schedule, took all remaining matters under submission on May 25, 2021.

**PROCEDURAL AND FACTUAL BACKGROUND**

On March 6, 2020, Governor Beshear declared that the 2019 coronavirus[2] constituted an emergency in the Commonwealth, invoking KRS Chapter 39A, and began issuing a string of executive orders. Among these, he ordered the closure of all businesses except for specific pursuits that he deemed essential for life.[3] Through the Cabinet for Health and Family Services ("CHFS"), he ordered the closure of churches and houses of worship.[4] Following his directives, CHFS prohibited individuals from meeting together in certain types of mass gatherings, later allowing meetings only in numbers not exceeding ten persons.[5] The Governor prohibited citizens from peaceably assembling for the purpose of petitioning a redress of these grievances but allowed and even joined assemblies for other causes.[6] He had prohibited travel, with limited exceptions, and decreed those daring to travel across state lines in violation of his order must quarantine for 14 days.[7] He ordered all citizens to remain at home unless engaged in a pursuit deemed by the government to be essential for life.[8] The CHFS ordered hospitals and doctors to cease providing any health care, including surgeries, unless said treatment was deemed emergent

---

Additionally, due to dismissals on side of both Plaintiffs and Defendants, this case is no longer captioned as *Kentucky Speedway, Inc., et al., v. Northern Kentucky Independent Health District, et al*.

[2] Known as SARS-COV-2, commonly referred to as "Covid-19."

[3] Ky. Exec. Order No. 2020-246, Gov.'s Resp., p. 4, Available at https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf .

[4] *Id.* CHFS Order, Mar. 19, 2020, Gov.'s Resp., p. 4, available at https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf .

[5] Order of CFHS Re: Mass Gatherings, available at https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf. See also, Gov. Beshear Updates Kentuckians on the Fight to Defeat COVID-19, available at https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=168.

[6] Testimony of Dr. Stack, V.R. 07/16/2020, circa 07:42:00; and Exh. 31 to July 16, 2020 hearing.

[7] Ky. Exec. Order No. 2020-258, Available at https://governor.ky.gov/attachments/20200330_Executive-Order_2020-258_Out-of-State-Travel.pdf ;See also Ky. Exec. Order No. 2020-266. Available at https://governor.ky.gov/attachments/20200402_Executive-Order_2020-266_State-of-Emergency.pdf ; and Ky. Exec. Order No. 2020-315, available at https://governor.ky.gov/attachments/20200506_Executive-Order_2020-315_Travel.pdf.

[8] https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=10.

(that is, likely to result in serious, irreparable harm if not provided within 24 hours), thereby prohibiting the people from access to procedures such as cancer-screenings, dental care and physical therapy.[9] The Governor ordered everyone in Kentucky to wear masks and threatened fines and penalties for violations.[10]

At first, the Governor indicated the emergency would last for just two weeks[11]—fourteen days to flatten the curve. But fourteen months later, the Governor insists his wielding of broad emergency powers must continue. At the hearing on May 17, 2021, the Commissioner of Public Health and Governor's health advisor, Dr. Steven Stack, testified that he could not specify an incidence rate or any precise conditions that would have to be in place in order to end the state of emergency and remove all the mandates.[12] That, he said, was something only the Governor could answer.[13]

In July 2020, for purposes of CR 65.04, this Court found the Governor's orders constitutionally offensive on grounds that KRS Chapter 39A attempted to delegate functions constitutionally reserved to the legislative branch, and also for violating the inherent and unalienable rights of Kentucky's citizens. In *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020),[14] the Kentucky Supreme Court reversed this Court's grant of temporary injunctive relief and held the delegation under KRS Chapter 39A to be constitutional.[15] The Kentucky Supreme Court

[9] See Ky. Exec. Order No. 2020-323, Available at https://governor.ky.gov/attachments/20200323_Directive_Elective-Procedures.pdf.
[10] Ky. Exec. Order No. 2020-586, available at https://governor.ky.gov/attachments/20200709_Executive-Order_State-of-Emergency.pdf.
[11] See Com. ex rel. Resp., p. 2, fn. 3, citing "Gov. Beshear Tightens Restrictions," https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=104, quoting the Governor as stating, "Kentucky—these next two weeks are about us . . . doing everything we can to blunt the curve" (last accessed May 30, 2021).
[12] V.R. 05/17/2021, *circa* 03:28:00; 03:47:00
[13] *Id.*; 04:06:30.
[14] See footnote 1, explaining that although *Acree* commenced as a separate original action on petition for a writ in response to denial of a writ, it also effectively resulted in an appeal of this Court's preliminary orders.
[15] *Id.*, at 805-813.

further held that the challenged orders were not unconstitutionally arbitrary under §§ 1 and 2 of Kentucky's Constitution,[16] except for an order which had prohibited family members from sitting together on outdoor stadium seating at race-tracks.[17] As to the latter, because the Governor had revised that order to remove the offending prohibition, the Kentucky Supreme Court found it to be moot.[18]

The landscape currently, however, has changed. Now, it is Defendants who seek to invalidate certain portions of KRS Chapter 39A on constitutional grounds. Plaintiff and Intervening Plaintiff assert that the Governor's continuing orders violate those Kentucky Statutes. During the 2021 legislative session, the General Assembly amended KRS Chapter 39A to limit the extent and duration of its legislative delegation to the Governor. The specific legislation at issue includes Senate Bill 1 (2021 RS SB1), Senate Bill 2 (2021 RS SB2), House Bill 1 (2021 RS HB1), and House Joint Resolution 77 (2021 RS HJR 77) (all collectively referred to hereinafter as the "New Legislation" or the "Acts"). The Governor vetoed each of these measures, after which the General Assembly overrode his veto with votes of overwhelming majorities.[19] All of the New Legislation contained severability clauses, and also emergency clauses resulting in the Acts going into effect immediately.

Senate Bill 1 amended Chapter 39A in several ways. Section 2 amends KRS 39A.090 to impose a 30-day limit on the duration of any executive orders or administrative regulations that purport to restrict in-person meetings or social gatherings, or thereby impairs the operation of churches, places of worship, schools, private businesses, local governments, nonprofit

[16] *Id.*, at 815-829; the Court specifically addressed the economic rights of Plaintiffs but did not address in its analysis the rights under Section 1 of the citizens at large who are represented by the Commonwealth, *ex rel*. Attorney General Daniel Cameron .
[17] *Id.*, at 825.
[18] *Id.*
[19] For example, Senate Bill 1 overrode the Governor's veto by vote of 69-20 in the house, and 29-8 in the Senate; and Senate Bill 2 overrode the Governor's veto in the House 72-22, and 29-8 in the Senate.

organizations, and other political, religious or social gatherings. After 30 days, the rules imposed by executive order will expire unless the General Assembly shall vote to extend it.[20] Section 3 of Senate Bill 1 requires reporting on the use of any public funds in connection with an emergency order.[21] Section 4 limits the delegation that would allow the Governor to suspend statutes or regulations by requiring that he specifically identify the law being suspended, and also conditions any suspension of law on the written approval of the Attorney General.[22]

One of the provisions in Senate Bill 2 requires the Cabinet for Health and Family Services to follow the procedures for promulgating regulations (rather than allowing it to merely issue rules) concerning the exercise of its authority relating to the invasion of infectious or contagious disease.[23] It also imposes a 30-day limit similar to that in Senate Bill 1.

House Bill 1 provides that any business or other organization, be it for-profit or nonprofit, as well as local government, including schools and school districts, "may remain open and fully operational for in-person services," so long as the business or organization adopts a plan that follows *either* the Governor's order or guidance issued by the Center for Disease Control ("CDC").[24] In other words, it allows the organization to choose the least restrictive option.

House Joint Resolution 77 expressed approval of 56 of the executive's orders and regulations, 24 of which it provided shall continue for 90 additional days, and 32 of which it extended for 30 additional days.[25] Otherwise, it provided that "[a]ll COVID-19 related executive orders, administrative regulations, other directives issued by the Governor or pursuant to his authority, or agencies or boards under the Governor's authority, not specifically extended by this

[20] 2021 Ky. Acts ch. 6 § 2.
[21] *Id.*, at § 3.
[22] *Id.*, at § 4.
[23] 2021 Ky. Acts ch. 7 § 4.
[24] 2021 Ky. Acts ch. 3 § 1.
[25] 2021 Ky. Acts ch. 168, §§ 2, 3.

Act are of no further force or effect as of the effective date of this Act."[26] Among the Governor's orders that the General Assembly expressly did not extend was his decree that all Kentuckians wear a mask.

**ARGUMENTS PRESENTED**[27]

Based on the New Legislation, Plaintiff and Intervening Plaintiff seek a declaration that all of the Governor's emergency orders in conflict with the Acts are void as a matter of law, and also seek a permanent injunction compelling Defendants to comply. Further, they point to existing data from various states to show that the Governor's mandates have had no appreciable effect on fighting the coronavirus and that there is no justification in fact for the same to continue.

Plaintiff presented testimony from Richard Hayhoe, owner of Ridgeway Properties, LLC, to show he is suffering continuing harm. Plaintiff, as to his business, argues the data shows there to be neither any need nor rational basis for certain measures the Governor continues to order and impose, including the mask mandate, social distancing, capacity limitations, and time limitations for serving customers. Plaintiff also presented testimony from Dr. Molly Rutherford and Stephen E. Petty, P.E., CIH., who testified as an expert as a certified industrial hygienist.

On the other side, Defendants filed a cross-motion for summary judgment asking the Court to declare the New Legislation unconstitutional. Defendants argue that the Governor cannot be in violation of the New Legislation because he obtained an injunction from the Franklin Circuit to enjoin application of those Acts and, thus, the Governor's orders remain in effect. Defendants also insist that, even without the ruling in Franklin Circuit, the Governor

[26] *Id.*, at § 1.

[27] Many arguments were presented and, although not recited, were considered. Some arguments or evidence presented may be recited only in the analysis portion of this Order.

cannot be limited by the New Legislation. According to Defendants, the result is an unconstitutional encroachment by the legislative branch.[28] Defendants presented testimony of Dr. Steven Stack, the Commissioner of Public Health and Governor's health advisor.

Defendants also argue that the harms alleged by Plaintiffs are either non-existent, moot, or have already been decreed by the Kentucky Supreme Court as insufficient to warrant injunctive relief, and that the same is the law of the case. They further point out that the Governor's emergency orders have undergone numerous revisions and that, under his current stated intention, both the capacity limitations on businesses will be removed, and the mask mandate imposed on all Kentuckians lifted, on June 11, 2021—but not in all settings.

Contra the arguments presented by Defendants, *ex rel*. Attorney General Daniel Cameron, as Intervening Plaintiff on behalf of the people of the Commonwealth, insists that the decision in the Franklin Circuit does not effect this case, that the law of the case from *Acree* does not apply to the relief sought and, consequently, that this Court should not delay to reach the merits of the claims and constitutional questions before it. Intervening Plaintiff argues the General Assembly passed the Acts as part of its legislative powers and, because the same are constitutionally sound, urges this Court to deny Defendants' cross-motion and to order Defendants to comply with the New Legislation.

**ANALYSIS**

No one in the civil realm, however high their office, is above the law. It was for this principle that English Barons assembled at Runnemede meadow and, on June 15, 1215, forced King John to sign the *Magna Carta*, within which he avowed the Crown would abide thereby in

[28] Defendants' specific arguments on this as to each of the Acts will be more fully addressed in the analysis section of this Order below.

perpetuity.[29] Even after he signed, the Barons refused allegiance until he formally affixed upon it the Seal of England. The great charter of Kentucky is its Constitution. And its guarantees are sealed by an oath, one that applies to all offices in all branches. Before a person may take any office, regardless of whether the person is elected or appointed, the individual, among other avowals, must formally declare:

> I do solemnly swear (or affirm . . .) that I will support the Constitution of the United States and the Constitution of this Commonwealth, and be faithful and true . . . so help me God.[30]

The Constitution places limits on what government may do to (and for) its citizens. All the laws enacted by the General Assembly, and all laws enforced by the executive, are subject to those limits. The result, as John Adams put it, is *a government of laws, not men*. No branch, not even all branches acting in concert, can legitimately change any provision of the Constitution. Only by direct vote or convention **of the people**—whose rights the Constitution exists to protect—can any change occur.[31] The text and meaning of the Constitution is fixed, as its framers make clear in § 26:

> To guard against transgression of the high powers which we have delegated, We Declare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.[32]

Words mean things, and the meaning of the words in our Constitution is clear. The legislature alone enacts the laws. "The legislative power shall be vested in a House of Representatives and a Senate . . . ."[33] The executive carries out the law. "The supreme executive

[29] *See, generally*, *Magna Carta*, § 1 ("We furthermore grant and give to all the freemen of our realm for ourselves and our heirs in perpetuity the liberties written below to have and to hold to them and their heirs from us and our heirs in perpetuity"), quoted from National Archives, Magna Carta Translation, https://www.archives.gov/exhibits/featured-documents/magna-carta/translation.html, last accessed, May 29, 2021.
[30] KY. CONST. § 228.
[31] KY. CONST. §§ 256, 258.
[32] KY. CONST. § 26.
[33] Ky. Const. § 29.

power of the Commonwealth shall be vested in . . . the 'Governor . . .' who "shall take care that the laws are faithfully executed."[34] And the judicial branch adjudicates controversies according to the law.[35] No branch "shall exercise any power properly belonging to either of the others, except in the instances . . . expressly directed or permitted [within the text of the Constitution]."[36]

All parties to this action agree on one point, namely, that the Constitution has been violated. The only dispute, when boiled down, is by which it is being transgressed.

**A. Law-of-the-Case and Comity**

Under the law-of-the-case doctrine, trial courts are not permitted to reopen questions of law that have been decided by an appellate court in the very same case. "A final decision of [an appellate court], *whether right or wrong,* is the law of the case and is conclusive . . . ."[37] Nevertheless, the law-of-the-case rule is not without exceptions. An exception exists in the "limited situation where the controlling law changes after reversal . . . but prior to a subsequent re-trial."[38] Further, the law-of-the-case doctrine applies to questions of law actually decided, and not *dicta*.[39] And the doctrine applies only to determinations made based upon law and not questions of fact.[40]

In *Acree*, the Kentucky Supreme Court held that the legislature can delegate to the Governor emergency rulemaking authority under 39A.[41] That determination is the law of this case. However, Plaintiff and Intervening Plaintiff seek relief based upon intervening changes in

[34] KY. CONST. §§ 69, 81.
[35] KY. CONST. § 109.
[36] KY. CONST. § 28.
[37] *Ragland v. DiGiuro*, 352 S.W.3d 908, 914–15 (Ky. App. 2010); quoting, *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky.1989) (emphasis original).
[38] *St. Clair v. Commonwealth*, 451 S.W.3d 597, 612–13 (Ky. 2014); *accord*, *Brown v. Commonwealth*, 313 S.W.3d 577, 610 (Ky. 2010), *Sherley v. Commonwealth*, 889 S.W.2d 794 (Ky. 1994).
[39] *Johnson, True & Guarnieri, LLP*, 538 S.W.3d 901, 918 (Ky. App. 2017).
[40] *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982).
[41] *Acree*, 615 S.W.3d, at 805-13.

the law since *Acree* was decided. In short, they contend that, by those changes, the legislature has limited some of the power previously granted. Plaintiff and Intervening Plaintiff insist that if the General Assembly can delegate that power, it can also limit the extent of its delegation or revoke it entirely. Although the Court found the Defendants' arguments concerning the law-of-the-case a difficult question, it is persuaded that it does not apply to the issues remaining for decision. In addition to the reasons recited herein, the Court is persuaded otherwise by the arguments presented in *ex rel*. Attorney General Daniel Cameron's Post Hearing Reply.[42] Although Plaintiff was a party plaintiff at the time *Acree* was decided, the law has nonetheless changed, new facts are presented, and the matter is before this Court for final judgment, not temporary relief.

Plaintiff presents evidence of new facts not offered or considered at the preliminary injunction hearing. Intervening Plaintiff provides factual data not existing in July 2020 and concerning which this Court can take judicial notice. The essential questions here are, first, whether the Acts are constitutional. And, if so, in light of the New Legislation and new facts, whether the Governor may continue to impose emergency orders that exceed the limits expressly set under the new law. Defendants argue that the Court may not address that question, entertain permanent injunctive relief, or address the merits in any manner inconsistent with the result reached in the Franklin Circuit.

[42] See pp. 1-9. However, the Court does correct a statement in the Attorney General's argument on page 9, which states that the decision in *Acree* "in no way precludes another Plaintiff, with different facts, in an altogether different legal landscape, from prevailing on its request for a permanent injunction." The current Plaintiff was in fact a Plaintiff at the time *Acree* was decided. However, this Court did not grant a temporary injunction to the current Plaintiff on the economic grounds presented by it but, rather, on the grounds presented by *ex rel*. Attorney General Cameron on behalf of all Kentucky citizens. In fact, this Court expressly held that Plaintiff did not show likelihood that it would suffer irreparable harm in the same way the other Plaintiffs had and that it was not granting injunctive relief on that basis. Consequently, the discussion in *Acree* concerning irreparable harm does not apply. Furthermore, this is on for final judgment and the elements required for temporary injunctive relief do not apply.

Defendants also assert that the Court should not resolve this matter because the Franklin Circuit has enjoined enforcement or enjoined the applicability of the New Legislation. Relating to this, the parties have presented arguments as to standing, ripeness and whether there was lack of controversy in Franklin Circuit where, purportedly, the party seeking the injunction is also the person that would be enjoined. But those arguments turn solely on the case in Franklin Circuit. The matter that is or was before the Franklin Circuit is different from the controversies presented here. And this Court does not agree that it should prevent final resolution on the merits in this case. Again, the Court agrees with the position espoused by *ex rel*. Attorney General Cameron that there is no basis for displacing the claims and controversies here.[43] "All courts shall be open, and every person for an injury done him . . . shall have remedy by due course of law, and right and justice administered without . . . denial or delay."[44]

As this Court sees it, Defendants' arguments concerning the Franklin Circuit are more closely related to comity than jurisdiction or ripeness. Under the rules of comity, where two identical actions are brought in separate courts that could result in conflicting judgments with "calamitous results," the court with the latter suit is counseled to defer.[45] However, comity only applies where all the parties are identical, and the cause of action in the first suit is identical with that in the second suit.[46] Here, the parties are not identical. Second, the cause of action differs as to the nature of the controversy. Third, there is evidence presented in this case that has not been presented in the other case, or the evidence otherwise differs. Moreover, there are already different decisions in at least two other circuits involving questions relating somewhat to that

[43] See Com. *ex rel*. Attorney General Daniel Cameron's Resp., p. 13, quoting *Baze v. Commonwealth*, 276 S.W.3d 761, 767 (Ky. 2008), *Bell v. Cabinet for Health & Family Servs., Dep't for Cmty. Based Servs*., 423 S.W.3d 742, 751 (Ky. 2014).
[44] KY. CONST. § 14.
[45] *Delaney v. Alcorn*, 301 Ky. 802, 805-806 (Ky. 1946).
[46] *Riddle v. Howard*, 357 S.W.2d 705, 708 (Ky. 1962).

presented here. It is not uncommon for decisions among circuits to differ, especially on questions of first impression. And here, the parties are ploughing new ground.

Moreover, there are already conflicting rulings in Franklin and Scott Counties. Ultimately, the conflicting circuit decisions will be resolved on appeal—something that can be expedited as the history in this case demonstrates. Delaying decision here would deprive the litigants in this case from presenting their arguments on the facts and law presented here. Defendants contend that this can be remedied by allowing Plaintiff to file an *amicus* brief with the appellate tribunal in those other cases. But that is not equivalent to having one's own case heard. Nor does that allow for the presentation of evidence by the Plaintiff here.

**B. Impact of Governor's Emergency Decrees**

Plaintiff presented evidence of the injury it is suffering. Plaintiff, along with Intervening Plaintiff, also presented evidence that there is no scientific basis for many of the Governor's orders at issue. Based upon the data presented, they argue that the measures imposed in Kentucky have had no appreciable effect when compared to other states.

Richard Hayhoe, owner of Beans Café & Bakery, testified[47] that as a result of the capacity restrictions ordered by the Governor, he lost two-thirds of his restaurant's seating capacity. According to Hayhoe, the mandates have put his business in a precarious financial condition. Additionally, the Northern Kentucky Independent Health District cited Plaintiff for violating the Governor's mask mandate, for which Hayhoe was later criminally charged. Hayhoe testified that he was not afforded any opportunity to defend against the allegations. He said that, had he been able to, he would have explained that the person not wearing a mask had a health exemption.

[47] V.R. 05/17/2021, *circa* 10:31:30 a.m.

After passage of the New Legislation, Hayhoe's business opted to develop a compliance plan based upon CDC guidance in lieu of the Governor's mandates. The former, according to Hayhoe, are less restrictive. Hayhoe testified that he fears enforcement actions may still be brought against him even though as yet, that has not occurred following the passage of the Acts.

**1. Analysis of Effectiveness of Various Mandates on Covid-19**

Dr. Mary ("Molly") Rutherford testified[48] as an expert in medicine in public health. Although Defendants objected to her qualifications, the Court found her education, background and experience sufficient. Dr. Rutherford obtained her master's degree in public health at John Hopkins University, with a focus on epidemiology. She worked for Dr. Fauci for a total of nine years, the first six at National Institute of Allergy and Infectious Diseases, and the latter three at the National Institute of Health. She co-authored an international, peer reviewed article titled, "*Multi-treatment of Early Ambulatory High Risk SARS/COV-2 Infection*."[49] She testified that she has treated nearly 100 patients for Covid-19 in her family practice. Dr. Rutherford is board certified in addiction medicine, and is the past Chair and a current board member of the American Academy of Family Physicians.

Dr. Rutherford pointed to several published articles during her testimony. One analyzed the effect that government mandates have had on the infection rates, hospitalizations and deaths from Covid-19 by comparing data from countries that imposed strict lockdowns against those that did nothing.[50] Among its conclusions, the study found that "government actions such as border closures, full lockdowns and a high rate of COVID-19 testing, were not associated with

[48] V.R. 05/17/2021, *circa* 10:46:30.
[49] Plaintiff's Exh. 16.
[50] Plaintiff's Exh. 17; Rabail Chaundhry, George Dranitsaris, *et al*., *A country level analysis measuring the impact of government actions, country preparedness and socioeconomic factors on Covid-19 mortality and related health outcomes*, EClinicalMedicine 25 (2020) 100464 (21 Jul. 2020).

statistically significant reductions in the number of critical cases or overall mortality."[51] Similarly, a later study likewise found that the "[s]tringency of measures settled to fight pandemia, including lockdown, did not appear to be linked with the death rate."[52]

Another study opined that, even if cases are reduced in the short-term, interventions actually lead to more deaths overall.[53] According to the researchers' findings, and Dr. Rutherford, the focus should have been only on those determined to be high risk, such as those over 70 years of age. Plaintiff also presented an article that is still in manuscript form that, in effect, challenges claims that government interventions saved any lives.[54] This study concludes that the "United Kingdom's lockdown was both superfluous and ineffective," and that proponents of government interventions employ "circular logic."[55]

Dr. Rutherford stated that, at first, she trusted Dr. Fauci and the CDC even though they were pushing governments to impose measures, such as social distancing, that were not based upon known science. However, Dr. Rutherford testified that in the following months, as a result of their actions, she no longer trusts what they say. It isn't just that the government lockdowns did not help. Rather, she opined, the government's actions have inflicted more harm and death. She testified that there has been an increase in overdose deaths and pointed to specific cases where she contends overdose deaths occurred as a direct consequence of the closure of facilities.

Finally, Dr. Rutherford also testified concerning Covid-19 data comparisons from various states, using it to illustrate the lack of difference between states that imposed harsh lockdowns

[51] *Id.*, p. 5.
[52] Plaintiff's Exh. 20: Quentin De Larochelambert, Andy Marc, *et al.*, *Covid-19 Mortallity: A Matter of Vulnerability Among Nations Facing Limited Margins of Adaption*, Front. Public Health 8:604339 (19 Nov. 2020).
[53] Plaintiff's Exh. 18: Ken Rice, Ben Wynne, et al., *Effect of school closures on mortality from coronavirus disease 2019: old and new predictions*, BMJ 2020; 371:m3588 (7 Oct. 2020).
[54] Plaintiff's Exh. 21: Stefan Homburg and Christof Kuhbandner, *Comment on Flaxman et al.*, Leibniz University Hannover and University of Regensburg (christof.kuhbandner@ur.de).
[55] *Id.*

from those that did not. In connection with this, Plaintiff presented a document identified as "Exhibit 26" containing a table of data comparisons. At the hearing, Defendants objected to admission of that document on grounds of improper foundation, and lack of identification of origin or sources. Because the testimony had occurred earlier in the day, and the witness had already been excused, the Court indicated that it would rule following a review of the testimony. Having done so, Defendant's objection to Exhibit 26 is sustained.[56] However, the objection applied only to Exhibit 26, not her testimony, or the specific points of data contained therein on which she expressed knowledge.

**2. Validity of Social Distancing and Mask Mandates on Covid-19**

Stephen E. Petty, P.E., CIH, testified[57] as an expert and was accepted as such without objection. Mr. Petty has served as an expert witness in approximately 400 cases relating to toxic or infectious exposure, personal protective equipment ("PPE"), and as a warning expert. He also served as an epidemiology expert for the plaintiffs in the Monsanto "Roundup" cases, and for those in the Dupont C8 litigation. In connection with his service as an expert, he was deposed nearly 100 times and has provided court testimony in approximately 20 trials. Mr. Petty holds nine U.S. patents, has written a book comprising nearly 1,000 pages on forensics engineering, is a certified industrial hygienist, and a recognized expert with the Occupational Safety and Health Agency. Mr. Petty helped write the rules on risk assessment for the State of Ohio and has trained Ohio's risk assessors.

Mr. Petty explained that the field of his expertise is "to anticipate and recognize and control things that could hurt people, everything from making them sick to killing them."[58] He

[56] On cross-examination, Dr. Rutherford testified that she did not participate in compiling the document, could not provide source citations to identify the source(s) of the data within the document, could not state who performed the calculations contained in the document, and could not identify who chose which states to sample.
[57] V.R. 05/17/2021, *circa* 11:45:40.
[58] *Id.*

testified that, in this context, he has analyzed the use of masks and social distancing in connection with Covid-19. He testified that both the six-foot-distancing rule, and mask mandates, are wholly ineffective at reducing the spread of this virus. Masks are worthless, he explained, because they are not capable of filtering anything as small as Covid-19 aerosols. In addition, masks are not respirators and lack the limited protections that respirators can provide.

The N-95 respirator, which he states is in the bottom class of what may be classified as a respirator, is rated to filter 95% of all particles that are larger than .3 microns. However, a Covid-19 particle, which is only between .09 to .12 micron, is much smaller. Mr. Petty further explained that an N-95 will not even filter above .3 microns if it is not used in accordance with industry standards. Among the requirements, respirators must be properly fitted to seal along the face, and they also must be timely replaced. Mr. Petty stated that N-95 masks, which he said are often utilized as surgical masks, are "not intended to keep infectious disease from either the surgeon or from the patient infecting each other" but only to catch the "big droplets" from the surgeon's mouth."[59]

According to Mr. Petty, masks have no standards, are not respirators, and do not even qualify as protective equipment. In contrast, respirators have standards, including rules that state respirators may not be worn by persons with facial hair, must be fitted to ensure a seal, and must be timely replaced—or, as in higher end respirators, the cartridges must be replaced to prevent saturation. In addition, standards for respirators also require users to obtain a medical clearance because the breathing restriction can impair lung function or cause other problems for persons having such limitations. Putting those persons in a respirator can harm their well-being.

[59] *Id.*

Concerning the effectiveness of respirators, Mr. Petty explained that it comes down to "big stuff" versus "small stuff." Big stuff can be taken out by the body's defenses, such as its mucus tissue, where droplets can be caught and eliminated. The small stuff, however—like aerosols—are more dangerous. Masks cannot filter the small stuff. According to Petty, because Covid-19 particles are comprised of aerosols, it is really, really, small stuff. And, as he pointed out, an N-95 is designed to filter larger particles. Even for particles as large as .3 micron, Mr. Petty testified that an N-95's effectiveness is in direct proportion to its seal. In fact, he stated it becomes completely ineffective if 3% or more of the contact area with the face is not sealed.

Mr. Petty testified that masks leak, do not filter out the small stuff, cannot be sealed, are commonly worn by persons with facial hair, and may be contaminated due to repetitive use and the manner of use. He emphatically stated that mask wearing provides no benefit whatsoever, either to the wearer or others.

He explained that the big droplets fall to the ground right away, the smaller droplets will float longer, and aerosols will remain suspended for days or longer if the air is stirred. Mr. Petty testified that the duration of time that particles remain suspended can be determined using "Stoke's Law." Based on it, for particles the size of Covid-19 (.12 to .09 micron) to fall five feet would take between 5 and 58 days in still air. Thus, particles are suspended in the air even from previous days. And so, he asks, "If it takes days for the particles to fall, how in the world does a six-foot rule have any meaning?"[60]

Mr. Petty acknowledged that both OSHA and CDC have recommended that people wear masks. However, he called this "at best dishonest."[61] As an example on this, he pointed to CDC guidance documents where, on page 1, it recommends wearing a mask; but then on page 6,

[60] *Id.*
[61] *Id.*

admits that "masks, do not provide . . . a reliable level of protection from . . . smaller airborne particles."[62] According to Mr. Petty, those agencies have smart individuals who know better. Mr. Petty points out that, even before March 2020, it was known that Covid-19 particles are tiny aerosols. And on this, he states that he insisted that fact early on. He also points to a more recent letter by numerous medical researchers, physicians and experts with Ph.D.s, asking the CDC to address the implications of Covid-19 aerosols. During Dr. Stack's subsequent testimony, he also acknowledged that Covid-19 is spread "by . . . airborne transmission that could be aerosols . . . ."[63]

Finally, Mr. Petty pointed to another recent study by Ben Sheldon of Stanford University out of Palo Alto. According to that study, "both the medical and non-medical face masks are ineffective to block human-to-human transmission of viral and infectious diseases, such as SARS, CoV-2 and COVID-19."[64] The Court finds the opinions expressed by Mr. Petty firmly established in logic. The inescapable conclusion from his testimony is that ordering masks to stop Covid-19 is like putting up chain-link fencing to keep out mosquitos. The six-foot-distancing requirements fare no better.

**3. Data Comparisons: Kentucky and Freer States**

Plaintiff and Intervening Plaintiff argue the Governor's orders have been shown to be ineffectual and, therefore, cannot justify continued imposition on an emergency basis. They compare Kentucky's data with the data from states that purportedly imposed no mandates, such as South Dakota, or states that imposed far less stringent mandates, such as Tennessee, Texas

[62] *Id.*
[63] V.R. 05/17/2021, *circa* 02:05:45.
[64] V.R. 05/17/2021, *circa* 11:45:40.

and Florida. At the hearing, and in the Attorney General's Reply, the primary focus was on Florida. The Court can take judicial notice of the published data.[65]

As to the greater freedoms allowed by the Governor in Florida, Dr. Steven Stack agreed that, "at varying times," Florida "had much less stringent requirements" than those imposed in Kentucky.[66] He further acknowledged that Florida "opened up earlier than us, yes, significantly."[67]

The population of Florida is more than four times that of Kentucky, Florida's being 21,538,187 and Kentucky's 4,505,836.[68] In addition, Florida has a higher percentage of its population over age 65 than does Kentucky. In Florida, 20.9% of the people are over age 65, whereas in Kentucky 16.9% are over age 65.[69] Florida had 10,471 Covid-19 cases for every 100,000 people, and Kentucky had 10,197 per 100,000 people.[70] The CDC reports that, in Florida, for every 100,000 people, 167 died with Covid-19 and, in Kentucky, for every 100,000 people, 150 people died with Covid-19.[71] That is a difference of a mere 0.017%, with Kentucky's number being slightly better.

However, Florida's population is older. In fact, an additional 4% of Florida's population are over age 65 compared to Kentucky. When that fact is considered, Florida's success and survival rate is better than Kentucky's. In Florida, deaths of persons with Coivd-19 who were at

[65] See Attorney General's Post Hear'g Reply, pp. 9-12; see also KRE 201(c), and *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 264 (Ky. App. 2005), holding a court can take judicial notice of a fact that is generally known and "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."
[66] V.R. 05/17/2021, *circa* 03:58:38 p.m.
[67] *Id.*
[68] See U.S. Census Bureau data for 2020, available at: https://www.census.gov/quickfacts/fact; see also Att. Gen. Reply, p. 10 for 2019 Census Data.
[69] *Id.*
[70] See CDC Covid Data Tracker, available at: https://covid.cdc.gov/covid-data-tracker/#cases_casesper100k; see also, Att. Gen. Reply, p. 11.
[71] *Id.*

age 65 and older represent 75.16% of the total persons who died of Covid-19 in that state.[72] Compare that to Kentucky, where persons who died with Covid-19 over the age of 65 represent 87.75% of all Covid-19 deaths.[73] In any event, the data comparison demonstrate there to be no emergency justification for continuing Governor Beshear's orders.

**4. Accuracy of CDC Case Counts**

Dr. Stack testified as to the different methods by which cases are determined to be positive for Covid-19. He also provided information on the polymerase chain reaction ("PCR") test and that, by government order, the cycle rates used in that testing may not be disclosed. According to Dr. Stack, federal regulation prohibits labs from reporting to the public the number of cycles it took to yield a positive result during the test.[74] This is commonly referred to as "cycle threshold" or "Ct" values.[75] The Ct value is "the number of amplification cycles . . . at which the diagnostic test result of the real-time PCR changes from negative (not detectable) to positive (detectible).[76] According to the guidance, the total number of cycles required to yield a positive result "generally ranges from about 15 to 45 cycles."[77] The guidance provided by Dr. Stack explains that, "[d]iagnostic laboratories should not include Ct values on laboratory reports because it could be out of compliance with laboratory regulations and they should not be used to inform patient management."[78]

[72] Compare CDC Covid Data Tracker, available at https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm#SexAndAge, with https://covid.cdc.gov/covid-data-tracker/#cases_casesper100k, and https://www.census.gov/quickfacts/fact.
[73] *Id.*
[74] V.R. 05/17/2021, at 03:50:00 p.m.; and 04:07:00.p.m
[75] See Defendants' Exh. A, at p. 31 of 34; *Ct Values: What They Are and How They Can be Used*; Vers. 1 APHL (Nov. 9, 2020).
[76] *Id.*
[77] *Id.*
[78] *Id.*

In contrast, however, the CDC has recently indicated that Ct values should be limited at, or less than, 28 cycles when cataloguing "breakthrough infections," *i.e.*, infections occurring in persons that have been fully vaccinated for Covid-19. For those cases, the CDC states that "Clinical specimens for sequencing should have an RT-PCR Ct value ≤28."[79] This is, at the very least, a curious difference. The CDC accepts Cycle thresholds for ordinary PCR testing for sequencing even when amplified as high as 45 cycles. But for "breakthrough" cases, states it should be no higher than 28. This invites many questions, such as why Ct values in Covid tests should differ based upon whether or not the individual being tested has been vaccinated; and, why a federal government agency has ordered labs to "not include Ct values on laboratory reports . . . to inform patient management," even though the CDC indicates that PCR Ct values should be ≤28. These are important questions. Case counts have been the poster child for the need to deprive people of their liberty.

**C. Constitutionality of the Acts**

Defendants point out that, under the New Legislation, the General Assembly did not repeal the delegation it granted under Chapter 39A. Thus, Defendants argue, since the General Assembly has maintained its delegation to the Governor, thereby allowing him to make rules during an emergency, it cannot at the same time manage the Governor in how he goes about it. That, they insist, would be engaging in executive functions by the legislature. According to Defendants, because the New Legislation attempts to do so, it encroaches on the powers granted to the executive branch under the Constitution.

As to House Bill 1, Defendants' challenge is on grounds that it attempts to delegate functions to the CDC. According to Defendants, House Bill 1 makes the CDC the interpretative

[79] See CDC, *COVID-19 vaccine breakthrough case investigation, Information for public health, clinical, and reference laboratories*, available at: https://www.cdc.gov/vaccines/covid-19/downloads/Information-for-laboratories-COVID-vaccine-breakthrough-case-investigation.pdf (last accessed, June 7, 2021).

or determinative body of what measures should be imposed upon businesses. Defendants complain that House Bill 1 does not specify which of the CDC's 100-plus guidance documents are not to be Kentucky law. Defendants further assert that CDC guidance is conflicting and difficult to navigate. Therefore, Defendants argue, because it makes CDC guidance the regulatory standard, House Bill 1 violates §§ 1 and 2 of Kentucky's Constitution for being impermissibly arbitrary, vague, and unintelligible.

Dr. Stack testified that he, in consult with others in the executive branch, reviews the guidance of the CDC and tailors the emergency orders that are imposed on Kentucky businesses.[80] According to Dr. Stack, CDC guidance would be too difficult for individual businesses to navigate on their own.[81] However, as Plaintiff points out, the emergency orders issued by Defendants also contain references to CDC guidance. Initially Dr. Stack contended that it would be impossible to enforce a company's compliance plan if it was predicated on the CDC guidance.[82] But, on cross-examination, he conceded that enforcement based upon CDC guidelines "should generally be doable."[83]

It is true that the General Assembly may not legitimately delegate functions to the CDC, or make it the interpretive or determinative body for Kentucky law. But House Bill 1 does not delegate legislative function to the CDC. Rather, House Bill 1 uses CDC guidance as a limit on the rule-making authority delegated to the Governor. It caps the extent or scope of rulemaking that the Governor may impose by emergency decree. The Kentucky Supreme Court held that the General Assembly may delegate rulemaking under KRS Chapter 39A. House Bill 1 sets a

[80] V.R. 05/17/2021, *circa* 02:18:00 p.m.
[81] *Id.*
[82] *Id.*, *circa* 02:31:00 – 02:33:00 p.m.
[83] V.R. 05/17/2021, *circa* 03:02:00 p.m.

boundary on that delegation by using CDC guidance as the foul-line. For the reasons Defendants point out, it is not likely much of a limit. But it is a limit nonetheless.

Whereas House Bill 1 limits executive decrees by their scope, or extent of their reach, Senate Bills 1 and 2 limit their duration. Senate Bill 1 still allows the executive to restrict in-person meetings or social gatherings, and to impair attendance at places of worship, schools, businesses, and other organizations under Chapter 39A, but it limits any such orders to 30 days "unless an extension, modification, or termination is approved by the General Assembly."[84] Senate Bill 2, § 22, contains a similar time limitation on administrative regulations. Defendants argue that this violates §§ 36 and 42 of the Kentucky Constitution which mandates that the General Assembly meet for only 30 days in odd years, and 60 days in even years. Further, Defendants point to § 80 of the Constitution, which provides that the Governor "may" call an extraordinary session. According to Defendants, because that provision gives the Governor discretion to call a special session, it implies that, should he decide not to, he has authority to decree whatever rules he deems necessary. This proposition, however, turns the Constitution's strict separation of powers into a meaningless formula.

In support of their proposition, Defendants present historical accounts of Kentucky's 1890-91 Constitutional Convention. Specifically, they quote delegates to show the Convention was called to constrain the General Assembly from meeting too often; that an ongoing legislature makes the people "subject at times to very great abuses;"[85] that without curbing the time during which the General Assembly may legislate, they "might go on for several months and expend the money of the people of Kentucky,"[86] and that the result was "too much legislation."[87] None of

[84] 2021 Ky. Acts ch. 6 § 2.
[85] Defendants' Resp. and Cross-motion, p. 36, quoting Delegate DeHaven, 1890 Debates, at 206.
[86] *Id.*, quoting Delegate Cox, 1890 Debates, 1126-27.
[87] *Id.*

this, however, proves that the people reined-in the legislature only to empower their governor to rule by mere decree in its stead. Indeed, that circumstance would be far worse than the first. The quotes presented by Defendants support the oft repeated quote that "*no one's life, liberty, or property is safe while the legislature is in session*."[88] But the complaint it expresses is not remedied by replacing legislation with executive rulemaking. As is so cleverly illustrated by the old Schoolhouse Rock cartoon, "*I'm Just a Bill*," it's not easy to pass a law. It's not supposed to be. We have a bicameral legislature for a reason.

Defendants contend the Acts violate § 80 of the Constitution "[b]y forcing the Governor to call a special session to extend emergency orders," thereby "effectively [rewriting §§ 36 and 42] to allow the General Assembly to meet for 30 legislative days during odd-numbered years and 60 legislature days in even numbered years, *unless an emergency exists*."[89] The Court disagrees. The Acts do not provide any means for the General Assembly to reconvene itself by virtue of its own legislation. It still requires a call from the Governor, and that call still remains at his discretion. Section 80 of the Constitution provides that the Governor "may, on extraordinary occasions, convene the General Assembly . . . . stating the subjects to be considered, and no other shall be considered." The Acts are consistent with this provision. The following quote attributed to Delegate MacKoy perhaps best makes the point:

> It is to be presumed, I think, when the Legislature is convened in special session, that it is so called in pursuance of some emergency of some public demand that is urgent, and that the Governor, knowing the wishes of the people and understanding fully the emergency, will call the Legislature in special session only when it is absolutely necessary that it shall be done.[90]

[88] Author unknown.
[89] Defendants' Resp. and Cross-motion, p. 37 (italics in original).
[90] *Id.*, quoting Delegate MacKoy, 1890 Debates, at 1049.

Before KRS Chapter 39A, if there was "some emergency" and the General Assembly was not then in normal session, the Governor had to call a special session and, as provided in § 80, present "the subjects to be considered" for legislation. Under the New Legislation, if there is "some emergency," the Governor may declare an emergency and act on his own for up to 30 days. After that, the authority delegated expires unless the General Assembly shall approve an extension. This does not square with Defendants' position that executive power is being usurped. As Delegate MacKoy remarked, a special session is "called in pursuance of some emergency . . . that is urgent." If a purported emergency that would extend beyond 30 days is not sufficiently urgent to call a special session, then it is not sufficiently urgent to justify the imposition of indefinite and open-ended rulemaking by executive decree. As John Adams counseled, "*The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty*."[91]

Defendants also attack § 4 of Senate Bill 1 because it requires the Governor to identify with specificity the laws being suspended, and conditions the Governor's emergency power to suspend laws upon the written approval of the Attorney General. According to Defendants, that is constitutionally offensive because it makes the action of the Governor depend upon a lesser constitutional officer. However, § 15 of the Constitution commands that, "No power to suspend laws shall be exercised unless by the General Assembly or its authority." Clearly, if the Governor can suspend laws, he can only do so "by the General Assembly or its authority." In *Acree*, the Kentucky Supreme Court held the General Assembly could delegate that authority. Now the General Assembly has, "by its authority," limited that delegation by the conditions set out in Senate Bill 1.

[91] John Adams, Bill of Rights Institute, https://billofrightsinstitute.org/founders/john-adams, last accessed May 29, 2021.

Defendants also assert that, if the Governor's emergency orders are not legislative in nature, or do not involve legislative power, then he has the authority under the Constitution to act without regard to any delegation under KRS Chapter 39A. If the Governor's emergency orders were not engaging in legislative power, that would certainly be true. Legislative power is defined in Black's Law Dictionary as, "[t]he power to make laws and to alter them at discretion . . . ."[92] Legislative function means "[t]he duty to determine legislative policy"; "the duty to form and determine future rights and duties."[93] And the definition of legislate includes, "[t]o bring something into or out of existence by making laws; to attempt to control (something) by legislation . . . ."[94]

Cleary, what has been ordered by the Governor's emergency decrees constitute legislation. Dr. Stack's testimony demonstrates that he and others engage in a process of collaboration and review of CDC guidelines and other documents, the purpose of which is to impose rules on persons and businesses in Kentucky, and that in formulating these rules they tailor them to apply uniformly across the Commonwealth.[95] This is formulating policy. He further testified that they have repeatedly amended and revised their orders, thus showing they deem to have the power to make laws and alter them at discretion. Indeed, he described the orders imposed as having a "breathtaking scope."[96]

It is obvious from even a cursory review that the orders issued over the past fifteen months "attempt to control" and seek "to form and determine future rights and duties" of Kentucky citizens. These included ordering the closure of all businesses, except those the Governor deemed essential. He ordered churches closed, prohibited social gatherings, including

[92] BLACK'S LAW DICTIONARY, 7th ed., West Group, p. 911 (St. Paul MN: 1999) (defining "legislative power").
[93] *Id*. (defining "legislative function").
[94] *Id*., at 910 (defining "legislate").
[95] V.R. 05/17/2021, *circa* 02:18:00.
[96] *Id*., at *circa* 03:02:00.

at weddings and funerals, prohibited travel, and through CHFS, even prohibited citizens from receiving scheduled surgeries and access to medical care. And then there is the order that everyone wear a mask. These are, undeniably, attempts to control, set policy, and determine rights and duties of the citizenry. Except in those instances where the federal courts have stepped in, Defendants assert authority to modify or re-impose these orders at their sole discretion. Consider, for example, the recent modification of the mask mandate. It orders persons who did not get vaccinated for Covid-19 to wear masks but lifts that requirement for others. That is setting policy and determining future rights and duties.

At the hearing, Defendants took exception to the Attorney General's characterization of the Governor's actions as a "lockdown," and argued that prohibiting persons from entering those restaurants is not the same as ordering that they be closed. But that doesn't minimize the impact on those who lost their businesses as a result, or those in nursing homes condemned to spend their final hours alone, deprived of the comfort from loved ones (or even any real contact with humanity), or those citizens who the Governor prohibited from celebrating their wedding day with more than ten persons, or those he forced to bury their dead alone, without the consoling presence of family and friends (and who likewise were deprived of paying their final respects), or those persons who were barred from entering church to worship Almighty God during Holy Week, and even Easter Sunday, or those persons who were denied access to health care, including cancer-screenings, or those denied entry into government buildings (which they pay for with their taxes) in order to obtain a necessary license, and who were forced to wait outside for hours in the sweltering heat, or rain, purportedly to keep them from getting sick.

What the people have endured over the past fifteen months—to borrow a phrase from United States District Judge Justin R. Walker—"is something this Court never expected to see

outside the pages of a dystopian novel."[97] Yet, Defendants contend that the Governor's rule by mere emergency decree must continue indefinitely, and independent of legislative limits. In effect, Defendants seek declaratory judgment that the Constitution provides this broad power so long as he utters the word, "emergency." It does not. For this Court to accept Defendant's position would not be honoring its oath to support the Constitution; it would be tantamount to a *coup d'état* against it.

To succeed on their claims that the New Legislation is unconstitutional, Defendants bear a heavy burden. Statutes enacted by the General Assembly enjoy a "strong presumption of constitutionality."[98] This is especially true here, since Defendants contend that the Acts are unconstitutional on their face. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully."[99] In order to find legislation unconstitutional, "the violation of the Constitution must be clear, complete and unmistakable."[100] Further, the party "must establish that no set of circumstances exists under which the Act would be valid."[101] For all of the foregoing reasons, this Court finds that Defendants have failed to meet their burden. And for the same reasons, Plaintiff's Motion, and the arguments of the Attorney General, are well taken.

**THEREFORE, JUDGMENT IS HEREBY ENTERED** in favor of Plaintiff and **DECLARATORY RELIEF** is **GRANTED** in that the Court finds and declares that all actions taken by Defendants, Hon. Andrew Beshear, as Governor, Mr. Eric Friedlander, as acting Secretary of the Cabinet for Health and Family Services, and Dr. Steven Stack, M.D., as

[97] *On Fire Christian Center, Inc., v. Greg Fischer, et al*. 3:20-CV-264-JRW, p. 3 (U.S. Dist. Ct., W. Dist. Ky., Apr. 11, 2020).
[98] *Wynn v. Ibold, Inc*., 969 S.W.2d 695, 696 (Ky. 1998).
[99] *Williams v. Commonwealth*, 213 S.W.3d 671, 681 (Ky. 2006), quoting, *Rust v. Sullivan*, 500 U.S. 173, 183 (1991).
[100] *Williams*, 213 S.W.3d, at 681, quoting *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493, 499 (Ky.1998).
[101] *Williams*, 213 S.W.3d, at 681, quoting *Rust*, 500 U.S., at 183.

Commissioner for the Kentucky Department of Public Health, and all emergency orders imposed by said Defendants, or that are being continued by said Defendants, are unconstitutional, void and without any legal effect, to the extent that the same are in conflict with, or are otherwise contrary to, House Bill 1, Senate Bill 1, Senate Bill 2, and House Joint Resolution 77, as passed in the 2021 session of the General Assembly.

**IT IS FURTHER HEREBY ORDERED** that Plaintiff's Motion for Permanent Injunction is **GRANTED** and that, effective June 10, 2021, at 5:00 p.m., Defendants, Hon. Andrew Beshear, as Governor, Mr. Eric Friedlander, as acting Secretary of the Cabinet for Health and Family Services, and Dr. Steven Stack, M.D., as commissioner for the Kentucky Department of Public Health, are enjoined from enforcing Plaintiff to comply with any emergency orders imposed by said Defendants, or that are being continued by said Defendants, that are in conflict with, or are otherwise contrary to, House Bill 1, Senate Bill 1, Senate Bill 2, and House Joint Resolution 77, as passed in the 2021 session of the General Assembly.

**IT IS FURTHER HEREBY ORDERED** that Plaintiff's Motion for Class Certification is **DENIED**, in that the result of the Declaratory Judgment has the same effect.

**IT IS FURTHER HEREBY ORDERED** that Defendants' Cross-Motion for Declaratory Judgment that the General Assembly violated the Constitution in passing House Bill 1, Senate Bill 1, Senate Bill 2, and House Joint Resolution 77, is **DENIED**.

There being no just cause for delay in the entry of this Judgement, this Judgment is final and appealable.

The Clerk shall serve notice of entry hereof in accordance with CR 77.

**IT IS SO ORDERED**.

/s/ HON. RICHARD A. BRUEGGEMANN
electronically signed
6/8/2021 2:10:34 PM ET

**JUDGE RICHARD A. BRUEGGEMANN**
**BOONE CIRCUIT COURT**

CC: ALL COUNSEL AND PARTIES OF RECORD.