Supreme Court of Kentucky

No. 2021-SC-0126-T
[To Be Heard With No. 2021-SC-0107-T]

ANDY BESHEAR, *et al.* — *Defendants-Movants*

v.

Transfer from Court of Appeals Nos. 2021-CA-0391-I
and Scott Circuit Court No. 21-CI-00128

GOODWOOD BREWING CO., LLC;
TRINDY'S LLC; & KELMARJO, INC. — *Plaintiffs-Respondents*

RESPONDENTS' INITIAL BRIEF

Respectfully submitted,

JOSHUA S. HARP
Ky. Bar No. 91386
Baughman Harp, PLLC
401 West Main Street
Frankfort, KY 40601
Tel: (502) 227-2271
harp@harplawoffice.com

OLIVER J. DUNFORD
Ky. PHV No. PH24392034*
Fla. Bar No. 1017791
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Tel: (916) 503-9060
ODunford@pacificlegal.org
**Admitted pro hac vice*

Attorneys for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2021, a copy of this brief was served by E-mail and by U.S. Mail on the following: Judge Brian Privett, Scott Circuit Court, Scott County Justice Ctr., 310 Main Street, Georgetown, KY 40361; Amy Cubbage, S. Travis Mayo, Laura Tipton, Taylor Payne, & Marc Farris, Office of the Governor, 700 Capitol Ave., Ste. 106 Frankfort, KY 40601; Wesley Duke & David Lovely, Cabinet for Health & Family Srvcs., 275 East Main St. 5W-A, Frankfort, KY 40621. I further certify that Respondents did not withdraw the record from the Clerk's Office.

OLIVER J. DUNFORD

(Additional counsel on inside cover)

Steven M. Simpson
Ky. PHV No. PH24392244*
DC Bar No. 462553
Daniel T. Woislaw
Ky. PHV No. PH24392397*
Va. Bar No. 91180
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
Tel: (202) 888-6881
SSimpson@pacificlegal.org
DWoislaw@pacificlegal.org
*Admitted pro hac vice

Attorneys for Plaintiffs-Respondents

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INTRODUCTION

In *Beshear v. Acree*, this Court stated that "the Governor is most definitely subject to constitutional constraints even when acting to address a declared emergency." 615 S.W.3d 780, 788 (Ky. 2020). Here, the Court is asked to decide whether the Governor's constitutional duty to "take care that the laws be faithfully executed" (KY. CONST. § 81) applies to the Commonwealth's emergency-powers laws recently amended by the General Assembly.

STATEMENT CONCERNING ORAL ARGUMENT

The Court has scheduled oral argument for Thursday June 10, 2021, in the Supreme Court courtroom.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Last year, Governor Beshear declared a state of emergency "by virtue of the authority vested in [him] by [KRS] Chapter 39A," *i.e.*, the "Statewide Emergency Management Programs" (KRS §§ 39A.010–.990).[1] The Governor has also insisted that "KRS Chapter 39A controls."[2] But now that the General Assembly has amended Chapter 39A and placed additional parameters on the Governor's emergency authority, Governor Beshear contends that he possesses inherent, sweeping, and virtually unreviewable "emergency" powers that may be enforced until he, and he alone, decides that the emergency has ended.

Plaintiffs Goodwood Brewing Company, LLC; Trindy's, LLC; and Kelmarjo, Inc. are restaurant-and-bar businesses struggling to survive under the Governor's continued enforcement of executive-branch directives (the "Challenged Orders") that lapsed automatically under the unambiguous terms of the amended laws. These Restaurants filed this suit in Scott Circuit Court to challenge the Governor's illegal conduct.

To avoid the merits, the Governor claims, among other things, (a) that his separate case in Franklin Circuit Court forbids the Restaurants' lawsuit and (b) that this Court's decision in *Beshear v. Acree* resolved the Restaurants' claims—even though the Restaurants' claims are based entirely on Chapter 39A's amendments, which were not enacted until after *Acree* was issued. The

[1] *See* Executive Order 2020-215 (Mar. 6, 2020), at Joint Appendix 51–54.

[2] *See* Br. for Appellants (*Beshear Acree Br.*), at 17, *Beshear v. Acree*, Ky. S. Ct. No. 2020-SC-000313-OA. *See* Tab 3.

Court should ignore the Governor's attempts to distract from the simple issue presented: whether the Governor, like everyone else in the Commonwealth, must follow the laws of the land—here, the additional limitations placed on the exercise of emergency powers.

A. Movants Issued Executive Orders under the Commonwealth's Emergency-Powers Laws[3]

Since Governor Beshear declared a state of emergency over a year ago, he and other executive-branch officials have issued and enforced scores of executive-branch directives, under the authority granted by KRS Chapter 39A. *See* Tab 1, Plaintiffs' Verified Complaint (Compl.), ¶¶ 8–31. The Challenged Orders here took the form of formal executive orders issued by the Governor himself (JA 51–54, 69–98, 154–161), administrative regulations (JA 122–133, 162–168), mandates from individual executive departments like CHFS (JA 55–68, 108–115, 134–141), and often-changing but binding "guidance" documents posted on-line (JA 99–107, 116–121, 142–153, 280–285).[4]

These Orders forced the Restaurants to close their businesses for in-person service twice (March 16, 2020 through May 22, 2020, and again from November 20, 2020 through December 13, 2020). Compl. ¶¶ 13, 21, 28, 33. When the Restaurants were permitted to open, the Challenged Orders severely restricted their operations and threatened their survival by, among other things,

[3] Unless the context provides otherwise, the Defendants-Movants will be collectively referenced here as either the "Governor" or "Movants."

[4] The Challenged Orders were attached to the Complaint as Exhibits 1–23 & 28, but due to their volume, they are not attached to this Brief. The Restaurants therefore cite to the Challenged Orders as they appear in the parties' Joint Appendix (JA).

prohibiting in-person service and bar-service, mandating early closing times, limiting capacity, and imposing further limits through various iterations of the "Requirements for Restaurants and Bars." *Id.* ¶¶ 8–33, 63, 69.

B. The General Assembly amends the emergency powers granted to the Governor in Chapter 39A

After nearly eight months of unilateral gubernatorial rule, the people of Kentucky last November elected an overwhelming majority of legislators committed to reforming and limiting emergency power. And, in February of this year, during its constitutionally authorized regular session, KY. CONST. § 36, the General Assembly amended KRS Chapter 39A and other statutes related to the Commonwealth's emergency-powers policy. Over the Governor's vetoes, the General Assembly enacted **House Bill 1**—"An Act relating to reopening the economy in the Commonwealth of Kentucky in response to the [COVID-related state of emergency] and continuing throughout the year of 2021 and declaring an emergency"; **Senate Bill 1**—"An Act relating to emergencies and declaring an emergency"; and **Senate Bill 2**—"An Act relating to administrative regulations and declaring an emergency".[5]

House Bill 1 states that private businesses "may remain open and fully operational for in-person services so long as it adopts an operating plan" that meets certain minimum safety requirements. H.B. 1, § 1 (R.S. 2021) (JA 170).

[5] Copies of House Bill 1, Senate Bill 1, and Senate Bill 2 may be found in the Joint Appendix at 170–174, 176–195, & 197–255, respectively. *See also* House Bill 1, https://apps.legislature.ky.gov/record/21rs/hb1.html; Senate Bill 1: https://apps.legislature.ky.gov/record/21rs/sb1.html; Senate Bill 2, https://apps.legislature.ky.gov/record/21rs/sb2.html (all last visited Apr. 30, 2021).

Senate Bill 1 provides that "[e]xecutive orders, administrative regulations, or other directives issued under [KRS Chapter 39A]" which "[p]lace[] restrictions on the in-person meeting or … on the functioning of … [p]rivate businesses" "shall be in effect no longer than thirty (30) days unless an extension, modification, or termination is approved by the General Assembly prior to the extension" of any such orders. KRS § 39A.090(2)(a)(1)(b) (eff. 2/2/21).

Further, "[u]pon the expiration of an executive order or other directive described in [§ 39A.090(2)(a)] declaring an emergency or other implementation of powers under this chapter," the Governor "shall not declare a new emergency or continue to implement any of the powers enumerated in this chapter … based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly." KRS § 39A.090(3) (eff. 2/2/21).

Senate Bill 2 provides that any "administrative regulation promulgated under the authority of [§ 214.020]" that "[p]laces restrictions on the in-person meeting or functioning of … [p]rivate businesses" "shall[] [b]e in effect no longer than thirty (30) days …." KRS § 214.020(2)(a)(1)(b) (eff. 2/2/21).

C. The Governor continues to enforce the Challenged Orders

The Governor claims that the General Assembly's enactments infringe on his inherent executive powers. As a result, he has ignored the plain language of the amended laws and continues to enforce the Challenged Orders beyond the 30-day limits established in Senate Bill 1 and Senate Bill 2. The Governor

also "continue[s] to implement" the powers enumerated in KRS Chapter 39A, based on the COVID-19 pandemic, in violation of Senate Bill 1.

1. Under Senate Bill 1, the Challenged Orders issued under KRS Chapter 39A lapsed on March 4, 2021

When the Restaurants filed their lawsuit on March 8, 2021, the General Assembly had not extended any of the Challenged Orders subject to Senate Bill 1 (JA 50–121, 134–161). These Orders "[p]lace[] restrictions on the in-person meeting [and] … on the functioning of" the Restaurants' "[p]rivate businesses," and, as a result, the Orders could have remained "in effect no longer than thirty (30) days unless an extension[or] modification [wa]s approved by the General Assembly prior to the[ir] extension." KRS § 39A.090(2)(a)(1)(b) (eff. 2/2/21). Without the General Assembly's extension, these Orders lapsed automatically 30 days after the effective date of Senate Bill 1—*i.e.*, on March 4, 2021. Therefore, as of March 5, 2021, these Orders are no longer in effect.

Because of a more recent action by the General Assembly, one exception now exists: Executive Order 2020-215, the state-of-emergency declaration. This order was extended through House Joint Resolution 77 (enacted over the Governor's veto on March 30, 2021).[6] Because the General Assembly extended Executive Order 2020-215 for an additional 90 days, this order is currently in effect. *See* 2021 H.J.R. 77, § 2 (eff. 3/30/21) (JA 460). The Restaurants do not, therefore, challenge the effectiveness of Executive Order 2020-215.

[6] JA 460–464. *See also* https://apps.legislature.ky.gov/record/21rs/hjr77.html (last visited Apr. 30, 2021). H.J.R. 77 extended many executive directives, but none (aside from Executive Order 2020-215) are at issue in this case.

2. Under Senate Bill 2, regulations issued under KRS § 214.020 lapsed on March 4, 2021

Regulations 902 KAR 2:190E and 902 KAR 2:211E (JA 122–133, 162–168) were issued under the authority of KRS § 214.020 and are therefore subject to Senate Bill 2. KRS § 214.020(2) (eff. 2/2/21). Pursuant to the terms of Senate Bill 2, these regulations were to remain "in effect no longer than thirty (30) days …." *Id.* These regulations thus lapsed by operation of law thirty days after February 2, 2021—*i.e.*, on March 4, 2021. And, therefore, as of March 5, 2021, these regulations have no force or effect.

3. Senate Bill 1 prohibits the Governor from continuing to implement the powers identified in Chapter 39A

The Governor continues to issue new COVID-related orders, in contravention of Senate Bill 1. For example, the Governor published Version 5.5 of the Requirements for Restaurants and Bars (JA 280–285), without the approval of the General Assembly, after the Challenged Orders lapsed. But (a) because the Challenged Orders had expired, (b) because this Version 5.5 is an attempt to "continue to implement … the powers enumerated in [KRS Chapter 39A] … based upon the same or substantially similar facts and circumstances as the original declaration or implementation," and (c) because it was issued "without the prior approval of the General Assembly"—Version 5.5 was invalidly issued and void *ab initio*. KRS § 39A.090(3) (eff. 2/2/21).[7] Subsequent related orders,

[7] Both the previous and current versions of KRS § 39A.090(1) provide that the Governor "may make, amend, and rescind any *executive orders* as deemed necessary to carry out the provisions of KRS Chapters 39A to 39F." *Id.* (emphasis added). Accordingly, the Governor's

also issued without the General Assembly's ratification, likewise violate § 39A.090(3). *See, e.g.*, Supplemental Requirements for Restaurants and Bars (Apr. 19, 2021) (Tab 4).[8]

D. The Governor sues the government

On the same day the General Assembly overrode his vetoes and enacted the amended emergency-powers policy, the Governor filed suit in Franklin Circuit Court against the President of the Kentucky Senate, the Speaker of the Kentucky House, the Legislative Research Commission, and the Attorney General. *Beshear v. Osborne*, Franklin Cir. Ct. No. 2021-CI-00089. Franklin Circuit Judge Shepherd "enjoined" certain provisions of House Bill 1, Senate Bill 1, Senate Bill 2, and, later, H.J.R. 77. *See* JA 324–346, 348–356.

E. The Restaurants sue to challenge the Governor's violations of the Commonwealth's emergency-powers policy, and the Governor's actions were enjoined

The Restaurants brought a lawsuit in Scott Circuit Court to challenge the Governor's continued enforcement of the Challenged Orders and the issuance of new, COVID-related restrictions.[9] The Restaurants allege, as described above, that the closure orders and other obstructive orders have "restrict[ed]"

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directives and guidance and updated "requirements" posted on-line—which are not executive orders—are improper, and they represent yet another defect in the Governor's use of emergency power. In any event, all such orders, regulations, directives relevant here (except Executive Order 2020-215) have lapsed under the current version of KRS § 39A.090(2).

[8] *See also* https://chfs.ky.gov/agencies/dph/covid19/HAWRestaurantsandBars.pdf (last visited Apr. 30, 2021).

[9] Plaintiff Trindy's is located in Scott County. According to House Bill 3 (another law recently enacted over the Governor's veto), a Kentucky resident who brings a constitutional challenges like the Restaurants' claims here "shall file" a complaint where the plaintiff resides. *See* H.B. 3 §§ 1(1), 1(2)(a) (R.S. 2021). When multiple plaintiffs file such claims, the complaint may be filed in any county where one of the plaintiffs resides. *Id.* § 1(2)(a). *See* JA 550; *see also* https://apps.legislature.ky.gov/record/21rs/hb3.html (last visited Apr. 30, 2021).

and continue to "restrict[]" the "in-person meeting" and "functioning of" their businesses. *See* KRS § 39A.090(2)(a)(1)(b); KRS § 214.020(2)(a)(1)(b). As a result, the Restaurants contend that Movants' actions violate the Restaurants' rights to acquire and protect their property (KY. CONST. § 1), their rights against absolute and arbitrary power (*id.* § 2), their rights to due process (*id.* §§ 1–2, 4), and their rights to the structural guarantees of Kentucky's Separation of Powers (*id.* §§ 27–29, 69, 109). *See* Compl. ¶¶ 69, 73, 79, 85, 98, 111, 116, 122–26 (Tab 1).

Because the Challenged Orders violate the Restaurants' constitutional rights and impose irreparable harm for which no damages are available, the Restaurants moved for a temporary injunction. After full briefing and a hearing, the Scott Circuit Court issued an Opinion and Order Granting Temporary Injunctive Relief (Injunctive Order), prohibiting Movants from enforcing—against the Plaintiffs-Restaurants only—the Challenged Orders and any new orders related to the COVID-19 pandemic. *Inj. Order* at 3, 11–13 (Tab 2).

The Scott Circuit Court explained that while "the law recognizes the need for the full-time executive to be able to respond to emergencies," it also establishes a "safeguard" so that "orders made in response to a temporary emergency do not become de facto legislation." *Inj. Order* at 2 (Tab 2). The court also emphasized the right of citizens to seek redress in courts of law:

> By issuing this temporary injunction, the Court gives these Plaintiff businesses, the business community, and general citizenry of the Commonwealth a real say in these matters. While we elect and put trust in our officials in Frankfort, the impact of decisions in the Capitol actually

> live and breathe with the citizens of the Commonwealth, where the people operate businesses and work and raise families. Where the Courts give the citizens of the Commonwealth the ability to seek redress for harm when a law, executive order, or regulation from Frankfort disrupts their ability to live within their inalienable rights, that redress should be freely given.

Id. at 4.

F. The Court of Appeals grants emergency relief from the Injunctive Order, and this Court accepts transfer

Upon the Governor's motion, the Court of Appeals granted emergency relief and recommended transfer to this Court. JA 821–822, 989–999. On April 15, 2021, this Court transferred this action to this Court and established an expedited briefing and review schedule. The Court also ordered that this case be heard with Case No. 2020-SC-0107, which arises from challenges to Judge Shepherd's injunctive order issued in the Governor's Franklin County suit. JA 1002–1003.

* * *

"'[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.'" [10]

The "Governor is most definitely subject to constitutional constraints even when acting to address a declared emergency." [11]

ARGUMENT

The issue before the Court is a simple one: whether certain limitations enacted over the Governor's vetoes—namely, the amendments to KRS Chapter 39A under which the Challenged Orders have expired—are valid. Because they are valid, duly enacted laws, the Governor must, like everyone else in the Commonwealth, follow them. As this Court has previously explained:

> The Governor, as the chief executive of this Commonwealth, has only the authority and powers granted to him by the Constitution and the general law. He is the chief executive of the Commonwealth. Ky. Const. § 69. But the Governor, like everyone, is bound by the law. Indeed, the Governor has a special duty with respect to the law, as he is commanded to "take care that the laws be faithfully executed." Ky. Const. § 81.

Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin, 498 S.W.3d 355, 369 (Ky. 2016).

This separation-of-powers principle is a cornerstone of constitutional government in Kentucky and throughout the country. Without it, the rule of law would crumble, for any one branch of government would be free to usurp the powers of the others and violate the people's liberties at will. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting Part the First, Article XXX of the Massachusetts Constitution (1780), which separated

[10] *Fletcher v. Commw.*, 163 S.W.3d 852, 871 (Ky. 2005) (citation omitted).
[11] *Acree*, 615 S.W.3d at 788.

the government's powers "to the end it may be a government of laws and not of men"); *The Federalist No. 47*, at 324 (Madison) (J. Cooke ed. 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny."); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (reaffirming the central judgment of the Framers that the "ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed").

Contrary to the Governor's post-*Acree* arguments, this principle, like all foundational principles of constitutional government, does not yield in an emergency. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times."). In *Youngstown*, the Supreme Court invalidated President Truman's unilateral seizure of steel mills—even though the President had invoked his authority as commander-in-chief during the Korean War. 343 U.S. at 582; *see Fletcher*, 163 S.W.3d at 868 (explaining that *Youngstown* found no congressional authorization for the President's actions). As *Youngstown* teaches, the rule of law is most important during an emergency, because it is in such times when citizens—and their leaders—are most tempted to favor "action" over principle.

Perhaps because the dispositive issue is so straightforward, the Governor has almost entirely avoided it in this case and has instead offered a series of red herrings and non sequiturs. As the Scott Circuit Court noted, the Movants "decided not to argue the substantive issues in this Court instead relying on the" purportedly "preclusive effect of the Franklin Circuit temporary injunction." *Inj. Order* at 9 (Tab 2). Ultimately, Kentucky's Separation of Powers requires the Governor to follow and enforce the law—not to ignore it and create his own. His attempted procedural roadblocks and overwrought warnings of impending doom ought not to distract the Court from applying the centuries-old principle that "'[s]haping public policy is the *exclusive domain* of the General Assembly.'" *Louisville & Jefferson Cty. Metro. Sewer Dist. v. Hill*, 607 S.W.3d 549, 555 (Ky. 2020) (quoting *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 807 (Ky. 2009)) (emphasis added).

I. The Scott Circuit Court did not abuse its discretion in issuing its Injunctive Order

An appellate court "may not disturb a trial court's decision on a temporary injunction unless the trial court's decision is a clear abuse of discretion." *Commw. ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162 (Ky. 2009) (citation omitted). No abuse of discretion exists unless "the judge's decision is 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *SM Newco Paducah, LLC v. Kentucky Oaks Mall Co.*, 499 S.W.3d 275, 278 (Ky. 2016) (citation omitted). Absent this clear showing, an appellate court "'has no power'" to set aside an injunction. *Boone Creek Props., LLC v. Lexington-Fayette Urban*

Cty. Bd. of Adjustment, 442 S.W.3d 36, 38 (Ky. 2014) (quoting *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978)).

Here, the Scott Circuit Court properly concluded that the Restaurants met the injunctive-relief standard, as they clearly showed: (1) a substantial possibility of prevailing on their claims that the Governor's actions violate Kentucky's Separation of Powers; (2) they will be irreparably harmed without an injunction, since they are precluded from operating their restaurant businesses in accordance with the laws of the land and they face the threat of fines and closure-orders, for which no damages are available; and (3) the equities favor an injunction because the Governor *cannot* be injured by complying with duly enacted laws and because the public has "'a preeminent interest in ensuring that all public officials comply with the law.'" *Commw. ex rel. Conway v. Shepherd*, 336 S.W.3d 98, 104 (Ky. 2011) (citation omitted).

II. Senate Bill 1 & Senate Bill 2 amended the Commonwealth's emergency-powers policy, and the Governor violates his constitutional obligations by refusing to execute and enforce that policy

A. The Kentucky Constitution vests the Commonwealth's powers in three separate branches to prevent absolute and arbitrary government

It is axiomatic that Kentucky's Separation of Powers exists to have the government's three branches "'operate in their respective spheres [so] as to create checks to the operations of the others and to prevent the formation by one department of an oligarchy through the absorption of powers belonging to the others.'" *Fletcher*, 163 S.W.3d at 862 (quoting *Sibert v. Garrett*, 246 S.W.

455, 458 (Ky. 1922)). This doctrine "'was adopted … to preclude the exercise of arbitrary power. The purpose was … to save the people from autocracy.'" *Commw. ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 683 (Ky. 2019) (quoting *Fletcher*, 163 S.W.3d at 863 (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting))).

Kentucky's government is thus structured to preclude arbitrary government. And the Constitution expressly so declares: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." KY. CONST. § 2. Nor, of course, may such power exist in the smallest minority of a single individual. The key protection against absolute and arbitrary government is the separation of powers under the rule of law. Thus, by dividing powers and thereby allowing power only as defined by law, the "problem of a *discretionary* power in government was swept aside." M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 148 (Liberty Fund 1998) (discussing JEFFERSON, NOTES ON THE STATE OF VIRGINIA 208–09 (1781)). This principle applies to all concentrations of the government's separate powers, as Madison explained: "'Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judg*e would then be the *legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.'" *The Federalist No. 47*, at 326 (Madison) (quoting Montesquieu).

Kentucky thus applies a particularly strict separation-of-powers doctrine. *Diemer v. Commw., Ky. Transp. Cabinet, Dep't of Highways*, 786 S.W.2d 861, 864–65 (Ky. 1990). The Constitution expressly divides the legislative, executive, and judicial powers into three separate branches. KY. CONST. §§ 29, 69, 109. And, through two additional guaranties, it mandates a stringent separation. Section 27 declares that each of the three "distinct departments" is "confined" to a separate body, while Section 28 demands that "[n]o person or collection of persons" in one department "shall exercise any power properly belonging to either of the others" unless otherwise "expressly" provided for in the Constitution. *Id.* §§ 27–28. As this Court recognized, Sections 27 and 28 "contain some of the most powerful restrictions on government power-sharing in the country." *Appalachian Racing, LLC v. Commw.*, 504 S.W.3d 1, 5 (Ky. 2016).

1. The Kentucky Constitution vests the Commonwealth's policy-making power exclusively in the General Assembly

Under the Constitution's strict division of powers, the General Assembly is vested with the Commonwealth's legislative power. KY. CONST. § 29. As such, "'[s]haping public policy is the *exclusive domain* of the General Assembly.'" *Hill*, 607 S.W.3d at 555 (emphasis added) (citation omitted). And this policy-making power is exercised on behalf of the people: "There is reserved to the people of Kentucky, acting through the Legislature, all governmental power not expressly or by necessary implication denied them by the Constitution[.]" *City of Louisville Mun. Hous. Comm'n v. Public Hous. Admin.*, 261 S.W.2d 286, 287 (Ky. 1953).

2. The Governor must execute the General Assembly's policy—not his own

The Governor is vested with the Commonwealth's executive power, KY. CONST. § 69, and he is further constrained with "the positive duty to go forward and 'take care that the laws be faithfully executed.'" *Legis. Research Comm'n By & Through Prather v. Brown*, 664 S.W.2d 907, 919 (Ky. 1984) (quoting KY. CONST. § 81). While the Constitution vests the Governor with a legislative role, that role is extremely limited: he may sign a bill into law or veto it. *See* KY. CONST. § 56 (signing of bills and presentment to the Governor); § 88 (signature or veto of bills). The General Assembly always gets the last word, if it so decides, by overriding the Governor's vetoes. *Id*. § 88. As this Court noted in *Fletcher*, the "same Constitutional powers and duties described in Sections 69 and 81 [of the Kentucky Constitution] are granted to the President of the United States." 163 S.W.3d at 869. Accordingly, "'[i]n the framework of our Constitution, the [Governor]'s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the [Governor] is to execute,'" as the Constitution vests the legislative power in the General Assembly. *Id*. (quoting *Youngstown*, 343 U.S. at 587–88).

3. The judicial branch is obligated to exercise its judgment, not its will

The Constitution vests the judicial power in the Commonwealth's courts. KY. CONST. § 109. The judiciary, like the executive, is bound by the law. "As Chief Justice John Marshall stated: 'Courts are the mere instruments of the law, and can will nothing.'" *Beshear*, 498 S.W.3d at 370 (quoting *Osborn v. Bank of U.S.*, 22 U.S. 738, 866 (1824)). "'Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to *the will of the law*.'" *Id*. at 370 (emphasis added) (quoting *Osborn*, 22 U.S. at 866). Therefore, as the Court considers Senate Bill 1 and Senate Bill 2, its "task … is to read the statutes and discern their meaning, and nothing more." *Id*.

B. Senate Bill 1 & Senate Bill 2 preclude the Governor's assumption of absolute and arbitrary government

Vested with "'the authority under the constitution to make the laws, and to alter and repeal them,'" the General Assembly amended the Commonwealth's emergency-powers laws by enacting, over the Governor's vetoes, Senate Bill 1 and Senate Bill 2.[12] *Beshear*, 575 S.W.3d at 682 (quoting *Purnell v. Mann*, 50 S.W. 264, 266 (Ky. 1899)); *see* KY. CONST. § 29 (vesting the Commonwealth's legislative power in the General Assembly); § 88 (providing the General Assembly with authority to override Governor's vetoes).

[12] *See* Senate Bill 1 (JA 176–195) and Senate Bill 2 (JA 197–255).

Upon enactment, the Commonwealth's (amended) policy was established, since an "act of the Legislature declaring the public policy on a certain question cannot in the nature of things be contrary to public policy." *Peak v. Akins*, 36 S.W.2d 351, 353 (Ky. 1931); *see also Bankers Bond Co. v. Buckingham*, 97 S.W.2d 596, 600 (Ky. 1936) (The "Legislature by its statutory declarations is supreme in the adoption of what may be the state's public policy on a particular question.").

Relevant here, the General Assembly's amended policy subjects some of the Governor's emergency powers to new durational limits, absent further action by the General Assembly. *See* Senate Bill 1 (amending KRS § 39A.030) & Senate Bill 2 (amending KRS § 214.020). As noted in *Acree*, the General Assembly last year adopted a durational limit on the current state of emergency. *See*, 615 S.W.3d at 811–12 (citing 2020 S.B. 150).

Before the General Assembly's 2021 amendments, the Governor acknowledged the proper roles of the legislature and executive branches: "The plain language of KRS Chapter 39A *authorizes* the Governor and CHFS to implement public health orders to protect Kentuckians from the spread of COVID-19. In doing so, KRS Chapter 39A does not violate the separation of powers, but, instead, *defines the Governor's executive authority during times of an emergency*."[13]

[13] *Beshear Acree Br.* at 14 (emphasis added) (Tab 3).

His current disagreements, therefore, are nothing more than policy disputes,[14] which—even if they contained any merit—are of no moment, because the "propriety, wisdom and expediency of statutory enactments are *exclusively* legislative matters." *Owens v. Clemons*, 408 S.W.2d 642, 645 (Ky. 1966) (emphasis added) (citations omitted).[15] And, as this Court has said "'countless times,'" "'absent a constitutional bar or command to the contrary, the General Assembly's pronouncements of public policy are controlling on the courts.'" *Bryant v. Louisville Metro Hous. Auth.*, 568 S.W.3d 839, 849 (Ky. 2019) (citations omitted). It "'is beyond the power of a court to vitiate [the amended emergency-powers laws] on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest.'" *Caneyville Volunteer Fire Dep't*, 286 S.W.3d at 807 (citation omitted).

Accordingly, upon enactment of Senate Bill 1 and Senate Bill 2, the Governor was constrained with "the positive duty to go forward and 'take care that [those laws] be faithfully executed.'" *Brown*, 664 S.W.2d at 919 (quoting KY. CONST. § 81). Instead, the Governor assumed newly discovered "emergency" powers that purportedly enable him to ignore his express constitutional duties and to rule by fiat until he, and he alone, determines that the emergency is at an end. The Governor's continued enforcement of the Challenged Orders and

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[14] *See, e.g.*, *Mtn. for 65.07 Relief* at 3 (JA 650) (arguing that the amendments will prevent him "from *effectively* protecting the public health during the ongoing COVID-19 emergency") (emphasis added).

[15] The Governor's legislative role ended before Senate Bill 1 and Senate Bill 2 were enacted—upon his decision to veto the bills. *Cf. Johnson v. Commw. ex rel. Meredith*, 165 S.W.2d 820, 823 (Ky. 1942) (The wisdom, need, or appropriateness of legislation is within the sole power of "the General Assembly, subject only to the veto power of the Governor.").

issuance of new, COVID-related directives contradict the plain terms of Senate Bill 1 and Senate Bill 2, according to which the Challenged Orders have lapsed. By these actions, the Governor exceeds express constitutional constraints.

III. There is no "emergency" exception in the Kentucky Constitution, and the "Governor is most definitely subject to constitutional constraints even when acting to address a declared emergency"[16]

A. Purported "necessity" does not trump the law

The Governor refuses to acknowledge that "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 68. Instead, the Governor "'grounds support of [his assumed powers] upon nebulous, inherent powers never expressly granted but said to have accrued to the office …. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.'" *Fletcher*, 163 S.W.3d at 871 (quoting *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring)).

To be sure, "emergency powers appear to reside primarily in the Governor in the first instance," *Acree*, 615 S.W.3d at 787, but a full year has passed since the Governor's Declaration of Emergency. Executive Order 2020-215 (Mar. 6, 2020) (JA 51–54). Thus, even though the Commonwealth is now well beyond the "first instance" of the COVID-19 emergency, the Governor maintains that he *alone* may decide whether the emergency continues and that he *alone* may determine the extent to which he may wield "emergency" powers. As far as the

[16] *Acree*, 615 S.W.3d at 788.

Governor is concerned, the General Assembly must accede to the Governor's emergency declaration—for as long as (he decides) it lasts—and to each and every one of the Governor's imagined powers that are exercised (he says) in connection with his declared emergency. But as just explained, the Governor's arguments contradict the Kentucky Constitution's strict separation of powers and the General Assembly's newly amended laws that place additional durational limits on the Governor's unilateral authority. As explained below, the Governor's reliance on this Court's decision in *Acree*—which reaffirmed that the Constitution contains no "emergency" exception—is misplaced.

B. *Acree* precludes the Governor's assertion of absolute and arbitrary power

This Court's decision in *Acree*—which considered categorically different claims for relief and issued before the General Assembly amended Chapter 39A—did not resolve the Restaurants' causes of action here. Unlike the plaintiffs in *Acree*, the Restaurants have *not* alleged that the Governor's exercise of his emergency powers lacked a rational basis or violated equal protection. Nor do the Restaurants claim that the General Assembly unconstitutionally delegated the Governor the power to make law, rather than to execute it. Further, the claims in *Acree* were based on the premise that the Governor was abusing the powers authorized by Chapter 39A. Here, the Restaurants make a fundamentally different claim: that the Governor *lacks* the power to indefinitely enforce and issue new orders, for the simple reason that the General Assembly, by amending Chapter 39A, *eliminated* that indefinite power. As a result, the

Governor is violating laws that are the prerogative of the General Assembly to pass or amend, and he is thereby breaching his constitutional obligation to take care that the laws be faithfully executed. KY. CONST. § 81. Thus, although *Acree* has only a limited application to the present circumstances, it unequivocally supports the Restaurants.

First, this Court "acknowledge[d], of course, that making laws for the Commonwealth is the prerogative of the legislature." *Acree*, 615 S.W.3d at 809. Indeed, as discussed below, the Court ultimately approved of the Governor's (previous) actions *because* he had acted within and through the Commonwealth's emergency-powers laws—namely, KRS Chapter 39A.

Second, as noted above, *Acree* expressly approved a law (2020 S.B. 150)—enacted during the COVID-19 pandemic—that restricted the Governor's emergency powers.[17] S.B. 150 limited the duration of the Governor's declared state of emergency, and this Court relied on that limitation to compare the emergency powers granted to Michigan's Governor with the more limited emergency authority granted to Kentucky's Governor, who "does not have emergency powers of indefinite duration …." *Acree*, 615 S.W.3d at 811–12. The Governor himself, in *Acree*, emphasized and approved the legislature's "plac[ing] an additional safeguard on the timing of this particular state of emergency." *Beshear Acree Br*. at 36 (Tab 3) (quoting 2020 S.B. 150 § 3).

[17] Governor Beshear declared the present state of emergency on March 6, 2020. *See* Executive Order 2020-215 (JA 51–54). 2020 S.B. 150 was signed into law on March 30, 2020. *See* https://apps.legislature.ky.gov/record/20rs/sb150.html (last visited Apr. 30, 2021).

To be sure, the Governor's authority "*in accordance with KRS Chapter 39A* [wa]s necessarily broad," but *Acree* approved of that authority *because* of the Constitution's checks, including the "legislative amendment *or revocation* of the emergency powers granted the Governor." 615 S.W.3d at 812–13 (emphasis added). The Governor again agrees—or used to. In his opening brief in *Acree*, the Governor argued that the legislature "may change or effectuate laws to the emergency in future sessions." *Beshear Acree Br.* at 36 (Tab 3). This is, of course, a fundamental principle under a constitution that embraces the separation of powers. *See Acree*, 615 S.W.3d at 809 ("We acknowledge, of course, that making laws for the Commonwealth is the prerogative of the legislature."). If the legislature may revoke emergency powers granted to the Governor, it *a fortiori* may limit those powers—which is precisely what the General Assembly did when it enacted Senate Bill 1 and Senate Bill 2. These new laws—like the previous version discussed and approved of in *Acree*—establish the parameters of a declaration of a state of emergency and "define[] the Governor's executive authority during times of an emergency." *Beshear Acree Br.* at 14 (Tab 3).

It would be an utterly bizarre state of affairs if the General Assembly could create a statutory set of emergency powers for the Governor to exercise, but not retain the power to amend or revoke them. And neither *Acree* nor Kentucky's Separation of Powers countenances such a one-way transfer of power between branches.

Third, *Acree* confirmed that the authority to declare a state of emergency is one of the powers granted to the Governor by the General Assembly—and the Court approved his declaration *because* he followed the statutory requirements. According to *Acree*, the previous version of KRS § 39A.100, "in clear and unambiguous language, authorize[d]" the Governor to declare a state of emergency when "situations or events contemplated by KRS 39A.010" occur. *Acree*, 615 S.W.3d at 800–01; *see id.* at 801 (concluding that the COVID-19 pandemic was one of the situations "contemplated" by § 39A.010). The plaintiffs in *Acree* had argued that the Governor's power to declare a state of emergency was limited by the definition of "emergency" in § 39A.020(12). *Id.* at 802. The Court pointed out, however, that the General Assembly's grant of emergency authority in § 39A.100 did "not reference" the definition in § 39A.020(12) or "signal" that, in declaring a state of emergency, the Governor was limited by that definition. *Id.* Had "the General Assembly intended that important limitation on the Governor's authority[,] it would have said so explicitly." *Id.*

Now, of course, through Senate Bill 1, the General Assembly *has* "said so explicitly" and limited the Governor's authority. *See* 2021 S.B. 1, § 3(1) (JA 180) (amending KRS § 39A.100 to say, "In the event of the occurrence or threatened or impending occurrence of any of the situations or events *enumerated in … 39A.020*, … the Governor may declare … that a state of emergency exists.") (emphasis added). "Ultimately," therefore, under both the previous and current versions of the Commonwealth's emergency-powers laws, the Governor's

"power to declare a state of emergency is *controlled by* KRS 39A.100…." *Acree*, 615 S.W.3d at 802 (emphasis added). The Governor's contention that he may ignore the General Assembly's restrictions on this power and unilaterally declare a state of emergency of unending duration finds no support in *Acree*.

Fourth, the Court acknowledged that, except for matters requiring the military, the Kentucky Constitution "does not directly address the exercise of authority in the event of an emergency." *Acree*, 615 S.W.3d at 787; *see id*. at 806 (same).[18] This comment arose in the Court's consideration of a non-delegation challenge to the Governor's powers. *See id*. at 805–13. Under the non-delegation doctrine, the issue is whether and to what extent the General Assembly may delegate legislative power to the executive. Ultimately, the Court declined the invitation to reconsider the Commonwealth's non-delegation doctrine: "the Governor [was] largely exercising emergency executive power but to the extent legislative authority [was] involved it has been validly delegated by the General Assembly consistent with decades of Kentucky precedent, which we will not overturn." *Id*. at 806.

[18] But even the Governor's role as commander-in-chief is not free from oversight by the General Assembly. *See Jones v. Crittenden*, 96 S.W.3d 13, 18 (Ky. 2003) ("The Constitution of Kentucky, Section 220, gives to the Kentucky Legislature the power to maintain and regulate the 'Militia.'"). Further, the military, like every other arm of the government, must follow the law. Indeed, the military may be used during emergencies to maintain the law and prevent lawlessness. *Franks v. Smith*, 134 S.W. 484 (Ky. 1911); *see id*. at 487 (The governor "may place the militia at the disposal of the civil authorities, or he may, through military channels, control and direct, *within lawful bounds*, their movements and operations.") (emphasis added); *id*. at 488 ("The *supremacy and authority of the law* at all times and places must be asserted and maintained at all hazard and at whatever cost.") (emphasis added). The Governor's argument is the opposite: that emergencies give him the authority to ignore the laws.

In briefing below, the Governor relies on a small excerpt, taken out of context, from this non-delegation discussion to support his assertion that *Acree* already resolved the Restaurants' separation-of-powers claims. *See, e.g.*, *Opp. to Mtn. for Temp. Inj*. at 8 (JA 496); *Motion for CR 65.07 Relief* at 21 (JA 668). The excerpt, however, fails to support the Governor's contention for two reasons. First, read in context, the excerpt merely considers whether the Governor's "emergency" powers—granted to him by the General Assembly—must be deemed "executive" or "legislative" *for purposes of the non-delegation doctrine*:

> First, our reading of the Kentucky Constitution leaves us with no evidence that the powers at issue must be deemed legislative. The "extraordinary occasion," § 80, of a global pandemic gives rise to an obvious emergency and, as noted, the Constitution impliedly tilts to authority in the full-time executive branch to act in such circumstances. Indeed, the Governor's "commander-in-chief" status under Section 75 reinforces the concept. Second, the structure of Kentucky government as discussed renders it impractical, if not impossible, for the legislature, in session for only a limited period each year, to have the primary role in steering the Commonwealth through an emergency.

Acree, 615 S.W.3d at 808–09. The Restaurants do not dispute that the legislature is ill-equipped to respond during the early phases of an emergency, particularly if, as Chapter 39A itself recognizes, the legislature is not in session. But nothing in the Kentucky Constitution, its structure of government, or the above passage undermines the Restaurants' claims that the Governor must faithfully comply with limitations on his exercise of emergency powers, as formulated by the General Assembly. And, as discussed below (pp. 42–43), the Governor remains free to negotiate with the General Assembly for a different policy.

Additionally, even if this non-delegation question were relevant to the Restaurants' case, *Acree* ultimately didn't answer it. The Court *did not resolve* whether the Governor's "powers at issue must be deemed legislative." *Acree*, 615 S.W.3d at 808. Instead, the Court stated, "Fortunately, the need to definitively label the powers necessary to steer the Commonwealth through an emergency as either solely executive or solely legislative is largely obviated by KRS Chapter 39A," which "reflects a cooperative approach between the two branches." *Id*. at 809. Importantly, the Court was unwilling to disapprove legislative delegations (if any) *because of* the limits and structure *provided by laws adopted by the General Assembly*. The Court concluded that no non-delegation concern arose because KRS § 39A.010 provided an "*intelligible principle*," and Chapter 39A "contain[ed] procedural safeguards to prevent" executive "abuses." *Id.* at 810–11. *See Inj. Order* at 2 (explaining that while "the law recognizes the need for the full-time executive to be able to respond to emergencies," it also establishes a "safeguard" so that "orders made in response to a temporary emergency do not become de facto legislation.") (Tab 2); *Beshear Acree Br*. at 36 (approving the legislature's "plac[ing] an additional safeguard on the timing of this particular state of emergency") (Tab 3).

Senate Bill 1 and Senate Bill 2 merely placed additional safeguards to prevent executive abuse. Accordingly, the brief passage from *Acree* does not in any way support the Governor's assertions of inherent executive authority. Indeed, outside the non-delegation context, it's a tautology to say that the head

of the executive branch exercises *executive* power. The question in the present case is which branch *establishes* policy, not which branch *executes* that policy. The Governor ignores that crucial distinction here.

Fifth, the Court held that the Governor was not limited to issuing emergency regulations through KRS Chapter 13A alone—because specific provisions in Chapter 39A (also) granted regulatory authority. *Acree*, 615 S.W.3d at 787, 813–15. Again, the Court found that Governor's actions to be valid *because* he followed the General Assembly's policy.

Finally, the Court concluded that the Governor's challenged actions had not lacked a rational basis. While the Restaurants do not raise any rational-basis challenges here, the Court's conclusion is notable because, without it, the Court could not have upheld the Governor's emergency responses since, "[a]s with all branches of government, the Governor is *most definitely* subject to constitutional constraints *even when* acting to address a declared emergency." *Acree*, 615 S.W.3d at 788 (emphasis added).

IV. The public's interest lies in the execution of duly enacted legislation

A. The Restaurants have established irreparable harm

As demonstrated above, the Restaurants have clearly established the required substantial possibility of prevailing on their claims that the Governor has violated and continues to breach the Constitution's separation of powers. These breaches have caused and will continue to cause harm to the Restaurants. Specifically, because of the Governor's continued enforcement of the

now-lapsed Challenged Orders and his illegal issuance of new restrictions, the Restaurants' ability to run their businesses in accordance with the laws of the land have been and continue to be severely restricted: The Restaurants must limit capacity well below the legal limit, they are precluded from serving bar patrons at the bars, they must close early—all of which impose significant financial harm for which no damages are available. These restrictions rise to the level of constitutional violations, as the Restaurants are denied their rights to acquire and protect their property (KY. CONST. §1), their rights against absolute and arbitrary power (*id.* § 2), their rights to due process (*id.* §§ 1–2, 4), and their rights to the structural guarantees of Kentucky's separation of powers (*id.* §§ 27–29, 69, 109); *cf. Bond v. United States*, 564 U.S. 211, 223 (2011) (When "the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object."). *See* Compl. ¶¶ 69, 73, 79, 85, 98, 111, 116, 122–26 (Tab 1).

These ongoing violations of the Kentucky Constitution and the Commonwealth's statutes constitute irreparable harm and warrant injunctive relief. *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 909–10 (Ky. 2012). Indeed, as this Court has held, because "irreparable harm is presumed" when constitutional violations exist, it is "not incumbent upon [plaintiffs] to present such evidence; rather, *the burden [i]s upon [defendants]* to rebut the presumption of irreparable harm." *Boone Creek Props., LLC v. Lexington-Fayette Urban*

Cty. Bd. of Adjustment, 442 S.W.3d 36, 41 (Ky. 2014) (citation omitted).[19] Therefore, the Scott Circuit Court was demonstrably correct and did not abuse its discretion in concluding that the Restaurants "clearly show[ed] that the Executive's continued violation of law affects their basic rights to operate, and as such, because it affects rights and not just economic damage, is an immediate and irreparable injury." *Inj. Order* at 6 (Tab 2). The Governor did not come close to carrying his burden to show otherwise.

B. The equities overwhelmingly favor the Restaurants

The Governor tries to show that the injunction below will cause irreparable injury to the Governor and lead to widespread public harm. This argument is beside the point and, in any event, entirely without merit for several reasons.

1. The violations of the Restaurants' constitutional rights support the injunction

Because the Governor's conduct violates the Restaurants' constitutional rights, "no substantial harm to others can be said to inhere in [the] enjoinment" of the Governor's actions, *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001) (citation omitted), certainly not harm to the Governor and other executive-branch officials acting in their official capacities.

[19] This is a well-established rule. *See also Overstreet v. Lexington–Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (Courts have "held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights."); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (irreparable harm based on alleged violation of Fourth Amendment rights).

2. The Governor cannot suffer harm by executing duly enacted law

The Governor simply cannot be injured by the mere amendment to the laws of the land, much less irreparably so. Indeed, far from being injured by Senate Bill 1 and Senate Bill 2, the Governor is *expressly obligated to* ("shall") "take care" that these laws are "faithfully executed." KY. CONST. § 81. This constitutional constraint has no "emergency" exception. To the contrary, "emergency powers are consistent with free government *only* when their control is lodged elsewhere than in the Executive who exercises them." *Fletcher*, 163 S.W.3d at 871 (emphasis added) (citation omitted); *see Acree*, 615 S.W.3d at 802 ("Ultimately, the Governor's power to declare a state of emergency is controlled by KRS 39A.100 …."); *id*. at 788 (The "Governor is most definitely subject to constitutional constraints even when acting to address a declared emergency."). *See also Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 68 ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten."). Accordingly, the Governor's policy dispute with the General Assembly does not lead to any harm, particularly because policy "'is the exclusive domain of the General Assembly.'" *Hill*, 607 S.W.3d at 555 (citation omitted).

To be sure, the Governor may litigate actual cases or controversies with respect to the validity of laws—and he may be subject to injunctive orders along the way. But injunctive orders like the Scott Circuit Court's here—barring the Governor from indefinitely enforcing time-limited directives—cannot

cause the Governor (or those under his charge) irreparable harm in their official duties. Even an injunction later held to be erroneous could not harm the Governor in his official capacity: Otherwise, the judicial branch would be precluded from executing its constitutional duties, and a court could ***never*** enjoin an executive official, when that official claims that laws are unconstitutional.

3. The Governor ignores the harm he is causing the public

Without injuries to himself or other executive-branch officials, the Governor purports to assume and exercise these expansive powers on behalf of the people. This claim is not only unsupportable, but it ignores what the public, through its elected representatives in the General Assembly, has decided is in its best interests.

Last fall, the people elected veto-proof representation in the General Assembly, and their elected representatives, over the Governor's vetoes, changed the Commonwealth's emergency-powers laws and placed additional durational limits to the Governor's "emergency" authority. The enactment of these laws "'constitutes [the General Assembly's] implied finding that violations [of the laws] *will harm the public* ….'" *Boone Creek Properties*, 442 S.W.3d at 40 (citation omitted). *See id*. at 40–41 (holding that non-enforcement of statute constitutes irreparable harm). And, the public "'has a preeminent interest in ensuring that all public officials comply with the law.'" *Shepherd*, 336 S.W.3d at 104 (citation omitted). In their myopic consideration of emergency restrictions and

nothing else, Movants run roughshod over the people's preeminent interest in lawful government.[20]

Accordingly, even if Movants were correct that a temporary injunction—applicable to three businesses comprising only five restaurants—would cause some harm, they do not get to make that decision for the public at large. That decision is the prerogative of the people of Kentucky, acting through their elected representatives. Governor Beshear may want a different set of policies, but the decision is not up to him. Instead, he is constitutionally required to execute the public's policy.

The Governor also relies on the allegedly "chaotic legal environment" that *might* follow the Scott Circuit Court's (limited) temporary injunction. *See Mtn. for 65.07 Relief* at 11 (JA 658); *see id.* at 13 (JA 660) (warning about "the possibility" of lawsuits throughout the Commonwealth). The Governor's worry about an onslaught of lawsuits challenging his actions strongly suggests that the public has a different idea of its interests than does the Governor.

But in any event, the Governor's asserted concern does not and cannot amount to an irreparable harm. Here, again, the Governor misunderstands his constitutional role, which is not to create and extend polices by fiat—on "emer-

[20] Here, again, the Governor's actions violate the Constitution's protection against absolute and arbitrary government. KY. CONST. § 2. *See Anti-Federalist No. 1*, Basic question: Is confederated government best for U.S. (Brutus Essay No. I) (Oct. 18, 1787) in 2 COMPLETE ANTI-FEDERALIST, at 369 (Storing 1981) ("In every free government, the people must give their assent to the laws by which they are governed. This is the true criterion between a free government and an arbitrary one. The former are ruled by the will of the whole, expressed in any manner they may agree upon; the latter by the will of one, or a few.").

gency" grounds that he alone determines—but to follow and carry out the policies established by the people through the General Assembly, even during emergencies. And if he nonetheless insists on ignoring laws duly passed by the General Assembly, he certainly has no legal claim to avoid challenges to that authority. *See* KY. CONST. § 14 ("All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."). Far from causing "chaos," attempts by citizens to vindicate their constitutional rights and to ensure the proper structure of government in courts of law is a feature, not a bug, of a constitutional government of separated powers.

V. The Governor's attempts to avoid the merits do not withstand scrutiny

A. The temporary injunction in a separate lawsuit to which the Restaurants are not parties does not bind the Scott Circuit Court or the Restaurants

The Restaurants' concerns about access to courts is hardly theoretical, as the Governor claims that the Restaurants should not even be allowed to present their claims in a court of law. *See, e.g.*, Opp. to Mtn. for Temp. Inj. (JA 489–501). The Governor admits that the Scott Circuit Court had both subject-matter and personal jurisdiction and that the case was properly venued there. As such, the Scott Circuit was "duty bound" to hear Plaintiffs' case. *See Stipp v. St. Charles*, 291 S.W.3d 720, 725 (Ky. App. 2009) (A court is "'duty bound to hear cases within its vested jurisdiction.'") (citation omitted). The Governor,

however, contends that a temporary injunction issued by Judge Shepherd in the Franklin Circuit Court[21] prohibited the Restaurants from filing suit in Scott County and precluded the Scott Circuit Court from considering the suit or the Restaurants' motion for injunctive relief. The Governor even suggests that the Restaurants' lawsuit is a "collateral attack" on the Franklin Circuit Court's temporary order—even though the Restaurants are neither parties nor privies in the Franklin Circuit Court. The Governor's arguments are dangerous, they fail this Court's well-settled jurisprudence, and they contradict House Bill 3, another law recently adopted by the General Assembly.

1. Judge Shepherd's order does not and cannot bind another circuit court

According to this Court, each circuit court has "co-equal abilities and powers." *Thompson*, 300 S.W.3d at 163. Therefore, no circuit court can bind another, as Judge Shepherd himself correctly acknowledged during a hearing in the Governor's separate lawsuit: "I've never been of the view that any Circuit Court can enjoin a proceeding in another court. … [T]here's a whole host of context[s] in which these issues can arise and certainly they can be litigated in any venue … where a controversy arises."[22] And, because even a final decision from a trial court "has 'no precedential value,'" *Bell v. CHFS, Dep't for Cmty. Based Servs.*, 423 S.W.3d 742, 751 (Ky. 2014) (citation omitted), Judge Shepherd's order—which is merely preliminary and which has not resolved a single

[21] *Beshear v. Osborne*, Franklin Circuit Court No. 21-CI-00089.

[22] *Beshear v. Osborne*, Franklin Circuit Court No. 21-CI-00089, Tr., Feb.18, 2021 hearing, at 143:19–144:2 (Tab 5).

substantive issue in the Governor's action—has no precedential value and does not in any way prevent another circuit court from considering a separate, validly filed lawsuit.[23]

2. Judge Shepherd's order does not and cannot bind the Restaurants

It is long-settled in Kentucky that an "injunction operates *in personam* only." *McCauly v. Givens*, 31 Ky. 261, 265 (1833). Indeed, the "first prerequisite to obtaining a binding injunction is that the court must have valid in personam jurisdiction over the [parties to be bound]." 11A Fed. Prac. & Proc. Civ. § 2956 (3d ed.) (Wright & Miller). Because Judge Shepherd lacks personal jurisdiction over the Restaurants, they are not bound by his preliminary order. Civil Rule 65.02 confirms this long-standing rule. It provides that an injunction "shall be binding upon *the parties to the action*, their officers, agents, and attorneys; and upon other persons in active concert or participation with them who receive actual notice" of the injunction. CR 65.02(2) (emphasis added). Because the Restaurants have no connection to the Governor's Franklin County case, Judge Shepherd could not have bound them even if the Governor had asked him to. *See* Wright & Miller § 2956 ("[P]ersons who are not actual parties to the action

[23] Even appellate court decisions are not binding when non-final. *Kohler v. Commw., Transp. Cabinet*, 944 S.W.2d 146 (Ky. App. 1997). *See Kentucky Nat'l Ins. Co. v. Shaffer*, 155 S.W.3d 738, 740 n.5 (Ky. App. 2004) (ruling that it was "impermissible to cite *Knotts* as authority" because "although the *Knotts* opinion was designated for publication, it [wa]s not final due to pending motion for discretionary review in the Supreme Court"). According to SCR 1.040(5), "[o]n all questions of law," circuit courts "are bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court" or, if none, those "established in the opinions of the Court of Appeals." And, even when final, circuit-court orders are not binding on other circuit courts.

or in privity with any parties may not be brought within the effect of a decree merely by naming them in the order.") (footnote omitted).

3. The timing of Judge Shepherd's temporary order is irrelevant

Movants erroneously claim nonetheless that Judge Shepherd's order is binding everywhere. This Court has foreclosed that argument.

a. In *Commonwealth ex rel. Conway v. Thompson*, this Court resolved inconsistent circuit court orders: rejecting the first order and upholding the second order

In *Thompson*, a Commonwealth Attorney obtained a temporary injunction from the Pulaski Circuit Court, which enjoined the Department of Corrections from applying a law retroactively to give relief to certain prisoners and parolees in the 28th Judicial District. 300 S.W.3d at 158–59. The Attorney General, although aware of the Pulaski case, filed "a strikingly similar" suit against the same defendant, the Department of Corrections, in Franklin County and asked for an injunction "to enjoin statewide the Department of Corrections … from continuing to release prisoners pursuant to its early release program." *Id*. at 159, 160. The Franklin Circuit Court denied the Attorney General's request, "despite the fact that the Pulaski Circuit Court had already issued a temporary injunction based upon the same facts." *Id*. at 160. The Pulaski Circuit Court later issued a declaratory judgment and permanent injunction applicable statewide against the Department. *Id*. Both matters went to the appellate courts, and this Court elected to resolve them together. *Id*.

The Court first ruled that the Pulaski Circuit Court could issue a statewide injunction, since all circuit-court judges in the Commonwealth "'enjoy equal capacity to act throughout the state.'" *Thompson*, 300 S.W.3d at 163 (citation omitted). Indeed, "the Pulaski Circuit Court had powers *co-extensive* with the Franklin Circuit Court or any other appropriate circuit court to adjudicate this matter and to grant a declaratory judgment or injunction, statewide or otherwise." *Id.* at 163–64 (emphasis added) (footnote omitted).

Importantly, "nothing" required the dispute over the Department's action "to have been brought in the Franklin Circuit Court." *Thompson*, 300 S.W.3d at 163. In the accompanying footnote, this Court "recognize[d] that permitting each circuit court to issue a statewide injunction could lead to inconsistent results between judicial circuits …. The remedy for that unfortunate possibility, however, lies with the General Assembly." *Id.* at 163 n.30.

This Court then resolved "the inconsistent results" in that case. The Court concluded that the Pulaski Circuit Court—the court that issued the first order—had "erred when it determined" that the law applied prospectively only. *Thompson*, 300 S.W.3d at 170. The Court therefore issued a writ of prohibition to prevent the enforcement of the Pulaski court's injunction. *Id.* at 171. The Court then upheld the decision of the Franklin Circuit Court—the court that ruled on a motion for an injunction *after* the Pulaski court had entered its temporary injunction. *Id.*

b. According to *Thompson*, Judge Shepherd's temporary order is not binding, and the Scott Circuit Court properly considered the Restaurants' case

Thompson completely defeats Movants' arguments. There, this Court expressly acknowledged the possibility of inconsistent equitable rulings and confirmed that eliminating that possibility was a matter solely for the General Assembly. Here, the General Assembly recently issued a new statute on venue (2021 H.B. 3) that, far from eliminating the possibility of inconsistent circuit-court orders, now encourages constitutional challenges across the Commonwealth. The very purpose of the law was to prevent the Franklin Circuit Court from ruling on every important constitutional challenge.[24] The General Assembly obviously sees value in having different courts address constitutional issues. And, consistent with that view, *Thompson* considered competing judicial orders and ultimately approved of and upheld the later-issued order. This necessarily means that the order first issued *did not bind* the second court.

[24] *See* Kentucky General Assembly, *The verdict: Lawmakers OK change to judicial venues* (Jan. 14, 2021), https://apps.legislature.ky.gov/publicservices/pio/release.html (quoting Senate Judiciary Committee Chair Whitney Westerfield, who said that H.B. 3 was designed "to eliminate the super circuit that Franklin County has right now"); *see also* Bruce Schreiner, Lawmakers vote to move cases out of Franklin Circuit Court, AP (Jan. 13, 2021), https://apnews.com/article/state-governments-frankfort-corona-virus-pandemic-kentucky-bills-8e194841f9b78904b33ccff9e00b156f (quoting Senate Judiciary Committee Chair Wil Schroder, who further explained the rationale behind the law: "Is it really fair that people should always have to come to the Franklin County circuit when it's dealing with a constitutional question in their state? If anyone should have to travel to defend it, in my opinion, it should be the state (attorneys), not the individual, or not the business that has a problem.").

In sum, *Thompson* confirms that the Scott Circuit Court is co-equal with the Franklin Circuit Court; that the Scott Circuit Court "'enjoy[s] equal capacity to act throughout the state;'" that the Scott Circuit Court has "powers coextensive with the Franklin Circuit Court," *Thompson*, 300 S.W.3d at 163–64 (citation omitted); and, finally, that Judge Shepherd's order does not and cannot bind another circuit court. If anything, *Thompson* demonstrates the value of presenting this Court with different opinions to ensure that issues are fully aired before it renders a final disposition.

B. The Governor seeks to avoid any challenges to his absolute and arbitrary rule

The Governor's desire to indefinitely extend his unilateral rule is further demonstrated through two recent veto messages in connection with bills addressing the COVID-19 pandemic. He claims that Joint Resolution 77 "relies on power the General Assembly attempted to provide itself through [2021] Senate Bill 1 and Senate Bill 2."[25] Therefore, even though the General Assembly adopted KRS Chapter 39A before the current pandemic; even though the Governor expressly relied on Chapter 39A in declaring a state of emergency (*see* E.O. 2020-215) (JA 52); even the Governor acknowledged the General Assembly's authority to "change or effectuate laws to the emergency in future sessions" (Tab 3 at 36); and even though *Acree* expressly held that the General Assembly could limit the Governor's emergency powers, the Governor now

[25] *See* JA 943, Veto Message From the Governor of the Commonwealth of Kentucky Regarding House Joint Resolution 77 of the 2021 Regular Session (Mar. 25, 2021).

claims that the General Assembly's authority with respect to the Commonwealth's emergency policy "relies on" newly created "power." This is patently false. The General Assembly did not provide its own power. Its power arises from the Kentucky Constitution, which provides that the "legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.'" KY. CONST. § 29. The Governor seems to believe that he can divest the General Assembly of that that power during an emergency.

Further undermining the separation of powers, the Governor claims that the General Assembly's reliance on the new laws is improper because Judge Shepherd enjoined their enforcement. JA 943. But Judge Shepherd's order does not preclude the General Assembly from passing *new laws*—and, of course, he has no such authority in the first place. *See Morrow v. City of Louisville*, 249 S.W.2d 721, 724 (Ky. 1952) (It is a "well established rule that the courts will not undertake to enjoin a legislative body … from passing legislation.") (citation omitted).

The Governor not only ignores this well-established rule but, in a separate veto message, he is even more brazen, claiming that the passage of House Bill 192 "directly violate[d] a temporary injunction entered by the Franklin Circuit Court against the General Assembly itself, *which could subject the body to a contempt of court citation*."[26]

[26] *See* JA 947, Veto Messages from the Governor Regarding House Bill 192 of the 2021 Regular Session at 8 (Mar. 26, 2021).

C. Senate Bill 1 & Senate Bill 2 do not create a "full-time" legislature

The Governor claims that the General Assembly's 30-day limits on emergency orders and regulations require the Governor to reconvene the legislature every month, thereby converting the Constitution's part-time legislature into a full-time legislature. This argument is without merit, as demonstrated by the General Assembly's passage of H.J.R. 77 (JA 460–464). There, the General Assembly—over the Governor's veto—extended the current state of emergency for 90 days (and extended other orders for 60 days). With this 90-day extension, the General Assembly proves that it does not intend to be called into session every month. H.J.R. 77 also shows that, if called into special session, the General Assembly is willing to extend emergency orders for any period of time (subject, of course, to later modifications or cancellations). The Governor could reconvene the General Assembly right now and ask for six or nine months of extended emergency authority.[27]

Finally, the power to convene the legislature on "extraordinary occasions" is constitutionally vested in the Governor alone; the legislature has no power to convene itself outside of the time periods set forth in the Constitution. KY. CONST. §§ 36, 80. And the Constitution protects against rogue sessions, as the Governor is given the sole power to determine what topics may be considered

[27] Because the General Assembly could extend the orders for periods beyond 30 days, the Governor's contention about the costs of reconvening the General Assembly every month are pure speculation. *See Mtn. for 65.07 Relief* at 5 (JA 652)

at extraordinary sessions. KY. CONST. § 80. The Governor's authority here prevents the General Assembly from using an extraordinary session as an excuse to consider legislation beyond the purpose of the Governor's reconvening. If the Governor determines that emergency powers are needed beyond those established by Chapter 39A, he may decide to convene the General Assembly and seek extensions. *The Governor's* refusal to exercise this constitutional prerogative—not the durational limits on his emergency authority—creates the problem he complains of.

VI. The Governor's assumption of absolute and arbitrary power must be repudiated

Justice Jackson's now-canonical explication of the executive's proper role is particularly apt here. *See Youngstown*, 343 U.S. at 634–55 (Jackson, J., concurring). Under Justice Jackson's analysis, the Governor's power is at its apex when he acts pursuant to authorization of the General Assembly. *Id.* at 635. That was the situation in *Acree*, where it was unnecessary for the Court to delineate the source of the Governor's authority; and the Court declined to do so. But today the Governor's position is unquestionably changed. Now, the Governor is "tak[ing] measures incompatible with the expressed or implied will of [the General Assembly]," and as a result, "his power is at its lowest ebb." *Id.* at 637. Accordingly, the Governor's claim to indefinite and unreviewable authority is tenable *only if* he has permanent and exclusive authority over the entire subject matter, *e.g.*, when issuing pardons. KY. CONST. § 77. But when, as

here, the Constitution does not vest the Governor with exclusive power to respond to emergencies and when, as here, the Constitution does vest the General Assembly with the power to establish rules and penalties which govern citizens' behavior and restrict their liberties, the Governor must comply with the policy decisions of the General Assembly.

This Court's jurisprudence is fully in accord with Justice Jackson: "'emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.'" *Fletcher*, 163 S.W.3d at 871 (quoting *Youngstown*, 343 U.S. at 652 (Jackson, J., concurring)). Therefore, it is axiomatic that the "Governor is most definitely subject to constitutional constraints even when acting to address a declared emergency." *Acree*, 615 S.W.3d at 788.

Kentucky's strict Separation of Powers doctrine is itself the key constitutional constraint on the Governor—even during an emergency. The doctrine exists "to create checks to the operations of the other[] [branches] and to prevent the formation by one department of an oligarchy through the absorption of powers belonging to the others.'" *Fletcher*, 163 S.W.3d at 862 (citation omitted). Consistent with this doctrine, the Court in *Acree* approved of the Governor's (legislatively granted) emergency powers because of legislative "checks," namely, the "amendment or revocation of the emergency powers granted the Governor." 615 S.W.3d at 813. The constraints imposed by a co-equal branch of government complement the Constitution's additional, express constraints.

The Governor is vested with the "supreme executive power of the Commonwealth." KY. CONST. § 69. As such, "the executive powers *and responsibilities* of the Commonwealth lie within the province of the Governor." *Brown*, 664 S.W.2d at 919 (emphasis added) (citing KY. CONST. § 69). Even more emphatically, the Constitution requires the Governor to ("shall") "take care that the laws be faithfully executed." KY. CONST. § 81. This Court has described this as a "special" and "positive" obligation. *Beshear*, 498 S.W.3d at 369; *Brown*, 664 S.W.2d at 919.

As such, the Governor's position in this lawsuit has no place in a constitutional republic. If the Governor is correct, then he—and he alone—may declare an emergency of indefinite duration and, as a consequence, exercise absolute and arbitrary power over the movement, interactions, work and business, education—indeed, the lives—of the people of Kentucky. There is no other conclusion to be drawn from the Governor's assertion that he may ignore the duly enacted laws of the General Assembly and its efforts to restrict his emergency powers. If the Governor possesses the power he claims, then the General Assembly would be reduced to a mere advisory body whose constitutionally vested power to make the law—and to override the Governor's veto—would be superfluous. The Governor is all but expressly demanding "absolute and arbitrary" power—the very danger sought to be avoided by the adoption of the Kentucky Constitution. KY. CONST. § 2. It is thus worth quoting at length this Court's predecessor's warnings about the dangers of concentrated powers:

> It cannot fail to be observed that the reasons underlying the separation of our republican form of government into the three branches was to prevent one of the departments from absorbing and appropriating unto itself the functions of either of the others. The purpose was to have each of them to so operate in their respective spheres as to create checks to the operations of the others and **to prevent the formation by one department of an oligarchy through the absorption of powers belonging to the others**. **The evil effects from such concentration of power were outstanding in the pages of past history**, the instances of which we need not stop to enumerate. **It was to prevent such evil effects** and a possible eventual revolution, and to preserve and forever perpetuate, if possible, the constitutional form of government, that sections 27 and 28 and similar ones were adopted ….

Sibert v. Garrett, 246 S.W. 455, 458 (Ky. 1922) (emphasis added). *See also* John Adams to Richard Henry Lee (Nov. 15, 1775), in 4 JOHN ADAMS WORKS 186 (Boston 1851) ("It is by balancing each of [the government's powers] against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution."); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 216–17 (G.P. Putnam's Sons 1904-05) ("Mankind soon learn to make interested uses of every right and power which they possess, or may assume. … Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny, is before they shall have gotten hold on us.").

If the Scott Circuit Court's Injunctive Order is reversed, the Court would establish a dangerous precedent that the Governor may rule by mere fiat, so long as he—and he alone—declares an emergency. Such a precedent would be worse in the long run than the Governor's current conduct, as it would freely

allow all future governors to claim emergency powers at the expense of the people's liberties and the Constitution's constraints. "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Fletcher*, 163 S.W.3d at 871 (quoting *Youngstown*, 434 U.S. at 655 (Jackson, J., concurring)).

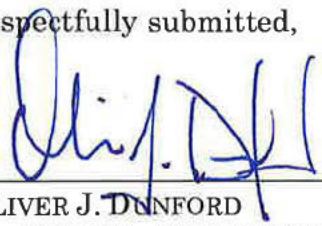
The Governor's pleas for unilateral "emergency" authority—for just a little while longer—represent a long-term danger to constitutional government. This Court is vested with the solemn duty to ensure that claims of "'necessity'" do not trump "'law.'" *Fletcher*, 163 S.W.3d at 871 (quoting *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring)).

CONCLUSION

The Governor believes that the Commonwealth's emergency powers should be lodged in him—and in him only. His desire for different public policy does not and cannot amount to harm. Rather, he is expressly required to enforce and execute the policy—even if he doesn't like it. The rule of law demands it. This Court should, therefore, conclude that the Scott Circuit Court did not abuse its discretion in enjoining the Governor and his executive-branch officials from enforcing the Challenged Orders against the Restaurants.

DATED: May 5, 2021.

Respectfully submitted,



JOSHUA S. HARP
Ky. Bar No. 91386
Baughman Harp, PLLC
401 West Main Street
Frankfort, KY 40601
Tel: (502) 227-2271
harp@harplawoffice.com

OLIVER J. DUNFORD
Ky. PHV No. PH24392034*
Fla. Bar No. 1017791
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Tel: (916) 503-9060
ODunford@pacificlegal.org

STEVEN M. SIMPSON
Ky. PHV No. PH24392244*
DC Bar No. 462553
DANIEL T. WOISLAW
Ky. PHV No. PH24392397*
Va. Bar No. 91180
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
Tel: (202) 888-6881
SSimpson@pacificlegal.org
DWoislaw@pacificlegal.org

**Admitted pro hac vice*

Attorneys for Plaintiffs-Respondents

Appendix Index

INDEX TO APPENDIX

TAB 1

1

COMMONWEALTH OF KENTUCKY
SCOTT COUNTY CIRCUIT COURT

GOODWOOD BREWING COMPANY, LLC, d/b/a Louisville Taproom, Frankfort Brewpub, and Lexington Brewpub; **TRINDY'S, LLC**; and **KELMARJO, INC.**, d/b/a The Dundee Tavern, Plaintiffs, v. **ANDY BESHEAR**, in his official capacity as Governor of the Commonwealth of Kentucky, **ERIC FRIEDLANDER**, in his official capacity as Secretary of the Cabinet for Health and Family Services, and **STEVEN STACK, M.D.**, in his official capacity as Commissioner of the Kentucky Department of Public Health, Defendants.	Case No. _____ **VERIFIED COMPLAINT FOR DECLARATORY RELIEF, A TEMPORARY INJUNCTION, AND A PERMANENT INJUNCTION**

Plaintiffs Goodwood Brewing Company, LLC, d/b/a Louisville Taproom, Frankfort Brewpub, and Lexington Brewpub; Trindy's, LLC; and Kelmarjo, Inc., d/b/a The Dundee Tavern; by and through counsel, bring this action for a declaration of rights, a temporary injunction, and a permanent injunction against the Defendants, Andy Beshear, in his official capacity as Governor of the Commonwealth of Kentucky, Eric Friedlander, in his official capacity as Secretary of the Cabinet for Health and Family

Services, and Steven Stack, M.D., in his official capacity as Commissioner of the Kentucky Department of Public Health.[1]

INTRODUCTION

The Kentucky Constitution divides the Commonwealth's power into three distinct branches. The legislative power—the power to shape the Commonwealth's public policy—is the "*exclusive domain*" of the General Assembly. *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 807 (Ky. 2009); *see* KY. CONST. § 29 (vesting "the legislative power" in the General Assembly). The executive power is vested in the Governor (KY. CONST. § 69), who is expressly obligated to "take care that the [General Assembly's] laws be faithfully executed," *id.* § 81. The power to resolve cases and controversies is vested in the judicial branch. *Id.* § 109.

Plaintiffs bring this lawsuit to ensure that the Governor carries out his constitutional obligation to "take care that the laws be faithfully executed," KY. CONST. § 69, including the laws duly enacted by the General Assembly just last month.

On March 6, 2020, in response to the COVID-19 pandemic, Governor Andy Beshear declared a state of emergency and, since that time, he and other officials in the Executive Branch have issued scores of orders, regulations, and directives.

Meeting for its regular session earlier this year, the General Assembly exercised its vested legislative power, KY. CONST. §§ 29, 36, 46, 56, 88, amended the Kentucky Revised Statutes (KRS), and placed lawful limits on the government's emergency powers. *See* 2021 H.B. 1, 2021 S.B. 1, and 2021 S.B. 2. Notably, under the new

[1] The Kentucky Attorney General is served pursuant to KRS § 418.075 but is not made a party.

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laws, certain executive orders, administrative regulations, and other directives issued under KRS Chapter 39A lapse automatically after thirty days, unless the Governor obtains the General Assembly's approval to extend them. Further, certain regulations issued under KRS Chapter 13A similarly lapse after thirty days. The new laws went into effect February 2, 2021. The Governor did not seek or obtain the approval to extend any orders issued under KRS Chapter 39A. As a result, the executive orders issued under KRS Chapter 39A and regulations issued under KRS Chapter 13A in response to the COVID-19 pandemic lapsed automatically on March 4, 2021. And, effective March 5, 2021, these orders and regulations are of no force or effect.

The Governor, despite his express constitutional obligation to "take care that the [new] laws be faithfully executed," KY. CONST. § 81, claims expansive, virtually unreviewable, and permanent authority to unilaterally regulate religious gatherings, schools, businesses, homes, and travel—so long as he, and he alone, determines that an emergency exists. He thus repudiates his constitutional duty.

Plaintiffs, who have struggled to keep their restaurants and bars in business amid the flurry of executive orders, file this lawsuit for a declaration that the Governor must carry out his solemn constitutional obligation to "take care that the laws"—including the new laws enacted just last month—"be faithfully executed." KY. CONST. § 81. Plaintiffs also seek an order enjoining the Governor from enforcing any executive orders arising out of the COVID-19 pandemic—orders which are now lapsed by operation of the duly enacted laws of the Commonwealth.

Without the Court's action, Plaintiffs will remain subject to the Governor's "[a]bsolute and arbitrary" power, which is now exercised in direct defiance of the Commonwealth's laws. KY. CONST. § 2.

NATURE OF THE ACTION

Plaintiffs, a collection of bars and restaurants, seek to enforce the separation of powers enshrined in Kentucky's constitution and to defend their right to be free against arbitrary rule through the exercise of naked legislative power exercised by the executive branch in the form of executive and administrative orders affecting their legal rights, duties, and obligations. KY. CONST. §§ 2, 4, 27, 28, 29, 69, 81.

More than 30 days have passed since Senate Bill 1, House Bill 1, and Senate Bill 2 became effective law and, therefore, none of the executive orders related to the COVID-19 pandemic that restrict Plaintiffs' businesses remain in effect. Plaintiffs seek a declaration of their legal rights and obligations concerning compliance with the executive and administrative orders issued by Governor Beshear and his designees pursuant to the March 6, 2020, declaration of a state of emergency in response to COVID-19.

Plaintiffs likewise seek a temporary injunction and a permanent injunction against the enforcement of any and all "administrative regulations, or other directives issued under [Chapter 39A of the Kentucky Revised Statutes] by the Governor" that were not extended through approval by the Kentucky General Assembly on or before March 4, 2021 pursuant to KRS § 39A.090(2)(a), as amended by Senate Bill 1.

JURISDICTION

1. An actual, justiciable controversy exists, and this Court has jurisdiction over this action pursuant to KRS § 418.040, KRS § 23A.010, CR 57, and CR 65.

VENUE

2. Venue is appropriate in this Court pursuant to KRS § 452.405 because Trindy's, LLC, a named Plaintiff, is physically located in Scott County. It is therefore in this county that any executive or administrative orders would be enforced against it. The requested injunctive relief would operate to prevent enforcement of executive and administrative orders in this county against Trindy's, LLC, and the declaratory relief sought by Plaintiffs would likewise concern the rights of a business located in this county.

DEFINITION

3. The term "Executive Order(s)" in this Complaint refers to (a) "[e]xecutive orders, administrative regulations, or other directives issued under [KRS Chapter 39A] by the Governor" that "[p]lace[] restrictions on the in-person meeting or place[] restrictions on the functioning of" private businesses, KRS § 39A.090(2)(a)(1)(b) (eff. 2/2/21); and/or (b) "[a]ny administrative regulation promulgated under the authority of" KRS § 214.020 that "[p]laces restrictions on the in-person meeting or functioning of" private business, *id.* § 214.020(2)(a)(1)(b); as further identified in ¶¶11–31, 43–55, 60–61 below and reproduced in Exhibits 1–23 & 28, attached hereto.

PARTIES

Plaintiffs

4. Plaintiffs are bar and restaurant businesses located in the Commonwealth of Kentucky.

5. Plaintiff **Trindy's, LLC**, operates a family restaurant with a full bar at 751 Stone Drive, Suite 20, Georgetown, KY 40324 and is located in Scott County, Kentucky.

6. Plaintiff **Goodwood Brewing Company, LLC**, operates a brewery, bar, and restaurant business across three physical locations in the Commonwealth of Kentucky.

a. Goodwood's first location, Louisville Taproom, is a 5,000-square-foot taproom with two full bars, two music stages, a restaurant, and a production brewery, located at 636 East Main Street, Louisville, KY 40202 in Jefferson County, Kentucky.

b. Goodwood's second location, Frankfort Brewpub, is a 6,000-square-foot restaurant with a brewery, located at 109 West Main Street, Frankfort, KY 40601 in Franklin County, Kentucky.

c. Goodwood's third location, Lexington Brewpub, is a 6,500-square-foot restaurant, bar, and brewery, located at 200 Lexington Green Circle, Lexington, KY 40503 in Fayette County, Kentucky.

7. Plaintiff Kelmarjo, Inc., d/b/a **The Dundee Tavern**, is a bar and restaurant, located at 2224 Dundee Road, Louisville, KY 40205 in Jefferson County, Kentucky.

Defendants

8. Defendant Hon. Andy Beshear is the duly elected Governor of Kentucky. He is sued in his official capacity. He issued, or authorized the issuance of, the Executive Orders, and he is responsible for their enforcement.

9. Defendant Eric Friedlander is the Secretary of the Cabinet for Health and Family Services (CHFS) and is sued in his official capacity. He issued, or authorized the issuance of, one or more of the Executive Orders, and he is responsible for their enforcement.

10. Defendant Steven Stack, M.D., is the Commissioner of the Kentucky Department of Public Health and is sued in his official capacity. He issued, or authorized the issuance of, one or more of the Executive Orders, and he is responsible for their enforcement.

BACKGROUND

The Executive Branch Issues Executive Orders in Response to COVID-19

11. On March 6, 2020, in response to the COVID-19 pandemic caused by the SARS-COV-2 virus, Governor Beshear declared a state of emergency by Executive Order 2020-215. A copy of Executive Order 2020-215 is attached as **Exhibit 1**.

12. Since Governor Beshear's emergency declaration, and in response to COVID-19, the Governor and/or his designees, specifically CHFS Secretary Eric

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Friedlander and Public Health Commissioner Steven Stack, M.D., have issued and continue to issue (and/or have enforced and continue to enforce or threaten to enforce) orders, administrative regulations, mandates, and other directives to individuals and businesses. These Executive Orders have declared and ordered which activities might be allowed, disallowed, or some combination thereof. The most pertinent of the Executive Orders are described here.

13. On March 16, 2020, CHFS ordered restaurants and bars to limit services to carry-out, drive-thru, and delivery only. This order expired by its own terms on March 30, 2020. A copy of CHFS's March 16, 2020 Order is attached as **Exhibit 2**.

14. The next day, March 17, 2020, CHFS ordered "public-facing businesses that encourage public congregation or, that by the nature of the service to the public, cannot comply with CDC guidelines concerning social distancing" to "cease in-person operations." These businesses included entertainment, hospitality, and recreational facilities, gyms, salons, theaters, and sporting-event facilities. To "avoid[] doubt," this order provided a laundry list of businesses that were permitted to remain open, "subject to limitations provided in prior orders" and, "to the extent practicable," subject to implementing certain CDC guidance. Among the businesses allowed to reopen and provide goods and services to the public (and in person) under this order were businesses providing food—except, apparently, restaurants and bars—agriculture, construction, retail, home repair/hardware and auto repair, insurance, veterinary clinics and pet stores, storage, public transportation, and hotels and commercial lodging. A copy of CHFS's March 17, 2020 Order is attached as **Exhibit 3**.

15. Two days later, March 19, 2020, CHFS ordered that "[a]ll mass gatherings are hereby prohibited." Mass gatherings "include[d] any event or convening that brings together groups of individuals, including, but not limited to," faith-based gatherings; community, civic, public, leisure, or sporting events; parades; festivals; conventions; fundraisers; "and similar activities." To "avoid[] doubt," several activities were excepted from this order, including "normal" operations at airports, libraries, shopping malls, "or other spaces where persons may be in transit." The order also did not apply to "typical" office environments, factories, or retail or grocery stores "where large numbers of people are present, but maintain appropriate social distancing." A copy of CHFS's March 19, 2020 Order is attached as **Exhibit 4**.

16. Also on March 19, 2020, the Commonwealth's Public Protection Cabinet—apparently countermanding CHFS's March 16, 2020 Order (Exh. 2) described above—issued an order through which the Commonwealth's Department of Alcoholic Beverage Control, in order "to diminish the economic impact to restaurants and bars caused by this sudden closing," ordered "supplemental rules while the prohibition of onsite consumption of food and beverage persists under Executive Order 2020-215." The Department of Alcoholic Beverage Control's order allowed on-premises drink licensees to sell alcohol for off-premises consumption, subject to certain restrictions. This order did not expressly allow sales of food for off-premises consumption. A copy of this March 19, 2020 Order is attached as **Exhibit 5**.

17. Just a few days later, March 22, 2020, Governor Beshear issued Executive Order 2020-246, which ordered and directed "[a]ll in-person retail businesses

that are not life-sustaining" to close, effective the next day at 8:00 p.m. "Life-sustaining" businesses "include[d] grocery stores, pharmacies, banks, hardware stores," and "other businesses that provide staple goods." A "full list of categories" of "life-sustaining in-person retail businesses" was attached to the order. The "categories" permitted to remain open were certain motor-vehicle and parts dealers (parts and rental business were included, dealers were not included); building-material and garden-equipment and supplies dealers; banks and other financial services; food and beverage "stores;" certain health and personal-care stores (pharmacies were included, optical-goods stores were not); gas stations and convenience stores; general-merchandise stores, including warehouse clubs (but not department stores); and pet and pet-supply stores (but not other "miscellaneous store retailers"). Those businesses allowed to open were required to follow, "to the fullest extent practicable," guidance from the CDC and the Kentucky Department of Health. Finally, "[f]or the avoidance of doubt," the order stated that "carry-out, delivery, and drive-through food and beverage sales may continue, consistent with" CHFS's March 16, 2020 Order and the Public Protection Cabinet's March 19, 2020 Order. A copy of Executive Order 2020-246 is attached as **Exhibit 6**.

18. Between March and May 2020, Governor Beshear issued other executive orders modifying or purporting to clarify previously issued orders and adopting additional restrictions (for example, suspending all "in-person government activities" that "are not necessary to sustain or protect life, or to supporting Life-Sustaining Busi-

nesses"), including restrictions on travel (subject to certain definitions and exemptions). A copy of Executive Order 2020-257 is attached as **Exhibit 7**. A copy of Executive Order 2020-258 is attached as **Exhibit 8**. A copy of Executive Order 2020-266 is attached as **Exhibit 9**. A copy of Executive Order 2020-315 is attached as **Exhibit 10**. According to Executive Order 2020-257 (Mar. 25, 2020), for example, carry-out, delivery, and drive-through food and beverage sales were allowed to continue, consistent with CHFS's March 16, 2020 Order and the Public Protection Cabinet's March 19, 2020 Order. *See* Exh. 7.

19. Through Executive Order 2020-323 (May 8, 2020), Governor Beshear announced a phased reopening plan. Among other things, this order allowed "businesses that are not life-sustaining" to reopen on May 11, 2020, under various restrictions. This order described "businesses that are not life-sustaining" as "including, but not limited to" manufacturing, distribution, and supply chain businesses; vehicle and vessel dealerships; horse-racing tracks; pet care, grooming, and boarding businesses; photography businesses, and office-based businesses. A copy of Executive Order 2020-323 is attached as **Exhibit 11**. The requirements for reopening businesses—which have changed over the past year—are published here: https://govstatus.egov.com/ky-healthy-at-work.

20. On May 11, 2020, CHFS issued an order requiring all "entities" in Kentucky to comply with the "Minimum Requirements for All Entities." A copy of CHFS's May 11, 2020 Order is attached as **Exhibit 12**.

21. On May 22, 2020, CHFS issued an order amending its March 16, 2020 Order regarding restaurants and its March 17, 2020 Order concerning "public-facing businesses." Pursuant to this May 22 Order, the March 16, 2020 Order "no longer prohibits restaurants holding a food service permit in good standing and having table seating from providing food and beverage sales for onsite consumption." This May 22 order required restaurants to comply with the Minimum Requirements for All Entities and with additional "Requirements for Restaurants," published at https://healthyatowrk.ky.gov. For the purposes of this May 22, 2020 Order, a "restaurant" was described as "an entity that stores, prepares, serves, vends food directly to the consumer or otherwise provides food for human consumption, and must hold a food service permit in good standing and have table seating." The March 16, 2020 Order "remain[ed] in effect for establishments that are not restaurants." Further, alcohol sales "at establishments that are not restaurants remain[ed] restricted to carry-out, delivery and drive-thru services only, to the extent permitted by law. Onsite consumption remain[ed] prohibited at establishments that are not restaurants." A copy of CHFS's May 22, 2020 Order is attached as **Exhibit 13.**

22. On June 29, 2020, CHFS issued an order modifying previous orders. According to this June 29, 2020 Order, among other things, CHFS's March 16, 2020 Order, concerning restaurants, "no longer prohibit[ed] bars that store, prepare, serve, or vend alcohol directly to the consumer for on-site consumption, and hold an active license to sell alcohol by the drink from providing beverage sales to consumers for onsite consumption." For purposes of this order, a "bar" was described as "an entity

that stores, prepares, serves, or vends alcohol directly to the consumer for on-site consumption, and must hold an active license to sell alcohol by the drink." CHFS's March 16, 2020 Order "remain[ed] in effect for establishments that are not bars or restaurants." Finally, this June 29, 2020 Order stated that bars and restaurants were subject to the Minimum Requirements for All Entities applicable to all entities in Kentucky and ordered bars and restaurants to "implement and follow" the "Requirements for Restaurants and Bars," https://healthyatwork.ky.gov. Among the requirements was a 50%-capacity limit. A copy of CHFS's June 29, 2020 Order is attached as **Exhibit 14**. A copy of Requirements for Restaurants and Bars, Version 1.0, is attached as **Exhibit 15**.

23. On July 10, 2020, CHFS adopted a regulation, 902 KAR 2:190E, pursuant to KRS Chapter 13A imposing mask requirements for individuals while inside (among other places) restaurants and bars. A copy of 902 KAR 2:190E is attached as **Exhibit 16**.

24. On July 28, 2020, CHFS amended previous orders and ordered bars to cease in-person operations for on-site consumption. This order noted that, pursuant to Senate Bill 150 (R.S. 2020), "the sale of alcoholic beverages by delivery, to-go or carryout" was "permitted only when it is incidental to the purchase of a meal and alcoholic beverages [were] not to be sold in bulk quantity." This order defined a bar as "an entity that stores, prepares, serves, or vends alcohol directly to the consumer for on-site consumption, and must hold an active license to sell alcohol by the drink." But this order did "not apply to restaurants holding a food service permit in good

standing and having table seating." This order was to remain in effect for 14 days subject to renewal. A copy of CHFS's July 28, 2020 Order is attached as **Exhibit 17**.

25. On August 10, 2020, CHFS issued an order that permitted bars which "store, prepare, serve, or vend alcohol directly to the consumer for on-site consumption [to] resume in-person operations for on-site consumption." This order, like the previous orders, provided that bars and restaurants were subject to the requirements applicable to all entities in Kentucky and were required to implement and follow the latest Requirements for Restaurants and Bars, found at https://healthyatwork.ky.gov. At that time, the Requirements for Restaurants and Bars imposed a 50% capacity, with social-distancing restrictions; a ban on bar seating and bar service; and curfews requiring businesses to halt food and beverage service by 10:00 p.m. local time and to close by 11:00 p.m. local time. A copy of CHFS's August 10, 2020 Order is attached as **Exhibit 18**. A copy of Requirements for Restaurants and Bars, Version 5.0, effective August 11, 2020, is attached as **Exhibit 19**.

26. On September 15, 2020, Governor Beshear announced a change to curfews on bars and restaurants, which were then required to halt food and beverage service by 11:00 p.m. and close by 12:00 a.m. local time. *See* https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=366 (last visited Mar. 7, 2021).

27. Version 5.4 of the Requirements for Restaurants and Bars went into effect on October 30, 2020. This version maintained the prohibition on bar seating and bar service; continued the curfews requiring dine-in food and drink service to cease

by 11:00 p.m. and requiring bars and restaurants to close by midnight (except for drive-thru, carry-out, and delivery services); and kept the 50%-capacity limitation in place. A copy of Requirements for Restaurants and Bars, Version 5.4, is attached as **Exhibit 20**.

28. On November 18, 2020, Governor Beshear issued Executive Order 2020-968, which ordered and directed, as of November 20, 2020, all restaurants and bars to cease all indoor food and beverage consumption. The order allowed outdoor seating if tables were limited to eight persons from a maximum of two households and the tables were socially distanced by six feet. This order expired by its own terms on December 13, 2020, at 11:59 p.m. local time. A copy of Executive Order 2020-968 is attached as **Exhibit 21**.

29. On December 11, 2020, Governor Beshear issued Executive Order 2020-1034, to take effect on December 13, 2020, at 11:59 p.m. local time. This order stated that "[c]urrent restrictions and guidelines are available online at the Healthy at Work website (https://govstatusegov.com/ky-healthy-at-work)." A copy of Executive Order 2020-1034 is attached as **Exhibit 22**.

30. These orders threatened penalties for noncompliance. For example, CHFS's June 29, 2020 Order states, "Failure to follow the requirements provided in this Order and any other Executive Order and any Cabinet Order, including but not limited to the Orders of the Cabinet for Health and Family Services, is a violation of the Orders issued under KRS Chapter 39A, and could subject businesses to closure or additional penalties as authorized by law." *See* Exh. 14.

31. CHFS adopted a regulation, 902 KAR 2:211E, effective January 5, 2021, imposing mask requirements for individuals inside (among other places) restaurants and bars. A copy of 902 KAR 2:211E is attached as **Exhibit 23**.

The Executive Orders Severely Harmed Plaintiffs' Businesses

32. The restrictions from the Governor and other officials in the Executive Branch not only impeded the ability of Plaintiffs to fully use their property, but the arbitrary, inconsistent, and ever-changing nature of those directives made it—and continues to make it—extremely difficult to understand what restrictions were and are in effect at any given time.

33. Plaintiffs had to shutter their businesses for in-person service twice, relying only on takeout, delivery, and drive-thru services for sales: first, from March 16, 2020, until May 22, 2020, and, again, from November 20, 2021, until December 13, 2020.

The General Assembly Amends Kentucky Law

34. The General Assembly met for its constitutionally authorized regular session, beginning in January 2021, KY. CONST. § 36, and immediately began work on the Commonwealth's emergency-powers laws.

35. On January 5, 2021, House Bill 1, Senate Bill 1, and Senate Bill 2 were introduced in the General Assembly. *See* https://apps.legislature.ky.gov/record/21rs/hb1.html (H.B. 1) (last visited Mar. 7, 2021), https://apps.legislature.ky.gov/record/21rs/sb1.html (S.B. 1) (last visited Mar. 7, 2021), and https://apps.legislature.ky.gov/record/21rs/sb2.html (S.B. 2) (last visited Mar. 7, 2021).

36. **House Bill 1** provides that "[n]otwithstanding any state law, administrative regulation, executive order, or executive directive to the contrary, during the current state of emergency declared by the Governor in response to COVID–19 or any future state of emergency related to any virus or disease, including but not limited to any mutated strain of the current COVID-19 virus, until January 31, 2022," any business "may remain open and fully operational for in-person services so long as it adopts an operating plan" that "[m]eets or exceeds all applicable guidance issued by the Centers for Disease Control and Prevention or by the executive branch, whichever is least restrictive," "[d]etails how the business . . . will foster the safety of employees, customers, attendees and patrons, including social distancing requirements," and posts the plan as directed. H.B. 1, § 1(1)(a) (R.S. 2021).

37. **Senate Bill 1** amended, among other provisions, statutes in KRS Chapter 39A—Statewide Emergency Management Programs. S.B. 1 (R.S. 2021).

38. Notably, **Senate Bill 1** limits the Governor's power to issue indefinite emergency declarations and executive orders. According to now-amended KRS § 39A.090,

> (2) (a) Executive orders, administrative regulations, or other directives issued under this chapter by the Governor shall be in effect no longer than thirty (30) days unless an extension, modification, or termination is approved by the General Assembly prior to the extension of any executive order or directive that:
>
> 1. Places restrictions on the in-person meeting or places restrictions on the functioning of the following:
>
> ...
>
> b. Private businesses or nonprofit organizations; [or]

...

2. Imposes mandatory quarantine or isolation requirements.

...

(3) Upon the expiration of an executive order or other directive described in subsection (2)(a) of this section declaring an emergency or other implementation of powers under this chapter, the Governor shall not declare a new emergency or continue to implement any of the powers enumerated in this chapter based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly.

KRS § 39A.090(2)–(3) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

39. **Senate Bill 2** amends, among other provisions, Kentucky's Administrative Procedure Act. The new law requires the government to meet certain (higher than before) burdens before adopting "emergency" regulations. (S.B. 2 (R.S. 2021)).

40. **Senate Bill 2** further provides:

(1) When the Cabinet for Health and Family Services determines that an infectious or contagious disease will invade this state, it shall take necessary action and promulgate administrative regulations under KRS Chapter 13A to prevent the introduction or spread of such infectious or contagious disease or diseases within this state.

(2) Any administrative regulation promulgated under the authority of this section shall:

(a) Be in effect no longer than thirty (30) days if the administrative regulation:

1. Places restrictions on the in-person meeting or functioning of the following:

...

b. Private businesses or non-profit organizations; [or]

...

2. Imposes mandatory quarantine or isolation requirements[.]

KRS § 214.020(1)–(2) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

41. House Bill 1, Senate Bill 1, and Senate Bill 2 duly passed both houses of the General Assembly and were presented to the Governor for his signature, but the Governor vetoed all three bills.

42. The General Assembly voted to override the Governor's vetoes, and House Bill 1, Senate Bill 1, and Senate Bill 2 became effective February 2, 2021. A copy of House Bill 1 is attached as **Exhibit 24**. A copy of Senate Bill 1 is attached as **Exhibit 25**. A copy of Senate Bill 2 is attached as **Exhibit 26**.

The Executive Orders at Issue in this Lawsuit Are No Longer in Force

43. As alleged above, pursuant to Senate Bill 1, the Executive Orders in effect on February 2, 2021 remained in effect for 30 days thereafter. KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)); KRS § 214.020(2)(a) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

44. The thirtieth day after February 2, 2021, was March 4, 2021.

45. Senate Bill 2 does not authorize the Governor to seek approval from the General Assembly to extend regulations 902 KAR 2:190E and 902 KAR 2:211E. *See* KRS § 214.020(2)(a) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

46. Regulations 902 KAR 2:190E and 902 KAR 2:211E were in effect through March 4, 2021. KRS § 214.020(2)(a) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

47. Regulations 902 KAR 2:190E and 902 KAR 2:211E lapsed by operation of law after thirty days after February 2, 2021, *i.e.*, March 5, 2021. KRS § 214.020(2)(a) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

48. Accordingly, regulations 902 KAR 2:190E and 902 KAR 2:211E are no longer in effect, as of March 5, 2021. KRS § 214.020(2)(a) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

49. Under Senate Bill 1, the Governor could have sought approval from the General Assembly to extend (or modify) the Executive Orders, except regulations 902 KAR 2:190E and 902 KAR 2:211E. *See* KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

50. Governor Beshear did not seek the General Assembly's approval to extend (or modify) the Executive Orders.

51. Governor Beshear did not obtain the General Assembly's approval to extend (or modify) the Executive Orders.

52. The General Assembly did not approve the extension of any of the Executive Orders.

53. The Executive Orders lapsed by operation of law after thirty days after February 2, 2021, *i.e.*, March 5, 2021. KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021))

54. Accordingly, the Executive Orders, are no longer in effect, as of March 5, 2021. KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

55. Further, "[u]pon the expiration" of the Executive Orders, Governor Beshear "shall not declare a new emergency or continue to implement any of the powers enumerated in [KRS Chapter 39A] based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the

prior approval of the General Assembly." KRS § 39A.090(3) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

Plaintiffs' Rights Will be Infringed by Continued Enforcement of the Executive Orders

56. The Commonwealth's "Governor does not have emergency powers of indefinite duration." *Beshear v. Acree*, __ S.W.3d __, 2020 WL 6736090, at *22 (Ky. 2020) (citing 2020 S.B. 150 § 3). And, as the Kentucky Supreme Court recognizes, the General Assembly has the power to limit the duration of the Governor's emergency powers under KRS Chapter 39A. *See id.* at *21.

57. In contravention of Senate Bill 1 and Senate Bill 2, Governor Beshear continues to insist that Kentuckians comply with the Executive Orders—restrictions on Plaintiffs' businesses (and on businesses, houses of worship, individuals, and families across the Commonwealth)—that are no longer in effect, pursuant to the unambiguous terms of KRS § 39A.090(2) & (3) (eff. 2/2/21) (S.B. 1 (R.S. 2021)) and KRS § 214.020(2)(a) (eff. 2/2/21) (S.B. 2 (R.S. 2021)). *See* https://governor.ky.gov/covid19 (last visited Mar. 7, 2021); and https://govstatus.egov.com/ky-healthy-at-work (last visited Mar. 7, 2021).

58. Governor Beshear and Secretary Friedlander also initiated a lawsuit to challenge the validity of House Bill 1, Senate Bill 1, and Senate Bill 2. *See Beshear v. Osborne*, Franklin Circuit Court Civil Action No. 21-CI-00089. On March 3, 2021, Judge Phillip J. Shepherd issued an order granting the Governor's motion for a temporary injunction. A copy of Judge Shepherd's March 3, 2021 Order is attached as **Exhibit 27**.

59. Respectfully, Judge Shepherd's order is in error, and it does not bind Plaintiffs here.

60. On March 5, 2021—the day the Executive Orders became ineffective by operation of law—new restrictions on bars and restaurants purportedly became effective. According to Version 5.5 of the "Requirements for Restaurants and Bars," the Governor has granted bars and restaurants permission to have a maximum capacity of 60%. A copy of Requirements for Restaurants and Bars, Version 5.5, is attached as **Exhibit 28.**

61. The Requirements for Restaurants and Bars, Version 5.5, states that "[r]estaurants and bars who fail to follow these requirements of the Executive Order will be subject to a fine and may also be subject to an order from a local health department or the Labor Cabinet requiring immediate closure." *See* Exh. 28.

62. KRS § 39A.990 provides for punishments in the form of fines ranging from $100 to $250 for "violating any . . . administrative regulation or order promulgated pursuant to" Chapter 39A, which describes emergency powers such as those exercised by Governor Beshear and his designees in promulgating the Executive Orders.

63. Plaintiffs are thus precluded from fully opening their bars and restaurants, despite Senate Bill 1 and Senate Bill 2, without risking prosecution and the threat of fines and closures due to Defendants' continued enforcement of the Executive Orders.

64. Defendants' continued enforcement of the Executive Orders is unlawful.

65. Plaintiffs are thus subject to arbitrary rule by the enforcement of the Executive Orders, which are no longer in force pursuant to the unambiguous terms of the newly enacted laws. Defendants are now acting in direct violation of the law by continuing to enforce lapsed orders and by issuing and enforcing new orders.

Allegations in Support of Declaratory and Injunctive Relief

66. Plaintiffs incorporate by reference every allegation previously set forth in this Complaint as if fully set forth herein.

67. An actual, justiciable controversy exists between Plaintiffs and Defendants as to their legal rights and obligations. KRS § 418.040. Plaintiffs contend that the Kentucky Constitution requires the strict separation of the government's powers. The government's three powers are vested in separate departments. The legislative power is vested in the General Assembly; the executive power is vested in the Governor; and the judicial power is vested in the judicial branch. KY. CONST. §§ 29, 69, 109. The Kentucky Constitution further includes two express "Separation of Powers" clauses. First, the Constitution provides that the "powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." *Id.* § 27. Second, the Constitution states that "[n]o person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or

permitted." *Id.* § 28. Under the Kentucky Constitution, therefore, the General Assembly writes the laws and sets the Commonwealth's policy; the Governor executes those laws—indeed, the Governor is expressly obligated to "take care that the laws be faithfully executed." *Id.* § 81. Here, pursuant to the new laws duly enacted by the General Assembly, the Executive Orders issued in response to the COVID-19 pandemic are, as of March 5, 2021, no longer in effect. Plaintiffs therefore further contend that neither Governor Beshear nor anyone else in the Executive Branch may enforce those Executive Orders. Finally, Plaintiffs contend that "[u]pon the expiration of the" Executive Orders, neither Governor Beshear nor anyone else in the Executive Branch may "declare a new emergency or continue to implement any of the powers enumerated in [KRS Chapter 39A] based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly." KRS § 39A.090(3) (eff. 2/2/21) (S.B. 1 (R.S. 2021)). Plaintiffs contend that the latest version of the Requirements for Restaurants and Bars (Exh. 28) constitutes a plain attempt to "continue to implement . . . the powers enumerated in [KRS Chapter 39A] based upon the same or substantially similar facts and circumstances" as those giving rise to the panoply of Executive Orders issued prior thereto. As such, the issuance or enforcement of "requirements" based upon expired Emergency Orders is plainly unlawful.

68. Accordingly, a present justiciable controversy exists between the parties concerning the continued enforcement of the Executive Orders and the enforcement of future orders, administrative regulations, or other directives issued under KRS

Chapter 39A. A judicial determination of rights and responsibilities arising from this controversy is necessary and appropriate at this time.

69. Plaintiffs are being and will continue to be directly, adversely, and irreparably harmed by Defendants' continued enforcement of the Executive Orders and of any future orders, administrative regulations, or other directives issued under KRS Chapter 39A. This enforcement deprives and will continue to deprive Plaintiffs of their ability to fully open their bars and restaurants—for which no damages are available. This enforcement further deprives and will continue to deprive Plaintiffs of, without limitation, their constitutional rights to "enjoying . . . their liberties," KY. CONST. § 1, "acquiring and protecting [their] property," *id.*, their constitutional right against absolute and arbitrary government, *id.* § 2, and their rights to the structural protections guaranteed by Kentucky's separation of powers, *id.* §§ 27–28, 29, 69, 109.

70. Defendants will not be harmed, as they have no valid interest in enforcing invalid laws and orders based on invalid laws, *i.e.*, the previous versions of the statutes amended in House Bill 1, Senate Bill 1, and Senate Bill 2.

71. Further, injunctive relief benefits Kentuckians generally because it is in the public interest that duly enacted laws are followed and enforced by the Commonwealth's chief executive who is bound by the Constitution to faithfully execute them. KY. CONST. § 81.

72. Finally, there is likewise a strong public interest in preventing the enforcement of arbitrary laws, here taking the form of executive orders and administrative regulations that enforce a declaration of emergency no longer in effect pursuant

to the legislation that designates emergency powers. KY. CONST. § 2; KRS §§ 39A.020(2), 214.020(2) (eff. 2/2/21).

CLAIMS FOR RELIEF

COUNT I
Declaratory Relief: The Executive Order declaring a state of emergency has lapsed pursuant to Senate Bill 1 and is no longer in effect

73. Plaintiffs incorporate by reference every allegation previously set forth in this Complaint as if fully set forth herein.

74. Governor Beshear declared a state of emergency on March 6, 2020, by Executive Order 2020-215, in response to the COVID-19 pandemic caused by the SARS-COV-2 virus. *See* Exh. 1.

75. According to Senate Bill 1,

> (2) (a) Executive orders, administrative regulations, or other directives issued under this chapter by the Governor shall be in effect no longer than thirty (30) days unless an extension, modification, or termination is approved by the General Assembly prior to the extension of any executive order or directive that:
>
> 1. Places restrictions on the in-person meeting or places restrictions on the functioning of the following:
>
> . . .
>
> b. Private businesses . . . .

KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

76. Senate Bill 1 became effective February 2, 2021.

77. Defendants did not obtain approval from the General Assembly to extend or modify Executive Order 2020-215.

78. Pursuant to Senate Bill 1, Executive Order 2020-215 is, as of March 5, 2021, no longer in effect.

COUNT II
Temporary and Permanent Injunctive Relief: Defendants should be temporarily and permanently enjoined from enforcing Executive Order 2020-215 and any powers or authorities created or established in Executive Order 2020-215

79. Plaintiffs incorporate by reference every allegation previously set forth in this Complaint as if fully set forth herein.

80. Governor Beshear declared a state of emergency on March 6, 2020, by Executive Order 2020-215, in response to the COVID-19 pandemic caused by the SARS-COV-2 virus. *See* Exh. 1.

81. According to Senate Bill 1,

> (2) (a) Executive orders, administrative regulations, or other directives issued under this chapter by the Governor shall be in effect no longer than thirty (30) days unless an extension, modification, or termination is approved by the General Assembly prior to the extension of any executive order or directive that:
>
> 1. Places restrictions on the in-person meeting or places restrictions on the functioning of the following:
>
> . . .
>
> b. Private businesses . . . .

KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

82. Senate Bill 1 became effective February 2, 2021.

83. Defendants did not obtain approval from the General Assembly to extend or modify Executive Order 2020-215.

84. Pursuant to Senate Bill 1, Executive Order 2020-215 is, as of March 5, 2021, no longer in effect, and Defendants should be temporarily and permanently

enjoined from enforcing Executive Order 2020-215 and any powers or authorities created or established in Executive Order 2020-215.

COUNT III
Declaratory Relief: All of the Executive Orders have lapsed pursuant to Senate Bill 1 and Senate Bill 2, and they are no longer in effect

85. Plaintiffs incorporate by reference every allegation previously set forth in this Complaint as if fully set forth herein.

86. Defendants issued and enforced the Executive Orders described above, and they continue to enforce the Executive Orders (except to the extent Executive Orders or portions thereof were invalidated by other Executive Orders)—including enforcement against Plaintiffs here.

87. According to Senate Bill 1,

> (2) (a) Executive orders, administrative regulations, or other directives issued under this chapter by the Governor shall be in effect no longer than thirty (30) days unless an extension, modification, or termination is approved by the General Assembly prior to the extension of any executive order or directive that:
>
> 1. Places restrictions on the in-person meeting or places restrictions on the functioning of the following:
>
> . . .
>
> b. Private businesses . . . .

KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

88. Pursuant to Senate Bill 2, administrative regulations promulgated under the authority of KRS § 214.020 that "[p]lace[] restrictions on the in-person meeting or functioning of" private businesses shall "[b]e in effect no longer than thirty (30) days." *Id.* § 214.020(2)(1)(b) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

89. Senate Bill 1 became effective February 2, 2021.

90. Senate Bill 2 became effective February 2, 2021.

91. Under Senate Bill 1, the Governor could have sought approval from the General Assembly to extend (or modify) the Executive Orders, except regulations 902 KAR 2:190E and 902 KAR 2:211E. *See* KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

92. Senate Bill 2 does not authorize the Governor to seek approval from the General Assembly to extend regulations 902 KAR 2:190E and 902 KAR 2:211E. *See* KRS § 214.020(2)(a) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

93. Governor Beshear did not seek the General Assembly's approval to extend (or modify) the Executive Orders.

94. Governor Beshear did not obtain the General Assembly's approval to extend (or modify) the Executive Orders.

95. The General Assembly did not approve the extension of any of the Executive Orders.

96. The Executive Orders lapsed by operation of law after thirty days after February 2, 2021, *i.e.*, March 5, 2021. KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)); § 214.020(2)(1)(b) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

97. Accordingly, the Executive Orders are no longer in effect, as of March 5, 2021. KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)); § 214.020(2)(1)(b) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

COUNT IV
Temporary and Permanent Injunctive Relief:
Defendants should be temporarily and permanently enjoined from enforcing the Executive Orders against Plaintiffs

98. Plaintiffs incorporate by reference every allegation previously set forth in this Complaint as if fully set forth herein.

99. Defendants issued and enforced the Executive Orders described above, and they continue to enforce the Executive Orders (except to the extent Executive Orders or portions thereof were invalidated by other Executive Orders)—including enforcement against Plaintiffs here.

100. According to Senate Bill 1,

> (2) (a) Executive orders, administrative regulations, or other directives issued under this chapter by the Governor shall be in effect no longer than thirty (30) days unless an extension, modification, or termination is approved by the General Assembly prior to the extension of any executive order or directive that:
>
> 1. Places restrictions on the in-person meeting or places restrictions on the functioning of the following:
>
> . . .
>
> b. Private businesses . . . .

KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

101. Pursuant to Senate Bill 2, administrative regulations promulgated under the authority of KRS § 214.020 that "[p]lace[] restrictions on the in-person meeting or functioning of" private businesses shall "[b]e in effect no longer than thirty (30) days." *Id.* § 214.020(2)(1)(b) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

102. Senate Bill 1 became effective February 2, 2021.

103. Senate Bill 2 became effective February 2, 2021.

104. Under Senate Bill 1, the Governor could have sought approval from the General Assembly to extend (or modify) the Executive Orders, except regulations 902 KAR 2:190E and 902 KAR 2:211E. *See* KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

105. Senate Bill 2 does not authorize the Governor to seek approval from the General Assembly to extend regulations 902 KAR 2:190E and 902 KAR 2:211E. *See* KRS § 214.020(2)(a) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

106. Governor Beshear did not seek the General Assembly's approval to extend (or modify) the Executive Orders.

107. Governor Beshear did not obtain the General Assembly's approval to extend (or modify) the Executive Orders.

108. The General Assembly did not approve the extension of any of the Executive Orders.

109. The Executive Orders lapsed by operation of law after thirty days after February 2, 2021, *i.e.*, March 5, 2021. KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)); § 214.020(2)(1)(b) (eff. 2/2/21) (S.B. 2 (R.S. 2021)).

110. Accordingly, the Executive Orders are no longer in effect, as of March 5, 2021, KRS § 39A.090(2) (eff. 2/2/21) (S.B. 1 (R.S. 2021)); § 214.020(2)(1)(b) (eff. 2/2/21) (S.B. 2 (R.S. 2021)), and Defendants should be temporarily and permanently enjoined from enforcing the Executive Orders against Plaintiffs.

COUNT V
Declaratory Relief: Defendants are prohibited from issuing and enforcing new orders related to the COVID-19 pandemic

111. Plaintiffs incorporate by reference every allegation previously set forth in this Complaint as if fully set forth herein.

112. Pursuant to Senate Bill 1,

> (3) Upon the expiration of an executive order or other directive described in subsection (2)(a) of this section declaring an emergency or other implementation of powers under [KRS Chapter 39A], the Governor shall not declare a new emergency or continue to implement any of the powers enumerated in this chapter based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly.

KRS § 39A.090(3) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

113. The Executive Orders, as of March 5, 2021, are no longer in effect.

114. Accordingly, the Governor shall not declare a new emergency or continue to implement any of the powers enumerated in KRS Chapter 39A based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly. KRS § 39A.090(3) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

115. Further, the latest version of the Requirements for Restaurants and Bars (Exh. 28) was unlawfully issued on March 5, 2021—after the other Executive Orders expired by operation of the new laws.

COUNT VI
Temporary and Permanent Injunctive Relief: Defendants should be temporarily and permanently enjoined from issuing and enforcing new orders related to the COVID-19 pandemic

116. Plaintiffs incorporate by reference every allegation previously set forth in this Complaint as if fully set forth herein.

117. Pursuant to Senate Bill 1,

> (3) Upon the expiration of an executive order or other directive described in subsection (2)(a) of this section declaring an emergency or other implementation of powers under [KRS Chapter 39A], the Governor shall not declare a new emergency or continue to implement any of the powers enumerated in this chapter based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly.

KRS § 39A.090(3) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

118. The Executive Orders, as of March 5, 2021, are no longer in effect.

119. Accordingly, the Governor shall not declare a new emergency or continue to implement any of the powers enumerated in KRS Chapter 39A based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly. KRS § 39A.090(3) (eff. 2/2/21) (S.B. 1 (R.S. 2021)).

120. Defendants should be temporarily and permanently enjoined from enforcing the latest version of the Requirements for Restaurants and Bars (Exh. 28), which was unlawfully issued on March 5, 2021—after the other Executive Orders expired by operation of the new laws.

121. Defendants should be temporarily and permanently enjoined from declaring a new emergency or continuing to implement any of the powers enumerated

in KRS Chapter 39A based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly.

COUNT VII
Due Process: Defendants' attempted and threatened enforcement of the Executive Orders violates Plaintiffs' Rights of Due Process

122. Plaintiffs incorporate by reference every allegation previously set forth in this Complaint as if fully set forth herein.

123. By enforcing, attempting to enforce, or threatening to enforce the Executive Orders after their power to do so has been removed by the General Assembly through the due enactment of new laws, Defendants have acted and continue to act arbitrarily and capriciously, in violation of Section 2 of Kentucky's Constitution.

124. By enforcing, attempting to enforce, or threatening to enforce the Executive Orders after their power to do so has been removed by the General Assembly through the due enactment of new laws, Defendants have violated and continue to violate Section 4 of Kentucky's Constitution, in that Defendants claim power that they do not have under Kentucky's representative form of government.

125. Even assuming, *arguendo*, the intrinsic wisdom or desirability of the instructions set forth in the Executive Orders, government may not seize power not duly given it without violating fundamental principles of due process, which are embodied in (among other places) Kentucky's Constitution, including (without limitation) Sections 1, 2, and 4 thereof. Defendants' attempt to force compliance with orders which have now expired as a matter of law serves to deprive the Plaintiffs and others like them of these fundamental due process rights.

126. As a result of Defendants' actions, Plaintiffs have been deprived of their substantive and procedural due process rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

1. A declaratory judgment, pursuant to KRS § 418.040, from the Court that pursuant to Senate Bill 1, Executive Order 2020-215 is, as of March 5, 2021, no longer in effect and binding on Plaintiffs.

2. Temporary and permanent injunctive relief enjoining Defendants from enforcing Executive Order 2020-215 and any powers or authorities created or established in Executive Order 2020-215.

3. A declaratory judgment, pursuant to KRS § 418.040, from the Court that all of the Executive Orders are, as of March 5, 2021, no longer in effect and binding on Plaintiffs.

4. Temporary and permanent injunctive relief enjoining Defendants from enforcing the Executive Orders against Plaintiffs.

5. A declaratory judgment, pursuant to KRS § 418.040, from the Court that pursuant to Senate Bill 1, the latest version of the Requirements for Restaurants and Bars (Exh. 28) was unlawfully issued on March 5, 2021—after the other Executive Orders expired by operation of the new laws; and that the Governor may not declare a new emergency or continue to implement any of the powers enumerated in KRS Chapter 39A based upon the same or substantially similar facts and circumstances

as the original declaration or implementation without the prior approval of the General Assembly.

6. Temporary and permanent injunctive relief enjoining Defendants from enforcing the latest version of the Requirements for Restaurants and Bars (Exh. 28), which was unlawfully issued on March 5, 2021—after the other Executive Orders expired by operation of the new laws; and further, from declaring a new emergency or continuing to implement any of the powers enumerated in KRS Chapter 39A based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly.

DATED: March 8, 2021.

Respectfully submitted,

s/ Joshua S. Harp
JOSHUA S. HARP
Ky. Bar No. 91386
Baughman Harp, PLLC
401 West Main Street
Frankfort, KY 40601
Tel: (502) 227-2271
harp@harplawoffice.com

OLIVER J. DUNFORD*
Fla. Bar No. 1017791
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Tel: (916) 503-9060
ODunford@pacificlegal.org

STEVEN M. SIMPSON*
DC Bar No. 462553
DANIEL T. WOISLAW*
Va. Bar No. 91180
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, VA 22201
Tel: (202) 888-6881
SSimpson@pacificlegal.org
DWoislaw@pacificlegal.org

**Pro hac vice* applications to be filed

Attorneys for Plaintiffs

VERIFICATION

I hereby certify that, in my capacity as CEO and Managing Partner of GOODWOOD BREWING COMPANY, LLC, I have reviewed the PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY RELIEF, A TEMPORARY INJUNCTION, AND A PERMANENT INJUNCTION, and the statements contained therein are true and accurate statements to the best of my knowledge, information, and belief.

Ted K. Mitzlaff, President
GOODWOOD BREWING COMPANY, LLC

Commonwealth of Kentucky)
) :ss
County of JEFFERSON)

The foregoing instrument was acknowledged before me this 6th day of March, 2021.

My Commission expires: AUG 15, 2024

NOTARY PUBLIC

WILLIAM J. HARDING
Notary Public - State at Large
KENTUCKY - Notary ID # KYNP11722
My Commission Expires August 15, 2024

VERIFICATION

I hereby certify that, in my capacity as President and Managing Member of Trindy's, LLC, I have reviewed the PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY RELIEF, A TEMPORARY INJUNCTION, AND A PERMANENT INJUNCTION, and the statements contained therein are true and accurate statements to the best of my knowledge, information, and belief.

Melinda C. Tindle, President
Trindy's, LLC

Commonwealth of Kentucky)
) :ss
County of Scott)

The foregoing instrument was acknowledged before me this 6 day of March, 2021.

My Commission expires: 5/31/2022

Tata Halcutz #601962
NOTARY PUBLIC

VERIFICATION

I hereby certify that, in my capacity as President of KELMARJO, INC. d/b/a Dundee Tavern, I have reviewed the PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY RELIEF, A TEMPORARY INJUNCTION, AND A PERMANENT INJUNCTION, and the statements contained therein are true and accurate statements to the best of my knowledge, information, and belief.

Alan Hincks, President
KELMARJO, INC. d/b/a
Dundee Tavern

Commonwealth of Kentucky)
) :ss
County of Jefferson)

The foregoing instrument was acknowledged before me this 6 day of March 2021.

My Commission expires: 8/10/2022

NOTARY PUBLIC
I.D. 603017

2

TAB 2

COMMONWEALTH OF KENTUCKY
SCOTT CIRCUIT COURT
DIVISION TWO
CIVIL ACTION NO. 21-CI-00128

GOODWOOD BREWING COMPANY, LLC, **PLAINTIFFS**
d/b/a Louisville Taproom,
Frankfort Brewpub, and
Lexington Brewpub;
TRINDY'S LLC; AND KELMARJO, INC.
d/b/a The Dundee Tavern

V.

ANDY BESHEAR, in his official capacity **DEFENDANTS**
as Governor of the Commonwealth of Kentucky;
ERIC FRIEDLANDER, in his official capacity as Secretary
of the Cabinet for Health and Family Services; and
STEVEN STACK, M.D., in his official capacity as
Commissioner of the Kentucky Depart of Public Health

OPINION AND ORDER
GRANTING TEMPORARY INJUNCTIVE RELIEF

This matter is before the Court on Motion of the Plaintiff for Temporary Injunctive Relief. The Court having reviewed the motion, response, and reply thereto, having heard oral arguments from the parties on April 1, 2021 in open court, and the Court being otherwise fully and sufficiently advised, issues the following Opinion and Order GRANTING the TEMPORARY INJUNCTION in favor of the Plaintiffs:

This action, at its most basic level, is simple. The Governor has two kinds of power: those given to him in the Constitution, and those given to him by the Legislature under statute. The emergency powers of the Governor at issue in this case are not inherent. They are not listed in the powers given to the Governor in the Constitution but were given to the Governor when the General

Assembly created and passed KRS Chapter 39A. Any power the General Assembly gives to the other branches of government, it can freely rescind, modify, or limit. The General Assembly makes the laws. The Governor and the Courts follow them.

In response to the COVID-19 pandemic, the Governor issued several executive orders and agencies issued emergency regulations in order to stop the spread of the disease. Some of these were challenged in cases last year in what ultimately became *Beshear v. Acree*, in the Kentucky Supreme Court. 615 S.W.3d 780 (Ky. 2020). In that case, Supreme Court stated that the Governor's Executive Orders up until that time were valid because he had been given the power to issue those by the legislature under the Statewide Emergency Management Programs regime in KRS Chapter 39A. During the 2021 regular session, the General Assembly responded to *Beshear v. Acree*, by passing H.B. 1, S.B. 1, and S.B. 2. In particular, S.B. 1 recognizes what the Supreme Court stated were "implied" emergency powers of the Governor in the Constitution, but placing restrictions on the powers granted under statute, an action the Supreme Court explicitly said the Legislature could do. This amendment to the Emergency Management chapter states that the Governor must include the Legislature in making decisions if an emergency lasts more than 30 days. The law recognizes the need for the full-time executive to be able to respond to emergencies but places a safeguard that orders made in response to a temporary emergency do not become de facto legislation.

The Plaintiffs in this case are businesses in Kentucky, in Scott, Jefferson, and Fayette Counties, affected by the Governor's continuing Executive Orders restricting their right to operate their establishments. H.B. 1, S.B. 1, and S.B. 2 state that before the Governor can continue to restrict these businesses, he must confer with the Legislature first. That has not happened. The General Assembly further has passed H.J.R. 77 granting continuation of some of the Governor's

Orders and Executive Branch Emergency Regulations. The restrictions the Plaintiffs complain of, however, were not covered under H.J.R. 77, and as of March 5, 2021, they have expired so that the Plaintiffs should be free to operate their businesses under the current state of the law.

The Governor and the General Assembly are involved in a lawsuit in Franklin Circuit Court concerning the validity of these statutes and that Court has issued a temporary injunction against the laws becoming effective until that matter is resolved. Review of that injunction has quickly moved from Franklin Circuit to the Court of Appeals and now sits with the Kentucky Supreme Court on an expedited basis because of the great public interest in the issue. As will be discussed below, however, that Court's ruling has no binding effect on this Court, as both are co-equal courts of the same level, with the same amount of power. While this Court has great respect for the Courts and Jurists in Franklin Circuit, it cannot be bound by the decisions of a sister court. Jurists in Kentucky enjoy a very collegial environment and deference is generally given to other Courts of equal level. This case, however, presents issues where that usual deference has to take second place, especially since these matters currently sit with the Supreme Court.

The issues in this case are not just about these specific businesses being able to operate, but touch on the interests of the entire Commonwealth still in the midst of COVID-19 infection. Under the law, this Court must balance those interests with the interests of the Plaintiffs. With the public interest in mind, this Court is issuing an order that is very narrow. The Defendants are specifically enjoined against issuing or enforcing new restrictions against only these specific Defendants. It does not affect every business in the Commonwealth, or schools, or masks, or any other issue. It only states that under the law, these specific businesses' rights have and continue to suffer harm and they should be relieved under the current state of the law. Also, because of the extreme speed the Franklin Circuit case made it to review with the Supreme Court, there is every

chance that this case will join it, that the Court of Appeals will stay the order very quickly, and then send this case to the Supreme Court with the other. In fact, the Court at oral argument offered Counsel for the Defendants a delayed effective date to give them time to file a Petition in the Court of Appeals, and Counsel declined.

If this Order will have no practical effect, then why is the Court issuing it? Because with the appellate courts taking such quick action in review, any risk to public health, or confusion, is lessened, and this case can proceed on principle only. These are great, fundamental issues of law and rights and fairness. The Franklin Circuit Case involves only the Governor and the General Assembly. By issuing this temporary injunction, the Court gives these Plaintiff businesses, the business community, and general citizenry of the Commonwealth a real say in the matters. While we elect and put trust in our officials in Frankfort, the impact of decisions in the Capitol actually live and breathe with the citizens of the Commonwealth, where the people operate businesses and work and raise families. Where the courts give the citizens of the Commonwealth the ability to seek redress for harm when a law, executive order, or regulation from Frankfort disrupts their ability to live within their inalienable rights, that redress should be freely given.

For the reasons stated below, Plaintiff's Motion for Temporary Injunctive Relief is GRANTED.

I. Jurisdiction

This Court has Jurisdiction in this matter because it affects the rights of a business located in Scott County. The Court further has Jurisdiction in this matter pursuant to 2021 H.B. 3, which requires that for any civil action that challenges the constitutionality of a Kentucky executive order and requesting injunctive relief against any state official, that action shall be filed in the county where the Plaintiff resides. 2021 H.B. 3, 1-2. In this action, Plaintiffs have chosen to file this

action in Scott Circuit Court because Defendant Trindy's LLC is located in this county. It is clear this Court has jurisdiction over this matter.

II. Standard for Temporary Injunctive Relief

Under KY CR 65.04, a temporary injunction can be granted if it is clearly shown that "the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury… pending a final judgment". KY CR 65.04(1). Under *Maupin v. Stansbury*, courts use a three-prong test to determine whether to grant and temporary injunction. 575 S.W.2d 695 (Ky App. 1978). First, the Court must find irreparable injury to the plaintiff. Second, the court should weigh the equities involved. Third is whether a substantial question has been presented, or "if the complaint shows a probability of irreparable injury and the equities are in favor of issuance, it is sufficient if the complaint raises a serious question warranting a trial on the merits" *Maupin*, at 699.

III. Under KY CR 65.04 and *Maupin*, Temporary Injunctive Relief is Warranted in this Case.

The main issue in this case is whether the Executive Branch may restrict a private business under Emergency Executive Order outside of an explicit statute regimen. For purposes of temporary injunctive relief, the Court does not have to ultimately decide that fact, only to the point of, along with the other *Maupin* factors, the Plaintiff raises a serious question warranting a trial on the merits. The answer to that is most definitely yes, and temporary injunctive relief should be granted in favor of the Plaintiff.

First, under KY CR 65.04 and the first *Maupin* prong, the Plaintiff must clearly show that its rights are being or will be violated and will suffer immediate and irreparable injury pending a final judgment in the action. The rights alleged to be violated in this case are basic ones. The

Plaintiffs operate businesses and have a right to do so in the Commonwealth without interference by the Government, except where the laws of the Commonwealth restrict in order to protect or benefit the public interest. In this case, the General Assembly has passed a statute specifically limiting the Governor's power in an emergency scenario (S.B. 1), and the Governor and Executive Branch have not followed that statute. Because they have not followed the statute, by operation of law, all of the executive orders and other directives issued for the COVID-19 emergency have now expired. There continue to be, however, further Executive Orders and enforcement of those Orders from the Executive in violation of the law, some of which harm the Plaintiffs and their right to do business in the Commonwealth. The Plaintiffs clearly show that the Executive's continued violation of law affects their basic rights to operate, and as such, because it affects rights and not just economic damage, is an immediate and irreparable injury.

Under the second prong of *Maupin*, the Court should weigh the equities involved within the matter. When the violation of a basic right by a business is alleged, one that is supported by statute, that weighs heavily against the Defendants. The Defendants argued that public interest in the Executive having the power to manage potential further infection in the pandemic outweighs the rights of the individuals here. The scope of this order is limited, however, in that it is applicable to only the Plaintiffs in this case in the locations they currently operate, not a broad state-wide swath. Because of the limited scope of the Order, and because of the almost certainty that this Order will be on review in the Court of Appeals within a matter of days after entry so that it will have little to no practical effect on the operation of government, the individual rights of the business outweigh the limited public interest here.

The third prong of *Maupin* goes to whether there is a substantial question raised, looking at the likelihood of Plaintiffs' success at trial. To this Court, this seems to be a simple question.

Under the Kentucky Constitution, § 29 grants legislative power in the General Assembly. § 81 of the Constitution states that the Governor shall "take care that laws are faithfully executed." It is a fundamental concept in the separation of powers that the Executive has only the powers granted to it by the Constitution, as well as those granted to it under legislation by the General Assembly. Where a power is granted to the Governor by the General Assembly, and not inherent in the Constitution, that power can be removed, amended, or revised whenever and however the General Assembly sees fit. The emergency powers relied upon by the Executive in KRS 31A were granted to it by the General Assembly. H.B. 1, S.B. 1, and S.B. 2 amend that power, and the Governor's veto of that legislation was overridden. Unless and until that legislation is ruled unconstitutional by the courts, it is a valid law that must be faithfully executed. This raises a substantial question in favor of the Plaintiffs so that temporary injunctive relief is appropriate on their behalf.

The Defendants have not argued the substantive matter of separation of powers in this action, instead arguing that because Franklin Circuit Court has issued temporary injunctive relief that relief precludes this Court from issuing an injunction in this case. The Plaintiffs argue that injunctive relief in the current action is proper because the Franklin Circuit cannot bind another Circuit Court in Kentucky as co-equal Courts, also that the injunctive relief is still available because they were not real parties in interest in the Franklin case. Both Defendants and Plaintiffs rely on *Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2009) to support their arguments.

Thompson concerns a Pulaski Circuit permanent injunction against the Kentucky Department of Corrections from retro-actively applying a change in the way parole time was counted toward service of a sentence. The parties in that case were the Commonwealth Attorney for the 28th Circuit and the Commissioner for the Department of Corrections (DOC) for a declaration of rights in applying the changed statute. The Pulaski Circuit granted permanent

injunctive relief only in criminal cases where judgment issued from the 28th Circuit. The Attorney General declined to intervene in that suit, and instead filed a similar action in the Franklin Circuit Court against the DOC Commissioner seeking the same relief. Franklin Circuit did not follow the Pulaski Circuit lead and both matters were taken up on review to resolve the discrepancies in the outcomes.

Noting that the Circuit Courts in Kentucky are part of a unitary court system, and that all circuit judges "enjoy equal capacity to act throughout the state," the Court held that Pulaski Circuit had the ability to issue injunctive relief against the DOC. *Id.* at 162-163, *quoting Baze v. Com.*, 276 S.W.3d 761, 767 (Ky. 2008). At importance was that the Pulaski Circuit had jurisdiction over the subject matter and the parties, that venue was proper, and that no statute would require the action be brought in Franklin Circuit, so that "in the absence of express authority to the contrary, each geographic division of the one statewide circuit court has co-equal abilities and powers." *Id.* at 163.

In the present case, there *is* express authority that allows this case to be brought in Scott Circuit, H. B. 3 from the just closed 2021 session of the General Assembly. H.B. 3 states that in actions just as these, where a party challenges an executive order or administrative regulation, includes a claim for declaratory or injunctive relief, and is against an official of the Commonwealth in his official capacity, that the action *shall* be filed in the county were the Plaintiff resides, or if there are multiple Plaintiffs, the county where one Plaintiff resides. 2021 H.B. 3, 1-2. Because this action has multiple parties and one is located in Scott County, this Court has express jurisdiction of the subject matter and the parties. This court has co-equal abilities and powers with the Franklin Circuit Court as part of the "one statewide circuit court" and under *Thompson* could enter even a statewide injunction in this matter if that were requested and appropriate. The

Plaintiffs in this matter are not requesting a statewide injunction, however, only one that is individual for them and in the localities in which they operate. Since this Court has the power to issue a broad statewide injunction, it obviously has the power to issue lesser injunctive relief covering only five Plaintiffs at their locations in four counties.

As stated above, Defendants have decided not to argue the substantive issues in this Court instead relying on the preclusive effect of the Franklin Circuit temporary injunction. This Court assumes that after the review from the Supreme Court on that case that this matter will be resolved in accordance with that decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the motion, response, and reply of the parties, having heard oral arguments and being otherwise fully and sufficiently advised, the Court hereby makes the following **Findings of Fact**:

1. Plaintiff Goodwood Brewing Company, LLC, d/b/a Louisville Taproom, Frankfort Brewpub, and Lexington Brewpub, is a Kentucky Limited Liability Corporation with headquarters located in Jefferson County, but with businesses in Jefferson, Franklin, and Fayette Counties; Plaintiff Trindy's, LLC is a Kentucky Limited Liability Company located in Scott County; and Kelmarjo, Inc. d/b/a The Dundee Tavern is a Kentucky Corporation located in Jefferson County.

2. The Plaintiffs are Commonwealth of Kentucky officials in their official capacities, Governor Andy Beshear, Eric Friedlander, Secretary of the Cabinet for Health and Family Services, and Steven Stack, M.D., Commissioner of the Kentucky Department of Public Health.

3. Jurisdiction and venue are proper with this Court as this is an action for declaratory or injunctive relief, brought contesting the constitutionality of an executive order or administrative

regulation, and because there are multiple Plaintiffs, brought in the county of where one of the Plaintiffs (Trindy's, LLC) resides.

4. In response to the COVID-19 pandemic, the Defendants have issued Executive Orders and Administrative Regulations that affect the Plaintiffs' businesses.

5. During the 2021 session of the Kentucky General Assembly, the Legislature passed H.B. 1, S.B. 1, and S.B. 2, restricting the ability of the Governor to issue executive orders in an emergency, and executive branch agencies from issuing emergency regulations. Namely, S.B. 1 required that all executive orders issued during an emergency would expire after 30 days unless the General Assembly approved of their continuance. S.B. 2 places new restrictions on administrative regulations promulgated pursuant to emergency powers and provides for legislative committee review and opportunity for public comment.

6. H.B. 1, S.B. 1, and S.B. 2 were passed by both Houses of the General Assembly, but vetoed by the Governor. The General Assembly voted to override the veto of the Governor. These bills, passed as emergency legislation, became effective on February 2, 2021.

7. After the vote to override the veto, the Governor filed action in Franklin Circuit Court to enjoin the implementation of the new laws. That Court issued a temporary injunction in favor of the Governor on March 3, 2021.

8. The emergency executive orders (except those continued by H.J.R. 77) expired under the new laws on March 4, 2021.

9. The Governor and Executive Branch agencies have continued to and will continue to enforce the executive orders against the Plaintiffs despite the passage of the new legislation.

10. The Plaintiffs filed this suit on March 5, 2021 for declaratory and permanent injunctive relief, and temporary injunctive relief alleging the Governor's action have harmed and continue to harm their rights to operate their business.

Based on the Findings of Fact, the Court issues the following **Conclusions of Law**:

1. That this Court has jurisdiction over both the subject matter in this action and the parties thereto;

2. That the Plaintiffs have been harmed and will continue to be harmed in their right to operate their businesses absent temporary injunctive relief, as the Defendants would continue to enforce executive orders and administrative regulations in violation of law;

3. That a narrowly-tailored restraining order in favor of the Plaintiffs, but taking into consideration the public interest in controlling the spread of the COVID-19 infection is equitable in this matter;

4. That Plaintiffs have presented a substantial question as to the validity of the Defendants' actions in the face of express statutory direction against those actions;

5. That this Court is a co-equal court with that of Franklin Circuit, that this Court has an equal ability to issue temporary injunctive relief concerning the same statute, and that this Court is not bound by the decisions or orders of the Franklin Circuit Court.

ORDER

Based on the preceding Findings of Fact and Conclusions of Law, the Court GRANTS the Motion of the Plaintiffs for Temporary Injunctive Relief and hereby issues the following ORDER:

1. Defendants and their designees and agents are enjoined from enforcing against only the individual Plaintiffs herein at their now-existing locations the following orders, administrative regulations, and directives:

a. Executive Order 2020-215;

b. March 16, 2020 CHFS Order;

c. March 17, 2020 CHFS Order;

d. March 19, 2020 CHFS Order;

e. March 19, 2020 Order from the Public Protection Cabinet and the Department of Alcoholic Beverage Control;

f. Executive Order 2020-246;

g. Executive Order 2020-257;

h. Executive Order 2020-258;

i. Executive Order 2020-266;

j. Executive Order 2020-315;

k. Executive Order 2020-323;

l. May 11, 2020 CHFS Order;

m. May 22, 2020 CHFS Order;

n. June 29, 2020 CHFS Order;

o. Requirements for Restaurants and Bars, Version 1.0;

p. Regulation 902 KAR 2:190E

q. July 28, 2020 CHFS Order;

r. August 10, 2020 CHFS Order;

s. Requirements for Restaurants and Bars, Version 5.0;

t. Requirements for Restaurants and Bars, Version 5.4;

u. Executive Order 2020-968;

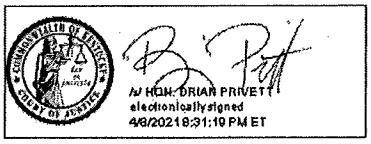
v. Executive Order 2020-1034;

w. Regulation 902 KAR 2:211E; and

x. Version 5.5 of the Restrictions on Restaurants and Bars.

2. This Temporary Injunction shall be effective for the duration of this action, or until further Orders of this Court, or otherwise stayed or vacated.

So Ordered, this 9th Day of April, 2020.



JUDGE BRIAN K. PRIVETT
SCOTT CIRCUIT COURT

Distribution:
Parties of Record

3

TAB 3

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2020-SC-000313-OA

HON. ANDREW BESHEAR, in his official capacity
as Governor of the Commonwealth of Kentucky, *et al.* APPELLANTS

v. On Appeal from Boone Circuit Court, Division 1
Civil Action No. 20-CI-00678

HON. GLENN E. ACREE,
Judge Kentucky Court of Appeals, *et al.* APPELLEES

BRIEF FOR APPELLANTS

La Tasha Buckner
General Counsel
S. Travis Mayo
Chief Deputy General Counsel
Taylor Payne
Laura Tipton
Marc Farris
Deputy General Counsels
Office of the Governor
Sam Flynn
Deputy General Counsel
Finance and Administration Cabinet
Joseph A. Newberg, II
Deputy General Counsel
Energy and Environment Cabinet
700 Capitol Avenue, Suite 106
Frankfort, KY 40601

Wesley Duke
Executive Director
Office of Legal Services
David T. Lovely
Deputy General Counsel
Cabinet for Health
and Family Services
275 East Main Street 5W-A
Frankfort, KY 40621

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of this brief was served on August 28, 2020 by email, and will be served by mail or hand-delivery by September 1, 2020 pursuant to the Court's instructions, upon the following: Hon. Richard A. Brueggemann, Judge, Boone Circuit Court, Boone County Justice Center, 6025 Rogers Lane, Room 141, Burlington, Kentucky 41005; Hon. Christopher Wiest, 25 Town Center Boulevard, Suite 104, Crestview Hills, Kentucky 41017; and Hon. Barry L. Dunn, Hon. S. Chad Meredith, Hon. Brett R. Nolan, Hon. Aaron J. Silletto, Hon. Heather L. Becker, Hon. Marc Manley, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601. I further certify that Appellants did not withdraw the record from the Clerk's Office.

La Tasha Buckner
General Counsel

Indeed, the legal issues raised by Appellees are not complex. The plain language of KRS Chapter 39A authorizes the Governor and CHFS to implement public health orders to protect Kentuckians from the spread of COVID-19. In doing so, KRS Chapter 39A does not violate the separation of powers, but, instead, defines the Governor's executive authority during times of an emergency. Additionally, the challenged Orders are not arbitrary because they reasonably relate to the state's interest in slowing the spread of COVID-19 and, thereby, protecting the public health.

COVID-19 is unquestionably contagious and deadly, and it can spread whenever humans interact. New "hotspots" develop weekly. Thus, the need for a flexible, immediate response is paramount. KRS Chapter 39A provides the Governor authority for such a response. The Orders issued under that authority – which are based on both public health criteria and input from Kentucky businesses – reduce COVID-19 spread, protect Kentuckians, and allow for a gradual return to normalcy before the disease is controlled.

I. The Governor Possesses Authority To Address This Once-In-A-Generation COVID-19 Global Health Emergency.

A. KRS Chapter 39A Authorizes the Governor to Respond to Emergencies.

The Orders represent the Governor's exercise of powers specifically and unambiguously set forth in KRS Chapter 39A. In that Chapter, the General Assembly confirmed that it intended to "establish and support a statewide comprehensive emergency management program for the Commonwealth . . . [and] [t]o confer upon the Governor . . . the emergency powers provided in KRS Chapters 39A to 39F." KRS 39A.010. It created the Division of Emergency Management and placed it under the direct operational control of the Governor. KRS 39A.030(1).

To carry out these powers, the General Assembly provided the Governor multiple resources to respond with immediacy and flexibility to the ongoing demands of an emergency like COVID-19. Indeed, the Governor "may make, amend, and rescind *any executive orders as deemed necessary* to carry out the provisions of KRS Chapters 39A to 39F." KRS 39A.090 (emphasis added). Furthermore, KRS 39A.180 permits "[t]he political subdivisions of the state and other agencies designated or appointed by the Governor [to] make, amend, and rescind orders and promulgate administrative regulations necessary for disaster and emergency response purposes." KRS 39A.180(1). That statute further recognizes the primacy of such emergency orders or regulations, providing, "*All written orders and administrative regulations* promulgated by the Governor, the director, or by any political subdivision or other agency authorized by KRS Chapter 39A to 39F to make orders and promulgate administrative regulations, shall have the full force of law, when, if issued by the Governor, the director, or any state agency, a copy is filed with the Legislative Research Commission, or, if promulgated by an agency or political subdivision of the state, when filed in the office of the clerk of that political subdivision or agency." KRS 39A.180(2) (emphasis added).

KRS Chapter 39A controls. This Court has held, when interpreting statutes, courts must give words their literal meaning. *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017) (citation omitted). If the plain language of a statute is clear, that plain language dictates and the inquiry ends. *See id.*; *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). As recently as 2019, this Court recognized that when the plain language of a statute gives the Governor authority to act, that plain language controls. *Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 679 (Ky. 2019).

In SB 150, the General Assembly "recognize[d] the efforts of the Executive Branch to address the state of emergency in the Commonwealth declared by Executive Order 2020-215 due to the outbreak of COVID-19 virus, a public health emergency." *Id.* It proceeded to enact specific provisions relating to numerous areas, ranging from suspending licensing fees (§ 1(1)(a)) and extending tax filings (§ 1(3)) to expanding telehealth (§ 1(4)). Thus, the General Assembly recognized there was an emergency, recognized the Executive Branch had taken action to curtail the emergency, and augmented that action by enacting specific provisions relating to a multitude of different laws and public policy. In Section 4, it declared an emergency. Further, while unnecessary due to the safeguards in KRS Chapter 39A, the legislature placed an additional safeguard on the timing of this particular state of emergency:

> Notwithstanding any state law to the contrary, the Governor shall declare, in writing, the date upon which the state of emergency in response to COVID–19, declared on March 6, 2020, by Executive Order 2020–215, has ceased. In the event no such declaration is made by the Governor on or before the first day of the next regular session of the General Assembly, the General Assembly may make the determination.

SB 150 § 3. While the General Assembly could already act when it comes into session in 2021 as described above, this provision leaves no doubt as it relates to this state of emergency. The legislature, as in *Beshear*, has acknowledged the emergency, the Governor's statutory authority to respond to COVID-19, and may change or effectuate laws relating to the emergency in future sessions. 575 S.W.3d at 683.

Taken to its conclusion, Appellees' argument is absurd. It would ensure the Governor has no authority to issue orders to protect flooded areas[59] or to fight wildfires

[59] *See e.g.* Executive Order 2020-136 (Feb. 8, 2020), State of Emergency related to flooding in southeastern Kentucky. https://governor.ky.gov/attachments/20200207_State-of-Emergency_EO.pdf (last visited August

challenge to KRS Chapter 39A and the Governor's Orders threaten that response. This Court should uphold KRS Chapter 39A and the Orders implementing public health measures directly related to protecting Kentuckians from COVID-19.

Respectfully submitted,

La Tasha Buckner
General Counsel
S. Travis Mayo
Chief Deputy General Counsel
Taylor Payne
Laura Tipton
Marc Farris
Deputy General Counsels
Office of the Governor
Sam Flynn
Deputy General Counsel
Finance and Administration Cabinet
Joseph A. Newberg, II
Deputy General Counsel
Energy and Environment Cabinet
700 Capitol Avenue, Suite 106
Frankfort, KY 40601
(502) 564-2611

Counsel for Appellant
Governor Andy Beshear

Wesley Duke
Executive Director
Office of Legal Services
David T. Lovely
Deputy General Counsel
Cabinet for Health
and Family Services
275 East Main Street 5W-A
Frankfort, KY 40621
(502) 564-7042

Counsel for Appellants
Cabinet for Health and Family
Services and Secretary Friedlander

4

Healthy at Work

Effective April 19, 2021

Supplemental Requirements for Restaurants and Bars

These supplemental requirements apply to restaurants and bars. All Entities must also comply with current Healthy at Work Minimum Requirements and all Supplemental Requirements applicable to their setting and/or activities.

For purposes of these requirements:

- • A "restaurant" is an entity that stores, prepares, serves, vends, or otherwise provides food directly to the consumer for human consumption, must hold a food service permit in good standing, and has table seating.
- • A "bar" is an entity that stores, prepares, serves, vends alcohol directly to the consumer for on-site human consumption and must hold a service permit in good standing.[1]

- Restaurants and bars must require that all customers be seated and served at tables or booths.
- Traditional stool seating at the bar is prohibited.
- Restaurants and bars must prohibit customer traffic in the bar or restaurant except for the purposes of entry, exit, and restroom usage.
- Restaurants and bars should discontinue self-service drink stations to the greatest extent practicable. If an establishment cannot discontinue self-service drink stations, it must: a) frequently clean and sanitize the stations, b) prohibit customers from bringing their own cup, glass, or mug, c) prohibit refills unless a new cup, glass, or mug is provided to the customer for each refill, and d) remove any unwrapped or non-disposable items (e.g., straws or utensils), as well as fruit (e.g., lemons), sweeteners, creamers, and any condiment containers that are not in single-use, disposable packages.
- Restaurants and bars should discontinue use of salad bars and other buffet style dining to the greatest extent practicable. If an establishment cannot discontinue buffet style dining, the restaurant must ensure that employees provide buffet service. Restaurants must not permit customer self-service. Restaurants providing buffet service should ensure appropriate sneeze guards are in-place.

[1] 1 These definitions and requirements also apply to any portion of a facility that serves food or alcohol to the public, including, but not limited to, breweries, distilleries, and wineries.

Healthy at Work

Effective April 19, 2021

- Restaurants and bars must limit the number of customers present inside any given establishment to the lesser of the maximum permitted occupancy defined in the current Healthy at Work Minimum Requirements or the occupancy level that permits individuals not from the same family/household to maintain six (6) feet of space between each other.

- For booth seating only, restaurants may install non-porous physical barriers (e.g., plexiglass shields) between booths to permit usage of sequential booths unable to be separated by six (6) feet so long as the barrier effectively separates the opposite sides of the barrier.

- Establishments that choose to have outdoor seating may do so without those customers counting against the established occupancy limit so long as those customers remain seated and at least six (6) feet of space is maintained between customers at different tables. If an establishment uses a tent, at least 50% of the tent perimeter (e.g., 2 sides of a square tent) must remain completely open at all times and six (6) feet of space must be maintained between customers at different tables. If an establishment uses a tent with fewer than 50% of the perimeter (e.g., for a square tent, fewer than 2 sides) completely open, that tent is considered interior space and is subject to the capacity limitation as set forth in the minimum requirements document.

- Restaurants and bars should continue to encourage food and beverage service via drive-thru, curbside, takeout, and delivery services to the greatest extent practicable, to minimize the number of persons within the establishment and the contacts between them.

- Restaurants and bars must discontinue dine-in food and drink by 12:00 a.m. local prevailing time. Restaurants and bars must close no later than 1:00 a.m. local prevailing time except for drive-thru, curbside, takeout, and delivery services. These closing times will remain in effect until 2.5 million persons have received at least one dose of a COVID-19 vaccine in Kentucky.

TAB 5

5

KENTUCKIANA
COURT REPORTERS

CIVIL ACTION NO. 21-CI-00089

ANDY BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY

ERIC FRIEDLANDER, IN HIS OFFICIAL CAPACITY AS SECRETARY FOR THE CABINET FOR HEALTH AND FAMILY SERVICES

V.

DAVID W. OSBORNE,IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE KENTUCKY HOUSE OF REPRESENTATIVES; ET AL.

HEARING

DATE:

FEBRUARY 18, 2021

COMMONWEALTH OF KENTUCKY
48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 21-CI-00089

ANDY BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY

AND

ERIC FRIEDLANDER, IN HIS OFFICIAL CAPACITY AS SECRETARY FOR THE CABINET FOR HEALTH AND FAMILY SERVICES,
Plaintiffs

V.

DAVID W. OSBORNE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE KENTUCKY HOUSE OF REPRESENTATIVES;

BETRAM ROBERT STIVERS, II, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE KENTUCKY SENATE;

THE LEGISLATIVE RESEARCH COMMISSION;

AND

DANIEL J. CAMERON, IN HIS OFFICIAL CAPACITY AS KENTUCKY ATTORNEY GENERAL,
Defendants

HEARING

WITNESSES: DR. STEVEN STACK
NICHOLAS HART
DATE: FEBRUARY 18, 2021

APPEARANCES

ON BEHALF OF THE PLAINTIFF, ANDY BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY:
Amy Cubbage
S. Travis Mayo
Taylor Payne
Laura Tipton
Office of the Governor
700 Capitol Avenue
Suite 106
Frankfort, Kentucky 40601

ON BEHALF OF THE PLAINTIFF, ERIC FRIEDLANDER, IN HIS OFFICIAL CAPACITY AS SECRETARY FOR THE CABINET FOR HEALTH AND FAMILY SERVICES:
Wesley W. Duke
Cabinet for Health and Family Services
Office of Legal Counsel
275 East Main Street
Suite 5W-A
Frankfort, Kentucky 40621

APPEARANCES (CONTINUED)

ON BEHALF OF THE DEFENDANT, DAVID W. OSBORNE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE KENTUCKY HOUSE OF REPRESENTATIVES:
Eric Lycan
Office of the Speaker of the House
Capitol Annex, Room 332
702 Capitol Avenue
Frankfort, Kentucky 40601

ON BEHALF OF THE DEFENDANT, BETRAM ROBERT STIVERS, II, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE KENTUCKY SENATE:
Davie E. Fleenor
Jeff Harmon
Office of the Senate President
Capitol Annex, Room 236
702 Capitol Avenue
Frankfort, Kentucky 40601

APPEARANCES (CONTINUED)

ON BEHALF OF THE DEFENDANT, THE LEGISLATIVE RESEARCH COMMISSION:
Greg Woosley
Legislative Research Commission
State Capitol, Room 316
700 Capitol Avenue
Frankfort, Kentucky 40601

ON BEHALF OF THE DEFENDANT, DANIEL J. CAMERON, IN HIS OFFICIAL CAPACITY AS KENTUCKY ATTORNEY GENERAL:
Victor B. Maddox
Carmine G. Iaccarino
Chad Meredith
Aaron Silletto
Office of the Attorney General
700 Capitol Avenue
Suite 118
Frankfort, Kentucky 40601

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think that we have to read that to mean that the legislature could simply have repealed 39A --

JUDGE SHEPHERD: Yeah.

MR. MADDOX: -- and it seems difficult to conclude that they could repeal 39A, but they can't modify it --

JUDGE SHEPHERD: Yeah.

MR. MADDOX: -- which is seems to be the Governor's position and I'll just -- finally on the jurisdictional question and the separation of powers issue, Your Honor, we cited in our case the Commonwealth versus Mountain Truckers Association case and, you know, that case addressed a restraining order that would attempt to bind the Commonwealth and everyone in it, all of its executive, judicial and legislative officers simply by the nominal participation of the Commonwealth and the Court struck that down. It said such an order would run contrary to the very essence of injunctive relief and not -- nor may all the Courts of Kentucky, other than the Franklin Circuit Court, be automatically divested of their jurisdiction to hear matters simply by the issuance of an restraining order including the Commonwealth as a party. Your Honor probably knows that there is a

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case pending in Boone Circuit Court right in which parents of school children have sued the local school board claiming that the school board is acting in reliance on the suspension of KRS158, that statute requires that schools, that there be in-person instruction. Of course, Dr. Stack indicated earlier that the schools are free to provide in-person instruction, but the -- the school board there is doing it now. That's a live case in controversary. I'm not sure if, Your Honor, would expect that injunction here today or whenever, Your Honor, might address that, could somehow, you know, bar that case from going forward.

JUDGE SHEPHERD: Yeah.

MR. MADDOX: I mean, that's a live case in controversary where --

JUDGE SHEPHERD: Yeah, I wouldn't really -- I've never been of the view that any Circuit Court can enjoin in a proceeding in another Court and, you know, I don't think that's really -- but, you know, there are -- that's one of the issues here is that they're -- you know, there's a whole host of context in which these issues can arise and certainly they can be litigated in any venue where

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they're -- you know, where the -- where controversary arises, but, you know, the parties do have a right, I think, to a declaration of rights as to the validity of the law and the constitutionality of the statutes that are being challenged, whether that ultimately comes here or from another Circuit, it's going to ultimately come from the Kentucky Supreme Court, but --

MR. MADDOX: That's true, Your Honor, but typically that comes in the context of a case in which there is, you know, some actual controversary. Now, they've cited cases suggesting that somehow the Declaratory Judgment Act is effectively an exception to the requirement that there be, you know, a case of controversary. I think the case law we've cited says otherwise.

JUDGE SHEPHERD: Yeah. I would say this, you know, we'll have to -- we'll delve into these jurisdictional arguments, I think, in more depth a little bit later, but, you know, it still is an issue that I think -- you know, again, unless the Attorney General is coming before the Court and saying, I agree with the Governor these statutes are an overreach and they violate the separation of powers, which the Attorney General is obviously not

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doing. If the Attorney General agreed with the Governor, I might well agree that there's no case of controversy, but if the Attorney General is defending the validity of these laws, then it seems to me like there is, at least initially, a case of controversary with regard to the interpretation of the statue that, you know, that the parties are entitled to have adjudicated. But, you know, we'll delve into those arguments a little bit later. You know, right now I think we're going limit our argue to the injunctive relief and I would agree Court is not going to issue an injunction and have made at least a preliminary determination, but there is jurisdiction here and so far, I think I've crossed that hurdle, but -- okay. Anything else, Mr. Maddox?

MR. MADDOX: Yeah, Your Honor. I would just conclude by, you know, reiterate that if the Governor believes he has emergency powers under the constitution then he isn't injured at the least by, you know, some limitation and a statue that he believes doesn't affect him, and if he does believe he needs legislative authority then, you know, it's plain that --

JUDGE SHEPHERD: Yeah.

problems of life and death for the people of Kentucky, so I do want to urge you-all to give some time, and some effort, and some thought to whether, you know, you-all could not propose some form of enlisting of people who have expertise and knowledge in the field of public health who might assist in that kind of an effort, so I'll leave that with you and I will enter an order that will outline the things that we've talked about here. I appreciate getting the additional briefs that we're talking about and do my best to get you-all a ruling on these issues in a very short of period of time, so unless anybody has anything else to add, I'm going to go ahead, and the Court will stand in recess.

MR. FLEENOR: Thank you, Your Honor.

MS. CUBBAGE: Thank you, Your Honor.

MR. WOOSLEY: Thank you, Your Honor.

MR. MADDOX: Thank you.

MR. MAYO: Thank you.

MR. LYCAN: Thank you, Judge.

(HEARING CONCLUDED.)

CERTIFICATE OF REPORTER

COMMONWEALTH OF KENTUCKY AT LARGE

I do hereby certify that the said matter was reduced to type written form under my direction, and constitutes a true record of the recording as taken, all to the best of my skill and ability. I certify that I am not a relative or employee of either counsel, and that I am in no way interested financially, directly or indirectly, in this action.

COURTNEY BUSICK,

COURT REPORTER / NOTARY

COMMISSION EXPIRES ON: 10/18/2021

SUBMITTED ON: 03/09/2021