8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000009 of 000043

COMMONWEALTH OF KENTUCKY
SCOTT COUNTY CIRCUIT COURT

GOODWOOD BREWING COMPANY, LLC, et al., Plaintiffs, v. **ANDY BESHEAR**, in his official capacity as Governor of the Commonwealth of Kentucky, et al., Defendants.	**CASE NO. 21-CI-00128** **HON. BRIAN PRIVETT** **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION**

"'[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.'" *Fletcher v. Commw.*, 163 S.W.3d 852, 871 (Ky. 2005) (citation omitted).

INTRODUCTION

This case presents a simple question: Must the Governor follow the laws duly enacted by the General Assembly? Under the Kentucky Constitution, the answer is obvious. Consistent with the bedrock American principle of the separation of powers, the General Assembly is vested with the legislative power, KY. CONST. § 29, and, thus, "[s]haping 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). The Constitution vests the Governor with the executive power, *id.* § 69, and obligates

him not just to follow the law, but also to "take care that the laws be faithfully executed," *id.* § 81. The judiciary is vested with the power to resolve actual controversies between parties affected by the laws. *Id.* § 109.

Here, the General Assembly recently amended the Commonwealth's emergency-powers policy and limited the Governor's emergency authority. Rather than carry out his constitutional obligations, the Governor sued the leaders of the General Assembly, the Legislative Research Council, and the Attorney General.[1] Turning the Constitution on its head, the Governor asserts that *he*—not the General Assembly—is vested with the power to establish the Commonwealth's policy. He claims to possess inherent, sweeping, and apparently unlimited "emergency" powers that trump the Constitution's strictly defined separation of powers and the unambiguous language of the newly enacted laws.

In claiming these powers, the Governor doesn't rely on an "emergency" exception in the Kentucky Constitution—because there isn't one. Indeed, the Kentucky Supreme Court recently ruled that *even during the COVID-19 pandemic*, the General Assembly may amend the Commonwealth's emergency-powers laws and limit the Governor's authority. In *Beshear v. Acree*, the Court noted approvingly that the duration of the

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

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000010 of 000043

COVID-19 state of emergency was limited by 2020 S.B. 150—a law enacted, with the Governor's signature, after the state of emergency was declared. *Beshear v. Acree*, ___ S.W.3d ___, 2020 WL 6736090, at *21 (Ky. Nov. 12, 2020).[2] If, as the Kentucky Supreme Court concluded, the General Assembly may amend the Commonwealth's laws to limit the duration of the Governor's state of emergency, the General Assembly may also properly limit other aspects of the Governor's emergency powers.

Accordingly, the General Assembly, meeting in its regular session earlier this year, amended KRS Chapter 39A, the "Statewide Emergency Management Programs," and other statutes related to the government's emergency powers.[3]

Pursuant to the new laws, certain executive orders—*i.e.*, orders or regulations issued under Chapter 39A or § 214.020 that restrict the "in-person meeting" and "functioning of" private businesses—may "be in effect no longer than thirty (30) days." *See* KRS §§ 39A.090, 214.020. Because the new laws went into effect February 2, 2021, all such orders restricting Plaintiffs' restaurant-and-bar businesses lapsed on March 4, 2021.[4] As of March 5,

[2] Governor Beshear declared a state of emergency on March 6, 2020. *See* Exec. Order 2020-215 (Ex. 1). 2020 S.B. 150 was signed into law on March 30, 2020. *See* https://apps.legislature.ky.gov/record/20rs/sb150.html (last visited Mar. 12, 2021).

[3] *See* 2021 H.B. 1, 2021 S.B. 1, 2021 S.B. 2 (eff. 2/2/21).

[4] Orders issued under Chapter 39A could have been extended with approval of the General Assembly. KRS § 39A.090(2)(a). The General Assembly did not approve the extension of any orders at issue in Plaintiffs' lawsuit.

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000011 of 000043

2021, therefore, neither Executive Order 2020-215 nor any related orders issued since are in effect. Further, "[u]pon the expiration" of such orders "declaring an emergency or other implementation of powers under [Chapter 39A]," the Governor is prohibited, without the prior approval of the General Assembly, from "declar[ing] a new emergency or continu[ing] to implement any of the powers enumerated" in Chapter 39A, "based upon the same or substantially similar facts and circumstances as the original declaration or implementation," *i.e.*, based on the COVID-19 pandemic. KRS § 39A.090(3) (eff. 2/2/21).

Accordingly, the Court should issue an Order enjoining defendants from: (1) enforcing executive orders and administrative regulations issued in response to the COVID-19 pandemic that restrict Plaintiffs' businesses (collectively, "Executive Orders"); (2) declaring a new state of emergency based upon the COVID-19 pandemic without the prior approval of the General Assembly; and (3) continuing to implement any of the powers enumerated in Chapter 39A based upon the COVID-19 pandemic without the prior approval of the General Assembly.

Because the Governor continues to enforce restrictive orders in direct defiance of the newly enacted laws, this Court's authority is needed to protect Plaintiffs' liberties against arbitrary rule. KY. CONST. § 14 ("All courts shall be open, and every person for an injury done him in his lands, goods,

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000012 of 000043

person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."). *See Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 83 (Ky. 2018) ("The Court's power, indeed, its duty, to declare the meaning of constitutional provisions is a primary function of the judicial branch in the scheme of checks and balances that has protected freedom and liberty in this country and in this Commonwealth for more than two centuries.").[5]

Injunctive relief is warranted here. CR 65.04; *SM Newco Paducah, LLC v. Kentucky Oaks Mall Co.*, 499 S.W.3d 275, 278 (Ky. 2016). *First*, as summarized above and explained fully below, Plaintiffs present a substantial question on the underlying merits of this case; *i.e.*, there is a substantial possibility that Plaintiffs will ultimately prevail on their claims that the

[5] Of course, courts may act only if, as here, an actual, justiciable controversy exists—another core separation-of-powers principle. This point is relevant here because the Governor has failed to allege that an actual, justiciable controversy exists in his Franklin County suit. No *resolvable* dispute exists there: the new laws have been duly enacted, and only the Governor is currently obligated to do anything, namely, cease enforcing the lapsed orders. Nonetheless, Judge Shepherd purported to issue an injunction. Respectfully, as explained below, Judge Shepherd's order further undermines the Commonwealth's strict separation of powers. Because he lacks jurisdiction over a justiciable controversy, his order is merely an advisory opinion, a nullity under the Kentucky Constitution. In any event, the order doesn't bind Plaintiffs, who are not parties to the Franklin County suit.

Here, the Governor moved this Court to transfer venue to Franklin County. Plaintiffs will respond in due course. Suffice it to say here that the Governor's arguments for transfer lack merit. Plaintiffs' justiciable case is properly venued here (the Governor does not claim otherwise); and no convenience exists justifying transfer (this case presents legal issues that can be resolved on papers with minimal, if any, discovery). The Governor simply wants to move the case to a judge who (again, erroneously and without jurisdiction) has already granted the Governor a favorable ruling. The transfer motion should be denied.

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000013 of 000043

Governor's actions violate Kentucky's Separation of Powers. *Second*, Plaintiffs will be irreparably impaired without the requested relief. The Governor's continued illegal enforcement of the Executive Orders and the issuance and enforcement of additional orders deprive and will continue to deprive the Plaintiffs of their ability to fully open their bars and restaurants—with the threat of fines and closures for noncompliance, 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 rights against absolute and arbitrary power, *id.* § 2, and their rights to the structural protections guaranteed by Kentucky's strict separation of powers, *id.* §§ 27–28, 29, 69, 109. *Third*, an injunction will not be inequitable: Defendants will suffer *no* harm, as they have no valid interest in defying duly enacted laws and enforcing void orders; and the public will be served, as the public has an interest in enforcing the Commonwealth's laws and in preventing the arbitrary exercise of power.

The Court should issue the requested injunction.

* * *

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000014 of 000043

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000015 of 000043

BACKGROUND

Defendants Issue Executive Orders Under Emergency-Powers Laws

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, are restaurant-and-bar businesses in Kentucky that have been injured and continue to be injured by the Governor's exercise of his "emergency" powers, described below. *See* Verified Complaint (Compl.) ¶¶ 4–7, 13–33, 65, 69.

One year ago, Governor Beshear, "by virtue of the authority vested in [him] by [KRS] Chapter 39A," issued Executive Order 2020-215 and declared a state of emergency arising out of the COVID-19 pandemic. *See* Compl. ¶ 11 & Exh. 1 (E.O. 2020-215 (Mar. 6, 2020)).[6] KRS Chapter 39A is titled "Statewide Emergency Management Programs" and, as discussed below, Chapter 39A and other laws related to the Commonwealth's emergency-response policy were amended, effective February 2, 2021, by House Bill 1, Senate Bill 1, and Senate Bill 2.

Since this state of emergency was declared, the Governor and his designees—including Defendants Eric Friedlander, Secretary of the Cabinet

[6] Exhibits cited here are the same exhibits attached to Plaintiffs' Verified Complaint. Due to their size, Plaintiffs have not re-filed the exhibits here.

for Health and Family Services (CHFS), and Steven Stack, M.D., Commissioner of the Kentucky Department of Public Health—have issued and continue to issue (and/or have enforced and continue to enforce or threaten to enforce) formal executive orders from the Governor himself (*e.g.*, Exh. 1, 6–10), administrative regulations (Exh. 16 & 23), mandates from individual executive departments like CHFS (*e.g.*, Exh. 2–4), and often-changing guidance documents posted on-line (*e.g.*, Exh. 12, 15, 20, 28)—all of which have restricted Plaintiffs' businesses (Executive Orders). Compl. ¶¶ 8–10, 12. *See generally id.* ¶¶ 11–31, 43–55, 60–61 (describing the Executive Orders) and Exhibits 1–23 & 28 (copies of the Executive Orders). These Executive Orders were issued pursuant to, *inter alia*, KRS Chapter 39A or other Executive Orders, which themselves were issued pursuant to Chapter 39A. *See id.*

Plaintiffs were forced to close for in-person service twice (from March 16, 2020 through May 22, 2020, and again from November 20, 2020 through December 13, 2020). *See* Compl. ¶¶ 13, 21, 28, 33;[7] CHFS March 16, 2020 Order (Exh. 2); CHFS May 22, 2020 Order (Exh. 13); Executive Order 2020-968 (Ex. 21). And when allowed to open, Plaintiffs' businesses were subject to many restrictions, briefly summarized below:

- March 16, 2020 CHFS Order (Exh. 2) limited restaurants and bars to carry-out, drive-thru, and delivery only. This order expired by its own terms on March 30, 2020.

[7] Plaintiffs inadvertently stated "November 20, 2021" in the Verified Complaint. *Id.* ¶ 33.

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000016 of 000043

- March 17, 2020 CHFS Order (Exh. 3) required all "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."

- March 19, 2020 CHFS Order (Exh. 4) banned "[a]ll mass gatherings," which "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."

- March 19, 2020 Order from the Public Protection Cabinet and the Department of Alcoholic Beverage Control (Exh. 5) allowed, subject to certain restrictions, on-premises-drink licensees to sell alcohol for off-premises consumption.

- March 22, 2020 Executive Order 2020-246 (Exh. 6) ordered "[a]ll in-person retail businesses that are not life-sustaining" to close (effective at 8:00 p.m. March 23, 2020). This order stated that "carry-out, delivery, and drive-through food and beverage sales may continue, consistent with" CHFS's March 16, 2020 Order (Exh. 4) and the March 19, 2020 Order (Exh. 5).

- May 8, 2020 Executive Order 2020-323 (Exh. 11) adopted a phased reopening plan, allowing "businesses that are not life-sustaining" to reopen May 11, 2020. This order required reopened businesses to follow "minimum" requirements, published at https://govstatus.egov.com/ky-healthy-at-work.

- May 11, 2020 CHFS Order (Exh. 12) required all "entities" in Kentucky to comply with the "Minimum Requirements for All Entities."

- May 22, 2020 CHFS Order (Exh. 13) allowed restaurants holding food-service permits to serve food and beverage for on-site consumption. In addition to the Minimum Requirements for All Entities, restaurants were required to follow "Requirements for Restaurants," published at the "Healthy At Work" website.

- June 29, 2020 CHFS Order (Exh. 14) allowed properly licensed bars to serve alcohol for on-site consumption. Restaurants and bars, subject to the Minimum Requirements for All Entities, were also subject to the "Requirements for Restaurants and Bars." Among the specific

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000017 of 000043

restrictions was a 50%-capacity limit. *See* Requirements for Restaurants and Bars, Version 1.0 (Exh. 15).

- July 10, 2020 regulation 902 KAR 2:190E (Exh. 16) imposed mask requirements for individuals while inside (among other places) restaurants and bars.

- July 28, 2020 CHFS Order (Exh. 17) required all bars to cease in-person operations for on-site consumption.

- August 10, 2020 CHFS Order (Exh. 18) allowed bars to resume in-person operations for on-site consumption. The then-current version of the Requirements for Restaurants and Bars (Exh. 19) imposed a 50%-capacity limit; banned bar seating and bar service; and required food-and-beverage sales for on-site consumption to end at 10:00 p.m. and required restaurants and bars to close (for on-site consumption) at 11:00 p.m.

- September 15, 2020 announcement allowed on-site consumption until 11:00 p.m. and set closing time (for on-site consumption) at 12:00 a.m. *See* https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=366 (last visited Mar. 12, 2021).

- October 30, 2020 Requirements for Restaurants and Bars, Version 5.4 (Exh. 20), maintained the capacity limits, bans on bar-seating and bar-service, and the 11:00 p.m. and 12:00 a.m. curfews.

- November 18, 2020 Executive Order 2020-968 (Exh. 21) ordered restaurants and bars to cease all indoor food and beverage consumption and placed restrictions on outdoor service. This order expired by its own terms at 11:59 p.m. on December 13, 2020.

- December 11, 2020 Executive Order 2020-1034 (Exh. 22), effective at 11:59 p.m. on December 13, 2020, announced that all prior orders, restrictions, and guidelines (except the March 19, 2020 order that banned mass gatherings (Exh. 4), as modified) remained in force and noted that "[c]urrent restrictions and guidance" were available at the Healthy At Work website.

- January 5, 2021 regulation 902 KAR 2:211E (Exh. 23) imposed mask requirements for individuals inside (among other places) restaurants and bars.

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000018 of 000043

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000019 of 000043

The General Assembly Amends
the Commonwealth's Emergency-Powers Laws

In January of this year, the General Assembly met for its constitutionally authorized regular session, KY. CONST. § 36, and began considering the amendment of Kentucky's emergency-powers laws, in particular KRS Chapter 39A. Effective February 2, 2021,[8] the General Assembly enacted (over the Governor's vetoes) three laws:

> **House Bill 1**—An Act relating to reopening the economy in the Commonwealth of Kentucky in response to the state of emergency declared by the Governor of Kentucky beginning in March 2020 and continuing throughout the year of 2021 and declaring an emergency (Exh. 24);
>
> **Senate Bill 1**—An Act relating to emergencies and declaring an emergency (Exh. 25); and
>
> **Senate Bill 2**—An Act relating to administrative regulations and declaring an emergency (Exh. 26).

Relevant here, Senate Bill 1 provides that "[e]xecutive orders, administrative regulations, or other directives issued under [KRS Ch. 39A]" that "[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 order. KRS § 39A.090(2)(a)(1)(b) (eff. 2/2/21). With the exception of two regulations (see below), the Executive

[8] *See* https://apps.legislature.ky.gov/record/21rs/hb1.html (H.B. 1), https://apps.legislature.ky.gov/record/21rs/sb1.html (S.B. 1), and https://apps.legislature.ky.gov/record/21rs/sb2.html (S.B. 2) (all last visited Mar. 12, 2021).

Orders relevant here (Exh. 1–15, 17–22) were issued under this section. The General Assembly did not approve an extension of any of them. Compl. ¶¶ 83, 108. Therefore, they all lapsed by operation of law thirty days after February 2, 2021—on March 4, 2021. Accordingly, as of March 5, 2021, these Executive Orders are no longer in effect. KRS § 39A.090(2) (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) (emphasis added). On March 5, 2021—after the expiration of the Executive Orders noted in the previous paragraph—Version 5.5 of the Requirements for Restaurants and Bars (Exh. 28) purportedly went into effect, without the approval of the General Assembly. But because the previous Executive Orders had expired, and because Version 5.5 was based upon the same or substantially similar facts and circumstances as the original emergency declaration

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000020 of 000043

and related implementations, Version 5.5 was invalidly issued and is void *ab initio*. KRS § 39A.090(3) (eff. 2/2/21).[9]

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 be in effect no longer than thirty (30) days …." KRS § 214.020(2)(a)(1)(b) (eff. 2/2/21). Regulations 902 KAR 2:190E (Exh. 16) and 902 KAR 2:211E (Exh. 23) were issued under this section and, therefore, lapsed by operation of law thirty days after February 2, 2021—on March 4, 2021. Accordingly, as of March 5, 2021, these regulations have no force or effect. KRS § 214.020(2) (eff. 2/2/21).

In sum, the Executive Orders identified in the Verified Complaint (Exh. 1–23 & 28) are no longer in effect.

* * *

[9] 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 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 have lapsed under the current version of KRS § 39A.090(2).

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000021 of 000043

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000022 of 000043

LAW & ARGUMENT

The Court Should Issue an Order Temporarily Enjoining Defendants from Enforcing the Executive Orders and Issuing Future Such Orders

Again, the dispositive question before the Court is: Must the Governor follow the laws duly enacted by the General Assembly?

Under the Kentucky Constitution, the General Assembly—alone—is vested with the power to establish and amend the Commonwealth's public policy. KY. CONST. § 29. The Governor is vested with the Commonwealth's executive power—the power to execute the Commonwealth's laws—and he is expressly obligated to "take care that the laws be faithfully executed." KY. CONST. §§ 69, 81. Now that the General Assembly has amended the Commonwealth's emergency-powers policy, the Governor must carry out his solemn constitutional duty and enforce the new laws—rather than continue to enforce executive orders that have expired by operation of those new laws. This Court should issue an order and enjoin the Governor from acting in violation of the laws of the Commonwealth.

Standard of Review

To obtain a temporary injunction under CR 65.04, Plaintiffs must show that (1) their position presents "a substantial question" on the merits, *i.e.*, there is a substantial possibility that they will ultimately prevail; (2) Plaintiffs will be irreparably impaired absent the requested injunction;

and (3) the injunction will not be inequitable, *i.e.*, it will not unduly harm other parties or disserve the public. *SM Newco Paducah*, 499 S.W.3d at 278 (holding that temporary injunction was warranted); *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978). Plaintiffs easily meet this standard.

I. There is a substantial possibility that Plaintiffs will prevail on the merits

A. Kentucky's strict doctrine of Separation of Powers exists to preclude arbitrary power

It is axiomatic that the purpose of Kentucky's separation of powers is to have each branch "'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 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 thus not only expressly divides the legislative, executive, and judicial powers into three separate branches. KY.

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000023 of 000043

CONST. §§ 29, 69, 109. But, through two additional guaranties, it also emphatically mandates a strict separation. *See id*. § 27 (declaring that each of the three "distinct departments" is "confined" to a separate body); and § 28 (stating 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).

B. The Kentucky Constitution vests the policy-making power in the General Assembly alone, and the Governor is obligated to execute that policy

Under this strict separation, "[s]haping public policy is the *exclusive domain* of the General Assembly." *Caneyville Volunteer Fire Dep't*, 286 S.W.3d at 807 (emphasis added). Here, vested with "'the authority under the constitution to make the laws, and to alter and repeal them,'" *Commw. ex rel. Beshear*, 575 S.W.3d at 682 (quoting *Purnell v. Mann*, 50 S.W. 264, 266 (Ky. 1899)), the General Assembly altered the Commonwealth's emergency-powers laws and, over the Governor's vetoes, duly enacted House Bill 1, Senate Bill 1, and Senate Bill 2, effective February 2, 2021.[10] *See* KY. CONST. §§ 29 (vesting the Commonwealth's legislative power in the General Assembly); 88 (providing that General Assembly may override Governor's vetoes).

[10] *See* https://apps.legislature.ky.gov/record/21rs/hb1.html (H.B. 1), https://apps.legislature.ky.gov/record/21rs/sb1.html (S.B. 1), and https://apps.legislature.ky.gov/record/21rs/sb2.html (S.B. 2) (all last visited Mar. 12, 2021).

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000024 of 000043

The Governor is vested with the Commonwealth's executive power, KY. CONST. § 69, and he is expressly obligated ("shall") to "take care that the laws be faithfully executed," *id.* § 81. As the Kentucky Supreme Court has said "'countless times,'" "'[a]bsent 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). Indeed, it "'is beyond the power of a court to vitiate an act of the legislature 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).

Here, there is no "constitutional bar or command" contrary to the General Assembly's new, duly enacted policy and, therefore, nothing in the Constitution allows the Governor to shirk his solemn duty to "take care that [House Bill 1, Senate Bill 1, and Senate Bill 2] be faithfully executed." KY. CONST. § 81.

C. There is no "emergency" exception in the Kentucky Constitution

While "emergency powers appear to reside primarily in the Governor in the first instance," *Acree*, 2020 WL 6736090, at *1, a full year has passed since the Governor's Declaration of Emergency (Exh. 1). We are well beyond the "first instance" of a COVID-19-related emergency. And, as *Acree* itself

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000025 of 000043

recognized, the General Assembly may limit the Governor's "emergency" powers. Nonetheless, Governor Beshear will likely point to the *Acree* opinion to support his *ultra vires* acts. This reliance will be misplaced.

First, as noted in the introduction, *Acree* expressly approved a legislative restriction on the Governor's emergency powers—a restriction enacted during the COVID-19 pandemic.[11] This law, 2020 S.B. 150, limited the duration of the Governor's declared state of emergency, a limitation that the Court relied on to conclude that Kentucky's Governor "does not have emergency powers of indefinite duration…." *Acree*, 2020 WL 6736090, at *21, *22. As the Court pointed out, "the legislature had a few weeks [during its regular 2020 session] to pass bills related to the COVID-19 pandemic *and did so*." *Id*. at *18 (emphasis added). Here, during its regular 2021 session, the General Assembly passed additional bills related to the COVID-19 pandemic. These new laws—like the previous versions discussed and approved of in *Acree*—establish the parameters of a declaration of a state of emergency and the Governor's actions permitted pursuant thereto.

Second, the Court in *Acree* "acknowledge[d], of course, that making laws for the Commonwealth is the prerogative of the legislature." *Id*., 2020

[11] Governor Beshear declared a state of emergency arising out of the COVID-19 pandemic on March 6, 2020. *See* Exec. Order 2020-215 (Ex. 1). 2020 S.B. 150 was signed into law on March 30, 2020. *See* https://apps.legislature.ky.gov/record/20rs/sb150.html (last visited Mar. 12, 2021).

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000026 of 000043

WL 6736090, at *19. And the Court ultimately held that Governor Beshear had acted within and through the Commonwealth's emergency-powers laws—namely, KRS Chapter 39A. Because the General Assembly has since amended those laws, the Governor must now act within and through Chapter 39A, as *amended*. *Acree* requires it.

Third, *Acree* explained that (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*, 2020 WL 6736090, at *13; *see id*. (concluding that the COVID-19 pandemic was one of the situations contemplated in § 39A.010). The plaintiffs in *Acree*, however, argued that the Governor, in declaring a state of emergency, was limited by the definition of "emergency" in § 39A.020(12). *Id*. at *13. The Court disagreed, explaining 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, he was limited by that definition. *Id*. at *14. Had "the General Assembly intended that important limitation on the Governor's authority, it would have said so explicitly." *Id*. Now, of course, through 2021 S.B. 1, the General Assembly *did* say so explicitly. *See* 2021 S.B. 1 § 3(1) (amending KRS § 39A.100). "Ultimately, the Governor's power to declare a state of

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000027 of 000043

emergency is *controlled by* KRS 39A.100…," *Acree*, 2020 WL 6736090, at *14 (emphasis added), now, as altered by KRS § 39A.090(3) (eff. 2/2/21).

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*, 2020 WL 6736090, at *1. There, the Court discussed whether and to what extent the Governor properly exercised delegated legislative power. *See id.* at *16–*22. According to the Court, "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 *16. "Fortunately," the Court said, 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 *19. Importantly, the Court's unwillingness to disapprove legislative delegations (if any) was based on the limits and structure *provided by laws adopted by the General Assembly—i.e.*, KRS § 39A.010 provided an "intelligible principle," and Chapter 39A "contain[ed] procedural safeguards to prevent" executive "abuses." *Id.* at *20, *21. With the recent amendments, additional safeguards are now in place. *See* 2021 S.B. 1; 2021 S.B. 2.

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000028 of 000043

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*, 2020 WL 6736090, at *2, *22–*24.

Finally, the Court concluded that the Governor's challenged actions had not been arbitrary—a finding that was required before the Court could approve 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*, 2020 WL 6736090, at *1 (emphasis added). As Plaintiffs have demonstrated above, one of the key constitutional restraints on the Governor is the Separation of Powers and, pursuant thereto, the duly enacted laws of the Commonwealth.

* * *

In sum, "'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) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring)); *see also Acree*, 2020 WL 6736090, at *14 ("Ultimately, the Governor's power to declare a state of emergency is controlled by KRS 39A.100…," now, as altered by KRS § 39A.090(3) (eff. 2/2/21)); *Brown v. Barkley*, 628 S.W.2d 616, 623 (Ky. 1982) ("Practically speaking, except for those conferred upon

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000029 of 000043

him specifically by the Constitution, [the Governor's] powers, like those of the executive officers created by Const. Sec. 91, are only what the General Assembly chooses to give him."). The Governor's enforcement of the Executive Orders (Exh. 1–23) in violation of the duly enacted provisions of Senate Bill 1 and Senate Bill 2, and the issuance of Version 5.5 of the Restrictions on Restaurants and Bars (Exh. 28), in violation of Senate Bill 1, are *ultra vires* and in direct violation of Kentucky's Separation of Powers. Plaintiffs will, therefore, succeed on the merits here.

II. Plaintiffs will be irreparably impaired without the requested relief

An ongoing violation of the Kentucky Constitution and the Commonwealth's statutes qualifies as irreparable harm, warranting injunctive relief before final adjudication. *Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 909–10 (Ky. 2012); *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).

Here, 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

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000030 of 000043

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—and subject them to fines and closure (*see, e.g.*, Exh. 14), 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.*, and their constitutional rights against absolute and arbitrary government, *id.* § 2.

The Governor's enforcement of orders that violate laws duly enacted by the General Assembly also impair Plaintiffs' rights to the structural protections guaranteed by Kentucky's separation of powers, *id.* §§ 27–28, 29, 69, 109. *Cf. Bond v. U.S.*, 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.").

III. An injunction will be equitable here

The requested injunction will not be inequitable: Because Plaintiffs have shown a substantial possibility that they will prevail on their claim that the Governor's violation of Senate Bill 1 and Senate Bill 2 is unconstitutional, "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*

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000031 of 000043

Nashville & Davidson Cty., 274 F.3d 377, 400 (6th Cir. 2001) (citation omitted). And since Defendants have no valid interest in ignoring duly enacted laws and enforcing invalid orders, Defendants will suffer *no* harm. Indeed, it bears repeating, the Governor is expressly obligated to "take care that the laws be faithfully executed." KY. CONST. § 81. Under the Commonwealth's Separation of Powers, the Governor and other Executive Branch officials must—just like everyone else—follow the law.

Further, the public will be served, as "'[t]he 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) (quoting Franklin Circuit Court, who, the Supreme Court stated, "appropriately balanced the equities" in granting a temporary injunction).

Finally, while the people's representatives have spoken through the new laws, the people get the last word: "If the citizenry deems [the Governor's existing emergency powers] insufficient, it will exercise its own constitutional power—the ballot." *Fletcher*, 163 S.W.3d at 873 (citing KY. CONST. §§ 31, 70).

IV. Judge Shepherd's Order does not affect this Court's authority

As Plaintiffs noted in their Verified Complaint (¶ 58), Franklin Circuit Court Judge Shepherd issued an order in the Governor's declaratory-judgment action that purports to enjoin (1) certain "requirements" of House

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000032 of 000043

Bill 1, Senate Bill 1, and Senate Bill 2, and (2) the Attorney General and the Legislative Research Council (LRC) from enforcing these laws. *See* Exh. 27, Mar. 3, 2021 Order, at 20–21. Respectfully, Judge Shepherd's order is plainly in error and, in any event, it cannot bind Plaintiffs, who are not parties to the Franklin County case.

First, an "injunction" is a "court order commanding or preventing an action." *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019);[12] *see also* CR 65.02(1) ("Every … injunction shall be specific in terms and shall describe in reasonable detail … the *act* … enjoined.") (emphasis added). An injunctive order thus commands or restricts people's actions, not statute books. The requirements in the new laws are not acts or actions themselves; they are rules under which individuals act. *See Commw. v. Mountain Truckers' Ass'n, Inc.*, 683 S.W.2d 260, 263 (Ky. App. 1984) ("[B]oth the federal and the Kentucky Rules of Civil Procedure require that restraining orders and injunctions be specific in their terms and describe in reasonable detail the *act* to be restrained.") (emphasis omitted; citations omitted). Accordingly, an injunction cannot enjoin "requirements" of laws, and Judge Shepherd's attempt to "enjoin" certain "requirements" of House Bill 1, Senate Bill 1, and Senate Bill 2, is wholly improper.

[12] A former version defined "injunction" as a "court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." *Injunction*, BLACK'S LAW DICTIONARY (6th ed. 1990).

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000033 of 000043

Nor is it clear by what authority Judge Shepherd purports to "enjoin" the Attorney General and the LRC from implementing or enforcing certain requirements of the new laws. *See* Exh. 27 at 21. The laws are passed, codified, and on the books. The only person required to act at this point is the Governor, who (alone) is obligated by the Constitution to "take care that the laws be faithfully executed." KY. CONST. § 81. Judge Shepherd's order purporting to broadly "enjoin" the Attorney General and the LRC from enforcing the laws' requirements is "overly broad and vague" and "run[s] contrary to the very essence of injunctive relief while creating the very abuses CR 65 seeks to prevent." *Mountain Truckers' Ass'n, Inc.*, 683 S.W.2d at 263.

Further, even if Judge Shepherd's order itself weren't defective, he lacked jurisdiction to issue it in the first place, because the Governor's declaratory-judgment action does not present an actual controversy—no justiciable case is properly before Judge Shepherd. *See* KY. CONST. § 112(5) (circuit court's jurisdiction limited to "justiciable causes"). The Governor sued the Speaker of the Kentucky House of Representatives, the President of the Kentucky Senate, the LRC, and the Kentucky Attorney General. And while the Governor alleges that House Bill 1, Senate Bill 1, and Senate Bill 2 are unconstitutional, he fails to allege any facts demonstrating an actual controversy—as opposed to a mere dispute between elected officials. *See* KRS § 418.040 (A party may ask for a declaration for rights when "it is made to

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000034 of 000043

appear that an *actual* controversy exists.") (emphasis added); *Jefferson Cty. ex rel. Coleman v. Chilton*, 33 S.W.2d 601, 605 (Ky. 1930) ("Every dispute between lawyers on a subject of law, whether adjudicative or substantive, is not a justiciable controversy to be settled in a declaratory judgment action."). In short, the Governor does not seek to resolve an actual controversy; he improperly seeks an advisory opinion. *See In re Constitutionality of House Bill No. 222*, 90 S.W.2d 692, 693 (Ky. 1936) (holding unconstitutional an act authorizing advisory opinions because the Constitution vests court of appeals with only "appellate jurisdiction").

And, finally, Judge Shepherd's order does not restrict this Court's jurisdiction or power, and it does not bind Plaintiffs, who are not parties to the Governor's suit in Franklin County and who properly seek to prevent the Governor from enforcing invalid orders against them. Therefore, any attempt by the Governor to extend Judge Shepherd's order beyond that case would be improper. *Cf. Mountain Truckers' Ass'n, Inc.*, 683 S.W.2d at 263 ("'An injunction decree or order restraining actions or proceedings in another court is directed only to the parties.'") (quoting 42 Am. Jur. 2d *Injunctions,* § 201 (1969)); *see id.* (noting the impropriety of "attempting to bind the Commonwealth in its entirety … simply by the nominal participation of the Commonwealth"). Accordingly, "all the courts of Kentucky, other than

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000035 of 000043

the Franklin Circuit Court, [may not] be automatically divested of their jurisdiction to hear matters … simply by issuance of a restraining order including the Commonwealth as a party." *Id.*

In sum, this Court retains full authority to resolve the actual controversy presented in this case and issue an injunction against the Governor, whose continued enforcement of the Executive Orders and issuance of additional such orders are *ultra vires* acts and contrary to the Kentucky Constitution's Separation of Powers.

CONCLUSION

The Court should issue an order temporarily enjoining the Defendants from (1) enforcing the Executive Orders (Exh. 1–23 & 28 to the Verified Complaint); (2) issuing a new declaration of emergency arising out of the COVID-19 pandemic, without the approval of the General Assembly; and (3) continuing to implement any of the powers enumerated in KRS Chapter 39A arising out of the COVID-19 pandemic, without the approval of the General Assembly.

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000036 of 000043

DATED: March 12, 2021.

Respectfully submitted,

s/ Joshua S. Harp

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**Pro hac vice* motions pending

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8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000037 of 000043

8BB69DE0-316B-4E3A-B42F-ECFA6573E646 : 000038 of 000043

CERTIFICATE OF SERVICE

This is to certify that on this the 12th day of March, 2021, the undersigned has electronically filed this document through the Kentucky eFiling system, which will send a Notice of Electronic Filing (NEF) to the following parties, pursuant to the eFiling Rules:

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