

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

**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 Depart of Public Health**

**DEFENDANTS**

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**OPINION AND ORDER  
GRANTING TEMPORARY INJUNCTIVE RELIEF**

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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 where 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:

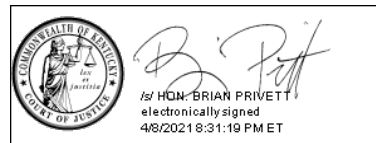
1. Defendants and their designees and agents are enjoined from enforcing against only the individual Plaintiffs herein at their now-existing locations the following orders, administrative regulations, and directives:

- 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.



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JUDGE BRIAN K. PRIVETT  
SCOTT CIRCUIT COURT

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