

*In the*  
COMMONWEALTH OF KENTUCKY  
HOUSE OF REPRESENTATIVES

JACOB CLARK, TONY L, WHEATLEY,  
RANDALL L. DANIEL, and ANDREW D. COOPERRIDER

PETITIONERS

v.

GOVERNOR ANDY BESHEAR

RESPONDENT

**RESPONSE OF GOVERNOR ANDY BESHEAR  
TO THE PETITION FOR IMPEACHMENT AND  
REQUEST FOR DISMISSAL**

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Governor Andy Beshear, by counsel, for his response to the Petition for Impeachment (the “Petition”), and his request to the Committee to dismiss the Petition, states:

### INTRODUCTION

Governor Beshear faced a crisis few could have imagined just three months into his administration: a global health pandemic that has endangered the health and safety of the Commonwealth’s citizens as well as its economic stability. The Governor has taken decisive action to address the ever-shifting target presented by the previously unknown – and now mutating – virus. He is aware that not everyone agrees with his decisions; no governor can ever hope to have unanimity with regard to his decisions. And, he is aware that his actions in managing the pandemic could have consequences at the ballot box. That is the way our Constitution is framed; the chief executive manages the executive branch of government, and the people decide if they agree at the next election.

The petitioners here pursued the rightful procedure for challenging a governor’s authority: filing actions in court. They, as well as others, specifically sought proper review in the state and federal judicial branches. They lost. Unhappy with their losses, the petitioners admit they filed the Petition because of this failing, stating: “they felt the Kentucky Supreme Court [in *Beshear v. Acree*] allowed Beshear to ‘do anything he wants’.”<sup>1</sup> The Petition cites no facts and little law in a last-ditch effort to upend our constitutional separation of powers, hoping the General Assembly will ignore the judgments of the judicial branch as well as the will of the people in electing their chief executive.

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<sup>1</sup> Travis Waldron, “Inside the Radical Effort to Impeach Kentucky’s Governor,” *Huffington Post* (Jan. 13, 2021), available at [https://www.huffpost.com/entry/kentucky-impeach-governor-andy-beshear\\_n\\_5fff5020c5b66f3f79639efd](https://www.huffpost.com/entry/kentucky-impeach-governor-andy-beshear_n_5fff5020c5b66f3f79639efd) (last visited Jan. 20, 2021).

The petitioners state no basis to justify any further impeachment inquiry. This Committee must reject the Petition.

## **FACTUAL BACKGROUND**

### **I. The Governor's Lawful Actions To Protect Kentuckians From A Deadly Disease.**

The facts of the COVID-19 pandemic are well known to the Committee. COVID-19 is a deadly, highly infectious disease. It spreads primarily on tiny droplets transmitted through close contact. However, it sometimes spreads through airborne transmission, particularly in poorly ventilated indoor spaces. As the disease has progressed, studies have shown that places where people congregate near each other indoors for extended periods of time are the locations most associated with spread of COVID-19, especially if people are not wearing masks the entire time. These outbreaks can race through a community, affecting people who did not choose to assume any risk. While it is not possible to *entirely* prevent the spread of COVID-19, carefully calibrated public health interventions can substantially reduce transmission rates.

The Commonwealth has been hard hit by COVID-19. Like most other states, it has experienced three waves of intensified infection. The first wave came in March through May 2020. A second surge occurred later in the summer. And a third wave is now underway. The numbers of COVID-19 cases, hospitalizations, and deaths are currently at some of the highest rates of the entire pandemic. As of January 21, 2021, Kentucky recorded a cumulative 338,034 cases, 3,301 deaths (with 58 deaths reported that day, a record), has 1,604 people hospitalized, 395 patients in intensive care, and 309 patients fighting for their lives on ventilators. On January 21, 2021, Kentucky recorded a positivity rate of 11.05%, thankfully down from a high of 12.45% in early January, 2021. These developments have placed a massive strain on Kentucky's hospital resources, endangering not only COVID-19 patients, but all sick persons within the State.

### **A. The Governor Responds to COVID-19.**

From the outset of the pandemic, Governor Beshear has adopted a nimble, targeted approach based on the best available data and proven science.<sup>2</sup> Over the course of the pandemic, Governor Beshear has moved from the categorical, preventative regulations recommended by the President and the White House Coronavirus Task Force to a more surgical approach based on expert advice, numerous studies, and actual experience gained in fighting the pandemic. He varied state regulations in mitigating the identified risks, balancing individual rights to the greatest extent consistent with protecting public health and safety.

Notably, the White House under President Donald Trump “commended” Governor Beshear for the widely-celebrated success of his “active measures.”<sup>3</sup> And the Kentucky Supreme Court unanimously upheld his orders as “necessary to slow the spread of COVID-19 and protect the health and safety of all Kentucky citizens.” *Beshear v. Acree*, No. 2020-SC-0313-OA, 2020 WL 6736090, at \*37 (Ky. Nov. 12, 2020) (attached hereto as Exhibit A).

### **B. The First and Second Waves of COVID-19 Hit Kentucky.**

In early March 2020, Governor Beshear recommended that all mass public gatherings end. That recommendation evolved into a requirement on March 19, 2020, after the Commonwealth had reached 47 cases and its second sick child.<sup>4</sup> When cases nearly doubled over the next three days, and on the advice of the White House, Governor Beshear closed non-life-sustaining retail businesses (that is, those providing staple goods such as groceries and banks).<sup>5</sup>

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<sup>2</sup> See generally, Office of the Governor, *Kentucky’s Response to COVID-19* (archived Oct. 20, 2020), available at [https://governor.ky.gov/Documents/20201020\\_COVID-19\\_page-archive.pdf](https://governor.ky.gov/Documents/20201020_COVID-19_page-archive.pdf) (last visited Jan. 22, 2021).

<sup>3</sup> *White House Coronavirus Task Force Report for Kentucky 1*, Kentucky Cabinet for Health and Human Services (Nov. 15, 2020), available at <https://dnks20yxl1c2u.cloudfront.net/381d0fbb43b611527a8f1c329301ef5-1fd555fcf/Kentucky%20%2011.17.pdf> (last visited Jan. 22, 2021).

<sup>4</sup> Press Release, *Gov. Beshear: Strong Actions Required to Protect Kentuckians from COVID-19*, Office of Governor Andy Beshear (Mar. 19, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=97> (last visited Jan. 22, 2021).

<sup>5</sup> Ky. Exec. Order 2020-246 (Mar. 22, 2020).

When cases doubled yet again over the following three days, Governor Beshear ordered all non-life-sustaining businesses to close and all life-sustaining businesses to comply with distancing and CDC guidelines at all businesses permitted to operate.<sup>6</sup> In this period of immense uncertainty, scarcity of testing, limited personal protective equipment, and in an effort to save lives as the nature and spread of the virus came to be understood, Governor Beshear also barred all indoor and outdoor gatherings and closed restaurants to indoor dining.<sup>7</sup> Virtually all states did the same, again at the request of the Trump administration.

By the time the second wave arrived, Governor Beshear – and the rest of the Nation – had a somewhat improved understanding of COVID-19. On that basis, and in regular consultation with local, state, and federal officials and experts, he continued to evolve his recommendations, guidance documents, and public health orders, relaxing them whenever consistent with public safety but adopting more active measures as required by discrete risks or COVID-19 upticks. Thus, starting in May 22, 2020, he allowed groups of up to 10 to gather; when that relaxation did not engender a spike in transmission rates, he eased the restriction on June 29, 2020 to allow groups of up to 50 people; but when cases jumped significantly in mid-July 2020 (the second wave), he recognized the need to revert back to the ten person limit and did so on July 20, 2020.<sup>8</sup> Similarly, whereas Governor Beshear responded to the first wave with bans on both indoor and outdoor gatherings, he relied on scientific advice to adopt a more nuanced approach to the second wave – *e.g.*, restricting the indoor capacity of restaurants to 25%

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<sup>6</sup> Ky. Exec. Order 2020-257 (Mar. 25, 2020); Press Release, Office of the Governor, *Gov. Beshear Tightens Restrictions Amid COVID-19*, Office of Governor Andy Beshear (Mar. 25, 2020), available at <https://chfs.ky.gov/News/Documents/nrestrictionstighten.pdf> (last visited Jan. 22, 2021).

<sup>7</sup> Press Release, *Gov. Beshear: Strong Actions Required to Protect Kentuckians from COVID-19*, Office of Governor Andy Beshear (Mar. 19, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=97> (last visited Jan. 22, 2021); Ky. Exec. Order (May 11, 2020).

<sup>8</sup> *See generally* Kentucky's Response to COVID-19; *see also* Office of the Governor, *Gov. Beshear: New Actions Required as COVID-19 Cases Grow* (July 20, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=274> (last visited Jan. 22, 2021).

while allowing outdoor dining (and working closely with state and local officials to expand outdoor dining options), and restricting many other indoor activities while working to facilitate outdoor opportunities by ensuring all of Kentucky’s state parks were open.<sup>9</sup> Again, these actions were supported by the White House, and were the same or similar steps taken by Arizona, Texas, Florida, and other impacted states.

With respect to his orders’ impact on religious practice, Governor Beshear has never attempted to prohibit a Kentuckian from practicing their faith and has honored the principles of religious free exercise. Indeed, religious worship and freedom are central to the Governor’s own life: he and his wife serve as deacons in their church and help to serve communion there; and his son’s baptism was postponed because of the pandemic.<sup>10</sup> *See* Statement of Governor Beshear (May 9, 2020) (“First, my faith is critically important to me. It’s a big part of my family life.”).

In the early days of the pandemic, Governor Beshear issued one order that impacted – but was in no way directed at – religious exercise. This order was a blanket ban on mass gatherings, issued March 19, 2020. This order was fully supported by controlling case law such as *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and *Prince v. Massachusetts*, 321 U.S. 158 (1944). While the Sixth Circuit would issue two opinions preliminarily enjoining this order, first as applied to drive-in worship services, and then later as applied to in-person services, the U.S. Supreme Court openly disagreed with these rulings, allowing similar orders in California, Illinois and Nevada to stand. *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020); *Elim Romanian*

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<sup>9</sup> Press Release, *Gov. Beshear Provides Update on Fight Against COVID-19*, Office of Governor Andy Beshear (May 28, 2020), available at <https://russellvilleky.org/index.php/covid-19-information/governor-daily-updates/622-may-28-2020-governor-daily-update> (last visited Jan. 22, 2021).

<sup>10</sup> Jack Brammer, *As Beshear Announces COVID-19 deaths, He Speaks of Faith. His Pastor Isn’t Surprised.*, Lexington Herald Leader (Apr. 9, 2020), available at <https://www.kentucky.com/news/politics-government/article241799251.html> (last visited on Jan. 22, 2021); *see also* Governor Andy Beshear, *Update on COVID-19 in Kentucky* (May 9, 2020) (“First, my faith is critically important to me. It’s a big part of my family life.”), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=159> (last visited Jan. 22, 2021).



*Church, et al. v. Pritzker, Gov. of Illinois*, 19A1046, 2020 WL 2781671 (Order List 590 U.S.) (U.S. May 29, 2020); *Calvary Chapel Dayton Valley v. Sisolak*, \_\_\_ S.Ct. \_\_\_, 2020 WL 4251360 (Mem) (2020)

On May 9, 2020, Governor Beshear permitted in-person indoor worship services and issued guidelines for places of worship that recommended 33% maximum occupancy capacity.<sup>11</sup> On June 10, 2020, he increased that recommendation to 50% maximum occupancy capacity.<sup>12</sup> Governor Beshear took these actions in active consultation with religious and faith leaders and reliant on evolving and improved public health data. As the executive director of the Kentucky Baptist Convention noted when the Governor re-opened houses of worship: “I am thankful for the hard work of Gov. Beshear and his team of advisers, as well as their outreach to faith leaders, in working through the details of this plan.”<sup>13</sup>

Since May 8, Governor Beshear has not regulated Kentucky’s places of worship at all.

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<sup>11</sup> Order, Cabinet for Health and Family Services (May 9, 2020), available at <https://www.lcdhd.org/wp-content/uploads/2020/05/Mass-Gathering-Order.pdf> (last visited Jan. 22, 2021).

<sup>12</sup> Office of the Governor, *Healthy at Work: Guidelines for Places of Worship* (June 10, 2020), available at [https://govsite-assets.s3.amazonaws.com/r00brFxT12TJkofBUZUh\\_Healthy%20at%20Work%20Reqs%20-%20Places%20of%20Worship%20-%20Final%20Version%202.0%20Final.pdf](https://govsite-assets.s3.amazonaws.com/r00brFxT12TJkofBUZUh_Healthy%20at%20Work%20Reqs%20-%20Places%20of%20Worship%20-%20Final%20Version%202.0%20Final.pdf) (last visited Jan. 22, 2021).

<sup>13</sup> Press Release, *Gov. Beshear Announces Requirements for Houses of Worship, Retail, Others to Reopen*, Office of Governor Andy Beshear (May 8, 2020), available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=158> (last visited Jan. 22, 2021).

### C. The Third Wave of COVID-19 Reaches Kentucky.

Kentucky experienced a deadly third wave of COVID-19 in the fall of 2020. Positive cases in Kentucky increased at record pace. Medical providers in the Commonwealth, overwhelmed by exponential spread, have neared their breaking point. Many hospitals across the Commonwealth struggled to ensure that they have sufficient personnel and space to provide adequate care for COVID-19 patients.<sup>14</sup> And some hospitals in Kentucky even resorted to voluntarily cancelling and postponing surgeries and other medical procedures to free up resources for COVID-19 cases.<sup>15</sup>

When the third wave began in late October, Governor Beshear first issued a series of targeted “recommendations” aimed at curtailing the spread of the virus. In particular, he urged Kentuckians who lived in “red zone” counties – which have a daily average of more than twenty-five cases per 100,000 people over a seven-day period – to avoid dining in restaurants or bars, to reduce in-person shopping, to cancel or postpone public events and social gatherings, and to otherwise reduce activity and contacts outside the home.<sup>16</sup>

The recommendation-based approach, even in combination with the existing regulations and requirements, did not stop the escalation. From late October to mid-November, the number of red zone counties more than doubled (from 55 to 113), and the number of daily new COVID-

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<sup>14</sup> See *COVID-19 Unit Full at Ephraim McDowell in Danville, two on vents*, WKYT News (Oct. 15, 2020), available at <https://www.wkyt.com/2020/10/16/covid-19-unit-full-at-ephrain-mcdowell-in-danville-two-on-vents/#:~:text=Healthcare%20leaders%20inside%20Ephraim%20McDowell,tested%20positive%20for%20the%20virus> (last visited Jan. 22, 2021).

<sup>15</sup> See also Alex Acquisto, *UK Hospital closing 5 operating rooms to free up resources for COVID-19 patients*, Lexington Herald-Leader (Nov. 24, 2020), available at <https://www.kentucky.com/news/coronavirus/article247391505.html> (last visited Jan. 22, 2021); *UofL opening floor of hospital unused for 12 years in preparation for expected surge*, WLKY (Nov. 25, 2020), available at <https://www.kentucky.com/news/coronavirus/article247391505.html> (last visited Jan. 22, 2021).

<sup>15</sup> Press Release, *Gov. Beshear: Kentuckians, Communities Urged to Follow New Red Zone Reduction Recommendations to Stop COVID Spread, Protect One Another*, Office of Governor Andy Beshear (Oct. 26, 2020) available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=433> (last visited Jan. 22, 2021).

<sup>16</sup> *Id.*

19 cases quadrupled (from 953 to 3,825).<sup>17</sup> On November 15, 2020, the White House indicated it “share[d] the strong concern of Kentucky leaders that the current situation is worsening and that all Kentuckians need to do their part to stop the spread.”<sup>18</sup> That same day, Kentucky mourned the first COVID-related death of a school-aged child.<sup>19</sup>

Meanwhile, public health experts uniformly warned that the impending holiday season – starting with Thanksgiving – posed a potentially devastating risk to the Commonwealth. Based on their familiarity with local customs, as well as recent nightmarish experiences in Canada (where cases “exploded” over Thanksgiving, with “exponential increases” two to three weeks after the holiday), scientists anticipated a massive increase of COVID-19 cases. Kentucky’s chief public health official determined Thanksgiving represented a “catastrophic” potential for “exponential rise if schools and other indoor facilities operated without restriction.”

Governor Beshear responded with two executive orders. The broader of these two orders – Executive Order 2020-968 – temporarily limited social gatherings to no more than eight people from more than two households. It temporarily prohibited indoor dining at restaurants, bars, and retail locations (including food courts). It required gyms, fitness centers, and other indoor recreational facilities to temporarily cut capacity from 50% to 33%; to ensure that all individuals wear face coverings and remain socially distanced at all times; and to cancel all group classes

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<sup>17</sup> Alex Acquisto, *Beshear makes new recommendations for ‘red zones’ as COVID-19 surge continues*, Lexington Herald-Leader (Oct. 26, 2020), available at <https://www.kentucky.com/news/coronavirus/article246730976.html> (last visited Jan. 22, 2021); Press Release, *Gov. Beshear: Another Frightening, Record Day for New COVID-19 Cases*, Office of Governor Andy Beshear (Nov. 20, 2020), available at <https://chfs.ky.gov/News/Documents/nranotherfrighteningday.pdf> (last visited Jan. 22, 2021).

<sup>18</sup> *White House Coronavirus Task Force Report for Kentucky 1*, Kentucky Cabinet for Health and Human Services (Nov. 15, 2020), available at <https://dnks20yxl1c2u.cloudfront.net/381d0fbb43b611527a8f1c329301ef5-1fd555fcf/Kentucky%20%2011.17.pdf> (last visited Jan. 22, 2021).

<sup>19</sup> Leanne Fuller, *Community mourns Ballard County teen who passed away after battle with COVID-19*, WPSD Local 6 (Nov. 18, 2020), available at [https://www.wpsdlocal6.com/coronavirus\\_news/community-mourns-ballard-county-teen-who-passed-away-after-battle-with-covid-19/article\\_\\_ee4c7cbe-2a1d-11eb-86ed-73a273a765d1.html](https://www.wpsdlocal6.com/coronavirus_news/community-mourns-ballard-county-teen-who-passed-away-after-battle-with-covid-19/article__ee4c7cbe-2a1d-11eb-86ed-73a273a765d1.html) (last visited Jan. 22, 2021).

and activities. It directed office-based businesses to cease in-person operations and permit telecommuting wherever possible, and to temporarily limit their in-person employee capacity by 33%, down from 50%. And, finally, Executive Order 2020-968 mandated that all indoor venues, event spaces, and theaters be limited to twenty-five people per room. The order specified that this twenty-five-person limit applies to weddings and funerals but not to “in-person services at places of worship.” *Id.*

Executive Order 2020-968 automatically expired on December 13, 2020. At that point, the Governor issued Executive Order 2020-1034, which reverted restrictions on indoor dining, gyms, fitness centers and other indoor recreational facilities, event spaces, and office-based businesses, but specified that the exception from the mask mandate for gyms, fitness centers and other indoor recreational facilities was removed, thus making masks universally required in public spaces.

Governor Beshear’s second executive order responding to the third wave – Executive Order 2020-969 – addressed in-person instruction for K-12 education. Before it, he had not issued *any* orders requiring schools to cease in-person instruction. The arrival of the third wave, however, presented *significant* additional risks that the Governor’s public health experts concluded (1) are unique to in-person, K-12 education and (2) cannot effectively be mitigated by reliance on other COVID-19 precautions (*e.g.*, social distancing, masks, self-reporting). The American Medical Association agreed with the decision.<sup>20</sup>

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<sup>20</sup> See Brief of the AMA and Louisville Metro Health Dep’t as Amici Curiae in Support of Respondents, *Danville Christian Academy v. Beshear*, No. 20A96 (U.S. Dec. 8, 2020), available at [https://www.supremecourt.gov/DocketPDF/20/20A96/163072/20201208143145110\\_20A96%20Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/20/20A96/163072/20201208143145110_20A96%20Amicus%20Brief.pdf) (last visited Jan. 21, 2021). Governor Beshear’s actions in combatting the pandemic continue to enjoy great support among Kentuckians. Recent polling demonstrates that 86% of Kentuckians support asking people to stay at home and avoid gathering in groups. 78% support closing restaurants to in-person dining and limiting restaurants to carry-out only, a step the Governor attempts to use only for limited durations. 73% support a blanket prohibition on in-person instruction in K-12 schools, again, a step the Governor attempts to use only as a last resort.

**D. Kentucky Applies for the Title XII Unemployment Fund Loan as Authorized by Federal and State Law.**

The Commonwealth, along with every other state, saw an unprecedented increase in claims for unemployment benefits as the COVID-19 pandemic unfolded in Spring 2020. As a result of the increased demand for state unemployment benefits, the Commonwealth's unemployment insurance fund, a segregated fund created under KRS 341.490 for the payment of state unemployment benefits, was close to a negative balance in June.<sup>21</sup> There is a *federal requirement* to continue to pay benefits regardless of the state unemployment's balance. 26 U.S.C. § 3304. Cognizant of that obligation, the General Assembly previously passed a statute, KRS 341.595, which directs the Governor to apply for federal advances in accordance with Title XII of the Social Security Act (the "Title XII Loan") in the event of a negative fund balance. Per KRS 341.595 and 26 U.S.C. §§ 3301 *et seq.*, the Title XII Loan is repaid through a reduction in the credit given employers on their Federal Unemployment Tax assessment. All interest is to be paid first through the unemployment compensation administration fund, KRS 341.611, and if that fund is insufficient, the assessment of a surcharge on employers pursuant to KRS 341.614. Under the scheme set forth by the General Assembly, no general fund dollars are required to pay the Title XII Loan. Under KRS 341.595, and 26 U.S.C. § 3304, the Commonwealth would have been in violation of state and federal law and at risk of losing the entire federal unemployment compensation program had the Governor not taken action.

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<sup>21</sup> Twenty-two jurisdictions are in a Title XII borrowing posture as a result of the COVID-19 pandemic. Title XII Advance Activities Schedule (Jan. 14, 2021), U.S. Treasury, available at [https://www.treasurydirect.gov/govt/reports/tfmp/tfmp\\_advactivitiesched.htm](https://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiesched.htm) (last visited Jan. 18, 2021).

## **II. The Petitioners**

The petitioners are four political activists ostensibly unhappy with the Governor's handling of the COVID-19 pandemic and their lack of success in court. Indeed, one of the petitioners, Tony Wheatley, is a frequent (and failed) litigant against the Governor. Andrew Cooperrider, a Libertarian Party of Kentucky organizer and official, was the subject of an enforcement action related to the Governor's November orders, and was ordered by the Fayette Circuit Court to comply with the Governor's legally binding orders after refusing to do so even when his business's food license was suspended. The other two petitioners are also Libertarian Party activists, candidates, and political opponents of the Governor. The common denominator among the four is a pattern of attacking and even attempting to instill fear in the Governor and his family.

### **A. Jacob Clark**

Petitioner Jacob Clark is a failed Libertarian Party of Kentucky candidate for State Representative for the 18<sup>th</sup> District. Clark has a history of incendiary social media posts related to the Governor's handling of the pandemic, as well as other radical causes. Clark posted on his campaign Facebook page seemingly aimed at U.S. Senator Mitch McConnell that "any politician that supports the Patriot Act... should be hanged." One day later, groups went to the Kentucky Capitol and hung the governor in effigy.



In April, Clark posted a video to the same page titled “a warning to Governor Andy Beshear” in which a gun is visible behind Clark and in which he writes that “God may strike [Beshear] down.”

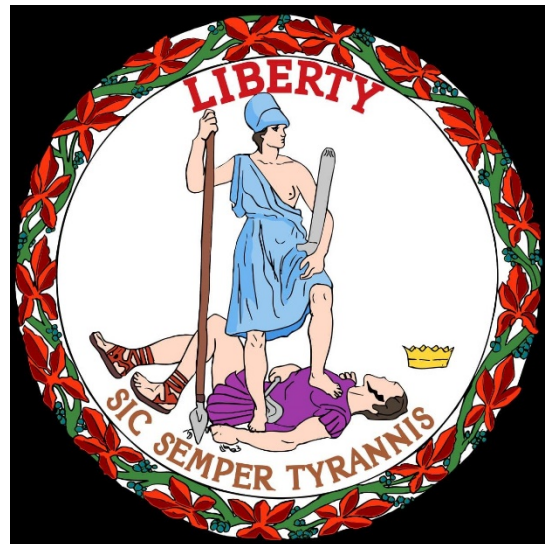


**Jacob Clark for Grayson / Hardin County KY District 18 House Representative**  
was live.  
April 11, 2020 · 🌐

As the decrees go out and become more tyrannical, I am reminded of Jeroboam, a wicked king. Beshear now plans to take action against those of us who will worship in the way we feel led to. Beshear blames a church revival for deaths in Hopkins County. However, the revival took place 3 days before the business closings began. He is pretending these folks were negligent, when they were actually just uninformed.

Mr. Beshear should rescind his order to record license plates and force quarantine church goers, or else God may strike him down. I have played along with all the "orders" until now. This is going too far.

In November, Clark raised the specter of “civil war” on both his personal and campaign accounts based on false pretenses of voter fraud and advocated for filming of all polling places, which is illegal. KRS 117.236. Clark’s Facebook profile picture as of January 18, 2021 evokes the murder of Julius Caesar, with the motto “Sic Semper Tyrannis” emblazoned around a picture of a man standing on a dead body.



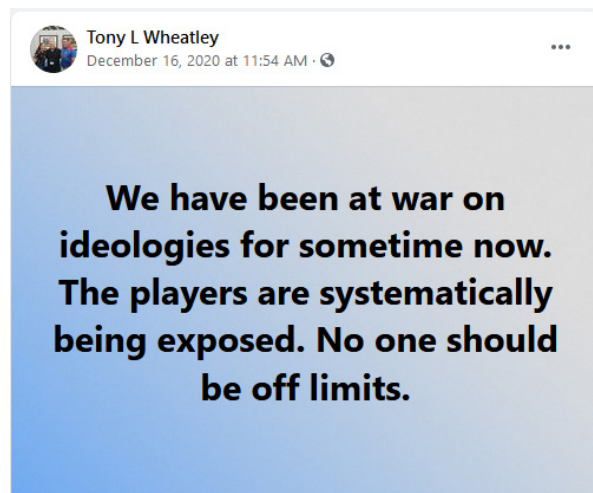
This same motto was written on the effigy of Governor Beshear hung on Capitol grounds on May 24, 2020. Clark’s violent message regarding the Governor is unmistakable.



## B. Tony L. Wheatley

Petitioner Tony Wheatley is an activist and the founder of Constitutional Kentucky, a libertarian-leaning interest group organized in December 2019 in apparent reaction to the Governor’s election. Wheatley was one of the organizers of the May 24, 2020, rally that ended with the governor hung in effigy after protesters disregarded barriers to the public and stormed to the front porch of the Governor’s Mansion, pounding on the windows and doors, where the Governor lives with his wife and children.<sup>22</sup> Since that time, Wheatley has continued to attend and organize rallies *with the same groups*, as recently as January 9, 2021.

In the month leading up to the attack on the U.S. Capitol on January 6, 2021, Wheatley posted inflammatory messages on his personal Facebook page including a post that appears to condone the coming violence: “two ways to have peace, submit or fight through it” and “no one should be off limits.”



<sup>22</sup> Travis Waldron, “Inside the Radical Effort to Impeach Kentucky’s Governor,” *Huffington Post* (Jan. 13, 2021), available at [https://www.huffpost.com/entry/kentucky-impeach-governor-andy-beshear\\_n\\_5fff5020c5b66f3f79639efd](https://www.huffpost.com/entry/kentucky-impeach-governor-andy-beshear_n_5fff5020c5b66f3f79639efd) (last visited Jan. 22, 2021).

During the attack on the U.S. Capitol, Wheatley stated on his own personal Facebook page that he was involved in sending people to DC, and took to social media to criticize Vice President Mike Pence on the same day violent protesters in DC were recorded chanting “Hang Mike Pence!” Wheatley’s social media is rife with debunked conspiracy theories about the 2019 gubernatorial and 2020 presidential elections.

Wheatley has expressed his distaste and disrespect for the rulings of the judicial branches of government on his social media pages, admitting he filed this Petition because of his anger at Kentucky Supreme Court and its unanimous decision affirming the Governor’s authority to issue orders to address the pandemic:

Wheatley told HuffPost that the four men filed the impeachment petition because they felt the Kentucky Supreme Court ruling allowed Beshear to “do anything he wants,” including “wipe out the legislature altogether.”

The Court ruling, though, did not go nearly that far — it merely found that Beshear’s orders complied with a law allowing governors to exercise some executive powers during an emergency.<sup>23</sup>

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<sup>23</sup> *Id.*

**C. Randall L. Daniel**

Petitioner Randall Daniel is a Vice-Chair of the Libertarian Party of Kentucky<sup>24</sup> and Vice-Chair and Membership Director of the Party's Second District. The Second District's Facebook page is full of false information regarding COVID-19, the Governor, as well as the effect of the Governor's orders. The Second District's page also includes the impeachment of the Governor as a basic political platform issue, promoting the issue with blatant misstatements of court rulings on the Governor's pandemic-related orders as well as the legal authority governing the Title XII Loan.<sup>25</sup> Daniel is also a litigant against the Governor in federal court—he is a plaintiff in the *Roberts v. Neace* case, in which Daniel alleged the Governor's mass gathering order violated his rights to free exercise of religion under the First Amendment.

**D. Andrew D. Cooperrider**

Petitioner Andrew Cooperrider is the incorporator and registered agent for the Libertarian Party of Kentucky Sixth District's corporate entity<sup>26</sup> and is the owner of Brewed Coffee and Beer Drinkery. Cooperrider pushed himself into the media spotlight when he refused to abide by EO 2020-968. As a result of his open defiance of the law, the Fayette County Health Department (FCHD) suspended Brewed's food service permit, and Alcoholic Beverage Control (ABC) suspended Brewed's liquor license. Nevertheless, Cooperrider continued to flagrantly violate the law. As a result the FCHD was required to ask the Fayette Circuit Court to enjoin Cooperrider's continued violation of the Order. The Fayette Circuit Court entered an injunction restraining Cooperrider's continued legal violations on December 1, 2020.<sup>27</sup> This injunction was dissolved

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<sup>24</sup> <https://lpky.org/about/leadership/>

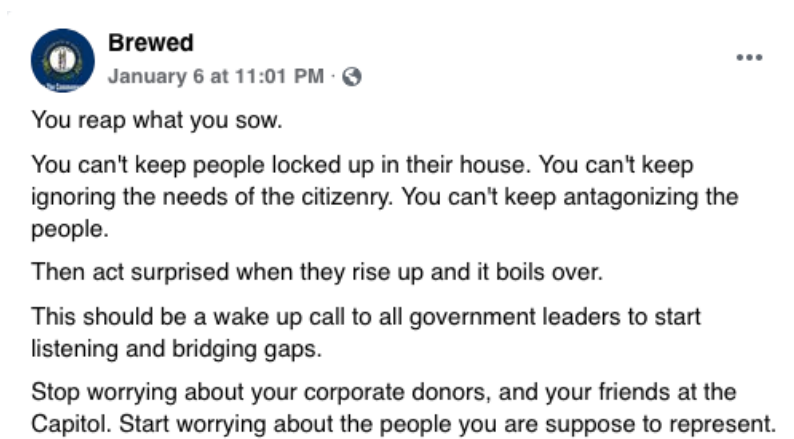
<sup>25</sup> <https://www.facebook.com/LPKY2/posts/10164678527335603> (last visited January 20, 2021).

<sup>26</sup> <http://web.sos.ky.gov/corpscans/21/1105821-09-99999-20200727-ART-8089077-PU.PDF>

<sup>27</sup> Order, *Lexington-Fayette Urban County Health Dep't v. Cooperrider*, No. 20-CI-3566 (Fayette Cir. Ct. Dec. 1, 2020), attached hereto as Exhibit B.

by mutual consent and Cooperrider received the return of his food service permit after he affirmatively agreed to refrain from further legal violations.

Cooperrider regularly posts inflammatory live videos on Facebook in which he attacks the Governor and his family, including his children. After the attack on the U.S. Capitol on January 6, Cooperrider posted on his Facebook page that you reap what you sow:



Cooperrider has also been investigated for threats against the Governor and his family. On January 13, 2021, a concerned citizen reported to Kentucky State Police that on January 7, 2021 (three days after he attended an “Impeach Andy” featuring a sign advocating the lynching of the Governor, and the day after the assault on the U.S. Capitol in which five people died), Cooperrider and the three other petitioners entered the establishment where she worked. While there, Cooperrider stated “wait until you see what I have planned for the Governor’s mansion in the next couple of weeks.” When interviewed by the Kentucky State Police, Cooperrider admitted making the statement, but disclaimed violent intent. The investigation is ongoing.

Nevertheless, just a few days later, Cooperrider posted a Facebook Live video discussing his research on the Governor's 11-year old son, which is based on false information.<sup>28</sup> Cooperrider's behavior appears to be escalating, posting about the Governor on his business Facebook page on average three times a day over the past two months.

## **ARGUMENT**

Impeachment is not supported on the (dubious) facts and law presented in the Petition. The petitioners fail to establish the necessary misdemeanor. Indeed, they fail to establish any wrongdoing by the Governor whatsoever. Impeachments in Kentucky have been reserved for serious misconduct in office. The petitioners, on the other hand, bring this Committee a list of grievances and slights already dismissed and ruled constitutional and necessary by the judicial branch. This Committee should dismiss the Petition.

### **I. Impeachment Is Rare And Not Appropriate For A Dispute Brought By Disappointed Litigants And Political Opponents.**

Representing a repeal of the will of the people who have elected an individual to an office of public trust and a reversal of the inherent power of the people in a democratic society to choose those who govern, impeachment is a power rarely exercised. *See* Anita Taylor, Legislative Research Comm'n, *Impeachment in Kentucky*, Informational Bulletin No. 176, at 1 (1991) (attached hereto as Exhibit C). The impeachment of civil officers is so rare that it has occurred only eight times in the nearly 240-year history of the Commonwealth, with the most recent instance occurring in 1991 when the Commissioner of Agriculture was impeached after being convicted in a criminal jury trial in Franklin Circuit Court for complicity to theft by deception, a felony criminal offense. *See id.*, at 13-14.

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<sup>28</sup> <https://fb.watch/389XcE8XK6/> (last visited Jan. 20, 2021).

**A. Impeachment Has Scant History in Kentucky.**

Prior to the impeachment of Agriculture Commissioner Ward “Butch” Burdette, which ended with the termination of Senate proceedings upon Burdette’s resignation, impeachment proceedings occurred: (1) in 1803 (Thomas Jones, Surveyor of Bourbon County, for overcharging the state for work done, failure to perform his duties, and surveying the wrong tracts of land); (2) in 1888 (“Honest Dick” Tate, a nine-term State Treasurer, who was tried in absentia for stealing more than \$197,964 of the state treasury and abandoning his office); and (3) in 1916 (McCreary County Judge J.E. Williams, who allegedly improperly issued warrants, suspended or shortened criminal sentences and failed to report fines he collected, ending in impeachment but no Senate conviction). *See id.*, at 13. *See also* Ky. House Jour., Reg. Sess. of 1916 (Mar. 2, 1916); Ky. Senate Jour., Reg. Sess. of 1887 (Mar. 24, 1888); Ky. Senate Jour., Reg. Sess. of 1887 (Mar. 29-30, 1888). In 1801, impeachment proceedings began against Elijah Craig, a Gallatin County Justice of the Peace, who was apparently impeached before the proceedings ended without a Senate conviction. *See* 3 William Littell, *The Statute Law of Kentucky* ch. 386, at 99, 162-63 (Frankfort, Ky., Johnson & Pleasants 1809); Robert M. Ireland, *The Place of the Justice of the Peace in the Legislature and Party System of Kentucky, 1792-1850*, 13 AM. J. LEGAL HIST. 202, 209 n.20 (1969). In 1808, an impeachment proceeding began against Livingston County Surveyor William C. Rogers, who was impeached in the House and acquitted in the Senate. *See* Ky. House Jour., Reg. Sess. of 1808 (1809); Ky. Senate Jour., Reg. Sess. of 1809 (1810).

In 1847, Perry County Surveyor John A. Duff was impeached on such allegations as extorting “a poor widow,” engaging in corrupt surveying, and failing to post the required bond in several years, and he was convicted of one count in the next regular session: failing to post bond

in five different years, a defined misdemeanor under Kentucky law. *See* Ky. Senate Jour., Reg. Sess. of 1846 (Jan. 13, 1847); Ky. Senate Jour., Reg. Sess. of 1847 (Jan. 11, 1848); Robert M. Ireland, *The County Courts in Antebellum Kentucky* 101-02 (1972).

Earlier, in 1806, Court of Appeals Judge Benjamin Sebastian resigned before being impeached, after the House committee found him guilty, on charges of essentially quasi-treasonous acts and receiving a foreign pension while sitting as a judge in Kentucky. *See* Ky. House Jour., Reg. Session of 1806 (Nov. 22, 1806). The charges stemmed from Sebastian's involvement in the Spanish Conspiracy that sought to have Kentucky secede from United States and join Spain, and the Aaron Burr Conspiracy that sought to create a new nation from parts of the Louisiana Purchase. *See* Lowell H. Harrison & James C. Klotter, *A New History of Kentucky* 59-60, 74, 85 (1997). The House eventually agreed to the committee's report, but no further action was taken because Sebastian resigned. *See* Ky. House Jour., Reg. Sess. of 1806 (Nov. 29, 1806).

**B. Politically-Motivated Impeachment Efforts During the COVID-19 Pandemic Have Been Rejected in Other States.**

Further showing the rarity of use of impeachment, the efforts of three petitions for impeachment, and articles against a Republican governor, failed in 2020. In Michigan, articles of impeachment were filed in the state House against Democratic Governor Gretchen Whitmer in November of 2020 over her actions during the pandemic. The articles were immediately met with heavy criticism from the Republican House Speaker. In a media article called, "House speaker shuts door on Whitmer impeachment talk," Speaker Lee Chatfield said the effort to impeach Whitmer would be "shameful."<sup>29</sup>

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<sup>29</sup> Associated Press, House speaker shuts door on Whitmer impeachment talk (Nov. 18, 2020), available at <https://apnews.com/article/donald-trump-health-michigan-coronavirus-pandemic-gretchen-whitmer-f5cea87c7011e9f5f283f20e80977916> (last visited Jan. 22, 2021).

In Ohio, articles of impeachment were filed in the Republican state House against Republican Governor Mike DeWine by four Republican lawmakers. Ohio Republican Party Chair Jane Timken called the move “a baseless, feeble attempt at creating attention for themselves.”<sup>30</sup>

And in Pennsylvania, articles of impeachment filed by a Republican House member against Democratic Governor Tom Wolf were referred to the Judiciary Committee and moved no farther.<sup>31</sup>

In December 2020, five Republican members of the New Hampshire state House dropped their impeachment inquiry into alleged abuse of power by Governor Chris Sununu.<sup>32</sup>

Kentucky has already taken its proceedings further than all other states. No allegation in the Petition comes remotely close to the allegations that led to the scant eight impeachment proceedings in Kentucky’s history. And the petitioners cannot overcome that, unlike in any other impeachment matter in nearly 240 years, here the Supreme Court of Kentucky upheld the Governor’s exercise of his executive powers in the COVID-19 public health emergency as lawful and necessary to protect all Kentuckians. The Committee should dismiss the Petition, with prejudice, and follow the lead of history and the four other states refusing to move forward with COVID-related impeachments.

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<sup>30</sup> Corky Siesmasko, Republican Ohio Gov. DeWine faces impeachment calls from GOP rebels over Covid restrictions, NBC News (Dec. 1, 2020), available at <https://www.nbcnews.com/news/us-news/republican-ohio-gov-dewine-faces-impeachment-calls-gop-rebels-over-n1249548> (last visited Jan. 22, 2021).

<sup>31</sup> Pennsylvania General Assembly, Regular Sess. 2019-2020, H.R. 915, available at <https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2019&sInd=0&body=H&type=R&bn=915> (last visited Jan. 22, 2021).

<sup>32</sup> Kevin Landrigan, Seven House Republicans drop impeachment bid, seek future reforms, New Hampshire Union Leader (Dec. 1, 2020), available at [https://www.unionleader.com/news/health/coronavirus/seven-house-republicans-drop-impeachment-bid-see-future-reforms/article\\_16cc0a76-f55c-5057-8f7a-b3d562f824b5.html](https://www.unionleader.com/news/health/coronavirus/seven-house-republicans-drop-impeachment-bid-see-future-reforms/article_16cc0a76-f55c-5057-8f7a-b3d562f824b5.html) (last visited Jan. 22, 2021).



## II. The Petition Fails To State A Prima Facie Claim Of Official Misconduct In The Second Degree.

The Kentucky Supreme Court has ruled that the Governor's actions in protecting Kentuckians during the COVID-19 public health emergency have been and continue to be lawful exercises of his executive powers under the Kentucky Constitution and KRS Chapter 39A. As such, those actions cannot meet the elements of KRS 522.030, the only misdemeanor in office the petitioners allege. In each count of their Petition, the petitioners allege the Governor's actions violate KRS 522.030. *See* Petition, pp. 5-7. On page 6 of the Petition, the petitioners assert that KRS 522.030 provides "in relevant part, that a 'public servant is guilty of official misconduct in the second degree when he knowingly: commits an act relating to his office which constitutes an unauthorized exercise of his official functions.'" *Id.* at p. 6. Based on the Petition, the petitioners allege the Governor's actions violated KRS 522.030(1)(a); they do not allege the Governor violated KRS 522.030 in either of the other two ways described in the statute.

A class B misdemeanor, KRS 522.030 provides:

- (1) A public servant is guilty of official misconduct in the second degree when he knowingly:
  - (a) Commits an act relating to his office which constitutes an unauthorized exercise of his official functions; or
  - (b) Refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or
  - (c) Violates any statute or lawfully adopted rule or regulation relating to his office.

KRS 522.030(1)(a) thus requires that (1) the accused is a public servant, (2) who knowingly (3) commits an act relating to his office which constitutes an unauthorized exercise of his official functions. A "public servant" means:

- (a) Any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state; or
- (b) Any person exercising the functions of any such public officer or employee; or
- (c) Any person participating as advisor, consultant or otherwise in performing a governmental function, but not including witnesses; or
- (d) Any person elected, appointed or designated to become a public servant although not yet occupying that position.

KRS 522.010(1). Under KRS 501.020(2), “A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists.”

To meet the requirement of conduct that is knowing, “[N]othing short of actual knowledge will suffice to sustain a conviction.” *Love v. Commonwealth*, 55 S.W.3d 816, 825 (Ky. 2001). Thus, the petitioners must present proof that the Governor, a public servant, knew that his acts were unauthorized or knew that he acted in an unauthorized manner. *See* KRS. 522.030, KRS 501.020. *See also* Leslie W. Abramson, KY. PRAC. SUBSTANTIVE CRIM. L. § 8:27 (Sept. 2020 Update).

While KRS 522.030 does not define “unauthorized,” in *Littrell v. Bosse*, the Kentucky Court of Appeals looked to the Merriam-Webster Dictionary definition of the term as “not authorized; without authority or permission[.]” 581 S.W.3d 584, 589 (Ky. App. 2019). There, the court rejected the argument that the chief of police’s actions were unauthorized in violation of KRS 522.030(1)(a) because they were inherently wrong, finding that to define unauthorized in that manner would cause “virtually every act undertaken by a public servant which is not expressly authorized or for which previous permission has not been given” to constitute a crime. *Id.* The court reasoned that “Not only does such a construction fail to comport with the rule of lenity, but it would bring public service to a screeching halt.” *Id.* The court added that had the

chief of police's superiors specifically told him not to engage in the conduct at issue in the case, there *may* have been a violation of KRS 522.030(1)(a), but that was not the case. *Id.*

Here, the Petition must fail because the petitioners cannot prove the Governor's acts as a public servant authorized under Kentucky law constituted official misconduct in the second degree under KRS 522.030(1)(a). As the Kentucky Supreme Court unanimously held, the Governor is authorized – as the Commander-in-Chief under Section 75 of the Kentucky Constitution, as the Chief Magistrate with the supreme executive powers of the Commonwealth under Section 69, and as the Governor with the duty to take care that the laws be faithfully executed under Section 81, and pursuant to his authority under KRS Chapter 39A – to exercise his executive powers in an emergency. *Beshear v. Acree*, No. 2020-SC-0313-OA, 2020 WL 6736090 (Ky. Nov. 12, 2020) Specifically, the Court held the Governor was authorized to exercise his executive powers in this COVID-19 public health emergency, and was authorized to do so statewide, especially considering that Kentucky has a part-time legislature that only the Governor may convene for extraordinary session. *See generally id.* In closing its 7-0 Opinion, the Court wrote:

We conclude that the greater public interest lies instead with the public health of the citizens of the Commonwealth as a whole. The global COVID-19 pandemic threatens not only the health and lives of Kentuckians but also their own economic interests; the interests of the vast majority take precedence over the individual business interests of any one person or entity. While we recognize and appreciate that the Plaintiffs allege injuries to entire industries in the state, such as the restaurant and childcare industries, the interests of these industries simply cannot outweigh the public health interests of the state as a whole. The Governor's orders were, and continue to be, necessary to slow the spread of COVID-19 and protect the health and safety of all Kentucky citizens. This type of highly contagious etiological hazard is precisely the type of emergency that requires a statewide response and properly serves as a basis for the Governor's actions under KRS Chapter 39A. Because the law and equities favor the Governor in this matter, it was an abuse of discretion for the trial court to issue the temporary injunction.

*Id.*, at p. 91.

As detailed further below, petitioners cannot prove the Governor's actions constitute official misconduct in the second degree under KRS 522.030 as alleged in the Petition. The Governor acted pursuant to his authority under the Kentucky Constitution and KRS Chapter 39A. He did not know his acts were unauthorized because *they were authorized*, and he acted pursuant to that authority to protect the health and safety of all Kentuckians.

### **III. The Title XII Loan Is Authorized By Statute And Cannot Form The Basis For A Claim Of Official Misconduct.**

Petitioners' claim that the Title XII Loan was unauthorized and is thus a violation of Sections 49 and 50 of the Kentucky Constitution and KRS 522.030(1)(a) is just as specious. The plain language of statutes enacted by the General Assembly authorized the Governor to seek the Title XII Loan. Indeed, the Commonwealth is *bound* by federal law to obtain some sort of loan to pay unemployment insurance claims if the state unemployment fund is insufficient to pay claims, and the Governor simply followed the mechanism set forth by the General Assembly in KRS Chapter 341.

The unemployment insurance program is a joint federal-state program whereby the state pays authorized unemployment insurance claims consistent with both state and federal law, and the federal government provides administrative funds to the states to run the program. Kentucky's unemployment insurance program is found in KRS Chapter 341, which sets forth parameters for payment of benefits, the levy of tax on employers to fund claims payments, and the management of the claims payment fund, called an unemployment insurance fund.

As part of the bargain for obtaining federal administrative funds, states are required to make benefit payments as required under federal and state law, even if the state's unemployment insurance fund lacks the funds to make the payments. 26 U.S.C. § 3304. In such a situation, a state must obtain funds to make the payments, either from a private lender or the federal

government via the mechanism set forth in Title XII of the Social Security Act, 26 U.S.C. § 3301, which allows states to apply for advances from the federal government to fund the payments.

Cognizant of its obligations under federal law, the General Assembly set forth a statutory scheme authorizing the Governor to obtain Title XII advances in the event the unemployment insurance fund lacks the resources to pay the federally-required payments. KRS 341.595 authorizes and directs the Governor to apply for Title XII advances from the federal government – as opposed to seeking a private lender – to pay unemployment benefits when the unemployment insurance fund lacks sufficient funds, and to seek a reduction in the Federal Unemployment Tax as the mechanism for repayment:

(1) The Governor *is hereby authorized* to apply for advances to the credit of this state's account in the unemployment trust fund from the federal unemployment account in such fund as provided for in Title XII of the Social Security Act when the balance of this state's account requires such action.

(2) If eligible under federal law, the Governor *shall* make application in 2013 and in subsequent calendar years to the secretary of the United States Department of Labor to request a cap on any Federal Unemployment Tax Act, 26 U.S.C. secs. 3301 to 3311, credit reduction.

(Emphasis added). KRS 341.610 further provides the General Assembly's specific guaranty of repayment on behalf of the Commonwealth to the federal government. KRS 341.611, .612, and .614 provide the mechanism for payment of interest on Trust Fund loans, which, in tandem with the repayment mechanism set forth in 26 U.S.C. §§ 3303-3304, provides for full repayment of the obligation.

The Governor's actions with respect to the Title XII Loan are not only fully authorized – they were required by the General Assembly in KRS Chapter 341. Neither KY. CONST. §§ 49 and 50 nor KRS 522.030(1)(1) are implicated. The Governor acted with full authority in seeking

Title XII advances, and the Title XII Loan cannot form the basis of articles of impeachment. Consequently, because the Governor's actions were not just authorized but *required* under state and federal law, the Governor's actions related to the unemployment insurance loan cannot constitute official misconduct in the second degree. This baseless Count must be dismissed.

#### **IV. The Alleged Violations Of The First Amendment And Sections 1 And 5 Of The Kentucky Constitution Do Not Support Impeachment.**

Counts I and III of the Petition fail in part because the Governor was authorized to prohibit mass gatherings and close schools to in-person educational services. Moreover, petitioners fail to cite to any specific order or action of the Governor to provide adequate notice for a defense. Instead, they rely on footnote citations to four civil actions – two of which petitioners Wheatley and Daniel initiated. Those cases do not address the Kentucky Constitution and do not establish that the Governor violated the law. In fact, no Court has entered a final order finding these actions violated the First Amendment or Sections 1 and 5 of the Kentucky Constitution. The cases cited by petitioners demonstrate that Governor Beshear never prevented any person from worshipping or gathering for political protest. He has repeatedly encouraged people to worship safely, by participating in virtual, drive-in, or outdoor worship services and expressly informed petitioner Wheatley that he and others would not be prohibited from or face consequence for protesting on capitol grounds.

A proper examination of United States Supreme Court precedent reveals that Governor's actions represented a constitutional response to a complex, uncertain and evolving factual and legal environment. Early evidence traced outbreaks to indoor group gatherings, including worship services.<sup>33</sup> A revival held in Dawson Springs at the beginning of the pandemic led

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<sup>33</sup> See, e.g., Tangi Salaun, Special Report: Five days of worship that set a virus time bomb in France, Reuters (Mar. 30, 2020), available at <https://www.reuters.com/article/us-health-coronavirus-france-church-spec/special-report-five-days-of-worship-that-set-a-virus-time-bomb-in-france-idUSKBN21H0Q2> (last visited Jan. 22, 2021).

directly to two dozen cases of COVID-19 and two deaths, and contributed to broad community spread throughout southwestern Kentucky.<sup>34</sup> At the advice of the White House and CDC, and like most governors across the country, Governor Beshear implemented a ban on mass gatherings on March 19, 2020.

Petitioners rely on three cases that challenged the Governor’s prohibition on mass gatherings and one case challenging an order closing schools to in-person educational services. While the mass gathering ban included in-person faith-based events, the Governor made clear that drive-in and virtual services were not only permitted, but encouraged. The order intended to prevent widespread transmission of COVID-19 in the Commonwealth at a time when personal protective equipment was lacking and the Commonwealth, nation and world had just been introduced to the disease. Later, just before the Thanksgiving holiday, the Governor closed all schools to in-person instruction in an effort to prevent greater spread following social gatherings during the holiday.

United States Supreme Court precedent clearly supported these actions at the time they were taken, *see Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (holding that “under the pressure of great dangers” even constitutional rights may be reasonably restricted “as the safety of the general public may demand.”); *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (noting that “[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease”). United States Supreme Court precedent that developed after the mass gathering ban affirmed that orders prohibiting or limiting mass gatherings during the COVID-19 pandemic are constitutional. Moreover, petitioners fail to

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<sup>34</sup> Bill Estep, ‘Hurting in their heart.’ KY church in spotlight after coronavirus spread at revival, *Lexington Herald-Leader* (Apr. 2, 2020), available at <https://www.kentucky.com/news/coronavirus/article241724581.html#storylink=cpy> (last visited Jan. 22, 2021).

apprise this Committee of a Sixth Circuit opinion overruling an opinion they rely on and a related case initiated by petitioner Wheatley and thoroughly dismissed by the District Court and the Sixth Circuit.

On May 29, 2020, the United States Supreme Court upheld public health measures issued by the Governors of California and Illinois that limited in-person gatherings for religious services. *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020); *Elim Romanian Church, et al. v. Pritzker, Gov. of Illinois*, 19A1046, 2020 WL 2781671 (Order List 590 U.S.) (U.S. May 29, 2020). The *South Bay United* case arose from several executive orders issued by Governor Newsom that are comparable to Kentucky's mass gatherings order. *Id.* In particular, on March 19, 2020, Governor Newsom issued Executive Order N-33-20, ordering all individuals living in California to stay at home or their places of residence. *Id.* On May 7, 2020, Governor Newsom published a four-stage plan for reopening the state. Religious establishments could not reopen until the state progressed into stage 3, but offices, manufacturing, retail, groceries, and other services were allowed to open prior to stage 3. *Id.* Further, California issued additional guidelines for religious organizations when they are allowed to open in stage 3, limiting attendance to 25% of building capacity or a maximum of 100 attendees. *Id.*

South Bay United filed suit, arguing that allowing certain entities to open prior to religious organizations violated the Free Exercise Clause of the First Amendment. *Id.* The District Court and the Ninth Circuit each denied South Bay's request for preliminary injunctive relief. South Bay applied for an injunction to the United States Supreme Court, which also denied injunctive relief. *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020).



The Supreme Court upheld the denial of the same injunctive relief Plaintiffs sought here because “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” *Id.* (quoting *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905).) In particular, the Supreme Court held that the California Order prohibiting mass gatherings passed First Amendment review because it applied similar restrictions to “lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time,” while treating differently “only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.” *Id.*, at \*2.

Courts throughout the country overwhelmingly rejected free exercise challenges to public health measures during the COVID-19 pandemic, relying predominantly on *South Bay United* after its issuance.<sup>35</sup>

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<sup>35</sup> *South Bay Pentecostal Church v. Newsom*, 2020 WL 2687079 (9th Cir. May 22, 2020), *aff'd* 140 S. Ct. 1613, 1613 (May 29, 2020) (denying TRO and upholding religious restrictions due to equivalent restrictions upon comparable secular activities such as theaters); *Harvest Rock Church, Inc. v. Newsom*, 2020 WL 5835219 (9th Cir. Oct. 1, 2020) (denying preliminary injunction on limits to in person worship); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 2020 WL 5994954 (E.D.N.Y. Oct. 9, 2020) (denying TRO and preliminary injunction even in light of non-neutral order restricting religious activities); *Robinson v. Murphy*, 2020 WL 5884801 (D.N.J. Oct. 2, 2020) (denying injunctive relief and upholding religious restrictions); *High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RMMEH, 2020 WL 4582720, (D. Colo. Aug. 10, 2020) (denying preliminary injunction and upholding religious restrictions); *Murphy v. Lamont*, 3:20-CV-0694 (JCH), 2020 WL 4435167 (D. Conn. Aug. 3, 2020) (denying preliminary injunction); *Ass'n of Jewish Camp Operators v. Cuomo*, 1:20-CV-0687 (GTS/DJS), 2020 WL 3766496 (N.D.N.Y. July 6, 2020) (denying preliminary injunction and upholding restrictions); *Legacy Church, Inc. v. Kunkel*, 2020 WL 3963764 (D.N.M. July 13, 2020) (denying preliminary injunction and injunctive relief), and 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (denying TRO and upholding religious restrictions); *High Plains Harvest Church v. Polis*, No. 1:20-cv-01480-RM-MEH, 2020 WL 3263902 (D. Colo. June 16, 2020) (denying TRO); *Bullock v. Carney*, No. 20-674-CFC, 2020 WL 2813316 (D. Del. May 29, 2020) (denying TRO), *aff'd*, 806 Fed. Appx. 157 (Mem) (3d Cir. 2020) (denying emergency motion for TRO and/or a preliminary injunction); *Antietam Battlefield KOA v. Hogan*, 2020 WL 2556496 (D. Md. May 20, 2020) (denying TRO and upholding religious restrictions); *Spell v. Edwards*, 2020 WL 2509078 (M.D. La. May 15, 2020), *vacated as moot*, 962 F.3d 175 (5th Cir. 2020) (denying preliminary injunction and dismissing appeal); *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2468194 (N.D. Ill. May 13, 2020) (denying TRO and upholding religious restrictions); *Calvary Chapel of Bangor v. Mills*, 2020 WL 2310913 (D. Me. May 9, 2020) (denying TRO and upholding religious restrictions); *Our Lady of Sorrows Church v. Mohammad*, No. 3:20-cv-00674-AVC (D. Conn. May 18, 2020); *Crowl v. Inslee*, No. 3:20-cv-5352 (W.D. Wash. May 8, 2020) (denying TRO); *Cross Culture Christian Ctr. v. Newsom*, ,

On the same day it decided *South Bay United*, the Court – without a written opinion – also declined to enjoin an order issued by the Governor of Illinois that prohibited in-person worship services. *Elim Romanian*, 2020 WL 2781671 (U.S. May 29, 2020) On July 4, 2020, Justice Kavanaugh denied similar relief to the Illinois Republican Party upon a free speech challenge to the same order. *See Illinois Republican Party v. Pritzker*, 19A1068 (U.S. July 4, 2020); *See also* Opinion and Order, *Illinois Republican Party v. Pritzker*, No 20 C 3489, Doc. 16 (N.D.Ill July 2, 2020).<sup>36</sup> Then, on July 24, 2020, in *Calvary Chapel Dayton Valley v. Sisolak*, --- S.Ct. ----, 2020 WL 4251360 (Mem) (2020), the Court again denied a church’s application for injunction in a 5-4 decision. The church alleged that the Nevada governor’s order limiting indoor worship services to 50 people while allowing secular activities such as casinos to operate at 50% capacity violated the Constitution. *Id.*, at \*1. The Court, now for the fourth time, disagreed that bans on mass gatherings during the COVID-19 pandemic violated the First Amendment.

Petitioners rely on opinions of the Eastern District of Kentucky and the Sixth Circuit that were entered prior to *South Bay United*, *Elim Romanian*, *Illinois Republican Party* and *Calvary Chapel* – cases in which the Governor argued that the standard in *Jacobson v. Massachusetts*,

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2020 WL 2121111 (E.D. Cal. May 5, 2020) (denying TRO and upholding religious restrictions); *Cassell v. Snyders*, 2020 WL 2112374 (N.D. Ill. May 3, 2020) (denying TRO and preliminary injunction, upholding religious restrictions); *Lighthouse Fellowship Church v. Northam*, 2020 WL 2110416 (E.D. Va. May 1, 2020) (denying TRO and preliminary injunction, upholding religious restrictions); *Gish v. Newsom*, No. 5:20-cv-755, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020) (denying TRO and affirming religious restrictions due to equivalent restrictions upon comparable secular activities such as theaters); *Davis v. Berke*, No.1:20-cv-98, 2020 WL 1970712 (E.D. Tenn. Apr. 17, 2020) (denying TRO); *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683-BAS-AHG, ECF No. 7 (S.D. Cal. Apr. 10, 2020) (denying TRO); *Tolle v. Northam*, 2020 WL 1955281 (E.D. Va. Apr. 8, 2020) (reaffirming and explaining denial of preliminary injunction on the grounds that the public interest outweighs any harm suffered by religious restrictions upon the plaintiff); *Nigen v. New York*, 2020 WL 1950775 (E.D.N.Y. Mar. 29, 2020) (denying TRO); *Elkhorn Baptist Church v. Brown*, 366 Or. 506 (2020) (preliminary injunctive relief vacated); *Hughes v. Northam*, No. CL 20-415 (Va. Cir. Ct. Russell Co. Apr. 14, 2020) (denying TRO on the grounds that the public interest outweighs any harm suffered by religious restrictions upon the plaintiff); *Hotze v. Hidalgo*, No. 2020-22609 (Tex. Dist. Ct. Apr. 13, 2020) (denying TRO); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (denying preliminary injunction).

<sup>36</sup> While Justice Kavanaugh alone denied the application, his denial, along with the decisions of Justices Roberts, Sotomayor, Kagan and Breyer to deny the application for injunction in *South Bay United*, *Elim Romanian*, and *Calvary Chapel*, indicates that the Court would not find a blanket prohibitions on mass gatherings during COVID-19 to violate the free speech or assembly clauses of the First Amendment.

197 U. S. 11, applied, as Chief Justice Roberts later reaffirmed in *South Bay United*. 140 S.Ct. 1613. *Maryville Baptist* and *Roberts* began with free exercise challenges to the mass gatherings order entered by CHFS. As the Supreme Court, both district courts initially determined that the mass gatherings order did not violate the free exercise clause, finding the order was neutral and generally applicable to all similar gatherings. In *Maryville*, plaintiffs appealed and sought an injunction pending the appeal. The Sixth Circuit granted the injunction to the extent the mass gatherings order prohibited drive-in religious services, but declined to enjoin the order as to in-person services. In *Roberts*, plaintiffs, including petitioner Daniels, similarly appealed and sought an injunction pending the appeal. There, a different panel of the Sixth Circuit enjoined the mass gatherings order as to in-person services during the appeal. The Sixth Circuit consolidated those appeals, and though given the opportunity to enjoin the order, the court declined to do so. Instead, it dismissed the appeal from *Maryville* and remanded the appeal from *Roberts*, and instructed both courts to consider whether the actions are moot. Thus, the injunctions pending appeal are no longer in effect as those appeals were not resolved in the plaintiffs' favors. Currently, those actions are before the federal district courts on pending motions to dismiss and summary judgment.

Similarly, in *Ramsek v. Beshear*, 468 F.Supp.3d 904 (E.D.Ky 2020), plaintiffs, including petitioner Wheatley, challenged the Governor's mass gatherings order as it applied to in-person protest on capitol grounds. But, as that opinion makes clear, the Governor never prevented political protest, and in fact, assured plaintiffs they would be permitted to hold political protests on capitol grounds despite the mass gatherings order. *Id.* at 916 ("But as previously explained, other than a disagreement about access to the Capitol grounds in Frankfort on one occasion, there is no evidence in the record that the Plaintiffs have faced any sanction for having exercised their

First Amendment rights.”) And *Ramsek* – like *Maryville* and *Roberts* – is also not final. The federal district court held that the mass gatherings order was content-neutral because it did not target the content of plaintiffs’ intended speech. *Id.* However, the court held the Governor did not narrowly tailor the order. *Id.* at 919. But that decision is currently on appeal before the Sixth Circuit, which has yet to decide the case.<sup>37</sup>

Notably, neither *Maryville*, *Roberts* nor *Ramsek* held that a Governor lacks authority to prohibit mass gatherings. Instead, the courts took the position that if the Governor prohibits gatherings in places of worship and on capitol grounds, the Governor must also prohibit any gathering whether incidental, transient in nature or necessary to respond to the emergency. Thus, even if these cases were final or not undercut by subsequent Supreme Court precedent, taken at the most favorable to the petitioners, they still do not establish the Governor lacked authority to prohibit mass gatherings in the opening days of the COVID-19 pandemic.

Finally, the petitioners also rely on *Danville Christian Academy v. Beshear*, 2020 WL 6954650 (E.D.Ky Nov. 25, 2020), the only case decided after the Supreme Court precedent

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<sup>37</sup> Even assuming the Sixth Circuit affirms the grant of a preliminary injunction against the order at issue in *Ramsek*, that preliminary injunction will be insufficient to establish an impeachable offense, much less a compensable constitutional violation sufficient to override the Governor’s immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the United States Supreme Court held that only violations of well-settled law are sufficient to overcome immunity:

We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to “know” that the law forbade conduct not previously identified as unlawful.

As noted above, the Governor’s actions, at the time they were taken, were supported by century-old U.S. Supreme Court precedent as well as multiple U.S. Supreme Court orders issued after the Governor entered his orders. If this is a violation of the magnitude suggested by petitioners, then so was the General Assembly’s passage of SB 151 (Regular Session 2018), which the Kentucky Supreme Court unanimously held violated clear constitutional provisions.

supporting the Governor’s actions. But that case is also not final. More importantly, the Sixth Circuit stayed the lower court’s order enjoining an order of the Governor closing all schools to in-person services, finding that the Governor’s order was neutral and generally applicable because it applied to all schools, not just religious schools. *Commonwealth v. Beshear*, 981 F.3d 505, 509 (6th Cir. 2020). The United States Supreme Court declined to overrule the Sixth Circuit. *Danville Christian Academy v. Beshear*, 141 S.Ct. 527 (Mem.) (U.S. Dec. 27, 2020). Thus, petitioners’ reliance on *Danville Christian* is improper, as that case was reversed.

In short, petitioners seek to relitigate claims challenging the Governor’s authority to enact public health measures to protect Kentuckians from the spread of an emerging deadly disease. Courts have yet to provide them relief, cautioning that “[w]hen those officials “undertake[ ] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” *South Bay United*, 140 S.Ct. at 1613 (citing *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974)). Their reliance on *Maryville Baptist*, *Roberts*, *Ramsek*, and *Danville Christian* does not support a conclusion that the Governor lacked authority so as to prove an element of KRS 522.030(1)(a). Nor do those cases even establish that the Governor violated either the First Amendment or the Kentucky Constitution. All of the Governor’s action were lawful, taken in good faith and based on his interpretation of ever-evolving legal standards in light of a one-in-100-years pandemic. Counts I and III of the Petition must be dismissed.

**V. The Kentucky Supreme Court Affirmed The Constitutionality Of The Governor’s Lawful Actions In *Beshear v. Acree*.**

The petitioners attack the Governor’s entry of various unspecified, alleged “lockdown orders” as a violation of Section 2 of the Kentucky Constitution. Petition at p. 5, Count II. This is the precise question presented to the Kentucky Supreme Court in *Beshear v. Acree*, *supra*: whether the Governor’s various orders violated § 2 of the Kentucky Constitution. The Court

unanimously held that the Governor both had the authority to issue the orders in question, and the various orders were and are constitutional. *Beshear v. Acree*, No. 2020-SC-0313-OA, 2020 WL 6736090 (Ky. Nov. 12, 2020). The Libertarian Party of Kentucky and these petitioners may disagree with the Court’s unanimously-stated position, but the Supreme Court is assigned the authority to interpret the Kentucky Constitution under §§ 109 and 110, and the House would violate the separation of powers provisions in §§ 27 and 28 if it supplants the Court’s determination in *Beshear v. Acree* by issuing impeachment articles to circumvent the Court’s lawful authority. Count II of the Petition must be dismissed.

**VI. Count IV Also Fails Because The Governor’s Actions In Keeping Kentuckians Healthy At Home Were Lawful.**

As with all their other allegations in the Petition, the allegations in count IV of the Petition are baseless and completely contradicted by the law. Again, like the entirety of their Petition, count IV does not reference a single specific action the Governor has taken or order the Governor has issued. If the count relates to the Governor’s Executive Orders regarding the suspension of evictions from residential premises for failure to pay rent, the count remains baseless and completely contradicted by the law, including federal law suspending evictions for non-payment of rent.

On March 25, 2020, in Executive Order 2020-257, and on May 8, 2020, the Governor suspended evictions from residential premises in Kentucky for failure to pay rent, in an effort to keep Kentuckians healthy at home and from being displaced from their home and potentially spreading COVID-19 through exposure to the public, and, in turn, preventing the state’s hospital system from being overwhelmed.<sup>38</sup> The orders explicitly did not relieve tenants of the obligation

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<sup>38</sup> Ky. Exec. Order 2020-257 (Mar. 25, 2020), available at [https://governor.ky.gov/attachments/20200325\\_Executive-Order\\_2020-257\\_Healthy-at-Home.pdf?\\_sm\\_au\\_=iVV3jHMRSnZt11tjJ8MfKK7vWLCsW](https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf?_sm_au_=iVV3jHMRSnZt11tjJ8MfKK7vWLCsW) (last visited Jan. 18, 2021); Ky. Exec. Order 2020-

to pay rent, make mortgage payments, or otherwise comply with any obligation they may have under a tenancy or mortgage, and both expressly stated they were not to be interpreted to interfere with or infringe on the powers of the judicial branch to perform its constitutional duties or exercise its authority.<sup>39</sup> It was thus clear that the orders did not foreclose any individual's ability to exercise his or her constitutional property rights, and did little to alter the express terms of the contracting parties' agreements; and, where any adjustments were made, they were reasonable, appropriate, and geared towards the service of a legitimate and important public purpose. In addition, the orders did not prevent access to courts as people were allowed to obtain a monetary judgment in relation to any breach of contract action for non-payment. By its own Orders, the Supreme Court of Kentucky halted the filing of eviction actions on April 1, 2020, then canceled all civil actions and closed all judicial facilities to in-person services beginning on April 24, 2020.<sup>40</sup>

On August 24, 2020, the Governor issued Executive Order 2020-700 to lift the suspension on evictions from residential premises for failure to pay rent, but implemented certain protections for tenants, and dedicated \$15 million in federal funds to create a Healthy at Home Eviction Relief Fund to provide assistance to landlords and tenants in a further effort to keep Kentuckians in their homes during the pandemic. On September 4, 2020, the Governor issued Executive Order 2020-751, implementing the Centers for Disease Control and Prevention

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257 (May 8, 2020), available at [https://govsite-assets.s3.amazonaws.com/G0Q86UG3TN2rUyIfFHBS\\_Executive%20Order%202020-323%20-%20Healthy%20at%20Work%20Reopening.pdf](https://govsite-assets.s3.amazonaws.com/G0Q86UG3TN2rUyIfFHBS_Executive%20Order%202020-323%20-%20Healthy%20at%20Work%20Reopening.pdf) (last visited Jan. 18, 2021).

<sup>39</sup> *Id.*

<sup>40</sup> *See* Ky. Supreme Ct. Amended Administrative Order 2020-16 (Apr. 1, 2020), available at <https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202016.pdf> (last visited Jan. 18, 2021); Ky. Supreme Ct. Amended Administrative Order 2020-24 (Apr. 24, 2020), available at <https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202028.pdf> (last visited Jan. 18, 2021). The Supreme Court allowed eviction actions to resume with certain requirements on August 1, 2020. *See* Ky. Supreme Ct. Amended Administrative Order 2020-56 (July 27, 2020), available at <https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/202056.pdf> (last visited Jan. 18, 2021).

nationwide federal moratorium on evictions for non-payment of rent.<sup>41</sup> The public health purposes of the CDC Order, as stated in the Order, are nearly identical to the public purposes the Governor has stated for his orders related to evictions in Kentucky.<sup>42</sup>

Although the petitioners do not cite any separate civil action as purported support of count IV, the only litigation involving the Governor's orders related to evictions is currently pending in the United States District Court for the Eastern District of Kentucky, Covington Division, *Greater Cincinnati N. Ky. Apartment Ass'n v. Beshear*, No. 2:20-CV-00096. The court has not entered any decision – either preliminarily or on the merits – in the action. However, as the Governor has argued in the case, his prior orders related to evictions from residential premises for failure to pay rent were lawful and constitutional under his executive authority in the COVID-19 public health emergency. Courts across the United States have upheld similar executive actions restricting evictions.<sup>43</sup> Likewise, every challenge to the CDC Order implementing the nationwide moratorium on evictions has thus far failed.<sup>44</sup>

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<sup>41</sup> Ky. Exec. Order 2020-751 (Sept. 4, 2020), available at [https://teamkyhherf.ky.gov/Images/2020\\_751.pdf](https://teamkyhherf.ky.gov/Images/2020_751.pdf) (last visited Jan. 18, 2021). Executive Order 2020-1055 renewed the order upon the United States Congress extended the CDC moratorium on evictions through January 31, 2021. Ky. Exec. Order 2020-1055 (Dec. 28, 2020), available at [https://governor.ky.gov/attachments/20201228\\_Executive-Order\\_2020-1055\\_Evictions.pdf](https://governor.ky.gov/attachments/20201228_Executive-Order_2020-1055_Evictions.pdf) (last visited Jan. 18, 2021).

<sup>42</sup> *See id.*

<sup>43</sup> *See Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148 (S.D.N.Y. 2020); *Gregory Real Estate and Management LLC v. Miles M. Keegan*, CV-2020-007629 (Superior Court of Arizona, July 22, 2020); *JL Properties Group B, LLC v. Pritzker*, Case No. 20-CH-601 (Twelfth Circuit Court of Illinois, July 31, 2020); *Private Properties, LLC v. Wolf*, 237 A.3d 399 (Pa. 2020), 2020 WL 4381579; *San Francisco Apartment Association v. City and County of San Francisco*, Case No. CPF-20-517136 (California Superior Court, August 3, 2020); *Auracle Homes, LLC v. Lamont*, 2020 WL 4558682 (D. Conn. Aug. 7, 2020); *Heights Apartments LLC v. Walz*, 2020 WL 7828818 (D. Minn. Dec. 31, 2020); *HAPCO v. City of Philadelphia*, No. CV 20-3300, 2020 WL 5095496 (E.D. Pa. Aug. 28, 2020); *Apartment Ass'n of Los Angeles Cty., Inc. v. Los Angeles*, No. CV2005193DDPJEMX, 2020 WL 6700568 (C.D. Cal. Nov. 13, 2020).

<sup>44</sup> *See Brown v. Azar, et al.*, No. 1:20-CV-03702 (N.D. Ga.); *Brown v. Azar*, No. 20-14210 (11th Cir.); *Tiger Lily LLC et al. v. U.S. Dept. of Housing and Urban Development et al.*, No. 2:20-cv-02692 (W.D. Tenn.); *Terkel et al. v. Centers for Disease Control and Prevention et al.*, No. 6:20-cv-00564 (E.D. Tex.); *Skyworks, Ltd., et al. v. Centers for Disease Control and Prevention et al.*, No. 5:20-CV-02407 (N.D. Ohio); *Chambless Enterprises et al. v. Redfield et al.*, No. 3:20-CV-1455 (W.D. La.).



Thus, the committee must reject and dismiss count IV of the Petition. The Governor's actions related to evictions from residential premises in Kentucky during the COVID-19 pandemic were and remain lawful exercises of his executive powers in this emergency. The Governor's actions were and remain lawful and necessary to protect Kentuckians from the spread of the disease. The petitioners cannot show otherwise.

#### **VII. The Governor's Lawful Travel Measures Cannot Provide Any Basis For Impeachment.**

The Petition also fails on Count V, which alleges the Governor violated the rights of millions of Kentuckians by restricting their ability to leave the state. The petitioners cite the federal court case of *Roberts v. Neace*, 457 F.3d 595 (E.D. Ky. 2020), in support of their allegation. The petitioners completely ignore that that federal civil action remains pending in the United States District Court for the Eastern District of Kentucky, Covington Division, and the federal court has not issued any decision on the merits of the case. Indeed, the Governor continues to argue that the Executive Orders he issued during the early months of the COVID-19 pandemic were constitutional, most recently in his renewed motion to dismiss the case. *See Roberts v. Neace*, E.D. Ky., No. 2:20-cv-00054-WOB-CJS, Memorandum in Support of Renewed Motion to Dismiss (Jan. 8, 2021).

The Governor's argument rests on United States Supreme Court precedent and multiple court decisions upholding travel restrictions issued during the COVID-19 pandemic. *See Zemel v. Rusk*, 381 U.S. 1 (1965); *Bowditch v. City of Boston*, 101 U.S. 16 (1879); *Lawton v. Steele*, 152 U.S. 133 (1894); *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902); *Jacobson*, 197 U.S. 11; *United States v. Caltex*, 349 U.S. 149 (1953); *In re Abbott*, 954 F.3d 772 (5th Cir. 2020); *Page v. Cuomo*, --- F.Supp.3d ----, 2020 WL 4589329 (N.D.NY Aug. 13, 2020). *See also Hartman v. Acton*, 2020 WL 6445830 (6th Cir. Nov. 3, 2020)

(citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)). Further, in a separate civil action that the petitioners do not cite or reference, in April 2020, a different United States District Court for the Eastern District of Kentucky, declined to enjoin enforcement of the then-existing Executive Order restricting travel. *See W.O. v. Beshear*, E.D. Ky., No. 3:20-cv-0023-GFVT, Order Denying Temporary Restraining Order (Apr. 3, 2020).

Furthermore, no Executive Order restricting travel has existed since May 22, 2020, when Executive Order 2020-415 rescinded Executive Order 2020-315. Issued on May 6, 2020, Executive Order 2020-315 was permissive and merely “asked” any individual entering Kentucky with the intent to stay to self-quarantine for 14 days unless they were traveling for one of the purposes enumerated in the order as exceptions to the request. Executive Order 2020-315 rescinded the provisions of two prior travel orders.

Regardless, the actions related to travel during the COVID-19 pandemic were lawful exercises of the Governor’s executive powers in a public health emergency under the Kentucky Constitution and KRS Chapter 39A, and were authorized under precedent of the United States Supreme Court, other federal courts, and court decisions rendered during the COVID-19 pandemic. Therefore, the travel orders cannot be the basis for impeachment and cannot constitute a violation of KRS 522.030(1)(a).

#### **VIII. *Beshear v. Acree* Forecloses Count VII. Of The Petition.**

As noted *supra*, the Kentucky Supreme Court in *Beshear v. Acree* held the Governor was authorized to exercise his executive powers in this COVID-19 public health emergency, and was authorized to do so statewide, especially considering that Kentucky has a part-time legislature that only the Governor may convene for extraordinary session under Section 80 of the

Constitution. *See generally id.* Specifically rejecting claims about violation of the separation of powers under Sections 27 and 28 of the Kentucky Constitution, the Court found that “our examination of the Kentucky Constitution causes us to conclude the emergency powers the governor has exercised are executive in nature, never raising a separation of powers issue in the first instance.” *Id.* at pp. 47-48. In so holding, the Court stated that the permissive language of Section 80 of the Kentucky Constitution leaves it solely to the Governor whether the General Assembly should be convened for an extraordinary session. *Id.* at p. 47. The Court aptly wrote that “A legislature that is not in continuous session and without constitutional authority to convene itself cannot realistically manage a crisis on a day-to-day basis by the adoption and amendment of laws.” *Id.* at p. 55.

It is beyond cavil that any decision of the Governor to decline to call the General Assembly into extraordinary session is a violation of §§ 27 and 28 when that is a power committed solely to his discretion. The Governor’s choice of when and how to exercise a power assigned solely to the executive cannot form the basis of a claim of official misconduct based on a separation of powers theory. Count VI must be dismissed.

**IX. The General Assembly Authorized The Governor And The Secretary Of State To Alter The Election Process In 2020.**

The petitioners’ impeachment claim based on Governor Beshear’s lawful exercise of statutory powers to adjust the election process is abundantly frivolous and would also provide grounds for the Secretary of State’s impeachment. The petitioners assert that permitting absentee voting by mail – which allowed voters to safely exercise their constitutional right – is contrary to Section 147 of Kentucky’s Constitution. Petitioners are wrong. The 2020 primary and general election plans were a bipartisan triumph that became a national model by permitting record voter turnout while preventing the spread of disease. Petitioners’ inclusion of this count underscores

that the Petition is based not on the serious criminal activity for which impeachment is reserved, but is instead based on political disagreement and personal animus.

There can be no dispute that the 2020 primary and general elections were lawfully administered. Kentucky's Constitution requires that "[a]ll elections shall be free and equal," KY. CONST. § 6, and empowers the General Assembly to provide by law how elections are to be conducted. *See* KY. CONST. § 153 ("Except as otherwise herein expressly provided, the General Assembly shall have power to provide by general law for the manner of voting, for ascertaining the result of elections and making due returns thereof, for issuing certificates or commissions to all persons entitled thereto, and for the trial of contested elections.") During its 2020 session, the General Assembly exercised that power by amending KRS 39A.100(j) to permit the Governor, upon the recommendation of the Secretary of State, to alter the "manner" of an election during an emergency and, in conjunction with the Secretary of State, to approve "[a]ny procedures" for the election. *See* KRS 39A.100(j).

Pursuant to this statutory authority, Governor Beshear, Secretary of State Michael Adams,<sup>45</sup> and the Board of Elections reached bipartisan agreements for both the primary and general elections that allowed Kentuckians to exercise their constitutional right to vote while staying safe.<sup>46</sup> During the primary election, any voter was permitted to use mail-in voting, and early in-person voting was expanded. For the general election, Governor Beshear and Secretary Adams expanded absentee voting by mail to anyone who feared catching or transmitting COVID-19, permitted everyone to vote early in-person for an unprecedented three weeks, and

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<sup>45</sup> The petitioners have not brought a similar charge against Secretary of State Adams, a Republican.

<sup>46</sup> *See* Executive Order 2020-311 (Primary Election), available at <http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2020-MISC-2020-0311-267630.pdf>; Executive Order 2020-688 (General Election), available at <https://governor.ky.gov/attachments/2020.08.14GeneralElection.pdf>.

allowed county clerks to reduce the number of in-person voting locations on election day to ensure they could provide safe voting accommodations.

The result was a resounding success. Primary turnout was 31.1%, and the general election turnout was 64.4%, the highest general election turnout since 2004.<sup>47</sup> Unlike states such as Georgia<sup>48</sup> and New York,<sup>49</sup> voters who wanted to cast their ballots in person did not have to wait hours to do so. And these incredible results were achieved while avoiding the superspreader events that characterized elections in other states, including Illinois<sup>50</sup> and Wisconsin.<sup>51</sup> The public resoundingly supported the election plan, and commentators and election experts from across the political spectrum applauded Governor Beshear and Secretary of State Adams.<sup>52</sup>

No one – not the petitioners, not the candidates, not the members of the General Assembly – challenged these changes prior to the election. Not a single lawsuit was brought claiming that expanded absentee voting was unconstitutional. To the contrary, by adopting a safe method for voting during COVID-19, Governor Beshear was able to secure the dismissal of lawsuits that alleged that failing to provide adequate absentee voting violated the First and

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<sup>47</sup> See <https://elect.ky.gov/Resources/Documents/voteturnoutagesex-2020P-20200823-072712.pdf> (2020 Primary Turnout); <https://elect.ky.gov/Resources/Documents/voteturnoutagesex-2020G-20210113-040625.pdf> (2020 General Election Turnout); <https://elect.ky.gov/Resources/Pages/Turnout.aspx> (Turnout Rates for Prior Elections).

<sup>48</sup> Associated Press, ‘A complete meltdown’: Long lines snarl voting in Georgia primary amid coronavirus, Los Angeles Times (June 9, 2020), available at <https://www.latimes.com/world-nation/story/2020-06-09/georgia-primary-will-protest-energy-shift-voting-booth> (last visited Jan. 18, 2021).

<sup>49</sup> CBS New York, New York Primary Plagued By Voting Issues, Including Long Lines, Broken Machines And Absentee Ballot Mix-Ups, available at

<sup>50</sup> Dana Kozlov, Multiple Chicago Primary Poll Workers Later Fell Ill With COVID-19, One Poll Worker Died, CBS Chicago (Apr. 13, 2020), available at <https://chicago.cbslocal.com/2020/04/13/poll-worker-who-was-on-duty-on-south-side-for-march-17-primary-dies-of-coronavirus/> (last visited Jan. 18, 2021).

<sup>51</sup> Chad Cotti et al., The Relationship Between In-Person Voting and COVID-19: Evidence from the Wisconsin Primary, NBER Working Paper 27187, available at

[https://www.nber.org/system/files/working\\_papers/w27187/w27187.pdf](https://www.nber.org/system/files/working_papers/w27187/w27187.pdf) (last visited Jan. 18, 2021).

<sup>52</sup> Editorial, Voting during a pandemic doesn’t have to be a disaster. Look at Kentucky., The Washington Post (June 24, 2020), available at [https://www.washingtonpost.com/opinions/voting-during-a-pandemic-doesnt-have-to-be-a-disaster-look-at-kentucky/2020/06/24/de95fe3a-b583-11ea-a8da-693df3d7674a\\_story.html](https://www.washingtonpost.com/opinions/voting-during-a-pandemic-doesnt-have-to-be-a-disaster-look-at-kentucky/2020/06/24/de95fe3a-b583-11ea-a8da-693df3d7674a_story.html) (last visited Jan. 18, 2021); Ben Tobin and Philip M. Bailey, Kentucky to allow mail-in ballots for every registered voter in June 23 primary, The Courier-Journal (Apr. 24, 2020), available at <https://www.courier-journal.com/story/news/2020/04/24/coronavirus-kentucky-mail-voting-allowed-2020-primaries/3019216001/> (last visited Jan. 18, 2021).

Fourteenth Amendments of the U.S. Constitution and Section 6 of the Kentucky Constitution. See *Collins v. Adams*, No. 3:20-cv-00375-CRS (W.D. Ky.), and *Sterne v. Adams*, No. 20-CI-538 (Franklin Cir. Ct.).

No one raised the claim the petitioners raise here because they are entirely wrong on the law. The petitioners contend that Section 147 of the Kentucky Constitution prohibits absentee voting by people who are physically present in their counties on election day. That argument ignores precedent and common sense. Kentucky's highest court has explained that Section 147 provides broad power in determining the contours of absentee voting, as it "contains no declarative limitation of legislative power on the subject of absentee voting...." *Hallahan v. Mittlebeeler*, 373 S.W.2d 726, 728 (Ky. 1963). See also *id.* ("So long as constitutional guarantees are observed, the Legislature is unhampered in its discretion in dealing with practical exigencies.") (quoting *Jones v. Russell*, 6 S.W.2d 460 (Ky. 1928)). Consistent with this flexibility, and the duty to protect the right of citizens to vote, the General Assembly has long permitted voters with medical conditions that prevent them from traveling to polling places to cast absentee ballots. See KRS 117.077 ("In case of a medical emergency within fourteen (14) days or less of an election, a registered voter and the registered voter's spouse may apply for an absentee ballot.")

This year, the General Assembly delegated to the Governor and Secretary of State the power to modify the election procedures to keep the public safe. Under that statutory authority, Governor Beshear and Secretary of State Adams expanded the existing medical absentee to apply to those at risk of catching or spreading COVID-19, a deadly respiratory pandemic. That response was more than reasonable, particularly given the alternative, which was to require voters or election officials to risk their lives for in-person voting.

Moreover, the petitioners' argument ignores the numerous legal provisions that protect the right to vote, including the First and Fourteenth Amendments to the U.S. Constitution (and implementing legislation including the Voting Rights Act), the Americans with Disabilities Act, and Section 6 of the Kentucky Constitution, which guarantees a free and fair election. Indeed, multiple courts ordered election officials in other states to remove obstacles to absentee voting during the pandemic. *See, e.g., Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020) (upholding lower court decision enjoining signature requirement for absentee ballots because “[t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote”); *League of Women Voters of Virginia v. Virginia State Bd. of Elections*, --- F. Supp. 3d ---, No. 6:20-CV-00024, 2020 WL 4927524, at \*1 (W.D. Va. Aug. 21, 2020) (confirming consent decree regarding signature requirement for absentee voters); *Drenth v. Boockvar*, No. 1:20-CV-00829, 2020 WL 2745729, at \*1 (M.D. Pa. May 27, 2020)(requiring Pennsylvania to provide accessible ballots for blind individuals to vote privately and independently from home). Thus, even if Section 147 of the Constitution limited absentee voting in the way the petitioners contend, that limitation must give way to the rights of the people to vote without risking their lives to a deadly disease.

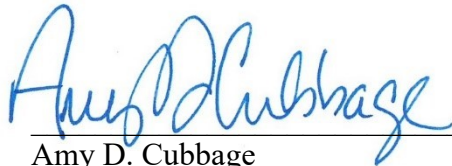
Governor Beshear worked in a bipartisan manner with Secretary of State Adams to ensure Kentuckians could safely vote in both the primary and general elections. The petitioners' after-the-fact impeachment count against Governor Beshear for these actions is entirely without merit.

## CONCLUSION

The petitioners brought the claims in the Petition to federal courts and raise bald allegations that the Supreme Court of Kentucky unanimously rejected. Like they have in multiple state and federal courts, the petitioners' claims must again overwhelmingly fail here. They now present their increasingly violent demands and faulty, vague claims to this body in an effort to get another bite at the apple and to overturn both the will of the people and the reasoned judgments of the Kentucky Supreme Court, the United States Supreme Court, as well as various lower state and federal courts. This body must uphold the Commonwealth's constitutional order and put an end to this vendetta that has no support in the law or reality. The petitioners have not and, indeed, cannot state a case for impeachment. The Committee must dismiss the Petition.

Dated: January 22, 2021

Respectfully submitted,



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# Exhibit A

# Supreme Court of Kentucky

2020-SC-0313-OA

HONORABLE ANDREW BESHEAR, IN  
HIS OFFICIAL CAPACITY AS  
GOVERNOR OF THE  
COMMONWEALTH OF KENTUCKY;  
ERIC FRIEDLANDER, IN HIS  
OFFICIAL CAPACITY AS SECRETARY  
OF THE KENTUCKY CABINET FOR  
HEALTH AND FAMILY SERVICES; DR.  
STEVEN STACK, IN HIS OFFICIAL  
CAPACITY AS COMMISSIONER OF  
THE KENTUCKY DEPARTMENT FOR  
PUBLIC HEALTH; THE KENTUCKY  
CABINET FOR HEALTH AND FAMILY  
SERVICES; AND THE KENTUCKY  
DEPARTMENT FOR PUBLIC HEALTH

PETITIONERS

v.

ORIGINAL ACTION IN THE SUPREME COURT  
ARISING FROM THE COURT OF APPEALS  
CASE NO. 2020-CA-0834  
BOONE CIRCUIT COURT CASE NO. 20-CI-00678

HONORABLE GLENN E. ACREE,  
JUDGE, KENTUCKY COURT OF  
APPEALS; AND HONORABLE  
RICHARD A. BRUEGGEMANN,  
JUDGE, 52ND JUDICIAL CIRCUIT,  
BOONE CIRCUIT COURT

RESPONDENTS

AND

FLORENCE SPEEDWAY, INC.;  
RIDGEWAY PROPERTIES, LLC, D/B/A  
BEANS CAFE & BAKERY; LITTLE  
LINKS LEARNING, LLC; AND  
HONORABLE DANIEL J. CAMERON,  
IN HIS OFFICIAL CAPACITY AS  
ATTORNEY GENERAL

REAL PARTIES IN INTEREST

## **OPINION OF THE COURT BY JUSTICE HUGHES**

### **REVERSING**

### **INTRODUCTION**

On March 6, 2020, as the COVID-19 global pandemic reached Kentucky, Governor Andy Beshear declared a state of emergency pursuant to Executive Order 2020-215. In the ensuing days and weeks, he issued additional executive orders and emergency regulations to address the public health and safety issues created by this highly contagious disease. In late June, three Northern Kentucky business owners filed suit in the Boone Circuit Court challenging various orders affecting the reopening of their respective businesses as well as the Governor's authority generally in emergencies. Attorney General Daniel Cameron intervened as a plaintiff, and the parties proceeded to obtain a restraining order that prohibited enforcement of certain of the emergency orders.

In response to that action with its imminent injunction hearing and at least one similar case elsewhere in the Commonwealth, this Court entered an order on July 17, 2020, staying all injunctive orders directed at the Governor's COVID-19 response until those orders were properly before this Court, with full record, pursuant to the direction of the Court. Having received briefs and heard oral argument, this Court addresses five primary questions. We begin by summarizing our answers to those questions.

**I. Did the Governor Properly Declare a State of Emergency and Validly Invoke the Emergency Powers Granted to Him in Kentucky Revised Statute (KRS) Chapter 39A?**

Yes. KRS 39A.100 authorizes the Governor to declare a state of emergency in the event of the occurrence of any of the situations or events contemplated by KRS 39A.010, which includes biological and etiological hazards such as the COVID-19 pandemic. Although the governing statutes do not require resort to the definition of “emergency” in KRS 39A.020(12), if that definition were applicable it would not inhibit the Governor’s authority. The local emergency management agencies referenced in KRS 39A.020(12) “shall, for all purposes, be under the direction . . . of the Governor when [he] deems that action necessary.” KRS 39B.010(5). Thus, the Governor was authorized to act without deference to any determination by a local authority or emergency management agency. On March 30, 2020, the General Assembly acknowledged the state of emergency declared by the Governor and “the efforts of the Executive Branch to address . . . the outbreak of COVID-19 virus, a public health emergency.” 2020 S.B. 150.

**II. Is KRS Chapter 39A With Its Provisions Regarding the Governor’s Powers in the Event of an Emergency an Unconstitutional Delegation of Legislative Authority in Violation of the Separation of Powers Provisions of Sections 27 and 28 of the Kentucky Constitution?**

No. The Kentucky Constitution does not directly address the exercise of authority in the event of an emergency except as to those events requiring the military, the Governor being the “commander-in-chief of the army and navy of this Commonwealth and of the militia thereof.” Ky. Const. § 75. However, our Constitution, which provides for a part-time legislature incapable of convening

itself, tilts toward emergency powers in the executive branch. Section 80 provides the Governor “**may**, on extraordinary occasions, convene the General Assembly” and may do so at a different place if Frankfort has “become dangerous from an enemy or from contagious diseases.” (Emphasis added.) The language is permissive, not mandatory. So emergency powers appear to reside primarily in the Governor in the first instance, but to the extent they are perceived as legislative, KRS Chapter 39A is a lawful delegation of that power with sufficient standards and procedural safeguards to pass constitutional muster. Kentucky has recognized the lawful delegation of legislative powers for decades, and we decline to overrule that precedent, especially in circumstances that would leave the Commonwealth without day-to-day leadership in the face of a pandemic affecting all parts of the state. Notably, the General Assembly, in 2020 Senate Bill 150, recognized the Governor’s use of the KRS Chapter 39A emergency powers, directed him to declare in writing when the COVID-19 emergency “has ceased” and further provided: “In the event no such declaration is made by the Governor on or before the first day of the next regular session . . . the General Assembly may make the determination.”

### **III. Was the Governor Required to Address the COVID-19 Emergency Solely Through Emergency Regulations Adopted Pursuant to KRS Chapter 13A?**

No. The General Assembly has specifically authorized the Governor in KRS 39A.090, .100 and .180 to act through executive orders and regulations that supersede “[a]ll existing laws, ordinances, and administrative regulations.” KRS 39A.180(2). KRS Chapter 13A is not controlling in the event of a declared

emergency pursuant to KRS 39A.010(1). In any event, the procedural safeguard of public notice is satisfied because KRS 39A.180 mandates that all emergency orders and administrative regulations issued by the Governor or any state agency “shall have the full force of law” when “a copy is filed with the Legislative Research Commission,” just as occurs under KRS Chapter 13A.

**IV. Do the Challenged Orders or Regulations Violate Sections 1 or 2 of the Kentucky Constitution Because They Represent the Exercise of “Absolute and Arbitrary Power Over the Lives, Liberty and Property” of Kentuckians?**

Only one subpart of one order, no longer in effect, was violative of Section 2. Property rights are enumerated in the Kentucky Constitution and are entitled to great respect, but they are not fundamental rights in the sense that all governmental impingements on them are subject to strict scrutiny, particularly in the area of public health. As with all branches of government, the Governor is most definitely subject to constitutional constraints even when acting to address a declared emergency. In this case, however, the challenged orders and regulations have not been established to be arbitrary, i.e., lacking a rational basis, except for one subpart of one order regarding social distancing at entertainment venues that initially made no exception for families or individuals living in the same household. Executive orders in emergency circumstances, especially where public health and safety is threatened, are entitled to considerable deference by the judiciary. During the course of this litigation, several of the orders and regulations at issue were superseded or changed, rendering some of the challenges moot.

## **V. Did the Boone Circuit Court Properly Issue Injunctive Relief Prohibiting Enforcement of the Governor's Orders or Regulations?**

No. Injunctive relief requires that a plaintiff prove irreparable injury, establish that the equities favor issuance of the injunction and raise a substantial question on the underlying merits, defined as a substantial possibility that the plaintiff will ultimately prevail. Given our conclusion regarding the lawful manner in which the Governor has responded to the COVID-19 emergency, Plaintiffs have not raised a substantial question on the merits with respect to their insistence that the Governor must first contact and defer to local emergency response agencies pursuant to KRS 39A.020(12); their separation of powers argument; their claim that KRS Chapter 13A controls issuance of all executive orders and regulations; or their argument that the Governor has exercised arbitrary powers in violation of Sections 1 and 2 of the Kentucky Constitution. Even if some Plaintiffs arguably have established irreparable harm to their businesses, that alone is insufficient to justify an injunction precluding enforcement of emergency orders and regulations directed to the protection of the health and safety of **all** Kentuckians. Applying our time-honored injunction standard, the law and equities favor the Governor in this matter.

Before turning to the facts of this case, we note that if Plaintiffs and the Attorney General were successful on any one of the first three issues of law—proper invocation of emergency powers, separation of powers among the three branches of government or applicability of KRS Chapter 13A—it would be the proverbial “knock-out punch” because it would undermine all of the Governor’s

COVID-19 response.<sup>1</sup> Because the law does not support them on those issues, their remaining argument that the Governor has acted arbitrarily in violation of Sections 1 and 2 of the Kentucky Constitution requires consideration of certain challenged individual executive orders and regulations. We do that below.

Before proceeding further, we first note that this case has been heralded as the “face mask” case, but as Plaintiffs’ counsel acknowledged at oral argument, that is not entirely accurate. Very little proof was elicited in the Boone Circuit Court regarding face masks and the proposed final injunction order makes no specific findings as to face masks other than the Plaintiffs’ asserted willingness to require employees and customers to wear them and a passing reference to a study comparing cloth masks to medical masks. In the end, the only face mask issue presented to this Court is whether the penalty provisions in the emergency regulation are enforceable. Second, although reference is made in briefs and the Boone Circuit Court order to earlier restraints on religious activities and elective medical procedures, neither of those issues is before us in this case. The religious challenges have been litigated in federal court, and no religious organization or health care provider has appeared in this case to challenge the Governor’s COVID-19 response.<sup>2</sup> With those clarifications, we turn to what is before this Court.

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<sup>1</sup> The actual declaration of emergency would only be undermined if the first or second argument was successful.

<sup>2</sup> Public perception that restrictions on nursing home or hospital visitation are at issue in this case is also in error because those restrictions are not before us and in any event stem from a combination of state and federal directives. *See, e.g.*, Cabinet for Health and Family Services, *Provider Guidance Update: Phased Reduction of Restrictions for Long Term Care Facilities* (Oct. 7, 2020), <https://chfs.ky.gov/cv19/>



## FACTS AND PROCEDURAL HISTORY

COVID-19 is a respiratory disease caused by a virus that transmits easily from person-to-person and can result in serious illness or death. According to the Centers for Disease Control and Prevention (CDC), the virus is primarily spread through respiratory droplets from infected individuals coughing, sneezing, or talking while in close proximity (within six feet) to other people.<sup>3</sup> On January 31, 2020, the United States Department of Health and Human Services declared a national public health emergency, effective January 27, 2020, based on the rising number of confirmed COVID-19 cases in the United States.<sup>4</sup> The CDC identified the potential public health threat posed by COVID-19 nationally and world-wide as “high.”<sup>5</sup>

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LTCFGuidancePhasedRestoration.pdf; Centers for Disease Control and Prevention (CDC), *Healthcare Facility Guidance*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-hcf.html> (last updated June 28, 2020); and Centers for Medicare & Medicaid Services, *Nursing Home Reopening Recommendations for State and Local Officials*, <https://www.cms.gov/files/document/qso-20-30-nh.pdf-0> (last updated Sept. 28, 2020).

<sup>3</sup> In addition, a person possibly can contract COVID-19 by touching a surface or object that has the virus on it and then touching their own nose, mouth or eyes. CDC, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last updated Sept. 21, 2020).

<sup>4</sup> U.S. Department of Health and Human Services, *Determination that a Public Health Emergency Exists* (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

<sup>5</sup> See Anne Schuchat, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 24-April 21, 2020* (May 8, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e2-H.pdf>; CDC, *Global COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/> (last updated Nov. 5, 2020). See also World Health Org., *Novel Coronavirus (2019-nCoV): Situation Report-13* (Feb. 2, 2020), <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200202-sitrep-13-ncov-v3.pdf>.

On March 6, 2020, Governor Andy Beshear, under the authority vested in him pursuant to KRS Chapter 39A, declared a state of emergency in Kentucky. Executive Order 2020-215. Subsequently, all 120 counties in Kentucky declared a state of emergency.<sup>6</sup> After the statewide declaration, Kentucky's Cabinet for Health and Family Services (the Cabinet) began issuing orders designed to reduce and slow the spread of COVID-19 and thereby promote public health and safety. Those orders included directives such as prohibiting on-site consumption of food and drink at restaurants, closing businesses that encourage congregation, and prohibiting mass gatherings. As knowledge regarding the heretofore unknown novel coronavirus (COVID-19) grew, the Governor and the Cabinet modified their orders accordingly.<sup>7</sup>

On March 17, 2020, the Cabinet issued an order requiring all public-facing businesses that encourage public congregation to close, including gyms, entertainment and recreational facilities, and theaters.<sup>8</sup> These emergency measures worked to reduce COVID-19 cases by limiting gatherings where the virus could be transmitted. The Governor announced on April 21, 2020, the

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<sup>6</sup> Kentucky Association of Counties, *COVID-19 County Emergency Declarations* (Mar. 23, 2020), <https://covid-19.kaco.org/covid-19-newsroom/covid-19-county-emergency-declarations>.

<sup>7</sup> We note at the outset that some of the challenged orders in this case were issued by the Cabinet, and others were issued by the Governor. Therefore, references to the challenged orders will include orders issued by both the Governor and the Cabinet, unless otherwise noted.

<sup>8</sup> Other public-facing businesses required to close included salons and concert venues. Certain essential businesses were permitted to stay open, such as businesses providing food, banks, post offices, hardware stores, and health care facilities. These businesses were subject to minimum requirements, such as maintaining social distance between persons and regularly cleaning commonly touched surfaces.

“Healthy at Work” initiative, a phased reopening plan based on criteria set by public health and industry experts to help Kentucky businesses reopen safely. On May 11, 2020, the Commonwealth began reopening its economy and the Cabinet issued minimum requirements that all public and private entities were required to follow, such as maintaining social distance between persons, requiring employees to wash hands regularly, and routinely cleaning and sanitizing commonly touched surfaces.

On May 22, 2020, restaurants were permitted to reopen for in-person dining, subject to 33% maximum capacity for indoor dining. Pertinent to the underlying case, the Cabinet issued an order on June 3, 2020, allowing automobile racing tracks to reopen with specific requirements, such as only allowing authorized employees and essential drivers on the premises, utilizing social distancing, implementing cleaning and disinfecting procedures, and requiring the use of personal protective equipment (PPE) in certain instances.<sup>9</sup>

Florence Speedway, Inc., an automobile racing track in Walton, Kentucky, filed a complaint in the Boone Circuit Court on June 16, 2020, against the Northern Kentucky Independent Health District (NKIHD), the organization charged with enforcing public health orders in Northern Kentucky. The complaint requested judicial review of a series of orders issued by the

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<sup>9</sup> Personal protective equipment refers to equipment worn for protection from COVID-19 and includes equipment such as face coverings, eye protection, gowns, and gloves. CDC, *Optimizing PPE Supplies*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html>. In its June 1, 2020 requirements for automobile racing tracks, the Cabinet required that employees, racing crews, and emergency medical crews use appropriate face coverings and other PPE (last updated July 16, 2020).

Governor and the Cabinet, alleging violations of multiple provisions of the Kentucky Constitution. Florence Speedway sought declaratory and injunctive relief deeming the orders unconstitutional and enjoining NKIHD from enforcing them.

Shortly thereafter, Florence Speedway filed an amended verified class action complaint that included Ridgeway Properties, LLC, d/b/a Beans Cafe & Bakery (Beans Cafe), located in Dry Ridge, Kentucky, and Little Links Learning, LLC (Little Links), a childcare center in Fort Wright, Kentucky, as Plaintiffs (collectively referred to as Plaintiffs).<sup>10</sup> In addition to NKIHD, the June 22, 2020 amended complaint included Dr. Lynne Sadler (District Director of the NKIHD), Governor Beshear, the Cabinet, Eric Friedlander (Secretary of the Cabinet), and Dr. Steven Stack (Commissioner of Public Health) as Defendants. Plaintiffs assert that the challenged orders (1) violate Section 1 of the Kentucky Constitution, which protects the rights of life, liberty, pursuit of safety and happiness, and acquiring and protecting property; (2) are arbitrary, in violation of Section 2 of the Kentucky Constitution; (3) violate the separation of powers provisions in Sections 27 and 28 of the Kentucky Constitution; (4) exceed the Governor's statutory authority to act pursuant to KRS 39A.100; and (5) are

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<sup>10</sup> Theodore J. Roberts was included as a Plaintiff in the amended complaint. Roberts suffers from asthma and alleged that mask usage presents a threat to his health. He was originally a party to the suit because he sought to challenge the mask usage requirements for barber shop patrons. However, on June 25, 2020, Governor Beshear amended the requirements for barbershops, making mask wearing for customers recommended, but not required. Roberts sought to be dismissed from the case on June 29, 2020. It is unclear whether he was dismissed by the trial court, but in any event, he is not named as a party in this appeal.

illegal because they violate the procedures outlined in KRS Chapter 13A for the adoption of regulations.

The amended complaint alleges specific issues with particular orders as they pertain to each business. Florence Speedway alleges that only allowing authorized employees and essential drivers and crews on the speedway premises is arbitrary and discriminatory because outdoor gatherings are safer than indoor gatherings, such as those in restaurants and bowling alleys, which are allowed at 33% capacity. With outdoor grandstands for spectators, Florence Speedway maintains it could operate at 33% capacity and use social distancing measures and contrasts its restrictions to the requirements for outdoor auctions which have no attendance limitations. Additionally, Florence Speedway challenges limiting its food service to “carry-out only” as arbitrary and discriminatory given that restaurants are permitted to operate at 33% capacity indoors. Finally, Florence Speedway claims that requiring PPE with no exceptions is arbitrary and prevents it from complying with the Americans with Disabilities Act.<sup>11</sup>

Beans Cafe raises issues with the requirement that employees must wear PPE (unless it would jeopardize their health) whenever they are near other employees or customers. The cafe alleges there are no requirements for employees working in the hot kitchen to wear masks, yet face masks are

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<sup>11</sup> 42 U.S.C. §§ 12101-12213 (2009).

required for other employees.<sup>12</sup> According to allegations in the amended complaint, little scientific basis exists for requiring face masks because cloth face masks do not protect the wearer, rendering the requirement arbitrary. The amended complaint also alleges that it is arbitrary and capricious to limit restaurants to 33% indoor capacity and require six feet of distance between customers because these requirements make it difficult, if not impossible, for restaurants to make a profit.

Little Links’s allegations pertain to childcare facility restrictions. Center-based childcare programs, like Little Links, were closed on March 20, 2020, but Limited Duration Centers (LDCs) were permitted to open. LDCs are childcare programs that provide temporary emergency childcare for employees of health care entities, first responders, corrections officers and Department for Community Based Services’s workers.<sup>13</sup>

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<sup>12</sup> The requirements for restaurants state that “Restaurants should ensure employees wear face masks for any interactions with customers, co-workers, or while in common travel areas of the business (e.g., aisles, hallways, loading docks, breakrooms, bathrooms, entries and exits). Restaurant employees are not required to wear face masks while alone in personal offices, while more than six (6) feet from any other individual, or if doing so would pose a serious threat to their health or safety.” It is unclear why Beans Cafe states that employees working in the kitchen do not have to wear face masks—whether, due to the hot temperatures, it would pose risks to their health to cover their faces, or whether they are spaced further than six feet apart. As written, the regulation makes no distinction between employees in the kitchen and those working elsewhere in a restaurant.

<sup>13</sup> On May 8, 2020, Inspector General Adam Mather issued supplemental guidance for verification of employment for childcare within an LDC. Comparing it to the March 19 guidance, it expands those able to use the LDCs. It provides that “Employees of a health care entity, First Responders (Law Enforcement, EMS, Fire Departments), Corrections Officers, Military, Activated National Guard, Domestic Violence Shelter Workers, Essential Governmental Workers, large structured physical plants employing 1000 staff or more, and Grocery Workers will be required to submit verification of employment . . . .” Cabinet for Health and Family Services – Office of

All childcare programs were permitted to reopen on June 15, 2020, subject to several requirements, including the following: (1) all childcare programs must utilize a maximum group size of ten children per group; (2) children must remain in the same group of ten children all day without being combined with another classroom; (3) childcare programs may not provide access to visitors or students conducting classroom observations; (4) adults must wear a face mask while inside a childcare program unless doing so would represent a serious risk to their health or safety or they are more than six feet away from any other individual; and (5) children five years of age and younger should not wear masks due to increased risks of suffocation and strangulation. Childcare programs were authorized to recommend to the parents of children over five years of age that their child wear a mask.

Conversely, LDCs were not subject to the ten children group size limitation and were instead subject to a premises requirement of thirty square feet per child. Presumably, if an LDC was particularly large, it could exceed the ten children per group requirement that was imposed on center-based childcare facilities.

Little Links alleges that the ten children per group requirement constitutes a significant limitation on the operation of a childcare facility and forces many providers to operate their businesses at a loss. Additionally,

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Inspector General, *Coronavirus (COVID-19) – Interim Guidance for Verification of Employment for Child Care within a Limited Duration Center* (May 8, 2020), <https://chfs.ky.gov/cv19/ChildCareguidance.pdf>.

requiring that children remain in the same group all day poses issues for end-of-the-day operations because childcare centers are not permitted to combine children from the same household in the same room, a customary practice in the childcare industry. Little Links alleges that the fact that these children will be in the same car and household together makes this requirement arbitrary. The prohibition on visitors, according to Little Links in its amendment to the motion for temporary injunction, arbitrarily prevents tours for prospective clients. Lastly, the adult mask requirement presents significant issues in a childcare setting because it is difficult for adults in masks to comfort upset children or assist children in the learning process because non-verbal communication is typically used.

Several of the challenged orders and regulations changed after the filing of the amended complaint, some following the conclusion of injunction proceedings in the circuit court. As of September 1, 2020, center-based childcare programs and LDCs became subject to the same requirements with the promulgation of 922 Kentucky Administrative Regulation (KAR) 2:405E. The regulation permits both center-based childcare programs and LDCs to maintain a maximum group size of fifteen children<sup>14</sup> but maintains the requirement that children remain in the same group throughout the day without combining with another group. In addition, the regulation allows tours to potential clients after regular operating hours if no children are in the facility

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<sup>14</sup> The group size applies to children age twenty-four months and older.



during the tour and the provider ensures all affected areas are cleaned after the conclusion of the tour. The regulation also provides that childcare providers shall not divide classroom space using a temporary wall in a manner that results in less than thirty-five (35) square feet of space per child. 922 KAR 2:405E.<sup>15</sup> Further, as of September 1, 2020, the stated purpose for LDCs is “to provide temporary emergency childcare for nontraditional instruction during traditional school hours to meet instructional needs.”<sup>16</sup>

On June 22, 2020, the requirements for restaurants were amended, allowing an increase from 33% to 50% indoor dining capacity. On June 29, 2020, the public-facing businesses order was amended to allow venues and event spaces, including Florence Speedway, to reopen to the public. The amendment allows 50% of the maximum capacity permitted at a venue, assuming all individuals can maintain six feet of space between them with that level of occupancy. Additionally, if the venues operate any form of dining service, those services must comply with the requirements for restaurants and bars.

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<sup>15</sup> See also Cabinet for Health and Family Services – Office of the Inspector General, *Novel Coronavirus (COVID-19) Limited Duration Centers Frequently Asked Questions* (Sept. 1, 2020), <https://chfs.ky.gov/cv19/FAQLDC.pdf> (indicating that each LDC location should account for thirty-five square feet per child).

<sup>16</sup> Cabinet for Health and Family Services – Office of the Inspector General, *supra* n.15; compare with Cabinet for Health and Family Services – Office of the Inspector General, *Novel Coronavirus (COVID-19) Limited Duration Centers Frequently Asked Questions* (Mar. 2020), <https://childcarecouncilofky.com/wp-content/uploads/2020/03/FAQ-LDCe-003.pdf> (identifying LDC to be a center approved to provide temporary emergency childcare to health care employees, first responders, corrections officers and DCBS workers). See 922 KAR 2:405E.

On June 24, 2020, Plaintiffs filed in the Boone Circuit Court case an emergency motion for a restraining order pursuant to Kentucky Rule of Civil Procedure (CR) 65.03 and a temporary injunction pursuant to CR 65.04. Alleging irreparable damage to their respective businesses, Plaintiffs requested the circuit court enjoin all further enforcement of the challenged orders.

Meanwhile, in a similar case challenging the constitutionality of the COVID-19 emergency orders, Ryan Quarles, the Commissioner of Agriculture, and Evans Orchard and Cider Mill, LLC (Evans Orchard), filed a complaint in Scott Circuit Court on June 29, 2020. The Attorney General intervened in that action. As the Commissioner of Agriculture, Quarles is charged with promoting agritourism in Kentucky and assisting with sustaining the industry's viability and growth, including the 548 agritourism businesses currently operating in the Commonwealth. Evans Orchard is a family-owned business that operates "agritourism attractions," like pick-your-own fruits, a retail market that sells food products, a cafe and bakery, and an event barn for weddings and other events. Evans Orchard alleged that it would be unable to operate profitably certain aspects of its business while the COVID-19 emergency orders remain in effect. Generally, the complaint alleges that the orders are unconstitutional for the same reasons raised in the Boone County litigation.

On June 30, 2020, the Governor responded in opposition to the Plaintiffs' restraining order/injunction motion, emphasizing the public health measures he and other public officials have taken to slow the escalation of COVID-19. Citing the injunction standard, Governor Beshear argued that Plaintiffs failed

to demonstrate a substantial question on the merits of the case because they have no absolute right to operate free from health and safety regulations; failed to establish immediate, irreparable injury; and did not have the equities in their favor given the potential harm to public health and safety if the injunction issued. Additionally, he argued the orders are a valid use of the Commonwealth's police power and the Governor's statutory authority to respond to emergencies. The Governor also noted that since the complaint was filed, the orders were amended to allow restaurants to increase their indoor seating capacity from 33% to 50% and that venues, like the Florence Speedway, could now host 50% of their normal maximum capacity.

Attorney General Daniel Cameron filed a motion to intervene in the Boone Circuit Court action and simultaneously filed an intervening complaint on June 30, 2020.<sup>17</sup> The Attorney General's intervening complaint mirrored several of Florence Speedway's, Beans Cafe's, and Little Links's arguments, and sought the following declarations: KRS Chapter 39A is an unconstitutional delegation of lawmaking authority; the Governor's orders are arbitrary and invalid because they exceed his statutory authority; the Governor's orders must

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<sup>17</sup> According to the Attorney General, the motion to intervene was filed pursuant to CR 24.01 and CR 24.02 to protect the rights of Kentucky citizens. The Commonwealth has a statutory right to intervene under KRS 15.020, which states that the Attorney General shall "enter his appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state . . . in which the Commonwealth has an interest." Attorney General Cameron also asserted that the trial court should grant permissive intervention pursuant to CR 24.02 because the Commonwealth sought to assert claims against the same group of state officials as the original complaint for violating the constitutional rights of Kentucky citizens.

be promulgated under the provisions of KRS Chapter 13A; and the Governor's orders violate various sections of the Kentucky Constitution. He also filed a motion for a restraining order on July 1, 2020. The motion asserted that the Governor did not comply with KRS Chapter 39A in declaring an emergency and raised several allegations regarding the legality of the chapter, specifically noting the lack of any time limitations on the Governor's executive orders and suspension of laws.

Additionally, the Attorney General argued that Governor Beshear lacked authority to declare a state of emergency pursuant to KRS 39A.100(1) because KRS 39A.020(12) defines "emergency" as "any incident or situation which poses a major threat to public safety so as to cause, or threaten to cause, loss of life, serious injury, significant damage to property, or major harm to public health or the environment **and which a local emergency response agency determines is beyond its capabilities.**" (Emphasis added.) The Attorney General argued that Governor Beshear failed to establish that any local emergency response agency had determined that the situation caused by COVID-19 was "beyond its capabilities." According to the Attorney General, this clause of the statute demonstrates the public policy of the legislature that disaster and emergency response be addressed first as a local matter, so that those closest to the scene of an "emergency" are entrusted with coordinating the response.

The Boone Circuit Court conducted a hearing on the motion for a restraining order on July 1, 2020. No witnesses were called, but the Plaintiffs

provided the trial court with copies of the Healthy At Work Requirements for Automobile Racing Tracks, effective June 1, 2020; the Healthy At Work Requirements for Venue and Event Spaces, effective June 29, 2020; and the Attorney General opinion OAG-19-021.<sup>18</sup> The next day, the trial court granted Plaintiffs' motion for an emergency restraining order and enjoined the Governor and the Cabinet from enforcing the June 1, 2020 requirements for automobile racing tracks, specifically holding that automobile racing tracks can operate at 50% capacity so long as all individuals could maintain six feet of distance between households. The trial court also enjoined the Governor and the Cabinet from enforcing the June 8, 2020 requirements that limit group sizes in childcare facilities to ten children and require children to remain in the same group all day. The restraining order specifically states that childcare programs shall be permitted to maintain a maximum group size of twenty-eight children.

In its July 2 order, the trial court determined that two of the Plaintiffs were entitled to injunctive relief. The trial court was satisfied that the impending loss of business, including the goodwill built up through years of serving customers, constituted irreparable harm and that the equities favored Florence Speedway and Little Links. Additionally, the trial court determined that Florence Speedway and Little Links sufficiently established that a

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<sup>18</sup> The Attorney General's opinion discussed whether a county judge or county executive could invoke the emergency powers of KRS Chapters 39A-39F to fill the position of County Road Supervisor in the absence of action by the Fiscal Court. The Attorney General opined that this type of vacancy does not constitute an "emergency" as contemplated by KRS Chapters 39A-39F.

substantial question exists on the merits of their claim because “it is unclear what criteria is being used to establish which businesses may survive versus those that must shutter.” The trial court specifically identified the fact that attendance at movie theaters is allowed, and the Governor has permitted horse races, yet attending automobile races is not allowed. The trial court scheduled a hearing for July 16, 2020 to hear the Attorney General’s motion for a restraining order and Plaintiffs’ motion for a temporary injunction.

In response, on July 6, 2020, the Governor filed a petition for a writ of mandamus in the Court of Appeals, along with a motion for intermediate relief pursuant to CR 76.36(4). The petition sought a writ to (1) mandate that the Boone Circuit Court dissolve the July 2, 2020 restraining order; (2) prohibit the Boone Circuit Court from hearing the Attorney General’s motion for a restraining order and the temporary injunction motion of the remaining Plaintiffs; and (3) grant intermediate relief staying enforcement of the July 2, 2020 restraining order during the pendency of the writ action. The Governor argued that a writ was necessary because the restraining order negated the statewide public health response to the spread of COVID-19. Further, not only was the restraining order contrary to law but it dangerously eliminated restrictions put in place based on the guidance of public health officials. The Governor insisted that the trial court’s decision would inevitably lead to more COVID-19 cases, illnesses, and deaths.

Meanwhile the Scott Circuit Court entered an order on July 9, 2020, enjoining the Governor, and others, from enforcing an executive order against

Evans Orchard or any other agritourism business in Kentucky. In addition, the order also stated that prior to issuing any other executive order pursuant to KRS Chapter 39A, the Governor must “specifically state the emergency that requires the order, the location of the emergency, and the name of the local emergency management agency that has determined that the emergency is beyond its capabilities.” The Governor also filed a petition for a writ of mandamus with respect to the Scott Circuit Court action, seeking relief similar to that sought in the Boone Circuit Court action.

In the interest of judicial economy, Court of Appeals Judge Glenn Acree issued a consolidated order addressing both the Boone County and Scott County cases and denied intermediate relief in both on July 13, 2020. Judge Acree determined that CR 65, which allows a party to move to dissolve a restraining order, provided the Governor with a swift and adequate remedy, rendering a writ inappropriate. Additionally, he determined that any injury resulting from the Boone Circuit Court order could be rectified at the scheduled July 16, 2020 hearing. The Court of Appeals’ order reflects that a three-judge panel would promptly consider the merits of the Governor’s petitions for a writ of mandamus.

That same day, Plaintiffs filed an amendment to their motion for a temporary injunction to address new and supplemental orders and regulations issued by the Governor and the Cabinet. Plaintiffs argued that the revised orders were arbitrary and capricious, specifically identifying the six-foot distance requirement and the group size requirements for childcare centers.

Plaintiffs noted that LDCs were not subject to the Cabinet's orders. Little Links asserted that the prohibition against visitors poses a significant problem because it prevents Little Links from conducting tours for new families seeking childcare services. Florence Speedway and Beans Cafe also argued that the statewide mask regulation, 902 KAR 2:190E, which states that businesses in continuing violation of the regulation can be immediately shut down, is not authorized by law.

On July 14, 2020, the Governor petitioned for a writ of mandamus in this Court and sought intermediate relief pursuant to CR 76.36(4) and CR 81, specifically requesting that this Court dissolve the Boone Circuit Court's restraining order. The Governor argued that Judge Acree erred in concluding that the Governor has an adequate remedy by appeal because a delayed judicial holding vindicating the Governor's actions offers no protection to the Kentuckians who may become ill, spread the disease to others, or die due to COVID-19 in the interim. The petition also criticized the failure of both lower courts to consider the presumption of constitutionality of the orders since the orders only implicate economic rights, not fundamental rights, requiring only a rational basis review of these emergency measures.

Plaintiffs responded on July 16, 2020, arguing that a writ is not an appropriate remedy because the parties were currently in the midst of an evidentiary hearing on their requested injunctive relief in the Boone Circuit Court, evidence which would be beneficial for this Court to review. They argued the Governor had a remedy by appeal once the trial court issued a



ruling based on the hearing. Plaintiffs claimed that Supreme Court intervention at that stage in the proceedings would result in businesses failing, including Florence Speedway and childcare centers across the state.

Additionally, Plaintiffs reiterated their arguments regarding the unconstitutionality and illegality of the various orders issued by the Governor and the Cabinet. The Attorney General filed a similar response arguing that the Governor did not satisfy the requirements for issuance of a writ.

The Boone Circuit Court conducted a twelve-and-one-half hour hearing on July 16, 2020. The trial court heard testimony from Plaintiff Christine Fairfield, owner of Little Links; Jennifer Washburn, childcare facility owner; Bradley Stevenson, Executive Director of the Childcare Council of Kentucky, a nonprofit agency located in Lexington, Kentucky, which provides support services to childcare providers; Greg Lee, small business owner; Larry Roberts, Kentucky Secretary of Labor; Josh King, promoter for Plaintiff Florence Speedway; Richard Hayhoe, owner of Plaintiff Beans Cafe and Bakery; John Ellison, general manager and part owner of the Hofbrauhaus, a brew pub, in Newport, Kentucky, as well as board member and past chair of the Kentucky Restaurant Association; Dr. John Garren, University of Kentucky economics professor; Dr. Sarah Vanover, Director of Kentucky's Division of Childcare; and Dr. Steven Stack, Commissioner of the Kentucky Department for Public Health.

Following the close of evidence, Plaintiffs sought a temporary injunction to require the Governor to increase the group sizes in childcare programs to fifteen children, to allow the combination of groups and to allow tours after

hours. They also sought to allow customers at restaurants to sit back-to-back with three and one-half feet of spacing and to remove the “shut down” penalty for a business’s continuing violation of the mask mandate.

On July 17, 2020 and pursuant to Section 110 of the Kentucky Constitution, this Court entered an order staying all orders of injunctive relief issued by lower courts of the Commonwealth in COVID-19 litigation pending further action of the Court. Noting the need for a clear and consistent statewide public health policy, the Court recognized that the Kentucky legislature has expressly given the Governor broad executive powers in a public health emergency. The stay continues in effect until the full record of proceedings below, including any evidence and pleadings considered by the lower courts, is reviewed by this Court and a final order is issued. The order expressly authorized the Scott and Boone Circuit Courts to proceed with matters pending before them and issue all findings of fact and conclusions of law they deem appropriate, but no order, however characterized, would be effective.

On July 20, 2020, the Boone Circuit Court issued an order that would have granted the temporary injunction against enforcement of the Governor’s orders but for this Court’s July 17 stay order. The trial court determined that Florence Speedway and Little Links will suffer irreparable harm in the form of permanent closure or loss of goodwill under the challenged orders and believed the cafe’s claim depends on whether “the executive” has authority to impose

the orders.<sup>19</sup> However, the trial court concluded that the Attorney General's claim of injury depended on whether "the people's" rights are being violated and concluded that they were. According to the Boone Circuit Court, because the government cannot take inalienable rights, such as the right to acquire and protect property and assemble, and certainly cannot punish a person for exercising a protected constitutional right, the Attorney General established irreparable harm.

In balancing the equities, the trial court noted that the Constitution and Bill of Rights are pitted against "the projections of certain medical professionals" which are "still developing and not all in agreement," citing several studies introduced by Plaintiffs that purportedly contradicted the challenged orders. The court further noted the Attorney General's argument that the government can have no legitimate interest in violating the constitutional rights of its citizens. The trial court observed "a decreasing trend in deaths attributed to COVID-19 since mid-April 2020," and that in the period of weeks ending on January 4 and June 27, 2020, 508 persons in Kentucky died from COVID-19, making up only 0.011% of Kentucky's deaths from all causes during that time period.<sup>20</sup> The trial court disagreed with the

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<sup>19</sup> The owner of Beans Cafe testified that although the amended orders allow 50% indoor dining capacity, the six-foot distancing requirement limits his available seating to 30%. The orders limit his ability to function because Beans Cafe closes at 2:00 p.m. He suggested that if the distance requirement was reduced to three feet, and capacity increased to two-thirds, he would at least be able to break even.

<sup>20</sup> Slightly over four months later the death toll has more than tripled with the total COVID-19 deaths in Kentucky standing at 1,534 on November 5, 2020. The non-partisan Kaiser Family Foundation has concluded that through October 15, 2020, COVID-19 now ranks third in the leading causes of death in the United States, behind

Governor’s insistence that equity supports the challenged executive orders, finding that the orders were neither constitutionally enacted nor narrowly tailored. Therefore, in the Boone Circuit Court’s view, “the scale of equity tips decidedly to the Constitution and the Bill of Rights.”

As to the third requirement that Plaintiffs present a substantial question on the merits, the trial court found no evidence that any local emergency response agency determined that the pandemic emergency was beyond its capabilities pursuant to KRS 39A.020(12). In questioning the scope of the Governor’s authority in emergency situations, the trial court concluded that the power is not broad enough “to extinguish the separation of powers, and the inherent rights of Kentuckians, including the right to attend church, to pursue a livelihood, to peaceably assemble, and to seek the health care that they may deem to be essential.” Ultimately, the trial court held that the Governor’s reliance on KRS Chapter 39A is ineffectual because the Plaintiffs are likely to succeed on the merits of their claims that the emergency powers granted by that chapter violate Sections 1, 2, 15, 27, 28 and 29 of the Kentucky Constitution.

Shortly after the trial court’s ruling, on July 22, 2020, the requirements for venues and event spaces, including Florence Speedway, were again revised

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only heart disease and cancer. *Analysis: COVID-19 Ranks as a Top 3 Leading Cause of Death in the U.S., Higher than in Almost All Other Peer Countries* (Oct. 22, 2020), <https://kff.org/coronavirus-covid-19/press-release/analysis-covid-19-ranks-as-a-top-3-leading-cause-of-death-in-the-u-s-higher-than-in-almost-all-other-peer-countries>.

and now state that “[a]ll individuals in the venue or event space must be able to maintain six (6) feet of space from everyone who is not a member of their household.” This amendment alleviated one of Florence Speedway’s primary issues with the challenged orders.

On August 7, 2020, this Court determined that, with entry of the trial court’s July 20 order, the claims in the Boone Circuit Court case were ripe for review. The order also noted that no further action had occurred in the Scott Circuit Court case since it entered the restraining order on July 9, 2020. Although the Court of Appeals consolidated the Boone and Scott Circuit Court cases for purposes of judicial economy, this Court found that the cases are no longer similarly situated since only the Boone Circuit Court matter proceeded to an injunction hearing. Accordingly, the Court deconsolidated the two actions.<sup>21</sup> Oral argument on September 17, 2020, focused on the legal issues Plaintiffs and the Attorney General raised in the Boone Circuit Court challenging the Governor’s COVID-19 executive orders and regulations.

### **ANALYSIS**

Before turning to the specific issues presented, we briefly address the history of emergency powers legislation, which has existed in Kentucky since 1952.<sup>22</sup> On March 5, 1952, the General Assembly enacted Chapter 39 of the

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<sup>21</sup> The order states that the Scott Circuit Court may proceed with matters before it and issue all findings of fact and conclusions of law it finds appropriate. The Court stated that any orders issued in the case should, after entry, be immediately transmitted to the Clerk of the Supreme Court.

<sup>22</sup> In 1949, the Soviet Union successfully tested its first nuclear weapon. U.S. Department of Homeland Security National Preparedness Task Force, *Civil Defense and Homeland Security: A Short History of National Preparedness Efforts* (Sept. 2006),

Kentucky Revised Statutes, relating to civil defense. 1952 Ky. Acts ch. 58.

While the stated purpose of the Act included minimizing the destructiveness caused by “fire, flood or other causes,” preparing the state for emergencies and protecting the public, much of the Act specifically related to Kentucky’s defense mechanisms for an enemy attack. *Id.* at § 1. The Act authorized the Governor to make necessary orders and regulations to carry out the provisions of the Act and to prepare a comprehensive plan for civil defense. *Id.* at § 9. In 1974, the Act was amended to create a state agency, the Department of Disaster and Emergency Services, in lieu of a state civil defense agency in order to focus on emergency response generally rather than civil defense matters only. Legis. Rec. Final Exec. Action - April 23, 1974, Reg. Sess. at 23 (Ky. 1974). In addition, the amendment redefined and expanded the scope of emergencies covered under the Chapter.<sup>23</sup> 1974 Ky. Acts ch. 114, § 1. Additionally, KRS 39.401, the definitions portion of the Chapter, added the definition of

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<https://training.fema.gov/hiedu/docs/dhs%20civil%20defense-hs%20-%20short%20history.pdf>. Fearing an imminent attack, local officials began demanding that the federal government create a plan for handling crisis situations. *Id.* While President Truman agreed that the United States should outline its civil defense functions, he believed that civil defense responsibilities should fall primarily on state and local governments. *Id.* On January 12, 1951, the Federal Civil Defense Act of 1950 was signed into law, which was the first comprehensive legislation pertaining to disaster relief. 64 Stat. 1245 (1951). The Act states: “It is further declared to be the policy and intent of Congress that this responsibility for civil defense shall be vested primarily in the several States and their political subdivisions.” *Id.*

<sup>23</sup> For example, instead of focusing on civil defense, the 1974 version of the statute specifically added a definition for “disaster and emergency response,” which includes “preparation for and the carrying out of all emergency functions, other than functions for which military forces are primarily responsible.” The amendment also included “natural or man caused disasters,” explosions, and transportation emergencies, among others, in the list of disasters and emergencies.

“disaster,” which was defined as “any incident or situation declared as such by executive order of the Governor pursuant to the provisions of this Act.” *Id.* at § 2.

Recognizing that the Commonwealth is always subject to both contained and widespread threatening occurrences, in 1998 the General Assembly replaced KRS Chapter 39 with KRS Chapter 39A, which establishes a statewide comprehensive emergency management system.<sup>24</sup> In enacting the Chapter, the General Assembly expressly noted that “response to these occurrences is a fundamental responsibility of elected government in the Commonwealth.” KRS 39A.010. KRS Chapter 39A further expanded the scope of disasters and emergencies which necessitate the Governor’s response and, notably, added biological and etiological hazards to the list of threats to public safety. The General Assembly recognized that the purpose of Kentucky’s emergency management response had evolved from responding only to security and defense needs to responding to all types of natural and man-made hazards in order to address the contemporary needs of Kentucky citizens. KRS 39A.030. As reflected in Appendix A to this Opinion, KRS Chapter 39A powers have been invoked by every Governor who has served since the law’s adoption in 1998. The emergencies have ranged from widespread events such as destructive storms to more localized concerns such as bridges and water supply. Since

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<sup>24</sup> *Omnibus Revision of Disaster and Emergency Services Laws: Hearing on H.B. 453*, H. State Gov’t Comm., 1998 Reg. Leg. Sess. 23 (Feb. 24, 1998) (statement of Rep. Charles Geveden, Chairman).

1996, an emergency of some magnitude has been declared on approximately 115 occasions, leaving aside the accompanying orders in the face of those occurrences which prohibit price gouging or allow pharmacists to address prescription needs. As we address the issues in this case, we are cognizant of the Commonwealth's history and experience with emergency response.

**I. The Governor Properly Invoked His Emergency Powers Pursuant to KRS 39A.100 by Declaring a State of Emergency Based on the "Occurrence" of One of the "Situations or Events" Contemplated by KRS 39A.010.**

KRS 39A.100(1) recognizes the Governor's authority to declare a state of emergency and exercise emergency powers. The first sentence states: "In the event of the occurrence or threatened or impending occurrence of any of the situations or events contemplated by KRS 39A.010, 39A.020 or 39A.030, the Governor may declare, in writing, that a state of emergency exists." KRS 39A.100(1). KRS 39A.010, relevant here, is a statement of "Legislative intent-Necessity" and, although lengthy, justifies extensive quotation:

The General Assembly realizes the Commonwealth is subject at all times to disaster or emergency occurrences which can range from crises affecting limited areas to widespread catastrophic events, and that response to these occurrences is a fundamental responsibility of elected government in the Commonwealth. It is the intent of the General Assembly to establish and to support a statewide comprehensive emergency management program for the Commonwealth, and through it an integrated emergency management system, in order to provide for adequate assessment and mitigation of, preparation for, response to, and recovery from, the threats to public safety and the harmful effects or destruction resulting from all major hazards, including but not limited to: flood, flash flood, tornado, blizzard, ice storm, snow storm, wind storm, hail storm, or other severe storms; drought, extremes of temperature, earthquake, landslides, or other natural hazards; fire, forest fire, or other conflagration; enemy attack, threats to public safety and health involving nuclear, chemical, or biological agents or weapons; sabotage, riot, civil disorder or acts of terrorism, and



other domestic or national security emergencies; explosion, power failure or energy shortages, major utility system failure, dam failure, building collapse, other infrastructure failures; transportation-related emergencies on, over, or through the highways, railways, air, land, and waters in the Commonwealth; emergencies caused by spill or release of hazardous materials or substances; mass-casualty or mass-fatality emergencies; other technological, biological, etiological, radiological, environmental, industrial, or agricultural hazards; or other disaster or emergency occurrences; or catastrophe; or other causes; and the potential, threatened, or impending occurrence of any of these events; and in order to protect life and property of the people of the Commonwealth, and to protect public peace, health, safety, and welfare, and the environment; and in order to ensure the continuity and effectiveness of government in time of emergency, disaster, or catastrophe in the Commonwealth, . . . .

The statute continues by declaring the necessity for: (1) the creation of a state agency, the Division of Emergency Management; (2) the conferring of emergency powers upon the Governor and local officials; (3) mutual aid agreements between local, state and federal governments; and (4) the establishment of a “statewide comprehensive emergency management program and integrated emergency management system.”

Preliminarily, we note the obvious, namely that our General Assembly has identified dozens of potential disasters, catastrophes, hazards, threats and emergencies which the Commonwealth may encounter—and in many instances has encountered—and has wisely provided for the exercise of emergency powers in those extraordinary circumstances. Our first responsibility is to determine what the legislature intended by examining carefully the laws enacted. When construing statutes we examine the language used to determine legislative intent, *Stephenson v. Woodward*, 182 S.W.3d 162, 169-70 (Ky. 2005), and if

that language is clear and unambiguous, we look no further. *Richardson v. Louisville/Jefferson Cty. Metro Gov't*, 260 S.W.3d 777, 779 (Ky. 2008).

Here KRS 39A.100, in clear and unambiguous language, authorizes the Governor to declare a state of emergency “in the event of the occurrence or threatened or impending occurrence” of any of the events or situations listed in KRS 39A.010, which expressly include “biological . . . or etiological . . . hazards.”<sup>25</sup> In short, the COVID-19 pandemic is the occurrence of both a biological hazard, generally, and an etiological hazard, more specifically, justifying the Governor’s March 6, 2020 declaration of emergency. Our statutory analysis in this case is essentially a straight line from the first sentence of KRS 39A.100 to the contents of KRS 39A.010. With the “plain language” of these controlling statutes clear, “our inquiry ends.” *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017).

Confronted with this straightforward statutory construction route, Plaintiffs and the Attorney General argue for a detour to the “Definitions for KRS Chapters 39A to 39F” set forth in KRS 39A.020, in particular the definition of “emergency.” KRS 39A.020(12) states:

“Emergency” means any incident or situation which poses a major threat to public safety so as to cause, or threaten to cause, loss of life, serious injury, significant damage to property, or major harm to public health or the environment

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<sup>25</sup> “Etiological” is defined as “causing or contributing to the development of a disease or condition.” Oxford English Dictionary Online, *Etiological*, [www.oed.com/view/Entry/3265](http://www.oed.com/view/Entry/3265) (accessed Oct. 28, 2020). The COVID-19 pandemic is properly deemed both an etiological hazard as well as a biological hazard, the genesis of the pandemic being a novel coronavirus.

**and which a local emergency response agency determines is beyond its capabilities.**

(Emphasis added.)

Focusing on the closing phrase, Plaintiffs and the Attorney General argue that the Governor was required to seek authority from local agencies in all 120 counties before declaring a state of emergency throughout the Commonwealth. The Boone Circuit Court agreed with this argument and concluded that “a certification by the local government that the matter is beyond its capabilities” was required “before [an] emergency is declared.” While we do not find this statutory detour appropriate under controlling principles of statutory construction, following this route leads to the same result, namely express statutory authority for the Governor to act as he did in declaring a state of emergency.

First, we note that the grant of authority to the Governor in KRS 39A.100 does not reference the definition of “emergency” or in any way signal that in declaring a state of emergency the Governor is limited by that definition. If the General Assembly intended that important limitation on the Governor’s authority it would have said so explicitly. Confronting a similar statutory construction argument in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), the United States Supreme Court, through Justice Scalia, wrote “that textual commitment must be a clear one. Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” Requiring the Governor to consult with local emergency agencies in 120

counties would certainly “alter the fundamental details,” *id.*, of the straightforward emergency declaration authority in KRS 39A.100. Our General Assembly did not direct the Governor (or any reader of the statute for that matter) to the definition of “emergency” as a limitation on gubernatorial authority, and we are not at liberty to add that language to the statute. *Stephenson*, 182 S.W.3d at 171 (citing *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000)). Further, as the Governor notes, the term “declared emergency,” is defined in relevant part as “any incident or situation declared to be an emergency by executive order of the Governor.” KRS 39A.020(7). Ultimately, the Governor’s power to declare a state of emergency is controlled by KRS 39A.100 and, in this case, KRS 39A.010; these KRS 39A.020 definitions are not limitations on his authority.

Second, the term “local emergency response agency,” as used in the aforementioned “emergency” definition is never defined in KRS Chapter 39A. KRS 39A.020(15) has a definition for “local emergency management agency,” KRS 39A.020(10) for “disaster and emergency response,” and KRS 39A.020(14) for “local disaster and emergency services organization,” but “local emergency response agency” appears nowhere in KRS Chapter 39A except that one reference in the KRS 39A.020(12) definition of “emergency.”<sup>26</sup> Assuming it is a

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<sup>26</sup> Indeed, the only other use of the term “local emergency response agency/agencies” in the entire Kentucky Revised Statutes is in KRS 352.640, a statute in the Mining Regulations chapter of Section XXVIII pertaining to Mines and Minerals. This particular statute requires the development of an emergency action plan to be used in the event of a mine emergency and requires the plan to include phone numbers for various officials and agencies including “state, federal, and local emergency response agencies.”

drafting error and the intended reference is to “local emergency management agency,” the closest terminology discoverable, then KRS Chapter 39B, “Local Emergency Management Programs” becomes relevant. This chapter deals with the creation and operation of local emergency management agencies and outlines their powers, authority and duties. Significantly, KRS 39B.010(5) states:

All local emergency management agencies or local disaster and emergency services organizations in the Commonwealth, and the local directors, and members of each, **shall, for all purposes, be under the direction of** the director of the [D]ivision [of Emergency Management], **and of the Governor when the latter deems that action necessary.**

(Emphasis added.)

Given that the Governor has ultimate authority “for all purposes,” *id.*, over all local emergency management agencies, even if the detour to the “emergency” definition in KRS Chapter 39A were justified, we would be compelled to conclude the Governor had the authority to act without regard to the determination of any local agency regarding whether the COVID-19 pandemic at hand was beyond its capabilities. The Governor is authorized to assume the “direction” of those agencies and could simply deem it “necessary” that they acknowledge that a pandemic is beyond their capabilities. KRS

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While “local emergency response agency” is not defined and that whole term is referenced only once in KRS 39A.020(12), a review of Chapters 39A and 39B provides an idea of the various entities involved in emergency response. See KRS 39A.020(10), KRS 39B.050(1)(f), KRS 39B.070(3). However, no indication exists that any of these entities would assume a role larger than the emergency management director, see KRS 39B.020(3)(d), KRS 39B.030, 39B.030(7)(a), whose role in conjunction with elected officials is further discussed below.

39B.010(5). This conclusion is further reinforced by KRS 39A.100(1)(a) which empowers the Governor “to assume direct operational control of all disaster and emergency response forces and activities in the Commonwealth.”<sup>27</sup>

Moreover, even if the focus on the statutory definition of “emergency” urged by the Plaintiffs and the Attorney General led to the result they seek—a limitation on the Governor’s emergency powers until he has consulted with agencies in all 120 counties—we would be compelled to consider another guiding principle of statutory construction. Courts must always presume that the legislature did not intend for a statute to produce an absurd result. *Layne v. Newberg*, 841 S.W.2d 181, 183 (Ky. 1992) (particular construction of statute rejected because it “flies in the face of the stated purpose of the [Workers’ Compensation] Act”). As the extensive list in KRS 39A.010 reflects, numerous natural and man-made events and occurrences can pose serious and immediate danger to the Commonwealth and thus require a prompt and effective response. The prospect that a Governor would need to consult with and defer to 120 different local agencies before he or she could declare a statewide emergency in the face of an immediate and fast-moving threat to the entire Commonwealth strains rational understanding.

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<sup>27</sup> Also, factually significant for present purposes, as discussed below, the General Assembly itself in 2020 Senate Bill 150 explicitly recognized the Governor’s emergency declaration and provided that the Governor “shall declare” when the state of emergency ceases, and if the declared emergency had not ceased “on or before the first day of the next regular session of the General Assembly, the General Assembly may make the determination.”

The *amicus curiae* emphasize that the Governor’s COVID-19 website reflects that on March 9, 2020, three days after his declaration, Governor Beshear called all 120 county-judge executives to update them and discuss emergency management.<sup>28</sup> Updating local officials is obviously different from seeking 120 county-specific determinations of capability to cope with a particular occurrence or event. And two questions arise. First, from whom would the Governor seek that determination? The “emergency” definition does not reference a local official, such as the county-judge executive or mayor, but refers explicitly to a situation “which a local emergency response agency determines is beyond its capabilities.” KRS 39A.020(12). Literally and again assuming the drafting error discussed above, it would appear the determination regarding local capabilities lies, at least in the first instance, with the director of the local emergency management agency, *see* KRS 39B.030, not elected local officials.<sup>29</sup> Second, is it logical that the General Assembly would intend a patchwork approach to a statewide emergency? KRS 39A.020(12) seems to require individualized, local determinations so the outcome of the Governor’s outreach under the Plaintiffs’ and Attorney General’s

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<sup>28</sup> *See Kentucky’s Response to COVID-19*, Kentucky Governor Andy Beshear, <https://governor.ky.gov/covid-19> (last updated Oct. 1, 2020).

<sup>29</sup> Further complicating the matter is the fact that KRS 39A.100(2) gives authority to declare a local emergency to the local executive officers, such as county judge-executives, mayor of a city or urban-county government, or other local chief executives as provided by ordinance. Also, KRS 39B.020 provides that the local executive officer, e.g., county judge-executive, “shall appoint” the director of the local emergency management agency and that director shall serve “at the pleasure of the appointing authority.” So even if KRS 39A.020(12) requires a determination by the emergency agency, arguably the local executive officer ultimately controls the decision.

theory would not be a simple “majority rules” approach but rather a county-by-county approach, potentially leaving pockets of the Commonwealth under a state of emergency while others are not. The confusion and inconsistency brought about by this approach in the face of a threat to the entire state is obvious.

That is not to say that the need for consultation with and deference to local authorities is never appropriate. KRS 39A.010 refers to the legislative intent to address “disasters or emergency occurrences which can range from crises affecting limited areas to widespread catastrophic events.” Thus, for “crises affecting limited areas” consultation with a “local emergency management agency” would be entirely appropriate and necessary but for those events or occurrences, such as a pandemic, which affect the whole of the Commonwealth (indeed the nation and the globe) and require a prompt response the necessity for consulting 120 county-level authorities is problematic at best.

In sum, the Governor properly declared a state of emergency pursuant to KRS 39A.100 because the COVID-19 pandemic constitutes the “occurrence” of a biological and etiological hazard as delineated in KRS 39A.010. Any focus on the specific definition of “emergency” in KRS 39A.020(12) is not appropriate under principles of plain language construction, but if it were, it appears the referenced “local emergency response agenc[ies]” are actually the local emergency management agencies. Those agencies are “under the direction of the [D]irector of the [D]ivision [of Emergency Management]” and, ultimately,



“the Governor when the latter deems that action necessary.” KRS 39B.010(5). So even if the definition of “emergency” in some way altered or affected the first sentence of KRS 39A.100, the result is the same. The Governor was not required to consult with any local government, official, or agency in determining that COVID-19 was a hazard justifying declaration of a state of emergency for the entire Commonwealth.

**II. During the Emergency, the Governor Has Exercised Executive Powers But to the Extent, If Any, KRS Chapter 39A Grants Him Legislative Authority, No Violation of the Separation of Powers Provisions of the Kentucky Constitution Has Occurred, the General Assembly Having Properly Delegated that Authority.**

The Kentucky Constitution directs the separation of powers among the legislative, executive and judicial branches, § 27, and prohibits any one branch from exercising “any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted,” § 28. The Governor maintains that in responding to the COVID-19 pandemic he has exercised executive powers derived from the Kentucky Constitution and that KRS Chapter 39A simply “recognizes, defines, and constrains” executive authority to direct an emergency response. To the extent any of his actions could be characterized as legislative, he notes that he is exercising authority lawfully delegated to him by the General Assembly in KRS Chapter 39A.

The Attorney General seemingly acknowledges some role for the Governor in the event of an emergency such as COVID-19 but generally insists that the Governor’s response these last months via executive orders and emergency regulations is an unconstitutional encroachment on legislative authority. In

advocating the striking of those portions of KRS Chapter 39A that permit the Governor to exercise legislative authority, particularly KRS 39A.100(1)(j) and KRS 39A.180(2), the Attorney General asks us to “use this case to restore the original meaning of the Constitution’s separation of powers.”<sup>30</sup> To the extent we decline that invitation, he argues that the legislative authority in KRS Chapter 39A has been improperly delegated to the Governor. As we consider this argument, we do so guided by the presumption that the challenged statutes were enacted by the legislature in accordance with constitutional requirements. *Cornelison v. Commonwealth*, 52 S.W.3d 570, 572 (Ky. 2001). “A constitutional infringement must be ‘clear, complete and unmistakable’ in order to render the statute unconstitutional.” *Caneyville Volunteer Fire Dep’t v. Green’s Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 806 (Ky. 2009) (citing *Kentucky Indus. Util. Customers, Inc. v. Kentucky Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998)). Ultimately, we conclude that the Governor is largely exercising emergency executive power but to the extent legislative authority is involved it has been validly delegated by the General Assembly consistent with decades of Kentucky precedent, which we will not overturn.

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<sup>30</sup> Citing, *inter alia*, Blackstone’s *Commentaries on the Laws of England*, John Locke, and *The Federalist Papers*, the Attorney General emphasizes the historical and philosophical underpinnings of the separation of powers principle. While these sources provide context, this Court’s North Star is our own Kentucky Constitution, the language used and the tripod structure erected for Kentucky government.

The current Kentucky Constitution, emanating primarily from the 1890 Constitutional Convention,<sup>31</sup> does not address emergency occurrences or events<sup>32</sup> directly except as to military matters which are firmly assigned to the Governor as the “commander-in-chief” of military affairs. § 75. Generally, Section 69 vests the Governor with the “supreme executive power of the Commonwealth” and Section 81 mandates the Governor “take care that the laws be faithfully executed.” Also instructive for the present case, Section 80 provides that the Governor “may, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place, if that should have become dangerous from an enemy or from contagious diseases . . . . When he shall convene the General Assembly it shall be by proclamation, stating the subjects to be considered, and no other shall be considered.”<sup>33</sup>

Although “extraordinary occasions” has been construed customarily to allow special legislative sessions for reasons of immediate import relating to

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<sup>31</sup> See generally *Official Report of the Proceedings and Debates in the Convention Assembled at Frankfort, on the Eighth Day of September 1890, to Adopt, Amend or Change the Constitution of the State of Kentucky* (1890).

<sup>32</sup> “Emergency” only appears twice in the Kentucky Constitution. Section 55 provides that an act containing an emergency clause becomes effective upon the Governor’s approval, rather than ninety days after adjournment of the session in which passed. Section 158 allows cities, counties and taxing districts to exceed their debt limit to cope with emergencies. “Extraordinary occasion” appears in the Constitution only in Section 80, which provides the Governor “may, on extraordinary occasions, convene the General Assembly.”

<sup>33</sup> A similar provision has appeared in all four Kentucky Constitutions. See Ky. Const. of 1891, § 83; Ky. Const. of 1850, art. 3, § 13; Ky. Const. of 1799, art. 3, § 14; Ky. Const. of 1792, art. 2, § 3.

funding and other matters,<sup>34</sup> it plainly extends to those events or occurrences that qualify as a natural or man-made emergency, underscored by the “clue” regarding the convening of the legislature somewhere other than Frankfort in the event of an enemy or contagious diseases. Notably, Section 80 contains the permissive “may . . . convene” as opposed to the mandatory “shall . . . convene.” Even in times when the Commonwealth is confronted with something extraordinary, to include enemies and contagious diseases, the decision to convene the General Assembly in a special session is solely the Governor’s.

The implied tilt of the Kentucky Constitution toward executive powers in times of emergency is not surprising, given our government’s tripartite structure with a legislature that is not in continuous session. At least two commentators have opined that “[t]he sixty-day limit on biennial sessions was the most significant restriction placed on the General Assembly by the [1890] Constitutional Convention.” Sheryl G. Snyder & Robert M. Ireland, *The Separation of Governmental Powers under the Kentucky Constitution: A Legal and Historical Analysis of L.R.C. v. Brown*, 73 Ky. L.J. 165, 181 (1984). Under the 1792 and 1799 Kentucky Constitutions the General Assembly met

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<sup>34</sup> See, e.g., 2007 First Extraordinary Session (alternative energy policies, appropriation of funds for capital projects and road construction, taxation of military pay, pretrial diversion for substance abusers, and public employee insurance plans); 1997 First Extraordinary Session (postsecondary education and budget modifications); 1983 Extraordinary Session (flat rate tax on individual income, standard deduction increase on personal income, and state-federal tax uniformity). Legislative Research Commission, *Extraordinary Session since 1940*, <https://legislature.ky.gov/Law/Statutes/Pages/KrsExtraOrdList.aspx> (last visited Oct. 28, 2020).

annually with no restrictions on length of session, but under the 1850 Constitution that changed to biannual sixty-day sessions with power in the body to extend the session on a two-thirds vote in each house, which they often did. *Id.* So, before the 1890 Convention “the legislature had the power to hold continuous sessions,” but “the framers of the present Constitution took that power away . . . and, for the first time in the history of Kentucky, put an absolute limit on the number of days the legislature could sit.” *Id.*

When the present Constitution was adopted in 1891, the Kentucky General Assembly could only meet for sixty days every other year, Ky. Const. § 42, and the only power to call the legislature into an extraordinary session resided in the Governor, Ky. Const. § 80. Even now after the 2000 constitutional amendments with the legislature convening annually, sessions are limited to thirty legislative days in odd-numbered years, Ky. Const. § 36, and sixty legislative days in even-numbered years, Ky. Const. § 42.<sup>35</sup> 2000 Ky. Acts ch. 407, § 1, ratified November 2000. Moreover, the odd-numbered year sessions cannot extend beyond March 30 and the even-numbered year sessions cannot extend beyond April 15. Ky. Const. § 42. And the power to convene in extraordinary session remains solely with the Governor. Ky. Const. § 80.

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<sup>35</sup> In 1966, 1969 and 1972 constitutional amendments were proposed that would have amended the Constitution “to enable [the General Assembly] once again to become ‘a continuous body,’ but each proposed amendment was defeated by the people.” Snyder & Ireland, 73 Ky. L.J. at 182.

Having a citizen legislature that meets part-time as opposed to a full-time legislative body that meets year-round, as some states have,<sup>36</sup> generally leaves our General Assembly without the ability to legislate quickly in the event of emergency unless the emergency arises during a regular legislative session. The COVID-19 pandemic arose during the latter part of the 2020 legislative session, after the deadline for introducing a new bill, resulting in fourteen proposed COVID-19 related amendments to existing bills, five of which eventually passed.<sup>37</sup> Most notably, Senate Bill 150, “AN ACT relating to the

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<sup>36</sup> Two states that have recently dealt with challenges to the authority of their Governor/executive branch officials during the COVID-19 pandemic, Michigan and Wisconsin, are examples. Pursuant to Michigan Constitution Article IV, Section 13, the Michigan legislature begins its session in January each year and remains in session year-round, with both the House and the Senate meeting an average of eight days per month in 2020. The Michigan legislature was thus readily available to address concerns presented by the pandemic. 2020 Session Schedule, Michigan House of Representatives, [https://www.house.mi.gov/PDFs/Current\\_Session\\_Schedule.pdf](https://www.house.mi.gov/PDFs/Current_Session_Schedule.pdf) (last visited Oct. 8, 2020); Session Schedule 2020, Michigan State Senate, <https://senate.michigan.gov/maincalendar.html> (last visited Oct. 8, 2020). The Wisconsin legislature meets annually, Wis. Stat. Ann. § 13.02, and was in session this year from January 14, 2020 until May 13, 2020. Article V, Section 4 of the Wisconsin Constitution authorizes the governor “to convene the legislature on extraordinary occasions.” Additionally, Article IV, Section 11 provides that “[t]he legislature shall meet at the seat of government at such time as shall be provided by law,” a provision which has been construed to allow the legislature to convene itself in an extraordinary session. *League of Women Votes of Wisconsin v. Evers*, 929 N.W.2d 209, 216 (Wis. 2019). Thus, the Wisconsin legislature also had the means to address immediately any needed COVID-19 response.

<sup>37</sup> Appendix B lists all COVID-19 related legislation introduced in the 2020 Session. Of the fourteen COVID-19-related amendments, five passed, the most expansive of which was Senate Bill 150. This bill addresses COVID-19’s effects on the Commonwealth by expanding unemployment benefits, facilitating and providing protection for expanded healthcare efforts, and allowing the Governor or applicable administrative bodies to suspend or waive business licensing, renewal, and application fees during the state of emergency. In addition, it (1) pertains to state requirements for tax filing and payment; (2) allows court-ordered counseling or education to be conducted by video or telephone conferencing; (3) allows agricultural industry employees to operate vehicles that would normally require a special operator’s license; (4) permits food service establishments to sell food items like bread and milk and other staple items to any customer; (5) suspends and tolls deadlines relating to hearings and

state of emergency in response to COVID-19 and declaring an emergency,”  
acknowledged the Governor’s declared emergency and provided:

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.

2020 S.B. 150, § 3. The legislature thereby signaled its awareness of the emergency and that the Governor was undertaking to exercise the emergency powers under KRS Chapter 39A. Thus, even within the confines of limited legislative sessions, the timing of this particular emergency was such that the legislature had a few weeks to pass bills related to the COVID-19 pandemic and did so.

The Attorney General invites the Court to adopt a strict separation of powers stance by identifying the Governor’s issuance of any rules, regulations or orders in an emergency as exercises of non-delegable legislative power (excepting only the Governor’s initial declaration of an emergency perhaps) and then holding those emergency responses constitutionally invalid under

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decisions in local legislative bodies, boards and commissions; (6) allows public agencies ten days to respond to an open records request; (7) allows restaurants to sell alcohol for carryout and delivery; (8) provides that businesses that manufacture or provide personal protective equipment or personal hygiene supplies that do not do so during their regular course of business shall have a defense to ordinary negligence and product liability, so long as they act reasonably and in good faith; (9) allows the State Board of Medical Licensure, Board of Emergency Medical Services, and Board of Nursing to waive or modify licensure and scope of practice requirements and expand medical students’ authority; and (10) allows individuals to be deemed in the presence of one another for signatures, testimony, or notarization if they are communicating via real time video conference.

Sections 27 and 28. We decline. 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.

On this latter point, the Attorney General argues that Section 80 allows the Governor to call an extraordinary session and thus “envisions that the Governor will not go it alone during a crisis, but instead will work hand in hand with the People’s representatives.” Again, the language of the section is permissive not mandatory, leaving it to the Governor—also duly elected by the People—whether the General Assembly should be convened. Moreover, the view advocated by the Attorney General creates an obvious dilemma: if the Governor is not empowered to adopt emergency measures because that constitutes “legislation,” the Commonwealth is left with no means for an immediate, comprehensive response because either the General Assembly is not in session and cannot convene itself or even if in session it will have limited time to deal with the matter under constitutionally mandated constraints on the length of



the session.<sup>38</sup> So, our examination of the Kentucky Constitution causes us to conclude the emergency powers the Governor has exercised are executive in nature, never raising a separation of powers issue in the first instance.

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, “Statewide Emergency Management Programs,” which reflects a cooperative approach between the two branches. Plaintiffs and the Attorney General insist that the statute is in large part unconstitutional, however, because it grants the Governor legislative authority in violation of the nondelegation doctrine. We disagree.

We acknowledge, of course, that making laws for the Commonwealth is the prerogative of the legislature. Addressing a statute that authorizes the Governor to reorganize governmental bodies during the period between annual legislative sessions, we recently observed, “[t]he legislative power we understand to be the authority under the constitution to make the laws, and to alter and repeal them.” *Beshear v. Bevin*, 575 S.W.3d 673, 682 (Ky. 2019) (quoting *Purnell v. Mann*, 50 S.W. 264, 266 (Ky. 1899)). “The nondelegation doctrine recognizes that the Constitution vests the powers of government in three separate branches and, under the doctrine of separation of powers, each

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<sup>38</sup> This is particularly true in the case of an emergency that goes from an acute stage to chronic, as is the case with a pandemic. Unlike an ice storm, wildfires or other natural events which sweep across all or part of the state, leaving destruction, but ending in a relatively short time, a biological/etiological hazard can hover for weeks and even months.

branch must exercise its own power rather than delegating it to another branch.” *Id.* at 681 (citing *TECO Mech. Contractor, Inc. v. Commonwealth*, 366 S.W.3d 386, 397 (Ky. 2012)). Nevertheless, we found KRS 12.028, at issue in that case, to be a valid delegation of legislative power, recognizing that legislative power can be delegated “if the law delegating that authority provides ‘safeguards, procedural and otherwise, which prevent an abuse of discretion’” thereby “‘protecting against unnecessary and uncontrolled discretionary power.’” *Id.* at 683 (citations omitted). Our holding was but one in a series of Kentucky cases over several decades addressing the proper delegation of legislative power.<sup>39</sup>

The United States Supreme Court in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) held that “[i]f Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power.” (Emphasis added.) Recognition of the delegation of legislative powers in Kentucky largely began with *Commonwealth v. Associated Industries of Kentucky*, 370 S.W.2d 584, 586 (Ky. 1963): “We find

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<sup>39</sup> In the seminal case, *Legislative Research Commission v. Brown*, 664 S.W.2d 907, 930 (Ky. 1984), this Court addressed the Governor’s statutorily granted power to reorganize state government between legislative sessions and concluded once the General Assembly “determines that that power is in the hands of the Governor, such interim action is purely an executive function.” However, in *Beshear v. Bevin*, 575 S.W.3d at 681-83, addressing the same statute but perceiving a factual distinction, a majority of this Court concluded that the statute was a “grant of legislative authority to the executive” and that the Governor was exercising legislative power. *But see id.* at 685 (VanMeter, J., concurring in result only) (“In my view, [the Governor] is exercising his ‘executive power’ as authorized by the legislature and the Kentucky Constitution.”).

nothing in our State Constitution that declares explicitly: ‘Legislative power may not be delegated.’” Noting the seminal role of John Locke in the articulation of democratic principles and his insistence that the power to make laws remain always in the hands of the legislature, the Court continued:

Locke believed that all human ideas, even the most complex and abstract, ultimately depended upon ‘experience’ to dedicate their truth . . . . So, if Locke was the fountainhead of the thesis that power could not be delegated, we feel sure that the experience of the last several centuries would have caused him to repudiate this idea. Experience has demonstrated some of the power must be invested in other bodies so that the government may function in a world that progressively is becoming more complex. There is nothing wrong with this so long as the delegating authority retains the right to revoke the power.

*Id.* at 588.<sup>40</sup> More recently, in *Board of Trustees of Judicial Form Retirement System v. Attorney General*, 132 S.W.3d 770, 781 (Ky. 2003), we recognized “given the realities of modern rule-making” a legislative body “has neither the time nor the expertise to do it all; it must have help.” (Citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). Examining the nondelegation doctrine generally and finding the “intelligible-principle rule” instructive if somewhat “toothless” in application by the federal courts, *id.* at 782-83, the Court

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<sup>40</sup> Even before *Associated Industries of Kentucky*, Kentucky courts recognized the right of the legislature “to delegate to executive officers the power to determine some fact upon which the act of the Legislature made or intended to make its own action to depend.” *Comm. ex rel Meredith v. Johnson*, 166 S.W.2d 409, 415 (Ky. 1942) (upholding statute that conferred upon the Governor the power to determine whether an emergency exists and then upon such determination make expenditures from a fund appropriated for that purpose). See also *Ashland Transfer Co. v. State Tax Comm.*, 56 S.W.2d 691, 697 (Ky. 1932) (upholding statute allowing highway commission and county judges to reduce load and speed limits for trucks or prohibit them altogether when necessary to prevent damage to roads “in order to protect the public safety and convenience”).

reviewed several Kentucky cases wherein a delegation of legislative authority was deemed unlawful because the “powers were granted without ‘legislative criteria,’” *Miller v. Covington Dev. Auth.*, 539 S.W.2d 1, 4-5 (Ky. 1976), or the delegation lacked “standards controlling the exercise of administrative discretion,” *Legislative Research Comm’n v. Brown*, 664 S.W.2d 907, 915 (Ky. 1984). The “unintelligible” legislative pension statute at issue in *Judicial Form Retirement* failed for those reasons—lack of “an intelligible principle” and the absence of any “standards controlling the exercise of administrative discretion.” 132 S.W.3d at 785.

In the case before us, the intelligible principle enunciated by the General Assembly and the legislative criteria pertinent to the use of emergency powers are set forth in KRS 39A.010 quoted above. In the event of any of those multitude of threats, the Governor (and the Division of Emergency Management and local emergency agencies) are authorized to take action “to protect life and property of the people of the Commonwealth, and to protect public peace, health, safety and welfare . . . and in order to ensure the continuity and effectiveness of government in time of emergency, disaster or catastrophe . . . .” In KRS 39A.100(1), the Governor is granted twelve enumerated “emergency powers” including in subsection (j) the following: “Except as prohibited by this section or other law, to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population.” Given the wide variance of occurrences that can

constitute an emergency, disaster or catastrophe, the criteria are necessarily broad and result-oriented, “protect life and property . . . and . . . public . . . health,” KRS 39A.010, allowing the Governor working with the executive branch and emergency management agencies to determine what is necessary for the specific crisis at hand. Floods, tornadoes and ice storms require different responses than threats from nuclear, chemical or biological agents or biological, etiological, or radiological hazards but the emergency powers are always limited by the legislative criteria, i.e., they must be exercised in the context of a declared state of emergency, KRS 39A.100(1); designed to protect life, property, health and safety and to secure the continuity and effectiveness of government, KRS 39A.010; and exercised “to promote and secure the safety and protection of the civilian population.” KRS 39A.100(1)(j).

In addition, KRS Chapter 39A contains procedural safeguards to prevent abuses. All written orders and administrative regulations promulgated by the Governor “shall have the full force of law” upon the filing of a copy with the Legislative Research Commission. KRS 39A.180(2).<sup>41</sup> This provides the

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<sup>41</sup> Plaintiffs and the Attorney General object that the Governor has suspended laws in violation of Section 15 of the Kentucky Constitution: “No power to suspend laws shall be exercised unless by the General Assembly or its authority.” They insist that suspensions are by their nature temporary and if an emergency continues at length, as in the present COVID-19 pandemic, the prolonged suspension of laws is invalid. However, the Governor is not suspending laws. His declaration of a state of emergency triggers his authority under KRS 39A.090 to “make, amend, and rescind any executive orders as deemed necessary” to carry out his responsibilities. The legislature has in KRS 39A.180(2) provided that all “existing laws, ordinances, and administrative regulations” that are inconsistent with KRS Chapters 39A to 39F or with the orders or administrative regulations issued under the authority of those KRS chapters “shall be suspended during the period of time and to the extent that the conflict exists.” Thus, the General Assembly, not the Governor, has suspended the

requisite public notice. The duration of the state of emergency, at least the one at issue in this case, is also limited by the aforementioned 2020 Senate Bill 150, Section 3, which requires the Governor to state when the emergency has ceased but, in any event, allows the General Assembly to make the determination itself if the Governor has not declared an end to the emergency “before the first day of the next regular session of the General Assembly.” The enunciation of criteria for use of the emergency powers, the timely, public notice provided for all orders and regulations promulgated by the Governor and the time limit on the duration of the emergency and accompanying powers all combine to render KRS Chapter 39A constitutional to the extent legislative powers are delegated.

Recently the Michigan Supreme Court, in a sharply divided opinion, addressed two certified questions posed by the federal district court regarding the Michigan Governor’s exercise of emergency powers under that state’s Emergency Management Act of 1976 (EMA) and Emergency Powers of the Governor Act of 1945 (EPGA). *In re Certified Questions From United States Dist. Court, W. Dist. of Michigan, S. Div.*, \_\_\_ N.W.2d \_\_\_, No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020). The EPGA gave the Governor power, indefinite in duration, to declare an emergency and issue “reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to

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laws. The statute has no time limitations on the length of the suspension and we will not read in one that prohibits “prolonged” emergencies.

bring the emergency situation within the affected area under control.” MCL<sup>42</sup> 10.31(1). The majority concluded the “reasonable” and “necessary” standard failed to provide sufficient guidance to the Governor regarding the exercise of her powers and failed to constrain her actions “in any meaningful manner.” *Certified Questions*, 2020 WL 5877599, at \*17.

Finding the power delegated to be “of immense breadth and . . . devoid of all temporal limitations,” *id.* at \*18, the majority struck the statute as an unlawful delegation of legislative power to the executive branch violative of the Michigan Constitution’s separation of powers provision. Chief Justice McCormack, writing for the three-justice minority, observed that the majority departed from one part of their longstanding test for delegation of legislative power, namely that “the standard must be as reasonably precise as the subject matter requires or permits.” *Id.* at \*41. Citing *Gundy v. United States*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2116, 2130 (2019), for the proposition that delegations of such authority must give the delegee “the flexibility to deal with real-world constraints,” she noted that “given the unpredictability and range of emergencies the Legislature identified in the statute, it is difficult to see how it could have been more specific.” *Id.* at \*42.

Our case differs from the Michigan case in several important ways but most notably our Governor does not have emergency powers of indefinite duration, 2020 S.B. 150, § 3, and our legislature is not continuously in

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<sup>42</sup> Michigan Compiled Laws.

session, ready to accept the handoff of responsibility for providing the government's response to an emergency such as the current global pandemic.<sup>43</sup> Moreover, with the breadth of potential emergencies identified in KRS 39A.010, the standards of protection of life, property, peace, health, safety and welfare (along with the "necessary" qualifier in KRS 39A.100(j)) are sufficiently specific to guide discretion while appropriately flexible to address a myriad of real-world events. While the authority exercised by the Governor in accordance with KRS Chapter 39A is necessarily broad, the checks on that authority are the same as those identified in Chief Justice McCormack's dissenting opinion: judicial challenges to the existence of an emergency or to the content of a particular order or regulation; legislative amendment or revocation of the emergency powers granted the Governor; and finally the "ultimate check" of citizens holding the Governor accountable at the ballot box. *Id.* at \*40.

Whatever import the principle of properly delegated legislative authority has in the ordinary workings of government, its import increases dramatically in the event of a statewide emergency in our Commonwealth. A legislature that is not in continuous session and without constitutional authority to convene itself cannot realistically manage a crisis on a day-to-day basis by the adoption and amendment of laws.<sup>44</sup> In any event, we decline to abandon approximately

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<sup>43</sup> See n.36. Also, our Constitution does not allow the General Assembly to convene itself in extraordinary session, that power resting solely in the Governor pursuant to Section 80.

<sup>44</sup> The *amicus curiae* President of the Senate appears not to have advocated the same strict separation of powers, nondelegation position that the Attorney General advances. The *amicus curiae* brief defines the sole issue presented by this case as: "Did the Governor exceed the scope of the authority that the General Assembly



sixty years of precedent that appropriately channels and limits the delegation of legislative power in Kentucky. Applying that delegation precedent, KRS Chapter 39A passes muster as a constitutional delegation of power to the extent any of the powers accorded to and exercised by the Governor are in fact legislative.

In sum, the powers exercised by a Kentucky Governor in an emergency are likely executive powers in the first instance given provisions of our Kentucky Constitution, but to the extent those powers are seen as impinging on the legislative domain, our General Assembly has wisely addressed the situation in KRS Chapter 39A. That vital and often-used statutory scheme validly delegates any legislative authority at issue to the Governor with safeguards and criteria sufficient to pass constitutional muster.

### **III. KRS Chapter 13A Does Not Limit the Governor’s Authority to Act Under the Constitution and KRS Chapter 39A in the Event of an Emergency.**

KRS Chapter 13A, “Administrative Regulations,” provides for the promulgation of administrative regulations—defined in relevant part as a “statement of general applicability . . . that implements, interprets, or prescribes law or policy,” KRS 13A.010(2)—both in the ordinary course of state government, KRS 13A.120, and in the event of an emergency, KRS 13A.190.

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provided to him in KRS Chapter 39A by issuing his executive orders declaring an emergency as a result of the novel coronavirus pandemic (COVID-19)?” The brief focuses on the definition of “emergency” and need to consult local authorities. The *amicus* also notes the legislature’s readiness to act if called into extraordinary session pursuant to Section 80 “[i]f the Governor feels that existing laws do not provide him with the tools needed to address COVID-19.”

Plaintiffs and the Attorney General challenge the executive orders and regulations issued by the Governor as violative of KRS Chapter 13A. The Governor maintains that KRS Chapter 39A by its plain terms controls in a declared emergency, granting him the authority he has exercised but that if any conflict is perceived then the more specific statutory enactment pertaining to emergencies prevails. The plain language of the statutes supports the Governor's position. *Rothstein*, 532 S.W.3d at 648.

KRS 39A.100 recognizes the authority of the Governor to declare an emergency and exercise the enumerated emergency powers. In furtherance of that authority, KRS 39A.090 provides that “[t]he Governor may make, amend, and rescind any executive orders as deemed necessary to carry out the provisions of KRS Chapters 39A to 39F.” Nothing in the plain words used requires consideration of KRS Chapter 13A or even requires promulgation of regulations; the Governor can choose to act solely through executive orders. The Governor may also promulgate regulations, however, as authorized by KRS 39A.180:

(2) All written orders and administrative regulations promulgated by the Governor, the director, or by any political subdivision or other agency authorized by KRS Chapters 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.  
**All existing laws, ordinances, and administrative regulations inconsistent with the provisions of KRS Chapters 39A to 39F, or of any order or administrative regulation issued under the authority of KRS Chapters 39A**

**to 39F, shall be suspended during the period of time and to the extent that the conflict exists.**

(Emphasis added.) This statute plainly provides that the orders and regulations issued pursuant to the emergency authority granted the Governor in KRS Chapter 39A “shall have full force of law” upon filing with the Legislative Research Commission (LRC), the same entity that compiles, publishes and distributes administrative regulations generally. KRS 13A.050. To the extent KRS Chapter 13A contains anything “inconsistent” with either Chapter 39A or an order or regulation issued under the authority of that chapter then the General Assembly has expressly directed that it “shall be suspended during the period of time and to the extent that the conflict exists.” KRS 39A.180(2). In short, while a state of emergency prevails the Governor can issue executive orders he or she “deem[s] necessary,” KRS 39A.090, and can also choose to promulgate regulations, all of which become effective upon filing with the LRC.<sup>45</sup>

Simply put, the issue of reconciling KRS Chapter 39A with Chapter 13A to the extent they are inconsistent never arises because the General Assembly has given clear, unambiguous direction: KRS Chapter 39A controls over all laws to the contrary. To the extent the Plaintiffs and the Attorney General raise

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<sup>45</sup> KRS Chapter 13A allows for the promulgation of “emergency administrative regulations,” when necessary to “meet an imminent threat to public health, safety, or welfare” or “protect human health and the environment.” KRS 13A.190(1). Those emergency regulations “shall become effective and shall be considered adopted” upon filing with the LRC. KRS 13A.190(2). Thus, KRS 39A.180(2) is consistent with the emergency administrative regulations provision in KRS Chapter 13A.

procedural due process concerns of public notice and public comment<sup>46</sup> with respect to the issuance of executive orders and promulgation of regulations pursuant to KRS Chapter 39A, those concerns have been adequately addressed. Public notice of all orders and regulations has been provided through the Governor’s websites, <https://govstatus.egov.com/ky-healthy-at-work> and <https://govstatus.egov.com/kycovid19>. Public notice of the executive orders is also given in the Executive Journal available online through the Secretary of State, <https://www.sos.ky.gov/admin/Executive/ExecJournal/Pages>. Additionally, the emergency regulations are available on the legislature’s website, <https://legislature.ky.gov/Law/kar/Pages/EmergencyRegs.aspx>. As for public input, the Healthy at Work website has a portal that allows industry groups, trade associations and individual businesses “to submit reopening proposals” and to discuss “strategies and challenges they face in safely reopening.” Thus, opportunity for public comment exists and public notice is virtually instantaneous, with all orders and regulations easily accessible online.

In insisting that the Governor must use the regulatory process to affect private rights, the Attorney General emphasizes our statement in *Bowling v. Department of Corrections*, 301 S.W.3d 478, 491-92 (Ky. 2009): “Regulation is

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<sup>46</sup> KRS 13A.190 does not provide an opportunity for public comment on emergency regulations, which are temporary in nature, just as the Governor’s emergency orders and regulations are temporary.

. . . mandated by KRS 13A.100, which requires regulation if, as here, the regulation will prescribe statements of general applicability which implement laws . . . or affect private rights.” Missing from this argument is any recognition that no state of emergency existed in *Bowling*, but, more importantly, any acknowledgement of the General Assembly’s specific directive in KRS 39A.180(2) that inconsistent laws, ordinances and regulations are suspended by KRS Chapter 39A and the executive orders and regulations issued pursuant thereto. We find nothing strange about the legislature giving the Governor flexibility in the event of an emergency to act through either executive orders or regulations, the former being more suited to immediate response in the acute state of an emergency. In any event, both the childcare COVID-19 restrictions and the face mask requirement have been promulgated as emergency regulations.

In short, the General Assembly has answered this argument for us. KRS 39A.180(2) suspends any inconsistent laws. To the extent KRS Chapter 13A requires more than KRS Chapter 39A, the regular process applicable to administrative regulations has been displaced.

**IV. The Specifically Challenged Orders and Regulations Are Not Arbitrary Under Sections 1 and 2 of the Kentucky Constitution with One Limited Exception No Longer Applicable.**

Plaintiffs and the Attorney General both contend that the Governor’s challenged orders and two emergency regulations violate Sections 1 and 2 of the Kentucky Constitution. Section 1 provides that “[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights” including

“[t]he right of acquiring and protecting property.” Section 2 states: “Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” “Section 2 is broad enough to embrace the traditional concepts of both due process of law and equal protection of the law.” *Kentucky Milk Mktg. & Antimonopoly Comm’n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985) (citing *Pritchett v. Marshall*, 375 S.W.2d 253, 258 (Ky. 1963)). Unlike the previously discussed legal arguments which are comprehensive attacks on all of the executive orders and regulations, this constitutional argument requires consideration of each order or regulation on an individual basis. The first consideration is the appropriate standard of review.

Strict scrutiny applies to a statute challenged on equal protection grounds if the classification used adversely impacts a fundamental right or liberty explicitly or implicitly protected by the Constitution or discriminates based upon a suspect class such as race, national origin, or alienage. *Steven Lee Enters. v. Varney*, 36 S.W.3d 391, 394 (Ky. 2000); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). To survive strict scrutiny, the government must prove that the challenged action furthers a compelling governmental interest and is narrowly tailored to that interest. *D.F. v. Codell*, 127 S.W.3d 571, 575 (Ky. 2003) (citing *Varney*, 36 S.W.3d at 394); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Intermediate scrutiny, seldomly used, is generally used for discrimination based on gender or illegitimacy. *Codell*, 127 S.W.3d at 575–76;

*Varney*, 36 S.W.3d at 394. Under this standard, the government must prove its action is substantially related to a legitimate state interest. *Id.* (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985)). Rational basis scrutiny is used for laws not subject to strict or intermediate scrutiny. Under this deferential standard, the challenger has the burden of proving that the law is not rationally related to a legitimate government purpose. *Hunter v. Commonwealth*, 587 S.W.3d 298, 304 (Ky. 2019). Pertinent to this case, “[w]hen economic and business rights are involved, rather than fundamental rights, substantive due process requires that a statute be rationally related to a legitimate state objective.” *Stephens v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 624, 627 (Ky. 1995).

Plaintiffs and the Attorney General both assert that the Governor’s orders have arbitrarily invaded the fundamental right of acquiring and protecting property guaranteed under Section 1 of the Kentucky Constitution. Although they advance a “fundamental right” argument that would dictate strict scrutiny analysis, they offer no precedent. Indeed, property rights, while enumerated in the Kentucky Constitution, have never been regarded as fundamental rights impervious to any impingement by the state except for restrictions that can pass strict scrutiny. As the United States Supreme Court stated in *Nebbia v. New York*, 291 U.S. 502, 524, 527-28 (1934):

These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision.

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The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited and the right to conduct a business, or to pursue a calling, may be conditioned.

In *Nourse v. City of Russellville*, 78 S.W.2d 761, 764 (Ky. 1935), this Court echoed that concept:

The right of property is a legal right and not a natural right, and it must be measured by reference to the rights of others and of the public. In *Mansbach Scrap Iron Co. v. City of Ashland*, 235 S.W.2d 968, 969 (Ky. 1930), we wrote: “The Bill of Rights grants no privileges. It conserves them subject, however, to the dominant rights of the people as a whole.”

(Internal citation omitted.) Significantly, “[t]he conservation of public health should be of as much solicitude as the security of life. It is an imperative obligation of the state, and its fulfillment is through inherent powers.” *Id.* Accordingly, as discussed below, Kentucky courts have always upheld restrictions on property rights that are reasonable, particularly in the all-important area of public health.

With no precedent for applying strict scrutiny, Plaintiffs and the Attorney General advocate intermediate scrutiny, but again Kentucky law does not support that heightened level of constitutional review. Addressing the case law they believe supportive of their position, we begin with *City of Louisville v. Kuhn*, 145 S.W.2d 851 (Ky. 1940), a case examining an ordinance that dictated the hours barbershops could be open for business. The Court began by noting the breadth of the police power exercised for the “public weal and for its betterment,” which “if conditions demand it, would approve complete



prohibitive legislation of some activities, or in certain areas if based upon sufficient reasons.” *Id.* at 853. Further, “whatever direction or phase that the legislation may take—whether of a prohibitory or regulatory character—it must not exceed or go beyond the limits of reasonability, or be rested upon assumed grounds for which there is no foundation in fact, nor may the legislation as enacted be more destructive of the interest of the public at large than beneficial.” *Id.* In striking the barbershop ordinance, the Court concluded the restrictions were “unreasonable.” *Id.* at 856. In short, while health reasons justified licensing barbers and certain restrictions, the hours of operation were not reasonably related to any legitimate governmental purpose.

Similarly, in *Adams, Inc. v. Louisville & Jefferson County Board of Health*, 439 S.W.2d 586 (Ky. 1969), apartment complex owners challenged an ordinance applicable to their private swimming pools. The Court succinctly observed: “There is perhaps no broader field of police power than that of public health. The fact that its exercise impinges upon private interests does not restrict reasonable regulation.” *Id.* at 589-90.

Under these conceptions of general subordination of private rights to public rights, we have no doubt that the city may enact laws to preserve and promote the health, morals, security, and general welfare of the citizens as a unit, and has a broad discretion in determining for itself what is harmful and inimical. It is sufficient if the municipal legislation has a real, substantial relation to the object to be accomplished, and its operation tends in some degree to prevent or suppress an offense, condition, or evil detrimental to a public good or reasonably necessary to secure public safety and welfare.

The community is to be considered as a whole in the matter of preservation of the health of all inhabitants, for a failure by a

few to conform to sanitary measures may inflict ill health and death upon many.

*Id.* at 590 (quoting *Nourse*, 78 S.W.2d at 765).

The Court observed “while all swimming pools may present some common health hazards which would reasonably require the same regulatory safeguards, in certain areas the dissimilarity in prevailing conditions would make the application of a single standard inappropriate, unrealistic and unreasonable.” *Id.* at 592. Given the nature of apartment complex swimming pools, the Court found the requirement of a lifeguard and pool attendant at all times, as well as shower facilities and separate gender-based entrances to be unreasonable. The Court struck part of the regulation but importantly for our purposes it stated, “insofar as public health is concerned, private property may become of public interest and the constitutional limitations upon the exercise of the power of regulation come down to a question of ‘reasonability.’” *Id.* at 590 (citing *Kuhn*, 45 S.W.2d 851).

The other cases relied on by Plaintiffs and the Attorney General to insist intermediate scrutiny applies are similarly unavailing. In *Kentucky Milk Marketing*, 691 S.W.2d at 893, the Court found that the challenged statute was a minimum retail mark-up law applicable to milk and milk products, rather than an anti-monopoly law, and struck it as “inimical to the public interest . . . an invasion of the right of merchants to sell competitively, and of the public to buy competitively in the open market.” *Id.* at 900. The Court began its Section 2 discussion by noting in part, “[t]he question of reasonableness is one of

degree and must be based on the facts of a particular case.” *Id.* at 899.

*Kentucky Milk Marketing* involved no health and safety regulations, nor did it employ intermediate scrutiny.

In *Ware v. Ammon*, 278 S.W. 593 (Ky. 1925), a statute that prohibited any business from advertising as a dry-cleaning business without first obtaining a license from the state fire marshal was held unconstitutional as to a particular proprietor who offered pressing and repairs onsite but did not perform the actual dry cleaning on his business premises. The ordinance was premised on the health and safety issues posed by the presence of flammable, volatile substances used in dry cleaning and there being none on Mr. Ammons’s premises the statute was “unreasonable and void” as to him and others similarly situated. *Id.* at 595. He could advertise as a dry cleaner. Again, the Court focused on whether the means adopted were “reasonably necessary to accomplish” the government’s purpose and whether the law “impos[ed] unreasonable restrictions on a lawful occupation.” *Id.*

A comprehensive review of Kentucky case law leaves no doubt that under Section 2 of our Constitution, laws and regulations directed to public health and safety are judged by their reasonableness. In *Graybeal v. McNevin*, 439 S.W.2d 323, 325-26 (Ky. 1969), a case involving fluoridation of a city’s water supply, this Court stated:

Among the police powers of government, the power to promote and safeguard the public health ranks at the top. If the right of an individual runs afoul of the exercise of this power, the right of the individual must yield.

On the issue of arbitrariness, the burden was on the plaintiff to show that the regulation had **no reasonable basis in fact or had no reasonable relation to the protection of the public health.**

(Emphasis added.) In upholding the city’s resolution to fluoridate its water pursuant to a state regulation, the *Graybeal* Court examined the credentials and testimony of both sides’ witnesses at the bench trial and “the studies, tests, experiences, and recommendations of practically all the people and organizations into whose care the health of this nation has been entrusted” before concluding the plaintiff had “failed in his burden to prove the resolution was arbitrary.” *Id.* at 331. The Court prefaced its holding that arbitrary exercises of public health powers are subject to judicial restraint but they “would have to be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health.” *Id.* at 326. That principle has been reflected in our Kentucky case law for decades. *See, e.g., Lexington-Fayette Cty. Food & Bev. Ass’n v. Lexington-Fayette Urban Cty. Gov’t*, 131 S.W.3d 745 (Ky. 2004) (upholding smoking ban as reasonable health regulation and noting public health interest is preferred over property interests).

Particularly apropos to the matter before us is the United States Supreme Court’s decision in *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905), the case in which Massachusetts’ mandatory vaccination law, enacted in the face of a growing smallpox epidemic, was challenged. Noting that “of paramount necessity, a community has the right to protect itself against an

epidemic of disease which threatens the safety of its members,” the Supreme Court held:

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by **reasonable** regulations, as the safety of the general public may demand.

*Id.* at 29 (emphasis added). Just recently in the midst of the global COVID-19 pandemic, in *South Bay United Pentecostal Church v. Newsom*, \_\_U.S.\_\_, 140 S. Ct. 1613, 1613-14 (Mem. 2020), Chief Justice John Roberts acknowledged the broad latitude accorded executive action in times such as these:

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905). When those officials “undertake[ ] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground.

Fully satisfied that the individual orders and regulations at issue in this case are only deficient under Sections 1 and 2 of the Kentucky Constitution if

they are unreasonable—that is lack a rational basis<sup>47</sup>—we address only those individual orders and regulations that have been specifically challenged. Preliminarily, we note that by the time the Boone Circuit Court conducted an evidentiary hearing, some of the challenged restrictions had changed. Also, the trial court did not address the specific allegations of arbitrariness individually, but dealt with the claims as a whole stating, “[B]ased upon the disproportionate treatment meted out to different businesses versus that allowed for substantially similar activities,<sup>[48]</sup> the Court also finds Plaintiffs and Intervening Plaintiffs have made sufficient showing that the challenged orders violate Section 2 of the Kentucky Constitution as an attempt to exert “[a]bsolute and arbitrary power over the lives, liberty and property’ of Kentucky citizens.” Our analysis is focused, as it must be, on individual orders and regulations. And, we examine the record to determine whether Plaintiffs and the Attorney General have met their burden of showing the challenged orders and regulations lack a rational basis and thus are unconstitutional. *Johnson v. Comm. ex rel Meredith*, 165 S.W.2d 820, 823 (Ky. 1942) (“So, always the burden

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<sup>47</sup> The Attorney General argues intermediate or heightened scrutiny is particularly appropriate here because the orders are the result of the Governor’s judgment alone, rather than the legislature’s after a bicameral process. He points to no authority for this proposition and we find none that dictates a more stringent standard than reasonableness/rational basis in these circumstances.

<sup>48</sup> The trial court Order states: “Plaintiffs insist that Defendants have presented no rational basis for the harshly disproportionate restrictions placed upon racetracks, daycares and cafes as compared to similarly situated activities such as baseball, auctions, and LDC’s.” It is not clear which standard of scrutiny the trial court used; the trial court also stated that “[I]t appears at this stage of the proceedings, that the challenged orders were neither constitutionally enacted nor narrowly tailored.”

is upon one who questions the validity of an Act to sustain his contentions.”); *Hunter*, 587 S.W.3d at 304.

### **A. Little Links’s Allegations**

Little Links’s declaratory and injunctive action stems from the June 15, 2020 Healthy at Work: Requirements for Childcare.<sup>49</sup> Center-based childcare programs, like Little Links, were closed on March 20, 2020. To fill the childcare void for health care workers and first responders LDCs were permitted to open. When center-based childcare programs were permitted to reopen on June 15, 2020, some regulations differed from the LDCs which were continuing to operate but were scheduled to be phased out by the end of August. Thus, the center-based childcare programs and the LDCs’ remaining operation period overlapped for about two and one-half months.

Little Links alleges three particular rules arbitrarily impose demands that are detrimental to survival of its business. Little Links complains that in contrast to LDCs, all other childcare programs must utilize a maximum group size of ten children per group, a significant limitation on the business’s ability to be profitable. Rather than being limited to a specific maximum group size, the LDCs have capacity limitation of one child per thirty square feet.<sup>50</sup> Second,

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<sup>49</sup> The Governor’s June 15, 2020 order incorporated the Healthy at Work requirements. The Healthy at Work: Requirements for Childcare Programs addressed the requirements for in-home childcare programs, which opened June 8, and center-based childcare programs, which opened June 15.

<sup>50</sup> Pursuant to 922 KAR 2:120, for Kentucky childcare center premises typically, “[e]xclusive of the kitchen, bathroom, hallway, and storage area, there shall be a minimum of thirty-five (35) square feet of space per child.” When emphasizing the difference in the capacity limits for LDCs vis-a-vis regular childcare programs, the Attorney General misapplies the building restriction, noting one witness had a 43,500

LDCs do not have the restriction that children must remain in the same group of ten children all day without being combined with another classroom. Little Links views this rule as arbitrary, interpreting it to not allow children of the same household to be grouped in the evening despite the children leaving the center in the same vehicle. Lastly, because programs may not provide access to visitors after hours Little Links cannot conduct tours for prospective clients. Plaintiffs' witnesses testified about these disparities and the negative impact on a childcare facility's business viability.

Dr. Sarah Vanover, Director of Kentucky's Division of Childcare, testified about the rule creation for the LDCs and the June 15 reopening of the center-based childcare programs. As to the LDCs, when it became obvious that childcare centers were going to be closed, her office began the background research to put emergency licensure in place, contacting several coastal "hurricane" states to obtain copies of their emergency licenses and applications. At that time, many hospitals were looking at creating pop-up centers on site to make sure their employees had the childcare coverage that they needed, given many childcare options were no longer available. LDCs were created specifically to serve the needs of hospital staff and first responders. Given the understanding of the pandemic at the time childcare facilities closed, and the critical need to keep childcare available to essential

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square foot playground, allowing 4,000 square feet per child "a limit untethered to science or reality" and hypothesizing that if it were an LDC it could serve well over 1,000 children. The childcare square footage limitation applies to buildings, not playgrounds.



employees, the LDCs were implemented using other states' emergency regulations as a guide. All centers which became LDCs were already a licensed type 1 center or certified program, meaning they already knew how childcare in Kentucky worked.

LDCs had fewer restrictions in order to open. Unlike the typical childcare regulations,<sup>51</sup> but like other states' emergency regulations, a specific maximum group size was not listed.<sup>52</sup> LDCs were required to have two adults present in each classroom and to divide children by age groups. Dr. Vanover testified that the many business closures at the time played a role in the adult to child ratio limitation. At the point LDCs opened, most businesses in the community were not open. Families using LDCs were leaving home, dropping a child off at childcare, going to work (as health care workers or first responders), and after work, picking up the child and going home. Consequently, the opportunity to contract the virus in different locations was very limited. Plus, many hospitals added their own restrictions, such as having their staff change out of their scrubs and into different clothes before picking their child up and entering the LDC to make sure that they were not spreading germs from the high-risk environment that they had been in. Dr. Vanover testified many LDCs

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<sup>51</sup> Dr. Vanover explained ordinarily the maximum group size for preschool children is 28, with an adult to child ratio of 1 to 14.

<sup>52</sup> A memorandum from the Cabinet, Office of Inspector General, entered into evidence during Christine Fairfield's July 16, 2020 testimony stated that each LDC location should have 30 square feet per child.

added other restrictions to make sure that the children were staying healthy and safe.

Dr. Vanover explained that some LDCs were allowed to stay open past June 15 because the state was having difficulty making sure there would be enough care for all of the hospital staff's children when childcare centers reopened. No effort was made to revise the LDC requirements as the economy began to reopen because LDCs were phasing out at that point, with a planned expiration at the end of August.

Dr. Vanover testified that she helped to create the childcare reopening plan, performing background work in April and May. She and other state personnel participated in the Childcare Council of Kentucky's virtual meetings for childcare providers and advocates and heard questions and concerns of childcare center directors throughout the state; she visited LDCs to see procedures employed beyond those prescribed by the state; she contacted other states that had already opened or that never closed childcare, collecting information on what group sizes they used, what things had and had not been successful, and the relative spread of illness; and the Division of Childcare extensively reviewed CDC guidelines for childcare centers open during the pandemic to make sure that Kentucky followed the best health practices.

Dr. Vanover agreed that a CDC online document providing guidance for childcare programs that remain open did not expressly state that children

should be in small groups.<sup>53</sup> She explained, however, that in multiple CDC phone calls for state administrators the CDC emphasized that having a smaller group size as well as having the children stay in those small groups was beneficial to the children. Many states chose a group size of ten to see if it would be a small enough number to stop the virus spread, with the intent later to enlarge the number. Kentucky followed that example in its reopening plan, and in an emergency regulation effective September 1, 2020 increased the child care group size to fifteen. 922 KAR 2:405E.

As to the requirement that children in different groups should not be combined, Dr. Vanover stated she knows of no public health reason that siblings should not be combined within the center at the end of the day.<sup>54</sup> Dr. Stack testified similarly. Dr. Vanover noted that the regulation applies to combining groups, it does not specifically address siblings. Thus, this issue appears to be a misunderstanding of the regulation because it does not prohibit grouping siblings at the end of the day.<sup>55</sup>

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<sup>53</sup> The CDC guidance was entered as an exhibit during the July 16, 2020 evidentiary hearing. According to the supplemental guidance, it was updated April 21, 2020.

<sup>54</sup> Under normal regulations, age group combinations are restricted in that children under the age of two and above the age of two may be combined for a maximum of one hour per day, which is typically the first half hour of the day and the last half hour of the day based on the number of children left in the building.

<sup>55</sup> Witness Jennifer Washburn also described as problematic not being able to combine at the end of the day siblings who are in separate classes. Neither Fairfield nor Washburn testified that a state official advised them they could not combine siblings at the end of the day. Witness Bradley Stevenson testified that the primary concerns in the childcare industry at that point were the group size restriction of ten and being able to combine children before and after school.

Dr. Vanover also explained that in regard to the restriction on tours, with contact tracing in mind, the general idea was to restrict visitors to make sure that children and staff in the center had the minimal exposure possible to others who may have been exposed to the virus. Access was restricted to staff; children currently enrolled; those who would need legal access to the building, such as first responders; those needed for necessary repairs in the building; and therapeutic professionals. The plan was always to adjust going forward based upon the containment or spread of the virus. We note that effective September 1, 2020 childcare facilities were allowed to resume tours for prospective clients. 922 KAR 2:405E.

Dr. Stack also testified that because children are not always compliant, other interventions are necessary which reduce density, increase hygiene, and if disease were to spread, enable other methodologies to contain it quickly, such as cohorting and keeping smaller groups. Consequently, if one cohort of a group of ten has a problem, that does not necessitate shutting down the whole facility. As to not allowing siblings to be grouped at the beginning and end of the day, Dr. Stack stated that separating a family from itself is not one of the vehicles the state is using to reduce virus risk. He acknowledged that the LDC and childcare reopening group size rules were different because knowledge about COVID-19 evolved and the state environment was a different place in March when most people had to stay healthy at home as compared to June as the broader community reopened.

Plaintiffs point to the differences between LDCs and the reopened childcare program requirements, both of which are meant to keep children and staff safe, and argue that if the lesser requirements serve that function, more stringent requirements are arbitrary. However, the record reflects the two programs were developed under different circumstances with different foundations of evolving knowledge. The LDCs were literally emergency childcare for healthcare workers and first responders in the very early days of the pandemic with regulations based on successful emergency childcare centers in other states. LDCs were limited to children of essential workers at a time when society was generally closed down, continued providing care when it was unclear that sufficient childcare would be available without them and now have evolved to provide temporary emergency childcare for nontraditional instruction during traditional school hours. When regular Kentucky childcare facilities generally reopened in June 2020, the group sizes and the tour restrictions for these centers were based on articulated public health reasons, i.e., efforts to limit the spread of disease as society in general was reopening. These facilities reopened serving the general population at a time when the potential for disease spread had increased. Thus, Plaintiffs failed to meet their burden of establishing that either of these challenged childcare restrictions lack a reasonable basis, standing alone or in comparison with LDC regulations. On the contrary, the record amply reflects a rational basis for both of them. As for the grouping of siblings, as noted above, the regulation does not prevent siblings being grouped together at the end of the day.

## **B. Florence Speedway's Allegations**

Next, Florence Speedway complains that the June 1, 2020 Healthy at Work: Requirements for Automobile Racing Tracks<sup>56</sup> contains arbitrary provisions, those being: (1) only allowing authorized employees and essential drivers and crews on the premises when indoor facilities like restaurants and bowling alleys are allowed 33% capacity; (2) limiting its food service to “carry-out only” when restaurants are permitted to operate at 33% capacity indoors; and (3) requiring PPE with no exceptions, which prevents it from complying with the Americans with Disabilities Act.<sup>57</sup> Because this was at a time when it was not permitted to have fans, Florence Speedway indicated that it was willing to space spectators six feet from people of a different household. By the time the Boone Circuit Court conducted an evidentiary hearing for the injunction request and issued its order, however, the requirements directly challenged had all changed. When Florence Speedway amended its motion for a temporary injunction, it did not challenge the capacity requirement in effect but, as a business reliant on family attendance, objected to the social distancing requirement which did not allow household members to sit within six feet of one another. Florence Speedway argued the six-foot social

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<sup>56</sup> The Governor’s June 3, 2020 order, incorporating the Healthy at Work requirements, made them effective June 1, 2020.

<sup>57</sup> The order actually provided: “Racetracks should ensure employees and racing crews wear appropriate face coverings at all times practicable . . . .” The requirements state that for employees who are isolated with more than six feet of social distancing, face coverings are not necessary at all times.

distancing requirement was arbitrary as household members maintain close proximity to each other throughout everyday life.

As noted above, on June 22, 2020, the requirements for restaurants were amended, allowing an increase from 33% to 50% indoor dining capacity. On June 29, 2020, the public-facing businesses order was amended to allow venues and event spaces, including Florence Speedway, to reopen to the public.<sup>58</sup> The amendment allows 50% of the maximum capacity permitted at a venue, assuming all individuals can maintain six feet of space between them with that level of occupancy. Additionally, if the venues operate any form of dining service, those services must comply with the requirements for restaurants and bars. On July 10, 2020, the emergency mask regulation provided a number of exemptions for the wearing of face coverings, one exemption being for “[a]ny person with disability, or a physical or mental impairment, that prevents them from safely wearing a face covering.”

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<sup>58</sup> The Healthy at Work: Requirements for Venues and Event Spaces applied to, among other businesses, “professional and amateur sporting/athletic stadiums and arenas.”

During the July 1, 2020 hearing of Plaintiffs’ motion for a temporary restraining order, Governor’s counsel explained that Florence Speedway’s capacity complaint was moot because the June 29 Healthy at Work order allowed it to open at 50% capacity. In response to Florence Speedway’s concern that a footnote in the order suggested differently, Governor’s counsel clarified that Florence Speedway was able to open at 50% capacity and offered to amend the order to address Florence Speedway’s concern. A revised order was issued, effective July 10, 2020. The July 10 order maintained the six-foot social distancing requirement for individuals. Florence Speedway, its business relying on family attendance, testified at the July 16 injunction hearing about the negative business impact of not being allowed to have family members sit within six feet of each other. Effective July 22, 2020, the social distancing requirement for venues and event spaces was amended to “[a]ll individuals in the venue or event space must be able to maintain six (6) feet of space from everyone who is not a member of their household.”

Except for the claim related to the inability of household members to sit within six feet of one another, which we discuss further below, the succeeding orders made Florence Speedway's initial claims of arbitrariness moot by the time the trial court entered its July 20 order. Of course, one exception to the mootness doctrine is the "capable of repetition, yet evading review" exception. *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992). Under this exception, Kentucky courts consider "whether (1) the 'challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again.'" *Id.* (quoting *In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir. 1988)). However, the Florence Speedway's claims of arbitrariness as to the June 1, 2020 Healthy at Work: Requirements for Automobile Racing Tracks do not meet the criteria for the "capable of repetition, yet evading review" exception. The nature of this case, a public health pandemic, is extraordinary and evolving knowledge of the virus results in evolving responses. Consequently, this is not the usual case of a challenged action being too short in duration to be fully litigated prior to its cessation or expiration. And given the advancement of knowledge of COVID-19 and the ongoing attempts to balance that knowledge with keeping the economy open, no reasonable expectation exists that Florence Speedway will again be subject to the initially challenged business restrictions. In terms of Florence Speedway's challenge against the social distancing requirement which did not



allow family members to sit within six feet of one another, we conclude that requirement was arbitrary.

During the July 16 hearing, Dr. Stack testified about the public health concerns related to sporting events. He said sporting events are particularly concerning because people are often shouting and cheering, which leads to an increased spread of the respiratory droplets that transmit the virus. This enhanced risk exists even outdoors due to the shouting and cheering. Also, eating and drinking increase saliva and spread respiratory droplets and consuming food and drink is not compatible with mask wearing. However, he agreed no medical or public health reason would prohibit household members sitting together at an event space and acknowledged that household seating had been permitted in other activities. Effective July 22, 2020, the social distancing requirement for venues and event spaces was amended to “[a]ll individuals in the venue or event space must be able to maintain six (6) feet of space from everyone who is not a member of their household.” Based on Dr. Stack’s testimony, we must conclude that there was not a rational basis for the social distancing requirement initially imposed on Florence Speedway. Given that the social distancing requirement was amended six days after the injunction hearing, Florence Speedway has now received the relief which it sought.

### **C. Beans Cafe's Allegations**

Beans Cafe originally sought a declaration that certain provisions of the May 22, 2020 Healthy at Work: Requirements for Restaurants<sup>59</sup> are arbitrary. It complained that the requirement that employees wear PPE whenever they are near other employees or customers (so long as such use does not jeopardize the employee's health or safety) is not uniformly applied. Beans Cafe also alleged little scientific basis exists for requiring cloth facemasks, rendering the requirement arbitrary. The cafe challenged as arbitrary and capricious the order limiting restaurants to 33% indoor capacity and requiring six feet of distance between customers, noting these requirements make it difficult, if not impossible, for restaurants to make a profit. Beans Cafe also contends that it is arbitrary not to allow customers to sit back-to-back at tables with a three-and-one-half foot distance between the customers.

As indicated above, effective June 29, 2020, in the Healthy at Work: Requirements for Restaurants and Bars, the social distancing requirements for restaurants changed to a 50% capacity limit or the greatest number that permits individuals not from the same household to maintain six feet of space between each other with that level of occupancy. The PPE mask provisions stayed the same. However, the emergency mask regulation went into effect July 10, 2020. Based on the changes in regulations, the only issues remaining are whether a rational basis exists for requiring the six-foot social distancing

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<sup>59</sup> The Governor's May 22, 2020 order incorporated the Healthy at Work requirements.

and face coverings. Beans Cafe seeks an amendment in the six-foot social distancing requirement because that requirement, despite being allowed 50% capacity, reduces the business's seating capacity to about 30%.

Although the July 10, 2020 emergency mask regulation is more detailed than the May 22, 2020 face mask provision, the requirement that employees must wear face masks when they are near other employees or customers (so long as such use does not jeopardize the employee's health or safety) is reflected in 902 KAR 2:190E<sup>60</sup> Section (2), subsections (2)(a) and (4)(b), which requires any person in a restaurant (when not seated and consuming food or beverage) to wear a face covering when within six feet of another, unless that individual is of his household; the face covering provision does not apply when a person has a disability that prevents them from safely wearing a face covering. As identified in 902 KAR 2:190E, KRS 214.020, the Cabinet for Health and Family Services's broad police powers for dealing with contagious

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<sup>60</sup> 902 KAR 2:210E replaced 902 KAR 2:190E effective August 7, 2020 at 5:00 p.m. Related to this case, 902 KAR 2:210E changed the non-compliance penalties. The penalties are described below.

diseases,<sup>61</sup> KRS 211.025,<sup>62</sup> and KRS 211.180(1)<sup>63</sup> provide a rational basis for the face covering and the social distancing measure which Beans Cafe challenges. In addition, Dr. Stack testified during the evidentiary hearing regarding the scientific basis for the six-foot social distancing requirement and wearing face coverings to prevent the spread of COVID-19, a highly contagious respiratory disease. Beans Cafe's citation to a study questioning the efficacy of cloth masks does not in any way negate the established rational basis for these public health measures.<sup>64</sup>

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<sup>61</sup> KRS 214.020 states:

When the Cabinet for Health and Family Services believes that there is a probability that any infectious or contagious disease will invade this state, it shall take such action and adopt and enforce such rules and regulations as it deems efficient in preventing the introduction or spread of such infectious or contagious disease or diseases within this state, and to accomplish these objects shall establish and strictly maintain quarantine and isolation at such places as it deems proper.

<sup>62</sup> KRS 211.025 states:

Except as otherwise provided by law, the cabinet shall administer all provisions of law relating to public health; shall enforce all public health laws and all regulations of the secretary; shall supervise and assist all local boards of health and departments; shall do all other things reasonably necessary to protect and improve the health of the people; and may cooperate with federal and other health agencies and organizations in matters relating to public health.

<sup>63</sup> KRS 211.180(1) states:

The cabinet shall enforce the administrative regulations promulgated by the secretary of the Cabinet for Health and Family Services for the regulation and control of the matters set out below . . . including but not limited to the following matters: (a) Detection, prevention, and control of communicable diseases, . . . .

<sup>64</sup> The Boone Circuit Court cited to the study but declined to rely on it as not being subject to judicial notice. The title of the study indicates it compared cloth masks to medical masks in healthcare workers.

In regard to Beans Cafe's allegation that it was arbitrary not to allow customers to sit back-to-back at tables with a three and one-half foot distance between them, Dr. Stack testified to the reasoning behind measures used in restaurants to mitigate spread of the virus. He first noted that eating and drinking increases saliva and spreads respiratory droplets because people do not wear masks while consuming food and drink. In terms of the six-foot spacing requirement for restaurant and bars, there is an exception for booth seating when there is a plexiglass barrier, as long as the barrier effectively separates the opposite side. The physical barrier is of added value and in theory prevents virus spreading easily back and forth. Dr. Stack contrasted that to the very different situation when people are sitting back-to-back with three-foot distance between them in the middle of an open restaurant, when people generally turn and move around, an environment where the virus can easily spread. On this restriction, Beans Cafe essentially had nothing more than an allegation of arbitrariness while Dr. Stack's testimony establishes a rational basis for this public health measure.

Finally, face masks. As this case progressed to the injunction hearing, Plaintiffs expressed that they were willing to require their employees and customers to wear masks, a fact noted by the Boone Circuit Court in its Order. However, they objected to the business closure penalty that could result if they did not enforce the mask requirement on their premises. Plaintiffs argue that the July 10, 2020 statewide mask regulation, 902 KAR 2:190E, which they

describe as requiring businesses in violation of the regulation to be immediately shut down, violates due process.

Pertinently, 902 KAR 2:190E Section 3, Non-Compliance, provides:

(2) Any person who violates this Regulation by failing to wear a face covering while in a location listed in Section 2 and not subject to any of the listed exemptions shall receive a warning for the first offense, a fine of fifty dollars (\$50) for the second offense, seventy five dollars for the third offense, and one hundred dollars for each subsequent offense.<sup>[65]</sup>

Additionally, if the person is violating this Regulation by attempting to enter a public-facing entity or mode of transportation listed in Section 2 while failing to wear a face covering and not subject to any of the exemptions listed, they shall be denied access to that public-facing entity or mode of transportation. If a person is already on the premises and violates this Regulation by removing a face covering, they shall be denied services and asked to leave the premises, and may be subject to other applicable civil and criminal penalties.

(3) Any owner, operator or employer of a business or other public facing entity who violates this Regulation by permitting individuals on the premises who are not wearing a

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<sup>65</sup> 902 KAR 2:210E revised the penalty section to read:

A person who violates this administrative regulation by failing to wear a face covering as required by Section 2(2) of this administrative regulation and who is not exempt pursuant to Section 2(3) of this administrative regulation shall be given a warning for the first offense and shall be fined:

1. Twenty-five (25) dollars for the second offense;
2. Fifty (50) dollars for the third offense;
3. Seventy-five (75) dollars for the fourth offense; and
4. \$100 for each subsequent offense.

At a September 8, 2020 meeting of the Administrative Regulation Review Subcommittee, the face mask regulation, 902 KAR 2:210E, was the subject of public comment by several witnesses. After the comments, a subcommittee member made a motion to declare the emergency regulation deficient. A deficiency motion is the vehicle the subcommittee uses to request that the Governor withdraw an emergency regulation in accordance with KRS 13A.190. The motion failed. *902 KAR 2:210E: Covering the Face in Response to Declared National Or State Public Health Emergency – Committee Review of Effective Regulations*, Admin. R. Review Subcomm. (Sept. 8, 2020) (minutes available at [https://apps.legislature.ky.gov/minutes/adm\\_regs/200908OK.PDF](https://apps.legislature.ky.gov/minutes/adm_regs/200908OK.PDF)).

face covering and are not subject to any exemption shall be fined at the rates listed in section 3(2). The business may also be subject to an order requiring immediate closure.

While the Plaintiffs argue that the closure penalty for non-compliance is arbitrary due to lack of procedural due process, they do not identify any among themselves who has been threatened with a fine, fined, threatened with closure, or closed pursuant to 902 KAR 2:190E. As recently explained in *Commonwealth Cabinet for Health & Family Services, Department for Medicaid Services v. Sexton by & through Appalachian Regional Healthcare, Inc.*, 566 S.W.3d 185, 195 (Ky. 2018), in order for Kentucky courts to have constitutional jurisdiction to decide a claim, the litigant must have standing. Standing is achieved when “[a] plaintiff . . . allege[s] a personal injury fairly traceable to the defendant’s allegedly unlawful conduct and [which is] likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S. 737, 751 (1984), *overruled on other grounds by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). The injury must be a distinct and palpable injury that is actual or imminent. *Id.* at 751; *Massachusetts v. EPA*, 549 U.S. 497, 517, 127 S. Ct. 1438, 1453 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)). Here, because the Plaintiffs’ injury is only hypothetical, they have failed to show the requisite injury for adjudication of their claim related to 902 KAR 2:190E’s business closure penalty. Additionally, because the Plaintiffs have not raised a case or controversy, *Commonwealth v. Bredhold*, 599 S.W.3d 409, 417 (Ky. 2020), a declaration of rights is not available to the Plaintiffs under 902 KAR 2:190E. *See also* KRS 418.040; *Veith v. City of Louisville*, 355

S.W.2d 295 (Ky. 1962). Finally, while it is clear that the Cabinet has broad police powers to enforce its public health measures, Plaintiffs are not without recourse if they were to become subject to a fine or business closure and chose to challenge it. Just as in the present case, the courts are always open when citizens believe the government has overstepped.

Although not a challenge to a specific individual order or regulation, the Attorney General also has challenged the Governor's orders as arbitrary because they have not been geographically tailored on a county-by-county or regional basis, but have employed a "one-size-fits-all-approach." He notes, at least early on, some areas of Kentucky had no reported COVID-19 cases. However, given Dr. Stack's testimony about COVID-19's introduction and quick spread to the United States and evolving knowledge of its method of transmission, the Attorney General has failed to show how the Governor's orders dealing with a previously unknown viral pathogen were not rationally related to mitigation of its spread. In fact, COVID-19 has now spread to all 120 Kentucky counties and all areas of the Commonwealth even with prompt and proactive public health measures.<sup>66</sup>

In summary, KRS 214.020 reflects the Cabinet's broad police powers (and the Governor's in conjunction with the Cabinet in the event of an emergency) to adopt measures that will prevent the introduction and spread of infectious diseases in this state. While a global pandemic is unprecedented for

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<sup>66</sup> See Kentucky Cabinet for Health and Family Services, *COVID-19 Daily Reports*, <https://chfs.ky.gov/Pages/cvdaily.aspx> (last visited Nov. 1, 2020).



all but those who were alive during the 1918 influenza epidemic,<sup>67</sup> the measures employed to deal with the spread of COVID-19, including business closure, are not unprecedented in our Commonwealth. *See Allison v. Cash*, 137 S.W. 245 (Ky. 1911) (smallpox epidemic in Lyon County grounds for closing millinery shop). Courts have long recognized the broad health care powers of the government will frequently affect and impinge on business and individual interests. As the United States Supreme Court recognized in *Jacobson*, 197 U.S. at 26,

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Here, except for the initial social distancing requirement at Florence Speedway which violates Section 2, the challenged public health measures do

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<sup>67</sup> University of Michigan Center for the History of Medicine, *American Influenza Epidemic of 1918-1919: Louisville, Kentucky*, <https://www.influenzaarchive.org/cities/city-louisville.html#>. The influenza death toll in Kentucky during that epidemic is estimated between 14,000-16,000. Worldwide it is estimated that at least 50 million died, with about 675,000 deaths occurring in the United States. Jack Welch, *The Mother of All Pandemics*, Louisville Magazine (Aug. 16, 2020, 11:03 a.m., originally appeared in Oct. 2009 issue), <https://www.louisville.com/content/mother-all-pandemics>; Centers for Disease Control and Prevention, *1918 Pandemic (H1N1 virus)*, <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>. (Sources last visited Nov. 1, 2020.)

not violate Sections 1 and 2 of the Kentucky Constitution. A rational basis exists for the other orders and regulations, all of which are reasonably designed to contain the spread of a highly contagious and potentially deadly disease. As to Florence Speedway, its social distancing complaint regarding household seating has been remedied with a subsequent executive order that became effective six days after the July 16 injunction hearing.

**V. The Writ Action is Moot and Plaintiffs Have Not Established that They Are Entitled to the Requested Injunctive Relief.**

This particular action, 2020-SC-0313, began as an original action seeking a writ against the Court of Appeals' judge who had denied writ relief following the issuance of the Boone Circuit Court's July 2, 2020 restraining order. Typically a restraining order remains in place until and not after (a) the time set for a hearing on a motion to dissolve the order, (b) entry of a temporary injunction or (c) entry of final judgment. CR 65.03. A hearing was held on Plaintiffs' and the Attorney General's request for a temporary injunction and the Boone Circuit Court prepared a July 20, 2020 temporary injunction order, granting the relief requested, but our July 17 stay order precluded entry of any such order until this Court addressed the COVID-19 emergency issues raised in that and other pending cases. With the presentation of a temporary injunction ready for entry, the writ action as presented is now moot and by virtue of this Court's stay order this case has essentially evolved into an appeal of the temporary injunction order.

A temporary injunction may be issued by the trial court when the plaintiff has shown irreparable injury, that the various equities involved favor

issuance of the relief requested and that a substantial question exists on the merits. *Maupin v. Stansbury*, 575 S.W.2d 695, 697 (Ky. App. 1978). “Although not an exclusive list, [in balancing the equities] the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo.” *Id.* To grant relief, a trial court must conclude “that an injunction will not be inequitable, *i.e.*, will not unduly harm other parties or disserve the public.” *Price v. Paintsville Tourism Comm’n*, 261 S.W.3d 482, 484 (Ky. 2008). To satisfy the “substantial question” prong of the temporary injunction analysis, the trial court must determine there is a “**substantial possibility**” that the plaintiff “will ultimately prevail on the merits.” *Norsworthy v. Kentucky Bd. of Medical Licensure*, 330 S.W.3d 58, 63 (Ky. 2009) (emphasis added). A trial court’s order granting injunctive relief is reviewed for abuse of discretion. *Price*, 261 S.W.3d at 484. “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Here, the trial court concluded that at least two of the Plaintiffs, Little Links and Florence Speedway, had established irreparable injury to their respective business interests. Even if we accept those findings for purposes of review, injunctive relief is still not justified in this case. As our discussion of the four legal challenges reflects, there is not a “substantial possibility” that Plaintiffs and the Attorney General “will ultimately prevail on the merits.”

*Norsworthy*, 330 S.W.3d at 63. Additionally, the equities weigh against the grant of a temporary injunction.

Plaintiffs and the Attorney General argue that the injunction serves the public interest because the Governor's orders have caused economic hardships and burdened the constitutional rights of citizens. In their view, the injunction will allow Kentuckians to reestablish control over critical aspects of their lives. We conclude that the greater public interest lies instead with the public health of the citizens of the Commonwealth as a whole. The global COVID-19 pandemic threatens not only the health and lives of Kentuckians but also their own economic interests; the interests of the vast majority take precedence over the individual business interests of any one person or entity. While we recognize and appreciate that the Plaintiffs allege injuries to entire industries in the state, such as the restaurant and childcare industries, the interests of these industries simply cannot outweigh the public health interests of the state as a whole.

The Governor's orders were, and continue to be, necessary to slow the spread of COVID-19 and protect the health and safety of all Kentucky citizens. This type of highly contagious etiological hazard is precisely the type of emergency that requires a statewide response and properly serves as a basis for the Governor's actions under KRS Chapter 39A. Because the law and equities favor the Governor in this matter, it was an abuse of discretion for the trial court to issue the temporary injunction.

## **CONCLUSION**

Upon finality of this Opinion, the stay entered July 17, 2020 shall be lifted as to any affected cases challenging the Governor's COVID-19 response and those cases may proceed consistent with this Opinion. As to the Boone Circuit Court litigation, the July 20, 2020 Order that has been held in abeyance is reversed and this matter is remanded to that Court for further proceedings, if any, consistent with this Opinion.

All sitting. All concur.

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## APPENDIX A

### Declarations of Emergency from 1996 to present

<b>Date:*</b>	<b>Order Number:</b>	<b>Related to:</b>
<b>1.</b> 1/8/1996	1996-0037	Severe winter storms
<b>2.</b> 3/21/1996	1996-0359	Severe winter storms
<b>3.</b> 4/22/1996	1996-0501	Heavy rainfall and storms
<b>4.</b> 5/30/1996	1996-0689	Severe weather tornadoes
<b>5.</b> 7/23/1996	1996-0970	Active Duty Order – severe weather
<b>6.</b> 3/3/1997	1997-0267	Severe storms and record rainfall
<b>7.</b> 12/10/1997	1997-1610	Active Duty Order – severe winter storms Monroe County
<b>8.</b> 2/10/1998	1998-0159	Winter storm
<b>9.</b> 2/18/1998	1998-0189	Winter storm
<b>10.</b> 7/30/1998	1998-1014	Threat to public health water contamination in Auburn
<b>11.</b> 9/16/1998	1998-1252	Threat to public health water contamination in Logan County
<b>12.</b> 9/16/1998	1998-1268	Sawdust fire
<b>13.</b> 9/17/1998	1998-1159	Critical need for hay due to drought
<b>14.</b> 8/20/1999	1999-1159	Severe drought and fire season
<b>15.</b> 10/11/1999	1999-1377	Failure of water treatment system
<b>16.</b> 11/18/1999	1999-1542	Contaminated water
<b>17.</b> 1/5/2000	1998-0012	Severe weather
<b>18.</b> 1/26/2000	2000-0019	Ohio County water tank failure
<b>19.</b> 2/21/2000	2000-0245	Severe thunderstorms
<b>20.</b> 5/11/2000	2000-0563	Menifee Co. & Frenchburg water loss from storage tanks
<b>21.</b> 5/30/2000	2000-0620	Grayson County severe storms
<b>22.</b> 10/16/2000	2000-1347	Water contamination
<b>23.</b> 11/6/2000	2000-1427	Forest fires
<b>24.</b> 12/14/2000	2000-1582	Collapse of water tank in Pineville
<b>25.</b> 1/22/2000	2000-0085	Vicco water tank failure
<b>26.</b> 6/4/2001	2001-0683	Laurel County storm damage
<b>27.</b> 6/12/2001	2001-0718	Rockport water plant failure
<b>28.</b> 8/7/2001	2001-0996	Severe storms
<b>29.</b> 8/20/2001	2001-1059	Severe storms
<b>30.</b> 9/5/2001	2001-1137	Dixon water line leakage
<b>31.</b> 9/5/2001	2001-1138	Elkhorn flooding
<b>32.</b> 9/21/2001	2001-1139	Changing weight limits for trucks due to petroleum shortage
<b>33.</b> 11/2/2001	2001-1361	Fire danger due to wind and drought
<b>34.</b> 2/1/2002	2002-0133	Severe storms and tornadoes+



<b>Date:*</b>	<b>Order Number:</b>	<b>Related to:</b>
<b>35.</b> 2/1/2002	2002-0134	Water supply shortages
<b>36.</b> 3/21/2002	2002-0326	Heavy rainfall, flooding, and power outages
<b>37.</b> 4/29/2002	2002-0483	Severe storms and tornadoes
<b>38.</b> 6/18/2002	2002-0686	Authorizing combining the Natural Resources and Environmental Protection Cabinet and the Department of Military Affairs during a state of emergency
<b>39.</b> 6/18/2002	2002-0687	Authorizing combining resources of the Kentucky National Guard and other state agencies during a state of emergency
<b>40.</b> 6/18/2002	2002-0688	Authorizing support of the Kentucky National Guard
<b>41.</b> 6/18/2002	2002-0689	Authorizing combining the Kentucky National Guard and other agencies in preparation for a seismic disaster
<b>42.</b> 6/18/2002	2002-0690	Authorizing combining the Kentucky National Guard and the Division of Forestry in preparation for forest fires
<b>43.</b> 6/18/2002	2002-0691	Authorizing the Kentucky National Guard to work on anti-drug operations
<b>44.</b> 12/6/2002	2002-1343	Dangerous levels of Manganese in the Hawesville water supply
<b>45.</b> 2/16/2003	2003-0150	Winter storm
<b>46.</b> 3/25/2003	2003-0284	Flood damage in Murray
<b>47.</b> 5/13/2003	2003-0459	Severe storms
<b>48.</b> 6/19/2003	2003-0617	Severe storms
<b>49.</b> 8/26/2003	2003-0875	Severe storms
<b>50.</b> 5/28/2004	2004-0536	Strong spring storms in Central Kentucky – tornadoes, flooding, heavy rainfall
<b>51.</b> 7/20/2004	2004-0780	Severe thunderstorms in Central Kentucky
<b>52.</b> 9/16/2004	2004-1019	Remnants of Hurricane Ivan moving into Kentucky
<b>53.</b> 12/23/2004	2004-1368	Winter storm; heavy snow and ice, freezing rain
<b>54.</b> 12/29/2004	2004-1371	Winter storm
<b>55.</b> 8/30/2005	2005-0927	Remnants of Hurricane Katrina moving across Kentucky
<b>56.</b> 11/7/2005	2005-1230	Extreme fall storms in Western Kentucky
<b>57.</b> 11/16/2005	2005-1255	Extreme fall storms in Western Kentucky
<b>58.</b> 12/21/2005	2005-1368	Winter storms across Kentucky
<b>59.</b> 1/4/2006	2006-0006	Severe storms across Kentucky
<b>60.</b> 4/3/2006	2006-0361	Severe weather; power outages across Kentucky
<b>61.</b> 9/29/2006	2006-1250	Extreme fall storms across Kentucky

<b>Date:*</b>	<b>Order Number:</b>	<b>Related to:</b>
<b>62.</b> 1/17/2007	2007-0063	Train derailment in Bullitt County; state of emergency applies to entire Commonwealth
<b>63.</b> 2/28/2007	2007-0179	Water emergency in Knott County and City of Hindman
<b>64.</b> 4/9/2007	2007-0291	Additional funding required for Kentucky State Police
<b>65.</b> 4/13/2007	2007-0298	Threat of failure of the Wolf Creek Dam
<b>66.</b> 4/25/2007	2007-0336	Severe weather in Eastern Kentucky; state of emergency applies to entire Commonwealth
<b>67.</b> 7/27/2007	2007-0610	Failure of the Wolf Creek Dam
<b>68.</b> 10/4/2007	2007-0819	Extreme drought conditions; also prohibited open burning
<b>69.</b> 10/23/2007	2007-0868	Drought conditions in Kentucky
<b>70.</b> 2/6/2008	2008-0124	Intense thunderstorms and tornadoes
<b>71.</b> 4/16/2008	2008-0332	Strong thunderstorms across the Commonwealth
<b>72.</b> 6/27/2008	2008-0597	Strong storms in Indiana; order to provide assistance
<b>73.</b> 7/7/2008	2008-0678	Biohazard released in the federal prison in McCreary County
<b>74.</b> 8/29/2008	2008-0923	To support Louisiana's preparation efforts for Hurricane Gustav
<b>75.</b> 9/10/2008	2008-0959	To support Texas's preparation efforts for Hurricane Gustav
<b>76.</b> 9/10/2008	2008-0960	To support Louisiana's preparation efforts for Hurricane Gustav
<b>77.</b> 9/15/2008	2008-0974	Conditions in the Commonwealth resulting from Hurricane Ike
<b>78.</b> 10/10/2008	2008-1056	Water emergency in Magoffin County
<b>79.</b> 11/12/2008	2008-1182	Damage relief caused by drought
<b>80.</b> 1/27/2009	2009-0098	Snow and ice storm across Kentucky
<b>81.</b> 2/20/2009	2009-0158	State of emergency in Marshall County related to young men on a capsized boat that were not yet located
<b>82.</b> 5/11/2009	2009-0432	Strong storms in Central and Eastern Kentucky
<b>83.</b> 8/11/2009	2009-0756	Strong storms in North Central and Eastern parts of Kentucky
<b>84.</b> 12/21/2009	2009-1207	Strong winter storms in Central and Eastern parts of Kentucky
<b>85.</b> 1/6/2010	2010-0026	Water shortage in Perry County due to water line break
<b>86.</b> 5/3/2010	2010-0286	Strong storms in Central and Eastern Kentucky

<b>Date:*</b>	<b>Order Number:</b>	<b>Related to:</b>
<b>87.</b> 7/19/2010	2010-0621	Flash flood in Pike and Shelby Counties
<b>88.</b> 7/21/2010	2010-0633	Severe thunderstorms in Pike and Shelby Counties
<b>89.</b> 7/21/2010	2010-0634	Severe thunderstorms in Carter, Fleming, Lewis and Rowan Counties
<b>90.</b> 11/4/2010	2010-0909	Drought conditions
<b>91.</b> 4/25/2011	2011-0274	Strong spring storms across the Commonwealth
<b>92.</b> 6/21/2011	2011-0474	Strong storms in eastern Kentucky
<b>93.</b> 9/9/2011	2011-0711	Drought; U.S. Sec. of Agriculture designated several areas in southwestern part of the U.S. as disaster areas
<b>94.</b> 2/6/2012	2012-0088	Water loss in Harlan County
<b>95.</b> 2/24/2012	2012-0139	Collapse of a ferry bridge in Trigg County
<b>96.</b> 3/3/2012	2012-0154	Severe weather across the Commonwealth – tornadoes, hurricane force winds
<b>97.</b> 3/3/2012	2012-0156	Emergency authority for pharmacists in certain counties (dispense 30-day emergency supply of medication, administer immunizations to children; dispense drugs as needed to respond to circumstances of emergency)
<b>98.</b> 3/5/2012	2012-0157	Amended emergency order pertaining to severe weather
<b>99.</b> 3/5/2012	2012-0158	Severe weather across the Commonwealth – commercial motor vehicles transporting relief supplies exempt from fees for overweight vehicles
<b>100.</b> 3/5/2012	2012-0159	Added additional counties to list of emergency authority for pharmacists (see 2012-0156)
<b>101.</b> 3/6/2012	2012-0180	“ ”
<b>102.</b> 3/7/2012	2012-0186	“ ”
<b>103.</b> 3/8/2012	2012-0190	“ ”
<b>104.</b> 3/14/2012	2012-0196	Adjustment of insurance related rules and regulations on a temporary and short-term basis
<b>105.</b> 3/29/2012	2012-0234	Authority for pharmacists – No additional counties have declared a state of emergency
<b>106.</b> 6/27/2012	2012-0486	Drought conditions across the Commonwealth
<b>107.</b> 10/29/2012	2012-0889	Hurricane Sandy; render mutual aid
<b>108.</b> 4/25/2013	2013-0264	Strong storms across the Commonwealth
<b>109.</b> 2/17/2015	2015-0118	Severe winter storm across the Commonwealth

<b>Date:*</b>	<b>Order Number:</b>	<b>Related to:</b>
<b>110.</b> 2/17/2015	2015-0120	Emergency authority for pharmacists – severe winter storm
<b>111.</b> 2/24/2015	2015-0134	Emergency authority for pharmacists – severe winter storm
<b>112.</b> 3/6/2015	2015-0151	Severe winter storm across the Commonwealth
<b>113.</b> 3/6/2015	2015-0152	Severe winter storm across the Commonwealth – commercial motor vehicles transporting relief supplies exempt from fees for overweight vehicles
<b>114.</b> 4/6/2015	2015-0224	Severe storm fronts across the Commonwealth
<b>115.</b> 7/14/2015	2015-0473	Severe storms across the Commonwealth
<b>116.</b> 7/14/2015	2015-0480	Amended order pertaining to severe storms across the Commonwealth
<b>117.</b> 7/14/2015	2015-0481	Second amended order pertaining to severe storms across the Commonwealth
<b>118.</b> 1/25/2016	2016-0034	Severe winter storms across the Commonwealth
<b>119.</b> 7/8/2016	2016-0502	Severe storms across the Commonwealth
<b>120.</b> 11/3/2016	2016-0792	Drought conditions across the Commonwealth
<b>121.</b> 12/22/2016	2016-0917	Montgomery County – extremely high levels of arsenic
<b>122.</b> 3/6/2017	2017-0138	Severe storms across the Commonwealth
<b>123.</b> 2/26/2018	2018-0137	Severe storms across the Commonwealth
<b>124.</b> 2/25/2019	2019-0164	Severe storms across the Commonwealth
<b>125.</b> 3/4/2019	2019-0184	Severe storms across the Commonwealth
<b>126.</b> 2/7/2020	2020-0136	Heavy rain across the Commonwealth; flooding and landslides
<b>127.</b> 3/6/2020	2020-0215	COVID-19

**Price gouging:**

<b>Date:*</b>	<b>Order Number:</b>	<b>Related to:</b>
<b>1.</b> 8/31/2005	2005-0943	Prohibition against price gouging (related to Hurricane Katrina)
<b>2.</b> 11/8/2005	2005-1235	Prohibition against price gouging (related to extreme storms in Crittenden, Hart, Henderson and Webster Counties – but prohibition applies to entire state)
<b>3.</b> 9/12/2008	2008-0967	Prohibition against price gouging (related to Hurricane Ike in Louisiana)
<b>4.</b> 1/28/2009	2009-0099	Prohibition against price gouging (related to winter storms across the Commonwealth)

<b>Date:*</b>	<b>Order Number:</b>	<b>Related to:</b>
<b>5.</b> 5/13/2009	2009-0446	Prohibition against price gouging (related to severe storms in several counties)
<b>6.</b> 12/21/2009	2009-1212	Prohibition against price gouging (related to winter storms in several counties in Central and Eastern Kentucky)
<b>7.</b> 5/3/2010	2010-0287	Prohibition against price gouging (related to severe storms across the Commonwealth)
<b>8.</b> 7/21/2010	2010-0633	Prohibition against price gouging in Pike and Shelby Counties (related to severe storms)
<b>9.</b> 4/26/2011	2011-0279	Prohibition against price gouging (related to severe storms across the Commonwealth)
<b>10.</b> 3/3/2012	2012-0155	Prohibition against price gouging (related to severe storms across the Commonwealth)
<b>11.</b> 2/17/2015	2015-0119	Prohibition against price gouging (related to severe storms across the Commonwealth)
<b>12.</b> 7/14/2015	2015-0482	Prohibition against price gouging (related to severe storms across the Commonwealth)
<b>13.</b> 1/25/2016	2016-0035	Prohibition against price gouging (related to severe winter storms across the Commonwealth)
<b>14.</b> 7/8/2016	2016-0505	Prohibition against price gouging (related to severe storms across the Commonwealth)
<b>15.</b> 3/6/2017	2017-0139	Prohibition against price gouging (related to severe storms across the Commonwealth)
<b>16.</b> 2/26/2018	2018-0138	Prohibition against price gouging (related to severe storms across the Commonwealth)
<b>17.</b> 2/27/2019	2019-0166	Prohibition against price gouging (related to severe storms across the Commonwealth)
<b>18.</b> 3/4/2019	2019-0184	Prohibition against price gouging (related to severe storms across the Commonwealth)

\* These are the dates the executive orders declaring a state of emergency were filed in the Executive Journal. There can be variance between the date of entry and the date of the declaration of emergency, but at most the date varies by a few days.

## APPENDIX B

### I. COVID-19 legislation introduced in the 2020 Legislative Session

Legislation passed and in effect:

<b>Bill</b>	<b>Description</b>
<b>1. Senate Bill 150</b>	General COVID-19 relief bill. See footnote 15 and accompanying text.
<b>2. Senate Bill 177</b>	Education bill that addresses issues facing school districts in relation to COVID-19 and allows school districts to use as many nontraditional instruction days as deemed necessary to curb the spread of the virus.
<b>3. House Bill 352</b>	Executive branch budget: references funding for the Kentucky Poison Control Center and COVID-19 hotline; the impact of COVID-19 on the status of dual credit scholarships; directs that no federal funds from the CARES act shall be used to establish any new programs unless those new programs can be fully supported from existing appropriations.
<b>4. House Bill 356</b>	Judicial branch budget: makes appropriations for the operations, maintenance and support of the Judicial Branch and which authorized the Chief Justice to declare a Judicial Emergency to protect the health and safety of court employees, elected officials and the general public during the COVID-19 emergency.
<b>5. House Bill 387</b>	Permits the Cabinet for Economic Development to make loans to rural hospitals to assist in providing health care services.

Legislation that did not pass:

<b>Bill</b>	<b>Description</b>
<b>6. Senate Bill 9</b>	Would have allowed the Attorney General to seek injunctive relief, as well as civil and criminal penalties, for violations of KRS 216B regarding abortion facilities and any orders issued under KRS Chapter 39A relating to elective medical procedures, including abortions.
<b>7. Senate Bill 136</b>	Would have allowed chiropractors and dentists to continue providing care. It also would have allowed entities like the Kentucky Restaurant Association and the Kentucky Hospital Association, to issue guidance on reopening businesses consistent with guidance on avoiding the spread of COVID-19.

<b>Bill</b>	<b>Description</b>
<b>8. House Bill 32</b>	Contained an amendment to create a Kentucky Small Business COVID-19 Task Force that would recommend reopening strategies, evaluate forms of assistance for small businesses, and develop recommendations for the General Assembly to consider related to small business assistance.
<b>9. House Bill 322</b>	Sought to create a new section of KRS Chapter 39A to limit the scope of emergency orders issued by the Governor and create a civil cause of action for persons adversely affected by an emergency order. The amendment would also make public officials who violate the amendment guilty of a Class A misdemeanor.
<b>10. House Bill 351</b>	Proposed an amendment to KRS 39A.100 to allow the Governor, upon recommendation of the Secretary of State, to declare by executive order a different time, place or manner for holding elections in an election area in which a state of emergency has been declared.
<b>11. House Bill 424</b>	Included an amendment that would provide that the time requirement for any filing, notice, recording, or other legal act with the County Clerk would be tolled until thirty days after the declaration of emergency ends.
<b>12. House Bill 449</b>	Included an amendment that would provide that the time requirement for any filing, notice, recording, or other legal act with the County Clerk would be tolled until thirty days after the declaration of emergency ends.
<b>13. House Bill 451</b>	Included an amendment to prohibit abortion facilities or physicians from deeming an abortion to be an emergent medical procedure.
<b>14. House Bill 461</b>	Contained amendments for educational relief, similar to Senate Bill 177.

**II. Resolutions introduced: All adopted but Senate Joint Resolution 246**

<b>Resolution</b>	<b>Description</b>
<b>1. Senate Joint Resolution 246</b>	Introduced on 03/06/2020 “directing the Cabinet for Health and Family Services to assess Kentucky’s preparedness to address the coronavirus and report to the General Assembly.” It was assigned to the Senate Health and Welfare Committee but received no hearing.

<b>Resolution</b>	<b>Description</b>
<b>2. Senate Resolution 296</b>	Honors teachers, bus drivers, janitorial staff of schools and other individuals delivering meals to Kentucky's students while schools are closed due to the coronavirus pandemic.
<b>3. Senate Resolution 321</b>	Honors Kentucky Mist Distillery for its help during the COVID-19 pandemic.
<b>4. Senate Resolution 331</b>	Honors the Kentucky Beer Wholesalers Association for distributing hand sanitizer.
<b>5. Senate Resolution 332</b>	Commends the Governor and others for their courageous service during the COVID-19 crisis.
<b>6. House Resolution 135</b>	Encourages LRC to establish emergency preparedness task force.
<b>7. House Resolution 137</b>	Honors the Beer Wholesalers.



# Exhibit B

**COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
8<sup>th</sup> DIVISION  
CIVIL ACTION NO. 20-CI-3566**

**LEXINGTON-FAYETTE URBAN  
COUNTY HEALTH DEPARTMENT**

**PLAINTIFF**

**VS.**

**ORDER**

**ANDREW COOPERRIDER  
and  
DEANS DINER, LLC  
d/b/a BREWED**

**DEFENDANTS**

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Before the Court is a motion filed by Plaintiff Lexington-Fayette Urban County Health Department (hereinafter LFCHD”) seeking a temporary restraining order and/or temporary injunction against Defendant Deans Diner, LLC d/b/a Brewed (hereinafter “Brewed”). LFCHD asserts that Brewed has defied Governor Beshear’s most recent Executive Order (“EO”)<sup>1</sup> prohibiting indoor dining and that Brewed has refused to comply with LFCHD’s repeated notices of enforcement.<sup>2</sup> On November 30, 2020 this Court did conduct a hearing on said motion. The hearing was conducted via Zoom in accordance with Supreme Court Order 2020-71 as amended. The parties with counsel appeared and stipulated to the Court having jurisdiction. At that hearing the parties were afforded the opportunity to present evidence and argument for the record. Counsel for Plaintiff elicited testimony from Karen Sanders and Denny “Skip” Castleman, both employees of LFCHD. Counsel for Defendants elected not call any witnesses at the hearing but did reference Mr.

<sup>1</sup> Governor Beshear’s emergency order Executive Order 2020-968.

<sup>2</sup> See Plaintiff’s Complaint and attached exhibits E, F, G and I.

Cooperrider's affidavit which was submitted with the Defendants' written Objection to Plaintiff's motion.

Having conducted the hearing, reviewed the record and being otherwise sufficiently advised, it is hereby **ORDERED** that LFCHD's motion for temporary restraining order and injunctive relief is **GRANTED**. While sympathetic to many of the arguments raised by the Mr. Cooperrider including the likely financial distress the enforcement of the Governor's EOs would place on him, his business "Brewed", and his employees, as a trial court this Court is duty bound to follow existing Kentucky law applicable to the issues raised.<sup>3</sup> The Kentucky Supreme Court recently held that the Governor is lawfully acting within the emergency powers granted to him by the legislature when he issues such public health emergency orders to attempt to reduce the spread of COVID-19.<sup>4</sup> LFCHD is lawfully authorized to enforce the Governor's EOs.<sup>5</sup> Thus, LFCHD has met the CR 65.04 requirements for the issuance of a temporary injunction, in particular that it is likely to succeed on the merits of its claims.

### **Findings of Fact**

LFCHD is an "urban county health department" whose duties include helping to prevent the spread of infectious diseases in Fayette County and enforcing "health related laws in its jurisdiction<sup>6</sup>." Brewed is a restaurant located at 124 Malibu Drive, Lexington, Fayette County, Kentucky 40503. Brewed, along with other food service entities located in Fayette County, operate subject to permits and oversight of the local Health Department<sup>7</sup>.

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<sup>3</sup> SCR 1.040

<sup>4</sup> See *Beshear v. Acree*, Case No. 2020-SC-0313-OA

<sup>5</sup> See KRS 212.245(6)

<sup>6</sup> See Plaintiff's Complaint at page 1.

<sup>7</sup> KRS 212.245

On November 18, 2020, Governor Beshear issued EO2020-968. This Executive Order is the latest of a series of emergency orders issued in response to the ongoing COVID-19 pandemic. Among the directives contained in EO 2020-968 is a temporary restriction on indoor dining at restaurants and bars in Kentucky. Pursuant to the EO, restaurants and bars “must cease all indoor food and beverage consumption<sup>8</sup>.” The Order further states that restaurants and bars may continue to serve patrons via carry-out or drive thru service and may serve patrons via outdoor dining so long as tables are placed 6 feet apart and each table has no more than 8 individuals from no more than 2 households<sup>9</sup>.

On November 24, 2020, Karen Sanders, an environmental health specialist/health inspector with LFCHD, came to Brewed to perform a routine inspection. Sanders testified that she was assigned to perform a routine inspection of the restaurant which occurs every 6 months pursuant to LFCHD guidelines. Sanders testified that upon entering the premise she observed several patrons sitting at tables indoors drinking coffee. Sanders approached the Counter and informed Defendant Cooperrider that she was with LFCHD and was there to perform a routine inspection of the establishment. Sanders further informed Defendant Cooperrider that in-person dining was prohibited pursuant to EO 2020-968. Mr. Cooperrider responded that he was operating as a patio because he had partially opened a bay door on the building which he asserts complied with the Order. Sanders stated that she informed Mr. Cooperrider that the premise could be no more than 50% walls in order to be considered “outdoor” as defined by the Healthy at Work directives. During the course of her conversation with Mr. Cooperrider, Sanders was

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<sup>8</sup> Executive Order 2020-968 paragraph 4

<sup>9</sup> Id.

approached by a patron who was not wearing a face mask in violation of EO 2020-586 which requires individuals to wear facial coverings while indoors in public places. Mr. Cooperrider insisted that he would continue operating at which point Sanders exited the building to call her supervisor Skip Castleman. Sanders conveyed her observations to Castleman who told her to complete the necessary paperwork for an Enforcement Notice in regard to the indoor dining and a Notice of Correction and citation regarding the face mask infraction<sup>10</sup>. Sanders completed the appropriate paperwork and returned to the restaurant to provide copies to Mr. Cooperrider. Ultimately, Mr. Cooperrider refused to sign the paperwork which prompted Sanders to call Castleman again for advice on How to proceed. Castleman told Sanders that he would come to the restaurant to discuss the matter with Cooperrider.

Skip Castleman, an environmental health coordinator with LFCHD, testified at the hearing as to his involvement in the inspection of Brewed on November 24, 2020. Castleman stated that he arrived at Brewed and spoke with Sanders in the parking lot to review the paperwork she had completed for the indoor dining and face mask violations she observed. Castleman testified that he then proceeded into the restaurant where he also observed patrons sitting at indoor tables and drinking coffee. Castleman then informed Cooperrider that he could continue to operate his business with limited outdoor seating on his patio, delivery service or curbside service but his continued refusal to comply with the Executive Order would result in a Closure Notice. Again, Cooperrider refused to comply and stated that he would continue allowing indoor dining.

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<sup>10</sup> See Plaintiff's Exhibits E, F, and G.

Castleman exited the restaurant and went to the parking lot to call his supervisor about how to proceed. Castleman was told to complete a second notice of enforcement and a notice of closure. Castleman completed the requisite paperwork and provided copies of the forms to an employee at the counter. Castleman also informed the employee that the restaurant's permit was revoked, and that Cooperrider could contact LFCHD for reinstatement of the permit. Castleman then assisted Sanders in taping the Closure Notice to the exterior door of the restaurant and exited the premise.

Defendant Cooperrider asserts, through his affidavit testimony, that his business Brewed is an event space since it regularly hosts various events and gatherings. Cooperrider further asserts that the restrictions for event spaces stated in 2020-968 are the applicable restrictions with which his business must comply. Cooperrider maintains that he complied with all pertinent restrictions and guidelines by implementing social distancing measures, regular sanitizing, requiring employees to wear face masks, and requiring patrons to wear face masks unless the patron is exempt<sup>11</sup>. Defendant alleges that the November 24, 2020 Inspection of Brewed by Karen Sanders was not a routine inspection because Sanders did not inspect "food preparation and other areas" as is typical for a routine inspection<sup>12</sup>. Further Defendant alleges that Sanders and Castleman entered the premise without a warrant and without consent. Cooperrider does not appear to deny that he was serving patrons food and beverage while inside Brewed.

Based on the information presented to the Court, the Court finds for purposes of this motion that Brewed is a restaurant or bar, that at the time the inspectors visited the premises on November 24<sup>th</sup> it had and was engaging in indoor food service and many of

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<sup>11</sup> See Defendant Cooperrider's Affidavit at page 3.

<sup>12</sup> See Defendant Cooperrider's Affidavit at page 2.

the patrons inside were not wearing a mask, Because Mr. Cooperrider continues to refuse to be compliant with the current rules LFCHD has filed a Complaint along with the instant motion for temporary injunctive relief pursuant to CR 65.04<sup>13</sup>

### **Standard**

Temporary injunctive relief is appropriate when the movant can clearly establish that the “movant’s rights are being violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual<sup>14</sup>.” The movant must “allege and prove facts from which the court can reasonably infer that such would be the result<sup>15</sup>.” Further, the Court must evaluate the equitable considerations in deciding whether an injunction is appropriate<sup>16</sup>.

### **Conclusions of Law**

The Court concludes that LFCHD has satisfied the requirements of CR. 65 and is therefore entitled to temporary injunctive relief.

First, Plaintiff has demonstrated that it will suffer irreparable harm as a result of Defendant’s conduct. LFCHD is a governmental entity tasked with enforcing laws related to public health and will suffer harm if they are not permitted to enforce such laws<sup>17</sup>. The Kentucky Supreme Court, in a recent opinion, determined that the Governor has the authority to issue executive orders to address the spread of COVID-19 pursuant to

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<sup>13</sup> The parties stipulated during the hearing that the remedy sought by Plaintiff was a temporary injunction pursuant to CR 65.04 instead of a temporary restraining order pursuant to 65.03.

<sup>14</sup> CR 65.04

<sup>15</sup> See Maupin v. Stansbury, 757 S.W.2d 695, 698-699 (Ky. App. 1978).

<sup>16</sup> 57 S.W.2d 695 at 697-700 (Ky. App. 1978).

<sup>17</sup> See Boone Creek Properties, LLC v. Lexington-Fayette Urban County Bd. of Adjustment, 442 S.W.3d 36, 40 (Ky. 2014).

Chapter 39A of Kentucky's emergency management statute<sup>18</sup>. The Court finds that pursuant to the Kentucky Supreme Court's determination in Beshear v. Acree Executive Order 2020-968 carries the weight of law<sup>19</sup>. Pursuant to KRS 212.245(6), The Health Department is required to enforce the law which includes seeking injunctive relief when necessary.

Further, the Court finds that at the time of LFCHD's inspection, Brewed was operating as a restaurant and allowing indoor dining in violation of EO 2020-968 despite Defendant Cooperrider's assertion that the opening of the bay door made the restaurant compliant. LFCHD, being tasked with enforcing the provisions of 2020-968 for businesses which receive permits through LFCHD, it follows that LFCHD will suffer irreparable harm if not permitted to enforce the provisions of 2020-968.

Next, Plaintiff has alleged and proved facts that indicate that it is likely to prevail on the merits of their claim. As stated above EO 2020-968 is clear as to its prohibition of indoor dining for bars and restaurants. Plaintiff has demonstrated through affidavit and witness testimony during the hearing, that patrons of Brewed were observed consuming food and beverage while sitting at tables inside of Brewed which was operating as a restaurant at the time. By serving patrons indoors, Defendants were in clear violation of EO 2020-968.

Defendants assert that Brewed was operating as an event venue and may therefore allow up to 25 people to be in the building at a time. Defendants further assert that as an event venue, they are not subject to the 2020-968's restrictions for bars and restaurants. On its face, 2020-968 makes no indication that an entity can only belong to one category

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<sup>18</sup> Beshear v. Acree, Case No. 2020-SC-0313-OA (2020).

<sup>19</sup> Id.



at a time. Rather, an entity can be both an event venue and a bar or restaurant at the time and thus be subject to both sets of restrictions simultaneously. This Court finds that Brewed, at the time of inspection, was operating as a restaurant since it was serving food and beverage to patrons and is therefore subject to EO 2020-968's provision prohibiting indoor dining.

Finally, the equities in this matter weigh in favor of granting Plaintiff's requested relief. While the Court is sympathetic to the economic hardship imposed on restaurants and bars as a result of provisions like EO 2020-968, the Kentucky Supreme Court has required that such orders be followed because, in its view, "...the greater public interest lies instead with the public health of the citizens of the Commonwealth as a whole. The global COVID-19 pandemic threatens not only the health and lives of Kentuckians but also their own economic interests; the interests of that vast majority take precedence over the individual business interests of any one person or entity. While we recognize and appreciate that the Plaintiffs allege injuries to entire industries I the state, such as the restaurant and childcare industries, the interests of the industries simply cannot outweigh the public health interests of the state as a whole<sup>20</sup>."

Defendants raise several defenses regarding the enforceability of the EO including the alleged ambiguity of the order's terms and its alleged unenforceability pursuant to Section 2 of the Kentucky Constitution. Many of the same arguments were not found to be persuasive by the Kentucky Supreme Court in the Beshear v. Acree case. Additionally, Defendants argue that the inspection of Brewed on November 24, 2020 constituted an impermissible administrative search which rendered any evidence obtained by LFCHD

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<sup>20</sup> Beshear v. Acree, Case No. 2020-SC-0313-OA at 91.

inadmissible<sup>21</sup>. This Court finds that this argument unpersuasive as there was no improper search as contemplated by the 4<sup>th</sup> Amendment since the evidence of the violations were readily observable from the exterior windows of the restaurant and were occurring in the open such that neither Sanders nor Castleman needed to perform a search to discover the violations. Patrons were consuming food and beverage at tables inside Brewed, a public space, which Sanders observed by simply walking into the building. An individual has no expectation of privacy in what they knowingly expose to the public and therefore 4<sup>th</sup> Amendment protections are not implicated in this matter<sup>22</sup>.

### **Conclusion:**

COVID-19 is real, highly contagious and can be very dangerous, particularly to older and sick Kentuckians. Reasonable persons of good will can have differing opinions on how to best mitigate against the spread of the disease. Economically, restaurants and bars are among the hardest hit private businesses due to COVID-19 restrictions such as the one in question. This is particularly true of those that have no drive thru and must rely on indoor, in-person patrons. Many restaurants have tried to improvise with carry out, curbside service and with tents to accommodate for “outdoor service” but tents will be impracticable as cold weather sets in.

The Court notes the Governor’s current EO 2020-968 is set to expire on December 13, 2020 at 11:59 p.m. Should it expire without extension, so will this Court order. Should it be extended so will be this order until other such orders of this Court. The Court encourages the parties to maintain a civil engagement to explore possible resolutions without further intervention of the Court. Should no permanent resolution be reached

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<sup>21</sup> See City of Los Angeles v. Patel, 576 U.S. 409(2015).

<sup>22</sup> See Katz v. United States, 389 U.S. at 351 (1967).

either party may file a motion with the Court seeking a ruling as the merits of the Plaintiff's Complaint for permanent injunctive relief as well as any defenses raised by the Defendants. Nothing about this order precludes the Defendants from availing themselves of any other remedies including an appeal to the Kentucky Court of Appeals, a plea to the Governor, apply for government aid/loans, and of course contacting members of the state legislature which convenes on January 5, 2021.

**Order**

For the reasons set forth above, it is **ORDERED** as follows:

1. That this Court **GRANTS** Plaintiff LFCDH's Motion for a Temporary Injunction.
2. That upon the Posting of a bond of \$5,000 by LFCHD, the Defendants are hereby Temporarily Enjoined from offering food or beverage services at the Brewed location, unless or until (a) the expiration of EO 2020-968 or (b) the Defendants obtain reinstatement of Brewed's food service permit via the regulatory appeal procedures.



THOMAS L. TRAVIS  
 Judge, Fayette Circuit Court  
 8<sup>th</sup> Division

**CLERK’S CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was electronically filed using the Court’s E-Filing system, which will send electronic notice to the following:

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# IMPEACHMENT IN KENTUCKY

**Informational Bulletin No. 176**

**LEGISLATIVE RESEARCH COMMISSION  
Frankfort, Kentucky**

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# IMPEACHMENT IN KENTUCKY

Prepared by  
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**Informational Bulletin No. 176**

**LEGISLATIVE RESEARCH COMMISSION**  
**Frankfort, Kentucky**  
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## FOREWORD

In 1991, the General Assembly met in one of the longest extraordinary sessions in Kentucky history. Among other issues, the legislature faced a task which had not been necessary for nearly a century — the impeachment of a constitutional officer.

Although the General Assembly had conducted impeachments in the past, few records had been maintained, other than entries in the House and Senate Journals. As a result, staff spent months preparing procedural rules, forms, and other materials to assist the General Assembly in determining how to proceed.

This informational bulletin is designed to assist future legislatures in conducting impeachments, and to provide the public with a look into the process itself.

The procedural rules and many of the documents utilized during the 1991 impeachment have been included as Appendices, as a guide for those who may, in the future, find themselves faced with this responsibility.

Vic Hellard, Jr.  
Director

The Capitol  
Frankfort, Kentucky  
September, 1991



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# CHAPTER I

## THE NATURE OF IMPEACHMENT

The removal of a public official from office through the process of impeachment is a grave matter, as it represents a repeal of the will of the people who have elected an individual to an office of public trust. Because it is a reversal of the inherent power of the people in a democratic society to choose those who govern, it is a power rarely exercised, and one which has fortunately been required in few instances in Kentucky's history.

Because impeachment has been such a rare occurrence in Kentucky, a shroud of mystery envelopes the process itself. There are many procedural questions for which answers are difficult to ascertain, and many constitutional issues which have been the subject of debate among those in government, academia, and the courts. Two of the major questions involved in impeachment relate to the types of conduct which are to be considered "impeachable" and whether the decisions reached by an impeachment tribunal are subject to judicial review.

Kentucky's 1891 Constitution closely mirrors the federal constitution in terms of its impeachment provisions. According to Section 68, the "Governor and all civil officers" are liable to impeachment by the House of Representatives and trial by the Senate. Although statutory provisions have been enacted to establish a mechanism for removing certain officers (See KRS 61.010 and 61.040) it is generally held that if a specific method of removal of a particular officer is prescribed by the Constitution, such as impeachment, that is the sole method of removal which may be utilized.<sup>1</sup>

While it is fairly clear who is subject to impeachment, the question of what is impeachable conduct is more complex. Because impeachment is a power vested solely in the legislature, the general rule is that the definition of impeachable conduct is exclusively a matter to be determined by the legislature. The Kentucky Constitution prescribes impeachment as the remedy when a public officer has committed "misdemeanors in office," but that term does not have the same connotation as in the judicial sense. Rather "misdemeanor" in this context has been defined as any activity involving a breach of the public trust, or any act which can be construed as misfeasance or malfeasance.

Usually an officer is impeached as a result of criminal conduct, generally after an indictment has been lodged against the individual. It can be inferred from the language in Section 68 of Kentucky's Constitution that the framers envisioned that impeachment would be associated with some form of criminal conduct, as it provides that "the party convicted [in an impeachment trial] shall, nevertheless, be subject and liable to indictment, trial and punishment by law." (Ky. Const. §68). Thus, it is not necessary that an official charged with impeachable conduct must previously have been convicted or even indicted on a criminal charge.

The issue of whether decisions adjudicated by an impeachment tribunal are subject to judicial review has been one of great debate. It is clear from a review of various treatises and case law from other jurisdictions that the issue continues to resurface at both the state and federal levels. Some argue that the framers of the federal constitution surely did not envision the delegation of the impeachment power to the legislative branch as an absolute exception to the doctrine of judicial review, especially since any impeachment may involve political undercurrents as well as concern for the public good.

One of the more persuasive arguments for judicial review appears in Raoul Berger's *Impeachment: The Constitutional Problems*. In part, his arguments center around the theory that the grant of the impeachment power to the legislative branch does not authorize the expansion of its powers beyond those explicitly provided in the Constitution. Because of the evolving concept of what might constitute impeachable conduct, he argues that the legislative branch has the potential for expanding what the framers intended by determining what types of acts may fall within the realm of an impeachable offense. He also argues that the interests of the public in preserving the integrity of the separation of powers doctrine are best served by strictly observing the "strong American bias in favor of a judicial determination of constitutional and legal issues."<sup>2</sup>

However, the greater weight of authority appears to hold that there is no basis for judicial review of impeachment proceedings. In *Ritter v. United States*, the Court held that not only should there be no judicial review of the ultimate judgment of the Senate, but also that no judicial determination should be made as to whether particular offenses were "impeachable offenses."<sup>3</sup>

This issue was most recently considered in connection with the Arizona case of Governor Edwin Mecham. At the time of his impeachment, Mecham had not been tried in the courts. During the impeachment proceedings, Mecham made clear his intention to seek judicial relief, not only in the Arizona Supreme Court, but also in federal court. In *Mecham v. Gordon*,<sup>4</sup> the Arizona Supreme Court ruled that the Arizona Senate had the power to determine the rules of procedure it would follow during the proceedings, a power emanating from the separation of powers clause of the Arizona Constitution. However, the court did appear to leave open the possibility that if the Senate had violated some constitutional requirement regarding the impeachment process, such as trying Mecham without Articles having been approved by the House of Representatives, the court would have the power to require the body to follow the provisions of the Constitution.

Another possible obstruction to judicial review of impeachment is the political question doctrine, which could preclude judicial determination of whether the legislature had correctly defined the scope of an impeachable offense due to lack of judicial standards. The political question doctrine basically holds that a question which is purely political in nature is nonjusticiable, or a question which courts will refuse to recognize.<sup>5</sup> The major authority in the area of the political question doctrine appears to be *The Federalist No. 65*, by Alexander Hamilton.

Lastly, an *Arizona Law Review* article indicates that there has been no reported case in American history in which a court has actually reviewed and reversed either a House impeachment or a Senate conviction. In *Ferguson v. Maddox*, the Texas Supreme Court did review an impeachment decision, but it observed that the judgment of a court of impeachment can only be questioned insofar as it might exceed constitutional authority. The Court held that

[s]o long as the Senate acts within its constitutional jurisdiction, its decisions are final. As to impeachment, it is a court of original, exclusive, and final jurisdiction.<sup>6</sup>





CHAPTER II  
IMPEACHMENT IN KENTUCKY

**Constitutional Provisions**

*§66 Power of impeachment vested in House.*

The House of Representatives shall have the sole power of impeachment.

*§67 Trial of impeachments by Senate.*

All impeachments shall be tried by the Senate. When sitting for that purpose, the Senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the Senators present.

*§68 Civil officers liable to impeachment; judgment; criminal liability.*

The Governor and all civil officers shall be liable to impeachment for any misdemeanors in office; but judgment in such cases shall not extend further than removal from office, and disqualification to hold any office of honor, trust or profit under this Commonwealth; but the party convicted shall, nevertheless, be subject and liable to indictment, trial and punishment by law.

*§77 Power of Governor to remit fines and forfeitures, grant reprieves and pardons; no power to remit fees.*

He shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons, except in case of impeachment, and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection. In cases of treason, he shall have power to grant reprieves until the end of the next session of the General Assembly, in which the power of pardoning shall be vested; but he shall have no power to remit the fees of the Clerk, Sheriff or Commonwealth's Attorney in penal or criminal cases.

*§84 When Lieutenant Governor to act as Governor; not to preside at impeachment of Governor.*

Should the Governor be impeached and removed from office, die, refuse to qualify, resign, be absent from the State, or be, from any cause, unable to discharge the duties of his office, the Lieutenant Governor shall exercise all the power and authority appertaining to the office of Governor until another be duly elected and qualified, or the Governor shall return or be able to discharge the duties of his office. On the trial

of the Governor, the Lieutenant Governor shall not act as President of the Senate or take part in the proceedings, but the Chief Justice of the Court of Appeals shall preside during the trial.

The Kentucky Constitution delegates to the General Assembly the authority to remove certain officers from office through impeachment by the House and subsequent conviction by the Senate. According to Section 66, the sole power of impeachment is vested in the House of Representatives, while the power to try impeachments is given to the Senate by Section 67. When sitting as triers of fact in an impeachment case, the Senators are to be upon oath or affirmation, and no person shall be convicted without the concurrence of two-thirds of the Senators present (Ky. Const. §67).

Section 68 provides that the Governor and all civil officers shall be liable to impeachment for any misdemeanor in office. However, a judgment in an impeachment extends only to removal from office and disqualification from holding any office of honor, trust or profit under the Commonwealth. An individual removed from office through impeachment may still be subject to indictment, trial, and punishment in a court of law as a result of the conduct resulting in his impeachment. Section 77 of the Constitution prohibits the Governor from issuing a pardon to an impeached officer.

While the authority for the General Assembly to remove public officers from office by means of impeachment is found in the Kentucky Constitution, the more specific guidelines to govern the impeachment process are statutory. As previously discussed, impeachment is a two-part process, and the role of each chamber of the legislature is spelled out in Chapter 63 of the Kentucky Revised Statutes. The following is a procedural guide for conducting impeachments in Kentucky according to current provisions of the Kentucky Revised Statutes.

### House of Representatives

#### *KRS 63.020 Impeachment and removal by address.*

Proceedings for impeachment or removal by address may be instituted by the House of Representatives without a petition from any person.

#### *KRS 63.030 Petition for impeachment.*

(1) Any person may, by written petition to the House of Representatives, signed by himself, verified by his own affidavit and the affidavits of such others as he deems necessary, and setting forth the facts, pray the impeachment of any officer.

(2) The House shall refer the petition to a committee, with power to send for persons and papers, to report thereon.

The House of Representatives has the responsibility for initiating the impeachment process, which may be done either upon receipt of a petition or on its own initiative (KRS 63.020). Any person may, by written petition, request the impeachment of any officer. The petition must be signed by the petitioner, verified by his own affidavit and the affidavits of others if he deems it necessary, and must set out the facts alleging that an impeachable offense has been committed by a public officer (KRS 63.030(1)). If such a petition is received by the House, it is then referred to a committee, which is then considered to have subpoena power, and which is to investigate the matter and report back to the full House (KRS 63.030(2)).

### **The House Impeachment Committee**

The impeachment committee is to review the evidence to determine whether there is sufficient cause to institute formal impeachment proceedings. There are no statutory or constitutional requirements relative to number of members, political party affiliation, or other requirements. In the 1916 impeachment of McCreary County Judge J.E. Williams, a seven-member panel was appointed, and that arrangement was followed in the 1991 proceedings against Agriculture Commissioner Ward "Butch" Burnette.

There are no statutory or constitutional requirements that the proceedings of an impeachment committee be open to the public. While meetings of standing committees of the General Assembly and most other public bodies are required to be held in open session, under the provisions of the Open Meetings Law, there is an express exception allowed for committees of the General Assembly other than standing committees, which permits them to conduct their business in private (KRS 61.810(9)). During the Burnette impeachment, the role of the House Impeachment Committee was viewed as comparable to the function of a grand jury in the court system, and the meetings of that committee were not open to the public. However, the rules of procedure adopted by that committee did allow for the proceedings of the committee to be opened upon a majority vote of the members (See Appendix D). As provided in KRS 63.030(2), the impeachment committee is to have the power to compel witnesses and the production of papers.

The question as to whether the accused is to be allowed to appear before the impeachment committee turns on the case involved and the course the committee determines to follow. There is no statutory or constitutional provision governing this issue, although the statutes governing the Senate trial of an impeachment case require that the accused be summoned to appear by precept, so that he might have the opportunity to confront his accusers. During the 1916 Williams impeachment, the impeachment committee spent several sessions hearing testimony from some 33 witnesses, including the accused. However, in the Burnette case, the impeachment committee did not take testimony from any witnesses, relying instead upon the complete record of Burnette's trial in Franklin Circuit Court. It is important to note that in the Williams case, the impeachment had been initiated by a petition from residents in McCreary County, and he had not been indicted on criminal charges in the courts, so the needs of the impeachment committees in the two situations were somewhat different.

## Report of Committee

Once the impeachment committee has completed its investigation, it then issues a report to the full House of Representatives, including a recommendation as to whether Articles of Impeachment should be returned and voted upon by the House. Approval of the report requires a majority vote of committee members, although majority and minority reports may be issued under House Rule 47. The report in the Williams case included a summary of the evidence, and also was in the form of a Majority and Minority Report. Each report was voted on separately by the House, with the majority report recommending impeachment ultimately being approved by the House. Approval of the report requires a majority vote of the House membership.

## Preparation of the Articles of Impeachment

### *KRS 63.035 Articles of impeachment.*

(1) If an impeachment is recommended by the committee of the House of Representatives to which it is referred, the committee shall draw up the articles of impeachment in accusation of the officer and submit the articles to the House with the recommendation for impeachment.

(2) The articles of impeachment shall state with reasonable certainty the misdemeanor in office for which impeachment is sought; and if there be more than one (1) misdemeanor, each shall be stated separately and distinctly.

KRS 63.035 governs the preparation of Articles of Impeachment. If the full House votes to adopt a committee report which recommends impeachment, Articles must be drafted. The Burnette impeachment committee offered with its final report House Resolution 40, which contained an Article of Impeachment as an attachment. However, in the Williams case, the Articles were prepared subsequent to the House vote on the committee report, by a group of five. It is interesting to note that in that case, the drafting committee included only two of the seven members of the original impeachment committee.

As required by KRS 63.030(2), the Articles must state with reasonable certainty the misdemeanor for which impeachment is sought, and if there are multiple misdemeanors, each is to be stated separately and distinctly.

## Committee to Prosecute

### *KRS 63.040 Prosecution — Witnesses.*

(1) If an impeachment is ordered by the House of Representatives a committee shall be appointed to prosecute it, and the committee chairman shall, within five (5) days, lay the impeachment before the Senate.

(2) The Senate shall appoint a day for hearing the impeachment. The accused shall be summoned by precept, issued by the clerk of the Senate, to appear on that day. The precept shall be served in person, or a copy left at his residence with a member of his family over the age of sixteen (16) years, together with a copy of the impeachment.

(3) The clerk of the Senate shall, at the instance of the chairman of the committee, or of the accused, issue process for the summoning of witnesses, and the production of books, papers, documents or tangible things. Process so issued shall be executed by peace officers or officers specially appointed by the Senate for that purpose in the same manner as similar process of courts. Upon disobedience to the process, the Senate may order the clerk to issue process for arresting the witnesses and seizing the books, papers, documents or tangible things. Disobedience may be punished in the manner provided for other witnesses before the General Assembly.

(4) A witness so summoned shall receive the same compensation, and have the same privilege in going, remaining and returning, as a witness in Circuit Court.

Once the House of Representatives has adopted Articles of Impeachment, the accused stands "impeached." However, that action alone does not remove the person from office, since the vote by the House is merely tantamount to an indictment. While the proceedings move to the Senate for trial, the role of the House is not over. KRS 63.040(1) requires that a committee of Representatives be appointed to go before the Senate to prosecute the Articles on behalf of the House. There is no statutory requirement that the prosecutors be the same individuals who served on the original impeachment committee appointed to conduct the initial investigation. Within five days of appointment of this new committee, the Chairman of the committee is required to lay the Articles of Impeachment before the Senate (KRS 63.040(1)).

### The Senate

After the Articles of Impeachment have been laid before the Senate, that body adopts Rules of Procedure to govern the impeachment proceedings. The rules are adopted in the form of a resolution (SR 41 in the Burnette case), requiring approval by a majority of Senators voting. KRS 63.055 requires that the rules specify the amount of time a Senator may be absent before being disqualified from casting a final vote on guilt or innocence of the accused. Also, the Senate sets a date certain for beginning the proceedings, and sends a message to the House to that effect.

KRS 63.040 requires that the accused be summoned by precept, issued by the Clerk of the Senate, to appear on the day designated for the trial to begin. While similar to a summons, a precept is

an order of direction, emanating from authority, to an officer or body of officers, commanding him or them to do some act within the scope of their powers.<sup>7</sup>

The precept is to be served in person, or a copy left at the residence of the accused with a member of his family over the age of 16, along with a copy of the impeachment (KRS 63.040(2)).

### Issuance and Service of Process

The Senate Clerk is charged with the duty to issue summons on direction of the chairman of the prosecuting committee or upon request of the accused. Process is to be served by peace officers specially appointed by the Senate for that purpose, in a manner similar to that used by the courts. Upon disobedience of the process, the Senate may order the Clerk to issue process for the arrest of the witness or seizure of the books or papers requested in the subpoena. Disobedience is punishable in the manner provided for other witnesses before the General Assembly (KRS 63.040(3)).

According to KRS 63.030(4), a witness summoned to appear before the Senate shall receive the same compensation, and have the same privileges in going, remaining, and returning as a witness in Circuit Court.

### Senate Trial

When the Senate convenes to begin its deliberations, the presiding officer and every Senator present is required by KRS 63.050 to take the following oath or affirmation:

I do solemnly swear (or affirm) that I will faithfully and impartially try the impeachment against \_\_\_\_\_ and give my decision according to the law and evidence.

The President of the Senate sits as the presiding officer. According to Section 84 of the Kentucky Constitution, the Chief Justice of the Supreme Court presides if the Governor is being impeached.

Upon convening and administration of the oath, the accused is given the opportunity to enter his plea to the Articles of Impeachment, and the parties announce ready for trial. The witnesses for the Commonwealth are sworn, either individually or collectively. The House presents its case by examining each witness, who is then subject to cross-examination by the defense. The defense then presents its case, followed by closing arguments. The details as to time allowed for each phase of the proceedings, as well as other procedural matters may be spelled out in the Rules adopted to govern the impeachment trial.

At the conclusion of the trial, the Senate votes on each Article of Impeachment

separately in a roll call vote. No person shall be convicted absent the concurrence of two-thirds of the Senators present (Ky. *Const.* §67).

### **Judgment**

If the accused is found guilty on any or all Articles, a judgment is entered to that effect. The judgment declares that the officer is removed from office, and may include a declaration that he also be disqualified from holding any office of honor, trust, or profit under the Commonwealth of Kentucky. Costs of the proceedings may be charged to the parties, as provided in KRS 63.070 and 63.075.





## CHAPTER III

### HISTORICAL OVERVIEW OF KENTUCKY IMPEACHMENTS

#### 1803 — Thomas Jones, Surveyor of Bourbon County

While most historical accounts cite only two impeachments in Kentucky prior to 1991, research has unearthed another impeachment of which little is known. In 1803, Thomas Jones, Surveyor of Bourbon County, was impeached for overcharging the state for work done, for failure to perform his duties, and for surveying the wrong tracts of land.

Although Jones resigned during the Senate trial, the members of the tribunal determined that his resignation did not terminate their authority, and continued the case. Jones was eventually found guilty of five of twenty-two charges and was ordered perpetually excluded from office. He was also ordered to pay the costs of the proceedings. Probably the most significant thing about the Jones impeachment was that the Senate actually empaneled a jury to determine the facts for the Senate. This is the only state impeachment case in which such a jury was summoned.<sup>8</sup>

#### 1888 — "Honest Dick" Tate, State Treasurer

Probably one of the most infamous characters in Kentucky's history is "Honest Dick" Tate, a man who was elected to nine terms as Kentucky's State Treasurer before absconding with most of the funds in the State Treasury in March, 1888. Although he and the money were never found, he was impeached and tried in absentia in 1888 for his actions.

Among other offenses, Tate was charged with leaving and abandoning his office without providing for its administration, refusing to perform his duties, and the theft of more than \$197,964.66 of the state's money. In all, six Articles of Impeachment were returned against him, although two were eventually dropped. Tate was found guilty.

#### 1916 — Judge J.E. Williams

Kentucky's third impeachment, in 1916, was conducted against McCreary County Judge J. E. Williams. The impeachment was instituted against Williams on the basis of a petition from several residents of McCreary County, who charged that he had committed numerous acts of misfeasance and malfeasance as county judge. Some twenty Articles of Impeachment were placed before the Senate, although several were eventually dismissed. Williams was tried on the remaining Articles, but was not removed from office, because the Senate failed to achieve the two-thirds vote required to convict on a single article.

## 1991 — Commissioner of Agriculture Ward “Butch” Burnette

During the 1991 Extraordinary Session, the House of Representatives initiated impeachment proceedings against Commissioner of Agriculture Ward “Butch” Burnette. While serving as Commissioner, Burnette had been convicted by a Franklin Circuit Court jury of complicity to theft by deception, a felony offense. The charge resulted from Burnette’s having signed time sheets for a department employee reflecting that she had worked for the entire month of June, 1988, when, in the opinion of the jurors, she had not worked during that period. He was sentenced to a one-year prison term and fined \$1,500.

A single Article of Impeachment was adopted by the House of Representatives, charging that

the conduct reflected by his conviction resulted in a theft of funds belonging to the Commonwealth of Kentucky and thereby constituted a willful disregard of his oath of office; and pursuant to Section 68 of the Constitution of Kentucky, such conduct is a misdemeanor in office and constitutes an impeachable offense under the Constitution of the Commonwealth of Kentucky.

Just hours before the Senate trial was to begin, Burnette resigned, and the Senate, sitting as a Court of Impeachment, voted to terminate the impeachment proceedings. The Senate subsequently ratified that action with the passage of SR 55. However, the charges against Burnette were not dismissed. The following day, the House passed a resolution (HR 87) concurring in the termination, bringing the fourth impeachment in Kentucky’s history to a close.

## FOOTNOTES

1. *Commonwealth ex rel. Attorney General v. Howard*, 297 Ky. 488, 180 S.W.2d 415 (1944); *Lowe v. Commonwealth*, 60 Ky. 237 (1860).
2. Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard U. Press, 1973) p. 121, quoting Louis L. Jaffe, "Standing to Secure Judicial Review: Public Actions," 74 *Harvard Law Review* 1265, (1961), p. 1302.
3. *Ritter v. United States*, 84 Ct.Cl. 293-300 (1936).
4. *Mecham v. Gordon*, 156 Ariz. 297, 751 P.2d 957 (1988).
5. Henry Campbell Black, *Black's Law Dictionary* (5th Edition, St. Paul: West Publishing Co., 1979), p. 1043.
6. *Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924).
7. Black, p. 1059.
8. Professor John Rogers of the U.K. College of Law, who acted as Special Advisor to the House Impeachment Committee in the Burnette case, uncovered the account of the Jones Impeachment in P. Hoffer and N. Hull's *Impeachment in America, 1635-1805*, 72 (1984). Hoffer and Hull supported their account of the case by citing the Kentucky Senate Journal 23, 52-53, 58, 59, 60, 62 (Nov. 22, Dec. 5, 6, 7, 1803) and the [Frankfort] *Palladium*, Dec. 10, 1803: Hoffer and Hull, at 304.



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*Mecham v. Gordon*, 156 Ariz. 297, 751 P.2d 957 (1988).

*Ritter v. United States*, 84 Ct.Cl. 293 (1936).

## APPENDICES\*

- Appendix I. House Impeachment Committee Rules.
- Appendix II. House Committee on Impeachment - Final Report.
- Appendix III. House Resolution 40 With Article of Impeachment.
- Appendix IV. House Message to Senate.
- Appendix V. Transmittal of Impeachment Committee Records.
- Appendix VI. Receipt for Impeachment Committee Records.
- Appendix VII. Senate Message to House.
- Appendix VIII. Senate Resolution 41 - Rules.
- Appendix IX. Precept.
- Appendix X. Senate Resolution 55 - Termination.
- Appendix XI. House Resolution 87 - Concurrence in Termination.

\*All materials included herein are taken from the record of the Burnette Impeachment.





# Appendix I

## IMPEACHMENT COMMITTEE RULES

### 1. MEETINGS

All meetings of the committee shall be held in executive session unless the committee determines to proceed upon particular matters in open session.

### 2. MEDIA COVERAGE

Any portion of the hearings open to the public may be covered by television broadcast, radio broadcast, still photography, or by any of such methods of coverage allowed by the Rules of the House.

### 3. COUNSEL

The Impeachment Committee may retain special counsel to advise it in all matters pertaining to the performance of its duties.

### 4. CLERK OF THE IMPEACHMENT COMMITTEE

The Impeachment Committee may appoint a Clerk who shall be the official custodian of all records, evidence, and other materials pertaining to the work of the committee. The Clerk shall maintain one complete set of original documents which shall constitute the record of the committee. The Clerk shall perform such other duties as the committee may direct.

### 5. SUBPOENAS

The Chair shall direct the issuance of subpoenas upon his own initiative or upon motion of a majority of the committee members.

### 6. QUORUM

For purposes of hearings held by the committee, a quorum shall consist of four (4) members of the committee.

### 7. RULES OF CHAIR

The Chair shall, when he deems appropriate, make rulings necessary for the fair and efficient conduct of committee proceedings. Such rulings shall control, unless overruled by a vote of a majority of the members present.

## 8. OATH OF WITNESSES

Witnesses called to testify before the committee shall, before giving their testimony, swear the following oath or affirmation:

"Do you solemnly swear (or affirm) that the testimony you are about to give in the matter of the impeachment of Ward "Butch" Burnette, shall be the truth, the whole truth, and nothing but the truth."

## 9. QUESTIONING OF WITNESSES

The Chair or his designee shall commence the questioning of each witness and may question a witness at any point during the appearance of the witness. Any member of the committee may also question a witness at any point during the appearance of the witness.

## 10. ANNOUNCEMENT OF OPEN MEETINGS

The Chair shall make public announcement of the date, time, place, and subject matter of any committee meeting open to the public as soon as practicable. Announcement on the floor of the House while in session shall constitute sufficient notice.

## 11. COMMUNICATIONS WITH COMMITTEE

There shall be no contact by the accused or his counsel with the committee members except through written communication directed to the Chair. Any such written communication shall become part of the record. This shall not preclude answers by the accused or his counsel to inquiries of the committee, which shall also be in writing.

## 12. PROCEDURES FOR HANDLING IMPEACHMENT INQUIRY MATERIALS

a. The Clerk of the committee shall at all times have access to and be responsible for all papers and things received from any source by subpoena or otherwise. Other members of the committee and committee counsel shall have access in accordance with the procedures hereafter set forth.

b. Certified copies of all records of judicial proceedings before the courts of the Commonwealth in the matter of Commonwealth v. Ward "Butch" Burnette, 89 CR 0126-2 and Burnette v. Commonwealth, 90 SC 204, including, but not limited to, pleadings, depositions, orders, video tapes, items of evidence deemed relevant, and documentation of evidence and


transcripts, appeals, orders, motions, and other evidence appropriate for consideration by the committee shall become subject to committee review upon being filed with the committee.

c. All items of evidence requested by the committee or submitted and accepted for review by the committee and any public records may be reviewed at any time by individual members of the committee when not meeting in session, unless the committee has, by majority vote, ruled otherwise with regard to a particular item.

d. All items of evidence shall be directed to the Clerk of the Impeachment Committee or its counsel.

e. Before the committee is called upon to make any disposition with respect to the testimony or papers and things presented to it, the committee members shall have a reasonable opportunity to examine all testimony, papers, and things that have been obtained by the committee staff.

f. Only testimony, papers, or things that are included in the record will be reported to the House.

  
Representative Gregory D. Stumbo, Chair

  
Representative Billie Ark

  
Representative Tom Jensen

  
Representative Albert Jones

  
Representative Sam McElroy

  
Representative Anne Northup

  
Representative Ernesto Scorsone

January 17, 1991

## Appendix II

### HOUSE COMMITTEE ON IMPEACHMENT

#### FINAL REPORT

On January 15, 1991, the Speaker of the House of Representatives of the General Assembly of the Commonwealth of Kentucky, in Extraordinary Session, appointed a committee of seven to investigate the matter of Commissioner of Agriculture, Ward "Butch" Burnette, and upon completion of its investigation to report its findings and recommendations to the House. The members included: the Gentleman from Larue 26, the Gentleman from McCracken 3, the Gentleman from Laurel 85, the Gentleman from Union 7, the Lady from Jefferson 32, the Gentleman from Fayette 75, and the Gentleman from Floyd 95 who served as Chairman. Upon their appointment, the members stood before the House of Representatives to take the oath of office, swearing to fulfill their duties as charged.

The committee has met from time to time in executive session. The committee adopted Rules of Procedure to govern its proceedings, appointed Professor John M. Rogers, University of Kentucky College of Law, Special Legal Advisor, W. Stephen Wilborn, Counsel, and Anita Taylor, Clerk of the Impeachment Committee, with responsibility of maintaining a record of the committee's actions, the security of evidence received and assisting counsel.

The committee issued subpoenas to Secretary of State Bremer Ehrler and George Russell, Executive Director of the State Board of Elections; John C. Scott, Clerk of the Supreme Court of Kentucky; and Janice Marshall, Franklin Circuit Clerk requesting the following documents:

A copy of the Certificate of Election of Ward "Butch" Burnette to the office of Commissioner of Agriculture and any other relevant information concerning his current status in that office;

A copy of all proceedings before any court of the Commonwealth, including, but not limited to, pleadings, depositions, orders, videotapes, items of evidence, and briefs as would relate to the case of Commonwealth of Kentucky v. Ward Burnette, 90 CR 0126-2 and Burnette v. Commonwealth, 90 SC 204.

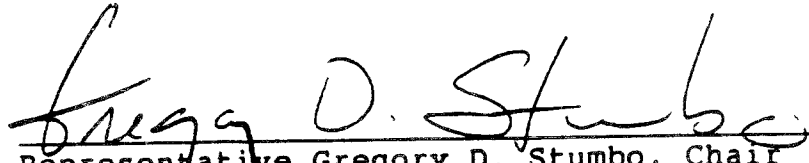
The subpoenas were continuing in nature, applicable to all items becoming available subsequent thereto.

The Committee chose to accept the judicial proceedings and resulting conviction as a valid basis upon which to believe that the conduct alleged did take place and the Committee found that such conduct is a sufficient basis on which to recommend that he be impeached.


Two complete records of the Impeachment Committee's actions, including copies of all evidence received are lodged in the office of the Committee Chairman, Room 304, State Capitol, for review by any member of the House.

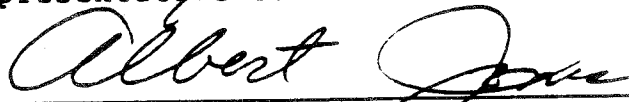
The committee hereby recommends that the House of Representatives of the General Assembly of the Commonwealth of Kentucky, in Extraordinary Session, accept this Final Report of the House Committee on Impeachment, that the Resolution and

Article of Impeachment attached hereto be adopted, and that the Article of Impeachment, accompanied with the original record of the Committee's actions, including the certified copies of all documents received by the Committee be laid before the Senate of the General Assembly of the Commonwealth of Kentucky as provided by law.

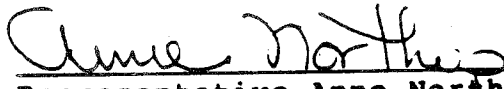
  
Representative Gregory D. Stumbo, Chair


  
Representative Billie Ark

  
Representative Tom Jensen

  
Representative Albert Jones

  
Representative Sam McElroy

  
Representative Anne Northrup

  
Representative Ernesto Scorsone

January 23<sup>rd</sup>, 1991

Appendix III

# IN HOUSE

SPECIAL SESSION 1991

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HOUSE RESOLUTION NO. 40

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WEDNESDAY, JANUARY 23, 1991

---

Representatives Gregory D. Stumbo, Tom Jensen, Billie D. Ark, Albert Jones, Sam M. McElroy, Anne Meagher Northup, and Ernesto Scorsone introduced the following resolution which was ordered to be printed.



A RESOLUTION laying before the House of Representatives an Article of Impeachment against Agriculture Commissioner Ward "Butch" Burnette.

WHEREAS, Commissioner Ward "Butch" Burnette was tried and convicted by the Franklin Circuit Court for a crime committed during his term as Commissioner, to wit:

Complicity to Theft by Deception over \$100, a felony in contravention of KRS 514.040 and KRS 502.020, in that he in the County of Franklin, Commonwealth of Kentucky, on or about June 20, 1988, and on or about July 16, 1988, with the intention of promoting or facilitating the commission of theft by deception, aided one Linda Campbell in committing the offense of theft by deception when he signed and approved time sheets submitted by Linda Campbell reflecting she had worked with the Department of Agriculture full time for the entire month of June, 1988, when he knew she had not been so employed and the time sheets reflecting such employment were false;

WHEREAS, Commissioner Burnette's conviction has been upheld by the Supreme Court of Kentucky, thereby exhausting his appeals in the Courts of the Commonwealth; and

WHEREAS, Commissioner Burnette's Motion for New Trial has not been granted and he has now begun serving his one-year sentence; and

WHEREAS, the House of Representatives chose not to

institute this impeachment inquiry until after  
Commissioner Burnette had exhausted his appeals in the  
Courts of the Commonwealth; and

WHEREAS, the duty of the House Impeachment Committee  
is to conduct an investigation to determine whether there  
is reason to believe Commissioner Burnette committed,  
during his term of office as Commissioner, an act that  
would warrant recommending that he be impeached; and

WHEREAS, the Committee believes commission of the  
crime of Complicity to Theft by Deception Over \$100, in  
contravention of KRS 514.040 and KRS 502.020 during  
Commissioner Burnette's term of office, is a reasonable  
basis upon which to recommend that Commissioner Burnette  
be impeached; and

WHEREAS, the Committee chose to accept the judicial  
proceedings and the resulting conviction of Commissioner  
Burnette as a valid basis upon which to believe the  
conduct alleged did take place;

NOW, THEREFORE,

Be it resolved by the House of Representatives of the  
General Assembly of the Commonwealth of Kentucky:

1 Section 1. The Article of Impeachment attached  
2 hereto is approved as adopted.

3 Section 2. A committee, with appropriate staff,

1 shall be appointed by the Speaker of the House to  
2 prosecute this Article before the Senate.

3 Section 3. The Chairman of the committee appointed  
4 to prosecute the Article shall lay it before the Senate  
5 within five (5) days as required by law, and shall  
6 transmit a complete record of the Impeachment Committee  
7 proceedings, including the original certified copies of  
8 all documents received by the Committee pursuant to the  
9 subpoenas issued.

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ARTICLE OF IMPEACHMENT

The Commonwealth of Kentucky, by the House of Representatives of the General Assembly, by virtue of the authority vested in it by Section 66 of the Kentucky Constitution and the laws of the Commonwealth, hereby charges Agriculture Commissioner Ward "Butch" Burnette through the following Article of Impeachment, to wit:

ARTICLE I

Ward "Butch" Burnette, was duly elected and qualified as Commissioner of Agriculture for the Commonwealth of Kentucky and continues to serve in that capacity; during his term of office, he engaged in conduct which resulted in his being charged with and convicted by a Franklin Circuit Court jury of Complicity to Theft by Deception over \$100, a felony in contravention of KRS 514.040 and KRS 502.020, in that he in the County of Franklin, Commonwealth of Kentucky, on or about June 20, 1988, and on or about July 16, 1988, with the intention of promoting or facilitating the commission of theft by deception, aided one Linda Campbell in committing the offense of theft by deception when he signed and approved time sheets submitted by Linda Campbell reflecting she had worked with the Department of Agriculture full time for the entire month of June, 1988, when he knew she had not been so employed and the time sheets reflecting such employment were false; thereafter, his conviction was

1 affirmed by the Supreme Court of Kentucky; the conduct  
2 reflected by his conviction resulted in a theft of funds  
3 belonging to the Commonwealth of Kentucky and thereby  
4 constituted a wilful disregard of his oath of office; and  
5 pursuant to Section 68 of the Constitution of Kentucky,  
6 such conduct is a misdemeanor in office and constitutes an  
7 impeachable offense under the Constitution of the  
8 Commonwealth of Kentucky.

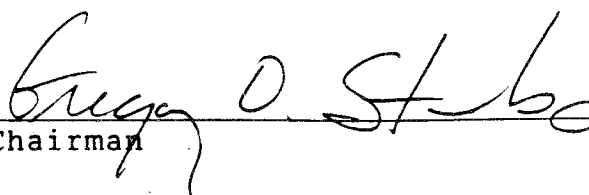
## Appendix IV

### HOUSE MESSAGE TO SENATE

January 28, 1991

To the Senate of Kentucky, Mister President:

In obedience to House Resolution 40, adopted by the House of Representatives on January 25, 1991, by a vote of 97/0, I appear before you, and in the name of the House of Representatives, and in the name of the Commonwealth of Kentucky, do impeach Ward "Butch" Burnette, Commissioner of Agriculture, of a misdemeanor in office, pursuant to Section 68 of the Kentucky Constitution, and do now present the Article of Impeachment, as approved by the House of Representatives, and in their name we demand that the Senate take order for the appearance of the said Commissioner of Agriculture, Ward "Butch" Burnette to answer said impeachment, and fix a day for the trial thereof. A complete record of the House Impeachment Committee proceedings, including the original certified copies of all documents received by the Committee pursuant to the subpoenas issued, is hereby transmitted to the Clerk of the Senate. The following members of the House of Representatives have been appointed to prosecute this Article before the Senate: Representatives Gregory D. Stumbo, Tom Jensen, Billie D. Ark, Albert Jones, Sam M. McElroy, Anne Meagher Northup, and Ernesto Scorsone.

  
Chairman

The said Article of Impeachment, as adopted by the House of Representatives, reported and presented on this date to the Senate is in words and figures as follows:

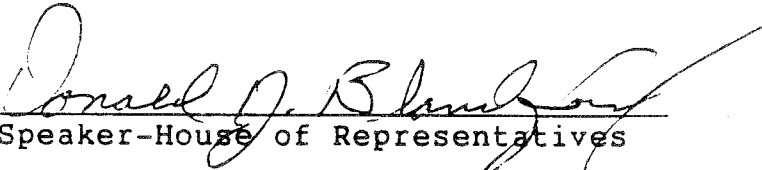
#### ARTICLE OF IMPEACHMENT

The Commonwealth of Kentucky, by the House of Representatives of the General Assembly, by virtue of the authority vested in it by Section 66 of the Kentucky Constitution and the laws of the Commonwealth, hereby charges Agriculture Commissioner Ward "Butch" Burnette through the following Article of Impeachment, to wit:

#### ARTICLE I

Ward "Butch" Burnette, was duly elected and qualified as Commissioner of Agriculture for the Commonwealth of Kentucky and continues to serve in that capacity; during his term of office, he engaged in conduct which resulted in his being charged with and convicted by a Franklin Circuit Court jury of Complicity to Theft by Deception over \$100, a felony in contravention of KRS 514.040 and KRS 502.020, in that he in the County of Franklin, Commonwealth of Kentucky, on or about June 20, 1988, and on or about July 16, 1988, with the intention of promoting or facilitating the commission of theft by deception, aided one Linda Campbell in committing the offense of theft by deception when he signed and approved time sheets submitted by Linda Campbell reflecting she had worked with the Department of Agriculture full time for the entire month of June, 1988, when he knew she had not been so employed and the time sheets reflecting such employment were false; thereafter, his

conviction was affirmed by the Supreme Court of Kentucky; the conduct reflected by his conviction resulted in a theft of funds belonging to the Commonwealth of Kentucky and thereby constituted a wilful disregard of his oath of office; and pursuant to Section 68 of the Constitution of Kentucky, such conduct is a misdemeanor in office and constitutes an impeachable offense under the Constitution of the Commonwealth of Kentucky.

  
Speaker-House of Representatives

Attest:   
Chief Clerk  
House of Representatives



## Appendix V

I, Anita Taylor, Clerk of the House Impeachment Committee, have, on this the 28th day of January, 1991, transmitted to the Clerk of the Senate a complete record of proceedings of the Impeachment Committee, including the original certified copies of all documents received pursuant to subpoenas issued by the Committee. These items include: Impeachment Outline; House Impeachment Committee Rules; Appointment of Impeachment Committee Clerk; Subpoena to Secretary of State Bremer Ehrler and George Russell, Executive Director of the State Board of Elections; Subpoena to John C. Scott, Clerk of the Kentucky Supreme Court; Subpoena to Janice Marshall, Franklin Circuit Court Clerk; original certified copies of the Supreme Court records in the matter of Commonwealth v. Burnette, 90 CR 0126-2 with videotapes, and Burnette v. Commonwealth, 90 SC 204; original certified copies of the Franklin Circuit Court records in the matter of Commonwealth of Kentucky v. Burnette, 89 CR 0126-2; original certified copies of documents relating to Ward "Butch" Burnette's election to and current status in the office of Commissioner of Agriculture; correspondence between the Honorable Gail Robinson and the Impeachment Committee; House Impeachment Committee Minutes; Final Report of Committee; materials distributed to the House of Representatives; House Resolution 40 ("B" Copy), with Article of Impeachment attached; and copy of roll call vote on HR 40.

  
Anita Taylor, Clerk  
House Impeachment Committee

## Appendix VI

I, Julie Haviland, Clerk of the Senate, have received on this the 28th day of January, 1991, a complete record of proceedings of the Impeachment Committee, including the original certified copies of all documents received pursuant to subpoenas issued by the Committee. These items include: Impeachment Outline; House Impeachment Committee Rules; Appointment of Impeachment Committee Clerk; Subpoena to Secretary of State Bremer Ehrler and George Russell, Executive Director of the State Board of Elections; Subpoena to John C. Scott, Clerk of the Kentucky Supreme Court; Subpoena to Janice Marshall, Franklin Circuit Court Clerk; original certified copies of the Supreme Court records in the matter of Commonwealth v. Burnette, 90 CR 0126-2 with videotapes, and Burnette v. Commonwealth, 90 SC 204; original certified copies of the Franklin Circuit Court records in the matter of Commonwealth of Kentucky v. Burnette, 89 CR 0126-2; original certified copies of documents relating to Ward "Butch" Burnette's election to and current status in the office of Commissioner of Agriculture; correspondence between the Honorable Gail Robinson and the Impeachment Committee; House Impeachment Committee Minutes; Final Report of Committee; materials distributed to the House of Representatives; House Resolution 40 ("B" Copy), with Article of Impeachment attached; and copy of roll call vote on HR 40.

  
Julie Haviland, Clerk of the Senate



COMMONWEALTH OF KENTUCKY  
STATE SENATE

January 29, 1991

The Honorable Donald J. Blandford  
Speaker of the House of Representatives  
Capitol  
Frankfort, Kentucky 40601

Dear Mr. Speaker:

Pursuant to the Rules of the Senate, the Senate has resolved itself into a Court of Impeachment, and I hereby notify this honorable body that Ward "Butch" Burnette has been summoned by precept to appear on Wednesday, February 6, 1991, at 10 a.m. (EST) in the Senate Chamber for a trial of impeachment. I shall, at the instance of the House Committee Chair and at the instance of the Respondent, issue process for the summoning of witnesses and the production of such books, papers, documents, or tangible things as may be desired by the House Committee or the Respondent.

In accordance with the Rules adopted in Senate Resolution 41, floor privileges will be extended to senators, members of the House Committee and its counsel and staff, personnel of the Court of Impeachment, the Presiding Officer and counsel, the Respondent and counsel, and those with proper identification as issued by the Clerk of the Court of Impeachment.

With regards,

A handwritten signature in cursive script that reads "Julie Haviland".

Julie Haviland  
Chief Clerk of the Senate  
and Clerk of the Court of  
Impeachment

cc: Rep. Greg Stumbo  
Rep. Billie Ark  
Rep. Tom Jensen  
Rep. Albert Jones  
Rep. Sam McElroy  
Rep. Anne Northrup  
Rep. Ernesto Scorsone

Appendix VIII

# IN SENATE

SPECIAL SESSION 1991

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SENATE RESOLUTION NO. 41

---

TUESDAY, JANUARY 29, 1991

---

Senators Michael Moloney and Walter A. Baker introduced the following resolution which was ordered to be printed.

A RESOLUTION resolving the Senate as a Court of Impeachment and providing for the adoption of Rules of Procedure therefor.

WHEREAS, the House of Representatives has, during the present Extraordinary Session of the General Assembly of the Commonwealth of Kentucky, issued an Article of Impeachment against Ward "Butch" Burnette, Commissioner of Agriculture, which determined that he engaged in conduct which resulted in his being charged with and convicted of a felony, and appointed a committee to prosecute the Article of Impeachment before the Senate, the chairman of which did, within five days next after the impeachment was ordered, lay the Article before the Senate; and

WHEREAS, the Senate does now designate the day and hour to commence hearing the impeachment, and the Respondent, Ward "Butch" Burnette, shall be summoned by precept issued by the Clerk of the Senate to appear before the Senate on that date;

NOW, THEREFORE,

Be it resolved by the Senate of the General Assembly of the Commonwealth of Kentucky:

1           Section 1. The Senate now resolves itself into a  
2           Court of Impeachment for the purpose of hearing the  
3           impeachment and designates Wednesday, February 6, 1991, at

1 the hour of 10:00 a.m. (EST) as the day and hour for the  
2 hearing, and that the President of the Senate and the  
3 members of the Senate shall take the oath prescribed by  
4 KRS 63.050, and that the Clerk of the Senate shall make  
5 proper record in the Journal of the names of all Senators  
6 who take the oath.

7 Section 2. The Clerk of the Senate shall inform the  
8 House of Representatives and the committee thereof  
9 appointed to prosecute the impeachment, that the Senate  
10 has resolved itself into a Court of Impeachment, that the  
11 Clerk shall summon the Respondent by precept to appear on  
12 that day and hour for the hearing, and that the Clerk  
13 shall, at the instance of the committee chair and at the  
14 instance of the accused, issue process for the summoning  
15 of witnesses and the production of such books, papers,  
16 documents, or tangible things as may be desired by the  
17 committee or the Respondent.

18 Section 3. For the purpose of governing the  
19 procedures at the impeachment hearing, there are hereby  
20 adopted by the Senate the following rules:

21 RULES GOVERNING THE SENATE OF THE

22 COMMONWEALTH OF KENTUCKY

23 SITTING AS A COURT OF IMPEACHMENT

24 (1) Rules of Procedure

25 Except as otherwise provided, and when not in  
26 conflict with these Rules, the Standing Rules of the

1 Senate shall apply, and the presiding officer shall retain  
2 the authority to invoke the Rules of the Senate.

3 (2) Rules of Evidence

4 When not in conflict with these Rules or the Rules of  
5 the Senate, the rules of evidence used in courts of  
6 general jurisdiction in the Commonwealth shall serve as a  
7 guide. However, variation from the rules of evidence may  
8 be permitted, and reliable evidence admitted, subject to  
9 the same being determined relevant, whenever the interests  
10 of justice require.

11 (3) Floor Privileges

12 Senators; members of the House Committee and its  
13 counsel and staff; personnel of the Court of Impeachment;  
14 the Presiding Officer and counsel; and the Respondent and  
15 counsel, and those with proper identification as issued by  
16 the Clerk of the Court of Impeachment shall be permitted  
17 within the Senate Chambers during the trial.

18 (4) Marshal of Court of Impeachment

19 The Court of Impeachment shall appoint a Marshal, who  
20 shall be the Sergeant at Arms of the Senate, and an  
21 Assistant Marshal.

22 (5) Clerk of Court of Impeachment

23 The Clerk of the Senate shall serve and be referred  
24 to as the Clerk of the Court of Impeachment and shall  
25 administer the oath to all witnesses, keep the Journal of  
26 the Senate sitting as a Court of Impeachment, and perform

1 all other duties usually performed by the clerk of a court  
2 of record in this Commonwealth. An Assistant Clerk may  
3 also be appointed.

4 (6) Presiding Officer

5 When the Senate sits as a Court of Impeachment, the  
6 President of the Senate shall preside, unless another  
7 presiding officer is appointed.

8 (7) Eligibility of Senators

9 Each Senator shall, by virtue of his office, be  
10 eligible to participate in the impeachment proceedings,  
11 and no Senator shall be subject to disqualification except  
12 as provided in Rule 8.

13 (8) Attendance

14 No member shall cast a final vote on the Article of  
15 Impeachment on which the member has not heard a  
16 substantial portion of the testimony and evidence or  
17 reviewed the video tapes of those portions of the  
18 testimony and evidence which the member did not hear.

19 (9) General Powers

20 The Senate shall have the power to compel the  
21 attendance of witnesses; to enforce obedience to its  
22 orders, precepts, summons, and judgments; to preserve  
23 order; to punish in the manner prescribed by law contempt  
24 of or disobedience of its orders, precepts, summons, or  
25 judgments; and to make all lawful orders and rules as it  
26 may deem necessary for the performance of its duties as a



1 Court of Impeachment.

2 (10) Immunity

3 The parties, which include the House Committee and  
4 Respondent, shall not call Senators, members of the House  
5 Committee, its counsel and staff, the Presiding Officer,  
6 counsel, or staff of the Court of Impeachment or  
7 Legislative Research Commission as witnesses, nor subpoena  
8 their personal records or work papers.

9 (11) Representation

10 The House of Representatives shall be represented by  
11 an appointed Committee and its counsel and staff. The  
12 Respondent shall appear in person or by counsel.

13 (12) Pre-Trial Conference

14 Counsel for the parties may meet with the Presiding  
15 Officer on his order or on motion by any party, at a time  
16 set by him, to rule on preliminary motions, stipulate to  
17 facts and exhibits, and address issues that will expedite  
18 trial.

19 (13) Communications From Respondent

20 There shall be no communication, either directly or  
21 indirectly, from the Respondent to any Senator unless it  
22 is submitted, in writing, by counsel for the Respondent,  
23 directly to the Clerk of the Court of Impeachment.  
24 Communications shall be restricted to information which  
25 would be admissible in a court of law. The Presiding  
26 Officer shall rule on the admissibility of the

1 communication.

2 (14) Communications From Individuals

3 At the time the Senate resolves itself into a Court  
4 of Impeachment, no individual, except another Senator,  
5 shall communicate any information relating to the  
6 impeachment to a Senator within the Senate Chambers.  
7 Senators shall immediately report any communication  
8 prohibited by this Rule to the Presiding Officer.  
9 Violation of this Rule may be subject to punishment as  
10 provided in Rule 9 and Rule 27.

11 (15) Appearance

12 (a) The Senate shall appoint a day for hearing the  
13 impeachment. The day for hearing shall not be less than  
14 seven days after the impeachment is received in the  
15 Senate. The Respondent shall be summoned by precept,  
16 issued by the Clerk of the Court of Impeachment, to appear  
17 on that day. The precept shall be served in person along  
18 with a copy of the impeachment and a copy of the Senate  
19 Resolution adopting these Rules by the Marshal of the  
20 Court of Impeachment, the Assistant Marshal, or an officer  
21 of the Kentucky State Police. Return of service shall be  
22 noted on the precept.

23 (b) The precept shall be issued at least seven days  
24 before the day appointed for trial.

25 (16) Subpoenas

26 (a) Subpoenas shall be issued by the Clerk of the

1 Court of Impeachment for the summoning of witnesses and  
2 the production of books, papers, documents, or tangible  
3 things, on written application of the parties or their  
4 counsel. The Clerk may issue subpoenas in blank. A Senator  
5 may request a subpoena through the Clerk, which shall  
6 issue if either party concurs. If neither party concurs  
7 with the request, a subpoena shall be issued on a motion  
8 by the Senator, a second to the motion, and a vote of a  
9 majority of the Senators present. The Senator may explain  
10 the reasons for his request and the vote shall be taken  
11 without debate. All requests for subpoenas shall be made  
12 and issued at least three days before the witness is  
13 scheduled to testify or produce books, papers, documents,  
14 or tangible things at the hearing.

15 (b) Service of process for subpoenas shall be by  
16 personal service executed by officers appointed by the  
17 Court of Impeachment or other officers authorized by law  
18 to serve process in the Courts of Justice of the  
19 Commonwealth. Return of service shall be noted on the  
20 subpoena.

21 (c) Upon disobedience to any process, the Senate may  
22 order the Clerk of the Court of Impeachment to issue  
23 process for arresting the witness and seizing the books,  
24 papers, documents, or tangible things which have been  
25 subpoenaed. Disobedience may be punished in the manner  
26 provided for other witnesses before the General Assembly.

1 (d) A witnesses shall receive the same compensation,  
2 and have the same privileges in going, remaining, and  
3 returning, as a witness in circuit court.

4 (17) Initial Appearance by Respondent

5 On the day appointed for the trial of the  
6 impeachment, the legislative business of the Senate shall  
7 be suspended except as otherwise ordered by the Senate. At  
8 the time fixed in the precept for the appearance of the  
9 Respondent and on proof of service, the Respondent shall  
10 be called to appear and answer the Article of Impeachment.  
11 If he appears or counsel appears on his behalf, the  
12 appearance shall be recorded. If he does not appear either  
13 personally or by counsel, the same shall be recorded and  
14 the impeachment proceedings conducted as though he were  
15 present and had entered a plea of not guilty.

16 (18) Answer

17 The Respondent shall answer, in writing, the Article  
18 of Impeachment prior to the opening of the trial of the  
19 impeachment. The answer shall be filed with the Clerk of  
20 the Court of Impeachment.

21 (19) Order of Proof

22 After preliminary motions are heard and decided, the  
23 House Committee or its counsel may make an opening  
24 statement not to exceed thirty minutes. The Respondent or  
25 his counsel may then make an opening statement not to  
26 exceed thirty minutes. The Presiding Officer shall

1 determine the order of the presentation of evidence.  
2 Closing arguments shall follow the presentation of all  
3 evidence to the Court of Impeachment and shall not exceed  
4 one hour. On motion of either party before closing  
5 argument, the time for closing argument may be extended by  
6 a vote of a majority of the Senators present. The argument  
7 shall be opened and closed by or on behalf of the House  
8 Committee.

9 The Senate shall hear all evidence related to the  
10 Article of Impeachment before casting the final vote on  
11 the Article of Impeachment.

12 (20) Oaths

13 (a) The following oath or affirmation shall be  
14 administered to each Senator and the Presiding Officer by  
15 the Chief Justice of the Commonwealth or an Associate  
16 Justice:

17 "I do solemnly swear or affirm that I will faithfully  
18 and impartially try the impeachment against [Insert the  
19 name of the Respondent], and give my decision according to  
20 the law and the evidence."

21 (b) Before any witness shall give his testimony, the  
22 Clerk of the Court of Impeachment shall administer to the  
23 witness the following oath or affirmation:

24 "Do you solemnly swear or affirm that the testimony  
25 you shall give in the matter of the impeachment of [Insert  
26 the name of the Respondent and his or her title], shall be

1 the truth, the whole truth, and nothing but the truth, so  
2 help you God?"

3 (21) Witnesses

4 All witnesses shall be examined by the party  
5 producing them or its counsel, and then cross-examined by  
6 the opposite party or its counsel. Only one attorney for  
7 each party may examine each witness. The Presiding Officer  
8 may permit re-direct examination and may permit re-cross  
9 examination. After completion of questioning by counsel,  
10 any Senator desiring to question the witness shall be  
11 permitted to do so. If objection to a Senator's question  
12 is raised by counsel for either party or by a Senator, the  
13 Senator desiring to question the witness may request a  
14 vote on the objection by a majority of the Senators  
15 present.

16 (22) Motions

17 (a) The Presiding Officer may rule on all  
18 objections, motions, pleas, and procedural questions made  
19 by the parties or their counsel. The ruling of the  
20 Presiding Officer shall be the judgment of the Senate  
21 unless any Senator requests the Presiding Officer to  
22 submit the question to be decided by a vote of a majority  
23 of the Senators present.

24 (b) On motion of any Senator and a vote of a  
25 majority of the Senators present, or at the request of the  
26 Presiding Officer, the party shall commit the motion,

1 plea, or procedural question to writing.

2 (c) Except as otherwise provided, arguments by  
3 parties or their counsel on motions shall be permitted  
4 only with a vote of a majority of the Senators present and  
5 shall not exceed fifteen minutes, unless further extended  
6 by a majority vote.

7 (d) Roll call votes may be requested by a Senator  
8 and shall be taken if five additional Senators concur in  
9 the request by standing.

10 (23) Verdict, Judgment, and Costs

11 (a) After closing arguments, all qualified Senators  
12 shall be required to vote on the question of whether to  
13 sustain the Article of Impeachment. A vote to sustain the  
14 Article shall be based on clear and convincing evidence  
15 that the Article is true and that the Article constitutes  
16 an impeachable offense. The vote on whether to sustain  
17 shall be taken as a roll call vote.

18 (b) If the Respondent is acquitted on the Article of  
19 Impeachment, a judgment of acquittal shall be pronounced  
20 and entered on the Journal on the Court of Impeachment.

21 (c) If two-thirds of the Senators present vote to  
22 sustain the Article of Impeachment the Court of  
23 Impeachment shall, by resolution, pronounce judgment of  
24 conviction and removal from office, and disqualifications  
25 to hold any office of honor, trust, or profit under the  
26 Constitution. The resolution shall be entered upon the

1 Journal of the Court of Impeachment.

2 (d) A copy of the judgment shall be filed in the  
3 office of the Secretary of State.

4 (e) In an impeachment proceeding prosecuted before  
5 the Senate, if the Respondent is acquitted, the  
6 Commonwealth shall pay the costs of the Respondent. If the  
7 Respondent is found guilty, he shall pay the Commonwealth  
8 the costs incurred in behalf of the prosecution. Costs  
9 shall be taxed by the Clerk of the Court of Impeachment.  
10 In no event shall costs include attorneys' fees incurred  
11 by the Commonwealth or the Respondent.

12 (24) Official Record

13 The transcript of the proceedings of the Senate  
14 sitting as a Court of Impeachment shall be the videotapes  
15 produced by Kentucky Educational Television.

16 (25) Instruction

17 At any time, on his own motion or on request of a  
18 Senator, the Presiding Officer may instruct the Senators  
19 on procedural matters.

20 (26) Conferences

21 At any point during the proceedings and on the  
22 request of any Senator, there shall be an immediate  
23 conference of all the Senators present. Conferences  
24 provided for under this Rule may be closed on a vote of a  
25 majority of the Senators present.

26 (27) Prohibited Conduct



1           Threats against and interference with the Court of  
2 Impeachment may be prosecuted as provided by law.

3           (28) Amendments to Rules

4           These Rules may be suspended or amended by a vote of  
5 two-thirds of the Senators present.

Appendix IX

SENATE OF THE  
COMMONWEALTH OF KENTUCKY  
SITTING AS A  
COURT OF IMPEACHMENT

PRECEPT

The Senate of the Commonwealth of Kentucky, sitting as a Court of Impeachment, to Ward "Butch" Burnette:

Whereas, the House of Representatives of the Commonwealth of Kentucky did on the 28th day of January, 1991, deliver to the Senate an Article of Impeachment against you, in the following words:

Be it resolved by the House of Representatives of the General Assembly of the Commonwealth of Kentucky:

Section 1. The Article of Impeachment attached hereto is approved as adopted.

Section 2. A committee, with appropriate staff,

shall be appointed by the Speaker of the House to prosecute this Article before the Senate.

Section 3. The Chairman of the committee appointed to prosecute the Article shall lay it before the Senate within five (5) days as required by law, and shall transmit a complete record of the Impeachment Committee proceedings, including the original certified copies of all documents received by the Committee pursuant to the subpoenas issued.

#### ARTICLE OF IMPEACHMENT

The Commonwealth of Kentucky, by the House of Representatives of the General Assembly, by virtue of the authority vested in it by Section 66 of the Kentucky Constitution and the laws of the Commonwealth, hereby charges Agriculture Commissioner Ward "Butch" Burnette through the following Article of Impeachment, to wit:

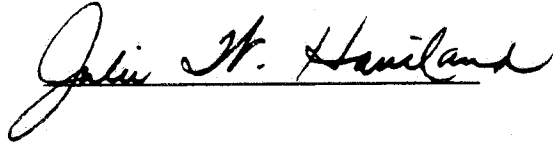
#### ARTICLE I

Ward "Butch" Burnette, was duly elected and qualified as Commissioner of Agriculture for the Commonwealth of Kentucky and continues to serve in that capacity; during his term of office, he engaged in conduct which resulted in his being charged with and convicted by a Franklin Circuit Court jury of Complicity to Theft by Deception over \$100, a felony in contravention of KRS 514.040 and KRS 502.020, in that he in the County of Franklin, Commonwealth of Kentucky, on or about June 20, 1988, and on or

about July 16, 1988, with the intention of promoting or facilitating the commission of theft by deception, aided one Linda Campbell in committing the offense of theft by deception when he signed and approved time sheets submitted by Linda Campbell reflecting she had worked with the Department of Agriculture full time for the entire month of June, 1988, when he knew she had not been so employed and the time sheets reflecting such employment were false; thereafter, his conviction was affirmed by the Supreme Court of Kentucky; the conduct reflected by his conviction resulted in a theft of funds belonging to the Commonwealth of Kentucky and thereby constituted a wilful disregard of his oath of office; and pursuant to Section 68 of the Constitution of Kentucky, such conduct is a misdemeanor in office and constitutes an impeachable offense under the Constitution of the Commonwealth of Kentucky.

Therefore, you, Ward "Butch" Burnette, are hereby summoned to appear before the Senate of the Commonwealth of Kentucky sitting as a Court of Impeachment, in its Chamber in the City of Frankfort, Kentucky, on Wednesday, the 6th day of February, 1991, at 10:00 a.m. (EST), then and there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the Commonwealth of Kentucky, sitting as a Court of Impeachment, shall make in the premises according to the Constitution of Kentucky, the laws of the Commonwealth of Kentucky, and the Rules of the Court of Impeachment.

Witness, Julie W. Haviland, Chief Clerk of the Senate and Clerk of the Court of Impeachment of the Commonwealth of Kentucky, at Frankfort, this the 29th day of January, 1991.

A handwritten signature in cursive script that reads "Julie W. Haviland". The signature is written in black ink and is positioned above a horizontal line.

Chief Clerk of the  
Senate and Clerk of the  
Court of Impeachment

**SENATE OF THE  
COMMONWEALTH OF KENTUCKY  
SITTING AS A  
COURT OF IMPEACHMENT**

**RETURN OF SERVICE**

This is to certify that I have personally served a true and correct copy of this Precept upon the Respondent, Ward "Butch" Burnette, along with a copy of the Senate Resolution adopting Rules of Procedure for the Court of Impeachment, at the hour of 4:30 P.M., this 29<sup>th</sup> day of January, 1991, pursuant to KRS 63.040(2).

For the Court of Impeachment

By:

Steph C Anderson  
Marshall

**RECEIPT OF RETURN OF SERVICE**

This is to certify that this Precept has been returned to the Clerk of the Court of Impeachment this 29<sup>th</sup> day of January, 1991.

Jodie Howland  
Chief Clerk of the Senate  
and Clerk of the Court of  
Impeachment

# IN SENATE

SPECIAL SESSION 1991

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SENATE RESOLUTION NO. 55

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THURSDAY, FEBRUARY 7, 1991

---

Senator Joe Wright introduced the following resolution which was ordered to be printed.

A RESOLUTION recognizing and ratifying the proceedings of the Court of Impeachment of the Senate.

WHEREAS, on January 15, 1991, the Speaker of the House of Representatives of the General Assembly of the Commonwealth of Kentucky, in Extraordinary Session, appointed a committee of seven to investigate the matter of Commissioner of Agriculture, Ward "Butch" Burnette, and upon completion of its investigation to report its findings and recommendations to the House; and

WHEREAS, the committee met from time to time after being appointed to conduct its investigation, chose to accept the judicial proceedings and resulting conviction as a valid basis upon which to believe that the conduct alleged did take place, found that this conduct is a sufficient basis on which to recommend that he be impeached, and recommended to the House that a Resolution and Article of Impeachment be adopted and laid before the Senate of the General Assembly of the Commonwealth of Kentucky; and

WHEREAS, the House of Representatives adopted an Article of Impeachment in House Resolution No. 40 on January 25, 1991, by a vote of 97-0; and

WHEREAS, a committee of the House of Representatives was appointed to prosecute the Article of Impeachment and did lay the Article of Impeachment before the Senate on January 28, 1991, and demanded that the Senate take order



for the appearance of Ward "Butch" Burnette to answer the Article of Impeachment and fix a day for the Trial of Impeachment; and

WHEREAS, the Senate adopted Senate Resolution No. 41 on January 29, 1991, designating the Senate as a Court of Impeachment, adopted rules of procedure for the Trial of Impeachment, and designated Wednesday, February 6, 1991, at the hour of 10:00 a.m. (EST) as the day and hour for the trial; and

WHEREAS, the Clerk of the Court of Impeachment informed the House of Representatives and the committee appointed to prosecute the impeachment on January 29, 1991, that the Senate resolved itself into a Court of Impeachment and summoned the Respondent, Ward "Butch" Burnette, by precept on January 29, 1991, to appear before the Court of Impeachment on Wednesday, February 6, 1991, at the hour of 10:00 a.m. (EST) for a Trial of Impeachment; and

WHEREAS, the Court of Impeachment convened on Wednesday, February 6, 1991, to conduct a Trial of Impeachment of the Respondent Ward "Butch" Burnette; and

WHEREAS, the Court of Impeachment was informed that the Respondent, Ward "Butch" Burnette, tendered his resignation as Commissioner of Agriculture, effective February 5, 1991, to Governor Wallace G. Wilkinson; that Governor Wilkinson accepted the Respondent's resignation

as tendered on February 6, 1991; and that the Respondent's letter of resignation and Governor Wilkinson's acceptance of the resignation were received and filed in the office of the Secretary of State on February 6, 1991, at 10:44 a.m. (EST); and

WHEREAS, the Court of Impeachment approved a motion that it take no further action to proceed in the matter of the impeachment of the Respondent, Ward "Butch" Burnette; and

WHEREAS, counsel for the House Committee, acting on behalf of the House Committee, had no objection to the motion of the Court of Impeachment and will recommend concurrence by the full House of Representatives; and

WHEREAS, the Court of Impeachment then did rise;

NOW, THEREFORE,

Be it resolved by the Senate of the General Assembly of the Commonwealth of Kentucky:

1           Section 1. The Senate hereby recognizes and ratifies  
2 the proceedings of the Court of Impeachment.

3           Section 2. The Clerk of the Senate is directed to  
4 deliver a copy of this resolution to the House of  
5 Representatives.

6           Section 3. The Clerk of the Senate is directed to  
7 spread the proceedings of the Court of Impeachment upon

1 the Journal at length.

# IN HOUSE

SPECIAL SESSION 1991

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HOUSE RESOLUTION NO. 87

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THURSDAY, FEBRUARY 7, 1991

---

Representatives Gregory D. Stumbo, Tom Jensen, Billie D. Ark, Albert Jones, Sam M. McElroy, Anne Meagher Northup, and Ernesto Scorsone introduced the following resolution which was ordered to be printed.

A RESOLUTION concurring in the termination by the Senate of the impeachment proceedings against Ward "Butch" Burnette.

WHEREAS, on January 15, 1991, the Speaker of the House appointed a committee to investigate the matter of Agriculture Commissioner Ward "Butch" Burnette; and

WHEREAS, on January 23, 1991, the Impeachment Committee issued its final report and recommended to the House of Representatives that Burnette be impeached; and

WHEREAS, on January 25, 1991, the House of Representatives passed House Resolution 40 and the Article of Impeachment attached thereto by a vote of ninety-seven yeas and no nays; and

WHEREAS, the Chairman of the House Impeachment Committee laid the Article of impeachment before the Senate on January 28, 1991 as required by law; and

WHEREAS, the Senate scheduled the impeachment trial for Wednesday, February 6, 1991; and

WHEREAS, just before the Senate convened as a Court of Impeachment, Burnette tendered his resignation to the Governor, the resignation was accepted, and the Senate was notified that Burnette had resigned; and

WHEREAS, the Senate, sitting as a Court of Impeachment, voted by thirty-four yeas and no nays that the impeachment proceedings against Burnette should be terminated, although such termination did not constitute

dismissal of the Article of Impeachment lodged against him; and

WHEREAS, the House Impeachment Committee had no objection to the action of the Senate in terminating the proceedings;

NOW, THEREFORE,

Be it resolved by the House of Representatives of the General Assembly of the Commonwealth of Kentucky:

1 That the House does concur with the termination by the  
2 Senate of the impeachment proceedings against Ward "Butch"  
3 Burnette as being in the interests of the General Assembly  
4 and the people of the Commonwealth of Kentucky.



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