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

FLORENCE SPEEDWAY, INC., *et al.*

Plaintiffs

and

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

Intervening Plaintiff

v.

NORTHERN KENTUCKY INDEPENDENT
HEALTH DISTRICT, *et al.*,

Defendants

COMMONWEALTH OF KENTUCKY *EX REL.* ATTORNEY GENERAL DANIEL CAMERON'S MOTION FOR TEMPORARY INJUNCTION

On behalf of the Commonwealth of Kentucky, Attorney General Daniel Cameron moves this Court under CR 65.04 for a temporary injunction to preclude the Governor and his agents from enforcing the Governor's executive orders at issue in this action.[1] In support of this motion, the Commonwealth states as follows:

[1] In this Court's order entered July 2, 2020, at page 11, the Court stated that the Commonwealth's motion for a temporary restraining order would "be taken as sought under CR 65.04," *i.e.*, as a motion for a temporary injunction. The Commonwealth's motion for a temporary restraining order is therefore incorporated herein by reference. It is the Commonwealth's intent in filing this motion to further expand upon and refine the argument previously made in its motion for a temporary restraining order.

FACTS[2]

Although there are nearly 4.5 million people in Kentucky,[3] and state government is composed of three branches of government, with a General Assembly composed of 38 senators and 100 representatives, right now nearly every aspect of the lives and livelihoods of those 4.5 million Kentuckian is purportedly governed by one man, and his political appointees: Governor Andrew Beshear. Governor Beshear has given little public explanation for the basis of the vast array of executive orders and directives that govern important aspects of the lives of Kentucky's citizens. But one of his political appointees, Dr. Steven Stack, was recently deposed. That deposition reveals the values-based judgment and ad-hoc rationalization in which the Governor and his appointees have engaged—all without public comment or notice.

Dr. Stack is the Commissioner of the Kentucky Department of Public Health. (Amended Complaint ¶ 10; Stack depo.[4] at 5, 82.) Dr. Stack's background is not in epidemiology or virology, but in emergency medicine. (Stack depo. At 6-7.) In his deposition,[5] Dr. Stack testified that the Governor's executive orders—and the directives of the other Defendants—issued under KRS Chapter 39A are based upon a "value judgment" involving a "weighted risk-benefit analysis," which asks whether

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[2] The Commonwealth incorporates by reference the averments in its complaint for declaratory and injunctive relief under CR 10.03.

[3] United States Census Bureau, Quick Facts: Kentucky, available at https://www.census.gov/quickfacts/KY (last visited June 30, 2020).

[4] Deposition of Dr. Steven Stack, taken on June 10, 2020, in *Ramsek v. Beshear*, Case no. 3:20-cv-00036 (E.D. Ky.), attached as an exhibit to Plaintiff's motion for an emergency temporary restraining order in this action.

[5] The Commonwealth incorporates by reference the factual averments set forth in Plaintiffs' verified amended complaint, and the deposition of Dr. Steven Stack, which have been made part of the record by Plaintiffs in this action.

the activity being regulated is "necessary to . . . human activity." (*Id.* at 90-91.) Dr. Stack has not conducted any studies of the coronavirus himself, but his recommendations to the Governor rely upon the work of others who have studied it. (*Id.* at 8-9.) Even though the scientific research results are constantly evolving, based upon what is currently known, the coronavirus is spread by droplets from coughing, sneezing, speaking, shouting, and singing. (*Id.* at 9, 12-13.) As a means of slowing the spread of the virus, the World Health Organization recommends social distancing of one meter (a little over three feet); however, both the U.S. Centers for Disease Control and Prevention and Kentucky officials recommend a social distance of six feet because the additional distance is a "margin of safety." (*Id.* at 23-24.)

Ultimately, the risk associated with contracting the coronavirus is relative. (*Id.* at 13-14.) Dr. Stack testified that the coronavirus does not care if a group of people are sitting next to each other in an office conference room or in a church pew, or if they are engaged in the same activity. (*Id.* at 22.) It also makes no distinction concerning the viewpoint of a speaker. (*Id.* at 28.) In short, the purpose of the communication or the words spoken have no bearing upon the transmission of the virus. (*Id.*) All else being equal, "the outdoor transmission rate is probably … to some degree lower than the indoor transmission rate because there's more air circulation and other variables such as the sunlight help to lower the risk." (*Id.* at 33.)

The use of social distancing and wearing masks have been encouraged, and in some circumstances required, as strategies for limiting the spread of coronavirus. (*Id.* at 24-25.) Public health experts' opinions have changed over time regarding the use

of face masks. (*Id*. at 24.) The current belief of public health experts is that mask usage is predominantly intended to protect others, and not the wearer, from transmission of the virus. (*Id*. at 25.) However, Dr. Stack testified, "There is no strategy available, other than remaining in complete isolation from each other until we find a prevention, treatment, or cure for this disease, to effectively keep everyone from becoming infected." (*Id*. at 30.) "Ideally from a public health standpoint, [the Defendants] would like to keep people away from each other so that they don't spread infection, but there are counterbalancing considerations in society." (*Id*. at 42.) "[H]uman commerce and social engagements" are another such counterbalancing consideration. (*Id*. at 62.) Constitutional requirements are other such counterbalancing considerations. And the Defendants have had to amend their public health orders over time, as courts have determined that the restraints imposed by those orders were constitutionally impermissible. (*Id*. at 37-38.)

At this point, only the Governor and his political appointees are engaged in and aware of these balancing and counterbalancing considerations and the "value judgments" made in striking that balance. It is the Governor and his political appointees that purport to make these determination free from any notice or comment from the 4.5 million Kentuckians those decisions affect.

ARGUMENT

The Court may grant a temporary injunction under CR 65.04 "where it is clearly shown that one's rights will suffer immediate and irreparable injury pending trial." *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978). A circuit court may

grant a temporary injunction if (1) the movant's position presents "a substantial question" on the underlying merits of the case, i.e. there is a substantial possibility that the movant will ultimately prevail; (2) that the movant's remedy will be irreparably impaired absent the extraordinary relief; and (3) that an injunction will not be inequitable, i.e. will not unduly harm other parties or disserve the public. *SM Newco Paducah, LLC v. Kentucky Oaks Mall Co.*, 499 S.W.3d 275, 278 (Ky. 2016) (citing *Price v. Paintsville Tourism Comm'n*, 261 S.W.3d 482, 484 (Ky. 2008)). A circuit court has the power to issue a statewide injunction. *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 163-64 (Ky. 2009).

I. The Commonwealth has a substantial possibility of prevailing on its claims against the Governor.

The first prerequisite for granting injunctive relief is that the movant have a "substantial possibility" of ultimately prevailing on the merits. "[A] circuit court's ruling as to temporary injunctive relief largely hinges upon its preliminary determination of the merits of the plaintiff's claim." *Nat'l Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77, 83 (Ky. 2001).

A. The Kentucky Constitutional Convention of 1890.

The Commonwealth's citizens enacted the Kentucky Bill of Rights as part of their covenant with the government. Ky. Const. § 4. ("All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property."). And "every thing in [the] Bill of Rights is excepted out of the general powers of government, and shall

forever remain inviolate; and all laws contrary thereto, or contrary to [the] Constitution" are void. Ky. Const. § 26.

The 1891 Constitution is the Commonwealth's fourth and current constitution. The primary purpose for calling the Constitutional Convention of 1890 was to rein in the "unlimited power of the General Assembly." John David Dyche, *Section 2 of the Kentucky Constitution – Where Did it Come From and What Does it Mean?* 18 N. Ky. Law Review 1991, at 509. During this period in Kentucky history, citizens were "full of distrust and fear of legislators, judges and other state officials . . . . The idea of central control was abhorred. The experience with Frankfort and the spirit of localism had nurtured the belief that the powers of state officials should be curbed and restricted." *Id*. (quoting H. Tapp and J. Klotter, Decades of Discord 262-63 (1977)).

Moreover, if the Delegates to the Constitutional Convention sought to circumscribe the power of the Legislative Branch, they certainly would have been opposed to the Legislative Branch purporting to delegate unrestrained authority to the Executive Branch. The Governor's patchwork of executive orders, designed to control nearly every aspect of daily life, such as religious worship, the right to assemble in a peaceable manner, the right to acquire and protect property, and to engage in economic activity, is the very "idea of central control" that Kentuckians "abhor." H. Tapp and J. Klotter, Decades of Discord 262-63 (1977).

B. The Governor's orders are not narrowly tailored, and are thus an arbitrary and unreasonable burden on the inherent and inalienable rights of the people.

In Count II of its Intervening Complaint, the Commonwealth alleges that the Governor has failed to reasonably tailor his orders to the location and needs of the emergency. Because the Commonwealth has a substantial possibility of prevailing on Count II of its Intervening Complaint, a temporary injunction is warranted.

Section 1 of the Kentucky Constitution provides:

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
>
> First: The right of enjoying and defending their lives and liberties.
>
> Second: The right of worshipping Almighty God according to the dictates of their consciences.
>
> Third: The right of seeking and pursuing their safety and happiness.
>
> Fourth: The right of freely communicating their thoughts and opinions.
>
> Fifth: The right of acquiring and protecting property.
>
> Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
>
> Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

Section 2 of the Kentucky Constitution provides, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

In construing Section 2 of the Kentucky Constitution, the Supreme Court has held that "[w]hatever is contrary to democratic ideals, customs and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the

reasonable and legitimate interests of the people is arbitrary." *Kentucky Milk Marketing & Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985). Sections 1 and 2 have been construed to provide greater protection of individual rights than are available under comparable provisions of the United States Constitution. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 494 (Ky. 1992). Among those rights that Sections 1 and 2 protect more strongly than the United States Constitution is the right to acquire and utilize property and to engage in economic activity. *Compare Kentucky Milk Marketing*, 691 S.W.2d at 901 (striking down a Kentucky statute fixing the price of milk under the Kentucky Constitution) *with Nebbia v. People of New York*, 291 U.S. 502, 539 (1934) (refusing to strike down a New York statute fixing the price of milk under the United States Constitution.).

Of course, not every law touching upon the economic lives of Kentuckians violates Sections 1 and 2. Rather, government may not "arbitrarily interfere with private business by imposing unusual, unreasonable and unnecessary restrictions upon lawful occupations." *City of Louisville v. Kuhn*, 284 Ky. 684, 145 S.W.2d 851, 856 (1940). "The question of reasonableness is one of degree and must be based on the facts of a particular case." *Kentucky Milk Marketing*, 691 S.W.2d at 899. Where, as here, the Governor is exercising totalitarian control over nearly every aspect of Kentuckians' lives, the burden is on Governor Beshear to demonstrate that his orders are narrowly tailored to combat a defined and articulable emergency. Put another way, it is arbitrary—in contravention of Sections 1 and 2 of the Kentucky Constitution—to utilize KRS Chapter 39A to broadly ban certain activity and require

other activity across the entirety of the Commonwealth, despite the unique facts that are present in each locality.

KRS Chapter 39A premises the Governor's emergency powers on "the occurrence or threatened or impending occurrence of any of the situations contemplated by KRS 39A.010, 39A.020, or 39A.030," such as a disaster, emergency, or catastrophe. KRS 39A.100(1). Despite statutory language that requires specificity and precision, the Governor has declared a state of emergency that extends throughout the Commonwealth and does not distinguish between locations that have been hard hit by the coronavirus from those that have not. In Kentucky, there is an extreme disparity between geographic locations regarding the number of infections, with densely populated urban areas experiencing much higher rates of infection than the more sparsely populated parts of the Commonwealth.

However, rather than tailoring the Commonwealth's response to the coronavirus based upon the prevalence of infections, the Defendants have imposed a uniform, onerous set of restrictions upon every citizen in every county of the Commonwealth. It cannot be said that Robertson County, which has experienced only its first coronavirus diagnosis approximately four months after the Governor declared a state of emergency, is experiencing the same "emergency," and to the same degree, as Jefferson County.

In *Adams, Inc. v. Louisville & Jefferson Cty. Bd. of Health*, 439 S.W.2d 586, 592 (Ky. 1969), Kentucky's highest court counseled that, "[i]n considering the reasonableness of regulations impairing private rights, many factors need be taken

into consideration." In *Adams*, the Court considered public health regulations that required an additional attendant be on duty at all pools to check bathers to ensure that they have taken a shower prior to bathing. But the Court carefully explained that while 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.* Thus, the Court struck down the regulation as unreasonable.

The lesson of *Adams* applies here. The Governor's one-size-fits-all approach is entirely arbitrary with respect to those counties, cities, and localities that have not experienced the novel coronavirus in the same way. Sections 1 and 2 of the Kentucky Constitution and KRS Chapter 39A require the Governor to tailor his declaration of a state of emergency, and his response, in a way that reasonably addresses the actual emergency in each locality.

The Commonwealth also has past experience with handling outbreaks of disease, and the response was entirely different. In *Allison v. Cash*, 143 Ky. 679, 137 S.W. 245 (1911), smallpox had broken out in Kuttawa, a city in Lyon County. Up to 90% of the city's residents had been exposed. The government's answer was not to shut down the entire state. Rather, the *local* health department employed a graduated response over time, tailoring its response to the needs on the ground. The response, over time, included vaccinations, isolation of specific individuals who had been exposed to the virus, localized travel restrictions, and targeted closures of

specific businesses affected by the outbreak. In this instance, the Governor and his appointees have instead adopted a far broader, and thus arbitrary, response.

By declaring a statewide emergency and refusing to tailor his orders to specific hotspots or concerns, Governor Beshear has and continues to violate Sections 1 and 2 of the Kentucky Constitution and KRS Chapter 39A. The Commonwealth therefore has a substantial possibility of prevailing on Count II of its Intervening Complaint.

C. The Governor's orders violate Sections 1 and 2 of the Kentucky Constitution because they exceed his statutory authority under KRS Chapter 39A, they fail to provide due process, and they are unequally enforced.

In Counts IV and VI of its Intervening Complaint, the Commonwealth alleges that the Governor's arbitrary orders violate Sections 1 and 2 of the Kentucky Constitution. Because the Commonwealth has a substantial possibility of prevailing on Count IV and VI of its Intervening Complaint, a temporary injunction is warranted.

The exercise of executive power is arbitrary when it exceeds statutory authority, violates procedural due process, or is not supported by substantial evidence. *See American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964).

KRS 39A.100(1) requires the Governor to declare, in writing, that a state of emergency exists prior to exercising his emergency powers under KRS Chapter 39A. On March 6, 2020, Governor Beshear issued Executive Order 2020-215, which declared a state of emergency and invoked his emergency powers. However, the

Governor failed to specifically define the emergency affecting the Commonwealth.[6] Despite not having clearly defined the emergency, the Governor then issued a series of restrictive executive orders, effectively shuttering the Commonwealth's economy and dictating the manner in which Kentucky's citizens lead their lives.

Using his emergency powers under KRS Chapter 39A, the Governor defined the businesses and pursuits he deemed to be "essential," while mandating the closure of all others. In doing so, he has placed unreasonable and arbitrary burdens upon the rights of a free people to "enjoy . . . their lives and liberties," "seeking and pursuing their safety and happiness," and "acquiring and protecting property." Ky. Const. § 1(1), (3), (5). The right to carry on one's trade or business is guaranteed by Section 1's protection of the "right of acquiring and protecting property," which includes a right to economic liberty protected by Kentucky's Constitution. *See, e.g.*, *Gen. Elec. Co. v. Am. Buyers Co-op, Inc.*, 316 S.W.2d 354, 360-61 (Ky. 1958); *City of Jackson v. Murray-Reed-Slone & Co.*, 178 S.W.2d 847, 848 (Ky. 1944).

The Governor also used his powers under KRS Chapter 39A to close churches and houses of worship, preventing corporate worship and the free exercise of religion in the Commonwealth, until courts stepped in to check his use of power. In doing so, the Governor denied the people of their "right of worshipping Almighty God according to the dictates of their consciences." Ky. Const. § 1(2).

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[6] On page 2 of Executive Order 2020-215, the Governor stated, "I, Andy Beshear, Governor of the Commonwealth of Kentucky, by virtue of the authority vested in me by Chapter 39A of the Kentucky Revised Statutes, declare that a State of Emergency exists in the Commonwealth of Kentucky[.]" However, nowhere in the executive order did the Governor define what the precise emergency is, or how he will determine that the emergency is over.

The Governor also exercised his KRS Chapter 39A powers to prohibit all but the smallest of gatherings. He denied the people their right to protest the very executive orders at issue in this case, unreasonably burdening the people's exercise of their "right of freely communicating their thoughts and opinions" and "assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes." Ky. Const. § 1(4), (6).

In each of these ways, this unchecked, totalitarian use of emergency authority violates the "inherent and inalienable rights" of the people, Ky. Const. § 1, and is, by its very nature, antithetical to democratic ideals, and is contrary to the customs and maxims of a free people. Under *Kentucky Milk Marketing*, this sort of gubernatorial lawmaking is arbitrary, and therefore violates Section 2 of the Constitution. 691 S.W.2d at 899.

Since declaring a state of emergency on March 6, 2020, the Governor has, at various times, permitted dog groomers to open to cut pets' hair, but not barbers and cosmetologists to cut peoples' hair. He has *completely closed* businesses for extended periods of time, even though KRS 39A.100(1)(g) only permits him to declare *curfews*. He has prohibited or limited the sale or consumption of *services*, even though KRS 39A.100(1)(h) only permits him to prohibit or limit the sale or consumption of *goods*. On March 16, the Governor closed restaurants and bars to in-person traffic.[7] But KRS

[7] March 16, 2020 Order, available at https://governor.ky.gov/attachments/20200316_Order_Restaurant-Closure.pdf (last visited July 15, 2020).

39A.100 only permits the Governor to exclude only certain individuals from certain places, *see* KRS 39A.100(1)(f), or "to declare curfews and establish their limits," KRS 39A.100(1)(g). These distinctions matter.

And importantly, KRS Chapter 39A and the Governor's executive orders leave citizens without any due process mechanism for challenging the Governor's determinations that their business or occupation is not "essential" or that other fundamental liberties may not be exercised. Section 2 of the Kentucky Constitution requires that the Governor afford due process to those Kentuckians affected by orders. Thus, "[i]n the interest of fairness, a party to be affected by an administrative order is entitled to procedural due process." *American Beauty Homes Corp. v. Louisville & Jefferson Cty. Planning & Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. 1964). And "[a]dministrative proceedings affecting a party's rights which did not afford an opportunity to be heard could likewise be classified as arbitrary." *Id.* But here, the Governor's orders provide no administrative proceedings nor any opportunity to be heard. With no prior notice, no opportunity to be heard, and no recourse after an adverse determination, the Governor's executive orders deny the due process protections guaranteed by Section 2.

Finally, "[u]nequal enforcement of the law, if it rises to the level of conscious violation of the principle of uniformity, is prohibited by [Section 2 of the Kentucky Constitution]." *Kentucky Milk Marketing*, 691 S.W.2d at 899. Even though the Governor has issued executive orders under KRS Chapter 39A that purport to enact mandatory rules, he has repeatedly made public statements that he does not plan to

enforce those orders against anyone challenging them in the courts.[8] *See, e.g.*, *W.O. v. Beshear*, No. 3:20-cv-23-GFVT, DE 30 at 12 (E.D. Ky. April 30, 2020). And although he barricades the Capitol grounds to those who would protest his arbitrary rules, the Governor welcomes mass gatherings on the Capitol grounds if he agrees with the content of the group's speech. Just last month, the Governor enthusiastically participated in a large protest on the Capitol grounds:[9]

Many of the people at the protest do not appear to have been wearing masks. None of them—not even the Governor—appear to be engaging in social distancing.

The Governor's claim of discretion to decide whether to enforce his executive orders or not, at his whim, with no public notice, guidelines, or explanation for how

[8] Notwithstanding the Governor's insistence that he will not seek to enforce his orders against anyone—which calls into question the viability of the state of emergency he has declared and the need to issue the orders in the first place—that is no comfort for people adversely affected by them. A violation of the Governor's KRS Chapter 39A orders is a misdemeanor. KRS 39A.990.

[9] A copy of this post on social media is available at https://twitter.com/GovAndyBeshear/status/1269064159234338816 (last visited July 6, 2020). This is a public record on the official Twitter account of the Governor of Kentucky.

and when his orders may be enforced, is an exercise of arbitrary power over the lives of the Commonwealth's citizens in violation of Section 2 of the Kentucky Constitution.

Because of the arbitrary nature of the Governor's actions, the Commonwealth has a substantial possibility of prevailing on Count IV and VI of its Intervening Complaint.

C. KRS Chapter 39A and the Governor's orders violate the nondelegation doctrine.

In Count III of its Intervening Complaint, the Commonwealth alleges that the Governor's actions violate Kentucky's "double barrel" separation of powers and the nondelegation doctrine. The Commonwealth has a substantial likelihood of prevailing on Count III of the Intervening Complaint.

Kentucky's Constitution has an especially powerful "double-barreled" separation of powers. Section 27 divides the powers of government among the Legislative, Executive, and Judicial branches. Section 28 then precludes any of the branches from overstepping the bounds of their delegated powers: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." *See Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280, 295 (Ky. 2013) ("The legislative, executive and judicial branches of our state government are to operate within their respective spheres"). As noted in *Legislative Research Commission v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984), "[o]ur present constitution contains explicit provisions which, on the one hand, mandate separation among the three branches of government, and on the other hand, specifically prohibit

incursion of one branch of government into the powers and functions of the others. Thus, our constitution has a double-barreled, positive-negative approach." For this reason, "perhaps no state forming part of the . . . United States has a constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does . . . [the Kentucky] Constitution." *Beshear*, 416 S.W.3d at 295 (citing *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922)).

Derived from these separation of powers principles is the "nondelegation doctrine." The purpose of the nondelegation doctrine is to protect against unnecessary and unrestrained discretionary power. "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 branch must exercise its own power rather than delegating it to another branch." *TECO Mech. Contractor, Inc. v. Commonwealth*, 366 S.W.3d 386, 397 (Ky. 2012) (citing *Board of Trustees of the Judicial Form Ret. Sys. v. Attorney General*, 132 S.W.3d 770, 781 (Ky. 2003)). To be lawful, a delegation from the Legislative to the Executive Branch "must not include the exercise of discretion as to what the law shall be." *Brown*, 664 S.W.2d at 915. Moreover, according to the Kentucky Supreme Court, the nondelegation doctrine under our Constitution is "more restrictive of powers granted than the federal Constitution . . . . Indeed, in the area of non-delegation, Kentucky may be unsurpassed by any state in the Union." *Board of Trustees*, 132 S.W.3d at 782. In Kentucky, the nondelegation doctrine requires that any grant of policymaking

authority from the General Assembly to the Executive Branch must be limited by "standards controlling the exercise of administrative discretion." *Id*.

Section 29 of the Kentucky Constitution vests "[t]he legislative power" in the General Assembly alone: "The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.'" Ky. Const. § 29. Part and parcel of "the legislative power" is the power to suspend laws: "No power to suspend laws shall be exercised unless by the General Assembly or its authority." Ky. Const. § 15. The Governor is not authorized to make law. Rather, it is his duty to "take care that the laws be faithfully executed." Ky. Const. § 81.

As is relevant here, KRS 39A.100(1) permits the Governor to declare that a state of emergency exists, enabling him to exercise broad powers, including the authority to impose curfews, limit the sale of goods, and "perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population." KRS 39A.100(1)(g), (h), (j). To utilize these broad emergency powers, KRS 39A.090 provides that the Governor may "make, amend, and rescind any executive orders as deemed necessary." Further, KRS 39A.180(2) provides that "[a]ll 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." The statute, in other words, purports to grant the Governor the ability to

suspend and rewrite laws to exercise broad and expansive powers. Moreover, to coerce compliance with the Governor's executive orders under KRS Chapter 39A, a violation of the orders may be punished as a Class A misdemeanor, KRS 39A.990, which could result in up to 12 months in jail, a fine of up to $500, or both. KRS 532.090(1); KRS 534.040(1), (2)(a).

KRS Chapter 39A includes none of the constitutionally-required "standards controlling the exercise of administrative discretion," *Board of Trustees*, 132 S.W.3d at 782, for the Governor to follow in making, amending, or rescinding his executive orders. The lack of any temporal limitation as a check on the Governor's powers under KRS Chapter 39A also is problematic. The General Assembly has not constrained the Governor's use of lawmaking power, other than to require that he may exercise his emergency powers "during the period in which the state of emergency exists." KRS 39A.100(1). But the emergency continues as long as the Governor permits. More than 120 days have passed since the Governor began his unconstitutional legislative spree, more than twice the amount of time granted to the legislative branch itself.

In addition, KRS Chapter 39A imposes no temporal or other limitations to constrain the Governor's discretion regarding which laws and regulations he may suspend, and what executive orders he may issue, which during a declared state of emergency carry the force of law. According to the Governor's conception of KRS Chapter 39A, he may determine, in his sole and unfettered discretion, whether and when a state of emergency exists, the duration of any state of emergency, what laws, regulations, and ordinances to suspend for any period of time during the declared

state of emergency, and what orders will replace those laws during the state of emergency. According to the Governor, he has unconstrained and complete authority to declare an emergency, fail to clearly articulate that emergency, address the emergency in any way he pleases, suspend the operation of any laws he pleases, and issue orders that govern the Commonwealth's citizens in any way and for as long as he pleases. Such unbounded discretion is the hallmark of a violation of the nondelegation doctrine.

In *Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673 (Ky. 2019), the Supreme Court considered the nondelegation doctrine in the context of KRS 12.028. That statute authorizes the Governor to temporarily reorganize certain executive branch agencies between legislative sessions. Although the Court concluded that the Governor was using legislative authority when he reorganized state government, the Court approved the Governor's use of such legislative authority because: (a) members of the General Assembly review the reorganization plans "both at the front and the back ends"; (b) any reorganizations effected by the Governor "only survive until the General Assembly's next regular session"; (c) the Governor's temporary reorganization "automatically reverts to the status existing before the Governor instituted it, even by the General Assembly's inaction"; and (d) the General Assembly limited the Governor's reorganization powers to only certain Executive Branch agencies. *Commonwealth ex rel. Beshear*, 575 S.W.3d at 683-84.

These meaningful limitations and constraints were essential to the Supreme Court finding the Governor's use of KRS 12.028 constitutional. Notwithstanding the

Court's approval of the use of lawmaking authority in the context of a reorganization (a statute that did not implicate the private rights of citizens), the Court drew a distinction between KRS 12.028 and a hypothetical statute that might provide, "The Governor shall have the power to change all laws of this Commonwealth between sessions of the General Assembly." *Id*. at 682. The Court disapproved of such a wide-ranging and limitless delegation from the General Assembly to the Governor under separation of powers and nondelegation principles. *See id*. KRS 39A.180 *is* the hypothetical statute that troubled the Court.

Unlike KRS 12.028, KRS 39A.180 confers the sort of wide-ranging and limitless delegation of legislative authority to the Governor that the Court declared unconstitutional in *Commonwealth ex rel. Beshear*. It contains none of the meaningful limitations and constraints required by the Kentucky Constitution. It is in all respects the very type of statute rejected by the Supreme Court in *Commonwealth ex rel. Beshear*, 575 S.W.3d at 683. In fact, KRS 39A.100(1) and KRS 39A.180, taken together, authorize the unconditional exercise of legislative authority and the suspension of laws enacted by the General Assembly. And the statutes authorize the use of this power without any meaningful legislative guidance or constraints on the use of the powers conferred, whether in geographic scope or temporal duration. Without any standards controlling the Governor's exercise of his KRS Chapter 39A powers, his use of those powers violates Sections 15, 27, and 28 of the Kentucky Constitution.

For all of these reasons, the Commonwealth has a substantial possibility of prevailing on Count III of its Intervening Complaint.

D. The Governor's orders violate KRS 39A.100.

In Count I, the Commonwealth alleges that the Governor has not demonstrated that he has met the requirements to invoke his emergency authority under KRS Chapter 39A. The Commonwealth has a substantial possibility of prevailing on Count I of its Intervening Complaint.

KRS Chapter 39A 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." KRS 39A.020(12) (emphasis added). Because the statutory definition of "emergency" is written in the conjunctive, there is no emergency unless there is both a "major threat to public safety" and a local emergency response agency first determines that it is not capable of handling it. The definition manifests the General Assembly's policy choice that disaster and emergency response be addressed first as a local matter, so that those closest to the scene of an "emergency," those most familiar with the facts on the ground and the needs of the community affected, are entrusted with coordinating the response. KRS 39A.020(12) provides the definition of "emergency" that serves as the premise for the Governor's right to declare a "state of emergency." Only if a local community is unable to address the size, scope, or

complexity of an emergency is the Governor permitted to intervene—at the request of the local response agency.

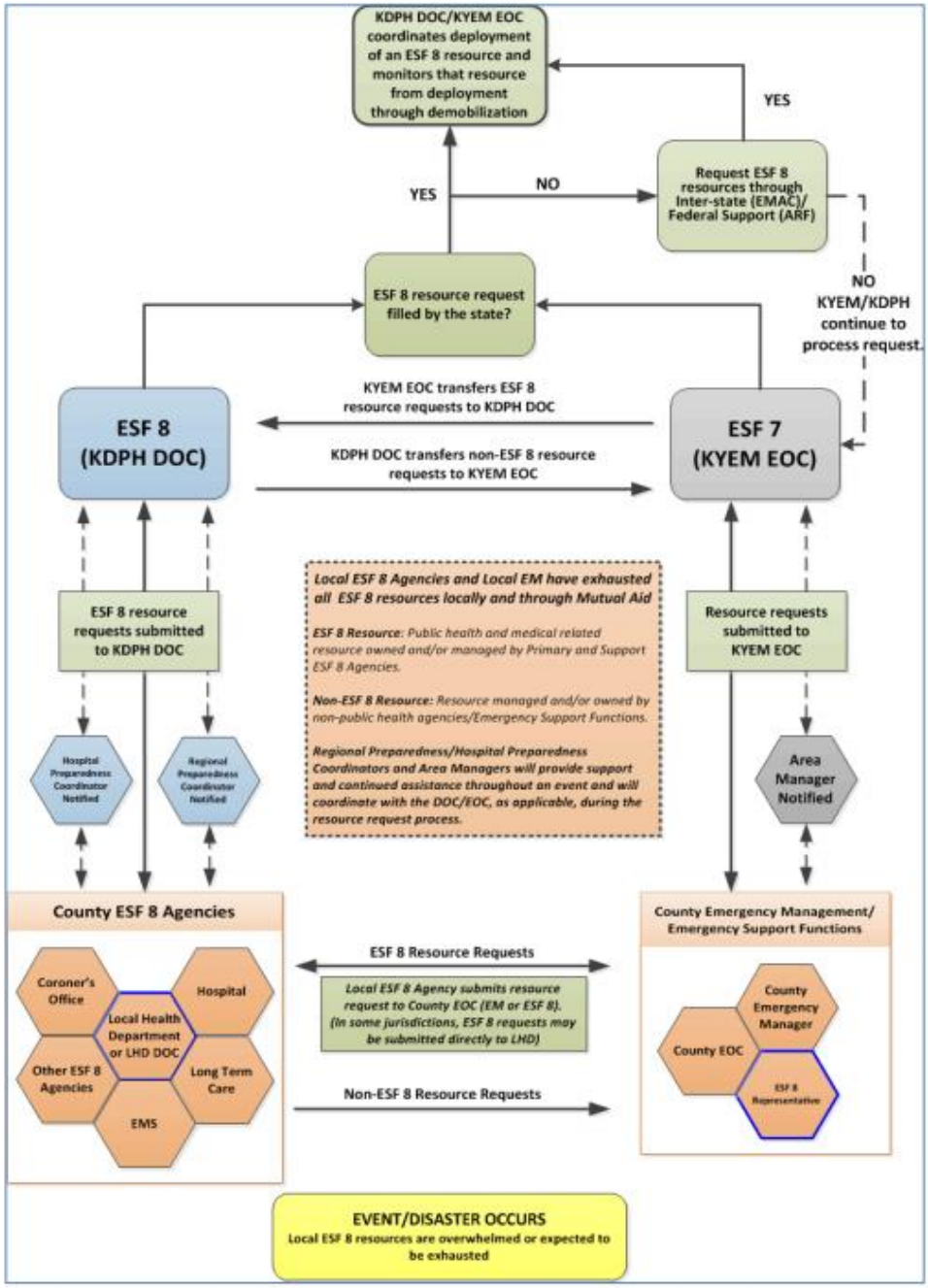
In fact, Governor Beshear is familiar with this statutory prerequisite to the use of these expanded, emergency powers. In an opinion issued by his office just last year, then-Attorney General Andrew Beshear considered whether a county judge/executive could invoke the emergency powers of KRS Chapters 39A–39F to fill the position of County Road Supervisor. Attorney General Beshear consulted the definition of "emergency" in KRS 39A.020(12) and determined that even if the vacancy posed a major threat to public safety, it was "not a circumstance that a local emergency response agency would determine to be beyond its capabilities." Ky. OAG No. 19-021, 2019 WL 6445355 (Nov. 18, 2019).

The analysis in OAG No. 19-021 is consistent with the Kentucky Emergency Operations Plan. In that plan, the Commonwealth assumes that resource requests will be made by local agencies as their resources are overwhelmed or exhausted:[10]

[10] Kentucky Emergency Operations Plan (Updated Aug. 2014), available at https://kyem.ky.gov/sitecontacts/Documents/State%20EOP.pdf (last visited July 15, 2020).

ATTACHMENT 6

ESF 8 Resource Request Process



Thus, KRS 39A.020, the Commonwealth's Emergency Operation Plan, and OAG No. 19-021 require a local determination before the Governor may exercise authority under KRS Chapter 39A. But the Governor has not pointed to any local emergency response agency in the Commonwealth—much less, *every* local agency—that has determined that the situation caused by the novel coronavirus "is beyond its capabilities." KRS 39A.100(1). For this reason, the Governor has no authority to invoke the statutory provisions of KRS 39A.100(1) on a statewide basis because the antecedent requirements to do so are absent. For these reasons, the Commonwealth therefore has a substantial possibility of prevailing on Count I of its Intervening Complaint.

E. The Governor's orders violate KRS Chapter 13A.

In Count V of its Intervening Complaint, the Commonwealth alleges that the Governor has failed to promulgate his order under KRS Chapter 13A. Because the Commonwealth has a substantial possibility of prevailing on Count V of its Intervening Complaint, a temporary injunction is warranted.

The General Assembly has expressly required that any statement of law by any state officer that generally applies to the Commonwealth's citizens must be adopted as an administrative regulation. KRS 13A.010(1), (2); KRS 13A.100. According to KRS 13A.100, "any administrative body that is empowered to promulgate administrative regulations shall, by administrative regulation, prescribe, consistent with applicable statutes . . . [e]ach statement of general applicability, policy, procedure, memorandum, or other form of action that implements; interprets;

prescribes law or policy . . . or affects private rights or procedures available to the public."

The KRS Chapter 13A process for adopting administrative regulations does not merely place form over substance. That process provides readily available public notice of the content of any proposed regulations, allows for public comment, yet provides flexibility and speed through the availability of emergency regulations when needed to address fast-evolving challenges. This opportunity for notice and comment also provides a measure of due process protection to the public, who are expected to follow the Governor's orders on pains of criminal sanctions for noncompliance.

The Governor's executive orders—which broadly apply to nearly every citizen of the Commonwealth and every activity of its citizens—are "statements of general applicability, policy, procedures . . . or other form of action that implements [or] prescribes law or policy [and] affects private rights or procedures available to the public." KRS 13A.100. They must, therefore, be promulgated under the provisions of KRS Chapter 13A. However, neither the Governor nor his designees have done so.

The strength of this claim is demonstrated by the Governor's recent use of emergency regulations to govern child care facilities and mandate the use of masks across the Commonwealth. Thus, the Commonwealth has a substantial possibility of prevailing on Count V of its Intervening Complaint.

II. The Commonwealth will suffer irreparable injury if the Court does not issue a temporary injunction.

The second prerequisite for granting injunctive relief is that the movant show he will be irreparably injured if the injunction is not granted. The Attorney General

"has not only the power to bring suit when he believes the public's legal or constitutional interests are under threat, but appears to have even the duty to do so." *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). The Attorney General has power to initiate suit to question the constitutionality of the Governor's actions. *Id*. at 363. Further, the Attorney General of the Commonwealth of Kentucky has standing to seek injunctive relief on behalf of the citizens of Kentucky. *Commonwealth ex rel. Conway*, 300 S.W.3d at 172-74. Accordingly, the Attorney General, by virtue of his office, has the right to file an action seeking injunctive relief to prevent government officials from "improperly and unconstitutionally applying" the law, even if he has "no personal interest in the outcome of the litigation." *Id*. at 173.

Similarly, when a governmental entity seeks an injunction to enforce its police powers under a statute, irreparable harm is presumed. *Boone Creek Properties, LLC v. Lexington-Fayette Urban Cty. Gov't*, 442 S.W.3d 36, 40-41 (Ky. 2014). This rule is based upon the "self-evident notion that if a governmental unit enacts a law . . . and the government cannot promptly compel compliance by enjoining an ongoing violation, the power and dignity of that governmental body is diminished." *Boone Creek*, 442 S.W.3d at 40. Here, the Attorney General has a responsibility to seek injunctive relief on behalf of Kentucky's citizens to prevent the violation of their constitutional rights. If irreparable injury is presumed when a governmental entity seeks to preserve its statutory right to enforce the laws, *a fortiori* irreparable injury must be presumed when the Attorney General seeks to vindicate the constitutional

rights of all the citizens of the Commonwealth. *See also Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights).

"We would further note, that in the area of temporary injunctive relief, the clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur prior to trial." *Maupin*, 575 S.W.2d at 698. In this case, the harm alleged in the Commonwealth's Intervening Complaint is the injury to the Commonwealth's constitutional order and the continued violation of constitutional rights. No monetary award can adequately compensate for that injury, and the people of the Commonwealth should not have to await trial before being restored to the form of government outlined in the Constitution.

III. Equity favors a temporary injunction.

The final prerequisite to granting injunctive relief is that the equities weigh in favor of issuing the injunction. "For example, in any temporary injunctive relief situation the relative benefits and detriments should be weighed . . . . Obviously, this entails a consideration of whether the public interest will be harmed by the issuance of the injunction or whether its effect will merely be to maintain the status quo." *Maupin*, 575 S.W.2d at 698. The Supreme Court has alternatively described this element as whether the injunction will "unduly harm other parties or disserve the public." *SM Newco*, 499 S.W.3d at 278.

As stated above, the constitutional rights of the citizens of Kentucky have been impaired and unreasonably burdened by the Governor and his appointees. Thus, an injunction would clearly serve the public interest. On the other hand, what harm will the Governor suffer? Surely, the Governor will claim that he must have the authority to enforce his orders or that the public health *might* suffer. But when challenged in court, the Governor has consistently told multiple courts that he has no intention of enforcing his orders against the plaintiffs in those actions. And the Kentucky Court of Appeals has recently denied the Governor's motion for intermediate relief in this case despite such claims, noting that "Kentuckians remain capable of doing the wise and common-sense things necessary to keep each other safe in the coming days, just as they have until now." *Beshear v. Brueggemann, et al*., No. 2020-CA-000834-OA (Ky. App. July 13, 2020) (denying Governor Beshear's motion for intermediate relief). For these reasons, and because the Governor can have no legitimate interest in violating the constitutional rights of its citizens, an injunction will not unduly harm the Defendants. Equity favors injunctive relief.

CONCLUSION

For all these reasons, the Commonwealth asks that the Court grant its motion for a temporary injunction under CR 65.04 to prohibit the Defendants from issuing or enforcing any executive order or other directive under KRS Chapter 39A.

Respectfully submitted,

Daniel Cameron
ATTORNEY GENERAL

/s/ Aaron J. Silletto
Barry L. Dunn (No. 93787)
Deputy Attorney General
S. Chad Meredith (No. 92138)
Solicitor General
Brett R. Nolan (No. 95617)
Special Litigation Counsel
Aaron J. Silletto (No. 89305)
Heather L. Becker (No. 94360)
Marc Manley (No. 96786)
Assistant Attorneys General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: (502) 696-5300
Barry.Dunn@ky.gov
Chad.Meredith@ky.gov
Brett.Nolan@ky.gov
Aaron.Silletto@ky.gov
Heather.Becker@ky.gov
Marc.Manley@ky.gov

Counsel for the Commonwealth of Kentucky ex rel. Attorney General Daniel Cameron

NOTICE OF HEARING

With leave of court, please take notice that this motion will be heard by the Boone Circuit Court on Thursday, July 15, 2020, at 10:00 a.m., or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

I certify that on July 15, 2020, a copy of the above was filed electronically with the Court and served through the Court's electronic filing system upon the following:

Christopher Wiest
25 Town Center Blvd, Suite 104
Crestview Hills, KY 41017
Chris@cwiestlaw.com
Counsel for Plaintiff

Thomas Bruns
4750 Ashwood Drive, Suite 200
Cincinnati, OH 45241
TBruns@bcvalaw.com
Counsel for the Plaintiff

Robert A. Winter, Jr.
P.O. Box 175883
Fort Mitchell, KY 41017
RobertAWinterjr@gmail.com
Counsel for the Plaintiff

Wesley W. Duke
David T. Lovely
Cabinet for Health and Family Services
275 East Main Street 5W-A
Frankfort, KY 40621
WesleyW.Duke@ky.gov
DavidT.Lovely@ky.gov
Counsel for the Cabinet for Health and Family Services, Secretary Eric Friedlander and Dr. Steven Stack

S. Travis Mayo
Taylor Payne
Joseph A. Newberg
700 Capitol Avenue, Suite 106
Frankfort, KY 40601
Travis.Mayo@ky.gov
Taylor.Payne@ky.gov
JoeA.Newberg@ky.gov
Counsel for the Governor

Jeffrey C. Mando
Claire E. Parsons
Olivia Amlung
40 West Pike Street
Covington, KY 41011
JMando@aswdlaw.com
CParsons@aswdlaw.com
OAmlung@aswdlaw.com
Counsel for Northern Kentucky Independent Health District and Dr. Saddler

/s/ Aaron J. Silletto
Counsel for the Commonwealth of Kentucky ex rel. Attorney General Daniel Cameron

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