

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION ____
CIVIL ACTION NO. 21-CI-_____

ANDY BESHEAR, in his official capacity as
Governor of the Commonwealth of Kentucky,

and

ERIC FRIEDLANDER, in his official capacity as
Secretary of the Cabinet for Health and Family Services,

PLAINTIFFS,

vs.

DAVID W. OSBORNE, in his official capacity as
Speaker of the Kentucky House of Representatives,

Serve: 702 Capitol Avenue
Annex Room 236
Frankfort, Kentucky 40601

Jay Hartz, Director
Legislative Research Commission
700 Capitol Avenue, Room 300
Frankfort, Kentucky 40601-3449

and

BERTRAM ROBERT STIVERS, II, in his official
capacity as President of the Kentucky Senate,

Serve: 702 Capitol Avenue
Annex Room 332
Frankfort, Kentucky 40601

Jay Hartz, Director
Legislative Research Commission
700 Capitol Avenue, Room 300
Frankfort, Kentucky 40601-34499

and

LEGISLATIVE RESEARCH COMMISSION,

Serve: Greg Woosley
Legislative Research Commission
700 Capitol Avenue, Room 300
Frankfort, Kentucky 40601-34499

and

DANIEL J. CAMERON, in his official capacity as
Kentucky Attorney General,

SERVE: Office of the Attorney General
The Capitol Building
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601-3449

DEFENDANTS.

**VERIFIED COMPLAINT FOR A DECLARATION OF RIGHTS, A TEMPORARY
RESTRAINING ORDER, A TEMPORARY INJUNCTION
AND A PERMANENT INJUNCTION**

Plaintiffs Andy Beshear, in his official capacity as Governor of the Commonwealth of Kentucky, and the Cabinet for Health and Family Services, by and through counsel, bring this action for a declaration of rights, a temporary restraining order, a temporary injunction and a permanent injunction against the Defendants, Robert W. Osborne, Speaker of the Kentucky House of Representatives, Bertram Robert Stivers, II, President of the Kentucky Senate, and Daniel J. Cameron, the Kentucky Attorney General.

INTRODUCTION AND FACTUAL BACKGROUND

1. The Commonwealth and the United States remains in a life-and-death battle against COVID-19 – the gravest threat to public health in over a century. To date, the pandemic has killed more than 441,000 Americans, meaning the virus has taken more lives than World War I, World War II, or the Korean or Vietnam Wars.

2. COVID-19 is a deadly, highly infectious disease. As described by the Kentucky Supreme Court:

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. 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. The CDC identified the potential public health threat posed by COVID-19 nationally and world-wide as “high”.

Beshear v. Acree, 2020-SC-0313-OA, 2020 WL 6736090, at *3 (Nov. 12, 2020).

3. COVID-19 also spreads through airborne transmission, particularly in poorly ventilated indoor spaces. As the disease has progressed, studies have shown that places where people congregate indoors for extended periods of time are the locations most associated with spread, especially if people do not wear masks or they remove their masks while indoors. These outbreaks can race through a community, affecting even people who did not choose to assume any risk by engaging in activities posing a higher risk of infection. While it is not possible to entirely prevent the spread of COVID-19, public health interventions can substantially reduce transmission rates.

4. As with other viruses, COVID-19 has mutated and multiple variants of COVID-19 have recently been documented. Three of these variants raise serious concern, as they spread more aggressively than the traditional strain that the United States has thus-far battled.¹ At least one of the new variants has been identified in Kentucky,² and another 29 states have reported

¹ New COVID-19 Variants, Centers for Disease Control and Prevention, updated Jan. 9, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html> (last visited Jan. 31, 2021).

² Gov. Beshear: President’s COVID-19 Team Increases Kentucky’s Vaccine Allocation, Jan. 26, 2021, available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=573> (last visited Jan. 31, 2021).

cases of this variant.³ The virulent South African B.1.351 variant has been identified in South Carolina⁴ and Maryland.⁵ And the Brazilian P.1 variant – which filled one Brazilian city’s hospitals to capacity in a matter of hours⁶ – has appeared in Minnesota.⁷ Public health experts agree the numbers likely understate the prevalence of these variants in the United States because of limited genomic testing.⁸ While vaccines show a light at the end of the tunnel, new strains of COVID-19 that may be as much as 50% more contagious and may be more fatal are already circulating in the United States. Public health authorities have therefore warned that the coming months will be deadly, forecasting 200,000 additional American deaths by May 1, an almost 50% increase to the already tragic toll.⁹ These experts have warned that these variants pose a particularly serious risk to hospital systems, which have been overwhelmed in other countries,¹⁰ and that they require “universal use of and strict compliance with” public health measures like those implemented in the Governor’s emergency orders.¹¹

³ Available at [html https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html](https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html) (last visited Jan. 31, 2021).

⁴ Andrew Joseph, South Carolina identifies the first U.S. cases of coronavirus variant first seen in South Africa, Jan. 28, 2021, available at <https://www.statnews.com/2021/01/28/south-carolina-first-cases-of-south-africa-variant/> (last visited Jan. 31, 2021).

⁵ Jason Hanna and Madeline Holcombe, *Maryland becomes 2nd state to report coronavirus variant first identified in South Africa*, CNN, Jan. 30, 2021, available at <https://www.cnn.com/2021/01/30/health/us-coronavirus-saturday/index.html> (last visited Jan. 31, 2021).

⁶ <https://www.washingtonpost.com/world/2021/01/27/coronavirus-brazil-variant-manaus/> (last visited Feb. 1, 2021).

⁷ <https://www.npr.org/sections/goatsandsoda/2021/01/27/961108577/why-scientists-are-very-worried-about-the-variant-from-brazil> (last visited Feb. 1, 2021).

⁸ <https://www.washingtonpost.com/health/2021/01/29/genetic-sequencing-mutations-coronavirus/> (last visited Feb. 1, 2021).

⁹ Maggie Fox, New variants could add up to 85,000 Covid-19 deaths to US toll by May, influential model forecasts, CNN Health, Jan. 29, 2021, available at https://edition.cnn.com/world/live-news/coronavirus-pandemic-vaccine-updates-01-29-21/h_5c168180a4c46f9c0203abb55997ce08 (last visited Feb. 2, 2021).

¹⁰ <https://www.nytimes.com/2021/01/15/health/covid-cdc-variant.html>. (last visited Feb. 2, 2021).

¹¹ https://www.cdc.gov/mmwr/volumes/70/wr/mm7003e2.htm?s_cid=mm7003e2_w (last visited Feb. 2, 2021).

5. On March 6, 2020, the Governor declared a State of Emergency related to COVID-19 and activated the Commonwealth’s Emergency Operations Center upon the first confirmed diagnosis of COVID-19 in Kentucky via Executive Order 2020-215.¹²

6. The federal government has concurred in that ongoing declaration. President Donald Trump issued four separate declarations of a federal state of emergency related to COVID-19, declarations now-President Joe Biden has left undisturbed. President Trump and Health and Human Services Secretary Alex Azar declared a public health emergency under the Public Health Service Act on Jan. 31, issued two national emergency declarations under both the Stafford Act and the National Emergencies Act (NEA) on March 13, *declaring all 50 states, the District of Columbia, and five territories major disaster areas*, and invoked emergency powers via Executive Order under the Defense Production Act on March 18.¹³ On March 19, President Trump named the Federal Emergency Management Agency (FEMA) as the lead agency in the COVID-19 emergency response efforts, a designation previously held by the Department of Health and Human Services (HHS). On January 7, 2021, Azar again renewed his determination that a public health emergency exists in the United States, a determination he first issued in January, 2020.¹⁴ On January 17, 2021, the White House Coronavirus Task Force warned in its State Report for Kentucky: “**Overall, this fall and winter surge is more aggressive**, with more rapid community spread that will need to be continuously met with aggressive and escalating mitigation.”¹⁵

¹² Ky. Exec. Order 2020-215, available at https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf (last visited Jan. 28, 2021).

¹³ Federal Emergency Management Agency, COVID-19 Disaster Declarations, available at <https://www.fema.gov/disasters/coronavirus/disaster-declarations> (last visited Jan. 22, 2021).

¹⁴ U.S. Department of Health and Human Services, Renewal of Determination that a Public Health Emergency Exists, Jan. 7, 2021, available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-07Jan2021.aspx> (last visited Jan. 22, 2021).

¹⁵ White House Coronavirus State Report, Jan. 17, 2021, available at <https://chfs.ky.gov/agencies/dph/covid19/Kentucky01172021.pdf> (last visited Jan 31, 2021).

7. Since taking office on January 20, 2021, President Joe Biden has issued additional declarations, including an omnibus order on January 22, 2021 addressing COVID-19-related financial insecurity, food insecurity, veteran assistance, and intergovernmental coordination.¹⁶

8. The Governor and the Cabinet for Health and Family Services (“CHFS”) have taken effective measures – through the Governor’s emergency powers – to protect the citizens of the Commonwealth. In taking these measures, the Governor has followed the recommendations and guidance of state, national, and global experts, including those at the White House, the Centers for Disease Control and Prevention, the World Health Organization, and the Kentucky Department for Public Health.

9. With the evolution of COVID-19 and our understanding of it, the Governor’s approach has evolved to a surgical and targeted approach based on expert advice, scientific studies, and real-time experience fighting the virus. The current approach involves a calibrated assessment of the risks posed by specific activities, and implementation of tailored measures to mitigate those risks with specific characteristics of Kentucky in mind. Notably, the White House recently “commended” the Governor for the widely-celebrated success of his “active measures.”¹⁷

10. The Governor has acted under constitutional executive powers, and the Governor and the Cabinet have acted pursuant to their executive powers under KRS Chapters 39A, 194A and 214. In enacting KRS Chapter 39A, the General Assembly recognized “that the rationale and

¹⁶ Fact Sheet: President Biden’s New Executive Actions Deliver Economic Relief for American Families and Businesses Amid the COVID-19 Crises (Jan. 22, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/22/fact-sheet-president-bidens-new-executive-actions-deliver-economic-relief-for-american-families-and-businesses-amid-the-covid-19-crises/> (last visited Jan. 30, 2021).

¹⁷ *White House Coronavirus Task Force Report for Kentucky*, Kentucky Cabinet for Health and Human Services, Nov. 15, 2020), available at <https://dnks20yx11c2u.cloudfront.net/381d0fbb43b611527a8f1c329301ef51fd555fcf/Kentucky%20%2011.17.pdf> (last visited Jan. XX, 2021).

purpose of the comprehensive emergency management program of the Commonwealth has evolved from a program for response to threats to national security, enemy attack and other defense needs, to a program for response to all hazards[.]” KRS 39A.030. It further declared it to necessary “[t]o confer upon the Governor . . . the emergency powers provided in KRS Chapters 39A to 39F[.]” KRS 39A.010(2).

11. The Supreme Court of Kentucky recently and unanimously upheld the executive powers of the Governor and the measures he has taken during this public health emergency.

Beshear v. Acree, 2020 WL 6736090. The Supreme Court concluded:

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 *37. Prior to its Opinion, the Supreme Court recognized the need for “a clear and consistent statewide public health policy” to slow the spread of this deadly disease. Order, *Beshear v. Acree*, 2020-SC-000313-OA (Ky. July 17, 2020) (attached as Exhibit A).

12. Kentucky has fared better than other states, seeing fewer cases and significantly fewer deaths. Adjusted for population, Kentucky has lost half the number of lives as Tennessee, a state that refuses to impose a mask mandate.¹⁸ Kentucky has lost less than one-fourth of the

¹⁸ Compare 9,374 total deaths/137 per 100,000 in Tennessee with 3,910 total deaths/88 per 100,000 in Kentucky as of January 29, 2021. See Coronavirus in the U.S.: Latest Map and Case Count, NY Times (available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states>) (last visited Jan. 30, 2021).

lives lost in North or South Dakota, states that refused to enact any measures until they recorded the highest mortality rates in the world late last fall.¹⁹

13. While the Governor’s measures have worked, Kentucky is still experiencing some of the highest number of cases and deaths it has seen during the pandemic. On January 6, Kentucky reported a record high 5,742 new cases of COVID-19, 670 of which were for people ages 18 and under, and 34 new deaths.²⁰ On that day, 1,778 Kentuckians were hospitalized for COVID-19, with 428 patients in the intensive care unit and 244 fighting for their lives on ventilators.²¹ The state’s positivity rate had increased to 12.34% on January 14.²² Kentucky reported a record number of new deaths, 69, on January 28, 2021.²³ In late December, after the Governor’s efforts and Kentuckians’ sacrifices, the positivity rate had dropped to below eight percent (8%).²⁴ As of February 1, 2021, all but 12 of Kentucky’s 120 counties were in the “red zone” based on average daily cases per 100,000 population over the prior seven days.²⁵

14. During the COVID-19 global pandemic, the CDC – organized under the U.S. Department for Health and Human Services – has issued guidance and considerations for state and local health officials to evaluate when implementing measures to protect citizens. The CDC is clear that its guidance should not take the place of state rules or regulation. Indeed, many of its documents explicitly warn against their use as regulatory material. In its “Considerations for

¹⁹ *Id.*

²⁰ KY COVID-19 Report, 06 JAN 21, available at <https://chfs.ky.gov/cvdaily/COVID19DailyReport010621.pdf> (last visited Feb. 2, 2021).

²¹ *Id.*

²² KY COVID-19 Report, 14 JAN 21, available at <https://chfs.ky.gov/cvdaily/COVID19DailyReport011421.pdf> (last visited Feb. 2, 2021).

²³ KY COVID-19 Report, 28 JAN 21, available at <https://chfs.ky.gov/cvdaily/COVID19DailyReport012821.pdf> (last visited Feb. 2, 2021).

²⁴ KY COVID-19 Report, 28 DEC 20, available at <https://chfs.ky.gov/cvdaily/COVID19DailyReport1228.pdf> (last visited Jan. 28, 2021).

²⁵ Kentucky Coronavirus Monitoring, Feb. 1, 2021, available at <https://govstatus.egov.com/kycovid19> (last visited Feb. 1, 2021).

Events and Gatherings,” updated January 8, 2021, the CDC states, “Because COVID-19 virus circulation varies in communities, these considerations are meant to supplement – **not replace** – any state, local, territorial, or tribal health and safety laws, rules, and regulations with which gatherings must comply.”²⁶ Guidance documents related to schools and community based organizations contain the same statement and warning. *See also* CDC, Operating schools during COVID-19: CDC’s Considerations (updated Jan. 8, 2021)²⁷; CDC, Considerations for Community-Based Organizations (updated Dec. 31, 2020)²⁸ (noting same restriction on the use of guidance as law, rule or regulation).

15. The CDC takes this position because its documents are numerous and overlapping, they do not provide clear directives (because they are “advice”), and they are primarily written in terms of “should” instead of “shall” or “must.” Simply put, they were never meant to be regulation and are therefore not written as such. For example, the most current guidance on events and gatherings gives no firm rules whatsoever; rather, the document simply labels activities as “lowest risk,” “more risk,” “higher risk,” and “highest risk.”²⁹

16. The sheer volume of overlapping guidance documents also makes it difficult to determine what rules apply. The CDC’s webpages lists 180 current COVID-19 guidance

²⁶ CDC, COVID-19, Considerations for Events and Gatherings, last updated Jan. 8, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> (last visited Jan. 28, 2021).

²⁷ CDC, Operating schools during COVID-19: CDC’s Considerations, last updated Jan. 8, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html> (last visited Jan. 28, 2021).

²⁸ CDC, Considerations for Community-Based Organizations, last updated Dec. 31, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/community-based.html> (last visited Jan. 28, 2021).

²⁹ CDC, COVID-19, Considerations for Events and Gatherings, last updated Jan. 8, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> (last visited Jan. 28, 2021).

documents as of January 28, 2021. These guidance documents are continuously updated and changed with little-to-no public notice.³⁰

17. Avoiding any doubt, on January 11, 2021, the Director of the CDC advised the Governor by letter as follows:

I want to make it clear that ***CDC guidance should not be interpreted as regulation***; rather they are meant as recommendations, It should be used in consideration for specific state and/or local regulations, but this guidance is meant to be flexible and adaptable. It is not meant to be prescriptive or interpreted as standards that can be regulation.

CDC provides ongoing guidance to individuals, businesses, schools, and states. We have and will continue to be available for technical assistance and guidance, but we expect each jurisdiction to modify this guidance to meet their state's needs.³¹

See CDC Letter, Jan. 11, 2021 (emphasis added) (attached as Exhibit B).

18. While CDC and White House Coronavirus Task Force³² recommendations are helpful –even vital – their very nature as “guidance” can lead to conflicting interpretations. Multiple guidance documents can apply to a single type of business. Food service providers could conceivably be subject to, among others, the Considerations for Events and Gatherings,³³ the Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Business, Schools, and Homes,³⁴ the Guidance for Businesses and Employers Responding to Coronavirus Disease 2019

³⁰ CDC, COVID-19 Guidance Documents, updated Jan. 28, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc> (last visited Jan. 28, 2021).

³¹ Letter from Robert R. Redfield, MD to Governor Andy Beshear, Jan. 11, 2021 (attached as Exhibit A).

³² Along with the CDC, the White House Coronavirus Task Force, within the federal executive branch, issues guidance and recommendations, and issues weekly state reports that include recommendations for other states. For example, the most recent White House Coronavirus Task Force State Report for Kentucky includes recommendations and information regarding states from California across the Sunbelt and into the Southeast, Mid-Atlantic and Northeast.

³³ *Id.*

³⁴ CDC, Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes, updated Jan. 5, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html> (last visited Jan. 28, 2021).

(COVID-19),³⁵ the Considerations for Restaurant and Bar Operators,³⁶ and the guidance on Personal and Social Activities.³⁷

19. Even if a business can readily identify all potentially applicable guidance, they can be difficult to harmonize and interpret. The Considerations for Restaurant and Bar Operators can be interpreted to require limiting food service to drive-through, delivery, take-out, and curbside pickup, or allowing on-site dining with indoor seating at no reduced capacity or even social distancing.³⁸ Likewise, the guidance on Personal and Social Activities could be interpreted to require take-out only if there is any kind of a “crowd,” which is undefined, both indoors and outdoors.³⁹

20. During the pandemic, the Governor’s administration has endeavored to keep the General Assembly and the public updated about the actions it has taken with regard to the COVID-19 emergency. Members of the Governor’s administration have appeared at the request of the General Assembly at over 40 committee hearings and spent more than 30 hours testifying under oath. Those testifying include Dr. Steven Stack, Commissioner of the Department of Public Health, who has testified a total of approximately six hours. Eric Friedlander, Secretary of the Cabinet for Health and Family Services, who has testified a total of approximately five hours. In addition, the Governor has held regular, sometimes daily press conferences explaining

³⁵ CDC, Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), updated Jan. 4, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last visited Jan. 28, 2021).

³⁶ CDC. Considerations for Restaurant and Bar Operators, updated Dec. 16, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> (last visited Jan. 28, 2021).

³⁷ CDC, Personal and Social Activities, updated Jan. 6, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html> (last visited Jan. 28, 2021).

³⁸ CDC. Considerations for Restaurant and Bar Operators, updated Dec. 16, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> (last visited Jan. 28, 2021).

³⁹ CDC, Personal and Social Activities, updated Jan. 6, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html> (last visited Jan. 28, 2021).

all steps taken to combat the virus and the reasons behind them. The Commonwealth has further maintained a comprehensive website, kycovid19.ky.gov, with enormous amounts of data available to legislators and the public including: daily and total cases, daily and total positivity rates, K-12 school case and quarantine information, testing rates and locations, and, now, vaccine rates and locations. The website also includes links to resources for the public, such as rental and utility assistance, current Healthy at Home guidance, and contact tracing information. Both the public and the General Assembly have more information and data available to them than in any previous emergency in the state's history.

21. Despite the grave and extraordinary circumstances facing the Commonwealth, immediately upon gaveling into the 30-day Regular Session on January 5, 2021 – a session in which a state budget must be enacted – the General Assembly chose to prioritize legislation aimed at taking away the Governor's executive authority to address emergencies rather than legislation to address COVID-19, to pass a state budget, to provide affordable health care, to address racial injustice, to invest in education, to address the opioid epidemic, or to appropriate more than \$220 million to help small businesses.

22. The General Assembly came into session on Saturday, January 9, 2021, to fully pass the following bills: Senate Bill 1 (R.S. 2021) (attached as Exhibit C), House Bill 1 (R.S. 2021) (attached as Exhibit D), and Senate Bill 2 (R.S. 2021) (attached as Exhibit E).

23. The Governor vetoed SB 1, HB 1 and SB 2 on January 20, 2021. Veto Messages, Jan. 20, 2021 (attached as Exhibit F). After issuing his vetoes, the Governor attempted good faith negotiations with the Speaker and Senate President. On January 20, 2021 he sent a letter suggesting any legislation wait until after this deadly pandemic, but nevertheless offering some areas of compromise. *See* Governor's Letter, Jan. 20, 2021 (attached as Exhibit G). No response

was provided for more than 11 days. Instead, on February 1, 2021 - the day before the General Assembly was scheduled to resume its session – the Speaker and Senate President sent a letter claiming they were too busy, would override the veto, and then the parties could potentially discuss. *See* Stivers & Osborne Letter, Feb. 1, 2021 (attached as Exhibit H).

24. The General Assembly convened on February 2, 2021, to vote to override the vetoes of SB 1, HB 1 and SB 2.

House Bill 1

25. House Bill 1 is named “An Act relating to reopening the economy in the Commonwealth of Kentucky in response to the state of emergency declared by the Governor of Kentucky beginning in March 2020 and continuing throughout the year of 2021 and declaring an emergency.”

26. Section 1 of HB 1 states that notwithstanding any state law, administrative regulation, executive order, or executive directive to the contrary, during the current state of emergency “declared by the Governor in response to COVID-19 or any future state of emergency related to any virus or disease, including but not limited to any mutated strain of the current COVID-19 virus, until January 31, 2022”, certain entities may remain open and be fully operational if they meet certain requirements of the bill.

27. The entities that HB 1 allows to remain open and be fully operational are: Any business; for-profit or not-for-profit organization; local government; association; or any school or school district; public; private; or religiously affiliated.

28. An entity identified in Section 1 of HB 1 may remain open and be fully operational so long as it adopts an operating plan that:

- a. Meets or exceeds all applicable guidance issued by the CDC or by the executive branch, whichever is least restrictive;
- b. Details how the entity will foster the safety of employees, customers, attendees and patrons, including social distancing requirements; and
- c. Is posted in a conspicuous place on the main entrance of the physical location of the entity, and on the website of the entity, if one exists.

29. HB 1 does not indicate whether the executive branch referenced in Section 1 is the state executive branch or the federal executive branch.

30. Under Section 1 of HB 1, the entity may prepare its operating plan or may use a plan prepared by a local or state government agency, local or state chamber of commerce, trade association, or other recognized affiliated organization.

31. Section 1 of HB 1 prohibits any state or local agency from enforcing restrictions related to the state of emergency impacting the ability of the entities listed in the section to remain open and fully operational for in-person services that exceed current applicable guidelines issued by the CDC or the executive branch, whichever is least restrictive.

32. Section 2 of HB 1 serves as the bill’s emergency clause, stating, “Whereas the economic impact of the state of emergency declared in response to COVID-19 on Kentucky’s citizens and businesses is of the utmost importance, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming law.”

Senate Bill 1

33. Senate Bill 1 (“SB 1”), “An Act relating to emergencies and declaring an emergency,” amends provisions of KRS Chapter 39A to take away the Governor’s ability to

respond to and protect Kentuckians from the very kind of emergency we now face – a once in a century pandemic – and any emergency and consequences of it that could last for more than 30 days. The bill also attempts to provide an end run around Sections 55 and 80 of the Kentucky Constitution by forcing the Governor to call the legislature into an extraordinary session every 30 days to extend, modify or terminate any order, including an order declaring a state of emergency or disaster, and any administrative regulation or other directive issued under KRS Chapter 39A.

34. Section 2 of SB 1 amends KRS 39A.090 to make any executive order, administrative regulation, or other directive issued under KRS Chapter 39A effective no longer than 30 days unless the General Assembly approves it prior to the extension of any executive order or directive that:

a. Places restrictions on the in-person meeting or places restrictions on the functioning of the following: Elementary, secondary, or postsecondary educational institutions; Private businesses or nonprofit organizations; Political, religious, or social gatherings; Places of worship; or Local governments; or

b. Imposes mandatory quarantine or isolation requirements.

35. Under Section 2 of SB 1: “All other executive orders, administrative regulations, or directives that are not described in paragraph (a) of this subsection may exceed thirty (30) days if requested by a chief executive officer or a legislative body of a local government only for that local government and only for the period of time requested by the chief executive officer or a legislative body. The chief executive officer or a legislative body may make a written request for extensions or early termination of the executive order.” The language of the section is not clear as to whom the chief executive officer or legislative body of a local government must submit a written request. This means that as to any executive orders, administrative regulations,

or directives issued during any statewide emergency like the COVID-19 pandemic, such a request must be received from all 120 counties to extend them, and the extension could only last for the amount of time requested by the local government.

36. Section 2 of SB 1 would also amend KRS 39A.090 in the following way:

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

37. Section 2 of SB 1 further provides that “[t]he General Assembly, by joint resolution, may terminate a declaration of emergency at any time.” Therefore, under the language of the bill, even if the General Assembly approved an extension of an executive order, administrative regulation, or other directive issued by the Governor under KRS Chapter 39A, including those described in Section 2, and even if the chief executive officer or legislative body of a local government – or from each of the 120 counties – submitted a written request to extend an executive order, administrative regulation, or directive, under SB 1 the General Assembly has discretion, by joint resolution and at any time, to terminate the declaration of emergency that effectuated those executive orders, administrative regulations, or directives.

38. Under Section 2 of SB 1, the General Assembly waives the Commonwealth’s immunity for prospective equitable and declaratory relief only under the Eleventh Amendment to the United States Constitution of the United States for cases brought against the Commonwealth in federal jurisdictions pursuant to KRS 446.350 during emergencies declared under KRS Chapters 39A to 39F.

39. In Section 3, SB 1 amends KRS 39A.100 to completely erase KRS 39A.100(1)(j), which currently allows the Governor “to perform an exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population.”

40. Section 3 of SB 1 also amends KRS 39A.100(1)(k) to remove the authority of the Governor, on the recommendation of the Secretary of State, to declare by executive order a different manner for holding elections. Under SB 1, the Governor and Secretary of State cannot, as they did for the primary and general elections in 2020, work together on a bipartisan basis to develop a plan for holding an election during an emergency, including one due to a pandemic of a highly contagious disease, such as by no-excuse or expanded-excuse mail-in or drop-off absentee ballot, or expanded early in-person voting. Under Section 3, the executive order affecting the time or place of an election remains in effect until the date of the suspended or delayed election, regardless of the time limitations in Section 2 of the bill, and shall not be changed except by approval of the General Assembly.

41. Section 3 of SB 1 adds a new KRS 39A.100(1)(l) that would provide the following authority to the Governor: “Except as prohibited by this section or other law, to take action necessary to execute those powers enumerated in paragraphs (a) through (k) of this subsection.”

42. Section 3 of SB 1 amends KRS 39A.100(4) to add that nothing in KRS 39A.100 shall be construed to allow a governmental entity to impose additional restrictions on: “[t]he right of people to exercise free speech, freedom of the press, to petition their government for redress of injuries, or to peaceably assemble” or “[t]he right of the people to worship in-person, or to act or refuse to act in a manner motivated by a sincerely held religious belief.” Section 3 then adds a new KRS 39A.100(5) that states that nothing in KRS 39A.100 “shall be construed to

allow any governmental entity to impose restrictions on the right of people to: (a) Peaceably assemble; or (b) Worship, worship in person, or to act or refuse to act in a manner motivated by a sincerely held religious belief.”

43. Section 4 of SB 1 amends KRS 39A.180(2) by deleting language under which, as the Kentucky Supreme Court confirmed in *Beshear v. Acree*, No. 2020-SC-0313-OA, 2020 WL 6736090 (Ky. Nov. 12, 2020), the General Assembly suspends all existing laws, ordinances, and administrative regulations inconsistent with KRS Chapters 39A through 39F, or any order or administrative regulation issued under KRS Chapters 39A through 39F, during the period of time and to the extent the conflict exists. Section 4 adds language to KRS 39A.180(2) that requires all administrative regulations promulgated under KRS Chapters 39A through 39F to follow the requirements of KRS Chapter 13A.

44. Section 4 of SB 1 adds a new provision to KRS 39A.180 that allows the Governor to suspend a statute by executive order when an emergency is declared under KRS Chapter 39A if: (1) The statute is specifically enumerated by the Governor in the executive order; and (2) The executive order specifying the suspension is approved by the Attorney General in writing.

45. Under Section 4 of SB 1, a statute suspension authorized by the section shall only be in effect while the emergency executive order is in effect.

46. Also under Section 4 of SB 1, any existing administrative regulation that conflicts with a written order issued under KRS Chapter 39A must be amended, withdrawn, or repealed pursuant to KRS Chapter 13A to conform with the written order. When a written order ends, any administrative regulation promulgated under the authority of Section 4 must become void and be withdrawn, amended, or repealed pursuant to KRS Chapter 13A.

47. Section 6 of SB 1 removes the penalty of a Class A misdemeanor for violation of any provision of KRS Chapter 39A or any administrative regulation or order issued under it for which another penalty is not specified. Under SB 1, the penalty would be a fine of up to \$100 for a first offense and up to \$250 for each subsequent offense.

48. Section 7 of SB 1 amends KRS 241.090 to limit the enforcement authority of state administrators and investigators during an emergency by providing, “The jurisdiction and police powers of state administrators and all investigators during an emergency declared under KRS Chapter 39A shall be subject to the limitations of Section 2 of [SB 1].”

49. Section 9 of SB 1 expressly states that the bill shall not affect the authority of the Attorney General to enforce the prohibition on price gouging implemented by the Governor during a declared state of emergency. Section 9 would amend KRS 367.374 to state, “Nothing in this section shall be affected by the requirements of Section 2 of this Act.”

50. Section 11 of SB 1 serves as the bill’s emergency clause, stating, “Whereas the impact of COVID-19 on Kentucky’s citizens and businesses is of the utmost importance, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming law.”

Senate Bill 2

51. Senate Bill 2 (“SB 2”), “An Act relating to administrative regulations and declaring an emergency,” among other things, amends KRS Chapter 13A.

52. Section 1 of SB 2 provides a definition for “legislative committee,” which is “an interim joint committee, a House or Senate standing committee, a statutory committee, or a subcommittee of the Legislative Research Commission.”

53. Section 2 of SB 2 amends KRS 13A.030(2) by no longer making the determination of the Administrative Regulation Review Subcommittee “nonbinding.” The bill does not insert any word as a substitute for “nonbinding.”

54. Section 4 of SB 2 amends KRS 13A.190 to subject emergency administrative regulations to the public comment provisions established under SB 2.

55. Section 4 of SB 2 also amends KRS 13A.190 to allow a legislative committee to review an emergency administrative regulation at a subsequent meeting, which may find the emergency administrative regulation deficient that must be reported to the Governor.

56. Section 14 of SB 2 amends KRS 13A.312 to add a new section that provides that if an executive order transfers authority over a subject matter to another administrative body or changes the name of an administrative body during the interim between regular sessions of the General Assembly, and the General Assembly does not codify or confirm the executive order during the next regular session, any and all administrative regulations promulgated to implement the executive order must return to their original form by the administrative body.

57. Section 22 of SB 2 amends KRS 214.020, the statute governing the Cabinet for Health and Family Services’ ability to respond to infectious or contagious disease in Kentucky. The Cabinet for Health and Family Services currently has authority to promulgate administrative regulations if it believes there is a probability that an infectious or contagious disease will invade Kentucky; SB 2 would make the Cabinet determine that such will invade the state.

58. Under Section 22 of SB 2 , an administrative regulation issued under the authority of KRS 214.020 must be in effect no longer than 30 days if it:

- a. Places restrictions on the in-person meeting or functioning of the following: elementary, secondary, or postsecondary institutions; private businesses or

non-profit organizations; political, religious, or social gatherings; places of worship; or local governments; or

b. Imposes mandatory quarantine or isolation requirements.

59. Section 22 of SB 2 requires any administrative regulation issued under the authority of KRS 214.020 to include the penalty, appeal, and due process rights for violations of the administrative regulation, and to contain the public hearing and written comment period notice required under Section 9 of SB 2.

60. Section 23 of SB 2 purports to amend KRS 214.990(2), the penalty provision, to provide that “[a]ny person who willfully violates any administrative regulation promulgated under KRS Chapter 13A by the Cabinet for Health and Family Services under KRS 214.020 shall be guilty of a Class B misdemeanor.” Under the current KRS 214.990(2), “Any owner or person having charge of any public or private conveyance, including watercraft, who refuses to obey the rules and regulations made by the Cabinet for Health and Family Services under KRS 214.020 shall be guilty of a Class B misdemeanor.”

61. Section 25 of SB 2 is the emergency clause, providing: “Whereas, ensuring that Kentucky citizens have adequate access to the administrative regulation process is a compelling and immediate need, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.”

Section 2 of the Kentucky Constitution

62. In the Bill of Rights of the Kentucky Constitution, Section 2 provides:

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

KY. CONST. § 2.

Section 27 of the Kentucky Constitution

63. Under Section 27 of the Kentucky Constitution:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

KY. CONST. § 27.

Section 28 of the Kentucky Constitution

64. As Section 28 of the Kentucky Constitution provides:

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.

KY. CONST. § 28.

Sections 36 and 42 of the Kentucky Constitution

65. Under Section 36 of the Kentucky Constitution:

(1) The General Assembly, in odd-numbered years, shall meet in regular session for a period not to exceed a total of thirty (30) legislative days divided as follows: The General Assembly shall convene for the first part of the session on the first Tuesday after the first Monday in January in odd-numbered years for the purposes of electing legislative leaders, adopting rules of procedure, organizing committees, and introducing and considering legislation. The General Assembly shall then adjourn. The General Assembly shall convene for the second part of the session on the first Tuesday in February of that year. Any legislation introduced but not enacted in the first part of the session shall be carried over into the second part of the session. In any part of the session in an odd-numbered year, no bill raising revenue or appropriating funds shall become a law unless it shall be agreed to by three-fifths of all the members elected to each House.

KY. CONST. § 36(1).

66. Under Section 42 of the Kentucky Constitution:

The members of the General Assembly shall severally receive from the State Treasury compensation for their services: Provided, No change shall take effect during the session at which it is made; nor shall a session occurring in odd-numbered years extend beyond March 30; nor shall a session of the General

Assembly occurring in even-numbered years continue beyond sixty legislative days, nor shall it extend beyond April 15; these limitations as to length of sessions shall not apply to the Senate when sitting as a court of impeachment. A legislative day shall be construed to mean a calendar day, exclusive of Sundays, legal holidays, or any day on which neither House meets.

KY. CONST. § 42.

Section 55 of the Kentucky Constitution

67. Section 55 of the Kentucky Constitution provides:

No act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency, when, by the concurrence of a majority of the members elected to each House of the General Assembly, by a yea and nay vote entered upon their journals, an act may become a law when approved by the Governor; but the reasons for the emergency that justifies this action must be set out at length in the journal of each House.

KY. CONST. § 55.

Section 59 of the Kentucky Constitution

68. In pertinent part, Section 59 of the Kentucky Constitution provides:

The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: ...

Twentieth: To provide for conducting elections, or for designating the places of voting, or changing the boundaries of wards, precincts or districts, except when new counties may be created.

...

Twenty-fourth: To regulate labor, trade, mining or manufacturing.

...

Twenty-ninth: In all other cases where a general law can be made applicable, no special law shall be enacted.

KY. CONST. § 59.

Section 60 of the Kentucky Constitution

69. Section 60 of the Kentucky Constitution provides:

The General Assembly shall not indirectly enact any special or local act by the repeal in part of a general act, or by exempting from the operation of a general act any city, town, district or county; but laws repealing local or special acts may be enacted. No law shall be enacted granting powers or privileges in any case where the granting of such powers or privileges shall have been provided for by a general law, nor where the courts have jurisdiction to grant the same or to give the relief asked for. No law, except such as relates to the sale, loan or gift of vinous, spirituous or malt liquors, bridges, turnpikes or other public roads, public buildings or improvements, fencing, running at large of stock, matters pertaining to common schools, paupers, and the regulation by counties, cities, towns or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the General Assembly, unless otherwise expressly provided in this Constitution.

KY. CONST. § 60.

Section 69 of the Kentucky Constitution

70. Under Section 69 of the Kentucky Constitution:

The supreme executive power of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the “Governor of the Commonwealth of Kentucky.”

KY. CONST. § 69.

Section 75 of the Kentucky Constitution

71. Section 75 states with respect to the Governor:

He shall be Commander-in-Chief of the army and navy of this Commonwealth, and of the militia thereof, except when they shall be called into the service of the United States; but he shall not command personally in the field, unless advised so to do by a resolution of the General Assembly.

KY. CONST. § 75.

Section 80 of the Kentucky Constitution

72. Under Section 80 of the Kentucky Constitution, as to the Governor:

He 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. In case of disagreement between the two Houses with respect to the time of adjournment, he may adjourn them to such time as he shall think proper, not exceeding four months. When he shall convene the

General Assembly it shall be by proclamation, stating the subjects to be considered, and no other shall be considered.

KY. CONST. § 80.

73. Section 80 of the Kentucky Constitution provides that the Governor “shall take care that the laws be faithfully executed.” KY. CONST. § 80.

Section 88 of the Kentucky Constitution

74. In pertinent part, Section 88 of the Kentucky Constitution states:

Every bill which shall have passed the two Houses shall be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to the House in which it originated, which shall enter the objections in full upon its journal, and proceed to reconsider it. If, after such reconsideration, a majority of all the members elected to that House shall agree to pass the bill, it shall be sent, with the objections, to the other House, by which it shall likewise be considered, and if approved by a majority of all the members elected to that House, it shall be a law; but in such case the votes of both Houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal of each House respectively. If any bill shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevent its return, in which case it shall be a law, unless disapproved by him within ten days after the adjournment, in which case his veto message shall be spread upon the register kept by the Secretary of State.

KY. CONST. § 88.

NATURE OF THE ACTION

75. This Verified Complaint for a Declaration of Rights and a Permanent Injunction is governed by the Kentucky Declaratory Judgment Act, KRS 418.010, *et seq.*, Kentucky Rule of Civil Procedure (“CR”) 57, and CR 65.

76. KRS 418.040 provides this Court with authority to “make a binding declaration of rights, whether or not consequential relief is or could be asked” when a controversy exists.

Actual and justiciable controversies regarding violations of Kentucky laws and the interpretation of contracts clearly exist in this action.

77. CR 65 permits this Court to issue a restraining order and a temporary injunction, and, in a final judgment, to issue a permanent injunction, any and all of which may restrict or mandatorily direct the doing of an act.

78. Plaintiffs request an expedited review pursuant to KRS 418.050 and CR 57. The COVID-19 state of emergency is ongoing and is in the midst of a surge of positive cases and hospitalizations. Resolution of Plaintiffs' authority to exercise executive powers in a public health emergency is an immediate concern. For these reasons, this justiciable controversy presents an immediate concern that the Court must promptly resolve.

JURISDICTION AND VENUE

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

80. Venue is appropriate in this Court pursuant to KRS 452.405 because the cause of action arises in Franklin County. In particular, the primary offices of the General Assembly and the Attorney General are located in Frankfort, Franklin County, Kentucky. Further, this action generally relates to violations of the Kentucky Constitution, which were either determined or accomplished or occurred in Franklin County, Kentucky.

81. Pursuant to KRS 418.040, *et seq.*, this Court may properly exercise *in personam* jurisdiction over the Defendants.

PARTIES

82. Plaintiff Andy Beshear files this action in his official capacity as the Governor of the Commonwealth of Kentucky.

83. Plaintiff Eric Friedlander files this action in his official capacity as the Secretary of the Cabinet for Health and Family Services. CHFS is the Executive Branch Cabinet authorized by KRS Chapter 194A and KRS Chapter 214 to address matters related to public health and related to infectious and contagious diseases, including, but not limited to, by promulgating administrative regulations and directing local public health departments.

84. Defendant David W. Osborne is the Speaker of the Kentucky House of Representatives and is sued in his official capacity only. In his position as Speaker of the Kentucky House of Representatives, Defendant Osborne led passage of House Bill 1 and signed House Bill 1 as part of the bill enrollment process.

85. Defendant Bertram Robert Stivers, II, is the President of the Kentucky Senate and is sued in his official capacity only. In his position as Kentucky Senate President, Defendant Stivers led passage of Senate Bill 1 and Senate Bill 2 and signed Senate Bill 1 and Senate Bill 2 as part of the bill enrollment process.

86. Defendant Legislative Research Commission (“LRC”) is sued in its official capacity only. LRC is the administrative and research arm of the General Assembly, and its structural work is performed by committees of three types that are considered subcommittees of LRC: interim joint committees, statutory committees, and special committees/task forces.

87. Defendant Daniel J. Cameron is the Attorney General of the Commonwealth of Kentucky and is sued in his official capacity only. In his position as Attorney General, Defendant serves as the Commonwealth’s chief law officer and chief prosecutor, charged with general supervision of criminal justice. KRS 15.020; KRS 15.700.

CLAIMS

Count I

Declaration of Rights

SB 1 – Violation of KY. CONST. § 2

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

89. In its Bill of Rights, the Kentucky Constitution prohibits “absolute and arbitrary power over the lives, liberty and property of freeman” in the Commonwealth. KY. CONST. § 2.

90. Despite the statutory language of KRS Chapter 39A that requires specificity and precision, through SB 1 the General Assembly attempts to amend KRS Chapter 39A to strip the Governor of his executive powers to respond to an emergency, including a public health emergency that is a global pandemic, and arbitrarily gives those executive powers to the legislative branch of state government and the local governments of the Commonwealth.

91. SB 1 gives absolute and arbitrary power to the General Assembly in an emergency by requiring the approval of the part-time legislature before the Governor may extend, modify or terminate any executive order or directive issued under KRS Chapter 39A that places restrictions on the in-person meeting or function of: Elementary, secondary, or postsecondary educational institutions; Private businesses or nonprofit organizations; Political, religious, or social gatherings; Places of worship; or Local governments. The same approval of the part-time legislator is required to extend any executive order or directive that imposes mandatory quarantine or isolation requirements. This absolute and arbitrary power would exist even when the part-time legislature is not in regular session, which would be 335 days in odd-numbered years under KY. CONST. § 36 and 315 days in even-numbered years under KY. CONST. § 42. SB 1, § 2(2)(a).

92. SB 1 gives absolute and arbitrary power to the General Assembly by allowing the part-time legislature to, by joint resolution and not formal legislation, terminate a declaration of an emergency at any time, including during the 10 to 11 months that the General Assembly is not in regular session. SB 1, § 2(4). Reading SB 1, § 2(2)-(3) and SB 1, § 2(4) together, the General Assembly would have the absolute and arbitrary power to, by joint resolution, terminate an order issued by the Governor under KRS Chapter 39A that the General Assembly has agreed to extend beyond 30 days.

93. SB 1 gives absolute and arbitrary power to the General Assembly by requiring the approval of the part-time legislature before the Governor may, upon the expiration of an executive order or other directive described in Section 2(2)(a), declare a new emergency or continue to implement any of the powers in KRS Chapter 39A based on the same or substantially similar facts and circumstances as the original declaration or implementation. SB 1, § 2(3). This absolute and arbitrary power would exist even when the part-time legislature is not in regular session, which would be 335 days in odd-numbered years under KY. CONST. § 36 and 315 days in even-numbered years under KY. CONST. § 42. *See id.*

94. SB 1 gives absolute and arbitrary power to each local government in each of the 120 counties in the Commonwealth by requiring a written request of the chief executive officer or legislative body of a local government before any executive order, administrative regulation, or directive other than those described in SB 1, § 2(2)(a) may exceed 30 days. SB 1, § 2(2)(b). An executive order, administrative regulation, or directive may be extended only for the local government that submits the written request and only for the period of time requested. *Id.* The absolute and arbitrary power that SB 1 gives to each local government also allows the chief

executive or legislative body of a local government to request extensions or early terminations of the executive order. *Id.*

95. Aside from giving absolute and arbitrary power to each local government over the Chief Magistrate of the Commonwealth with the supreme executive power, SB 1 does not establish what happens when the chief executive of a county submits a written request that an executive order, administrative regulation, or directive be extended beyond 30 days, but no local governments within that same county submit a written request, or when the chief executive of a county requests an early termination of the executive order, but no local government within that same county submits a request. *Id.*

96. Under SB 1, the Governor has no authority to extend, modify, or terminate any executive order, administrative regulation, or directive without the approval of the part-time General Assembly or the chief executive or legislative body of a local government. All executive orders, administrative regulations, or directives issued under KRS Chapter 39A are effective for only 30 days absent such approval.

97. SB 1, § 2(4), gives the part-time General Assembly absolute and arbitrary power to terminate a declaration of an emergency – an executive power and function – by joint resolution at any time.

Count II
Declaration of Rights
HB 1 – Violation of KY. CONST. § 2

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

99. In its Bill of Rights, the Kentucky Constitution prohibits “absolute and arbitrary power over the lives, liberty and property of freeman” in the Commonwealth. Ky. Const. § 2.

100. HB 1 violates Section 2 of the Kentucky Constitution because it is void for vagueness and places absolute and arbitrary power in the federal government over the Governor and the executive branch of state government by, under Section 1(1)(a), allowing certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to remain open and fully operational for in-person services so long as it adopts an operating plan that meets or exceeds all applicable guidance issued by the CDC or by the executive branch, whichever is least restrictive.

101. HB 1, §1(1)(a) does not specify whether the executive branch it references is the executive branch of the federal government or the executive branch of state government. It does not specifically identify what qualifies as executive branch directives – directives of the federal executive branch from the White House, the Department for Health and Human Services or another agency, or directives of the executive branch of state government. The CDC cannot be the source of those directives under the language of the bill. Thus, it does not specifically provide the entities identified in HB 1, §1(1)(a) or any enforcement agency clear direction on what mandates to compare to the CDC guidance, and it does not provide sufficient notice of what is sought to be prohibited. HB 1 is therefore unconstitutionally vague and arbitrary in violation of Section 2 of the Kentucky Constitution.

102. The CDC is organized under the U.S. Department for Health and Human Services, an agency of the federal executive branch, and the White House Coronavirus Task Force, within the executive branch of the federal government, provides recommendations and guidance regarding the COVID-19 pandemic.

103. Regardless of the executive branch referenced but not defined in HB 1, HB 1 places absolute and arbitrary power in the CDC, a federal agency, to control the executive power

and function under Kentucky law of addressing and responding to emergencies in the Commonwealth.

104. The CDC provides guidance and considerations regarding COVID-19 for state and local health officials to consider when implementing measures to protect citizens. The guidance and considerations are meant to supplement – not replace – any state, local, territorial, or tribal health and safety laws, rules, and regulations with which entities or events must comply. The CDC guidance and consideration encourages collaboration of citizens with state and local health officials on whether and how to implement the guidance and considerations, making adjustments to meet the unique needs and circumstances of the local community.

105. In a letter to the Governor dated January 11, 2021, the CDC Director confirmed the non-regulatory intent of CDC guidance, stating: “I want to make it clear that CDC guidance should not be interpreted as regulation; rather, they are meant as recommendations. It should be used in consideration for specific state and/or local regulations, but this guidance is meant to be flexible and adaptable. It is not meant to be prescriptive or interpreted as standards that can be regulated. CDC provides ongoing guidance to individuals, businesses, schools, and states. We have and will continue to be available for technical assistance and guidance, but we expect each jurisdiction to modify this guidance to meet their state's needs.” (Exhibit A.)

106. The CDC guidance and recommendations change with changing circumstances nationally.

107. As of January 31, 2021, the CDC had issued at least 180 guidance documents, some of which are not relevant to the United States. CDC guidance is not generally organized by industry or degree of community transmission of COVID-19.

108. HB does not specify how a specific entity is to determine what CDC guidance applies to it. HB 1 does not specify what specific guidance the entities described in it must follow. HB 1 does not provide sufficient notice to the entities described in it or to any enforcement agency of what CDC guidance must be followed or what is sought to be prohibited. HB 1 is thus unconstitutionally vague and arbitrary in violation of Section 2 of the Kentucky Constitution.

109. Further, CDC guidance is permissive and necessarily less restrictive than state and local directives, laws, rules and regulations. Choosing the least restrictive alternative between the permissive guidance and an executive branch directive could leave the Commonwealth with no mandatory protections during the COVID-19 pandemic. HB 1 does not provide sufficient specificity and is therefore unconstitutionally vague, unconstitutionally unintelligible, and arbitrary in violation of Section 2 of the Kentucky Constitution.

110. HB 1 also violates Section 2 of the Kentucky Constitution by giving private entities – the local or state chamber of commerce, a trade association, or other recognized affiliated organization – the absolute and arbitrary power of preparing an operating plan for the entities described in Section 1(1)(a), rather than the Governor or the executive branch of state government or another governmental entity. HB 1 does not specify what operational plan an entity must implement when the plan prepared by a local or state chamber of commerce, a trade association, or another recognized affiliated organization differs from the operational plan prepared for another entity of the same or similar kind. This vagueness and arbitrariness also impedes enforcement of HB 1. HB 1 places arbitrary and absolute power in private entities to develop an operational plan for entities to respond to the COVID-19 public health emergency

and is unconstitutionally vague, unconstitutionally unintelligible, and arbitrary in violation of Section 2 of the Kentucky Constitution.

Count III
Declaration of Rights
SB 1 – Violation of KY. CONST. §§ 27, 28

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

112. SB 1 violates the separation of powers enshrined in the Kentucky Constitution by giving the part-time General Assembly the executive power and function of the Governor in addressing emergencies in the Commonwealth.

113. Senate Bill 1 requires the Governor to obtain the approval of the part-time General Assembly before extending, modifying, or terminating any executive order, administrative regulation, or directive issued under KRS Chapter 39A that places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local governments, or imposes mandatory quarantine or isolation requirements. In doing so, SB 1, § 2(2)(a) takes an executive power and function that properly belongs to the Governor – the Chief Magistrate of the Commonwealth with supreme executive power and the Commander in Chief under Sections 69 and 75 of the Kentucky Constitution, and gives it to the legislative branch in violation of Sections 27 and 28 of the Kentucky Constitution.

114. SB 1 also violates the separation of powers under the Kentucky Constitution by prohibiting the Governor – upon the expiration of any executive order or other directive that places restrictions on the in-person meeting or functioning of elementary, secondary, or

postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local government, or imposes mandatory quarantine or isolation requirements – from declaring an emergency or continuing to implement any of his powers under KRS Chapter 39A based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the part-time General Assembly. SB 1, § 2(3) prevents the Governor – the Chief Magistrate of the Commonwealth with supreme executive power and the Commander in Chief under Sections 69 and 75 of the Kentucky Constitution – from exercising an executive power and function without legislative approval, which violates Sections 27 and 28 of the Kentucky Constitution. This prohibition puts at risk millions of dollars in FEMA funding for responses to emergencies that have lasted longer than 30 days. *See* KYEMS Letter, Feb. 2, 2021 (attached as Exhibit I).

115. SB 1 further violates the separation of powers under the Kentucky Constitution by giving the part-time General Assembly the authority to terminate a declaration of emergency by joint resolution at any time, SB 1, § 2(4), encroaching on the Governor’s executive power and function in emergencies in violation of Sections 27 and 28 of the Kentucky Constitution.

Count IV
Declaration of Rights
HB 1 – Violation of KY. CONST. §§ 27, 28

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

117. HB 1 violates the separation of powers in Sections 27 and 28 of the Kentucky Constitution by giving to the CDC, an agency organized under the executive branch of the federal government, the executive power and function of addressing the COVID-19 public health emergency properly belonging to the Governor under the Kentucky Constitution and KRS

Chapter 39A. HB 1 thus encroaches on the executive branch of state government and presents an unlawful delegation of power in violation of Sections 27 and 28 of the Kentucky Constitution.

118. HB 1 violates Sections 27 and 28 of the Kentucky Constitution by unlawfully delegating to private entities – the local or state chamber of commerce, a trade association, or another recognized affiliated organization – the executive power and function of addressing the COVID-19 public health emergency properly belonging to the Governor under the Kentucky Constitution and KRS Chapter 39A by allowing those private entities to create operational plans for certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to remain open and fully operational during the emergency.

119. HB 1 also violates Sections 27 and 28 of the Kentucky Constitution by encroaching on the executive power and function of addressing the COVID-19 public health emergency properly belonging to the Governor under the Kentucky Constitution and KRS Chapter 39A for all of the Commonwealth by allowing certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to remain open and fully operational for in-person services without complying with the directives of the executive branch of state government.

120. HB 1 violates Section 27 of the Kentucky Constitution by prohibiting all state agencies of the executive branch of state government and under the supervision and control of the Governor from enforcing restrictions related to COVID-19. HB 1 allows certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to remain open and fully operational as long as it meets the least restrictive guidelines issued by the CDC or the executive

branch. Thus, HB 1 prohibits the executive branch of state government from exercising the executive power and function of enforcing restrictions implemented to address the COVID-19 public health emergency.

Count V
Declaration of Rights
SB 2 – Violation of KY. CONST. §§ 27, 28

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

122. SB 2 violates the separation of powers under Section 27 of the Kentucky Constitution by invading the executive power and function of the Cabinet for Health and Family Services – an executive branch Cabinet – to act to address and protect Kentuckians from infectious or contagious diseases by prohibiting *any* administrative regulation issued under KRS Chapter 214 from being in effect longer than 30 days if it: (1) places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local governments; or (2) imposes mandatory quarantine or isolation requirements . SB 2, § 22(2). Under SB 2, the General Assembly purports to limit the executive power and executive function of an executive branch Cabinet to take action under a statutory chapter over which that Cabinet has jurisdiction regarding an infectious or contagious disease by prohibiting any administrative regulation – emergency or ordinary – from being effective for more than 30 days. SB 2 thus places a limit on the executive power and function of the executive branch Cabinet and places it nowhere, infringing on the executive power in violation of Section 27 of the Kentucky Constitution.

Count VI
Declaration of Rights
SB 1 – Violation of KY. CONST. §§ 36, 42, 80

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

124. SB 1, § 2(2)(a) violates Sections 36, 42 and 80 of the Kentucky Constitution. SB 1 forces the Governor to call an extraordinary session of the part-time General Assembly to extend, modify, or terminate any executive order, administrative regulation, or directive that places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local governments, or imposes mandatory quarantine or isolation requirements. SB 1, § 2(2)(a). SB 1 forces the Governor to choose whether to allow an executive order, administrative regulation, or directive issued under KRS Chapter 39A – an executive power and function – to expire or call the part-time General Assembly into an extraordinary session at the expense of Kentucky taxpayers before the 30-day expiration date to seek the legislature’s approval to extend, modify, or terminate the executive order, administrative regulation, or directive. During the COVID-19 global pandemic or in response to any emergency that continues beyond 30 days, SB 1 would force the Governor to call an extraordinary session of the part-time General Assembly every month to obtain the legislature’s approval to extend, modify, or terminate such executive orders, administrative regulations, or directives. A continuous legislature violates Sections 36 and 42 of the Kentucky Constitution and is not what the framers of the Constitution intended in creating a part-time legislature. SB 1, § 2(2)(a) violates Sections 36, 42 and 80 of the Kentucky Constitution by

attempting to create a continuous legislature that the Kentucky Constitution does not allow through the forced calling of an extraordinary session.

125. SB 1, § 2(3) also violates Sections 26, 42 and 80 of the Kentucky Constitution by forcing the Governor to call an extraordinary session of the part-time General Assembly when an executive order, administrative regulation, or directive in SB 1, § 2(2)(a) expires to obtain the approval of the General Assembly before declaring a new emergency or continuing the implementation of any of the powers in KRS Chapter 39A based on the same or similar facts and circumstances as the original declaration of implementation. During the COVID-19 global pandemic or in response to any emergency that continues beyond 30 days, SB 1 would force the Governor to call an extraordinary session of the part-time General Assembly every time an executive order, administrative regulation, or directive expired to obtain the legislature’s authority to exercise the executive power and function of declaring an emergency or implementing his executive powers under KRS Chapter 39A if the declaration or implementation were based on the same or similar facts and circumstances as the original declaration of implementation – even if the legislature previously approved extending the executive orders, administrative regulations, or directives under SB 1, § 2(2)(a). A continuous legislature violates Sections 36 and 42 of the Kentucky Constitution and is not what the framers of the Constitution intended in creating a part-time legislature. SB 1, § 2(2)(a) violates Sections 36, 42 and 80 of the Kentucky Constitution by attempting to create a continuous legislature that the Kentucky Constitution does not allow through the forced calling of an extraordinary session.

Count VII
Declaration of Rights
SB 1 – Violation of KY. CONST. § 69

126. Plaintiffs incorporate by reference each and every allegation previously set forth

in this Complaint as if fully set forth herein.

127. SB 1 violates Section 69 of the Kentucky Constitution by making the executive power and function of the Governor, the Chief Magistrate vested with the supreme executive power of the Commonwealth, in declaring and addressing emergencies subject to the approval of the part-time General Assembly. By requiring the Governor to obtain the approval of the part-time General Assembly before extending, modifying, or terminating any executive order, administrative regulation, or directive issued under KRS Chapter 39A that places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local governments, or imposes mandatory quarantine or isolation requirements, SB 1, § 2(2)(a) takes a executive power and function that properly belongs to the Governor and gives it to the legislative branch in violation of Section 69 of the Kentucky Constitution.

128. SB 1 also violates Section 69 of Kentucky Constitution by prohibiting the Governor – upon the expiration of any executive order or other directive that places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local government, or imposes mandatory quarantine or isolation requirements – from declaring an emergency or continuing to implement any of his powers under KRS Chapter 39A based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the part-time General Assembly. SB 1 prohibits the Governor from exercising an executive power and function without legislative approval in violation of Section 69 of the Kentucky Constitution.

129. SB 1 further violates Section 69 of the Kentucky Constitution by giving the part-time General Assembly the authority to terminate a declaration of emergency by joint resolution at any time in SB 1, § 2(4). The Governor, not the part-time General Assembly, has the supreme executive power of the Commonwealth as the Chief Magistrate, and the removal of the Governor's executive power and executive function in emergencies violates Section 69 of the Kentucky Constitution.

130. SB 1 violates Section 69 of the Kentucky Constitution by giving each local government in each of the 120 counties in the Commonwealth the power of allowing executive orders, administrative regulations, or directives issued by the Governor under KRS Chapter 39A that are not described in SB 1, § 2(2)(a) to lapse after 30 days without the written request of the chief executive officer or legislative body of the local government that it exceed 30 days. SB 1 also violates Section 69 of the Kentucky Constitution by giving each local government the ability to request extensions or early terminations of the executive order. SB 1, § 2(2)(b) violates the Governor's supreme executive power as the Chief Magistrate under Section 69 of the Kentucky Constitution.

131. SB 1 also violates Section 69 of the Kentucky Constitution by removing the executive power and function of the Governor, as the Chief Magistrate with the supreme executive power of the Commonwealth, in addressing an emergency by, upon the recommendation of the Secretary of State, declaring by executive order a different manner for holding elections in an election area for which a state of emergency has been declared for part of all of the election area, SB 1, § 3(1)(k).

132. SB 1 violates Section 69 of the Kentucky Constitution by removing the executive power and function of the Governor, the Chief Magistrate vested with the supreme executive

power of the Commonwealth, to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population, SB 1, § 3(1)(k).

133. SB 1 violates Section 69 of the Kentucky Constitution by placing the Governor – the Chief Magistrate vested with the supreme executive power – under the supervision and control of an inferior officer, the Attorney General, by requiring the Governor to obtain the inferior officer’s written approval before suspending a statute by executive order, SB 1, §4(2)(b).

Count VIII
Declaration of Rights
HB 1 – Violation of KY. CONST. § 69

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

135. HB 1 violates Section 69 of the Kentucky Constitution by making the executive power and function of the Governor, the Chief Magistrate with the supreme executive power of the Commonwealth, of addressing the COVID-19 public health emergency subject to the guidance and directives of the executive branch of the federal government as to certain entities in Kentucky – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated. HB 1 takes an executive power and function that properly belongs to the Governor and gives it to the executive branch of the federal government, in violation of Section 69 of the Kentucky Constitution.

136. HB 1 violates Section 69 of the Kentucky Constitution by prohibiting the Governor from exercising the executive power and function of the Governor, to address the COVID-19 public health emergency as to certain entities – any business, for-profit or not-for-

profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – in Kentucky during the emergency.

137. HB 1 violates Section 69 of Kentucky Constitution by giving private entities – the local or state chamber of commerce, a trade association, or another recognized affiliated organization – the executive power and function of addressing the COVID-19 public health emergency properly belonging to the Governor, by allowing those private entities to create operational plans for certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to remain open and fully operational during the emergency.

138. HB 1 violates Section 69 of the Kentucky Constitution by prohibiting the Governor from exercising the executive power and function of the Governor to address the COVID-19 public health emergency by allowing certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to fail to implement or comply with the directives of the executive branch of state government during the emergency.

139. HB 1 violates Section 69 of the Kentucky Constitution by prohibiting all state agencies within the executive branch of state government and under the supervision and control of the Governor, the Chief Magistrate vested with the supreme executive power of the Commonwealth, from enforcing restrictions related to the state of emergency regarding the COVID-19 public health agency, allowing certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to remain open and fully operational as long as it meets the least restrictive guidelines issued by the CDC or the executive branch.

Count IX
Declaration of Rights
SB 2 – Violation of KY. CONST. § 69

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

141. SB 2 violates Section 69 of the Kentucky Constitution by invading the purely executive power and function of the Cabinet for Health and Family Services – an executive branch Cabinet under the supervision and control of the Governor – to act to address and protect Kentuckians from infectious or contagious diseases by prohibiting *any* administrative regulation issued under KRS Chapter 214 from being in effect longer than 30 days if it places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local governments, or imposes mandatory quarantine or isolation requirements. SB 2, § 22(2). Under SB 2, the General Assembly purports to limit the executive power and executive function of an executive branch Cabinet of the Governor to take action under a statutory chapter over which that Cabinet has jurisdiction regarding an infectious or contagious disease by prohibiting any administrative regulation – emergency or ordinary – from being effective for more than 30 days. SB 2 thus violates Section 69 of the Kentucky Constitution that vests the Governor, as the Chief Magistrate, with the supreme executive power of the Commonwealth.

Count X
Declaration of Rights
SB 1 – Violation of KY. CONST. § 75

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

143. SB 1 violates Section 75 of the Kentucky Constitution by making the executive power and function of the Governor, the Commander in Chief, in declaring and addressing emergencies subject to the approval of the part-time General Assembly. By requiring the Governor to obtain the approval of the part-time General Assembly before extending, modifying, or terminating any executive order, administrative regulation, or directive issued under KRS Chapter 39A that places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local governments, or imposes mandatory quarantine or isolation requirements, SB 1, § 2(2)(a) takes an executive power and function that properly belongs to the Governor as the Commander in Chief and gives it to the legislative branch, in violation of Section 75 of the Kentucky Constitution.

144. SB 1 also violates Section 75 of Kentucky Constitution by prohibiting the Governor, the Commander in Chief – upon the expiration of any executive order or other directive that places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local government, or imposes mandatory quarantine or isolation requirements – from declaring an emergency or continuing to implement any of his powers under KRS Chapter 39A based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the part-time General Assembly. SB 1 bars the Governor from exercising an executive power and function without legislative approval in violation of Section 75 of the Kentucky Constitution.

145. SB 1 further violates Section 75 of the Kentucky Constitution by giving the part-time General Assembly the authority to terminate a declaration of emergency by joint resolution at any time in SB 1, § 2(4). The Governor is the Commander in Chief, not the part-time General Assembly, and the removal of the Governor's executive power and executive function in emergencies violates Section 75 of the Kentucky Constitution.

146. SB 1 violates Section 75 of the Kentucky Constitution by giving each local government in each of the 120 counties in the Commonwealth the power to allow executive orders, administrative regulations, or directives issued by the Governor under KRS Chapter 39A that are not described in SB 1, § 2(2)(a) to lapse after 30 days without the written request of the chief executive officer or legislative body of the local government that they exceed 30 days. SB 1 also violates Section 69 of the Kentucky Constitution by giving each local government the ability to request extensions or early terminations of the executive order. SB 1, § 2(2)(b) violates the Governor's authority under Section 75 of the Kentucky Constitution.

147. SB 1 also violates Section 75 of the Kentucky Constitution by removing the executive power and function of the Governor, as the Commander in Chief, to address an emergency by, upon the recommendation of the Secretary of State, declaring by executive order a different manner for holding elections in an election area for which a state of emergency has been declared for part of all of the election area, SB 1, § 3(1)(k).

148. SB 1 violates Section 69 of the Kentucky Constitution by removing the executive power and function of the Governor, the Commander in Chief, to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population, SB 1, § 3(1)(k).

149. SB 1 violates Section 69 of the Kentucky Constitution by placing the Governor, the Commander in Chief, under the supervision and control of an inferior officer, the Attorney General, by requiring the Governor to obtain the inferior officer's written approval before suspending a statute by executive order, SB 1, §4(2)(b).

Count XI
Declaration of Rights
HB 1 – Violation of KY. CONST. § 75

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

151. HB 1 violates Section 75 of the Kentucky Constitution by making the executive power and function of the Governor, the Commander in Chief, to address the COVID-19 public health emergency subject to the guidance and directives of the executive branch of the federal government as to certain entities in Kentucky – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated. HB 1 takes an executive power and function that properly belongs to the Governor and gives it to the executive branch of the federal government, in violation of Section 75 of the Kentucky Constitution.

152. HB 1 violates Section 75 of the Kentucky Constitution by prohibiting the Governor from exercising the executive power and function of the Governor, the Commander in Chief, to address the COVID-19 public health emergency as to certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – in Kentucky during the emergency.

153. Specifically, HB 1 violates Section 75 of Kentucky Constitution by giving private entities – the local or state chamber of commerce, a trade association, or another recognized

affiliated organization – the executive power and function to address the COVID-19 public health emergency properly belonging to the Governor, the Commander in Chief, by allowing those private entities to create operational plans for certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to remain open and fully operational during the emergency.

154. HB 1 also violates Section 75 of the Kentucky Constitution by prohibiting the Governor from exercising the executive power and function of the Governor, the Commander in Chief, to address the COVID-19 public health emergency by allowing certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to fail to implement or comply with the directives of the executive branch of the state government during the emergency.

155. HB 1 violates Section 75 of the Kentucky Constitution by prohibiting all state agencies within the executive branch of state government and under the supervision and control of the Governor, the Commander in Chief, from enforcing restrictions related to the COVID-19 state of emergency, impacting the ability of certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to remain open and fully operational that exceed current applicable guidelines issued by the CDC or the federal or state executive branch, whichever is least restrictive.

Count XII
Declaration of Rights
SB 2 – Violation of KY. CONST. § 75

156. Plaintiffs incorporate by reference each and every allegation previously set forth

in this Complaint as if fully set forth herein.

157. SB 2 violates Section 75 of the Kentucky Constitution by invading the purely executive power and function of the Cabinet for Health and Family Services – an executive branch Cabinet – to act to address and protect Kentuckians from infectious or contagious diseases by prohibiting *any* administrative regulation issued under KRS Chapter 214 from being in effect longer than 30 days if it places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local governments, or imposes mandatory quarantine or isolation requirements. SB 2, § 22(2). Under SB 2, the General Assembly purports to limit the executive power and executive function of an executive branch Cabinet of the Governor to take action under a statutory chapter over which that Cabinet has jurisdiction regarding an infectious or contagious disease by prohibiting any administrative regulation – emergency or ordinary – from being effective for more than 30 days. SB 2 thus violates the Governor’s authority as the Commander in Chief under Section 75 of the Kentucky Constitution.

Count XIII
Declaration of Rights
SB 1 – Violation of KY. CONST. § 81

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

159. SB 1 violates Section 81 of the Kentucky Constitution by preventing the Governor from carrying out his duty to take care that the laws be faithfully executed by making his executive power in declaring and addressing emergencies subject to the approval of the part-time General Assembly. By requiring the Governor to obtain the approval of the part-time

General Assembly before extending, modifying, or terminating any executive order, administrative regulation, or directive issued under KRS Chapter 39A that places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local governments, or imposes mandatory quarantine or isolation requirements, SB 1, § 2(2)(a) takes an executive power and function that properly belongs to the Governor as the Commander in Chief and gives it to the legislative branch.

160. SB 1 also violates Section 81 of Kentucky Constitution by preventing the Governor from carrying out his duty to take care that the laws be faithfully executed by prohibiting him – upon the expiration of any executive order or other directive that places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local government, or imposes mandatory quarantine or isolation requirements – from declaring an emergency or continuing to implement any of his powers under KRS Chapter 39A based upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the part-time General Assembly. Preventing the Governor from taking care that the laws be faithfully executed by exercising the purely executive power and function of acting in an emergency without legislative approval violates Section 81 of the Kentucky Constitution.

161. SB 1 further violates Section 81 of the Kentucky Constitution by giving the part-time General Assembly the authority to terminate a declaration of emergency by joint resolution at any time in SB 1, § 2(4), making the Governor’s duty to faithfully execute the laws subject to legislative approval.

162. SB 1 violates Section 81 of the Kentucky Constitution by giving each local government in each of the 120 counties in the Commonwealth the power of allowing executive orders, administrative regulations, or directives issued by the Governor under KRS Chapter 39A that are not described in SB 1, § 2(2)(a) to lapse after 30 days without the written request of the chief executive officer or legislative body of the local government that it exceed 30 days. SB 1 also violates Section 69 of the Kentucky Constitution by giving each local government the ability to request extensions or early terminations of the executive order. SB 1, § 2(2)(b) violates Section 81 of the Kentucky Constitution by ceding the Governor's duty to take care that the laws be faithfully executed to the authority of local governments in an emergency.

163. SB 1 also violates Section 81 of the Kentucky Constitution by removing the executive power and function of the Governor to address an emergency by, upon the recommendation of the Secretary of State, declaring by executive order a different manner for holding elections in an election area for which a state of emergency has been declared for part or all of the election area, SB 1, § 3(1)(k).

164. SB 1 violates Section 81 of the Kentucky Constitution by removing the Governor's executive power to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population, in an emergency SB 1, § 3(1)(k).

165. SB 1 violates Section 81 of the Kentucky Constitution by requiring the Governor to obtain the written approval of an inferior officer, the Attorney General, before suspending a statute by executive order, SB 1, §4(2)(b), thus preventing the Governor from carrying out his duty to take care that the laws be faithfully executed.

Count XIV
Declaration of Rights
HB 1 – Violation of KY. CONST. § 81

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

167. HB 1 violates Section 81 of the Kentucky Constitution by making the executive power and function of addressing the COVID-19 public health emergency subject to the guidance and directives of the executive branch of the federal government as to certain entities in Kentucky – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated.

168. HB 1 also prevents the Governor from carrying out his constitutional duty to take care that the laws be faithfully executed by prohibiting him from exercising the executive power and function of addressing the COVID-19 public health emergency as to certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – in Kentucky during the emergency.

169. HB 1 also violates Section 81 of the Kentucky Constitution by prohibiting him from exercising the executive power and function of addressing the COVID-19 public health emergency by allowing certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to fail to implement or comply with the directives of the executive branch of the state government during the emergency.

170. HB 1 violates Section 81 of the Kentucky Constitution by prohibiting all state agencies within the executive branch of state government and under the supervision and control of the Governor, the Commander in Chief, from enforcing restrictions related to the state of

emergency related to the COVID-19 state of emergency, impacting the ability of certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – to remain open and fully operational that exceed current applicable guidelines issued by the CDC or the federal or state executive branch, whichever is least restrictive.

Count XV
Declaration of Rights
SB 2 – Violation of KY. CONST. § 81

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

172. SB 2 violates Section 81 of the Kentucky Constitution by invading the executive power and function of the Cabinet for Health and Family Services – an executive branch Cabinet – to act to address and protect Kentuckians from infectious or contagious diseases by prohibiting *any* administrative regulation issued under KRS Chapter 214 from being in effect longer than 30 days if it places restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary educational institutions, private businesses or nonprofit organizations, political, religious, or social gatherings, places of worship, or local governments, or imposes mandatory quarantine or isolation requirements. SB 2, § 22(2). Under SB 2, the General Assembly purports to limit the executive power and executive function of an executive branch Cabinet of the Governor to take action under a statutory chapter over which that Cabinet has jurisdiction regarding an infectious or contagious disease by prohibiting any administrative regulation – emergency or ordinary – from being effective for more than 30 days. SB 2 prevents the Governor from carrying out his duty to take care that the laws be faithfully executed, in violation of Section 81 of the Kentucky Constitution.

Count XVI
Declaration of Rights
SB 1 – Violation of KY. CONST. § 59

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

174. SB 1, Section 1, § 3(1)(k), violates Section 59 of the Kentucky Constitution as a special act purporting to amend KRS Chapter 39A to provide for the conducting of elections in an emergency, which is an executive power and function. Thus, SB 1 is special legislation in violation of Section 59 of the Kentucky Constitution.

175. SB 1, Section 2(2)(a), violates Section 59 of the Kentucky Constitution as a special act purporting to amend KRS Chapter 39A to regulate labor and trade in a manner that treats certain entities – elementary, secondary, or postsecondary educational institutions; private businesses or nonprofit organizations; and places of worship – more favorably and differently than other entities in the Commonwealth in an emergency. Thus, SB 1 is special legislation in violation of Section 59 of the Kentucky Constitution.

176. SB 1 violates Section 59 of the Kentucky Constitution because it is a special law purporting to amend KRS Chapter 39A – a law that is generally applicable to emergencies – in a way that renders KRS Chapter 39A no longer generally applicable.

Count XVII
Declaration of Rights
HB 1 – Violation of Ky. Const. § 59

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

178. HB 1 violates Section 59 of the Kentucky Constitution because it is a special act that is not legislation or law at all. HB 1 does not purport to create legislation or amend existing

legislation in the Kentucky Revised Statutes. It purports to address the COVID-19 pandemic and by its own language has no effect and will not exist beyond January 31, 2021. HB 1 is therefore special legislation in violation of Section 59 of the Kentucky Constitution.

179. HB 1 also violates Section 59 of the Kentucky Constitution because it is a special act purporting to regulate labor and trade in a manner that treats certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – more favorably and differently than other entities in the Commonwealth. Thus, HB 1 is special legislation in violation of Section 59 of the Kentucky Constitution.

180. HB 1 violates Section 59 of the Kentucky Constitution because it is a special law purporting address the COVID-19 public health emergency in a specific manner other than Kentucky law, KRS Chapter 39A, that is generally applicable to emergencies in the Commonwealth.

Count XVIII
Declaration of Rights
SB 2 – Violation of KY. CONST. § 59

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

182. SB 2, § 22(2) violates Section 59 of the Kentucky Constitution as a special act purporting to amend KRS 214.020, a generally applicable statute that grants the Cabinet for Health and Family Services the power to address and protect Kentuckians from infectious or contagious disease, in a manner that makes KRS 214.020 apply more favorably and differently to certain entities – elementary, secondary, or postsecondary educational institutions; private businesses or nonprofit organizations; and places of worship – than others.

Count XIX
Declaration of Rights
SB 1 – Violation of KY. CONST. § 60

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

184. SB 1 violates Section 60 of the Kentucky Constitution because it is a special law purporting to amend KRS Chapter 39A – a law that is generally applicable to emergencies – in a way that renders KRS Chapter 39A no longer generally applicable. Instead, SB 1 applies KRS Chapter 39A more favorably and differently to some entities – elementary, secondary, or postsecondary educational institutions; private businesses or nonprofit organizations; and places of worship – than others.

Count XX
Declaration of Rights
HB 1 – Violation of KY. CONST. § 60

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

186. HB 1 violates Section 60 of the Kentucky Constitution because it is a special act that is not legislation or law at all. HB 1 does not purport to create legislation or amend existing legislation in the Kentucky Revised Statutes. It purports to address the COVID-19 pandemic and by its own language has no effect and will not exist beyond January 31, 2021. HB 1 is therefore special legislation in violation of Section 60 of the Kentucky Constitution.

187. HB 1 violates Section 60 of the Kentucky Constitution because it is a special act purporting to regulate labor and trade in a manner that treats certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – more favorably and differently than other

entities in the Commonwealth. HB 1 is special legislation in violation of Section 60 of the Kentucky Constitution.

188. HB 1 violates Section 60 of the Kentucky Constitution because it is a special law purporting address the COVID-19 public health emergency in a specific manner other than Kentucky law, KRS Chapter 39A, that is generally applicable to emergencies in the Commonwealth.

Count XXI
Declaration of Rights
SB 2 – Violation of KY. CONST. § 60

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

190. SB 2, § 22(2) violates Section 60 of the Kentucky Constitution as a special act purporting to amend KRS 214.020, a generally applicable statute that grants the Cabinet for Health and Family Services the power to address and protect Kentuckians from infectious or contagious disease, in a manner that makes KRS 214.020 apply more favorably and differently to certain entities – elementary, secondary, or postsecondary educational institutions; private businesses or nonprofit organizations; and places of worship – than others.

Count XXII
Declaration of Rights
SB 1 – Violation of KY. CONST. § 55

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

192. SB 1 violates Section 55 of the Kentucky Constitution because it does not set out at length in the journal of each House the reasons for the emergency that justifies it being emergency legislation. Section 11 of SB 1 states, “Whereas the impact of COVID-19 on

Kentucky’s citizens and businesses is of the utmost importance, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming law.” The one conclusory sentence does not satisfy the requirement of Section 55 of the Kentucky Constitution; it does not set out at length the reasons justifying why SB 1 is necessary as emergency legislation in the 10th month of the COVID-19 pandemic, and it does not provide any rational basis for concluding the circumstances cited as constituting an emergency justify more expeditious action than would ordinarily be true.

Count XXIII
Declaration of Rights
HB 1 – Violation of KY. CONST. § 60

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

194. HB 1 violates Section 60 of the Kentucky Constitution because it is a special act that is not legislation or law at all. HB 1 does not purport to create legislation or amend existing legislation in the Kentucky Revised Statutes. It purports to address the COVID-19 pandemic and by its own language has no effect and will not exist beyond January 31, 2021. HB 1 is therefore special legislation in violation of Section 60 of the Kentucky Constitution.

195. HB 1 violates Section 60 of the Kentucky Constitution because it is a special act purporting to regulate labor and trade in a manner that treats certain entities – any business, for-profit or not-for-profit organization, local government, association, or any school or school district, public, private, or religiously affiliated – more favorably and differently than other entities in the Commonwealth. HB 1 is special legislation in violation of Section 60 of the Kentucky Constitution.

196. HB 1 violates Section 60 of the Kentucky Constitution because it is a special law purporting address the COVID-19 public health emergency in a specific manner other than Kentucky law, KRS Chapter 39A, that is generally applicable to emergencies in the Commonwealth.

Count XXIV
Declaration of Rights
SB 2 – Violation of KY. CONST. § 55

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

198. SB 2 violates Section 55 of the Kentucky Constitution because it does not set out at length in the journal of each House the reasons for the emergency that justifies it being emergency legislation. Section 25 of SB 2 serves as the emergency clause, providing: “Whereas, ensuring that Kentucky citizens have adequate access to the administrative regulation process is a compelling and immediate need, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.” The one sentence does not satisfy the requirement of Section 55 of the Kentucky Constitution; it does not set out at length the reasons justifying why SB 2 is necessary as emergency legislation to amend KRS 214.020, and it does not provide any rational basis for concluding the circumstances cited as constituting an emergency justify more expeditious action than would ordinarily be true.

Count XXV
Declaration of Rights
SB 1 – Violation of KY. CONST. §§ 55, 88

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

200. Under Section 55 of the Kentucky Constitution, no act other than general appropriation bills shall become law until 90 days after the session adjourns, except in cases of emergency, and emergency legislation may become law when approved by the Governor.

201. Under Section 88 of the Kentucky Constitution, every bill that has passed the two Houses of the General Assembly must be presented to the Governor and if he returns the bill with his objections to the House in which it originated, the two Houses must reconsider it and pass it over the Governor's objections by a majority of the members.

202. Reading Sections 55 and 88 together, SB 1, emergency legislation, does not become law until 90 days after the adjournment of the 2021 Regular Session of the General Assembly because the Governor vetoed SB 1 and did not approve it.

Count XXVI
Declaration of Rights
HB 1 – Violation of KY. CONST. §§ 55, 88

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

204. Under Section 55 of the Kentucky Constitution, no act other than general appropriation bills shall become law until 90 days after the session adjourns, except in cases of emergency, and emergency legislation may become law when approved by the Governor.

205. Under Section 88 of the Kentucky Constitution, every bill that has passed the two Houses of the General Assembly must be presented to the Governor and if he returns the bill with his objections to the House in which it originated, the two Houses must reconsider it and pass it over the Governor's objections by a majority of the members.

206. Reading Sections 55 and 88 together, HB 1, emergency legislation, does not become law until 90 days after the adjournment of the 2021 Regular Session of the General Assembly because the Governor vetoed HB 1 and did not approve it.

207. Plaintiffs are entitled to further relief as may be shown by the evidence and legal authority that may be presented in this proceeding. Plaintiffs reserve the right to amend this Complaint, as necessary, to request any further relief to which they are entitled.

Count XXVII
Declaration of Rights
SB 2 – Violation of KY. CONST. §§ 55, 88

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

209. Under Section 55 of the Kentucky Constitution, no act other than general appropriation bills shall become law until 90 days after the session adjourns, except in cases of emergency, and emergency legislation may become law when approved by the Governor.

210. Under Section 88 of the Kentucky Constitution, every bill that has passed the two Houses of the General Assembly must be presented to the Governor and if he returns the bill with his objections to the House in which it originated, the two Houses must reconsider it and pass it over the Governor's objections by a majority of the members.

211. Reading Sections 55 and 88 together, SB 2, emergency legislation, does not become law until 90 days after the adjournment of the 2021 Regular Session of the General Assembly because the Governor vetoed SB 2 and did not approve it.

212. Plaintiffs are entitled to further relief as may be shown by the evidence and legal authority that may be presented in this proceeding. Plaintiffs reserve the right to amend this Complaint, as necessary, to request any further relief to which they are entitled.

WHEREFORE, Plaintiffs demand judgment against Defendants as set forth in the prayer for relief, below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand as follows:

- I.** A declaration that SB 1 violates Sections 2, 27, 28, 36, 42, 55, 59, 60, 69, 75, 80, 81, and 88 of the Kentucky Constitution;
- II.** A declaration that HB 1 violates Sections 2, 27, 28, 55, 59, 60, 69, 75, 81, and 88 of the Kentucky Constitution;
- III.** A declaration that SB 2 violates Sections 27, 28, 42, 55, 59, 60, 69, 75, 81, and 88 of the Kentucky Constitution;
- IV.** Preliminary and permanent injunctive relief preventing enforcement of SB 1;
- V.** Preliminary and permanent injunctive relief preventing enforcement of HB 1;
- VI.** Preliminary and permanent injunctive relief preventing enforcement of SB 2; and
- VII.** Any and all other relief to which Plaintiff appears entitled.

Respectfully submitted,

/s/ Amy. D. Cabbage
 Amy D. Cabbage
 General Counsel
 S. Travis Mayo
 Chief Deputy General Counsel
 Taylor Payne
 Deputy General Counsel
 Marc Farris
 Deputy General Counsel
 Laura C. Tipton
 Deputy General Counsel
 Office of the Governor
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 Frankfort, KY 40601
 (502) 564-2611
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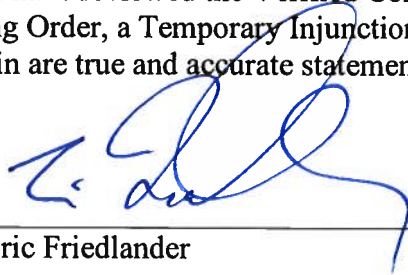
/s/ Wesley W. Duke (w/ permission)

Wesley W. Duke
Executive Director
Office of Legal Services
LeeAnne Applegate
Deputy General Counsel
Cabinet for Health and Family Services
275 East Main Street 5W-A
Frankfort, KY 40621
(502) 564-7042
WesleyW.Duke@ky.gov
LeeAnne.Applegate@ky.gov

Counsel for Plaintiffs

VERIFICATION

I hereby certify that, in my capacity as Secretary of the Cabinet for Health and Family Services of the Commonwealth of Kentucky, I have reviewed the Verified Complaint for a Declaration of Rights, a Temporary Restraining Order, a Temporary Injunction and a Permanent Injunction, and the statements contained therein are true and accurate statements to the best of my knowledge, belief and information.

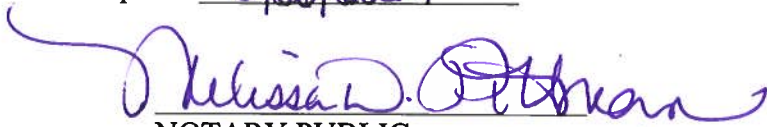


Eric Friedlander
Secretary
Cabinet for Health and Family Services

Commonwealth of Kentucky)
) :ss
County of Franklin)

The foregoing instrument was acknowledged before me this 2nd day of February, 2021.

My Commission expires: 5/26/2024.


NOTARY PUBLIC KYNP 7280

| |
|---|
| MELISSA D. PITTMAN NOTARY PUBLIC STATE AT LARGE KENTUCKY |
|---|

EXHIBIT A

Supreme Court of Kentucky

2020-SC-000313-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; KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES; AND, THE KENTUCKY DEPARTMENT FOR PUBLIC HEALTH

PETITIONERS

V. ORIGINAL ACTION IN SUPREME COURT
ARISING FROM COURT OF APPEALS
NOS. 2020-CA-000834 AND 2020-CA-000849

HONORABLE GLENN E. ACREE, JUDGE, KENTUCKY COURT OF APPEALS; HONORABLE RICHARD A. BRUEGGEMANN, JUDGE, 52ND JUDICIAL CIRCUIT, BOONE CIRCUIT COURT; AND, HONORABLE BRIAN PRIVETT, JUDGE, 14TH JUDICIAL CIRCUIT, SCOTT CIRCUIT COURT

RESPONDENTS

AND

REAL PARTIES IN INTEREST

FLORENCE SPEEDWAY, INC.; RIDGEWAY PROPERTIES, LLC D/B/A BEAN'S CAFÉ & BAKERY; LITTLE LINKS TO LEARNING, LLC; RYAN QUARLES, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF AGRICULTURE; EVANS ORCHARD AND CIDER MILL, LLC.; WEDCO DISTRICT HEALTH DEPARTMENT; CRYSTAL MILLER; AND, HONORABLE DANIEL J. CAMERON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL

ORDER

Pursuant to Section 110 of the Kentucky Constitution the Kentucky Supreme Court "shall have the power to issue all writs necessary in aid of its appellate jurisdiction, or the complete determination of any cause, or as may be required to exercise control of the Court of Justice." Today we act pursuant to that power to maintain the status quo by staying orders issued by the lower courts of the Commonwealth pending further action by this Court.

In the midst of a global pandemic that has resulted in the Governor issuing Executive Orders deemed necessary to the protection of the public health and safety, two circuit courts have issued injunctive relief preventing the enforcement of specific Executive Orders challenged by plaintiffs who claim injury to their respective business interests. It appears that one circuit court has indicated an intent to issue an Order shortly that will enjoin all executive orders entered by the Governor and any actions taken pursuant to his public emergency powers. Given the need for a clear and consistent statewide public health policy and recognizing that the Kentucky legislature has expressly given the Governor broad executive powers in a public health emergency, the Court orders a stay of all orders of injunctive relief until such time as the various orders are properly before the Court with a full record of any evidence and pleadings considered by the lower courts.

The Boone and Scott Circuit Courts may proceed with matters before them and issue all findings of fact and conclusions of law they find appropriate but no order, however characterized, shall be effective. Our stay shall continue

until the full record of proceedings below is reviewed by this Court, all parties have been given the opportunity to address the orders in briefs, and this Court issues a final order addressing these issues of paramount public importance to all citizens of the Commonwealth.

This Court hereby directs that any lower court order, after entry, be immediately transmitted to the Clerk of the Supreme Court for consideration by the full Court pursuant to its constitutional authority under Section 110.

IT IS SO ORDERED.

All sitting. All concur.

Dated: July 17, 2020.

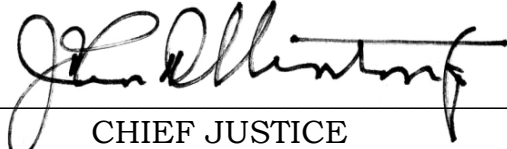

CHIEF JUSTICE

EXHIBIT B



COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

Andy Beshear
GOVERNOR

Capitol Building, Suite 100
700 Capitol Avenue
Frankfort, KY 40601
(502) 564-2611
Fax: (502) 564-2517

January 11, 2021

Robert Stivers
Senate President
702 Capitol Avenue
Annex Room 236
Frankfort, KY 40601

David Osborne
Speaker of the House
702 Capitol Avenue
Annex Room 332
Frankfort, KY 40601

Dear President Stivers and Speaker Osborne,

I'm writing to provide some additional information concerning House Bill 1, which passed on Saturday.

That bill attempts to write CDC guidelines into state law for the purposes of responding to the Covid-19 emergency.

Please find the attached letter from CDC Director Robert Redfield stating that CDC guidelines are not intended for that purpose and are not to be used as such.

If you have any questions, please let me know. Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read "Cy B".

Andy Beshear
Governor

cc: Morgan McGarvey, Senate Democratic Leader
Joni Jenkins, House Democratic Leader



U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Centers for Disease Control
and Prevention (CDC)
Atlanta GA 30329-4027

January 11, 2021

The Honorable Andy Beshear
Governor of Kentucky
700 Capitol Avenue, Suite 100
Frankfort, Kentucky 40601

Dear Governor Beshear:

It has come to my attention that there is concern regarding the Centers for Disease Control and Prevention (CDC) mitigation guidance. I want to make it clear that CDC guidance should not be interpreted as regulation; rather, they are meant as recommendations. It should be used in consideration for specific state and/or local regulations, but this guidance is meant to be flexible and adaptable. It is not meant to be prescriptive or interpreted as standards that can be regulated.

CDC provides ongoing guidance to individuals, businesses, schools, and states. We have and will continue to be available for technical assistance and guidance, but we expect each jurisdiction to modify this guidance to meet their state's needs.

Sincerely,

Robert R. Redfield, MD
Director, CDC

EXHIBIT C

1 AN ACT relating to emergencies and declaring an emergency.

2 ***Be it enacted by the General Assembly of the Commonwealth of Kentucky:***

3 ➔Section 1. KRS 39A.020 is amended to read as follows:

4 As used in KRS Chapters 39A to 39F, unless the context requires otherwise:

- 5 (1) "Adjutant general" means the executive head of the Department of Military Affairs
6 vested with general direction and control authority for the department and the
7 division of emergency management;
- 8 (2) "Catastrophe" means a disaster or series of concurrent disasters which adversely
9 affect the entire Commonwealth of Kentucky or a major geographical portion
10 thereof;
- 11 (3) "Chief executive officer" means a:
- 12 (a) County judge/executive of a county;
- 13 (b) Mayor of a consolidated local government;
- 14 (c) Mayor of an urban-county government;
- 15 (d) Chief executive officer of a charter county government;
- 16 (e) Chief executive officer of a unified local government; or
- 17 (f) Mayor of a city;
- 18 (4) "Comprehensive emergency management program" means the public safety
19 program developed, organized, implemented, administered, maintained, and
20 coordinated by the Division of Emergency Management and local emergency
21 management agencies created pursuant to the provisions of KRS Chapters 39A to
22 39F, to assess, mitigate, prepare for, respond to, or recover from, an emergency,
23 declared emergency, disaster, or catastrophe, or threat of any of those, as
24 contemplated in KRS 39A.010 or as defined in this section;
- 25 (5) "Coordination" means having and exercising primary state or local executive branch
26 oversight for the purpose of organizing, planning, and implementing;
- 27 (6) "County" means a county, urban-county government, charter county government,

- 1 consolidated local government, or unified local government;
- 2 (7) "Declared emergency" means any incident or situation declared to be an emergency
3 by executive order of the Governor, or a county judge/executive, or a mayor, or the
4 chief executive of other local governments in the Commonwealth pursuant to the
5 provisions of KRS Chapters 39A to 39F;
- 6 (8) "Director" means the director of the Division of Emergency Management of the
7 Department of Military Affairs;
- 8 (9) "Disaster" means any incident or situation declared as such by executive order of
9 the Governor, or the President of the United States, pursuant to federal law;
- 10 (10) "Disaster and emergency response" means the performance of all emergency
11 functions, other than war-related functions for which military forces are primarily
12 responsible, including, but not limited to: direction and control, incident command,
13 or management; communications; fire protection services; police services; medical
14 and health services; ambulance services; rescue; search and rescue or recovery;
15 urban search and rescue; engineering; alerting and warning services; resource
16 management; public works services; nuclear, chemical, biological, or other
17 hazardous material or substance monitoring, containment, decontamination,
18 neutralization, and disposal; emergency worker protection, site safety, site
19 operations and response planning; evacuation of persons; emergency welfare
20 services; emergency transportation; physical plant protection; temporary restoration
21 of public utility services; emergency lighting and power services; emergency public
22 information; incident investigation, hazards analysis, and damage assessment; and
23 other functions related to effective reaction to a disaster or emergency or
24 catastrophe, or the potential, threatened, or impending threat of any disaster or
25 emergency or catastrophe, together with all other activities necessary or incidental
26 to the preparation for and carrying out of the functions set out in this subsection;
- 27 (11) "Division" means the Division of Emergency Management of the Department of

- 1 Military Affairs;
- 2 (12) "Emergency" means any incident or situation which poses a major threat to public
3 safety so as to cause, or threaten to cause, loss of life, serious injury, significant
4 damage to property, or major harm to public health or the environment~~[-and which a
5 local emergency response agency determines is beyond its capabilities];~~
- 6 (13) "Integrated emergency management system" means the unified and
7 multidisciplinary disaster and emergency response infrastructure developed in the
8 Commonwealth, under the coordination of the division, using methods which align
9 state or local administrative, organizational, and operational resources, to
10 accomplish the mission, goals, and objectives of the comprehensive emergency
11 management program of the Commonwealth;
- 12 (14) "Local disaster and emergency services organization" means that organization of
13 public and private entities developed to carry out the multiagency disaster and
14 emergency response of a city, county, urban-county or charter county pursuant to
15 KRS Chapters 39A to 39F;
- 16 (15) "Local emergency management agency" means the agency created, operated, and
17 maintained to coordinate the local comprehensive emergency management program
18 and disaster and emergency response of a city, county, and urban-county or charter
19 county government pursuant to KRS Chapters 39A to 39F;
- 20 (16) "Local emergency management director" or "Local director" means the executive
21 head of the local emergency management agency, appointed pursuant to the
22 provisions of KRS Chapters 39A to 39F;
- 23 (17) "State emergency management agency" means the Division of Emergency
24 Management of the Department of Military Affairs; and
- 25 (18) "State emergency management director" means the director of the Division of
26 Emergency Management.
- 27 ➔Section 2. KRS 39A.090 is amended to read as follows:

- 1 (1) The Governor may make, amend, and rescind any executive orders as deemed
2 necessary to carry out the provisions of KRS Chapters 39A to 39F.
- 3 (2) (a) *Executive orders, administrative regulations, or other directives issued*
4 *under this chapter by the Governor shall be in effect no longer than thirty*
5 *(30) days unless an extension, modification, or termination is approved by*
6 *the General Assembly prior to the extension of any executive order or*
7 *directive that:*
- 8 1. *Places restrictions on the in-person meeting or places restrictions on*
9 *the functioning of the following:*
- 10 a. *Elementary, secondary, or postsecondary educational*
11 *institutions;*
- 12 b. *Private businesses or nonprofit organizations;*
- 13 c. *Political, religious, or social gatherings;*
- 14 d. *Places of worship; or*
- 15 e. *Local governments; or*
- 16 2. *Imposes mandatory quarantine or isolation requirements.*
- 17 (b) *All other executive orders, administrative regulations, or directives that are*
18 *not described in paragraph (a) of this subsection may exceed thirty (30)*
19 *days if requested by a chief executive officer or a legislative body of a local*
20 *government only for that local government and only for the period of time*
21 *requested by the chief executive officer or a legislative body. The chief*
22 *executive officer or a legislative body may make a written request for*
23 *extensions or early termination of the executive order.*
- 24 (3) *Upon the expiration of an executive order or other directive described in*
25 *subsection (2)(a) of this section declaring an emergency or other implementation*
26 *of powers under this chapter, the Governor shall not declare a new emergency or*
27 *continue to implement any of the powers enumerated in this chapter based upon*

1 the same or substantially similar facts and circumstances as the original
 2 declaration or implementation without the prior approval of the General
 3 Assembly.

4 (4) The General Assembly, by joint resolution, may terminate a declaration of
 5 emergency at any time.

6 (5) The Commonwealth waives immunity for prospective equitable and declaratory
 7 relief only, under the Eleventh Amendment to the Constitution of the United
 8 States for cases brought against it in federal jurisdictions pursuant to KRS
 9 446.350 during emergencies declared under KRS Chapters 39A to 39F. No award
 10 of monetary damages, costs, or attorney fees is waived or authorized under this
 11 subsection.

12 ➔Section 3. KRS 39A.100 is amended to read as follows:

13 (1) In the event of the occurrence or threatened or impending occurrence of any of the
 14 situations or events enumerated in~~contemplated by~~ KRS 39A.010, 39A.020, or
 15 39A.030, the Governor may declare, in writing, that a state of emergency exists.
 16 The Governor shall have and may exercise the following emergency powers during
 17 the period in which the state of emergency exists:

18 (a) To enforce all laws~~[-]~~ and administrative regulations relating to disaster and
 19 emergency response and to assume direct operational control of all disaster
 20 and emergency response forces and activities in the Commonwealth;

21 (b) To require state agencies and to request local governments, local agencies, and
 22 special districts to respond to the emergency or disaster in the manner
 23 directed;

24 (c) To seize, take, or condemn property, for the duration of the emergency, and
 25 only for public use as defined in KRS 416.675, excluding firearms and
 26 ammunition, components of firearms and ammunition, or a combination
 27 thereof, for the protection of the public or at the request of the President, the

1 Armed Forces, or the Federal Emergency Management Agency of the United
2 States, including:

- 3 1. All means of transportation and communication;
- 4 2. All stocks of fuel of whatever nature;
- 5 3. Food, clothing, equipment, materials, medicines, and all supplies; and
- 6 4. Facilities, including buildings and plants;

7 **Compensation for property seized, taken, or condemned under this**
8 **paragraph shall be determined using the process in KRS 416.540 to 416.670**
9 **to determine value.**

10 (d) To sell, lend, give, or distribute any of the property under paragraph (c) of this
11 subsection among the inhabitants of the Commonwealth and to account to the
12 State Treasurer for any funds received for the property;

13 (e) To make compensation for the property seized, taken, or condemned under
14 paragraph (c) of this subsection;

15 (f) To exclude all nonessential, unauthorized, disruptive, or otherwise
16 uncooperative personnel from the scene of the emergency, and to command
17 those persons or groups assembled at the scene to disperse. A person who
18 refuses to leave an area in which a written order of evacuation has been issued
19 in accordance with a written declaration of emergency or a disaster may be
20 forcibly removed to a place of safety or shelter, or may, if this is resisted, be
21 arrested by a peace officer. Forcible removal or arrest shall not be exercised as
22 options until all reasonable efforts for voluntary compliance have been
23 exhausted;

24 (g) To declare curfews and establish their limits;

25 (h) To prohibit or limit the sale or consumption of goods, **in the event of a**
26 **shortage of goods,** excluding firearms and ammunition, components of
27 firearms and ammunition, or a combination thereof, or commodities for the

- 1 duration of the emergency;
- 2 (i) To grant emergency authority to pharmacists pursuant to KRS 315.500, for the
- 3 duration of the emergency;
- 4 (j)~~[Except as prohibited by this section or other law, to perform and exercise~~
- 5 ~~other functions, powers, and duties deemed necessary to promote and secure~~
- 6 ~~the safety and protection of the civilian population;~~
- 7 (k)~~] To request any assistance from agencies of the United States as necessary and~~
- 8 ~~appropriate to meet the needs of the people of the Commonwealth;~~~~[and]~~
- 9 **(k)(1)** Upon the recommendation of the Secretary of State, to declare by
- 10 executive order a different time~~[,]~~ **or** place~~[,] or manner]~~ for holding elections
- 11 in an election area for which a state of emergency has been declared for part or
- 12 all of the election area. The election shall be held within thirty-five (35) days
- 13 from the date of the suspended or delayed election. **The executive order shall**
- 14 **remain in effect until the date of the suspended or delayed election**
- 15 **regardless of the time limitations in Section 2 of this Act and shall not be**
- 16 **changed except by action of the General Assembly.** The State Board of
- 17 Elections shall establish procedures for election officials to follow. Any
- 18 procedures established under this paragraph shall be subject to the approval of
- 19 the Secretary of State and the Governor by respective executive orders; **and**
- 20 **(l) Except as prohibited by this section or other law, to take action necessary to**
- 21 **execute those powers enumerated in paragraphs (a) to (k) of this subsection.**
- 22 (2) **Within thirty (30) days of a declared emergency, and every thirty (30) days**
- 23 **thereafter, the Governor shall report to the General Assembly, if in session, or to**
- 24 **the Legislative Research Commission if the General Assembly is not in session,**
- 25 **on a form provided by the Commission detailing:**
- 26 **(a) All expenditures relating to contracts issued during the emergency under**
- 27 **KRS 45A.085 or 45A.095, or under any provision for which a state agency**

1 does not solicit bids or proposals for a contract; and

2 (b) All revenues received from the federal government in response to the
3 declared emergency, any expenditures or expenditure plan for the federal
4 funds by federal program, the state agency or program that was allocated
5 the federal funds, and any state fund expenditures required to match the
6 federal funds.

7 **(3)** In the event of the occurrence or threatened or impending occurrence of any of the
8 situations or events contemplated by KRS 39A.010, 39A.020, or 39A.030, which in
9 the judgment of a local chief executive officer is of such severity or complexity as
10 to require the exercise of extraordinary emergency measures, the county
11 judge/executive of a county other than an urban-county government, or mayor of a
12 city or urban-county government, or chief executive of other local governments or
13 their designees as provided by ordinance of the affected county, city, or urban-
14 county may declare in writing that a state of emergency exists, and thereafter,
15 subject to any orders of the Governor, shall have and may exercise for the period as
16 the state of emergency exists or continues, the following emergency powers:

17 (a) To enforce all laws and administrative regulations relating to disaster and
18 emergency response and to direct all local disaster and emergency response
19 forces and operations in the affected county, city, urban-county, or charter
20 county;

21 (b) To exclude all nonessential, unauthorized, disruptive, or uncooperative
22 personnel from the scene of the emergency, and to command persons or
23 groups of persons at the scene to disperse. A person who refuses to leave an
24 area in which a written order of evacuation has been issued in accordance with
25 a written declaration of emergency or a disaster may be forcibly removed to a
26 place of safety or shelter, or may, if this is resisted, be arrested by a peace
27 officer. Forcible removal or arrest shall not be exercised as options until all

- 1 reasonable efforts for voluntary compliance have been exhausted;
- 2 (c) To declare curfews and establish their limits;
- 3 (d) To order immediate purchase or rental of, contract for, or otherwise procure,
- 4 without regard to procurement codes or budget requirements, the goods and
- 5 services essential for protection of public health and safety or to maintain or to
- 6 restore essential public services; and
- 7 (e) To request emergency assistance from any local government or special district
- 8 and, through the Governor, to request emergency assistance from any state
- 9 agency and to initiate requests for federal assistance as are necessary for
- 10 protection of public health and safety or for continuation of essential public
- 11 services.

12 ~~(4)~~~~(3)~~ Nothing in this section shall be construed to allow any governmental entity to

13 impose additional restrictions on:

14 (a) The lawful possession, transfer, sale, transport, carrying, storage, display, or

15 use of firearms and ammunition or components of firearms and ammunition;

16 (b) *The right of the people to exercise free speech, freedom of the press, to*

17 *petition their government for redress of injuries, or to peaceably assemble;*

18 *or*

19 (c) *The right of the people to worship, worship in-person, or to act or refuse to*

20 *act in a manner motivated by a sincerely held religious belief.*

21 (5) *Nothing in this section shall be construed to allow any governmental entity to*

22 *impose restrictions on the right of the people to:*

23 (a) *Peaceably assemble; or*

24 (b) *Worship, worship in person, or to act or refuse to act in a manner motivated*

25 *by a sincerely held religious belief.*

26 ➔Section 4. KRS 39A.180 is amended to read as follows:

27 (1) The political subdivisions of the state and other agencies designated or appointed by

1 the Governor may make, amend, and rescind orders and promulgate administrative
 2 regulations necessary for disaster and emergency response purposes, and to
 3 supplement the carrying out of the provisions of this chapter, if not inconsistent
 4 with any orders or administrative regulations promulgated by the Governor or by
 5 any state agency exercising a power delegated to it by the Governor.

6 (2) **(a)** All written orders and administrative regulations promulgated by the
 7 Governor, the director, or by any political subdivision or other agency
 8 authorized by KRS Chapters 39A to 39F to make orders and promulgate
 9 administrative regulations, shall have the full force of law **and, if**
 10 **promulgated as administrative regulations, shall follow the requirements**
 11 **for promulgating administrative regulations under KRS Chapter 13A. All**
 12 **written orders authorized by KRS Chapters 39A to 39F shall be**~~[, when, if~~
 13 ~~issued by the Governor, the director, or any state agency, a copy is]~~ filed with
 14 the Legislative Research Commission~~[, or, if promulgated by an agency or~~
 15 ~~political subdivision of the state, when filed in the office of the clerk of that~~
 16 ~~political subdivision or agency. All existing laws, ordinances, and~~
 17 ~~administrative regulations inconsistent with the provisions of KRS Chapters~~
 18 ~~39A to 39F, or of any order or administrative regulation issued under the~~
 19 ~~authority of KRS Chapters 39A to 39F, shall be suspended during the period~~
 20 ~~of time and to the extent that the conflict exists].~~

21 **(b) The Governor may suspend a statute by executive order when an emergency**
 22 **is declared under KRS Chapter 39A if:**

23 **1. The statute is specifically enumerated by the Governor in the executive**
 24 **order; and**

25 **2. The executive order specifying the suspension is approved by the**
 26 **Attorney General in writing.**

27 **(c) A statute suspension authorized in paragraph (b) of this subsection shall**

1 only be in effect while the emergency executive order is in effect.

2 (d) Any existing administrative regulation that conflicts with a written order
 3 issued under this chapter shall be amended, withdrawn, or repealed in
 4 accordance with KRS Chapter 13A to conform with the written order.

5 (e) When a written order ends, any administrative regulation promulgated
 6 under the authority of this section shall:

7 1. Become void; and

8 2. Be withdrawn, amended, or repealed in accordance with KRS Chapter
 9 13A.

10 (3) Notwithstanding subsection (2) of this section, the Governor shall not suspend
 11 any laws in KRS Chapters 39A to 39F, KRS Chapter 13A, KRS 446.350, 527.020,
 12 311.710 to 311.820, or any other statutes related to abortion.

13 ~~(4)~~⁽³⁾ The law enforcement authorities of the state and of its counties, urban-
 14 counties, charter counties, and cities shall enforce the written orders and
 15 administrative regulations issued pursuant to KRS Chapters 39A to 39F.

16 ➔Section 5. KRS 39A.280 is amended to read as follows:

17 (1) Disaster and emergency response functions provided by a state or local emergency
 18 management agency, or any emergency management agency-supervised operating
 19 units or personnel officially affiliated with a local disaster and emergency services
 20 organization pursuant to KRS 39B.070, shall not, in itself, be deemed to be the
 21 making of a promise, or the undertaking of a special duty, towards any person for
 22 the services, or any particular level of, or manner of providing, the services; nor
 23 shall the provision of or failure to provide these services be deemed to create a
 24 special relationship or duty towards any person upon which an action in negligence
 25 or other tort might be founded. Specifically:

26 (a) The failure to respond to a disaster or other emergency, or to undertake
 27 particular inspections or types of inspections, or to maintain any particular

1 level of personnel, equipment, or facilities, shall not be a breach of any duty to
2 persons affected by any disaster or other emergency.

3 (b) When a state or local emergency management agency, or local emergency
4 management agency-supervised operating unit officially affiliated with a local
5 disaster and emergency services organization, does undertake to respond to a
6 disaster or other emergency, the failure to provide the same level or manner of
7 service, or equivalent availability or allocation of resources as may or could be
8 provided, shall not be a breach of any duty to persons affected by that disaster
9 or other emergency.

10 (c) A state or local emergency management agency, or local emergency
11 management agency-supervised operating unit officially affiliated with a local
12 disaster and emergency services organization shall not have or assume any
13 duty towards any person to adopt, use, or avoid any particular strategy or
14 tactic in responding to a disaster or other emergency.

15 (d) A state or local emergency management agency, or local emergency
16 management agency-supervised operating unit officially affiliated with a local
17 disaster and emergency services organization, in undertaking disaster and
18 emergency preparedness or prevention activities including inspections, or in
19 undertaking to respond to a disaster or other emergency, shall not have
20 voluntarily assumed any special duty with respect to any risks which were not
21 created or caused by it, nor with respect to any risks which might have existed
22 even in the absence of that activity or response, nor shall any person have a
23 right to rely on such an assumption of duty.

24 (2) Neither the state nor any political subdivision of the state, nor the agents or
25 representatives of the state or any of its political subdivisions, shall be liable for
26 personal injury or property damage sustained by any person appointed or acting as a
27 volunteer emergency management agency member, or disaster and emergency

1 services member, or disaster and emergency response worker, or member of any
2 agency engaged in any emergency management or disaster and emergency services
3 or disaster and emergency response activity. The immunity provided by this
4 subsection shall not apply to the extent that the state, a political subdivision of the
5 state, or a person or organization maintains liability insurance or self-insurance for
6 an act or omission covered by this subsection. To the extent that the state, a political
7 subdivision of the state, or a person or an organization maintains liability insurance
8 or self-insurance, sovereign immunity shall not be claimed with regard to an act or
9 omission covered by this subsection. This immunity shall not affect the right of any
10 person to receive benefits or compensation to which the person might otherwise be
11 entitled under the Workers' Compensation Law, or this chapter, or any pension law,
12 or any Act of Congress.

13 (3) Subject to subsection (6) of this section, neither the state nor any political
14 subdivision of the state nor, except in cases of willful misconduct, gross negligence,
15 or bad faith, the employees, agents, or representatives of the state or any of its
16 political divisions, nor any volunteer or auxiliary emergency management agency or
17 disaster and emergency services organization member or disaster and emergency
18 response worker or member of any agency engaged in any emergency management
19 or disaster and emergency services or disaster and emergency response activity,
20 complying with or reasonably attempting to comply with this chapter or any order
21 or administrative regulation promulgated pursuant to the provisions of this chapter,
22 or other precautionary measures enacted by any city of the state, shall be liable for
23 the death of or injury to persons, or for damage to property, as a result of that
24 activity. The immunity provided by this subsection shall not apply to the extent that
25 the state, a political subdivision of the state, or a person or organization maintains
26 liability insurance or self-insurance for an act or omission covered by this
27 subsection. To the extent that the state, a political subdivision of the state, or a

1 person or an organization maintains liability insurance or self-insurance, sovereign
2 immunity shall not be claimed with regard to an act or omission covered by this
3 subsection.

4 (4) Decisions of the director, his subordinates or employees, a local emergency
5 management director, or the local director's subordinates or employees, a rescue
6 chief or the chief's subordinates, concerning the allocation and assignment of
7 personnel and equipment, and the strategies and tactics used, shall be the exercise of
8 a discretionary, policy function for which neither the officer nor the state, county,
9 urban-county, charter county, or city, or local emergency management agency-
10 supervised operating unit formally affiliated with a local disaster and emergency
11 services organization, shall be held liable in the absence of malice or bad faith, even
12 when those decisions are made rapidly in response to the exigencies of an
13 emergency.

14 (5) Any person owning or controlling real estate or other premises who voluntarily and
15 without compensation grants a license or privilege, or otherwise permits the
16 designation or use of the whole or any part of the real estate or premises for the
17 purpose of sheltering persons during an actual, impending, mock, or practice
18 disaster or emergency, together with his or her successors in interest, shall not be
19 civilly liable for negligently causing the death of, or injury to, any person on or
20 about the real estate or premises for loss of, or damage to, the property of that
21 person. The immunity provided by this subsection shall not apply to the extent that
22 the state, a political subdivision of the state, or a person or organization maintains
23 liability insurance or self-insurance for an act or omission covered by this
24 subsection. To the extent that the state, a political subdivision of the state, or a
25 person or organization maintains liability insurance or self-insurance, sovereign
26 immunity shall not be claimed with regard to an act or omission covered by this
27 subsection.

- 1 (6) Subsection (3) of this section shall apply to a volunteer or auxiliary disaster and
2 emergency response worker only if the volunteer or worker is enrolled or registered
3 with a local disaster and emergency services organization or with the division in
4 accordance with the division's administrative regulations.
- 5 (7) While engaged in disaster and emergency response activity, volunteers and auxiliary
6 disaster and emergency response workers enrolled or registered with a local disaster
7 and emergency service organization or with the division in accordance with
8 subsection (6) of this section shall have the same degree of responsibility for their
9 actions and enjoy the same immunities as officers and employees of the state and its
10 political subdivisions performing similar work, including the provisions of KRS
11 12.211, 12.212, and 12.215, allowing the Attorney General to provide defense of
12 any civil action brought against a volunteer enrolled or registered with a local
13 disaster or emergency service organization or with the division due to an act or
14 omission made in the scope and course of a disaster and emergency response
15 activity.
- 16 (8) (a) Notwithstanding subsections (3) and (6) of this section, a licensed
17 professional engineer as defined in KRS 322.010 or an architect licensed
18 under KRS Chapter 323, who voluntarily and without compensation provides
19 architectural, structural, electrical, mechanical, or other professional services
20 at the scene of a declared emergency, disaster, or catastrophe, shall not be
21 liable for any personal injury, wrongful death, property damage, or other loss
22 of any nature related to the licensed professional engineer's or licensed
23 architect's acts, errors, or omissions in the performance of the services carried
24 out:
- 25 1. At the request of or with the approval of a federal, state, or local:
 - 26 a. Emergency management agency official with executive
27 responsibility in the jurisdiction to coordinate disaster and

- 1 emergency response activity;
- 2 b. Fire chief or his or her designee; or
- 3 c. Building inspection official;
- 4 whom the licensed professional engineer or licensed architect believes to
- 5 be acting in an official capacity;
- 6 2. Within ninety (90) days following the end of the period for the declared
- 7 emergency, disaster, or catastrophe. *If the emergency is*~~[, unless]~~
- 8 extended *under Section 2 of this Act, the ninety (90) days shall run*
- 9 *from the end date of the last extension*~~[by the Governor under KRS~~
- 10 ~~39A.100]; and~~
- 11 3. If the professional services arose out of the declared emergency, disaster,
- 12 or catastrophe and if the licensed professional engineer or licensed
- 13 architect acted as an ordinary reasonably prudent member of the
- 14 profession would have acted under the same or similar circumstances.
- 15 (b) Nothing in this subsection shall provide immunity for wanton, willful, or
- 16 intentional misconduct.

17 ➔Section 6. KRS 39A.990 is amended to read as follows:

18 Any person violating any provision of this chapter or any administrative regulation or

19 order promulgated pursuant to this chapter for which another penalty is not specified shall

20 be *fined an amount not to exceed one hundred dollars (\$100) for a first offense and not*

21 *to exceed two hundred fifty dollars (\$250) for each subsequent offense*~~[guilty of a Class~~

22 ~~A misdemeanor].~~

23 ➔Section 7. KRS 241.090 is amended to read as follows:

24 State administrators and all investigators shall have the full police powers of peace

25 officers, and their jurisdiction shall be coextensive with the state. They may inspect any

26 premises where alcoholic beverages are manufactured, sold, stored, or otherwise

27 trafficked in, without first obtaining a search warrant. They may confiscate any

1 contraband property. **The jurisdiction and police powers of state administrators and all**
 2 **investigators during an emergency declared under KRS Chapter 39A shall be subject to**
 3 **the limitations of Section 2 of this Act.**

4 ➔Section 8. KRS 315.500 is amended to read as follows:

5 (1) When the Governor declares a state of emergency pursuant to KRS 39A.100, the
 6 Governor may issue an executive order for a period of up to thirty (30) days giving
 7 pharmacists emergency authority. The executive order shall designate the
 8 geographical area to which it applies. In the executive order, the Governor may vest
 9 pharmacists with the authority to:

10 (a) Dispense up to a thirty (30) day emergency supply of medication;

11 (b) Administer immunizations to children pursuant to protocols established by the
 12 Centers for Disease Control and Prevention, the National Institutes of Health,
 13 or the National Advisory Committee on Immunization Practices or determined
 14 to be appropriate by the commissioner of public health or his or her designee;

15 (c) Operate temporarily, a pharmacy in an area not designated on the pharmacy
 16 permit; and

17 (d) Dispense drugs as needed to prevent or treat the disease or ailment responsible
 18 for the emergency pursuant to protocols established by the Centers for Disease
 19 Control and Prevention or the National Institutes of Health or determined to
 20 be appropriate by the commissioner of public health or his or her designee to
 21 respond to the circumstances causing the emergency.

22 (2) The provisions of this section may be extended, in writing, by the Governor if
 23 necessary to protect the lives or welfare of the citizens.

24 **(3) Nothing in this section shall be affected by the requirements of Section 2 of this**
 25 **Act.**

26 ➔Section 9. KRS 367.374 is amended to read as follows:

27 (1) (a) When a Condition Red has been declared by the United States Department of

1 Homeland Security under the Homeland Security Advisory System or the
2 Governor has declared a state of emergency under KRS 39A.100, the
3 Governor may implement this section by executive order for a period of
4 fifteen (15) days from notification of implementation, as required by KRS
5 367.376. The order implementing this section shall be limited to the
6 geographical area indicated in the declaration of emergency. The Governor
7 may terminate or limit the scope of the order at any time.

8 (b) No person shall sell, rent, or offer to sell or rent, regardless of whether an
9 actual sale or rental occurs, a good or service listed in this paragraph or any
10 repair or reconstruction service for a price which is grossly in excess of the
11 price prior to the declaration and unrelated to any increased cost to the seller.

12 Goods and services to which this section applies are:

- 13 1. Consumer food items;
- 14 2. Goods or services used for emergency cleanup;
- 15 3. Emergency supplies;
- 16 4. Medical supplies;
- 17 5. Home heating oil;
- 18 6. Building materials;
- 19 7. Housing;
- 20 8. Transportation, freight, and storage services; and
- 21 9. Gasoline or other motor fuels.

22 (c) A person's price does not violate this subsection if it is:

- 23 1. Related to an additional cost imposed by a supplier of a good or other
24 costs of providing the good or service, including an additional cost for
25 labor or materials used to provide a service;
- 26 2. Ten percent (10%) or less above the price prior to the declaration;
- 27 3. Ten percent (10%) or less above the sum of the person's costs and

1 normal markup for a good or service;

2 4. Generally consistent with fluctuations in applicable commodity,
3 regional, national, or international markets, or seasonal fluctuations; or

4 5. A contract price, or the result of a price formula, established prior to the
5 order implementing this subsection.

6 (d) Whether a price violates this subsection is a question of law. In determining if
7 a violation of this subsection has occurred, the court shall consider all relevant
8 circumstances, including prices prevailing in the locality at that time.

9 (2) The provisions of this section may be extended for up to three (3) additional fifteen
10 (15) day periods by the Governor, if necessary to protect the lives, property, or
11 welfare of the citizens.

12 (3) If a person sold or rented a good or service listed in subsection (1) of this section at
13 a reduced price in the thirty (30) days prior to the Governor's implementation of this
14 section, the price at which that person usually sells or rents the good or service in
15 the area for which the declaration was issued shall be used in determining if the
16 person is in violation of this section.

17 (4) If a person did not sell or rent or offer to sell or rent a good or service listed in
18 subsection (1) of this section prior to the Governor's implementation of this section,
19 the price at which a good or service was generally available in the area for which
20 the declaration was issued shall be used in determining if the person is in violation
21 of this section.

22 **(5) Nothing in this section shall be affected by the requirements of Section 2 of this**
23 **Act.**

24 ➔Section 10. It is the intent of the General Assembly that if any part of this Act
25 be held unconstitutional, the remaining parts shall remain in force.

26 ➔Section 11. Whereas the impact of the state of emergency declared in response
27 to COVID-19 on Kentucky's citizens and businesses is of the utmost importance, an

- 1 emergency is declared to exist, and this Act takes effect upon its passage and approval by
- 2 the Governor or upon its otherwise becoming law.

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EXHIBIT D

1 AN ACT relating to reopening the economy in the Commonwealth of Kentucky in
2 response to the state of emergency declared by the Governor of Kentucky beginning in
3 March 2020 and continuing throughout the year of 2021 and declaring an emergency.

4 ***Be it enacted by the General Assembly of the Commonwealth of Kentucky:***

5 ➔Section 1. Notwithstanding any state law, administrative regulation, executive
6 order, or executive directive to the contrary, during the current state of emergency
7 declared by the Governor in response to COVID-19 or any future state of emergency
8 related to any virus or disease, including but not limited to any mutated strain of the
9 current COVID-19 virus, until January 31, 2022:

10 (1) (a) Any business, for-profit or not-for-profit organization, local government,
11 association, or any school or school district, public, private, or religiously affiliated, may
12 remain open and fully operational for in-person services so long as it adopts an operating
13 plan that:

14 1. Meets or exceeds all applicable guidance issued by the Centers for Disease
15 Control and Prevention or by the executive branch, whichever is least restrictive;

16 2. Details how the business, for-profit or not-for-profit organization, local
17 government, association, or school or school district, whether public, private, or
18 religiously affiliated, will foster the safety of employees, customers, attendees and
19 patrons, including social distancing requirements; and

20 3. Is posted in a conspicuous place on the main entrance door of the physical
21 location of the business, for-profit or not-for-profit organization, local government,
22 association, or school or school district, whether public, private, or religiously affiliated,
23 and on the Web site of the business, for-profit or not-for-profit organization, local
24 government, association, or school or school district, whether public, private, or
25 religiously affiliated, if one exists; and

26 (b) The business, for-profit or not-for-profit organization, local government,
27 association, or school or school district, whether public, private, or religiously affiliated,

1 may prepare the plan detailed in paragraph (a) of this subsection itself or may utilize a
2 plan prepared by a local or state government agency, local or state chamber of commerce,
3 trade association, or any other recognized affiliated organization; and

4 (c) No state or local agency shall enforce restrictions related to the state of
5 emergency impacting the ability of the entities listed in this subsection to remain open
6 and fully operational for in-person services that exceed current applicable guidelines
7 issued by the Centers for Disease Control and Prevention or the executive branch,
8 whichever is least restrictive.

9 (2) Interest and penalties on unpaid employer contributions pursuant to KRS
10 341.300 shall not accrue, shall not be charged against an employer, shall not be
11 considered due and owing, and shall not be collected by the Labor Cabinet through
12 December 31, 2021.

13 (3) Existing court orders regarding in-person noncustodial parental visitation,
14 fictive kin visitation, parenting time, or timesharing pursuant to a valid court order shall
15 not be restricted, modified, or suspended by the Cabinet for Health and Family Services.

16 (4) The Cabinet for Health and Family Services shall develop regulations and
17 guidelines authorizing and regulating visitation by family members or legal guardians, or
18 outside caregivers, friends, or volunteers who provided regular care and support to the
19 resident prior to the pandemic, that are designated as being important to the mental,
20 physical, or social well-being of the resident in a long-term care facility as defined in
21 KRS 216A.010 or a residential long-term care facility as defined in KRS 216.510 that:

22 (a) Set forth procedures for the designation of a family member or legal guardian
23 whose visitation is important to the mental, physical, or social well-being of the resident
24 as an "essential personal care visitor";

25 (b) Allow visitation by essential personal care visitors;

26 (c) Require that, provided the residential long-term care facility is compliant with
27 Kentucky State Health Department guidelines, essential care visitors assume the risk for

1 exposure to COVID-19 and other viruses;

2 (d) Provide that a resident may designate no more than one (1) essential personal
3 care visitor along with procedures for changing the designation a personal care visitor;

4 (e) Provide that essential personal care visitors shall be exempt from any
5 prohibitions on visitation at a long-term care facility subject to the provisions of this
6 subsection;

7 (f) Require all essential personal care visitors to follow safety protocols required
8 for long-term residential care staff, including testing of communicable disease, checking
9 body temperature, health screenings, the use of appropriate personal protection
10 equipment, social distancing, and any other requirement the facility deems appropriate in
11 accordance with guidance from the Centers for Disease Control and Prevention. If testing
12 of communicable disease is not provided by the long-term care facility, the essential
13 personal care visitor is responsible for obtaining testing per protocol mandated by the
14 facility;

15 (g) Set forth the frequency of visitation, the duration of visits, and the total
16 number of essential personal care visitors allowed at the long-term care facility at any one
17 time;

18 (h) Provide that the long-term care facility may require a written agreement with
19 the essential personal care visitor; and

20 (i) Provide that facilities are not required to accept visitors.

21 (5) The Cabinet for Health and Family Services shall develop regulations and
22 guidelines authorizing and regulating visitation by family members or legal guardians, or
23 outside caregivers, friends, or volunteers who provided regular care and support to the
24 resident prior to the pandemic, that are designated as being important to the mental,
25 physical, or social well-being of a resident in critical situations such as end of life, or in
26 the instance of significant mental or social decline of the resident, or when exigent
27 circumstances exist regarding a resident in a long-term care facility as defined in KRS

1 216A.010 or a residential long-term care facility as defined in KRS 216.510 that:

2 (a) Set forth procedures for the designation of a family member or legal guardian
3 whose visitation is important to the mental, physical, or social well-being of the resident
4 during critical situations such as end of life, or in the instance of significant mental or
5 social decline of the resident, or when exigent circumstances exist regarding a resident as
6 an "essential compassionate care visitor";

7 (b) Require all essential compassionate care visitors to follow safety protocols
8 required for long-term residential care staff, including testing of communicable disease,
9 checking body temperature, health screenings, the use of appropriate personal protection
10 equipment, social distancing, and any other requirement the facility deems appropriate in
11 accordance with guidance from the Centers for Disease Control and Prevention. If testing
12 of communicable disease is not provided by the long-term care facility, the essential
13 personal care visitor is responsible for obtaining testing per protocol mandated by the
14 facility;

15 (c) Restrict visitation of essential compassionate care visitors to one room to
16 provide compassionate care to the resident;

17 (d) Provide that essential compassionate care visitors shall be exempt from any
18 prohibitions on visitation at a long-term care facility subject to the provisions of this
19 subsection;

20 (e) Provide that the long-term care facility may require a written agreement with
21 the essential personal care visitor;

22 (f) Require that, provided the residential long-term care facility is compliant with
23 Kentucky State Health Department guidelines, essential compassionate care visitors
24 assume the risk for exposure to COVID-19 and other viruses; and

25 (g) Provide that facilities are not required to accept visitors.

26 ➔Section 2. Whereas the economic impact of the state of emergency declared in
27 response to COVID-19 on Kentucky's citizens and businesses is of the utmost

- 1 importance, an emergency is declared to exist, and this Act takes effect upon its passage
- 2 and approval by the Governor or upon its otherwise becoming a law.

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EXHIBIT E

1 AN ACT relating to administrative regulations and declaring an emergency.

2 ***Be it enacted by the General Assembly of the Commonwealth of Kentucky:***

3 ➔Section 1. KRS 13A.010 is amended to read as follows:

4 As used in this chapter, unless the context otherwise requires:

- 5 (1) "Administrative body" means each state board, bureau, cabinet, commission,
6 department, authority, officer, or other entity, except the General Assembly and the
7 Court of Justice, authorized by law to promulgate administrative regulations;
- 8 (2) "Administrative regulation" means each statement of general applicability
9 promulgated by an administrative body that implements, interprets, or prescribes
10 law or policy, or describes the organization, procedure, or practice requirements of
11 any administrative body. The term includes an existing administrative regulation, a
12 new administrative regulation, an emergency administrative regulation, an
13 administrative regulation in contemplation of a statute, and the amendment or repeal
14 of an existing administrative regulation, but does not include:
- 15 (a) Statements concerning only the internal management of an administrative
16 body and not affecting private rights or procedures available to the public;
- 17 (b) Declaratory rulings;
- 18 (c) Intradepartmental memoranda not in conflict with KRS 13A.130;
- 19 (d) Statements relating to acquisition of property for highway purposes and
20 statements relating to the construction or maintenance of highways; or
- 21 (e) Rules, regulations, and policies of the governing boards of institutions that
22 make up the postsecondary education system defined in KRS 164.001
23 pertaining to students attending or applicants to the institutions, to faculty and
24 staff of the respective institutions, or to the control and maintenance of land
25 and buildings occupied by the respective institutions;
- 26 (3) "Adopted" means that an administrative regulation has become effective in
27 accordance with the provisions of this chapter;

- 1 (4) "Authorizing signature" means the signature of the head of the administrative body
 2 authorized by statute to promulgate administrative regulations;
- 3 (5) "Commission" means the Legislative Research Commission;
- 4 (6) "Effective" means ~~that~~ an administrative regulation ***that*** has completed the
 5 legislative ***committee*** ~~subcommittee~~ review established by KRS 13A.290,
 6 13A.330, and 13A.331;
- 7 (7) "Federal mandate" means any federal constitutional, legislative, or executive law or
 8 order that requires or permits any administrative body to engage in regulatory
 9 activities that impose compliance standards, reporting requirements, recordkeeping,
 10 or similar responsibilities upon entities in the Commonwealth;
- 11 (8) "Federal mandate comparison" means a written statement containing the
 12 information required by KRS 13A.245;
- 13 (9) "Filed" or "promulgated" means that an administrative regulation, or other
 14 document required to be filed by this chapter, has been submitted to the
 15 Commission in accordance with this chapter;
- 16 (10) "Last effective date" means the latter of:
- 17 (a) The most recent date an ordinary administrative regulation became effective,
 18 without including the date a technical amendment was made pursuant to KRS
 19 13A.040(10), 13A.2255(2), or 13A.312; or
- 20 (b) The date a certification letter was filed with the regulations compiler for that
 21 administrative regulation pursuant to KRS 13A.3104(4), if the letter stated
 22 that the administrative regulation shall remain in effect without amendment; ~~[-]~~
- 23 (11) **"Legislative committee" means an interim joint committee, a House or Senate**
 24 **standing committee, a statutory committee, or a subcommittee of the Legislative**
 25 **Research Commission;**
- 26 **(12)** "Local government" means and includes a city, county, urban-county, charter
 27 county, consolidated local government, special district, or a quasi-governmental

1 body authorized by the Kentucky Revised Statutes or a local ordinance;

2 ~~(13)~~~~(12)~~ "Proposed administrative regulation" means an administrative regulation that:

3 (a) Has been filed by an administrative body; and

4 (b) Has not become effective or been withdrawn;

5 ~~(14)~~~~(13)~~ "Regulatory impact analysis" means a written statement containing the
6 provisions required by KRS 13A.240;

7 ~~(15)~~~~(14)~~ "Small business" means a business entity, including its affiliates, that:

8 (a) Is independently owned and operated; and

9 (b) 1. Employs fewer than one hundred fifty (150) full-time employees or their
10 equivalent; or

11 2. Has gross annual sales of less than six million dollars (\$6,000,000);

12 ~~(16)~~~~(15)~~ "Statement of consideration" means the document required by KRS 13A.280
13 in which the administrative body summarizes the comments received, its responses
14 to those comments, and the action taken, if any, as a result of those comments and
15 responses;

16 ~~(17)~~~~(16)~~ "Subcommittee" means the Administrative Regulation Review
17 Subcommittee~~, any other subcommittee~~ of the Legislative Research Commission~~,
18 an interim joint committee, or a House and Senate standing committee~~;

19 ~~(18)~~~~(17)~~ "Tiering" means the tailoring of regulatory requirements to fit the particular
20 circumstances surrounding regulated entities; and

21 ~~(19)~~~~(18)~~ "Written comments" means comments submitted to the administrative body's
22 contact person identified pursuant to KRS 13A.220(6)(d) via hand delivery, United
23 States mail, e-mail, or facsimile and may include but is not limited to comments
24 submitted internally from within the promulgating administrative body or from
25 another administrative body.

26 ➔Section 2. KRS 13A.030 is amended to read as follows:

27 (1) The Administrative Regulation Review Subcommittee shall:

- 1 (a) Conduct a continuous study as to whether additional legislation or changes in
2 legislation are needed based on various factors, including, but not limited to,
3 review of new, emergency, and existing administrative regulations, the lack of
4 administrative regulations, and the needs of administrative bodies;
- 5 (b) Except as provided by KRS 158.6471 and 158.6472, review and comment
6 upon effective administrative regulations pursuant to subsections (2), (3), and
7 (4) of this section or administrative regulations filed with the Commission;
- 8 (c) Make recommendations for changes in statutes, new statutes, repeal of statutes
9 affecting administrative regulations or the ability of administrative bodies to
10 promulgate them; and
- 11 (d) Conduct such other studies relating to administrative regulations as may be
12 assigned by the Commission.
- 13 (2) The subcommittee may make a ~~nonbinding~~ determination:
- 14 (a) That an effective administrative regulation or an administrative regulation
15 filed with the Commission is deficient because it:
- 16 1. Is wrongfully promulgated;
 - 17 2. Appears to be in conflict with an existing statute;
 - 18 3. Appears to have no statutory authority for its promulgation;
 - 19 4. Appears to impose stricter or more burdensome state requirements than
20 required by the federal mandate, without reasonable justification;
 - 21 5. Fails to use tiering when tiering is applicable;
 - 22 6. Is in excess of the administrative body's authority;
 - 23 7. Appears to impose an unreasonable burden on government or small
24 business, or both; ~~or~~
 - 25 8. **Is filed as an emergency administrative regulation without adequate**
26 **justification of the emergency nature of the situation as described in**
27 **Section 4(1) of this Act;**

1 9. Has not been noticed in conformance with the requirements of
 2 subsection (3) of Section 9 of this Act; or

3 10. Appears to be deficient in any other manner;

4 (b) That an administrative regulation is needed to implement an existing statute;
 5 or

6 (c) That an administrative regulation should be amended or repealed.

7 (3) The subcommittee may review an effective administrative regulation if requested by
 8 a member of the subcommittee.

9 (4) The subcommittee may require any administrative body to submit data and
 10 information as required by the subcommittee in the performance of its duties under
 11 this chapter, and no administrative body shall fail to provide the information or data
 12 required.

13 ➔Section 3. KRS 13A.040 is amended to read as follows:

14 The director of the Legislative Research Commission shall appoint an administrative
 15 regulations compiler who shall:

16 (1) Receive administrative regulations, and other documents required to be filed by the
 17 provisions of this chapter, tendered for filing;

18 (2) Stamp administrative regulations tendered for filing with the time and date of
 19 receipt;

20 (3) Provide administrative and support services to the subcommittee;

21 (4) Maintain a file of administrative regulations and other documents required to be
 22 filed by this chapter, for public inspection, with suitable indexes;

23 (5) Maintain a file of ineffective administrative regulations;

24 (6) Maintain a file of material incorporated by reference, including superseded or
 25 ineffective material incorporated by reference;

26 (7) Prepare the Kentucky Administrative Regulations Service;

27 (8) Upon request, certify copies of administrative regulations and other documents that

- 1 have been filed with the regulations compiler;
- 2 (9) Correct errors that do not change the substance of an administrative regulation,
3 including~~[,]~~ but not limited to~~[,]~~ typographical errors, errors in format, and
4 grammatical errors;
- 5 (10) (a) Change items in an administrative regulation in response to a specific written
6 request for a technical amendment submitted by the administrative body if the
7 regulations compiler determines that the requested changes do not affect the
8 substance of the administrative regulation. Examples of technical amendments
9 include the address of the administrative body, citations to statutes or other
10 administrative regulations if a format change within that statute or
11 administrative regulation has changed the numbering or lettering of parts, or
12 other changes in accordance with KRS 13A.312; and
- 13 (b) Notify the administrative body within thirty (30) business days of receipt of a
14 technical amendment letter the status of the request, including:
- 15 1. Any requested changes that are accepted as technical amendments; and
16 2. Any requested changes that are not accepted as technical amendments;
- 17 (11) Refuse to accept for filing administrative regulations, and other documents required
18 to be filed by this chapter, that do not conform to the drafting, formatting, or filing
19 requirements established by the provisions of KRS 13A.190~~(5) to (11)~~~~[(4) to (10)]~~,
20 13A.220, 13A.222(1), (2), and (3), 13A.230, and 13A.280, and notify the
21 administrative body in writing of the reasons for refusing to accept an
22 administrative regulation for filing;
- 23 (12) Maintain a list of all administrative regulation numbers and the corresponding last
24 effective date, based on the information included in the history line of each
25 administrative regulation; and
- 26 (13) Perform other duties required by the Commission or by a legislative
27 committee~~subcommittee~~.

1 →Section 4. KRS 13A.190 is amended to read as follows:

2 (1) An emergency administrative regulation is *an administrative regulation*~~[one]~~ that:

3 (a) *An administrative body can clearly demonstrate, through documentary*
 4 *evidence submitted with the filing of the emergency administrative*
 5 *regulation,* must be placed into effect immediately in order to:

6 1. Meet an imminent threat to public health, safety,~~[or]~~ welfare, *or the*
 7 *environment;*

8 2. Prevent *an imminent*~~[a]~~ loss of federal or state funds;

9 3. Meet *an imminent*~~[a]~~ deadline for the promulgation of an administrative
 10 regulation that is established by state statute or federal law; or

11 4. ~~[Protect human health and the environment]~~*Comply with an Executive*
 12 *Order issued under KRS Chapter 39A;* and

13 (b) 1. Is temporary in nature and will expire as provided in this section; or

14 2. Is temporary in nature and will be replaced by an ordinary administrative
 15 regulation as provided in this section.

16 *For the purposes of this section, "imminent" means within two hundred seventy*
 17 *(270) days of the filing of the emergency administrative regulation.*

18 (2) *An agency's finding of an emergency pursuant to this section shall not be based*
 19 *on the agency's failure to timely process and file administrative regulations*
 20 *through the ordinary administrative regulation process.*

21 (3) *An* emergency administrative *regulation*~~[regulations shall];~~

22 (a) *Shall* become effective and shall be considered as adopted upon filing;~~[-~~
 23 ~~Emergency administrative regulations shall]~~

24 (b) *Shall* be published in the Administrative Register in accordance with the
 25 publication deadline established in KRS 13A.050(3);

26 (c) *Shall be subject to the public comment provisions established in Sections 9*
 27 *and 10 of this Act;*

- 1 (d) 1. May be reviewed at a subsequent meeting of a legislative committee
 2 after the filing of the emergency administrative regulation; and
 3 2. May, by a vote of the majority of the legislative committee's
 4 membership as established by KRS 13A.020(4) and Section 11(9) of
 5 this Act, be found to be deficient, and the deficiency shall be reported
 6 to the Governor pursuant to KRS 13A.330(2); and

7 (e) May be amended:

- 8 1. By the promulgating administrative body after receiving public
 9 comments as established in Section 10 of this Act. The amended after
 10 comments version shall:
 11 a. Become effective upon filing; and
 12 b. Not require a statement of emergency; or
 13 2. At a legislative committee meeting as established in Section 16 of this
 14 Act. The amendment shall be approved as established by KRS
 15 13A.020(4) and Section 11(9) of this Act. The amended version shall
 16 become effective upon adjournment of the meeting following the
 17 procedures established in Section 18 of this Act.

18 ~~(4)~~~~(3)~~ (a) Except as provided by paragraph (b) of this subsection, emergency
 19 administrative regulations shall expire two hundred seventy (270) days after
 20 the date of filing or when the same matter filed as an ordinary administrative
 21 regulation filed for review is adopted, whichever occurs first.

- 22 (b) If an administrative body extends the time for filing a statement of
 23 consideration for an ordinary administrative regulation as provided by KRS
 24 13A.280(2)(b), an emergency administrative regulation shall remain in effect
 25 for two hundred seventy (270) days after the date of filing plus the number of
 26 days extended under the provisions of KRS 13A.280(2)(b) or when the same
 27 matter filed as an ordinary administrative regulation filed for review is

1 adopted, whichever occurs first.

2 **(c) Filing an emergency amended after comments administrative regulation**
 3 **shall not affect the expiration of an emergency regulation as established in**
 4 **paragraphs (a) and (b) of this subsection.**

5 ~~(5)[(4)]~~ Except as established in subsection ~~(6)[(5)]~~ of this section, an emergency
 6 administrative regulation with the same number or title or governing the same
 7 subject matter shall not be filed for a period of **two hundred seventy (270)**
 8 **days**~~[nine (9) months]~~ after it has been initially filed.~~[No other emergency~~
 9 ~~administrative regulation that is identical to the previously filed emergency~~
 10 ~~administrative regulation shall be promulgated.]~~

11 ~~(6)[(5)]~~ If an emergency administrative regulation with the same number or title or
 12 governing the same subject matter as an emergency administrative regulation filed
 13 within the previous **two hundred seventy (270) days**~~[nine (9) months]~~ is filed, it
 14 shall contain a detailed explanation of the manner in which it differs from the
 15 previously filed emergency administrative regulation. The detailed explanation shall
 16 be included in the statement of emergency required by subsection ~~(7)[(6)]~~ of this
 17 section.

18 ~~(7)[(6)]~~ Each emergency administrative regulation shall contain a statement of:

- 19 (a) The nature of the emergency;
- 20 (b) The reasons why an ordinary administrative regulation is not sufficient;
- 21 (c) Whether or not the emergency administrative regulation will be replaced by an
 22 ordinary administrative regulation;
- 23 (d) If the emergency administrative regulation will be replaced by an ordinary
 24 administrative regulation, the following statement: "The ordinary
 25 administrative regulation (is or is not) identical to this emergency
 26 administrative regulation.";
- 27 (e) If the emergency administrative regulation will not be replaced by an ordinary

- 1 administrative regulation, the reasons therefor; and
- 2 (f) If applicable, the explanation required by subsection ~~(6)~~~~(5)~~ of this section.
- 3 ~~(8)~~~~(7)~~ (a) An administrative body shall attach the:
- 4 1. Statement of emergency required by subsection ~~(7)~~~~(6)~~ of this section to
- 5 the front of the original and each copy of a proposed emergency
- 6 administrative regulation;~~and~~
- 7 2. **Public hearing and public comment period information required by**
- 8 **KRS 13A.270(2)**, regulatory impact analysis, tiering statement, federal
- 9 mandate comparison, fiscal note, summary of material incorporated by
- 10 reference if applicable, and other forms or documents required by the
- 11 provisions of this chapter to the back of the emergency administrative
- 12 regulation; **and**
- 13 3. **Documentary evidence submitted justifying the finding of an**
- 14 **emergency in accordance with subsection (1) of this section to the**
- 15 **back of the emergency regulation if it is:**
- 16 **a. No more than four (4) pages in length; and**
- 17 **b. Typewritten on white paper, size eight and one-half (8-1/2) by**
- 18 **eleven (11) inches, and single-sided;**
- 19 **Larger volumes of documentary evidence shall be filed in a separate**
- 20 **binder or on a CD-ROM or DVD disc.**
- 21 (b) An administrative body shall file with the regulations compiler:
- 22 1. The original and five (5) copies of the emergency administrative
- 23 regulation; and
- 24 2. At the same time as, or prior to, filing the paper version, an electronic
- 25 version of the emergency administrative regulation and the attachments
- 26 required by paragraph (a) of this subsection saved as a single document
- 27 for each emergency administrative regulation in an electronic format

1 approved by the regulations compiler.

2 (c) The original and four (4) copies of each emergency administrative regulation
3 shall be stapled in the top left corner. The fifth copy of each emergency
4 administrative regulation shall not be stapled. The original and the five (5)
5 copies of each emergency administrative regulation shall be grouped together.

6 ~~[(8) (a) If an emergency administrative regulation will not be replaced by an ordinary
7 administrative regulation, the administrative body shall schedule a public
8 hearing and public comment period pursuant to KRS 13A.270(1). The public
9 hearing and public comment period information required by KRS 13A.270(2)
10 shall be attached to the back of the emergency administrative regulation.]~~

11 ~~[(b) If an emergency administrative regulation will be replaced by an ordinary
12 administrative regulation:~~

13 1. ~~The ordinary administrative regulation shall be filed at the same time as
14 the emergency administrative regulation that will be replaced; and~~

15 2. ~~A public hearing and public comment period shall not be required for
16 the emergency administrative regulation.]~~

17 (9) The statement of emergency shall have a two (2) inch top margin. The number of
18 the emergency administrative regulation shall be typed directly below the heading
19 "Statement of Emergency." The number of the emergency administrative regulation
20 shall be the same number as the ordinary administrative regulation followed by an
21 "E."

22 (10) Each executive department emergency administrative regulation shall be signed by
23 the head of the administrative body and countersigned by the Governor prior to
24 filing with the Commission. These signatures shall be on the statement of
25 emergency attached to the front of the emergency administrative regulation.

26 (11) **If an emergency administrative regulation will be replaced by an ordinary**
27 **administrative regulation, the ordinary administrative regulation shall be filed at**

1 *the same time as the emergency administrative regulation that it will replace.*

2 ~~(12)(a)~~ If an ordinary administrative regulation that was filed to replace an emergency
3 administrative regulation is withdrawn;[,]

4 (a) The emergency administrative regulation shall expire on the date the ordinary
5 administrative regulation is withdrawn; and[.]

6 ~~(b) [If an ordinary administrative regulation that was filed to replace an
7 emergency administrative regulation is withdrawn,]~~The administrative body
8 shall inform the regulations compiler of the reasons for withdrawal in writing.

9 (13)(12) (a) If an emergency administrative regulation that was intended to be
10 replaced by an ordinary administrative regulation is withdrawn, the emergency
11 administrative regulation shall expire on the date it is withdrawn.

12 (b) If an emergency administrative regulation has been withdrawn, the ordinary
13 administrative regulation that was filed with it shall not expire unless the
14 administrative body informs the regulations compiler that the ordinary
15 administrative regulation is also withdrawn.

16 (c) If an emergency administrative regulation is withdrawn, the administrative
17 body shall inform the regulations compiler of the reasons for withdrawal in
18 writing.

19 (14) The administrative regulations compiler shall notify all legislative committees of
20 the number, title, and subject matter of all emergency administrative regulations
21 and shall forward any additional information filed about the emergency
22 administrative regulation requested by a legislative committee.

23 ~~[(13) A subcommittee may review an emergency administrative regulation and may
24 recommend to the Governor that the administrative regulation be withdrawn.]~~

25 ➔Section 5. KRS 13A.220 is amended to read as follows:

26 All administrative regulations shall comply with the provisions of KRS 13A.222 and
27 13A.224.

- 1 (1) (a) An administrative body shall file with the regulations compiler:
2 1. The original and five (5) copies of an administrative regulation; and
3 2. At the same time as, or prior to, filing the paper version, an electronic
4 version of the administrative regulation and required attachments saved
5 as a single document for each administrative regulation in an electronic
6 format approved by the regulations compiler.
- 7 (b) If there are differences between the paper copy and the electronic version of
8 an administrative regulation filed with the regulations compiler, the electronic
9 version shall be the controlling version.
- 10 (2) The original and four (4) copies of each administrative regulation shall be stapled in
11 the top left corner. The fifth copy of each administrative regulation shall not be
12 stapled. The original and the five (5) copies of each administrative regulation shall
13 be grouped together.
- 14 (3) An amendment to an administrative regulation shall not be made on a copy of the
15 administrative regulation reproduced from the Kentucky Administrative
16 Regulations Service or the Administrative Register. It shall be a typed original in
17 the format specified in subsection (4) of this section.
- 18 (4) The format of an administrative regulation shall be as follows:
19 (a) An administrative regulation shall be typewritten on white paper, size eight
20 and one-half (8-1/2) by eleven (11) inches and shall be double-spaced through
21 the last line of the body of the administrative regulation. The first page shall
22 have a two (2) inch top margin. The administrative regulation shall be typed in
23 a twelve (12) point font approved by the regulations compiler. The lines on
24 each page shall be numbered, with each page starting with line number one
25 (1). Pages of an administrative regulation and documents attached to the
26 administrative regulation shall be numbered sequentially. Page numbers shall
27 be centered in the bottom margin of each page. Copies of the administrative

- 1 regulation may be mechanically reproduced;
- 2 (b) The regulations compiler shall place a stamp indicating the date and time of
3 receipt of the administrative regulation in the two (2) inch margin on the first
4 page;
- 5 (c) The cabinet, department, and division of the administrative body shall be
6 listed on separate double-spaced lines two (2) inches from the top in the upper
7 left hand corner of the first page. This shall be followed on the next double-
8 spaced line by "(New Administrative Regulation)," "(Amendment),"
9 "(Amended After Comments)," "(Repealer)," "(New Emergency
10 Administrative Regulation)," "(Emergency Amendment)," "(Emergency
11 Amended After Comments)," or "(Emergency Repealer)," whichever is
12 applicable;
- 13 (d) The notation shall be followed by the number and title of the administrative
14 regulation on the next double-spaced line. The promulgating administrative
15 body shall contact the regulations compiler prior to filing to obtain an
16 administrative regulation number for a new administrative regulation;
- 17 (e) On the next double-spaced line following the number and title of an
18 administrative regulation, after the words "RELATES TO:," the
19 administrative body shall list all statutes and other enactments, including any
20 branch budget bills or executive orders, to which the administrative regulation
21 relates or which shall be affected by the administrative regulation. After the
22 words "STATUTORY AUTHORITY:" the administrative body shall list the
23 specific statutes and other enactments, where applicable, authorizing the
24 promulgation of the administrative regulation. Federal statutes and regulations
25 shall be cited in the "RELATES TO:" and "STATUTORY AUTHORITY:"
26 sections as provided by KRS 13A.222(4)(n) and (o); and
- 27 (f) Following the citations provided for in paragraph (e) of this subsection, and

1 following the words "NECESSITY, FUNCTION, AND CONFORMITY:" the
2 administrative body shall include a brief statement setting forth the necessity
3 for promulgating the administrative regulation, a summary of the functions
4 intended to be implemented by the administrative regulation, and, if
5 applicable, the statement required by KRS 13A.245(2)(b).

6 (5) The numbering within the body of an administrative regulation shall be the
7 responsibility of the promulgating body, subject to the authority of the regulations
8 compiler to divide or renumber an administrative regulation. The following format
9 shall be used by the administrative body in the numbering of each administrative
10 regulation. Each section shall begin with the word "Section" followed by an Arabic
11 number, and titles of sections shall be initially capitalized. Subsections shall be
12 designated by an Arabic number in parentheses. Paragraphs shall be designated by
13 lower case letters of the alphabet in parentheses (e.g., (a), (b), (c), etc.).
14 Subparagraphs shall be designated by an Arabic number followed by a period (e.g.,
15 1., 2., etc.). Clauses shall be designated by lower case letters of the alphabet
16 followed by a period (e.g., a., b., c., etc.). Subclauses shall be designated by lower
17 case Roman numerals in parentheses (e.g., (i), (ii), (iii), etc.). A section shall not be
18 divided into subsections, paragraphs, subparagraphs, clauses, or subclauses if there
19 is only one (1) item in that level of division.

20 (6) After the complete text of an administrative regulation, on the following page, the
21 administrative body shall include the following information:

22 (a) If the provisions of KRS 13A.120(3) are applicable, a statement that the
23 official or the head of the administrative body has reviewed or approved the
24 administrative regulation; the signature of such official or head; and the date
25 on which such review or approval occurred;

26 (b) The authorizing signature of the administrative body promulgating the
27 administrative regulation, and the date on which the administrative body

1 approved the promulgation;

2 (c) Information relating to public hearings and the public comment period
3 required by KRS 13A.270; and

4 (d) The name, position, mailing address, telephone number, e-mail address, and
5 facsimile number of the contact person of the administrative body. The
6 contact person shall be the person authorized by the head of an administrative
7 body to:

8 1. Receive information relating to issues raised by the public or by a
9 legislative committee~~[subcommittee]~~ prior to a public meeting of the
10 legislative committee~~[subcommittee]~~;

11 2. Negotiate changes in language with a legislative
12 committee~~[subcommittee]~~ in order to resolve such issues; and

13 3. Answer questions relating to the administrative regulation.

14 (7) The format for signatures required by subsection (6)(a) and (b) of this section shall
15 be as follows:

16 (a) The signature shall be placed on a signature line; and

17 (b) The name and title of the person signing shall be typed immediately beneath
18 the signature line.

19 (8) *An administrative body shall prominently display on its Web site:*

20 *(a) A notice that an administrative regulation has been filed with the*
21 *Commission;*

22 *(b) A summary of the administrative regulation including:*

23 *1. The number of the administrative regulation;*

24 *2. The title of the administrative regulation; and*

25 *3. Any changes made if it is an existing administrative regulation;*

26 *(c) Information on how to access the administrative regulation on the*
27 *Commission's Web site; and*

1 **(d) The dates of the public comment period and the place, time, and date of the**
 2 **scheduled public hearing as well as the manner in which interested parties**
 3 **shall submit:**

4 **1. Notification of attending the public hearing; and**

5 **2. Written comments.**

6 **(9)** (a) A letter of request, notification, or withdrawal required to be filed with the
 7 regulations compiler pursuant to this chapter may be filed electronically if the
 8 letter:

9 1. Is on the administrative body's official letterhead; and

10 2. Contains the signature of a representative of that administrative body.

11 (b) Paragraph (a) of this subsection shall not apply to the letters required by KRS
 12 13A.320(2)(b) for amendments at a **legislative committee**~~[subcommittee]~~
 13 meeting.

14 ➔Section 6. KRS 13A.2251 is amended to read as follows:

15 (1) An administrative body shall incorporate material by reference in the last section of
 16 an administrative regulation. This section shall include:

17 (a) The title of the material incorporated by reference placed in quotation marks,
 18 followed by the edition date of the material;

19 (b) Information on how the material may be obtained; and

20 (c) A statement that the material is available for public inspection and copying,
 21 subject to copyright law, at the main, regional, or branch offices of the
 22 administrative body, and the address and office hours of each. Following the
 23 required statement, the administrative body **shall**~~[may]~~ include~~[optional]~~
 24 information that states the administrative body's Web site address or telephone
 25 number or that provides contact information for other sources that may have
 26 the material available to the public.

27 (2) The section incorporating material by reference shall be titled "Incorporation by

- 1 Reference".
- 2 (a) If only one (1) item is incorporated by reference, the first subsection of the
3 section incorporating material by reference shall contain the following
4 statement: "(name and edition date of material incorporated) is incorporated
5 by reference."
- 6 (b) If more than one (1) item is incorporated by reference, the first subsection of
7 the section incorporating material by reference shall contain the following
8 statement: "The following material is incorporated by reference: (a) (name and
9 edition date of first item incorporated); and (b) (name and edition date of
10 second item incorporated)."
- 11 (c) The second subsection of the section incorporating material by reference shall
12 include the following statement: "This material may be inspected, copied, or
13 obtained, subject to applicable copyright law, at (name of administrative body,
14 full address), Monday through Friday, (state the regular office hours)."
- 15 (3) A summary of the incorporated material, in detail sufficient to identify the subject
16 matter to which it pertains, shall be attached to an administrative regulation that
17 incorporates material by reference. This summary shall include:
- 18 (a) Relevant programs, statutes, funds, rights, duties, and procedures affected by
19 the material and the manner in which they are affected;
- 20 (b) A citation of the specific state or federal statutes or regulations authorizing or
21 requiring the procedure or policy found in the material incorporated by
22 reference; and
- 23 (c) The total number of pages incorporated by reference.
- 24 (4) (a) 1. One (1) copy of the material incorporated by reference shall be filed
25 with the regulations compiler when the administrative regulation is filed.
26 2. *For material incorporated by reference that was developed by the*
27 *promulgating administrative body:*

- 1 **a. The material incorporated by reference shall be prominently**
 2 **displayed on the administrative body's Web site; and**
 3 **b. The Uniform Resource Locator (URL) of the address where the**
 4 **material may be directly viewed on the agency's Web site shall be**
 5 **included in the body of the administrative regulation.**
- 6 **3. For materials incorporated by reference that are subject to a valid**
 7 **copyright owned by a third party not controlled by the promulgating**
 8 **administrative body, the material shall be referenced by providing**
 9 **sufficient information to assist in locating the material from the third**
 10 **party.**
- 11 (b) Material incorporated by reference shall be placed in a binder, attached to the
 12 back of the administrative regulation, or filed on a CD-ROM or DVD.
- 13 1. If the material is placed in a binder, the administrative body shall
 14 indicate, on the front binder cover and on the first page of the material
 15 incorporated by reference, the:
- 16 a. Number of the administrative regulation to which the material
 17 incorporated by reference pertains;
- 18 b. Date on which it is filed; and
- 19 c. Citation of each item that is included in the binder.
- 20 2. The material incorporated by reference may be attached to the back of
 21 the administrative regulation if it is:
- 22 a. No more than four (4) pages in length; and
- 23 b. Typewritten on white paper, size eight and one-half (8 1/2) by
 24 eleven (11) inches, and single-sided.
- 25 3. The material incorporated by reference may be filed on a CD-ROM or
 26 DVD disc if the material is saved in Adobe Portable Document Format
 27 (PDF). The administrative body shall indicate on the disc and the disc's

1 storage case the:

- 2 a. Number of the administrative regulation to which the material
3 incorporated by reference pertains;
4 b. Date on which it is filed; and
5 c. Citation of each item that is included on the disc.

6 (c) If the same material is incorporated by reference in more than one (1)
7 administrative regulation, an administrative body may file one (1) copy of the
8 material in a binder or on a CD-ROM or DVD disc. The numbers of the
9 administrative regulations in which the material is incorporated by reference
10 shall be indicated with the other information as required by paragraph (b) of
11 this subsection.

12 ➔Section 7. KRS 13A.2255 is amended to read as follows:

13 (1) When an administrative body amends material that had been previously
14 incorporated by reference, the amendment shall be accomplished by submission of:

15 (a) An amendment to the administrative regulation with a new edition date for the
16 material incorporated by reference. The amendment shall be filed in
17 accordance with:

- 18 1. KRS 13A.220 to initiate a change in an existing administrative
19 regulation;
20 2. KRS 13A.280 to amend a proposed administrative regulation as a result
21 of the hearing or written comments received; or
22 3. KRS 13A.320 to amend a proposed administrative regulation at a
23 legislative committee~~[subcommittee]~~ meeting;

24 (b) 1. An entire new document in which the amendments have been made but
25 are not reflected in the manner specified in KRS 13A.222(2).

26 2. If the new document has been developed by the promulgating
27 administrative body, the entire document shall be displayed

1 *prominently on the administrative body's Web site and the Uniform*
 2 *Resource Locator (URL) of the address where the material may be*
 3 *directly viewed on the agency's Web site shall be included in the body*
 4 *of the administrative regulation.*

5 *3. If any materials incorporated by reference are subject to a valid*
 6 *copyright owned by a third party not controlled by the promulgating*
 7 *administrative body, the material shall be referenced by providing*
 8 *sufficient information to assist in locating the material from the third*
 9 *party;*

10 (c) A detailed summary of the changes and their effect. This summary shall:

- 11 1. a. Describe changes that are being made in the material incorporated
 12 by reference, in sufficient detail that a person reading the summary
 13 will know the differences between the material previously
 14 incorporated by reference and the new material; or
- 15 b. List each change in the manner required by KRS 13A.320(2)(c)
 16 and (d); and
- 17 2. Be attached to the back of the administrative regulation or, if part of an
 18 amendment pursuant to KRS 13A.320, to the amendment submitted for
 19 the *legislative committee*~~[subcommittee]~~ meeting; and

20 (d) The page or pages of any document developed by the promulgating
 21 administrative body in which changes have been made, with the changes
 22 accomplished in the manner specified in KRS 13A.222(2). Notwithstanding
 23 KRS 13A.040(6), the regulations compiler shall not be required to keep these
 24 marked copies once the administrative regulation has been adopted or
 25 withdrawn.

26 (2) (a) If the changes to the material incorporated by reference are technical in nature
 27 and authorized by KRS 13A.040(10) or 13A.312, the administrative body may

1 submit to the regulations compiler a copy of the revised material incorporated
2 by reference and a detailed letter explaining what changes are made and the
3 reason for the changes.

4 (b) If the regulations compiler determines that the requested change does not
5 affect the substance of the material incorporated by reference and that the
6 change is authorized by KRS 13A.040(10) or 13A.312, the edition date stated
7 in the administrative regulation shall be changed to match the edition date on
8 the revised material and the history line of that administrative regulation shall
9 note that a technical amendment was made.

10 (c) If the requested change affects the substance of the material incorporated by
11 reference or is not authorized by KRS 13A.040(10) or 13A.312, the
12 administrative body shall comply with subsection (1) of this section.

13 ➔Section 8. KRS 13A.250 is amended to read as follows:

14 (1) An administrative body that promulgates an administrative regulation shall consider
15 the cost that the administrative regulation may cause state or local government to
16 incur. The cost analysis shall include the projected cost or cost savings to the
17 Commonwealth of Kentucky and each of its affected agencies, and the projected
18 cost or cost savings to affected local governments, including cities, counties, fire
19 departments, and school districts. Agencies affected by the administrative regulation
20 may submit comments in accordance with KRS 13A.270(1) to the promulgating
21 administrative body or to a legislative committee~~subcommittee~~ reviewing the
22 administrative regulation.

23 (2) Each administrative body that promulgates an administrative regulation shall
24 prepare and submit with the administrative regulation a fiscal note. The fiscal note
25 shall state:

26 (a) The number of the administrative regulation;

27 (b) The name, e-mail address, and telephone number of the contact person of the

- 1 administrative body identified pursuant to KRS 13A.220(6)(d), and, if
 2 applicable, the name, e-mail address, and telephone number of an alternate
 3 person to be contacted with specific questions about the fiscal note;
- 4 (c) The unit, part, or division of state or local government the administrative
 5 regulation will affect;
- 6 (d) In detail, the aspect or service of state or local government to which the
 7 administrative regulation relates, including identification of the applicable
 8 state or federal statute or regulation that mandates the aspect or service or
 9 authorizes the action taken by the administrative regulation; and
- 10 (e) The estimated effect of the administrative regulation on the expenditures and
 11 revenues of a state or local government agency for the first full year the
 12 administrative regulation will be in effect. If specific dollar estimates cannot
 13 be determined, the administrative body shall provide a brief narrative to
 14 explain the fiscal impact of the administrative regulation.

- 15 (3) Any administrative body may request the advice and assistance of the Commission
 16 in the preparation of the fiscal note.

17 ➔Section 9. KRS 13A.270 is amended to read as follows:

- 18 (1) (a) In addition to the public comment period required by paragraph (c) of this
 19 subsection, following publication in the Administrative Register of the text of
 20 an administrative regulation, the administrative body shall, unless authorized
 21 to cancel the hearing pursuant to subsection (7) of this section, hold a hearing,
 22 open to the public, on the administrative regulation.

- 23 (b) The public hearing *for an:*

- 24 **1. Ordinary administrative regulation** shall not be held before the twenty-
 25 first day or *after*~~[later than]~~ the last workday of the month following the
 26 month in which the administrative regulation is published in the
 27 Administrative Register; *or*~~[.]~~

1 **2. Emergency administrative regulation shall not be held before the**
 2 **twenty-first day or after the last workday of the month in which the**
 3 **administrative regulation is published in the Administrative Register.**

4 **Nothing in this paragraph shall preclude the administrative body from**
 5 **holding additional public hearings in addition to the hearing mandated in**
 6 **subparagraph 1. or 2. of this paragraph.**

7 (c) The administrative body shall accept written comments regarding the
 8 administrative regulation during the comment period. The comment period
 9 shall begin on the date the administrative regulation is filed with the
 10 regulations compiler and:

11 **1. For an ordinary administrative regulation,** shall run until 11:59 p.m.
 12 on the last day of the calendar month following the month in which the
 13 administrative regulation was published in the Administrative Register;

14 **or**

15 **2. For an emergency administrative regulation, shall run until 11:59**
 16 **p.m. on the last day of the calendar month in which the administrative**
 17 **regulation is published in the Administrative Register.**

18 (2) Each administrative regulation shall state:

19 (a) The place, time, and date of the scheduled public hearing;

20 (b) The manner in which interested persons shall submit their:

21 1. Notification of attending the public hearing; and

22 2. Written comments;

23 (c) That notification of attending the public hearing shall be transmitted to the
 24 administrative body no later than five (5) workdays prior to the date of the
 25 scheduled public hearing;

26 (d) The deadline for submitting written comments regarding the administrative
 27 regulation in accordance with subsection (1)(c) of this section; and

- 1 (e) The name, position, mailing address, e-mail address, and telephone and
2 facsimile numbers of the person to whom a notification and written comments
3 shall be transmitted.
- 4 (3) (a) A person who wishes to be notified that an administrative body has filed an
5 administrative regulation shall:
- 6 1. Contact the administrative body by telephone or written letter to request
7 that the administrative body send the information required by paragraph
8 (c) or (d) of this subsection to the person; or
 - 9 2. Complete an electronic registration form located on a centralized state
10 government Web site developed and maintained by the Commonwealth
11 Office of Technology.
- 12 (b) A registration submitted pursuant to paragraph (a) of this subsection shall:
- 13 1. Indicate whether the person wishes to receive notification regarding:
 - 14 a. All administrative regulations promulgated by an administrative
15 body; or
 - 16 b. Each administrative regulation that relates to a specified subject
17 area. The subject areas shall be provided by the administrative
18 bodies and shall be listed on the centralized state government Web
19 site in alphabetical order;
 - 20 2. Include a request for the person to provide an e-mail address in order to
21 receive regulatory information electronically;
 - 22 3. Be valid for a period of four (4) years from the date the registration is
23 submitted, or until the person submits a written request to be removed
24 from the notification list, whichever occurs first; and
 - 25 4. Be transmitted to the promulgating administrative body, if the
26 registration was made through the centralized state government Web
27 site. The collected e-mail addresses shall be used solely for the purposes

1 of this subsection and shall not be sold, transferred, or otherwise made
2 available to third parties, other than the promulgating administrative
3 body.

4 (c) A copy of the administrative regulation as filed, and all attachments required
5 by KRS 13A.230(1), shall be e-mailed:

6 1. To every person who has:

7 a. Registered pursuant to paragraph (a) of this subsection; and

8 b. Provided an e-mail address as part of the registration request;

9 2. Within five (5) working days after the date the administrative regulation
10 is filed with the Commission; and

11 3. With a request from the administrative body that affected individuals,
12 businesses, or other entities submit written comments that identify the
13 anticipated effects of the proposed administrative regulation.

14 (d) Within five (5) working days after the date the administrative regulation is
15 filed with the Commission, the administrative body shall mail the following
16 information to every person who has registered pursuant to paragraph (a) of
17 this subsection but did not provide an e-mail address:

18 1. A cover letter from the administrative body requesting that affected
19 individuals, businesses, or other entities submit written comments that
20 identify the anticipated effects of the proposed administrative regulation;

21 2. A copy of the regulatory impact analysis required by KRS 13A.240
22 completed in detail sufficient to put the individual on notice as to the
23 specific contents of the administrative regulation, including all proposed
24 amendments to the administrative regulation; and

25 3. A statement that a copy of the administrative regulation may be obtained
26 from the Commission's Web site, which can be accessed on-line through
27 public libraries or any computer with Internet access. The Commission's

1 Web site address shall be included in the statement.

2 (e) An administrative body shall not be required to send a copy of an
3 administrative regulation that was amended after comments in accordance
4 with KRS 13A.280 to persons who have registered pursuant to paragraph (a)
5 of this subsection, unless the person requested a copy pursuant to KRS
6 13A.280(8).

7 (4) (a) If small business may be impacted by an administrative regulation, the
8 administrative body shall e-mail a copy of the administrative regulation as
9 filed, and all attachments required by KRS 13A.230(1), to the chief executive
10 officer of the Commission on Small Business Advocacy within one (1)
11 working day after the date the administrative regulation is filed with the
12 Commission.

13 (b) The e-mail shall include a request from the administrative body that the
14 Commission on Small Business Advocacy review the administrative
15 regulation in accordance with KRS 11.202(1)(e) and submit its report or
16 comments in accordance with the deadline established in subsection (1)(c) of
17 this section. A copy of the report shall be filed with the regulations compiler.

18 (c) An administrative body shall not be required to send a copy of an
19 administrative regulation that was amended after comments in accordance
20 with KRS 13A.280 to the Commission on Small Business Advocacy, unless
21 its chief executive officer requested a copy pursuant to KRS 13A.280(8).

22 (5) (a) If a local government may be impacted by an administrative regulation, the
23 administrative body shall send, by e-mail if the local government has an e-
24 mail address, a copy of the administrative regulation as filed and all
25 attachments required by KRS 13A.230(1) to each local government in the
26 state within one (1) working day after the date the administrative regulation is
27 filed with the Commission. If the local government does not have an e-mail

- 1 address, the material shall not be sent.
- 2 (b) The e-mail shall include a request from the administrative body that the local
3 government review the administrative regulation in the same manner as would
4 the Commission on Small Business Advocacy under KRS 11.202(1)(e), and
5 submit its report or comments in accordance with the deadline established in
6 subsection (1)(c) of this section. A copy of the report or comments shall be
7 filed with the regulations compiler.
- 8 (c) An administrative body shall not be required to send a copy of an
9 administrative regulation that was amended after comments in accordance
10 with KRS 13A.280 to a local government, unless its contact person requested
11 a copy pursuant to KRS 13A.280(8).
- 12 (6) Persons desiring to be heard at the hearing shall notify the administrative body in
13 writing as to their desire to appear and testify at the hearing not less than five (5)
14 workdays before the scheduled date of the hearing.
- 15 (7) The administrative body shall immediately notify the regulations compiler by letter
16 if:
- 17 (a) No written notice of intent to attend the public hearing is received by the
18 administrative body at least five (5) workdays before the scheduled hearing,
19 and it chooses to cancel the public hearing; and
- 20 (b) No written comments have been received by the close of the last day of the
21 public comment period.
- 22 (8) (a) 1. Upon receipt from interested persons of their intent to attend a public
23 hearing, the administrative body shall notify the regulations compiler by
24 letter that the public hearing shall be held.
- 25 2. If the public hearing is held but no comments are received during the
26 hearing, the administrative body shall notify the regulations compiler by
27 letter that the public hearing was held and that no comments were

1 received.

2 (b) Upon receipt of written comments, the administrative body shall notify the
3 regulations compiler by letter that written comments have been received.

4 (9) If the notifications required by subsections (7) and (8) of this section are not
5 received by the regulations compiler by close of business on the second workday of
6 the calendar month following the end of the public comment period, the
7 administrative regulation shall be deferred to the next regularly scheduled meeting
8 of the subcommittee.

9 (10) The notifications required by subsections (7) and (8) of this section shall be made
10 by letter. The letter may be sent by e-mail if the administrative body uses an
11 electronic signature and letterhead for the e-mailed document.

12 (11) Every hearing shall be conducted in such a manner as to guarantee each person who
13 wishes to offer comment a fair and reasonable opportunity to do so, whether or not
14 such person has given the notice contemplated by subsection (6) of this section. No
15 transcript need be taken of the hearing, unless a written request for a transcript is
16 made, in which case the person requesting the transcript shall have the
17 responsibility of paying for same. A recording may be made in lieu of a transcript
18 under the same terms and conditions as a transcript. This section shall not preclude
19 an administrative body from making a transcript or making a recording if it so
20 desires.

21 (12) Nothing in this section shall be construed as requiring a separate hearing on each
22 administrative regulation. Administrative regulations may be grouped at the
23 convenience of the administrative body for purposes of hearings required by this
24 section.

25 ➔Section 10. KRS 13A.280 is amended to read as follows:

26 (1) Following the last day of the comment period, the administrative body shall give
27 consideration to all comments received at the public hearing and all written

1 comments received during the comment period, including any report filed by the
 2 Commission on Small Business Advocacy in accordance with KRS 11.202(1)(e)
 3 and 13A.270(4), or by a local government in accordance with KRS 11.202(1)(e) and
 4 13A.270(5).

5 (2) (a) Except as provided in paragraph (b) of this subsection, the administrative
 6 body shall file with the commission on or before 12 noon, eastern time, on the
 7 fifteenth day of the calendar month following the end of the public comment
 8 period the statement of consideration relating to the administrative regulation
 9 and, if applicable, the amended after comments version.

10 (b) If the administrative body has received a significant number of public
 11 comments:~~[-]~~

12 1. It may extend the time for filing the statement of consideration for an
 13 ordinary administrative regulation and, if applicable, the amended after
 14 comments version by notifying the regulations compiler in writing on or
 15 before 12 noon, eastern time, on the fifteenth day of the calendar month
 16 following the end of the public comment period; ~~and[-]~~

17 2. The administrative body shall file the statement of consideration for an
 18 ordinary administrative regulation and, if applicable, the amended after
 19 comments version, with the Commission on or before 12 noon, eastern
 20 time, no later than the fifteenth day of the second calendar month
 21 following the end of the public comment period.

22 (3) (a) If the administrative regulation is amended as a result of the hearing or written
 23 comments received, the administrative body shall forward the items specified
 24 in this paragraph to the regulations compiler by 12 noon, eastern time, on the
 25 applicable deadline specified in subsection (2) of this section:

26 1. The original and five (5) copies of the administrative regulation
 27 indicating any amendments~~[in the original wording]~~ resulting from

1 comments received at the public hearing and during the comment
2 period. **The amendments shall be indicated in:**

3 **a. The original wording for an ordinary administrative regulation;**

4 **or**

5 **b. The wording of an emergency administrative regulation as**

6 **amended, for an emergency administrative regulation that was**

7 **amended at a legislative committee meeting pursuant to Section**

8 **4(3) of this Act;**

9 2. The original and five (5) copies of the statement of consideration as
10 required by subsection (2) of this section, attached to the back of the
11 original and each copy of the administrative regulation; and

12 3. The regulatory impact analysis, tiering statement, federal mandate
13 comparison, or fiscal note on local government. These documents shall
14 reflect changes resulting from amendments made after the public
15 hearing.

16 (b) The original and four (4) copies of the amended after comments version, the
17 statement of consideration, and the attachments required by paragraph (a)3. of
18 this subsection shall be stapled in the top left corner. The fifth copy shall not
19 be stapled.

20 (c) At the same time as, or prior to, filing the paper version, the administrative
21 body shall file an electronic version of the amended after comments version,
22 the statement of consideration, and the required attachments saved as a single
23 document for each amended after comments administrative regulation in an
24 electronic format approved by the regulations compiler.

25 (4) (a) If the administrative regulation is not amended as a result of the public
26 hearing, or written comments received, the administrative body shall file the
27 original and five (5) copies of the statement of consideration with the

1 regulations compiler by 12 noon, eastern time, on the deadline established in
2 subsection (2) of this section. The original and four (4) copies of the statement
3 of consideration shall be stapled in the top left corner. The fifth copy of each
4 statement of consideration shall not be stapled.

5 (b) If the statement of consideration covers multiple administrative regulations, as
6 authorized by subsection (6)(g)L. of this section, the administrative body shall
7 file with the regulations compiler:

- 8 1. The original and five (5) copies of the statement of consideration as
9 required by paragraph (a) of this subsection; and
- 10 2. Two (2) additional unstapled copies of the statement of consideration for
11 each additional administrative regulation included in the group of
12 administrative regulations.

13 (c) At the same time as, or prior to, filing the paper version, the administrative
14 body shall file an electronic version of the statement of consideration saved as
15 a single document for each statement of consideration in an electronic format
16 approved by the regulations compiler.

17 (5) If comments are received either at the public hearing or during the public comment
18 period, the administrative regulation shall be deferred to the next regularly
19 scheduled meeting of the subcommittee following the month in which the statement
20 of consideration is due.

21 (6) The format for the statement of consideration shall be as follows:

22 (a) The statement shall be typewritten on white paper, size eight and one-half (8-
23 1/2) by eleven (11) inches. Copies of the statement may be mechanically
24 reproduced;

25 (b) The first page of the statement of consideration shall have a two (2) inch top
26 margin;

27 (c) The heading of the statement shall consist of the words "STATEMENT OF

- 1 CONSIDERATION RELATING TO" followed by the number of the
2 administrative regulation that was the subject of the public hearing and
3 comment period and the name of the promulgating administrative body. The
4 heading shall be centered. This shall be followed by the words "Not Amended
5 After Comments," "Emergency Not Amended After Comments,"~~[or]~~
6 "Amended After Comments," or "Emergency Amended After Comments,"
7 whichever is applicable;
- 8 (d) If a hearing has been held or written comments received, the heading is to be
9 followed by:
- 10 1. A statement setting out the date, time and place of the hearing, if the
11 hearing was held;
- 12 2. A list of those persons who attended the hearing or who submitted
13 comments and the organization, agency, or other entity represented, if
14 applicable; and
- 15 3. The name and title of the representative of the promulgating
16 administrative body;
- 17 (e) Following the general information, the promulgating administrative body shall
18 summarize the comments received at the public hearing and during the
19 comment period and the response of the promulgating administrative body.
20 Each subject commented upon shall be summarized in a separate numbered
21 paragraph. Each numbered paragraph shall contain two (2) subsections:
- 22 1. Subsection (a) shall be labeled "Comment," shall identify the name of
23 the person, and the organization represented if applicable, who made the
24 comment, and shall contain a summary of the comment; and
- 25 2. Subsection (b) shall be labeled "Response" and shall contain the
26 response to the comment by the promulgating administrative body;
- 27 (f) Following the summary and comments, the promulgating administrative body

1 shall:

2 1. Summarize the statement and the action taken by the administrative
3 body as a result of comments received at the public hearing and during
4 the comment period; and

5 2. If amended after the comment period, list the changes made to the
6 administrative regulation in the format prescribed by KRS
7 13A.320(2)(c) and (d); and

8 (g) 1. If administrative regulations were considered as a group at a public
9 hearing, one (1) statement of consideration may include the group of
10 administrative regulations. If a comment relates to one (1) or more of the
11 administrative regulations in the group, the summary of the comment
12 and response shall specify each administrative regulation to which it
13 applies.

14 2. *Emergency administrative regulations shall be in a separate statement*
15 *of consideration from ordinary administrative regulations.*

16 (7) If the administrative regulation is amended pursuant to subsection (3) of this
17 section, the full text of the administrative regulation shall be published in the
18 Administrative Register. The changes made to the administrative regulation shall be
19 typed in bold and made in the format prescribed by KRS 13A.222(2). The
20 administrative regulation shall be reviewed by the Administrative Regulation
21 Review Subcommittee after such publication.

22 (8) If requested, copies of the statement of consideration and, if applicable, the
23 amended after comments version of the administrative regulation shall be made
24 available by the promulgating administrative body to persons attending the hearing
25 or submitting comments or who specifically request a copy from the administrative
26 body.

27 ➔Section 11. KRS 13A.290 is amended to read as follows:

- 1 (1) (a) Except as provided by KRS 158.6471 and 158.6472, the Administrative
2 Regulation Review Subcommittee shall meet monthly to review
3 administrative regulations prior to close of business on the fifteenth day of the
4 calendar month.
- 5 (b) The agenda shall:
- 6 1. Include each administrative regulation that completed the public
7 comment process;
 - 8 2. Include each administrative regulation for which a statement of
9 consideration was received on or before 12 noon, eastern time, on the
10 fifteenth day of the prior calendar month;
 - 11 3. Include each effective administrative regulation that the subcommittee
12 has decided to review;
 - 13 4. Include each administrative regulation that was deferred from the prior
14 month's meeting of the subcommittee; and
 - 15 5. Not include an administrative regulation that is deferred, withdrawn,
16 expired, or automatically taken off the agenda under the provisions of
17 this chapter.
- 18 (c) Review of an administrative regulation shall include the entire administrative
19 regulation and all attachments filed with the administrative regulation. The
20 review of amendments to existing administrative regulations shall not be
21 limited to only the changes proposed by the promulgating administrative
22 body.
- 23 (2) The meetings shall be open to the public.
- 24 (3) Public notice of the time, date, and place of the Administrative Regulation Review
25 Subcommittee meeting shall be given in the Administrative Register.
- 26 (4) (a) A representative of the administrative body for an administrative regulation
27 under consideration shall be present to explain the administrative regulation

- 1 and to answer questions thereon.
- 2 (b) If a representative of the administrative body with authority to amend a filed
3 administrative regulation is not present at the subcommittee meeting, the
4 administrative regulation shall be deferred to the next regularly scheduled
5 meeting of the subcommittee.
- 6 (c) If a representative of an administrative body for an effective administrative
7 regulation fails to appear before the subcommittee, the subcommittee may:
- 8 1. Defer the administrative regulation to the next regularly scheduled
9 meeting of the subcommittee; or
- 10 2. Make a ~~nonbinding~~ determination pursuant to KRS 13A.030(2), (3),
11 and (4), **or Section 4(3) of this Act.**
- 12 (5) Following the meeting and before the next regularly scheduled meeting of the
13 Commission, the Administrative Regulation Review Subcommittee shall forward to
14 the Commission its findings, recommendations, or other comments it deems
15 appropriate in writing. The Administrative Regulation Review Subcommittee shall
16 also forward to the Commission its findings, recommendations, or other comments
17 it deems appropriate on an effective administrative regulation it has reviewed. The
18 Administrative Regulation Review Subcommittee's findings shall be published in
19 the Administrative Register.
- 20 (6) (a) After review by the Administrative Regulation Review Subcommittee, the
21 Commission shall, on the first Wednesday of the following month, or if the
22 first Wednesday is a legal holiday, the next workday of the month, assign a
23 filed administrative regulation to **a legislative committee**;
24 ~~1. An interim joint committee~~ with subject matter jurisdiction~~;~~ or
25 ~~2. The Senate and House standing committees with subject matter~~
26 ~~jurisdiction~~.
- 27 (b) Upon notification of the assignment by the Commission, the legislative

1 committee~~[subcommittee]~~ to which the administrative regulation is assigned
2 shall notify the regulations compiler:

- 3 1. Of the date, time, and place of the meeting at which it will consider the
4 administrative regulation; or
5 2. That it will not meet to consider the administrative regulation.

6 (7) (a) Within ninety (90) days of the assignment, the legislative
7 committee~~[subcommittee]~~ may hold a public meeting during which the
8 administrative regulation shall be reviewed.

9 (b) If the ninetieth day of the assignment falls on a Saturday, Sunday, or holiday,
10 the deadline for review shall be the workday following the Saturday, Sunday,
11 or holiday.

12 (c) 1. If the administrative regulation is assigned to an interim joint committee
13 and a session of the General Assembly begins during the review period,
14 the assignment shall transfer to the Senate and House standing
15 committees with subject matter jurisdiction.

16 2. If the administrative regulation is assigned to Senate and House standing
17 committees and a session of the General Assembly adjourns sine die
18 during the review period, the assignment shall transfer to the interim
19 joint committee with subject matter jurisdiction.

20 3. An administrative regulation may be transferred more than one (1) time
21 under this paragraph. A transfer shall not extend the review period
22 established by this subsection.

23 (d) Notice of the time, date, and place of the meeting shall be placed in the
24 legislative calendar.

25 (8) Except as provided in subsection (9) of this section, a legislative
26 committee~~[subcommittee]~~ shall be empowered to make the same~~[nonbinding]~~
27 determinations and to exercise the same authority as the Administrative Regulation

1 Review Subcommittee.

2 (9) (a) This subsection shall apply to administrative regulations filed with the
3 Commission.

4 (b) A majority of the entire membership of the legislative
5 committee~~[subcommittee to which an administrative regulation is referred~~
6 ~~pursuant to subsection (6)(a) of this section]~~ shall constitute a quorum for
7 purposes of reviewing administrative regulations.

8 (c) In order to amend an administrative regulation pursuant to KRS 13A.320,
9 defer an administrative regulation pursuant to KRS 13A.300, or find an
10 administrative regulation deficient pursuant to KRS 13A.030(2), (3), or~~[and]~~
11 (4), or Section 4(3) of this Act, the motion to amend, defer, or find deficient
12 shall be approved by a majority of the entire membership of the legislative
13 committee~~[subcommittee]~~. Additionally, during a session of the General
14 Assembly, standing committees of the Senate and House of Representatives
15 shall agree in order to amend an administrative regulation, defer an
16 administrative regulation, or find an administrative regulation deficient by:

- 17 1. Meeting separately; or
- 18 2. Meeting jointly. If the standing committees meet jointly, it shall require
19 a majority vote of Senate members voting and a majority of House
20 members voting, as well as the majority vote of the entire membership
21 of the standing committees meeting jointly, in order to take action on the
22 administrative regulation.

23 (10) (a) The quorum requirements of subsection (9)(b) of this section shall apply to an
24 effective administrative regulation under review by a legislative
25 committee~~[subcommittee]~~.

26 (b) A motion to find an effective administrative regulation deficient shall be
27 approved by:

- 1 1. A majority of the entire membership of the Administrative Regulation
2 Review Subcommittee; or
3 2. ~~[A majority of a House or Senate standing committee; or~~
4 ~~3.—]~~ A legislative committee~~[joint standing committee]~~ in accordance with
5 subsection (9)(c)~~[2.]~~ of this section.
- 6 (11) (a) Upon adjournment of the meeting at which a legislative
7 committee~~[subcommittee]~~ has considered an administrative regulation
8 pursuant to subsection (7) or (10) of this section, the legislative
9 committee~~[subcommittee]~~ shall inform the regulations compiler of its
10 findings, recommendations, or other action taken on the administrative
11 regulation.
- 12 (b) Following the meeting and before the next regularly scheduled meeting of the
13 Commission, the legislative committee~~[subcommittee]~~ shall forward to the
14 Commission its findings, recommendations, or other comments it deems
15 appropriate in writing. The legislative committee's~~[subcommittee's]~~ findings
16 shall be published in the Administrative Register.
- 17 ➔Section 12. KRS 13A.300 is amended to read as follows:
- 18 (1) The administrative body that promulgated an administrative regulation may request
19 that consideration of the administrative regulation be deferred by a legislative
20 committee~~[the subcommittee]~~.
- 21 (2) The deferral of an administrative regulation scheduled for review by the
22 Administrative Regulation Review Subcommittee shall be governed by KRS
23 13A.020(4) and the following:
- 24 (a) A request for deferral of an ordinary administrative regulation filed with the
25 Commission shall be automatically granted if:
- 26 1. The administrative body submits a written letter to the regulations
27 compiler; and

- 1 2. The letter is received prior to the subcommittee meeting;
- 2 (b) A request for deferral of an effective administrative regulation or an
- 3 emergency administrative regulation may be granted if:
- 4 1. The administrative body submits a written letter to the regulations
- 5 compiler;
- 6 2. The letter is received prior to the subcommittee meeting; and
- 7 3. Approved by the co-chairs of the Administrative Regulation Review
- 8 Subcommittee;
- 9 (c) A request for deferral may be granted at the discretion of the subcommittee if
- 10 the request is made by the administrative body orally at a meeting of the
- 11 subcommittee;
- 12 (d) The subcommittee may request that consideration of an administrative
- 13 regulation be deferred by the promulgating administrative body. Upon receipt
- 14 of the request, the promulgating administrative body may agree to defer
- 15 consideration of the administrative regulation;
- 16 (e) Except as provided in paragraph (f) of this subsection, an administrative
- 17 regulation that has been deferred shall be placed on the agenda of the next
- 18 scheduled meeting of the subcommittee. If it is an administrative regulation
- 19 filed with the Commission, the subcommittee shall consider the administrative
- 20 regulation as if it had met all other requirements of filing. Repromulgation
- 21 shall not be required in those cases; and
- 22 (f) An administrative regulation shall not be deferred under this subsection more
- 23 than twelve (12) times.
- 24 (3) (a) The deferral of a filed ordinary administrative regulation referred to a second
- 25 legislative committee or committees pursuant to KRS 13A.290(6) and (7)
- 26 shall be governed by this subsection and the voting requirements of
- 27 subsection (9) of Section 11 of this Act.

- 1 (b) 1. A request for deferral shall be automatically granted if:
- 2 a. The administrative body submits a written letter to the regulations
- 3 compiler; and
- 4 b. The letter is received prior to the legislative committee meeting;
- 5 2. A request for deferral may be granted at the discretion of the second
- 6 legislative committee if the request is made by the administrative body
- 7 orally at a meeting of the legislative committee; and
- 8 3. The legislative committee may request that consideration of an
- 9 administrative regulation be deferred by the promulgating administrative
- 10 body. Upon receipt of the request, the promulgating administrative body
- 11 may agree to defer consideration of the administrative regulation.
- 12 (c) 1. An administrative regulation that is deferred may be placed on a
- 13 subsequent agenda of the legislative committee or committees within the
- 14 review period.
- 15 2. *If a filed ordinary administrative regulation that has been deferred is*
- 16 *not*~~[Unless the deferred administrative regulation is]~~ placed on a
- 17 subsequent agenda within the review period, the administrative
- 18 regulation shall take effect at the expiration of the review period.
- 19 (4) (a) The deferral of an effective administrative regulation *or an emergency*
- 20 *administrative regulation* under review by a legislative committee
- 21 ~~[subcommittee]~~ shall be governed by this subsection *and the voting*
- 22 *requirements of subsection (9) of Section 11 of this Act.*
- 23 (b) A request for deferral may be granted if:
- 24 1. The administrative body submits a written letter to the regulations
- 25 compiler;
- 26 2. The letter is received prior to the legislative committee~~[subcommittee]~~
- 27 meeting; and

- 1 3. Approved by the presiding chair or chairs.
- 2 (c) A request for deferral may be granted at the discretion of the **legislative**
- 3 **committee** ~~[subcommittee]~~ if the request is made by the administrative body
- 4 orally at a meeting of the **legislative committee**~~[subcommittee]~~.
- 5 (d) The **legislative committee**~~[subcommittee]~~ may request that consideration of an
- 6 administrative regulation be deferred by the administrative body. Upon receipt
- 7 of the request, the administrative body may agree to defer consideration of the
- 8 administrative regulation.
- 9 (e) An administrative regulation that is deferred may be placed on a subsequent
- 10 agenda of the **legislative committee**~~[subcommittee]~~.

11 **(5) Except as provided by subsection (4) of Section 11 of this Act, if a representative**

12 **of an administrative body whose administrative regulation is scheduled for review**

13 **fails to appear before a legislative committee, the legislative committee in**

14 **conformance with subsection (9) of Section 11 of this Act may:**

- 15 **(a) Defer the administrative regulation to the next regularly scheduled meeting**
- 16 **of the legislative committee; or**
- 17 **(b) Make a determination pursuant to Section 2(2) or 4(2) of this Act.**

18 ➔Section 13. KRS 13A.310 is amended to read as follows:

- 19 (1) Except as provided in KRS 13A.3102 and 13A.3104, an **ordinary** administrative
- 20 regulation, once adopted, cannot be withdrawn but shall be repealed if it is desired
- 21 that it no longer be effective.
- 22 (2) Except as provided in KRS 13A.3102 and 13A.3104, an **ordinary** administrative
- 23 regulation, once adopted, cannot be suspended but shall be repealed if it is desired
- 24 to suspend its effect.
- 25 (3) (a) An **ordinary** administrative regulation shall be repealed only by the
- 26 promulgation of an administrative regulation that:
- 27 1. Is titled "Repeal of (state number of administrative regulation to be

- 1 repealed)";
- 2 2. Contains the reasons for repeal in the "NECESSITY, FUNCTION, AND
- 3 CONFORMITY" paragraph;
- 4 3. Includes in the body of the administrative regulation, a citation to the
- 5 number and title of the administrative regulation or regulations being
- 6 repealed; and
- 7 4. Meets the filing and formatting requirements of KRS 13A.220.
- 8 (b) 1. Except as provided in subparagraph 2. of this paragraph, on the effective
- 9 date of an administrative regulation that repeals an administrative
- 10 regulation, determined in accordance with KRS 13A.330 or 13A.331,
- 11 the regulations compiler shall delete the repealed administrative
- 12 regulation and the repealing administrative regulation from the
- 13 Kentucky Administrative Regulations Service.
- 14 2. If the repealing administrative regulation specifies an effective date that
- 15 is after the administrative regulation would become effective pursuant to
- 16 KRS 13A.330 or 13A.331, the specified effective date shall be
- 17 considered the effective date of the repealing administrative regulation.
- 18 On the specified effective date, the regulations compiler shall delete the
- 19 repealed administrative regulation and the repealing administrative
- 20 regulation from the Kentucky Administrative Regulations Service.
- 21 (c) An administrative body may repeal more than one (1) administrative
- 22 regulation in an administrative regulation promulgated pursuant to paragraph
- 23 (a) of this subsection if the administrative regulations being repealed are
- 24 contained in the same chapter of the Kentucky Administrative Regulations
- 25 Service.
- 26 (4) (a) An ordinary administrative regulation may be withdrawn by the promulgating
- 27 administrative body at any time prior to its adoption.

1 (b) An ordinary administrative regulation that has been found deficient may be
 2 withdrawn by the promulgating administrative body ~~or~~~~[at any time prior to~~
 3 ~~receipt by the regulations compiler of the determination of the Governor made~~
 4 ~~pursuant to KRS 13A.330 or may be withdrawn]~~ by the Governor at any time
 5 prior to its adoption.

6 (c) ~~[If an ordinary administrative regulation is withdrawn, the administrative body~~
 7 ~~or the Governor shall inform the regulations compiler of the reasons for~~
 8 ~~withdrawal in writing.~~

9 ~~(5)~~—]Once an ordinary administrative regulation is withdrawn, it shall not be reinstated,
 10 except by repromulgation as a totally new matter.

11 (5) (a) An emergency administrative regulation may be withdrawn by the
 12 promulgating administrative body at any time prior to its expiration.

13 (b) An emergency administrative regulation that has been found deficient may
 14 be withdrawn by the promulgating administrative body or by the Governor
 15 at any time prior to its expiration.

16 (6) If an administrative regulation is withdrawn, the administrative body or the
 17 Governor shall inform the regulations compiler of the reasons for withdrawal in
 18 writing.

19 ➔Section 14. KRS 13A.312 is amended to read as follows:

20 (1) If authority over a subject matter is transferred to another administrative body or if
 21 the name of an administrative body is changed by statute or by executive order
 22 during the interim between regular sessions of the General Assembly, the
 23 administrative regulations of that administrative body in effect on the effective date
 24 of the statutory change or the executive order shall remain in effect as they exist
 25 until the administrative body that has been granted authority over the subject matter
 26 amends or repeals the administrative regulations pursuant to KRS Chapter 13A.

27 (2) After receipt of a written request, submitted pursuant to subsection (3) of this

1 section, to make changes to an administrative regulation pursuant to the statutory
2 change or executive order, the regulations compiler shall alter the administrative
3 regulations referenced in subsection (1) of this section to:

4 (a) Change the name of the administrative body pursuant to the provisions of the
5 statute or executive order; and

6 (b) Make any other technical changes necessary to carry out the provisions of the
7 statute or executive order.

8 (3) The administrative body that has been granted statutory authority over the subject
9 matter shall provide to the regulations compiler in writing:

10 (a) A listing of the administrative regulations that require any changes; and

11 (b) The specific names, terms, or other information to be changed with those
12 changes properly referenced.

13 (4) The administrative body that has been granted statutory authority over the subject
14 matter shall submit new forms to replace forms previously incorporated by
15 reference in an administrative regulation if the only changes on the form are the
16 name and mailing address of the administrative body. If there are additional changes
17 to a form incorporated by reference, the administrative body shall promulgate an
18 amendment to the existing administrative regulation and make the changes to the
19 material incorporated by reference in accordance with KRS 13A.2255.

20 (5) If an administrative body is abolished by statute or executive order and the authority
21 over its subject matter is not transferred to another administrative body, the
22 Governor, or the secretary of the cabinet to which the administrative body was
23 attached, shall promulgate an administrative regulation to repeal the existing
24 administrative regulations that were promulgated by the abolished administrative
25 body. The repeal shall be accomplished as provided by KRS 13A.310.

26 **(6) If an executive order transfers authority over a subject matter to another**
27 **administrative body or changes the name of an administrative body during the**

1 interim between regular sessions of the General Assembly, and the General
 2 Assembly does not codify or confirm the executive order during the next regular
 3 session, any and all administrative regulations promulgated to implement the
 4 unconfirmed executive order shall be returned to their previous form by the
 5 administrative body using the promulgation procedures established by KRS
 6 Chapter 13A, including but not limited to:

7 (a) Withdrawal of a proposed administrative regulation;

8 (b) Amendment or repeal of an existing administrative regulation;

9 (c) Promulgation of a new administrative regulation; or

10 (d) Submission of technical changes in the manner established by subsections
 11 (3) and (4) of this section.

12 ➔Section 15. KRS 13A.315 is amended to read as follows:

13 (1) An administrative regulation shall expire and shall not be reviewed by a legislative
 14 committee~~subcommittee~~ if:

15 (a) It has not been reviewed or approved by the official or administrative body
 16 with authority to review or approve;

17 (b) The statement of consideration and, if applicable, the amended after
 18 comments version are not filed on or before a deadline specified by this
 19 chapter;

20 (c) The administrative body has failed to comply with the provisions of this
 21 chapter governing the filing of administrative regulations, the public hearing
 22 and public comment period, or the statement of consideration; or

23 (d) The administrative regulation is deferred pursuant to KRS 13A.300(2) more
 24 than twelve (12) times.

25 (2) (a) An administrative regulation that has been found deficient by a legislative
 26 committee~~subcommittee~~ shall be withdrawn immediately if, pursuant to
 27 KRS 13A.330, the Governor has determined that it shall be withdrawn.

- 1 (b) The Governor shall notify the regulations compiler in writing and by
 2 telephone that he or she has determined that the administrative regulation
 3 found deficient shall be withdrawn.
- 4 (c) The written withdrawal of an administrative regulation governed by the
 5 provisions of this subsection shall be made in a letter to the regulations
 6 compiler in the following format: "Pursuant to KRS 13A.330, I have
 7 determined that (administrative regulation number and title) shall be
 8 (withdrawn, or withdrawn and amended to conform to the finding of
 9 deficiency, as applicable). The administrative regulation, (administrative
 10 regulation number and title), is hereby withdrawn."
- 11 (d) An administrative regulation governed by the provisions of this subsection
 12 shall be considered withdrawn upon receipt by the regulations compiler of the
 13 written withdrawal.

14 →Section 16. KRS 13A.320 is amended to read as follows:

- 15 (1) (a) An administrative body may amend an administrative regulation at a
 16 legislative committee~~[subcommittee]~~ meeting with the consent of the
 17 legislative committee~~[subcommittee]~~. A legislative committee~~[subcommittee]~~
 18 may amend an administrative regulation at a legislative
 19 committee~~[subcommittee]~~ meeting with the consent of the administrative
 20 body.
- 21 (b) An administrative regulation shall not be amended at a public meeting of a
 22 legislative committee~~[subcommittee]~~ unless the amendment concerns an issue
 23 that was related to the administrative regulation filed with the Legislative
 24 Research Commission and was:
- 25 1. Considered at the public hearing;
 - 26 2. Raised pursuant to a comment received by the administrative body at the
 27 public hearing or during the public comment period pursuant to KRS

- 1 13A.280(1); or
- 2 3. Raised during the legislative committee~~[subcommittee]~~ meeting.
- 3 (c) Nothing in this chapter shall be construed to require the administrative
- 4 regulation's resubmission or refileing or other action. The administrative
- 5 regulation may be adopted as amended.
- 6 (d) Following approval of an amendment to an administrative regulation at a
- 7 legislative committee~~[subcommittee]~~ meeting, the administrative regulation as
- 8 amended shall be published in the Administrative Register, unless all
- 9 amendments to the administrative regulation that were made at the meeting of
- 10 the legislative committee~~[subcommittee]~~:
- 11 1. Relate only to the formatting and drafting requirements of KRS
- 12 13A.220(5) and 13A.222(4)(b), (c), (i), (j), and (l); and
- 13 2. Do not alter the intent, meaning, conditions, standards, or other
- 14 requirements of the administrative regulation.
- 15 (e) If the amendments to an administrative regulation made at a meeting of a
- 16 legislative committee~~[subcommittee]~~ meet the exception requirements of
- 17 paragraph (d) of this subsection, the regulations compiler shall publish a
- 18 notice in the Administrative Register that the administrative regulation was
- 19 amended at a legislative committee~~[subcommittee]~~ meeting only to comply
- 20 with the formatting and drafting requirements of this chapter.
- 21 (2) When an administrative body intends to amend an administrative regulation at a
- 22 meeting of a legislative committee~~[the subcommittee]~~, the following requirements
- 23 shall be met:
- 24 (a) Amendments offered by the administrative body prior to a legislative
- 25 committee~~[subcommittee]~~ meeting shall be approved by the head of the
- 26 administrative body.
- 27 (b) Amendments shall be contained in a letter to the legislative

- 1 committee~~[subcommittee]~~. The letter shall:
- 2 1. Identify the administrative body;
- 3 2. State the number and title of the administrative regulation;
- 4 3. Be dated;
- 5 4. Be filed with the regulations compiler at least three (3) workdays prior
- 6 to the meeting of the legislative committee~~[subcommittee]~~ if the
- 7 amendments are initiated by the administrative body; and
- 8 5. Comply with the format requirements in paragraphs (c) and (d) of this
- 9 subsection if the amendments are initiated by the administrative body.
- 10 (c) On separate lines, the amendment shall be identified by the number of the:
- 11 1. Page;
- 12 2. Section, subsection, paragraph, subparagraph, clause, or subclause, as
- 13 appropriate; and
- 14 3. Line.
- 15 (d) 1. If a word or phrase, whether or not underlined, is to be deleted, the
- 16 amendment shall identify the word or phrase to be deleted and state that
- 17 it is to be deleted. If a word or phrase is to be replaced by another word
- 18 or phrase, the amendment shall specify the word or phrase that is to be
- 19 deleted and shall specify the word or phrase that is to be inserted in lieu
- 20 thereof.
- 21 2. If new language is to be inserted, the amendment shall state that it is to
- 22 be inserted, and the new language shall be underlined.
- 23 3. If the amendment consists of no more than four (4) words, the words
- 24 shall be placed between quotation marks. If the amendment consists of
- 25 more than four (4) words, the amendment shall be indented and not
- 26 placed between quotation marks.
- 27 4. If a section, subsection, paragraph, subparagraph, clause, or subclause is

1 to be deleted in its entirety, the amendment shall identify it and state that
2 it is deleted in its entirety, whether or not it contains underlined or
3 bracketed language.

- 4 (3) If an amendment is drafted by legislative committee~~[subcommittee]~~ staff on behalf
5 of a legislative committee~~[subcommittee]~~, the amendment shall be made:
- 6 (a) In the format required by subsection (2)(c) and (d) of this section; or
 - 7 (b) By substituting the complete text of the administrative regulation, with the
8 proposed changes made to the administrative regulation typed in bold,
9 italicized, and in the format prescribed by KRS 13A.222(2).
- 10 (4) An amendment to an administrative regulation may be made orally at a legislative
11 committee~~[subcommittee]~~ meeting if the requirements of subsection (1)(a) of this
12 section are met.
- 13 (5) Except for an amendment made orally pursuant to subsection (4) of this section:
- 14 (a) For a meeting of the Administrative Regulation Review Subcommittee, an
15 administrative body shall submit twenty (20) copies of an amendment to an
16 administrative regulation to the regulations compiler prior to the
17 Administrative Regulation Review Subcommittee meeting at which the
18 amendment will be considered and, if applicable, in accordance with the
19 deadline established in subsection (2)(b)4. of this section; or
 - 20 (b) For a meeting of a legislative committee~~[subcommittee]~~ other than the
21 Administrative Regulation Review Subcommittee, an administrative body
22 shall contact the regulations compiler prior to the legislative
23 committee~~[subcommittee]~~ meeting at which the amendment will be
24 considered to find out the number of copies needed for that specific legislative
25 committee~~[subcommittee]~~. The original amendment and the specified number
26 of copies shall be submitted to the regulations compiler prior to the legislative
27 committee~~[subcommittee]~~ meeting at which the amendment will be

1 considered and, if applicable, in accordance with the deadline established in
 2 subsection (2)(b)4. of this section.

3 →Section 17. KRS 13A.330 is amended to read as follows:

- 4 (1) (a) If a filed ***ordinary*** administrative regulation has been found deficient, the
 5 ***legislative committee***~~[subcommittee]~~ shall transmit to the Governor and the
 6 regulations compiler:
- 7 1. A copy of the finding of deficiency and other relevant findings,
 8 recommendations, or comments; and
 - 9 2. A request that the Governor determine whether the administrative
 10 regulation shall:
 - 11 a. Be withdrawn;
 - 12 b. Be amended at a ***legislative committee***~~[subcommittee]~~ meeting
 13 pursuant to KRS 13A.320 to conform to the finding of deficiency;
 14 or
 - 15 c. Become effective pursuant to the provisions of this section
 16 notwithstanding the finding of deficiency.
- 17 (b) The Governor shall transmit his or her determination to the Commission and
 18 the regulations compiler.
- 19 (c) A filed ***ordinary*** administrative regulation that has been found deficient shall
 20 be considered as adopted and become effective after:
- 21 1. a. The review period established in this chapter has been completed;
 22 and
 - 23 b. The regulations compiler has received the Governor's
 24 determination that the administrative regulation shall become
 25 effective pursuant to the provisions of this section notwithstanding
 26 the finding of deficiency; or
 - 27 2. The ***legislative committee***~~[subcommittee]~~ that found the filed

1 administrative regulation deficient subsequently determines that it is not
 2 deficient in accordance with KRS 13A.335, provided that this
 3 determination was made prior to receipt by the regulations compiler of
 4 the Governor's determination.

5 (2) **(a) If an emergency administrative regulation has been found deficient, the**
 6 **legislative committee finding it deficient shall transmit to the Governor and**
 7 **the regulations compiler:**

8 **1. A copy of the finding of deficiency and other relevant findings,**
 9 **recommendations, or comments; and**

10 **2. A request that the Governor determine whether the emergency**
 11 **administrative regulation shall:**

12 **a. Be withdrawn;**

13 **b. Be amended at a legislative committee meeting pursuant to KRS**
 14 **13A.320 to conform to the finding of deficiency; or**

15 **c. Remain effective as established in KRS 13A.190(4)**
 16 **notwithstanding the finding of deficiency.**

17 **(b) The Governor shall transmit his or her determination to the Commission**
 18 **and the regulations compiler.**

19 **(c) The legislative committee that found the emergency administrative**
 20 **regulation deficient may subsequently determine that it is not deficient in**
 21 **accordance with KRS 13A.335.**

22 **(3)** If an effective **ordinary** administrative regulation has been found deficient by a
 23 **legislative committee**^[subcommittee], the **legislative committee**^[subcommittee]
 24 shall transmit to the Governor a copy of its finding of deficiency and other findings,
 25 recommendations, or comments it deems appropriate.

26 ➔Section 18. KRS 13A.331 is amended to read as follows:

27 A filed **ordinary** administrative regulation that has not been deferred or found deficient

1 *and has been referred by the Commission to a legislative committee* shall be considered
2 as adopted and shall become effective:

3 (1) Upon adjournment of a meeting of *a legislative*~~[an interim joint]~~ committee *other*
4 *than the subcommittee* if:

5 (a) The administrative regulation was on the meeting agenda; and

6 (b) A quorum was present;

7 ~~(2) [Upon adjournment of a meeting of a joint standing committee if:~~

8 ~~(a) The administrative regulation was on the meeting agenda; and~~

9 ~~(b) A quorum was present;~~

10 ~~(3)]~~ Upon adjournment of a meeting of a House or Senate standing committee if:

11 (a) The administrative regulation was on its meeting agenda;

12 (b) A quorum was present; and

13 (c) The administrative regulation has previously been on a meeting agenda of the
14 other standing committee when a quorum was present; or

15 ~~(3)~~~~[(4)]~~ At the expiration of the review period established in KRS 13A.290(7), if
16 within the review period a *legislative committee*~~[subcommittee]~~ has failed to meet
17 or failed to place a filed administrative regulation on a meeting agenda.

18 ➔ Section 19. KRS 13A.335 is amended to read as follows:

19 (1) (a) A filed administrative regulation found deficient by a *legislative*
20 *committee*~~[subcommittee]~~ shall not be considered deficient if:

21 1. A subsequent amendment of that administrative regulation is filed with
22 the Commission by the administrative body;

23 2. The *legislative committee*~~[subcommittee]~~ that found the administrative
24 regulation deficient approves a motion that the subsequent amendment
25 corrects the deficiency; and

26 3. Any *legislative committee*~~[subcommittee]~~ that reviews the
27 administrative regulation under the provisions of KRS Chapter 13A

- 1 finds that the administrative regulation is not deficient.
- 2 (b) A filed administrative regulation found deficient by the Administrative
3 Regulation Review Subcommittee shall not be considered deficient if:
- 4 1. The administrative regulation is amended to correct the deficiency at a
5 meeting of the legislative committee~~[subcommittee]~~ to which it was
6 assigned by the Commission;
- 7 2. That legislative committee~~[subcommittee]~~ does not determine that the
8 administrative regulation is deficient for any other reason; and
- 9 3. The Administrative Regulation Review Subcommittee approves a
10 motion that the deficiency has been corrected and that the administrative
11 regulation should not be considered deficient.
- 12 (c) A filed administrative regulation found deficient by a legislative
13 committee~~[subcommittee]~~ with subject matter jurisdiction shall not be
14 considered deficient if the legislative committee~~[subcommittee]~~:
- 15 1. Reconsiders the administrative regulation and its finding of deficiency;
16 and
- 17 2. Approves a motion that the administrative regulation is not deficient.
- 18 (d) If an amendment to an effective administrative regulation is going through the
19 KRS Chapter 13A promulgation process and is found deficient by a legislative
20 committee~~[subcommittee]~~, the administrative regulation shall not be
21 considered deficient if the:
- 22 1. Administrative regulation was found deficient due to the amendment;
23 2. Promulgating administrative body has withdrawn the proposed
24 amendment of the existing administrative regulation; and
- 25 3. Regulations compiler has not received the Governor's determination
26 pursuant to KRS 13A.330.
- 27 (2) If an effective administrative regulation is found deficient by a legislative

1 committee[subcommittee], the administrative regulation shall not be considered
2 deficient if the legislative committee[subcommittee]:

- 3 (a) Reconsiders the administrative regulation and its finding of deficiency; and
4 (b) Approves a motion that the administrative regulation is not deficient.

5 (3) (a) If an administrative regulation has been found deficient by a legislative
6 committee[subcommittee], the regulations compiler shall add the following
7 notice to the administrative regulation: "This administrative regulation was
8 found deficient by the [name of legislative committee[subcommittee]] on
9 [date]." This notice shall be the last section of the administrative regulation.

10 (b) If an administrative regulation has been found deficient by a legislative
11 committee[subcommittee], subsequent amendments of that administrative
12 regulation filed with the Commission shall contain the notice provided in
13 paragraph (a) of this subsection.

14 (c) If an administrative regulation that has been found deficient by a legislative
15 committee[subcommittee] has subsequently been determined not to be
16 deficient under the provisions of this section, the regulations compiler shall
17 delete the notice required by paragraph (a) of this subsection.

18 ➔Section 20. KRS 13A.336 is amended to read as follows:

19 (1) (a) After the last regularly scheduled meeting of the Administrative Regulation
20 Review Subcommittee in a calendar year, but by the thirty-first day of
21 December of that calendar year, the staff of the Administrative Regulation
22 Review Subcommittee shall submit a report to the co-chairs of that
23 subcommittee regarding administrative regulations that were found deficient
24 by any legislative committee[subcommittee] of the Commission during that
25 calendar year.

26 (b) The report in paragraph (a) of this subsection shall contain:

- 27 1. Effective administrative regulations that were found deficient; and

- 1 2. Administrative regulations filed with the Commission that were found
2 deficient.
- 3 (2) The report shall not contain any administrative regulation that was found deficient
4 and:
- 5 (a) Has been withdrawn; or
6 (b) Is no longer considered deficient under KRS 13A.335.
- 7 (3) The report shall contain at least the following information for each administrative
8 regulation in the report:
- 9 (a) Administrative regulation number and title;
10 (b) Name of the promulgating agency;
11 (c) Date of deficiency determination;
12 (d) Name of the legislative committee~~[subcommittee]~~ that made the deficiency
13 determination;
14 (e) Effective date, if it is in effect;
15 (f) The finding of deficiency and any other findings, recommendations, or
16 comments sent to the Governor; and
17 (g) If applicable under KRS 13A.330, the Governor's determination regarding the
18 deficiency, if received by the Commission.
- 19 (4) The first page of the report required by subsection (1) of this section shall contain
20 the following text, in fourteen (14) point font or larger:
- 21 "To ratify the deficiency findings listed in this report, a co-chair or other legislator
22 may request that Legislative Research Commission staff prepare a bill:
- 23 (a) Declaring that one (1) or more administrative regulations listed in the report
24 shall be void; or
25 (b) Amending the relevant subject matter statutes in conformity with the findings
26 of deficiency."
- 27 ➔Section 21. KRS 13A.338 is amended to read as follows:

- 1 (1) The General Assembly finds that certain administrative regulations as evidenced by
 2 the records of the Legislative Research Commission, including but not limited to
 3 the Kentucky Administrative Regulations Service and the Administrative Register
 4 of Kentucky, were found deficient but became effective notwithstanding the finding
 5 of deficiency, pursuant to KRS 13A.330~~[(5)(a)2. or 13A.331(5)(a)2.]~~, on or after
 6 March 27, 2002, and before March 16, 2004.
- 7 (2) Contrary provisions of any section of the Kentucky Revised Statutes
 8 notwithstanding, each administrative regulation referenced in subsection (1) of this
 9 section shall be null, void, and unenforceable as of March 16, 2004.
- 10 (3) Contrary provisions of any section of the Kentucky Revised Statutes
 11 notwithstanding, the administrative body shall be prohibited from promulgating an
 12 administrative regulation that is identical to, or substantially the same as, any of the
 13 administrative regulations referenced in subsection (1) of this section for a period
 14 beginning on March 16, 2004, and concluding on June 1, 2005.
- 15 (4) A list of the administrative regulations referenced in subsection (1) of this section
 16 shall be available to the public, in the office of the Legislative Research
 17 Commission's regulations compiler.

18 ➔Section 22. KRS 214.020 is amended to read as follows:

19 **(1)** When the Cabinet for Health and Family Services **determines**~~[believes]~~ that
 20 **an**~~[there is a probability that any]~~ infectious or contagious disease will invade this
 21 state, it shall take **necessary**~~[such]~~ action and **promulgate administrative**~~[adopt and~~
 22 ~~enforce such rules and]~~ regulations **under KRS Chapter 13A to prevent**~~[as it deems~~
 23 ~~efficient in preventing]~~ the introduction or spread of such infectious or contagious
 24 disease or diseases within this state~~[, and to accomplish these objects shall establish~~
 25 ~~and strictly maintain quarantine and isolation at such places as it deems proper]~~.

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

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

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

4 **a. Elementary, secondary, or postsecondary educational**
 5 **institutions;**

6 **b. Private businesses or non-profit organizations;**

7 **c. Political, religious, or social gatherings;**

8 **d. Places of worship; or**

9 **e. Local governments; or**

10 **2. Imposes mandatory quarantine or isolation requirements;**

11 **(b) Include the penalty, appeal, and due process rights for violations of the**
 12 **administrative regulation; and**

13 **(c) Contain the public hearing and written comment period notice required by**
 14 **Section 9 of this Act.**

15 ➔Section 23. KRS 214.990 is amended to read as follows:

16 (1) Every head of a family who willfully fails or refuses and every physician who fails
 17 or refuses to comply with KRS 214.010 shall be guilty of a violation for each day he
 18 neglects or refuses to report. Repeated failure to report is sufficient cause for the
 19 revocation of a physician's certificate to practice medicine in this state.

20 (2) Any ~~owner or~~ person ~~having charge of any public or private conveyance,~~
 21 ~~including watercraft,~~ who **willfully violates any administrative regulation**
 22 **promulgated under KRS Chapter 13A**~~[refuses to obey the rules and regulations~~
 23 ~~made]~~ by the Cabinet for Health and Family Services under KRS 214.020 shall be
 24 guilty of a Class B misdemeanor.

25 (3) Any physician or other person legally permitted to engage in attendance upon a
 26 pregnant woman during pregnancy or at delivery who fails to exercise due diligence
 27 in complying with KRS 214.160 and 214.170 shall be guilty of a violation.

1 (4) Any person who violates any of the provisions of KRS 214.280 to 214.310 shall be
2 guilty of a Class A misdemeanor.

3 (5) Any person who violates any provision of KRS 214.034 or KRS 158.035 shall be
4 guilty of a Class B misdemeanor.

5 (6) Any person who violates any provision of KRS 214.420 shall be guilty of a
6 violation. Each violation shall constitute a separate offense.

7 (7) Any person who knowingly violates any provision of KRS 214.452 to 214.466 shall
8 be guilty of a Class D felony. Each violation shall constitute a separate offense.

9 ➔Section 24. If any provision of this Act or the application thereof to any person
10 or circumstance is held invalid, the invalidity shall not affect other provisions or
11 applications of the Act that can be given effect without the invalid provision or
12 application, and to this end the provisions of this Act are severable.

13 ➔Section 25. Whereas, ensuring that Kentucky citizens have adequate access to
14 the administrative regulation process is a compelling and immediate need, an emergency
15 is declared to exist, and this Act takes effect upon its passage and approval by the
16 Governor or upon its otherwise becoming a law.

EXHIBIT F



COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

Andy Beshear
GOVERNOR

Capitol Building, Suite 100
700 Capitol Avenue
Frankfort, KY 40601
(502) 564-2611
Fax: (502) 564-2517

VETO MESSAGE FROM THE
GOVERNOR OF THE COMMONWEALTH OF KENTUCKY
REGARDING SENATE BILL 1 OF THE
2021 REGULAR SESSION

I, Andy Beshear, Governor of the Commonwealth of Kentucky, pursuant to the authority granted under section 88 of the Kentucky Constitution, do hereby veto the following:

Senate Bill 1 of the 2021 Regular Session of the General Assembly in its entirety.

I am vetoing Senate Bill 1 because it unconstitutionally interferes with the Governor's power and responsibility to confront emergencies. It would severely limit Kentucky's ability to respond to emergencies like this pandemic, putting lives at risk.

Senate Bill 1 attempts to limit all emergency orders that restrict certain in-person activities to thirty days, unless the General Assembly approves the extension. This limitation would prevent state government from responding to future disease outbreaks and many other emergencies unless the General Assembly is called to special session and passes approving legislation within thirty days.

That is not workable. Emergencies call for flexibility, which is why the power to respond to emergencies rests with the executive branch. It is also not constitutional. The Governor is charged with responding to emergencies under Kentucky's Constitution. By attempting to limit the duration of emergencies, the General Assembly is intruding on the Governor's executive power in violation of the Constitution.

Senate Bill 1 also violates the Constitution by allowing the General Assembly to exercise power outside of session and forcing the Governor to call it back into session in the event of an emergency. Our General Assembly is a part-time, citizen legislature. When it is out of session, it ceases to exist. The Framers of our Constitution wisely imposed these limits to check legislative abuses. This bill attempts to circumvent those limits by forcing the Governor to call the General Assembly into session in order to respond to emergencies. The General Assembly cannot try to accomplish by statute that which the Constitution prohibits.

I am also vetoing Senate Bill 1 because it limits all other emergency orders to thirty days unless a local judge-executive requests an extension. As this pandemic has shown, and as the Kentucky Supreme Court has recognized, a coordinated statewide response to certain emergencies is

essential. Natural emergencies do not respect county lines. Moreover, this provision is unconstitutional. The Governor exercises the supreme executive power of the Commonwealth. That power cannot be subject to the approval of local officials.

Finally, Senate Bill 1 is unconstitutional because it provides an inferior executive officer – the Attorney General – the power to approve or disapprove the Governor’s decision to suspend laws. The supreme executive power rests in the Governor. The Attorney General may advise the Governor, but he cannot override the Governor’s decision to suspend laws if needed in response to an emergency.

This the 19th day of January, 2021.



Andy Beshear
Governor



COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

Andy Beshear
GOVERNOR

Capitol Building, Suite 100
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VETO MESSAGE FROM THE
GOVERNOR OF THE COMMONWEALTH OF KENTUCKY
REGARDING HOUSE BILL 1 OF THE
2021 REGULAR SESSION

I, Andy Beshear, Governor of the Commonwealth of Kentucky, pursuant to the authority granted under section 88 of the Kentucky Constitution, do hereby veto the following:

House Bill 1 of the 2021 Regular Session of the General Assembly in its entirety.

I am vetoing House Bill 1 because it is unconstitutional, impractical, and would severely hamper the serious and significant steps needed to protect lives and keep our workforce healthy and thereby our economy open.

House Bill 1 attempts to remove the authority from the Executive Branch to respond to a worldwide health pandemic at a time when the state is experiencing some of its highest cases, deaths, and hospitalizations. A mutated strain of the virus is spreading more aggressively than at any time in the pandemic. Areas of the country that have not acted quickly and with flexibility are seeing devastating results, with Los Angeles County out of hospital beds, unable to make ambulance runs, and now storing bodies in as many as 88 freezer trucks.

It is at this time that House Bill 1 attempts to remove authority from the Governor and instead write "guidelines issued by the Center for Disease Control and Prevention" into law as enforceable regulation. Attached to this statement is a letter from Dr. Redfield, the Director of the CDC. In no uncertain terms, he states CDC Guidelines are not "meant to be prescriptive or interpreted as standards that can be regulated." Instead, Dr. Redfield says they are merely guidance meant to be considered for state or local emergency orders.

Not only are CDC Guidelines not written for or intended to be written into law, they can be contradictory, vague, and in some instances more restrictive than current state rules. For a single business, three or more sets of guidance may be applicable. One set of guidance could be read to prohibit all "group events, gatherings, or meetings where social distancing ... between people who do not live in the same household cannot be maintained" Another provision appears to require businesses to implement paid leave. A third may allow restaurants to be open, but to prohibit any customers.

House Bill 1 is further unconstitutional as the Kentucky Constitution tasks the Governor with responding to an emergency. By vesting the “supreme executive power” in the Governor and making him the Commander in Chief, while expressly limiting the General Assembly annual part-time meetings, our Constitution “tilts toward emergency powers in the executive branch.” Beshear v. Acree, --- S.W.3d ---, No. 2020-SC-0313-OA, 2020 WL 6736090, at *1 (Ky. Nov. 12, 2020).

Finally, if responding to an emergency is – in any part – legislative, House Bill 1 is unconstitutional for vagueness, and for attempting to delegate rule making authority to chambers of commerce and trade organizations.

This the 19th day of January, 2021.



Andy Beshear
Governor



COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

Andy Beshear
GOVERNOR

Capitol Building, Suite 100
700 Capitol Avenue
Frankfort, KY 40601
(502) 564-2611
Fax: (502) 564-2517

VETO MESSAGE FROM THE
GOVERNOR OF THE COMMONWEALTH OF KENTUCKY
REGARDING SENATE BILL 2 OF THE
2021 REGULAR SESSION

I, Andy Beshear, Governor of the Commonwealth of Kentucky, pursuant to the authority granted under section 88 of the Kentucky Constitution, do hereby veto the following:

Senate Bill 2 of the 2021 Regular Session of the General Assembly in its entirety.

I am vetoing Senate Bill 2 because it is unconstitutional. Senate Bill 2 attempts to authorize binding decisions by interim legislative committees by removing the word "nonbinding" from the language of the current provision of KRS Chapter 13A related to the interim Administrative Regulation Review Subcommittee. Senate Bill 2 is further unconstitutional because it attempts to allow interim legislative committees to amend regulations with the force of law. Senate Bill 2 is also unconstitutional in attempting to limit the authority of the Cabinet for Health and Family Services to promulgate any administrative regulations under KRS Chapter 214 to address infectious and contagious diseases in the Commonwealth by making any such administrative regulations effective for only 30 days as to certain entities. Senate Bill 2 violates the limitations placed on the General Assembly under the Kentucky Constitution and Legislative Research Commission, By and Through Joseph W. Prather v. Brown, 664 S.W.2d 907 (Ky. 1984), and violates the separation of powers under Sections 27 and 28 of the Kentucky Constitution and Brown v. Barkley, 628 S.W.2d 616 (Ky. 1982).

This the 19th day of January, 2021.

Andy Beshear
Governor

EXHIBIT G



COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

Andy Beshear
GOVERNOR

Capitol Building, Suite 100
700 Capitol Avenue
Frankfort, KY 40601
(502) 564-2611
Fax: (502) 564-2517

January 20, 2021

VIA HAND-DELIVERY

Robert Stivers
President of the Senate
702 Capital Avenue
Annex Room 236
Frankfort, KY 40601

David Osborne
Speaker of the House
702 Capital Avenue
Annex Room 332
Frankfort, KY 40601

Dear President Stivers and Speaker Osborne:

I am writing pursuant to my recent veto of several bills from the 2021 Session of the General Assembly. This letter is an attempt to provide a potential framework for discussion and compromise.

The first area I would like to address are the three bills that would remove or curtail authority for a governor to respond to the Covid-19 pandemic or a future emergency that exceeds 30 days. My strong preference is for any legislation to wait until Kentucky has emerged from this deadly pandemic. Kentucky has fared better than most of the nation, and better than all of our neighboring states in addressing this pandemic. Adjusted for population, we have lost half the number of lives as Tennessee. Further, we have been ranked in the top ten states in the country for distribution of vaccines. This ranking occurred before last week, where we vaccinated 83,212 Kentuckians, well exceeding the supply of doses the federal government provided that week. To “mess” with emergency powers that have helped us achieve this relative success would be like legislating troop movements and tactics in the middle of a battle. The inevitable result is less success and more casualties.

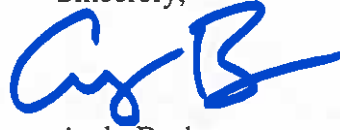
If the General Assembly is determined – even in the midst of a deadly pandemic and in spite of our comparatively successful response – on passing legislation, then I recommend we discuss narrowly tailoring that legislation to address concerns that you raise. First, you have raised concerns over the length of an emergency. While I believe the emergency itself – here, a deadly virus – sets the timeline, I am open to discussing how to potentially index the length of a state declaration in response to a pandemic or extended emergency to the length of the applicable federal declaration with some grace period, perhaps 60 days. The Trump Administration has issued a federal declaration in response to the coronavirus pandemic that is still in effect. This shows that the length of the current state declaration is warranted.

Second, you have raised concerns about “consultation” with the General Assembly. If the true goal is consultation – and not control – then formalizing and providing a structure for such consultation should be the goal of any legislation. I suggest we consider a bill that creates an obligation during a state of an emergency for the Governor’s administration to report to a statutorily created committee monthly on the state of emergency and the steps employed to address it. This would create formalized consultation in a structural and transparent way where legislative committee members could express support or concern to both the administration and the public.

The second area I would like to address is the vetoed legislation that attempts to prohibit a governor from not only reorganizing state boards, but also cabinets and offices that he directly oversees. The legislation creates a number of issues, from preventing the faithful execution of the law if necessary structures are not in place, to disqualifying Kentucky from federal grants that routinely require new or changed offices or commissions. I suggest a more tailored approach that would specifically prohibit the reorganization of certain, specific state boards that need protection and insulation based on their functions. I would be more than willing to discuss what those boards should be, again in an attempt to reach a compromise.

I believe these suggestions create a reasonable framework around which to have a conversation. Thank you.

Sincerely,



Andy Beshear
Governor

EXHIBIT H



KENTUCKY GENERAL ASSEMBLY
State Capitol Frankfort, Kentucky 40601 502-564-8100

February 1, 2021

The Honorable Andy Beshear
Governor
Capitol Building, Suite 100
Frankfort, KY 40601

Dear Governor Beshear:

We received your letter dated January 20, 2021, and welcome your interest in discussing possible changes to the bills passed with the overwhelming support of both chambers of the General Assembly. The amount of work on the budget and other legislation that must be addressed in this short session will make such discussions a challenge, but we are certainly willing to engage with you to achieve the best, long-term public policy outcomes for all Kentuckians.

We recognize there has been communication between your administration and the legislature, but there is a critical difference between one-sided communication and the collaboration our constituents expect from their elected officials. Actively discussing policy likely would have lessened the angst of so many Kentuckians over these last months, made the work you have done less controversial, and provided comfort to everyone in a year that has been so highly charged for a variety of reasons.

Given our time constraints, we are compelled to proceed with the veto override votes this week. Regardless of the outcome of those votes, we will be happy to sit down with you as soon as schedules allow and talk about what modifications might improve the legislation and its application to the ongoing pandemic. This can be a valuable opportunity to engage productively in addressing the issues facing our Commonwealth.

Sincerely,

Handwritten signature of Robert Stivers in black ink.

Robert Stivers
President of the Senate

Handwritten signature of David Osborne in black ink.

David Osborne
Speaker of the House

EXHIBIT I



KENTUCKY EMERGENCY MANAGEMENT

Andy Beshear
Governor

Boone National Guard Center
100 Minuteman Parkway
Frankfort, KY 40601-6168

Michael E. Dossett
Director

February 2, 2021

VIA HAND-DELIVERY

Robert Stivers
President of the Senate
702 Capital Avenue
Annex Room 319
Frankfort, KY 40601

David Osborne
Speaker of the House
702 Capital Avenue
Annex Room 332
Frankfort, KY 40601

Dear President Stivers and Speaker Osborne:

I write concerning the potential negative impact that may limit an emergency declaration to 30 days could have on Kentucky's ability to receive federal emergency funding.

Pursuant to the Stafford Act, declaration application deadlines and coverage from the Federal Emergency Management Agency (FEMA) are both triggered and may be limited in duration with a governor's declaration of a state of emergency when determining the disaster's incident period. Since 2008, Kentucky has received over \$1.2 billion from FEMA pursuant to emergency declarations by the governor. Five of those post-2008 emergency declarations lasted over 30 days. If these five emergency declarations had been limited to 30 days while the emergency continued, Kentucky would have failed to receive federal dollars to which it was otherwise entitled.

Artificially limiting an emergency declaration to a predetermined period of time can seriously limit the amount of federal funding available for any days in which the Commonwealth incurs emergency costs after the state of emergency ends that would be ineligible for federal funding. A limitation on the length of declarations could also reduce the percentage of federal funds allocated and the amount of time available to the Commonwealth to file claim reports. The ultimate burden of reduced FEMA recovery funding will weigh heaviest on impacted communities.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Dossett".

Michael Dossett, Director
Kentucky Emergency Management

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO. 21-CI-_____

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

PLAINTIFFS

v.

DAVID W. OSBORNE, II, in his official capacity as
Speaker of the Kentucky House of Representatives, *et al.*

DEFENDANTS

MOTION FOR LEAVE TO EXCEED THE PAGE LIMIT

Plaintiffs Andy Beshear, in his official capacity as Governor of the Commonwealth of Kentucky, and Eric Friedlander, in his official capacity as Secretary of the Cabinet for Health and Family Services, by and through counsel, hereby move this Court for leave to exceed the twenty-page limit for motions in this Court with respect to the contemporaneously filed Motion for a Temporary Restraining Order and Temporary Injunction. The motion addresses three bills enacted by the General Assembly on February 2, 2021 by overriding the Governor's veto, and addresses violations of over ten sections of the Kentucky Constitution. Movants request leave to file the Motion and accompanying memoranda to not exceed sixty pages in length.

Respectfully submitted,

/s/Amy D. Cabbage
Amy D. Cabbage
General Counsel
S. Travis Mayo
Chief Deputy General Counsel
Taylor Payne
Deputy General Counsel
Marc Farris
Deputy General Counsel
Laura C. Tipton
Deputy General Counsel
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laurac.tipton@ky.gov

/s/ Wesley W. Duke (w/ permission)

Wesley W. Duke
Executive Director
Office of Legal Services
LeeAnne Applegate
Deputy General Counsel
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275 East Main Street 5W-A
Frankfort, KY 40621
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WesleyW.Duke@ky.gov
LeeAnne.Applegate@ky.gov

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, undersigned counsel served the foregoing Motion to Exceed the Page Limit via the Court's electronic filing system and by sending the same to:

Robert Bertram Stivers, II
702 Capitol Avenue
Annex Room 332
Frankfort, KY 40601

David W. Osborne
702 Capitol Avenue
Annex Room 236
Frankfort, KY 40601

Legislative Research Commission
700 Capitol Avenue
Room 300
Frankfort, KY 40601

Daniel Cameron
Office of the Attorney General
The Capitol Building
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

/s/ Amy D. Cabbage
Amy D. Cabbage

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION ____
CIVIL ACTION NO. 21-CI-_____

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

PLAINTIFFS

v.

DAVID W. OSBORNE, II, in his official capacity as
Speaker of the Kentucky House of Representatives, *et al.*

DEFENDANTS

PROPOSED ORDER

The parties being heard and this Court being otherwise sufficiently advised, the
Plaintiffs' Motion to Exceed the Page Limit is hereby granted.

So ordered this _____ day of _____, 2021.

Judge
Franklin Circuit Court

Distributed to:

Counsel of Record

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION ____
CIVIL ACTION NO. 21-CI-_____

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

PLAINTIFFS

v.

DAVID W. OSBORNE, II, in his official capacity as
Speaker of the Kentucky House of Representatives, *et al.*

DEFENDANTS

**MOTION FOR A
TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**

Plaintiffs Andy Beshear, in his official capacity as Governor of the Commonwealth of Kentucky, and Eric Friedlander, in his official capacity as Secretary of the the Cabinet for Health and Family Services, by and through counsel, hereby move this Court for a temporary restraining order and temporary injunction pursuant to CR 65.03 and 65.04. Undersigned counsel will provide service to last known counsel for Defendants by email contemporaneous with filing and will effectuate formal service by hand delivery on February 3, 2021. A memorandum in support of the motion, a separate motion to exceed page limits, and proposed orders are attached.

NOTICE

Please take notice that this motion will be brought for hearing on February 3, 2021 at 9:00 a.m. at the Franklin Circuit Court, Division I, 222 St. Clair Street, Frankfort, Kentucky 40601, or at the earliest convenience of the Court, by Zoom at:
<https://us02web.zoom.us/j/5516924938?pwd=ZGZoMTJPRGFvVk0rUC9RM1A1ZkYrQT09>.

Respectfully submitted,

/s/ Amy D. Cabbage

Amy D. Cabbage
General Counsel
S. Travis Mayo
Chief Deputy General Counsel
Taylor Payne
Deputy General Counsel
Marc Farris
Deputy General Counsel
Laura C. Tipton
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/s/ Wesley W. Duke (w/ permission)

Wesley W. Duke
Executive Director
Office of Legal Services
LeeAnne Applegate
Deputy General Counsel
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Frankfort, KY 40621
(502) 564-7042
WesleyW.Duke@ky.gov
LeeAnne.Applegate@ky.gov

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, undersigned counsel served the foregoing Motion for Temporary Restraining Order and Temporary Injunction via the Court's electronic filing system and by sending the same to:

Robert Bertram Stivers, II
702 Capitol Avenue
Annex Room 332
Frankfort, KY 40601

David W. Osborne
702 Capitol Avenue
Annex Room 236
Frankfort, KY 40601

Legislative Research Commission
700 Capitol Avenue
Room 300
Frankfort, KY 40601

Daniel Cameron
Office of the Attorney General
The Capitol Building
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

/s/ Amy D. Cabbage
Amy D. Cabbage

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CIVIL ACTION NO. 21-CI-_____

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

PLAINTIFFS

v.

DAVID W. OSBORNE, in his official capacity as
Speaker of the Kentucky House of Representatives, *et al.*

DEFENDANTS

**MEMORANDUM IN SUPPORT OF A
TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**

Plaintiffs Andy Beshear, in his official capacity as Governor of the Commonwealth of Kentucky, and Eric Friedlander, in his official capacity as Secretary of the Cabinet for Health and Family Services (“CHFS”), by and through counsel, submit this memorandum in support of their motion for a temporary restraining order and a temporary injunction.

INTRODUCTION

Both the United States and the Commonwealth of Kentucky remain in a life-and-death battle against COVID-19 – the gravest threat to public health in over a century. To date, the pandemic has killed more than 441,000 Americans, meaning the virus has taken more lives than World War I, World War II, or the Korean or Vietnam Wars. Recognizing this threat, Governor Beshear has taken legal and appropriate action. Indeed, the Supreme Court of Kentucky has already weighed in, unanimously upholding the measures he has taken. *Beshear v. Acree*, No. 2020-SC-0313-OA, 2020 WL 6736090 (Ky. Nov. 12, 2020). In its Opinion, the Court concluded that Governor Beshear’s actions were not only legal, but “*necessary* to slow the spread of COVID-19 and protect the health and safety of all Kentucky citizens.” *Id.* at *37 (emphasis added).

These actions have worked. Adjusted for population, Kentucky has lost fewer lives than its neighbors. It is a national leader in testing and a top 10 state for vaccine distribution.

The powers used by Governor Beshear to achieve this success – and save thousands of lives – are what the General Assembly seeks to strip and/or assume through Senate Bills (“SB”) 1 and 2 and House Bill (“HB”) 1. In particular, should HB 1 become law, Governor Beshear’s effective set of rules and regulations would be replaced by vague, conflicting guidance from the Centers for Disease Control and Prevention (“CDC”). The CDC categorically rejected this move, stating its guidance is ill-suited to and was never meant for this purpose. For instance, under that CDC guidance, HB 1 could be read to eliminate any and all capacity restrictions on everything from bars to indoor stadiums, and to render masking *voluntary*. HB 1 can and would create the super-spreader events the Commonwealth has fought to avoid. Conversely, the guidance could also be read to prohibit crowds of any size anywhere, *i.e.* prohibiting Kentuckians from entering restaurants, retail, or other businesses.

Moreover, through SB 1 and SB 2, the General Assembly and local governments could modify or terminate executive orders issued by the Governor to address an emergency. Not only does this violate the Constitution, it would also prevent the intent and purpose of comprehensive statewide action necessary to defeat COVID-19 or similar threats that impact the entire the state.

This Court should grant the Governor’s motion. The legislation at issue violates the Kentucky Constitution’s separation of powers, its limitations on the subversion of the executive power, its explicit limit on the number of days the General Assembly may convene, and its mandate that the Governor be the sole arbiter of when to call an extraordinary session. The legislation is further void for vagueness and constitutes special legislation. Alternatively, it violates the nondelegation doctrine.

FACTUAL BACKGROUND

I. COVID-19 Is A Highly Infectious, Deadly Virus.

As described by the Kentucky Supreme Court:

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. 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. The CDC identified the potential public health threat posed by COVID-19 nationally and world-wide as “high”.

Beshear v. Acree, 2020 WL 6736090, at *3.

COVID-19 also spreads through airborne transmission, particularly in poorly ventilated indoor spaces. [Verified Complaint (“VC”) ¶ 3.] As the disease has progressed, studies have shown that places where people congregate indoors for extended periods of time are the locations most associated with spread, especially if people do not wear masks or if they remove their masks while indoors. These outbreaks can race through a community, affecting people who did not choose to assume any risk by engaging in activities posing a higher risk of infection. While it is not possible to entirely prevent the spread of COVID-19, public health interventions can substantially reduce transmission rates. [VC ¶¶ 2-3; 12-14.]

As with other viruses, COVID-19 has mutated and multiple variants of COVID-19 have recently been documented. Three of these variants raise serious concern, as they spread more aggressively than the traditional strain that the United States has thus-far battled.¹ At least one

¹ New COVID-19 Variants, Centers for Disease Control and Prevention, updated Jan. 9, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html> (last visited Jan. 31, 2021).

of the new variants was identified in Kentucky. [VC ¶ 4.] The concerning South African variant has also now reached the United States.²

To date, COVID-19 has caused or contributed to the deaths of 2,239,000 people worldwide, 441,000 in the United States, and 3,780 in Kentucky. It is now the third highest cause of death in the United States, behind only heart disease and cancer, and outpacing accidents, chronic respiratory disease, stroke, and Alzheimer’s disease.³

Even though vaccines are now available, the quantities remain limited. Public health authorities have therefore warned that the coming months will be deadly, forecasting 200,000 additional American deaths by May 1, an almost 50% increase to the already tragic toll.⁴ Because of this concern – and the rise of the new variants – public health experts agree that strong state mitigation efforts are critical. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Disease, stated that while the vaccine is cause for celebration, active public health measures must continue: “The eventual vaccine is ‘not going to do it alone, though,’ he said. ‘That’s the important point. ***This should not be a signal to pull back on the public health measures that we must continue to implement.***”⁵

² South African COVID-19 Variant Detected In US, NPR, updated January 29, 2021, available at: <https://www.npr.org/2021/01/29/961970029/south-african-covid-19-variant-detected-in-u-s> (last visited Feb. 1, 2021).

³ Jacqueline Howard, Covid-19 likely ranks as the third leading cause of death in the US in 2020, CDC statisticians say, CNN (Jan. 5, 2021), available at <https://www.cnn.com/2021/01/05/health/covid-third-leading-cause-of-death-cdc-wellness/index.html> (last visited Jan. 30, 2021).

⁴ Maggie Fox, New variants could add up to 85,000 Covid-19 deaths to US toll by May, influential model forecasts, CNN Health, Jan. 29, 2021, available at https://edition.cnn.com/world/live-news/coronavirus-pandemic-vaccine-updates-01-29-21/h_5c168180a4c46f9c0203abb55997ce08 (last visited Feb. 2, 2021).

⁵ James Doubek, Fauci: Vaccine Results Are ‘Important Advance,’ But Virus Precautions Are Still Vital, NPR, Nov. 17, 2020, available at <https://www.npr.org/2020/11/17/935778145/fauci-vaccine-results-are-important-advance-but-virus-precautions-are-still-vita> (last visited Jan. 28, 2020).

II. Governor Beshear Has Aggressively And Effectively Fought The Virus.

Faced with this pandemic, Governor Beshear has taken effective measures – through his emergency powers – to protect the citizens of the Commonwealth. In taking these measures, the Governor has followed the recommendations and guidance of state, national, and global experts, including those at the White House, the CDC, the World Health Organization, and the Kentucky Department for Public Health.

With the evolution of COVID-19 and our understanding of it, the Governor’s approach has evolved to a surgical and targeted approach based on expert advice, scientific studies, and real-time experience in fighting the virus. The current approach involves a calibrated assessment of the risks posed by specific activities, and implementation of tailored measures to mitigate those risks with specific characteristics of Kentucky in mind. [VC ¶¶ 8-10.] Notably, the White House recently “commended” the Governor for the widely-celebrated success of his “active measures.”⁶

Kentucky has fared better than other states, seeing fewer cases and significantly fewer deaths. Adjusted for population, Kentucky has lost less than two-thirds the number of lives as Tennessee, a state that refuses to impose a mask mandate.⁷ Kentucky has lost less than one-half the lives lost per capita in North or South Dakota, states that refused to enact any mitigation measures until they recorded the highest mortality rates in the world.⁸ The lesson is clear: when

⁶ *White House Coronavirus Task Force Report for Kentucky*, Kentucky Cabinet for Health and Human Services, Nov. 15, 2020), available at <https://dnks20yx11c2u.cloudfront.net/381d0fbb43b611527a8f1c329301ef51fd555fcf/Kentucky%20%2011.17.pdf> (last visited Jan. 28, 2021).

⁷ Compare 9,374 total deaths/137 per 100,000 in Tennessee with 3,910 total deaths/88 per 100,000 in Kentucky as of January 29, 2021. *See Coronavirus in the U.S.: Latest Map and Case Count*, NY Times (available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states>) (last visited Jan. 30, 2021).

⁸ *Id.*

a governor takes action, his or her state experiences fewer deaths. When a governor does not, the results are tragic.

While the Governor’s measures have worked, Kentucky is still experiencing some of the highest number of cases and deaths it has seen during the pandemic. On January 6, Kentucky reported a record high 5,472 new cases of COVID-19, 670 of which were for people ages 18 and under, and 34 new deaths.⁹ On that day, 1,778 Kentuckians were hospitalized for COVID-19, with 428 patients in the intensive care unit and 244 fighting for their lives on ventilators.¹⁰ The state’s positivity rate increased to 12.34% on January 14.¹¹ Kentucky reported a record number of new deaths, 69, on January 28, 2021.¹² In late December, after the Governor’s efforts and Kentuckians’ sacrifices, the positivity rate had dropped to below eight percent (8%).¹³ As of February 1, 2021, all but 12 of Kentucky’s 120 counties were in the “red zone” based on average daily cases per 100,000 population over the prior seven days.¹⁴ [VC ¶¶ 12-13.]

III. The Commonwealth Has Considered Guidance From The CDC, Which The Organization Insists Is Advice And Not Regulation.

During the COVID-19 global pandemic, the CDC – organized under the U.S. Department for Health and Human Services – has issued guidance and considerations for state and local health officials to evaluate when implementing measures to protect citizens. The CDC is clear that its guidance should not take the place of state rules or regulation. Indeed, many of its

⁹ KY COVID-19 Report, 06 JAN 21, available at <https://chfs.ky.gov/cvdaily/COVID19DailyReport010621.pdf> (last visited Feb. 2, 2021).

¹⁰ *Id.*

¹¹ KY COVID-19 Report, 14 JAN 21, available at <https://chfs.ky.gov/cvdaily/COVID19DailyReport011421.pdf> (last visited Feb. 2, 2021).

¹² KY COVID-19 Report, 28 JAN 21, available at <https://chfs.ky.gov/cvdaily/COVID19DailyReport012821.pdf> (last visited Feb. 2, 2021).

¹³ KY COVID-19 Report, 28 DEC 20, available at <https://chfs.ky.gov/cvdaily/COVID19DailyReport1228.pdf> (last visited Feb. 2, 2021).

¹⁴ Kentucky Coronavirus Monitoring, Feb. 1, 2021, available at <https://govstatus.egov.com/kycovid19> (last visited Jan. 14, 2021).

documents explicitly warn against their use as regulatory material. In its “Considerations for Events and Gatherings,” updated January 8, 2021, the CDC states, “Because COVID-19 virus circulation varies in communities, these considerations are meant to supplement – **not replace** – any state, local, territorial, or tribal health and safety laws, rules, and regulations with which gatherings must comply.”¹⁵ Guidance documents relating to schools and community based organizations contain the same statement and warning. *See also* CDC, Operating schools during COVID-19: CDC’s Considerations (updated Jan. 8, 2021)¹⁶; CDC, Considerations for Community-Based Organizations (updated Dec. 31, 2020)¹⁷ (noting same restriction on the guidance’s use as law, rule or regulation).

There is a very good reason the CDC takes this position. Its documents are numerous, overlapping, do not provide clear directives (because they are “advice”), and are primarily written in the terms of “should” instead of “shall” or “must.” Simply put, they were never meant to be regulation, and are therefore not written as such. For example, the most current guidance on events and gatherings gives no firm rules whatsoever; rather, the document simply labels activities as “lowest risk,” “more risk,” “higher risk,” and “highest risk.”¹⁸ [VC ¶¶ 14-15.]

The sheer volume of overlapping guidance documents also makes it difficult to determine what rules apply. The CDC’s webpages lists 175 COVID-19 guidance documents as of February

¹⁵ CDC, COVID-19, Considerations for Events and Gatherings, last updated Jan. 8, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> (last visited Jan. 28, 2021).

¹⁶ CDC, Operating schools during COVID-19: CDC’s Considerations, last updated Jan. 8, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html> (last visited Jan. 28, 2021).

¹⁷ CDC, Considerations for Community-Based Organizations, last updated Dec. 31, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/community-based.html> (last visited Jan. 28, 2021).

¹⁸ CDC, COVID-19, Considerations for Events and Gatherings, last updated Jan. 8, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> (last visited Jan. 28, 2021).

2, 2021, down from 180 on January 28. These guidance documents are continuously updated and changed with little-to-no public notice.¹⁹ [VC ¶ 16.]

To avoid any doubt, on January 11, 2021, the Director of the CDC advised the Governor by letter as follows:

I want to make it clear that ***CDC guidance should not be interpreted as regulation***; rather they are meant as recommendations, It should be used in consideration for specific state and/or local regulations, but this guidance is meant to be flexible and adaptable. It is not meant to be prescriptive or interpreted as standards that can be regulation.

CDC provides ongoing guidance to individuals, businesses, schools, and states. We have and will continue to be available for technical assistance and guidance, but we expect each jurisdiction to modify this guidance to meet their state’s needs.²⁰

[VC ¶ 17 and Exhibit B.]

While CDC and White House Coronavirus Task Force²¹ recommendations are helpful – even vital – their very nature as “guidance” can lead to conflicting interpretations. Multiple guidance documents can apply to a single type of business. Food service providers could conceivably be subject to, among others, the Considerations for Events and Gatherings,²² the Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Business, Schools, and Homes,²³ the Guidance for Businesses and Employers Responding to Coronavirus Disease 2019

¹⁹ CDC, COVID-19 Guidance Documents, updated Jan. 28, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc> (last visited Jan. 28, 2021).

²⁰ Letter from Robert R. Redfield, MD to Governor Andy Beshear, Jan. 11, 2021 [VC Exhibit B].

²¹ Along with the CDC, the White House Coronavirus Task Force, within the federal executive branch, issues guidance and recommendations, and issues weekly state reports that include recommendations for other states. For example, the most recent White House Coronavirus Task Force State Report for Kentucky includes recommendations and information regarding states from California across the Sunbelt and into the Southeast, Mid-Atlantic and Northeast.

²² *Id.*

²³ CDC, Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes, updated Jan. 5, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html> (last visited Jan. 28, 2021).

(COVID-19),²⁴ the Considerations for Restaurant and Bar Operators,²⁵ and the guidance on Personal and Social Activities.²⁶

Even if a business can readily identify all potentially applicable guidance, they can be difficult to harmonize and interpret. The Considerations for Restaurant and Bar Operators can be interpreted to require limiting food service to drive-through, delivery, take-out, and curbside pickup, or allowing on-site dining with indoor seating at no reduced capacity or even social distancing.²⁷ Likewise, the guidance on Personal and Social Activities could be interpreted to require take-out only if there is any kind of a “crowd,” which is undefined, both indoors and outdoors.²⁸ [VC ¶¶ 18-19.]

IV. The Federal Government Agrees That The Virus – And Thus The State Of Emergency – Has Persisted For 13 Months And Is Ongoing.

On March 6, 2020, Governor Beshear issued the Commonwealth’s state of emergency related to COVID-19 and activated the Commonwealth’s Emergency Operations Center upon the first confirmed diagnosis of COVID-19 in Kentucky via Executive Order 2020-215.²⁹ The federal government has concurred in that ongoing declaration: President Donald Trump issued four separate declarations of a federal state of emergency related to COVID-19, declarations now-President Joe Biden has left undisturbed. President Trump and Health and Human Services

²⁴ CDC, Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), updated Jan. 4, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last visited Jan. 28, 2021).

²⁵ CDC, Considerations for Restaurant and Bar Operators, updated Dec. 16, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> (last visited Jan. 28, 2021).

²⁶ CDC, Personal and Social Activities, updated Jan. 6, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html> (last visited Jan. 28, 2021).

²⁷ CDC, Considerations for Restaurant and Bar Operators, updated Dec. 16, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> (last visited Jan. 28, 2021).

²⁸ CDC, Personal and Social Activities, updated Jan. 6, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html> (last visited Jan. 28, 2021).

²⁹ https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf

Secretary Alex Azar declared a public health emergency under the Public Health Service Act on Jan. 31, issued two national emergency declarations under both the Stafford Act and the National Emergencies Act (NEA) on March 13, ***declaring all 50 states, the District of Columbia, and five territories major disaster areas***, and invoked emergency powers via Executive Order under the Defense Production Act on March 18.³⁰ On March 19, Trump named the Federal Emergency Management Agency (FEMA) as the lead agency in the COVID-19 emergency response efforts, a designation previously held by the Department of Health and Human Services (HHS). [VC ¶ 6.] On January 7, 2021, Azar again renewed his determination that a public health emergency exists in the United States, a determination he first issued in January, 2020.³¹ On January 17, 2021, the White House Coronavirus Task Force warned in its State Report for Kentucky: ***“Overall, this fall and winter surge is more aggressive***, with more rapid community spread that will need to be continuously met with aggressive and escalating mitigation.”³²

Since his swearing-in on January 20, 2021, President Joe Biden has issued additional declarations, including an omnibus order on January 22, 2021, addressing COVID-19-related financial insecurity, food insecurity, veteran assistance, and intergovernmental coordination.³³

While some lament the length of the emergency, its reasonableness and necessity is shown by both the state and federal government’s recognition that the dire public health threat of COVID-19 persists.

³⁰ Federal Emergency Management Agency, COVID-19 Disaster Declarations, available at <https://www.fema.gov/disasters/coronavirus/disaster-declarations> (last visited Jan. 22, 2021).

³¹ U.S. Department of Health and Human Services, Renewal of Determination that a Public Health Emergency Exists, Jan. 7, 2021, available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-07Jan2021.aspx> (last visited Jan. 22, 2021).

³² White House Coronavirus State Report, Jan. 17, 2021, available at <https://chfs.ky.gov/agencies/dph/covid19/Kentucky01172021.pdf> (last visited Jan 31, 2021).

³³ Fact Sheet: President Biden’s New Executive Actions Deliver Economic Relief for American Families and Businesses Amid the COVID-19 Crises (Jan. 22, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/22/fact-sheet-president-bidens-new-executive-actions-deliver-economic-relief-for-american-families-and-businesses-amid-the-covid-19-crises/> (last visited Jan. 30, 2021).

V. During the Pandemic, The Executive Branch Has Updated And Consulted With The General Assembly Through Extensive Testimony At Formal Committee Hearings.

Governor Beshear’s administration has endeavored to keep the General Assembly and the public updated about the actions it has taken with regard to the COVID-19 emergency. Members of the Governor’s administration have appeared at the request of the General Assembly at over 40 committee hearings and spent more than 30 hours testifying under oath. Those testifying include Dr. Steven Stack, Commissioner of the Department for Public Health, who has testified a approximately 6 hours and Eric Friedlander, Secretary of the Cabinet for Health and Family Services, who has testified approximately 5 hours. In addition, the Governor has held regular, sometimes daily press conferences explaining all steps taken to combat the virus and the reasons behind them. The Commonwealth has further maintained a comprehensive website, kycovid19.ky.gov, with enormous amounts of data, including: daily and total cases, daily and total positivity rates, K-12 school case and quarantine information, testing rates and locations, and, now, vaccine rates and locations. The website also includes links to resources for the public, such as rental and utility assistance, current Healthy at Home guidance, and contact tracing information.

During COVID-19, both the public and the General Assembly have more information and data available to them than in any previous emergency in the state’s history. [VC ¶ 20.]

VI. Despite Kentucky’s Success, The General Assembly Now Attempts To Strip The Governor Of Authority, Replacing It With Vague CDC Guidelines, And Monthly Special Sessions.

Despite the Commonwealth’s success, the General Assembly now seeks to strip the Governor’s ability to fight COVID-19 and place any remaining authority under the supervision and control of the General Assembly. Through three bills passed on January 9, 2020 – and challenged here – they seek to transfer the Governor’s executive authority to the CDC, local

chambers of commerce, and to the General Assembly itself. They further seek to require monthly special sessions, and to empower interim committees of the General Assembly to make binding decisions and to alter and amend regulations, all while the General Assembly is not in session.

A. House Bill 1

HB 1 [VC Exhibit D], is entitled “An Act relating to reopening the economy in the Commonwealth of Kentucky in response to the state of emergency declared by the Governor of Kentucky beginning in March 2020 and continuing throughout the year of 2021 and declaring an emergency.” HB 1 attempts to abrogate the successful actions taken by the Governor to address the pandemic and to prevent him from taking similar, effective actions in the future..

Section 1 of HB 1 states that during the current state of emergency “... or any future state of emergency related to any virus or disease, ...” certain entities may remain open and be fully operational if they meet certain requirements of the bill. HB 1 applies to virtually any and all entities in the state, including businesses, for-profit or not-for-profit organizations, local governments, associations, and any school or school district, public, private, or religiously affiliated.

Under HB 1, these entities may remain open and be fully operational so long as they adopt an operating plan that:

1. Meets or exceeds all applicable guidance issued by the CDC or by the executive branch, whichever is least restrictive;
2. Details how the entity will foster the safety of employees, customers, attendees and patrons, including social distancing requirements; and
3. Is posted in a conspicuous place on the main entrance of the physical location of the entity, and on the website of the entity, if one exists.

HB 1 does not indicate whether the executive branch referenced in Section 1 is the state or federal executive branch. Nor does it define “guidance issued by the CDC,” or list which of the approximately 180 CDC guidance documents apply to any particular entity and whether the CDC’s frequently updates these 180 documents would create new and changing requirements on the Kentucky entities. It further attempts to put binding and legal rulemaking in the hands of local or state chambers of commerce, trade associations, or other “recognized affiliated organizations.” It is unclear if a business could operate if only one of these groups approves their plan, while the rest do not.

Section 1 of HB 1 also prohibits any state or local agency from enforcing restrictions related to the state of emergency impacting the ability of the entities listed in the section to remain open and fully operational for in-person services that exceed current applicable guidelines issued by the CDC or the executive branch, whichever is least restrictive. Again, the bill identifies neither the executive branch nor which of the 180 sets of CDC guidelines will apply. Though vague and ambiguous, HB 1 certainly attempts to override the Governor’s emergency response in favor of shifting guidelines and recommendations interpreted by the industry groups as approved by the General Assembly.

Section 2 of HB 1 serves as the bill’s emergency clause. If allowed to go into law, the Executive Branch will be unable to enforce the vast majority of the Governor’s COVID-19 measures, such as capacity limits for indoor venues. In the case of sporting arenas, this could mean large events with more than 20,000 people can immediately restart, notwithstanding the precarious state of the pandemic and the new, highly-transmissible variants. Based on at least some of the CDC guidance documents, masking would also immediately become “voluntary,”

something the White House Task Force has strongly condemned.³⁴ *See* Jan. 11, 2021 WH Report for Kentucky (... without uniform implementation of effective face masking (two or three ply and well-fitting) and strict physical distancing, epidemics could quickly worsen as more transmissible variants spread and become predominant.”)

On January 19, 2021, Governor Beshear vetoed HB 1. *See* Veto Message, HB 1, Jan. 19, 2021 [VC Exhibit F].

B. Senate Bill 1

SB 1 [VC Exhibit C] purports to amend provisions of KRS Chapter 39A to strip the Governor’s executive authority to respond to any emergency that exceeds 30 days. After 30 days, responding to the emergency becomes a legislative function where the General Assembly must be called in special session each month to approve, modify or terminate a responsive measure. In doing so, the bill attempts to provide an end run around Sections 55 and 80 of the Kentucky Constitution, extending the days the General Assembly convenes and/or forcing special sessions. If this provision had been in place from the beginning of the pandemic, the Governor would have been required to call the General Assembly into session 11 times for at least a total of 55, at an estimated minimum cost to the Commonwealth of over \$3,600,000.

In pertinent part, SB 1:

- Amends KRS 39A.090 to make any executive order, administrative regulation, or other directive issued under KRS Chapter 39A effective no longer than 30 days. SB 1, § 2.
- Allows other executive orders, administrative regulations, or other directives to exceed 30 days only if requested by a local government. *Id.*

³⁴ White House Coronavirus Task Force State Report, Jan. 11, 2021, available at <https://gscdn.govshare.site/381d0fbb43b611527a8f1c329301ef51fd555fcf/Kentucky.pdf> (last visited Jan. 31, 2021).

- Prevents the Governor from extending a state of emergency based on the “same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly.” *Id.*
- Grants the General Assembly the power to terminate a declaration of emergency “at any time.” *Id.*
- Waives the Commonwealth’s immunity for prospective equitable and declaratory relief during emergencies. *Id.*
- Removes the authority of the Governor, on the recommendation of the Secretary of State, to declare a different manner for holding elections. *Id.*
- Limits the enforcement authority of state administrators and investigators during an emergency. *Id.* § 7.

Senate Bill 1 further adds a new provision to KRS 39A.180 that allows the Governor to suspend a statute by executive order under KRS Chapter 39A, but ***only if the suspension is approved by the Attorney General.*** *Id.* § 4. SB 1 finally contains a boilerplate emergency clause, which purports to allow the bill to take effect upon its passage and approval by the Governor or upon its otherwise becoming law.

On January 19, 2021, Governor Beshear vetoed SB 1. *See* Veto Message, SB 1, Jan. 19, 2021 [VC Exhibit F].

C. Senate Bill 2

SB 2 [VC Exhibit E] seeks to limit and control the Governor’s ability to respond to emergencies through emergency regulations. Among other things, SB 2:

- Amends KRS 13A.030(2) by no longer making the determination of the Administrative Regulation Review Subcommittee “nonbinding.” SB 2 § 2.
- Amends KRS 13A.190 to subject emergency administrative regulations to the public comment provisions established under SB 2. *Id.* § 4.
- Amends KRS 13A.190 to allow a legislative committee to review an emergency administrative regulation at a subsequent meeting, which may find the emergency administrative regulation deficient. *Id.*

- Amends KRS 13A.190 to permit a legislative committee to amend an emergency administrative regulation *Id.* §§ 4, 16.
- Amends KRS 13A.312 to add a new section that provides that if an executive order transfers authority over a subject matter to another administrative body or changes the name of an administrative body during the interim between regular sessions of the General Assembly, and the General Assembly does not codify or confirm the executive order during the next regular session, any and all administrative regulations promulgated to implement the executive order must return to their original form by the administrative body. *Id.* § 14.

Section 22 of SB 2 also purports to amend KRS 214.020, the statute governing the Cabinet for Health and Family Services' ability to respond to infectious or contagious disease in Kentucky. Under Section 22 of SB 2, an administrative regulation issued under the authority of KRS 214.020 must be in effect no longer than 30 days if it: (1) places restrictions on the in-person meeting or functioning of the following: elementary, secondary, or postsecondary institutions; private businesses or non-profit organizations; political, religious, or social gatherings; places of worship; or local governments; or (2) imposes mandatory quarantine or isolation requirements. Section 22 of SB 2 requires any administrative regulation issued under the authority of KRS 214.020 to include the penalty, appeal, and due process rights for violations of the administrative regulation, and to contain the public hearing and written comment period notice required under Section 9 of SB 2.

Section 25 of SB 2 serves as the emergency clause for both the changes to KRS Chapters 13A and 214, providing: "Whereas, ensuring that Kentucky citizens have adequate access to the administrative regulation process is a compelling and immediate need, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law."

On January 19, 2021, Governor Beshear vetoed SB 2. *See Veto Message, SB 2, Jan. 19, 2021 [VC Exhibit F].*

VII. This Action

After issuing his vetoes, the Governor attempted good faith negotiations with the Speaker and Senate President. On January 20, 2021 he sent a letter suggesting any legislation wait until after this deadly pandemic, but nevertheless offering some areas of compromise. [VC Exhibit G]. No response was provided for more that 11 days. Instead, on February 1, 2021 - the day before the General Assembly was scheduled to resume its session – the Speaker and Senate President sent a letter claiming they were too busy, would override the veto, and then the parties could potentially discuss. [VC Exhibit H].

On February 2, 2021, the Governor and Secretary of CHFS filed this action against the Speaker of the House, the President of the Senate, the Legislative Research Commission and the Attorney General alleging HB 1, SB 1, and SB 2 each violate various sections of the Kentucky Constitution. The Governor simultaneously moved for temporary injunctive relief and expedited review.

LEGAL STANDARD

Under CR 65.04(1), a court may grant a temporary injunction if it is “clearly shown by verified complaint, affidavit, or other evidence that the movant’s rights are being or will be 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.” The granting of a temporary injunction is within the sound discretion of the trial court. *Maupin v. Stansbury*, 575 S.W.2d 695, 697-98 (Ky. App. 1978). A court should grant a temporary injunction if the movant shows irreparable injury, the existence of a substantial legal question on the merits, and a weighing of the equities favor injunctive relief.

Id.

As the court explained in *Maupin*:

Applications for temporary injunctive relief should be viewed on three levels. First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, 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. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded.

Id. at 699.

As the movants, the Governor and the Secretary carry the burden of “clearly showing” these elements. CR 65.04(1); *Maupin*, 575 S.W.2d at 698. The rule requires that “(t)he complaining party must allege and prove facts from which the court can reasonably infer such would be the result.” *Id.* at 698-99. The Kentucky Supreme Court has recognized that a potential ongoing violation of the Kentucky Constitution and state statute automatically qualifies as irreparable harm, warranting injunctive relief before final adjudication. *See Legislative Research Comm’n v. Fischer*, 366 S.W.3d 905, 909-10 (Ky. 2012).

ARGUMENT

This Court should enjoin enforcement of HB 1, SB 1 and SB 2 because each violates the Kentucky Constitution. In particular, among other claims, the bills violate Kentucky’s strict separation of powers set forth in sections 27 and 28; they subvert the supremacy of the Governor’s executive power under section 69; they are arbitrary, vague and unenforceable in violation of Section 2; and they usurp the Governor’s role as commander in chief and his duty to faithfully execute the law in violation of sections 75 and 81. More specifically, HB 1 overrides the Governor’s public health measures in response to COVID-19 and establishes its own

response that favors industry adopted measures interpreting shifting and ambiguous CDC guidance. SB 1 places the Governor’s emergency response under the supervision and control of the General Assembly and the Attorney General. It additionally violates Sections 36, 42, and 80, by seeking to convert the General Assembly into a continuous body during an emergency and forcing a governor to call a special session. SB 2 allows subcommittees of the legislature to supervise and amend emergency administrative regulations issued by the executive branch.

If not enjoined, enforcement of these bills will cause irreparable harm to the Governor, the Secretary, and the people of Kentucky by preventing a comprehensive emergency response to COVID-19 and its mutations. In July 2020, with even less at stake, the Kentucky Supreme Court exercised power to grant temporary relief and stayed any order issued by a lower court in the Commonwealth enjoining the Governor’s ability to take emergency action in response to COVID-19. *See Order, Beshear v. Acree*, 2020-SC-000313-OA (Ky. July 17, 2020) [VC Exhibit A.]. It did so for two simple reasons: (1) the need for “a clear and consistent statewide public health policy” to slow the spread of this deadly disease and (2) the Governor has “broad executive powers in a public health emergency” to establish that policy. *Id.* at 2. Those same reasons exist here, but to a greater degree after the Court’s opinion unanimously upholding the Governor’s public health measures. This court should follow the instruction of the highest court and enjoin HB 1, SB 1 and SB 2 from taking effect.

I. Absent An Injunction, The Governor And The People Of Kentucky Will Be Irreparably Harmed.

This Court should issue an injunction to prevent irreparable harm to the Governor, the Secretary and the people of Kentucky and to preserve the status quo while the Court addresses the important constitutional questions at issue. *Maupin*, 575 S.W.2d at 699. The Supreme Court has held that an ongoing constitutional violation represents irreparable injury and warrants

immediate injunctive relief. *Fischer*, 366 S.W.3d at 909-10. As set forth in the Verified Complaint and below, HB 1, SB 1, and SB 2 violate Sections 2, 27, 28, 36, 42, 69, 75, 80, and 81 of the Kentucky Constitution. The bills each prevent a Governor-lead, comprehensive and statewide approach to the COVID-19 pandemic and future emergencies by violating the Kentucky Constitution. As such, the bills irreparably harm the Governor and the people of Kentucky and this Court should enjoin them.

Moreover, and as is the case here, the Kentucky Supreme Court has also held that “the required showing for issuance of an injunction is relaxed when an injunction is sought by a governmental entity to enforce its police powers. In such case, any alternative legal remedy is ignored and irreparable harm is presumed.” *Boone Creek Properties, LLC v. Lexington-Fayette Urban Cty. Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014) (citation omitted). That presumption applies here, where the three bills immediately interfere with the Governor’s constitutional power and duty to respond to an ongoing public health emergency.

All three bills at issue have emergency clauses and, if not enjoined, will cause immediate and concrete harm to the people of the Commonwealth by preventing the Governor and the Secretary from exercising supreme executive authority to enact public health measures to slow the spread of COVID-19. In particular, HB 1 will immediately undermine the emergency public health measures currently in place. State and local officials, local health departments, and businesses will be unable to discern what public health measures remain in effect. That confusion will imperil compliance with and enforcement of these measures. SB 1 places an artificial time limit on these measures that has no basis in science and would allow local executives to seek immediate termination or modification of existing public health measures. As the Kentucky Supreme Court ruled, “[I]f the Governor is not empowered to adopt emergency

measures . . . 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.” *Beshear*, 2020 WL 6736090, at *19. SB 2 would prevent the executive branch – and CHFS in particular – from crafting immediate and responsive administrative regulations to address the evolving circumstances presented by COVID-19.

The existing public health measures that would be eliminated by these bills have saved countless lives. One study concluded that Kentucky’s social distancing measures had saved 2,000 lives by April 25.³⁵ The Trump White House agreed and repeatedly praised the Governor’s active response.

Absent an injunction, Kentucky could be faced with the severe outcomes we have seen in other jurisdictions that have failed to implement strong public health measures – ICUs filled to capacity, ventilators in short supply, and refrigerated trucks pulling up to hospitals “as bodies pile up at hospital morgues.”³⁶

Indeed, these bills come at a perilous time. While vaccines show us a light at the end of the tunnel, new strains of COVID-19 that may be as much as 50% more contagious and may be more fatal are already circulating in the United States.³⁷ On January 26, 2021, two cases of the

³⁵ Charles Courtemanche et al., *Did Social-Distancing Measures in Kentucky Help to Flatten the COVID-19 Curve?*, Institute for the Study of Free Enterprise Working Paper 29, Apr. 28, 2020, available at <http://isfe.uky.edu/sites/ISFE/files/research-pdfs/NEWISFE%20Standardized%20Cover%20Page%20-%20Did%20Social%20Distancing%20Measures%20in%20Kentucky.pdf> (last visited Feb. 2, 2021).

³⁶ <https://ktla.com/news/local-news/refrigerated-trucks-arrive-in-l-a-as-bodies-pile-up-at-hospital-morgues-amid-rising-covid-19-death-toll/>

³⁷ Apoorva Mandavilli and Roni Caryn Rabin, *C.D.C. Warns the New Virus Variant Could Fuel Huge Spikes in Covid-19 Cases*, *The New York Times*, Jan. 15, 2021, available at <https://www.nytimes.com/2021/01/15/health/covid-cdc-variant.html?action=click&module=RelatedLinks&pgtype=Article> (last visited Jan. 31, 2021).

British B.1.1.7 variant were confirmed in Kentucky,³⁸ and another 29 states have reported cases.³⁹ The virulent South African B.1.351 variant has been identified in South Carolina⁴⁰ and Maryland.⁴¹ And the Brazilian P.1 variant – which filled one Brazilian city’s hospitals to capacity in a matter of hours⁴² – has appeared in Minnesota.⁴³ Public health experts agree these numbers likely understate the prevalence of these variants in the United States because of limited genomic testing.⁴⁴ These experts have warned that these variants pose a particularly serious risk to hospital systems, which have been overwhelmed in other countries,⁴⁵ and that they require “universal use of and strict compliance with” public health measures like those implemented in the Governor’s emergency orders.⁴⁶

These emerging threats show the need for clear, continuing public health measures, including social distancing requirements in places of high-risk spread and facial covering mandates – the very measures HB 1, SB 1, and SB 2 prohibit or curtail. Without these measures,

³⁸ Gov. Beshear: President’s COVID-19 Team Increases Kentucky’s Vaccine Allocation, Jan. 26, 2021, available at <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=573> (last visited Jan. 31, 2021).

³⁹ Available at [html https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html](https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html) (last visited Jan. 31, 2021).

⁴⁰ Andrew Joseph, South Carolina identifies the first U.S. cases of coronavirus variant first seen in South Africa, Jan. 28, 2021, available at <https://www.statnews.com/2021/01/28/south-carolina-first-cases-of-south-africa-variant/> (last visited Jan. 31, 2021).

⁴¹ Jason Hanna and Madeline Holcombe, *Maryland becomes 2nd state to report coronavirus variant first identified in South Africa*, CNN, Jan. 30, 2021, available at <https://www.cnn.com/2021/01/30/health/us-coronavirus-saturday/index.html> (last visited Jan. 31, 2021).

⁴² Terence McCoy and Helosia Traiano, The Amazonian city that hatched the Brazil variant has been crushed by it, *The Washington Post*, Jan. 27, 2021, available <https://www.washingtonpost.com/world/2021/01/27/coronavirus-brazil-variant-manaus/> (last visited Feb. 1, 2021).

⁴³ Michaelen Doucleff, Why Scientists Are Very Worried About The Variant From Brazil, NPR, Jan. 27, 2021, available at <https://www.npr.org/sections/goatsandsoda/2021/01/27/961108577/why-scientists-are-very-worried-about-the-variant-from-brazil> (last visited Feb. 1, 2021).

⁴⁴ William Wan and Ben Guarino, Why America is ‘flying blind’ to the coronavirus mutations racing across the globe, *The Washington Post*, Jan. 29, 2021, <https://www.washingtonpost.com/health/2021/01/29/genetic-sequencing-mutations-coronavirus/> (last visited Feb. 1, 2021).

⁴⁵ Apoorva Mandavilli and Roni Caryn Rabin, C.D.C. Warns the New Virus Variant Could Fuel Huge Spikes in Covid-19 Cases, *The New York Times*, Jan. 15, 2021, available at <https://www.nytimes.com/2021/01/15/health/covid-cdc-variant.html>. (last visited Feb. 2, 2021).

⁴⁶ Summer E. Galloway, et al., Emergence of SARS-CoV-2 B.1.1.7 Lineage — United States, December 29, 2020–January 12, 2021, *Morbidity and Mortality Weekly Report*, CDC, Jan. 22, 2021, available at https://www.cdc.gov/mmwr/volumes/70/wr/mm7003e2.htm?s_cid=mm7003e2_w (last visited Feb. 2, 2021).

Kentucky’s hospitals may become quickly overwhelmed. These threats also underline how essential it is that the executive branch is able to respond to changing circumstances. Public health guidance is already evolving in response to these strains.⁴⁷ The government must be able to respond quickly to save lives.

II. The Equities Favor Injunctive Relief.

The equities favor issuing an injunction that will preserve the status quo and save lives. Just this summer, the Supreme Court acknowledged “the need for a clear and consistent statewide public health policy” in issuing an extraordinary writ to stay a lower court order that would have undermined the Governor’s public health measures. Order, *Beshear v. Acree*, No. 2020-SC-000313-OA (Ky. July 17, 2020). And the Supreme Court later held that, notwithstanding the hardship of complying with public health measures, “the greater public interest lies [] with the public health of the citizens of the Commonwealth as a whole.” *Beshear*, 2020 WL 6736090 at *37. The need for clear, consistent public health measures that will save lives favors an injunction here.

As set forth below in Argument Sections III. - VII, the Governor raises a substantial question as to the constitutionality of HB 1, SB 1 and SB 2.

III. HB 1, SB 1 And SB 2 Violate The Separation Of Powers Set Forth In The Kentucky Constitution.

Kentucky’s Constitution creates three distinct branches of government and expressly forbids any branch from exercising the powers of another branch. Section 27 of the Kentucky Constitution provides:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

⁴⁷ See generally *id.*

KY. CONST. § 27. Section 28 of the Kentucky Constitution provides:

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.

KY. CONST. § 28. Kentucky is a *strict* adherent to the separation of powers doctrine.

Kentucky’s constitutional separation of powers doctrine is perhaps the strictest doctrine of any state in the United States. *See Diemer v. Commonwealth, Ky. Transp. Cabinet, Dep’t of Highways*, 786 S.W.3d 861, 864-65 (Ky. 1990) (citing *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922)).

Here, through HB 1, SB 1 and SB 2, the General Assembly seeks to unlawfully infringe on the Governor’s executive authority to respond to emergencies, control, supervise and direct the Governor’s emergency response actions, exercise executive authority itself, and undermine the Governor’s executive authority by delegating it to entities outside of state government.

A. The Power to Respond to Emergencies Lies in the Executive Branch.

1. As Recognized by the Kentucky Supreme Court, the Constitution Places the Emergency Response Within the Executive Branch.

The Kentucky Constitution creates a full-time executive, but a part-time legislature. KY. CONST. §§ 36, 42, 69 and 80. Because of this constitutional relationship, the Governor holds the primary responsibility and authority to respond to emergencies. Indeed, in *Beshear*, 2020 WL 673090, at *19, the Kentucky Supreme Court held that the Constitution recognized “authority in the full-time executive branch to act in such circumstances.” Upholding the emergency public health measures issued by the Governor to address the COVID-19 pandemic, the Court stated:

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[.]

Recognizing the limited role of the legislature, the Court further concluded, “[T]he 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.” *Id.* In other words, “if the Governor is not empowered to adopt emergency measures . . . , 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.” *Id.* In short, the Court dismissed the Attorney General’s claim *challenging* the Governor’s public health measures as a separation of powers violation, finding that “the emergency powers the Governor has exercised are executive in nature, never raising a separation of powers issue in the first instance.” *Id.*

This ruling is consistent with the intent of our Framers, who understood that the Governor would protect the public from emergencies. In the Constitutional Convention, Delegate DeHaven said as much, stating that the “take care” clause of Section 81 means “that all executive power with which the Governor is vested shall be exercised *whenever an emergency arises*...”

OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE 1890 CONVENTION, E. Polk Johnson, Vol. 1, p. 1051.

Indeed, the Constitution mandates certain power and responsibility reside with the Governor. Section 69 of the Kentucky Constitution places the supreme power of the executive with the elected Governor of the Commonwealth. KY. CONST. § 69. Section 75 appoints the Governor as “Commander-in-Chief” of the Commonwealth’s militia. KY. CONST. § 75. And, Section 81 requires the Governor to “take care” to faithfully execute the laws. KY. CONST. § 81; *Beshear*, 2020 WL 673090, at *17. However, Section 80 is permissive: it states the Governor “may . . . convene” the General Assembly during an emergency. KY. CONST. § 81. Thus, “[e]ven 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.” *Beshear*, 2020 WL 673090, at *17.

Taken together, as held in *Beshear v. Acree*, the Constitution recognizes emergency power residing in the full-time executive branch.

2. In Kentucky, the Governor Has Responded to Emergencies.

The conclusion the Court reached in *Beshear v. Acree* is not new. Kentucky courts have long recognized the Governor’s obligation to act during an emergency pursuant to these constitutional provisions. In 1911, Kentucky’s then-highest court recognized that, as Commander-in-Chief, the Governor must possess a power “ample *to meet every emergency* that may present itself.” *Franks v. Smith*, 134 S.W. 484, 487 (Ky. 1911) (emphasis added). This is because “there should not be a moment in the life of any orderly, well-established and republican form of government, like ours, when it has not the means and the ability to give to every citizen that peace, safety, happiness, and protection guaranteed to him by the Constitution.” *Id.* at 488.

The Governor’s command over emergency responses is necessary to fulfill his duty to execute the laws under Section 81 of the Kentucky Constitution. KY. CONST. § 81. During a

prior emergency, the *Franks* Court recognized that, as Commander-in-Chief, the Governor must possess a power “ample to meet every emergency that may present itself.” *Franks v. Smith*, 134 S.W. 484, 487 (Ky. 1911). *Franks* involved a challenge to Governor Augustus Willson’s order activating the militia to detain “night riders” in Caldwell County. *Id.* at 485. At the time, the Governor possessed the statutory power to order the state guard or military force into active service whenever he deemed it “necessary for the safety or welfare of the commonwealth, or when any actual or threatened invasion, insurrection, domestic violence or other danger to the public interest makes it necessary.” *Id.* at 486 (citation omitted).

The *Franks* Court recognized the Governor’s constitutional authority and noted that “[t]he power to call out the state militia was vested in the Governor, the chief executive officer of the state, for the wise and wholesome purpose of enabling him to carry into effect the mandate of the Constitution that he ‘must take care that the laws be faithfully executed.’” *Id.* at 487. The Court further noted that “[i]f this power were not lodged in him,” Section 81 “would be an idle and meaningless phrase, because, although charged with the duty of taking care that the laws of the state should be faithfully executed, he would have no authority to enforce the obligation imposed upon him.” *Id.*

The scope of the power “lodged in the Governor” was not lost on the Court. Indeed, it recognized its necessity, stating a government “denied the authority to take final action would be too weak and inefficient to maintain itself or afford due measure of security and protection to the people who created and established it; and in many instances it would entirely fail to accomplish the purpose of its existence.” *Id.* Thus, to protect the people, the Governor “may act independently of any other civil authority if he desires to do so, or he may act in conjunction with the other civil authorities.” *Id.* As the Court concluded, “there should not be a moment in

the life of any orderly, well-established and republican form of government, like ours, when it has not the means and the ability to give to every citizen that peace, safety, happiness, and protection guaranteed to him by the Constitution.” *Id.* at 488. In fact, the *Franks* Court held that a governor’s authority could not depend on requests from local authorities, noting “[t]his limitation upon his constitutional duty would in many instances deny him the right to take prompt and decisive action” and fulfill his duty under section 81 of the Constitution. *Id.* at 487-488.

Courts have long recognized the executive’s authority to respond to emergencies. The Supreme Court noted this in *Beshear v. Acree*, stating:

While a global pandemic is unprecedented for all but those who were alive during the 1918 influenza epidemic, the measures employed to deal with the spread of COVID-19, including business closure, are not unprecedented in our Commonwealth. See *Allison v. Cash*, 143 Ky. 679, 137 S.W. 245 (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, 25 S.Ct. 358,

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.

Id. at *35.

The Supreme Court also noted more recent history of the Governor’s use of emergency power in *Beshear v. Acree*. “Since 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.” *Beshear*, 2020 WL 673090, at *12. Moreover, the emergency powers described in KRS Chapter 39A “have been invoked by every Governor who has served since the law’s adoption in 1998.”

The Governor’s exercise of executive power to respond to emergencies is not just consistent with protecting the rights of the people, it is necessary to secure the rights guaranteed in the Constitution. “Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.” THE FEDERALIST NO. 70 (March 15, 1788) (Alexander Hamilton). And particular to COVID-19, as the Court held in *Beshear*, “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.” 2020 WL 673090, at *37.

Finally, it is important to note that emergencies exceeding thirty days are not new. The Spanish Flu pandemic lasted for almost two years, infecting an estimated 500 million people and causing the deaths of around 100 million people. Smaller and more recent emergencies often exceed 30 days as well. Notably, at least 20 percent of the emergencies declared over the past 10 years have lasted more than 30 days.⁴⁸ For these reasons, the Governor, acting in a full-time

⁴⁸ And, if those emergencies had been arbitrarily terminated at 30 days, the Commonwealth – and especially its counties – would have lost millions of dollars in FEMA funding for infrastructure repairs. [VC Exhibit I.]

capacity, maintains the power to respond. Indeed, KRS 39A.010 recognizes the Governor’s responsibility not only to respond to an emergency, but also to use his authority for “adequate assessment and mitigation of, preparation for, response to, and recover from” emergency threats to the public safety.

3. In enacting KRS Chapter 39A, the General Assembly Recognized the Governor Is Responsible for Responding to Emergencies.

The General Assembly once recognized this, too. In enacting KRS Chapter 39A, the General Assembly created a unified emergency response system, all of which reports to the Governor in his role as Commander-in-Chief. *See* Ky. Const. § 75. *See also* KRS 39A.010, *et seq.* In KRS Chapter 36, the General Assembly created the Department of Military Affairs and attached it to the Office of the Governor. KRS 36.010. That Department “is responsible to the Governor for the proper functioning of the Kentucky National Guard, militia, and all other military or naval matters of the state.” *Id.* Within that Department, the General Assembly placed the Division of Emergency Management, which administers the unified emergency response program established by KRS Chapter 39A. *Id.* The Division of Emergency Management carries out all duties “under the general direction of the Adjutant General,” who answers to the Governor. KRS 36.010, KRS 39A.030, KRS 39A.060(2). The statutory structure thus makes clear that the legislature envisioned the response to emergencies as part-and-parcel to the Governor’s role as Commander-in-Chief.

Recognizing this, the General Assembly enacted KRS Chapter 39A in 1998 to establish a “statewide comprehensive emergency management system.” KRS 39A.010. In doing so, the General Assembly stated:

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

Id. Further, it stated that:

the rationale and purpose of the comprehensive emergency management program of the Commonwealth has evolved from a program for response to threats to national security, enemy attack, and other national defense needs, to a program for response to all hazards, but primarily, domestic hazards and threats including natural, man-made, technological, industrial, or environmental emergencies or disasters, for which civil government is primarily responsible

KRS 39A.030. The comprehensive emergency response is developed “on behalf of the Governor, and in consultation with the cabinet secretaries of state government, other appropriate state agency heads, local elected chief executives, local emergency management directors, and local emergency planning committees.” *Id.*

Neither KRS Chapter 39A nor the Constitution contemplate an active role for the General Assembly during an emergency. As noted in *Beshear v. Acree*, the Constitution makes this impossible, limiting the General Assembly to enacting law during a few specified days a year. And, even if this authority was not established in the Constitution, as recognized in *Beshear v. Acree*, the Supreme Court has previously recognized that “once the General Assembly has made the determination . . . that that power is in the hands of the Governor, such . . . action is purely an executive function.” *Legislative Research Comm’n By and Through Prather v. Brown*, 664 S.W.2d 907, 930 (Ky. 1984) (“*L.R.C. v. Brown*”). Thus, KRS Chapter 39A created the framework necessary for the executive branch of state government to fulfill its constitutional duties. Now, the General Assembly ignores this framework to strip the Governor of his executive

power to respond to emergencies and assume for itself an active, ongoing and controlling role in any emergency response. This violates the separation of powers.

B. HB 1, SB 1, and SB 2 Unlawfully Infringe on the Executive Power to Respond to Emergencies.

HB 1, SB 1, and SB 2 impermissibly infringe on the executive's role to respond to emergencies. Principally, HB 1 seeks to override the Governor's executive authority and replace it with CDC guidance to be interpreted and implemented by industry, local or state chambers of commerce, trade associations, or "any other recognized affiliated organization". Moreover, it prevents the state from enforcing public health measures that go beyond recommendations of the CDC. HB 1 therefore subverts the Governor's executive role in favor of non-governmental agencies, the CDC, and the federal government. This is not only unconstitutional, but a dangerous abdication of the Commonwealth's duty to protect the public health during an emergency.

SB 1 likewise infringes on the Governor's ability to exercise executive authority with respect to future emergencies threatening the Commonwealth. In particular, SB 1 would require the Governor to obtain the General Assembly's approval to take any executive action beyond thirty days. This means to address most emergencies, the Governor would be *required* to seek approval from the General Assembly, even when it is out of session. Moreover, the General Assembly would then have the power to determine whether the emergency should be extended and what the Governor could do about it. In short, the Governor's executive authority in an emergency transfers to the General Assembly after thirty-days.

SB 2 places a similar arbitrary 30-day limit on the Secretary's authority to promulgate administrative regulations to address infections, disease, quarantines, a key component of emergency response. Indeed, through SB 2, the General Assembly ensures the Governor cannot

adequately address emergencies beyond thirty days without their approval by utilizing CHFS to promulgate emergency regulations.

But SB 1 goes even further. It would allow local governments to seek early termination or modification of executive orders, although the bill is not clear as to whom the request must go. In other words, SB 1 would allow local governments to prevent the Governor from guiding a comprehensive and statewide approach to an evolving emergency. This is the exact scenario envisioned by the Courts in *Beshear v. Acree* and *Franks v. Smith*, that led each to find the power to respond to emergencies resides with the Governor. Addressing whether locals could override the Governor’s statewide response, the Court in *Beshear v. Acree* stated the result, “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.” 2020 WL 6736090, at *15.

C. By Seeking to Actively Approve, Alter or Deny Emergency Response Actions, the General Assembly Is Exercising Executive Authority.

Not only does the General Assembly seek to strip and subvert the executive authority to respond to emergencies, it also attempts to subsume that executive power. HB 1, SB 1 and SB 2 seek to grant the General Assembly an active, ongoing role in both the response to COVID-19 and all future emergencies. The Kentucky Supreme Court called such an approach “impractical, if not impossible.” *See Beshear*, 2020 WL 673090, at *19 (Ky. Nov. 12, 2020). Such an approach also violates the separation of powers, and as described in Argument VI, *infra*, the limitation on the number of days the General Assembly may be in session.

Sections 27 and 28 of the Kentucky Constitution, as recognized by our Supreme Court, were intended primarily “to curb the power of the General Assembly.” *L.R.C. v. Brown*, 664

S.W.2d 907, 912 (Ky. 1984). Indeed, the Framers of our current constitution “intended the legislature to discuss and enact laws, and *to do nothing else.*” *Id.* (quoting *Pratt v. Breckinridge*, 23 Ky. Law Rep. 1858, 112 KY. 1, 65 S.W. 136, 140 (1901)). Recognizing this, the Supreme Court instructs the separation of powers must be “strictly construed.” *Id.* (quoting *Arnett v. Meredith*, 121 S.W.2d 36, 38 (Ky. 1938)).

Through HB 1, the General Assembly seeks to manage the response to the COVID-19 emergency, by creating its own response in place of the Governor’s public health measures. Similarly, SB 1 seeks to provide the General Assembly with active supervision over and approval of the executive action during future emergencies. In particular, SB 1 gives the General Assembly the executive authority to approve any extension, modification, or termination of any emergency executive order, administrative regulation, or directive, and the authority to terminate a declaration of emergency by joint resolution at any time. SB 1, § 2(4).

The Kentucky Supreme Court has already rejected legislation that purports to provide the General Assembly such powers. In *L.R.C. v. Brown*, the Court struck down legislation giving the legislature, through the legislative research commission, the authority to *prevent* administrative regulations from becoming effective until *reviewed* and *accepted* by the commission or *placed before* and *not disapproved* by the General Assembly. 664 S.W.2d at 917. Finding the legislation violated the separation of powers, the Court held that because the adoption of administrative regulations is executive in nature, laws “providing legislative or LRC review of proposed legislations” violate the separation of powers “and are a legislative encroachment into the power of the executive branch.” *Id.* at 919; *see also id.* n. 13. (adopting *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (stating “Under *Chadha, supra*, we conclude that the legislative veto of the action of the executive is also a violation of the separation of powers.”)).

Here, as in *L.R.C. v. Brown*, the General Assembly has violated the separation of powers by giving itself either direct control or veto power over executive action. This Court should enter a restraining order and ultimate injunction to prevent this violation.

The bills further attempt to assign to the General Assembly the Governor's express powers under Section 75 as Commander-in-Chief and under Section 81 to take care that the laws be faithfully executed. By naming the Governor as the "Commander-in-Chief" and assigning him the authority to execute the laws of the Commonwealth, the Kentucky Constitution places the responsibility and authority to respond to emergencies within the executive branch. Any attempt to restrain that authority "would be an interference by one department of the government with the power lodged in another department, and a violation of section 27 of the Constitution of the state[.]" *Franks v. Smith*, 134 S.W. 484, 487 (Ky. 1911).

In *Franks* the Court recognized the Governor's duties under both Sections 75 and 81, noting that "[t]he power to call out the state militia was vested in the Governor, the chief executive officer of the state, for the wise and wholesome purpose of enabling him to carry into effect the mandate of the Constitution that he 'must take care that the laws be faithfully executed.'" *Id.* "If [these] power[s] were not lodged in him," the Court recognized that the Commonwealth's government "would be too weak and inefficient to maintain itself or afford due measure of security or protection to the people who create and established it; and in many instances it would entirely fail to accomplish the purpose of its existence." *Id.* The Court also stated that Section 81 "would be an idle and meaningless phrase, because, although charged with the duty of taking care that the laws of the state should be faithfully executed, he would have no authority to enforce the obligation imposed upon him." *Id.*

HB 1, SB 1, and SB 2 violate Sections 75 and 81 of the Kentucky Constitution because they invade and limit the Governor’s ability to exercise his powers under those provisions by making his executive power in emergencies subject to the approval of the part-time General Assembly, local governments, the federal government, and non-governmental organizations. Further, SB 1 violates these Sections by removing the executive power of the Governor in addressing an emergency to, upon the recommendation of the Secretary of State, declare by executive order a different manner for holding elections in an election area for which a state of emergency has been declared for part or all of the election area. SB 1, § 3(1)(k). It also violates these Sections by requiring the Governor to obtain the written approval of an inferior officer, the Attorney General, before suspending a statute, SB 1, §4(2)(b).

SB 2 also violates Section 81 by invading the executive power and function of the Cabinet for Health and Family Services – an executive branch Cabinet – to act to protect Kentuckians from infectious or contagious diseases by limiting *any* administrative regulation issued under KRS Chapter 214 from being in effect longer than 30 days if it places restrictions on the in-person meeting or functioning certain entities. SB 2, §22(2).

Thus, under SB 1, HB 1 and SB 2, the Governor’s constitutional duties under Section 75 as Commander-in-Chief and under Section 81 to respond to an emergency in order take care that the laws be faithfully executed “would be [] idle and meaningless phrase[s].” *See Franks*, 134 S.W. at 487. The Governor would be left without the executive power reserved for him to protect Kentuckians from any emergency – or the effects of it – that could last more than 30 days. He would have no authority to enforce the obligation imposed on him.

IV. HB 1, SB 1, and SB 2 Subvert the Supremacy of Executive Power Vested with the Governor in Violation of Section 69 of the Kentucky Constitution.

The Governor’s executive authority cannot be placed under the supervision or subject to the approval of the General Assembly or another constitutional officer. Under Section 69 of the Kentucky Constitution:

The supreme executive power of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the “Governor of the Commonwealth of Kentucky.”

KY. CONST. § 69.

Any law infringing the Governor’s executive power violates Section 69 of the Kentucky Constitution. *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 472 (Ky. 1998) (citing *Kentucky Ass’n of Realtors, Inc. v. Musselman*, Ky., 817 S.W.2d 213 (1991); *L.R.C. v. Brown*, Ky., 664 S.W.2d at 911–14)). Moreover, if a law purports to grant executive branch authority to the legislative branch or a nongovernmental person, it is in violation of Section 69, as the Governor’s executive authority would no longer be supreme. *Id.* Here, through HB 1, SB 1, and SB 2, the General Assembly places the Governor’s executive authority to respond to emergencies subject to the approval, termination, or modification of the General Assembly, the Attorney General and local governments. When it comes to emergencies facing the Commonwealth, Section 69 would mean nothing.

As mentioned above, *see* Argument III, crafting emergency public health measures to respond to the COVID-19 pandemic is an executive function. *See Beshear*, 2020 WL 673090, at *19. *See also LRC v. Brown*, 664 S.W.2d at 930 (even if the legislature placed the power with the Governor, once placed there, the power is purely executive). Pursuant to Section 69 of the Kentucky Constitution, that authority cannot be placed under the control or supervision of another. *See Brown v. Barkley*, 628 S.W.2d 616, 622 n. 12 (Ky. 1982) (“Sec. 69 makes it clear

that these [constitutional] officers are inferior to the Governor and that no other executive office can be created which will not also be inferior to that of the Governor.”).

HB 1 places the Governor and his response under the control of the CDC and the interpretation and implementation of its guidelines by industry, organizations, local governments, chambers of commerce, trade association or others. In other words, while the Governor may take executive action to respond to COVID-19, that action cannot be enforced against and need not be implemented by the organizations listed in HB 1, provided those organizations implement any guidance offered by the CDC. The Governor’s response would then be subject to the control of shifting CDC guidance and varied and inconsistent interpretation of that guidance throughout the Commonwealth, as set forth by the General Assembly.

SB 1 likewise purports to place an executive function of the Governor under the supervision of the Attorney General, stating that the Governor may suspend statutes in response to an emergency *only* if he obtains approval from the Attorney General. It further seeks to place this same authority under the control of the General Assembly, prohibiting the Governor from carrying out emergency response actions unless it is approved by the General Assembly. Moreover, SB 1 allows the General Assembly to terminate a Governor’s declaration of an emergency, despite it being a purely executive function. Finally, SB 1 places the comprehensive emergency response under the control of local executives by providing them with authority to terminate or modify executive orders, administrative regulations or directives, upon written request.

SB 2 would then subject any emergency regulation promulgated by the Secretary under the Governor’s leadership to modification, review, and ultimate control by the General Assembly. Moreover, it would place the same thirty-day limitation on regulations promulgated

by the Secretary that SB 1 places upon the Governor, thus ensuring General Assembly control of emergency responses lasting beyond thirty days.

Each of these actions violates well-settled case law. Indeed, the governor's ability to suspend statutes in an emergency cannot be placed under the control and approval of the Attorney General. In *Brown v. Barkley*, the Kentucky Supreme Court ruled that "Sec. 69 makes it clear" that constitutional officers such as the Attorney General "are inferior to the Governor" 628 S.W.2d 616, 622 n. 12 (Ky. 1982). It further held that as the "supreme executive power," it is not possible for the General Assembly to create another executive officer or officers who will not be subject to that supremacy." *Id.* at 622. To empower the Attorney General to approve or disapprove of emergency responses of the Governor plainly violates the express language of Section 69 and as interpreted by the Kentucky Supreme Court.

For the same reasons, a Governor's emergency powers and actions cannot be subject to termination or modification by local governments. Doing so would violate the supremacy of the executive held by the Governor. *Id.* (the General Assembly cannot create another executive officer not subject to the Governor's supremacy). HB 1 and SB 1 would allow local governments to avoid that supremacy by establishing their own public health measures. Moreover, in *Beshear v. Acree*, the Supreme Court addressed *this very emergency* and upheld the Governor's lawful exercise of executive power to implement statewide public health measures regardless of disagreement by local executives. 2020 WL 6736090, at *15. It directly rejected the argument that the Governor must obtain local or county approval to address a statewide emergency. *Id.* *14-15 (recognizing the Governor "has ultimate authority 'for all purposes,' *id.*, over all local emergency management agencies[.]"). Indeed, the "prospect that a Governor would need to . . .

defer to 120 different local agencies . . . in the face of an immediate and fast-moving threat to the entire Commonwealth strains rational understanding, *Id.* at *15. It also violates Section 69.

Finally, just as the General Assembly cannot approve, modify, or deny executive action, because it violates the separation of powers, *see* Argument III (citing *L.R.C. v. Brown*, 664 S.W.2d at 917), these actions would also violate the supremacy of the executive established in Section 69. Indeed, when the General Assembly exercises executive power – as it does here, *see* Argument III. – it prevents the Governor’s executive actions from being final. The bottom line is that if the responsibility to respond to emergencies is executive, that power cannot be controlled by the General Assembly. HB 1, SB 1, and SB 2 each give the General Assembly not just executive power, but *ultimate* power to maintain continuing control over the Governor’s executive actions. Doing so violates Section 69.

V. HB 1 Is Arbitrary, Vague And Unenforceable.

HB 1 also unconstitutional because it is arbitrary, vague, and unenforceable. Its incorporation of “CDC guidance” as enforceable regulation does not specify which of the nearly 180 guidance documents are now Kentucky law, nor does it address how those documents are updated often and without notice to the public. HB 1 further fails to address that CDC guidance is not written in terms of clear and enforceable rules or *restrictions*. Instead, the guidance documents provide general, often overlapping, and sometimes contradictory advice. For these reasons, HB 1 does not give clear instruction to the people of Kentucky, public health officials enforcing the law, or the courts that must apply it. HB 1 therefore violates the due process rights of the public and the separation of powers.

A. HB 1 Is Void for Vagueness.

Section 2 in the Bill of Rights 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.” This prohibition on arbitrary power “embrace[s] 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)). See generally *Beshear v. Acree*, 2020 WL 6736090, at *24.

HB 1 violates Section 2 because it is unconstitutionally vague, in violation of the public’s due process rights. To pass constitutional muster, a law must state explicitly what it mandates and what is enforceable, and vague terms must be defined. See generally *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (finding the term “humane” unconstitutionally vague); *United States of America v. Loy*, 237 F.3d 251 (3d Cir. 2001) (“‘legal adult pornography’ was unconstitutionally vague because it posed a danger the prohibition might ultimately turn on whatever the officer personally found titillating”); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) (the court ruled a statute unconstitutionally vague where the FCC had not defined “obscene”, “vulgar”, “profane”, and “indecent”); *Sessions v. Dimaya*, 138 U.S. 1204 (2018) (a statute designating violent crimes for immigration purposes was unconstitutionally vague). The vagueness doctrine “addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *Fox*, 567 U.S. at 253. Vagueness is of

particular concern where, as here, compliance with public health measures may have penal consequences. *Commonwealth v. Looper*, 294 S.W.3d 39, 41 (Ky. App. 2009).

HB 1 cannot clear this hurdle because it fails to notify the people what public health measures apply to them or their businesses. Instead, it nebulously provides that businesses may follow either CDC guidance or executive branch orders, whichever is “least restrictive.” But there is no way for an individual to discern whether CDC guidance is less restrictive than a state public health measure. For example, the CDC has said that the lowest risk gatherings are “virtual-only activities, events, and gatherings,” while the highest risk activities are settings “where it is difficult for individuals to remain spaced at least 6 feet apart and attendees travel from outside the local area.”⁴⁹ Those principles are designed to help individuals balance risk, but they ultimately fail to provide any clear limitation on what people can and cannot do. CDC restaurant guidance is similarly unclear. It provides that “[f]ood service limited to drive-through, delivery, take-out, and curbside pick up” is lowest risk, while the highest risk comes from “[o]n-site dining with indoor seating.”⁵⁰ It then lists strategies that restaurants and bars “may implement,” some of which simply direct the restaurant to comply with state and local regulations.⁵¹ As the CDC has said, such decisions are ultimately for state and local officials: “The size of an event or gathering should be determined based on state, local, territorial or tribal safety laws and regulations.”⁵² CDC guidance and considerations are meant to supplement – not

⁴⁹CDC, COVID-19, Considerations for Events and Gatherings, last updated Jan. 8, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> (last visited Jan. 28, 2021).

⁵⁰ CDC, Considerations for Restaurant and Bar Operators, updated Dec. 16, 2020, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html> (last visited Jan. 28, 2021).

⁵¹ *Id.*

⁵² *Id.*

replace – any state, local, territorial, or tribal health and safety laws, rules, and regulations with which entities or events must comply.

HB 1’s incorporation of this guidance renders it unconstitutionally vague, for reasons shown by the *Looper* case. There, the court held the word “importation” in a statute unconstitutionally vague because it could be read to prohibit any of four activities: bringing the item into the Commonwealth, transporting it through the Commonwealth, bringing the item with the intent for it to remain in the Commonwealth, or bringing the item to the Commonwealth to sell it. *Looper*, 294 S.W.3d at 42. The court struck down the statute, because any of the possible constructions was “reasonable,” resulting in “confusion” and failing to provide notice to the public. *Id.* at 42-43. HB 1 presents a similar problem. Businesses cannot know what conduct they can lawfully engage in. For instance, under current orders, restaurant and venue capacities are limited. It is equally reasonable for such businesses to presume that they may engage in the “highest risk” activities laid out in CDC guidance, or that they must follow the current orders. HB 1 provides no clarity on the correct standard.

Indeed, in a letter to the Governor dated January 11, 2021, the CDC Director confirmed the non-regulatory intent of CDC guidance, stating: “I want to make it clear that CDC guidance should not be interpreted as regulation; rather, they are meant as recommendations. It should be used in consideration for specific state and/or local regulations, but this guidance is meant to be flexible and adaptable. It is not meant to be prescriptive or interpreted as standards that can be regulated. CDC provides ongoing guidance to individuals, businesses, schools, and states. We have and will continue to be available for technical assistance and guidance, but we expect each jurisdiction to modify this guidance to meet their state's needs.” [VC Exhibit B.]

Moreover, the CDC guidance and recommendations change with the circumstances, further implicating due process concerns. In *Fox*, the Supreme Court struck down regulatory penalties against broadcasters who displayed fleeting indecency because the changed interpretation of the law reflected “abrupt” “regulatory change” that failed to give notice to the broadcasters. 567 U.S. at 254. HB 1 guarantees that regulated entities will have no notice of these changes, because CDC guidance changes often and is not organized to provide such notice. As of February 2, 2021, the CDC had issued at least 175 guidance documents, some of which are not relevant to the United States. That guidance totaled 180 documents just a few days earlier, and it is not clear what guidance was removed. CDC guidance is not organized by industry or degree of community transmission of COVID-19. HB 1 does not specify how a specific entity is to determine what CDC guidance applies to it or provide a mechanism for the entity to know if the guidance applicable to it has changed. HB 1 does not specify what specific guidance the entities described in it must follow. HB 1 does not provide sufficient notice to the entities described in it or to any enforcement agency of what CDC guidance must be followed or what is sought to be prohibited. HB 1 is thus unconstitutionally vague and arbitrary in violation of Section 2 of the Kentucky Constitution.

B. HB 1 Is Void for Unintelligibility.

For the reasons stated above, HB 1 is also unconstitutionally unintelligible. The doctrine of void-for-unintelligibility “is not found in the Bill of Rights but rather [is] the bedrock principle of separation of powers.” *Util. Mgmt. Grp., LLC v. Pike Cty. Fiscal Court*, 531 S.W.3d 3, 12 (Ky. 2017) (citation omitted). Like void-for-vagueness, however, this doctrine renders void statutes that are so unclear a court cannot apply them. *See id.* (“[W]here the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon

whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative and void.”).

HB 1 provides no direction to local health departments and other agencies enforcing public health restrictions beyond that the standard for compliance is the bare minimum suggested by undefined “CDC guidance” and the directives of an undefined executive branch charged with administering the law. Courts that would subsequently hear cases regarding violations will have an ever-changing set of standards to compare to reach their own understanding of which is the least restrictive. Where a court cannot determine which regulations apply to an entity and what they require, the regulatory scheme is void for unintelligibility. *See Bostic v. E. Const. Co.*, 497 F.2d 712, 715 (6th Cir. 1974). In *Bostic*, the court applied Kentucky law to hold that where it was impossible to determine what fire regulation applied to a particular apartment building, the regulation was unintelligible. *Id.* (“[E]ven the Deputy Fire Marshall could not indicate to the satisfaction of the district judge where in the regulations it states that any particular number of fire extinguishers are required in such a building. Those portions of the standards here involved simply do not possess that degree of clarity necessary for validity...”). HB 1 creates the same problem: in many instances, no health official, court, or business will be able to determine which CDC “guidance” is operative, or what that guidance permits or prohibits.

HB 1 worsens this problem by outsourcing to private, paid-membership organizations the power to develop plans that businesses may adopt, and by suggesting that adopting such plans is a get-out-of-jail free card for businesses. Specifically, the bill gives private entities – the local or state chamber of commerce, a trade association, or other recognized affiliated organization – the power of preparing an operating plan. HB 1 then provides that businesses following such a plan will be in compliance with the law. This vagueness and arbitrariness further impedes

enforcement of HB 1, as the Secretary and local health departments will be forced to compare state mandates, CDC guidance, and Chamber of Commerce plans, with no clarity about what restrictions ultimately control.

HB 1 does not give notice to the public about what is permitted and what is prohibited. Indeed, it interferes with the Executive Branch’s efforts to provide that notice. And HB 1 fails to give the requisite guidance to public health officials and the courts about how to apply public health law. For these reasons, it is unconstitutionally vague, in violation of Section 2 of the Constitution, and unconstitutionally unintelligible, in violation of the separation of powers.

VI. SB 1 Seeks To Convert The Part-Time General Assembly Into A Body Of Continuous Session During An Emergency In Violation of the Kentucky Constitution.

Senate Bill 1 further attempts to create a full-time General Assembly of continuous session despite the express language of the Kentucky Constitution, the recorded intent of the framers of the Constitution, and the history of prior constitutions that it be a part-time legislature. The Court should enjoin SB 1 for violating Sections 36, 42 and 80 of the Kentucky Constitution that make the General Assembly a part-time legislature that only the Governor has authority, in his discretion, to convene after the part-time session has ended.

A. The General Assembly Is a Part-Time Legislature for a Specific, Non-Continuing Session.

As at least two commentators have noted, “A desire to control legislative excesses constituted the principle reason for the calling of the 1890-91 Constitutional Convention. *See* Sheryl G. Snyder & Robert M. Ireland, *The Separation of Governmental Powers under the Kentucky Constitution: A Legislative and Historical Analysis of L.R.C. v. Brown*, 73 Ky. L.J. 165, 167 (1984)). As Delegate John D. Carroll of Henry County stated during the Constitutional Convention:

It is a well-known fact that one of the prime causes for the calling of this Convention was the abuses of practice by the Legislative Department of this State; and I venture the assertion that except for the various legislation and the local and special laws of all kinds and character passed by the Legislatures that have met in Kentucky for the last twenty years, that no proposition to call a Constitutional Convention could ever have received a majority of the votes of the people of Kentucky. The people in Kentucky are more in danger from abuses by the Legislative Department than they are from abuses by any other Department of the State Government.

I 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 1482 (1890) (“1890 Debates”). Indeed, Delegate Askew stated during the debates that former Kentucky House Speaker William C. Owens of Scott County had said to him, “I do not care what you do; every reform you attempt will turn to ashes in your hands unless you do something to reform the Legislative Department.” III 1890 Debates, at 3821. Later in the debates, Delegate Spalding noted in opposition to allowing the legislature to extend its sessions that the people had called the convention to establish a more economical government. IV 1890 Debates, at 5348.

As the Kentucky Supreme Court noted two months ago, “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 in the [1890] Constitutional Convention.’” *Beshear v. Acree*, 2020 WL 6736090, at *17 (citing Sheryl G. Snyder & Robert M. Ireland, *The Separation of Governmental Powers under the Kentucky Constitution: A Legislative and Historical Analysis of L.R.C. v. Brown*, 73 Ky. L.J. 165, 181 (1984)). Under Section 36 of the Kentucky Constitution, the General Assembly shall meet in odd-numbered years for a period not to exceed a total of 30 days. KY. CONST. § 36(1). A session occurring in odd-numbered years cannot extend beyond March 30. KY. CONST. § 42. Also under Section 42, a session of the General Assembly in even-numbered years shall not exceed 60 legislative days and cannot extend beyond April 15. *Id.*

The General Assembly has never been a continuous session, under any constitution. Under the current Kentucky Constitution, when the legislature adjourns *sine die* it ceases to exist. As the Supreme Court of Kentucky held in *LRC v. Brown*, “The Kentucky General Assembly is not one of continuous session and a necessary corollary thereto is that it cannot legislate after it has adjourned sine die. A legislative body ceases to exist at the moment of its adjournment.” 664 S.W.2d at 915 (citing *Anderson v. Dunn*, 19 U.S. 204 (1821)).

In *Beshear v. Acree*, the Supreme Court reiterated the part-time legislature expressly established by the Kentucky Constitution. In expressing the Governor’s constitutional executive powers in emergencies, the unanimous Court in *Beshear v. Acree* stated, “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.” 2020 WL 6736090, at *17. “Under the 1792 and 1799 Constitutions the General Assembly met annually with no restrictions on length of session, but under the 1850 Constitution that changed to biannual sixty-day sessions with the power of the body to extend the session by a two-thirds vote in each house, which they often did.” *Id.* (citing Snyder et al., *The Separation of Governmental Powers under the Kentucky Constitution: A Legislative and Historical Analysis of L.R.C. v. Brown*, 73 Ky. L.J. at 181). Before the 1890 Constitutional Convention, “the legislature had the power to hold continuous sessions,” but “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 adopted in 1891, the present Constitution established that the General Assembly could only meet for 60 days every other year. *Id.* at *18 (citing KY. CONST. § 42). The only power to convene the legislature for an extraordinary session resided in the Governor. *Id.* (citing

KY. CONST. § 80). By putting an absolute limit on the number of days the General Assembly could sit and giving the sole power of calling and determining the agenda for an extraordinary session to the governor, the framers of the 1891 Constitution abolished the notion of a legislature of continuous session.

The prohibition of a legislature of continuous session survived multiple attempts to change it or remove it in the past 60 years. *See Snyder et al., The Separation of Governmental Powers under the Kentucky Constitution: A Legislative and Historical Analysis of L.R.C. v. Brown*, 73 Ky. L.J. at 182. Each time, the people of Kentucky defeated the attempts. *Id.* In 1966, the Constitution Revision Assembly proposed a constitution that would have made the legislature a continuous body; the people rejected it. *Id.* (citing Act of Mar. 18, 1966, ch. 37, 1966 Ky. Acts 295-347). Three years later, the legislative article of the Constitution Revision Assembly's draft would have made the legislature a continuing body, but the people again rejected it by voting down a separate amendment. *Id.* (citing Act of Mar. 27, 1968, ch. 201, 1968 KY. Acts 825-26). In 1972, the General Assembly proposed "the so-called annual sessions amendment" that did not include any reference to the legislature as a continuous body; the people rejected the proposal in 1973. *Id.* (citing Act of Mar. 30, 1972, ch. 375, 1972 Ky. Acts 1640-41). In 1978, the General Assembly passed the "Kenton Amendment" providing for a limited organizational session, which omitted the phrase making the legislature "a continuing body" and the provision for annual sessions. *Id.* (citing Kenton Amendment, ch. 440 1978 Ky. Acts 1400-01).

The same absolute limitation on the time the legislature can convene remains today. After the constitutional amendment in 2000, the General Assembly is limited to convening annually, with sessions in odd-numbered years limited to 30 legislative days with an absolute end date of March 30, and sessions in even-numbered years limited to 60 legislative days with an absolute

end date of April 15. *Id.* (citing KY. CONST. §§ 36, 42; 2000 Ky. Acts ch. 407, § 1, ratified Nov. 2000). “And the power to convene in extraordinary session remains solely with the Governor.” *Id.* (citing KY. CONST. § 80). As the Court aptly recognized in *Beshear v. Acree*: “Having a citizen legislature that meets part-time as opposed to a full-time legislative body that meets year-round, as some states have, generally leaves the General Assembly without the ability to legislate quickly in the event of an emergency unless the emergency arises during a regular legislative session.” *Id.*

B. The Kentucky Constitution Gives the Governor Sole Authority to Convene an Extraordinary Session.

Likewise, Section 80 of the Kentucky Constitution provides an express limitation on who can convene the General Assembly for an extraordinary session and what the General Assembly can consider during that session. Section 80 of the Kentucky Constitution provides:

He 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. In case of disagreement between the two Houses with respect to the time of adjournment, he may adjourn them to such time as he shall think proper, not exceeding four months. When he shall convene the General Assembly it shall be by proclamation, stating the subjects to be considered, and no other shall be considered.

KY. CONST. § 80.

In *Beshear v. Acree*, the Kentucky Supreme Court pointed to the permissive language of Section 80 to note that “emergency powers appear to reside primarily in the Governor in the first instance.” 2020 6736090, at *1. Expanding on its discussion, the Court recognized that “[n]otably, Section 80 contains the permissive ‘may ... convene’ as opposed to the mandatory ‘shall ... convene.’” 2020 6736090, at *17. “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.” *Id.*

Again, the Court noted the sole authority of the Governor to convene extraordinary sessions as supporting the “implied tilt of the Kentucky Constitution toward executive powers in times of emergency,” which it found “not surprising.” *Id.* at *17-19. Rejecting the Attorney General’s argument that because Section 80 allows the Governor to call an extraordinary session it “envisions the Governor will not go it alone during a crisis,” but will work with the legislature, the Court reiterated, “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.” *Id.* at *19. *See also Gevedon v. Commonwealth*, 142 S.W.3d 170, 172 (Ky. App. 2004) (noting “[w]hether to summon an Extraordinary Session of the General Assembly and what matters are to be addressed at such a session are questions entrusted to the discretion of the Governor under Section 80 of our state constitution.” in refusing to grant a preliminary injunction to compel the Governor to call a special session, which would have violated the separation of powers and “jettison settled and basic constitutional principles”) (citing *Royster v. Brock*, 79 S.W.2d 707 (1935)); *Brown v. Barkley*, 628 S.W.2d at 621 (recognizing that calling an extraordinary session under Section 80 is one of the constitutional powers expressly conferred upon the Governor).

The Supreme Court’s analysis firmly squares with the intent of the framers of the current Kentucky Constitution. At the outset of the 1890 Constitutional Convention, the delegates expressed concern about special sessions being too lengthy and with unwise legislation. Delegate Buckner offered several resolutions early in the Constitutional Convention, including one related to extraordinary sessions, stating: “As the office of Governor has been created, not only for enforcement of the laws, but also as a tribune of the people, to protect them, from hasty or intemperate legislation; therefore, *Resolved*, ... When the General Assembly shall be convened

in special session, there shall be no legislation upon subjects other than those designated in the proclamation by the Governor convening the same.” I 1890 Debates, at 206. During later debate on Section 80, Delegate DeHaven stated, “Those of us who have had any Legislative experience know that where extra sessions of the Legislature are called they are subject at times to very great abuse.”

Discussing confining an extraordinary session to the object stated on the Governor’s proclamation, Delegate Cox noted, “If the Governor wants a called session of the Legislature of Kentucky, and the Legislature has the power to do other business aside from that which is presented in the call, we know not how long that Legislature will be in session. ... The limit fixed by the Constitution of Kentucky would not reach the called session, but they might go on for several months and expend the money of the people of Kentucky.” *Id.* at 1126-27. Delegate Cox concluded by stating, “Certainly it is wisdom upon the part of this Convention to so limit the action of every department of this government as to save the people from unnecessary expense, and this provision of the report of the Committee unquestionably accomplishes that end.” *Id.* at 1127. Delegate DeHaven also stated his belief that the legislature had had “too much legislation,” *id.* at 1126, and that the Governor should call the extraordinary session when “he sees fit.” *Id.* at 1125. In perhaps the clearest statement of the framer’s intent that only the Governor – not the General Assembly through bills like SB 1 – can call an extraordinary session, Delegate MacKoy asserted: “It is to be presumed, I think, when the Legislature is convened in special session, that it is so called in pursuance of some emergency of some public demand that is urgent, and that the Governor, knowing the wishes of the people and understanding fully the emergency, will call the Legislature in special session only when it is absolutely necessary that it shall be done.” *Id.* at 1049.

C. SB 1 Violates Sections 36, 42 and 80 of the Kentucky Constitution.

SB 1 is the latest attempt by the General Assembly to circumvent the absolute limitation the framers of the 1891 Constitution placed on the number of days that the legislature can meet for a regular session by forcing the Governor to call a special session to extend emergency orders. SB 1 would effectively rewrite Sections 36 and 42 of the Kentucky Constitution to allow the General Assembly to meet for 30 legislative days during odd-numbered years and 60 legislature days in even-numbered years, *unless an emergency exists*. If an emergency exists the General Assembly must meet monthly to consider whether or not to extend executive orders, administrative regulations, or directives the Governor has issued for the emergency under his executive powers. SB 1 also would effectively rewrite Sections 36 and 42 by allowing the General Assembly to, when an emergency exists, convene after the March 30 and April 15 dates that the sections expressly establish for the end of regular sessions.

Plainly, SB 1 would also force the Governor to call an extraordinary session of the part-time General Assembly in cases of an emergency. Such an approach would violate the explicit wording of Section 80, which provides the Governor the sole authority for the convening of any extraordinary session. As stated in the Kentucky Supreme Court’s ruling in *Beshear v. Acree*, “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.” 2020 WL 6736090, at *17.

SB 1 would further violate the intent of the Framers, which specifically and solely entrusted the calling of a special session to the judgment of the Governor, who they described as “knowing the wishes of the people.” I 1890 Debates at 1047. During the passage of SB 1, its proponents were clear they wanted to replace the Governor’s judgment with their own. For

example, Senator Thayer claimed superior knowledge of the “wishes of the people,” claiming “people have been weary ... and they feel like their voice has not been heard in this Capitol.” He was then more explicit about replacement of judgment, stating: “The executive has the bully pulpit. We’ve got it back now and we’re trying to restore the people’s voice to the process.”⁵³

SB 1 1 would effectively make the General Assembly a continuous body in violation of Sections 36 and 42 of the Kentucky Constitution and the Framers’ intent in creating a part-time legislature. And SB 1 violates Section 80 of the Kentucky Constitution by attempting to create a continuous legislature that the Kentucky Constitution does not allow through the forced calling of an extraordinary session. The Governor cannot be compelled to convene an extraordinary session *Gevedon*. 142 S.W.3d at 172.

As the Supreme Court stated in *Beshear v. Acree*, “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.” 2020 WL 6736090, at *17. Senate Bill 1 seeks to erase the intent of the framers and render Sections 36, 42 and 80 of the Kentucky Constitution meaningless. This Court must enjoin SB 1 and ultimately rule SB 1 unconstitutional.

VII. In The Alternative, HB 1 Improperly Delegates Authority.

The response to an emergency is an executive power, and therefore belongs to the Governor. *See* Argument III, *supra*. HB 1 violates the separation of powers by attempting to wrest that power away from him. But assuming for the sake of argument that HB 1 did not

⁵³ Senate Floor Debate, Jan. 7, 2021, Part 2, at 41:09, 41:45 available at <https://www.ket.org/legislature/archives/?nola=WGAOS+022015&stream=aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcmlRwcmVzcy9fZGVmaW5zdF8vbXAxOndnYW9zL3dnYW9zXzIyMjAxNS5tcDQvcGxheWxpc3QubTN1OA%3D%3D&part=2> (last visited Jan. 29, 2021).

violate the separation of powers, it would still be unconstitutional because the General Assembly delegates that power to a federal agency and private interest groups.

“[T]he legislature must establish the principles and policies, and leave to such agencies only the details of administration.” *Young v. Willis*, 305 Ky. 201, 204–05, 203 S.W.2d 5, 7 (1947). Legislation is invalid if it empowers unaccountable agencies or private persons to decide either what the law shall be or when a law shall be effective. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, (1936).

HB 1 is an unconstitutional delegation because it leaves far more than details entirely undefined. The General Assembly first seeks to delegate rule-making authority to the CDC. However, the CDC guidance cannot fulfill that role, as the CDC has made clear. The federal government does not administer public health in the state of Kentucky and, thus, the attempted delegation to the CDC cannot be the permissible “for the sake of administration” delegation as described in *Young v. Willis*.

HB 1 also provides in Section 1(1)(b) that an entity “may prepare the plan detailed in paragraph (a) of this subsection itself or may utilize a plan prepared by a local or state government agency, local or state chamber of commerce, trade association, or any other recognized affiliated organization”. As in *Anderson's Adm'r v. Granville Coal Co.*, 205 Ky. 111, 265 S.W. 472, 474 (1924), the legislation itself impermissibly fails to set any rules, and instead defers to private members-only organizations to set devise public health plans. In *Granville Coal Co.*, the General Assembly authorized mine operators to formulate the rules for mining and provided those rules became effective when signed by the chief mining inspector. The Court of Appeals hold that the General Assembly was unlawfully delegating its duty to enact the rules, particularly because the business affected then formulated the rules. *Id.*

The General Assembly here similarly abdicates any substantive rulemaking to the affected entities or, if the entity chooses, to its trade association or local chamber of commerce. This is an unlawful delegation of the substance of the law to private entities. While the legislation directs that the policies are to abide by the lesser of the CDC guidance or executive directives, the ultimate party formulating the specific procedures for compliance has no authority to do so.

The General Assembly's abdication will wreak havoc for both the local health departments charged with enforcing these unenforceable laws and the businesses that are attempting to comply with them. Both the health department and the business would be forced to turn vague CDC guidance into operational limits. For example, the CDC has said that the lowest risk gatherings are "virtual-only activities, events, and gatherings," while the highest risk activities are settings "where it is difficult for individuals to remain spaced at least 6 feet apart and attendees travel from outside the local area."⁵⁴ Those principles are helpful to individuals and government officials attempting to balance risk, but they ultimately fail to provide any clear limitation on what people can and cannot do. As the CDC has said, such decisions are ultimately for state and local officials: "The size of an event or gathering should be determined based on state, local, territorial or tribal safety laws and regulations."⁵⁵ HB 1 places that decision in a federal agency that disclaims that decisionmaking power.

CONCLUSION

For the foregoing reasons, HB 1, SB 1 and SB 2 are unconstitutional and if allowed to take effect will cause significant harm to the Governor's constitutional duty to respond COVID-

⁵⁴ CDC, COVID-19, Considerations for Events and Gatherings, last updated Jan. 8, 2021, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html> (last visited Jan. 28, 2021).

⁵⁵ *Id.*

19 and the overall public health during the pandemic. As a result, this Court should enjoin their enforcement.

Respectfully submitted,

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION ____
CIVIL ACTION NO. 21-CI-_____

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

PLAINTIFFS

v.

DAVID W. OSBORNE, II, in his official capacity as
Speaker of the Kentucky House of Representatives, *et al.*

DEFENDANTS

PROPOSED ORDER

The parties being heard and this Court being otherwise sufficiently advised, the Plaintiffs' Motion for a Temporary Restraining Order/Temporary Injunction is hereby granted. HB 1 (RS 2021), SB 1 (RS 2021), and SB 2 (RS 2021) are enjoined and shall have no force or effect until further order of this Court.

So ordered this _____ day of _____, 2021 at _____ .m.

Judge
Franklin Circuit Court

Distributed to:

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