COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2020-SC-000313-OA

HON. ANDREW BESHEAR, in his official capacity
as Governor of the Commonwealth of Kentucky, *et al.* APPELLANTS

v. On Appeal from Boone Circuit Court, Division 1
Civil Action No. 20-CI-00678

HON. GLENN E. ACREE,
Judge Kentucky Court of Appeals, *et al.* APPELLEES

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CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of this brief was served on August 28, 2020 by email, and will be served by mail or hand-delivery by September 1, 2020 pursuant to the Court's instructions, upon the following: Hon. Richard A. Brueggemann, Judge, Boone Circuit Court, Boone County Justice Center, 6025 Rogers Lane, Room 141, Burlington, Kentucky 41005; Hon. Christopher Wiest, 25 Town Center Boulevard, Suite 104, Crestview Hills, Kentucky 41017; and Hon. Barry L. Dunn, Hon. S. Chad Meredith, Hon. Brett R. Nolan, Hon. Aaron J. Silletto, Hon. Heather L. Becker, Hon. Marc Manley, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601. I further certify that Appellants did not withdraw the record from the Clerk's Office.

La Tasha Buckner
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INTRODUCTION

This case concerns whether the Governor, the Commander-in-Chief and supreme executive officer, has authority under the Kentucky Constitution and state statutes to protect Kentuckians during a global pandemic. Appellees contend that the General Assembly violated the separation of powers when it enacted KRS Chapter 39A; that Appellants' emergency orders reopening Kentucky businesses are arbitrary and suspend statutes; and that the Governor cannot declare a statewide emergency or issue Executive Orders to respond to the emergency. The Boone Circuit Court temporarily restrained the emergency orders. Appellants filed this original action challenging that restraint. This Court stayed the lower court order pursuant to Section 110 of the Kentucky Constitution.

STATEMENT CONCERNING ORAL ARGUMENT

This Court has already determined that this case is of great and immediate public importance when it entered its Order of August 7, 2020. The Court set oral argument in this matter on Thursday, September 17, 2020 at 10:00 a.m. The Petitioners are ready and willing to present oral argument at that time in the Supreme Court room or via-Zoom or other teleconferencing service.

STATEMENT OF POINTS AND AUTHORITIES

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STATEMENT OF THE CASE

In the early months of 2020, the world experienced an outbreak of a never-before-seen, highly contagious, and deadly respiratory disease: COVID-19. Since that time, over 180,165 Americans have lost their lives. Put simply, the Commonwealth is at war with a once-in-a-century pandemic – the very definition of an "emergency."

On March 6, 2020, Governor Andy Beshear declared a State of Emergency in the Commonwealth of Kentucky. Pursuant to his constitutional powers and statutory authority under KRS Chapter 39A, the Governor and the Kentucky Cabinet for Health and Family Services ("CHFS" or the "Cabinet"), through Secretary Friedlander, and the Department for Public Health ("DPH"), through Commissioner Dr. Steven Stack, took action under KRS Chapter 39A to respond to the emergency and slow the spread of COVID-19. Multiple studies have shown these steps have saved thousands of lives. Now, Appellees seek to undo those steps and eliminate the ability to respond to the virus. What they seek will cost lives, leave first responders without needed assistance, and defund school systems. The Court should uphold the Governor's executive powers to protect the public in an emergency.

I. The Spread Of COVID-19 Leads To A Global Public Health Emergency.

COVID-19 was first identified in Wuhan, Hubei Province, China in December 2019. (Vol. VI, R. at Env. V, July 16, 2020 Hearing Tr. 387:11-15.) While much about the virus remains unknown, (*Id.* at 388-389:23-12), it is clear that COVID-19 is a highly contagious respiratory disease caused by the virus SARS-CoV-2. (*Id.*) It results in illness that can range from mild to severe. (*Id.* at 389:17-25.) In its severest form, COVID-19 can be lethal, as 180,165 Americans and 918 Kentuckians have died as of this filing. Older people and people of all ages with chronic medical conditions (such as heart

disease, lung disease, and diabetes) have a higher risk of developing serious illness. (*Id.* at 389-390:25-8.)

Commissioner of Public Health Dr. Steven Stack has advised that COVID-19 "represents the single greatest infectious spread to the species of humanity in at least 100 years . . . [it] threatens our existence as we have known it and represents a grave challenge to our way of life if we don't address it as effectively as we're able." (*Id*. at 386:17-22.) This is because the entire population is susceptible to COVID-19 and the disease spreads quickly in communities, with each infected person infecting three others on average. (*Id.* at 389:12-13; 390:7-14.) The result of unchecked spread is that our healthcare delivery systems become overwhelmed and collapse. (*Id.*) As Dr. Stack said: "[T]he things we are coming to know with clarity is that if we let up our guard, the disease will spread. If the disease spreads, the number of infected shoot up rapidly and then death follows. We know that." (*Id.* at 417:5-7.)

The World Health Organization ("WHO") declared the spread of COVID-19 a Public Health Emergency of International Concern on January 30, 2020.[1] The next day, the U.S. Department of Health and Human Services ("HHS") declared a public health emergency.[2] *See* 42 U.S.C. § 247d. The WHO declared COVID-19 a pandemic on March 11, 2020.[3] On April 21, 2020, HHS renewed its determination that a public health

[1] *WHO Director-General's Statement On [International Health Regulations] Emergency Committee On Novel Coronavirus (2019-nCoV)*, World Health Organization, available at https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov) (last visited Aug. 27, 2020).
[2] *Determination That A Public Health Emergency Exists*, U.S. Department of Health and Human Services, Jan. 31, 2020, available at https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx (last visited Aug. 27, 2020).
[3] *WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020*, World Health Organization, Mar. 11, 2020, available at https://www.who.int/dg/speeches/detail/who-director-

emergency exists due to the continuing threat presented by COVID-19, and renewed it again on July 23, 2020.[4] Separately, on March 13, 2020, the President declared a national emergency. [5] *For the first time in history, the President declared all 50 states a major disaster area.*[6]

On March 29, 2020, the Centers for Disease Control and Prevention ("CDC") stated, "During the next 30 days, individuals and organizations should cancel or postpone in-person events that consist of 10 people or more throughout the U.S."[7] Similarly, the White House recommended measures to avoid gatherings of 10 or more people.[8] And as the CDC later recognized, the disease spreads rapidly due to the close-proximity of individuals in workplaces and social gatherings, densely populated areas, limited available testing, and the ability of asymptomatic spread.[9]

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general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited Aug. 27, 2020).

[4] *Renewal of Determination That A Public Health Emergency Exists***,** U.S. Department of Health and Human Services, Apr. 21, 2020, available at https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-21apr2020.aspx (last visited Aug. 27, 2020); *Renewal of Determination That a Public Health Emergency Exists*, U.S. Department of Health and Human Services, July 23, 2020, available at https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-23June2020.aspx (last visited Aug. 27, 2020).

[5] Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Mar. 13, 2020, available at https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/ (last visited Aug. 26, 2020); Sonam Seth, *Trump declares a national emergency over the coronavirus after weeks of downplaying the threat of the pandemic*, https://www.businessinsider.com/trump-will-declare-national-emergency-coronavirus-outbreak-2020-3 (last visited Aug. 26, 2020).

[6] Michael Ruiz, *Coronavirus: Trump has declared major disaster in all 50 states at once, first time in history*, Fox News, Apr. 11, 2020, available at https://www.foxnews.com/politics/coronavirus-trump-declared-major-disaster-in-all-50-states-first-time-history (last visited Aug. 26, 2020).

[7] Social Distancing, Quarantine, and Isolation, Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited Aug. 28, 2020).

[8] The President's Coronavirus Guidelines for America: 30 Days to Stop the Spread, Do Your Part to Slow the Spread of the Coronavirus, available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_ coronavirus-guidance_8.5x11_315PM.pdf (last visited Aug. 28, 2020).

[9] Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 24 – April 21, 2020, available at https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e2.htm (last visited Aug. 28, 2020).

As a result of the threats posed by the rapid spread of COVID-19, upon the first confirmed case of coronavirus in Kentucky on March 6, the Governor declared a state of emergency pursuant to KRS Chapter 39A. (Ky. Exec. Order No. 2020-215).[10] Subsequently, all 120 Kentucky counties declared a state of emergency.[11]

II. Kentucky Takes Decisive Action To Slow the Spread of COVID-19.

Following the statewide emergency declaration, the Governor and CHFS acted swiftly and decisively to prevent the virus' spread in Kentucky. Using the emergency powers provided in KRS Chapter 39A, the Governor and CHFS took scientifically- and medically-supported, systematic actions to decrease the number of chances for exposure to the virus by prohibiting certain high-risk activities.[12] These actions culminated in Executive Order 2020-257, which encouraged all Kentuckians to remain "Healthy at Home" and temporarily closed all but life-sustaining businesses to in-person business. (Executive Order 2020-257).[13] As it learns about COVID-19, the Department for Public Health calibrates public health interventions "to save the greatest number of lives with

[10] Available at https://governor.ky.gov/attachments/20200306_Executive-Order_2020-215.pdf (last visited on Aug. 27, 2020).

[11] The Kentucky Association of Counties, COVID-19 County Emergency Declarations, available at https://www.kaco.org/en/county-information/covid-19-resources/covid-19-emergency-declarations.aspx (last visited Aug. 27, 2020).

[12] *See generally* Kentucky's Response to COVID-19, available at https://governor.ky.gov/covid19 (last visited July 26, 2020). *See also , e.g.*, CHFS Order, Mar. 16, 2020 (prohibiting onsite consumption of food and beverage), available at https://governor.ky.gov/attachments/20200316_Order_Restaurant-Closure.pdf (last visited Aug. 27, 2020); CHFS Order, Mar. 17, 2020 (prohibiting certain public-facing businesses), available at https://governor.ky.gov/attachments/20200317_Order_Public-Facing-Businesses.pdf (last visited June 29, 2020); and CHFS Order, Mar. 19, 2020 (prohibiting mass gatherings), available at https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf (last visited June 29, 2020); Executive Order 2020-257, available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf?_sm_au_=iVV3jHMRSnZt11tjJ8MfKK7vWLCsW (last visited Aug. 27, 2020); Executive Order 2020-257, Mar. 25, 2020, available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited Aug. 27, 2020).

[13] Available at https://governor.ky.gov/attachments/20200325_Executive-Order_2020-257_Healthy-at-Home.pdf (last visited on Aug. 27, 2020)

the least unintended consequences." (Vol. 6, R. at Env. V, July 16, 2020 Hearing Tr. 403:20-25.)

The Executive Branch did not act alone. The General Assembly and this Court also took statewide action to limit the spread of COVID-19. On March 30, 2020, the General Assembly enacted Senate Bill ("SB") 150, recognizing the declared emergency caused by the spread of COVID-19, taking action to limit the necessity of social interactions across Kentucky, and suspending laws contrary to SB 150. 2020 Ky. Acts Ch. 73. Notably, the legislature passed SB 150 nearly a month after the Governor issued Executive Order 2020-215 declaring the state of emergency and did nothing to alter his executive powers during the emergency. In House Bill ("HB") 351, the General Assembly further amended – and reenacted in full – KRS 39A.100, ensuring that the Governor and Secretary of State could alter the manner of elections during the pandemic. 2020 Ky. Acts Ch. 91 § 74.

This Court also took action to protect employees of the Court of Justice and the public. On March 16, the Court cancelled most in-person appearances, postponed civil trials, hearing and motions, and limited attendance for the few in-person proceedings that could go forward to attorneys, parties, and necessary witnesses.[14] The Court extended all appellate filing deadlines.[15] It established emergency standards for pretrial release and drug testing to protect defendants, peace officers, jail staff, and drug testing providers.[16]

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[14] *In re: Kentucky Court of Justice Response to COVID-19 Emergency*, Admin. Order 2020-08 (Ky. Mar. 16, 2020).
[15] *In re: Extension of Filing Deadlines for Supreme Court of Kentucky and Kentucky Court of Appeals*, Admin. Order 2020-11 (Ky. Mar. 18, 2020).
[16] *In re: Kentucky Court of Justice Emergency Release Schedule for Pretrial Defendants and Emergency Pretrial Drug Testing Standards in Response to COVID-19 Emergency*, Admin. Order 2020-25 (Ky. Apr. 14, 2020).

It suspended evictions for non-payment of rent until August 1.[17] It also cancelled in-person bar examinations.[18]

These emergency measures successfully reduced the spread of COVID-19 and "flattened the curve" of infection. (Vol. VI, R. at Env. V, July 16, 2020 Hearing Tr. 391:10-12.) ("[I]n Kentucky we effectively flattened the curve. In fact, we effectively stomped the top off of it entirely.")) One study concluded that Kentucky's social distancing measures had saved 2,000 lives by April 25.[19] On April 26, 2020, it appeared cases had plateaued, as the Commonwealth reported only 202 new cases of COVID-19.[20]

III. Kentucky's Decisive Measures Slow the Spread of COVID-19, Allowing The Governor To Ease Restrictions.

As a result of Kentucky's success and the evolving scientific understanding of the disease, the Governor created the "Healthy at Work" plan to establish public health measures in public facing businesses to allow for a return to a sense of normalcy – or new normalcy – while still limiting the spread of COVID-19. The Governor's "Healthy at Work" plan was based on public health criteria.[21] The Governor loosened restrictions in stages to help Kentuckians safely return to work while still protecting the most vulnerable citizens.[22] The White House and CDC also recommended states use a phased approach to

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[17] *In re: Kentucky Court of Justice Response to COVID-19 Emergency: Expansion of Court Proceedings*, Admin. Order 2020-44 (Ky. May 29, 2020).
[18] *In re: Administration of 2020 Bar Examinations*, Order, 2020-50 (July 9, 2020).
[19] 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 August 28, 2020).
[20] *Gov. Beshear Urges Vigilance as Kentucky Takes First Reopening Step*, April 26, 2020, https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=145 (last visited Aug. 27, 2020).
[21] (*See generally* Vol. VI, R. at Env. V, July 16, 2020 Hearing Tr. 402:5-418:16.
[22] (*Id.* at 404:4-18.)

reopening.[23] By loosening the restrictions in phases, the Governor was able to monitor data on the spread of COVID-19 under controlled circumstances.

The Governor also welcomed the input of industry groups and businesses.[24] The Governor encouraged these groups to submit proposals through the Healthy at Work web portal. These proposals allowed businesses to illuminate challenges they would face while safely reopening as well as provide insights and strategies for safely easing restrictions. Kentucky's business community stepped up and provided nearly 1,700 proposals. The proposals helped the Governor and public health officials evaluate which restrictions could be safely eased or removed without allowing for significant increase in the spread of COVID-19.[25] This ensured Kentucky businesses could comply with public health protocols.

On May 11, 2020, the Governor lifted the order closing public facing businesses due to COVID-19.[26] Secretary Friedlander implemented minimum requirements for all entities in the Commonwealth, including social distancing and hygiene requirements.[27] The Secretary also began issuing detailed, specific requirements for various sectors of the economy based on a growing body scientific evidence and, in part, on proposals submitted by the entities themselves.[28] The Governor also provided resources for

[23] *See* White House Guidelines: Opening Up America Again, available at https://www.whitehouse.gov/openingamerica/ (last visited Aug. 28, 2020).
[24] https://govstatus.egov.com/ky-healthy-at-work (last visited Aug. 27, 2020).
[25] *Id*.
[26] https://govstatus.egov.com/ky-healthy-at-work (last visited Aug. 27, 2020).
[27]Available at https://govsite-assets.s3.amazonaws.com/lilckLQBSZSBxlq6ddJq_5-11-2020%20CHFS%20Order%20Minimum%20Requirements%20for%20All%20Entities%20v1.3.pdf (last visited Aug. 27, 2020).
[28] *See* https://govstatus.egov.com/ky-healthy-at-work (last visited Aug. 27, 2020).

businesses such as compliance signage and information about where to purchase personal protection equipment ("PPE").[29]

IV. Appellees File Suit In Boone Circuit Court To Challenge The Governor's Authority To Limit The Capacity Of Their Businesses.

In late June, Appellees filed suit – not to challenge the initial closures of their businesses, but to challenge the orders reopening their businesses at limited capacities while COVID-19 continued to gain steam throughout the country. Appellee Florence Speedway, Inc. claims the May 22nd reopening requirements for automobile racing entities are arbitrary and capricious because they permitted only authorized employees and essential drivers and crews on the premises, limited food service to carry-out, and required employees and racing crews to wear cloth masks. (Vol. I, R. 17-20.) But as the disease evolved, as well as the scientific understanding of it, the reopening requirements also evolved. As of today, Florence Speedway may host up to 50% of its capacity and serve food on premises in accordance with the requirements applicable to restaurants.[30]

Appellee Bean's Café claims the May 20 requirements for restaurants are arbitrary and capricious because they require employees to wear face coverings when near other employees or customers (so long as it does not jeopardize their health or safety), and limit indoor capacity to 33% of the building capacity. (Vol. I, R. 33-23.) The Requirements for Restaurants and Bars now limit capacity to 50-percent (50%) maximum permitted occupancy, or the greatest number that permits individuals from different

[29] https://govstatus.egov.com/ky-healthy-at-work (last visited Aug. 27, 2020).
[30] Requirements for Venues and Event Spaces, available at https://healthyatwork.ky.gov (last visited Aug. 27, 2020).

households to maintain six (6) feet of space between each other with that level of occupancy.[31]

Appellee Little Links claims the June 15 guidance issued for daycare centers is arbitrary and capricious because it limits group interaction to ten children and requires adults to wear face coverings while in the childcare facility. (Vol. 1, R. 23-25.)

Collectively, Appellees argue KRS Chapter 39A violates the separation of powers in Sections 27 and 28 of the Kentucky Constitution. (Vol. I, R. 26-29.) They also claim the Orders suspend statutes in violation of Section 15 and are arbitrary and capricious under Sections 1 and 2. Finally, they argue the Governor exceeded his statutory authority because he issued Orders rather than promulgating regulations. (Vol. I, R. at 30-31.)

Notably, the COVID-19 landscape has changed since Appellees filed suit. On that day, there were 12,289 total cases of COVID-19 in Kentucky, with 298 cases among children aged 0-9 and 617 cases among children aged 10-19.[32] Kentucky reported 203 new cases on June 16th.[33] Since that time, Kentucky has experienced an alarming increase in COVID-19 cases. Kentucky reported 792 new cases on August 28.[34]

The increase in cases among children is particularly concerning. While early evidence suggested that children were unlikely to contract COVID-19 and become sick, recent cases of a new, potentially fatal multisystem inflammatory syndrome – including

[31] Requirements for Restaurants and Bars, available at https://healthyatwork.ky.gov (last visited Aug. 27, 2020).
[32] KY COVID-19 Daily Summary 06/16/2020, chfs.ky.gov/cvdaily/COVID19DailyReport0616.pdf (last visited Aug. 27, 2020).
[33] Gov. Beshear Provides Update on COVID-19, June 16, 2020, kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prld=216 (last visited Aug. 27, 2020).
[34] KY COVID-19 Daily Summary 8/28/2020, Aug. 28, 2020, available at https://chfs.ky.gov/agencies/dph/covid19/COVID19DailyReport.pdf (last visited Aug. 28, 2020).

in Kentucky – have shown otherwise.[35] (Vol. VI, R. at Env. V, pg. 389:17-25.) Further, a recent report by the CDC reviewing the time period from March 1-July 25, 2020, states that, "[a]lthough the cumulative rate of pediatric COVID-19-associated hospitalization remains low (8.0 per 100,000 population) compared with that among adults (164.5), weekly rates increased during the surveillance period, and one in three hospitalized children were admitted to the ICU, similar to the proportion among adults."[36] Accordingly, the CDC advised that "[r]einforcement of prevention efforts is essential in congregate settings that serve children, including childcare centers and schools."[37] Moreover, since Kentucky started tracking cases related to daycares, at least 162 childcare facilities have been affected by COVID-19. This includes 132 staff and 100 children that have contracted the virus.[38]

V. The Boone Circuit Court Temporarily Restrains The Orders and Appellants Seek Relief By Writ.

On June 24, 2020, shortly after filing their complaint, the original Appellees filed a motion for a temporary restraining order ("TRO") and a temporary injunction. (Vol. III, R. at 199-324.) Appellants filed their response on June 30. (Vol. IV, R. 345-364.) In an eleventh-hour filing, the Attorney General moved to intervene on June 30, tendering a complaint and seeking similar injunctive relief. (Vol. IV, R. 375-430.) The lower court heard arguments of counsel on the motion for a TRO on July 1, 2020. No witnesses

[35] CDC Guidance, For Parents: Multisystem Inflammatory Syndrome in Children (MIS-C) associated with COVID-19, May 30, 2020, available at https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/children/mis-c.html (last visited Aug. 26, 2020).
[36] CDC, Hospitalization Rates and Characteristics of Children Aged <18 Years Hospitalized with Laboratory-Confirmed COVID-19 – COVID – NET, 14 States, March 1 – July 25, 2020, Aug. 7, 2020, cdc.gov/mmwr/volumes/69/wr/mm6932e3.htm?s (emphasis added) (last visited Aug. 26, 2020).
[37] *Id.*
[38] "Gov. Andy Beshear – Media Briefing 08.26.2020," available at https://www.youtube.com/watch?v=LseCG1kpPK8, 19:25-21:00 (last visited Aug. 27, 2020).

testified and no evidence was taken. (*See* Vol. IV.) On July 2, 2020, the court granted a statewide TRO against the emergency orders relating to the operation of automobile racing tracks, venues and event spaces, and childcare programs. Among other things, the trial court allowed childcare facilities to have 28 children in a room at one time, the maximum permitted by law when not under a state of emergency. (Vol. V., R. 490-500.)

Appellants sought a writ of mandamus and a writ of prohibition relating to the Boone Circuit Court's arbitrary and erroneous TRO and requested intermediate relief from the Kentucky Court of Appeals. (Vol. V., R. Env. I.) The writs – and the intermediate relief – were necessary because the TRO negated the statewide public health response to the spread of COVID-19. Not only was the TRO contrary to law, but it dangerously eliminated capacity restrictions in place based on the guidance of public health officials. The inevitable result of the lower court's decision would be more cases, more illness, and more deaths.

On July 13, 2020, in a consolidated Order addressing both the instant matter and a related case pending in Scott Circuit Court, the Court of Appeals denied intermediate relief. (Order, July 13, 2020.) The Court of Appeals did not reach the merits of the Appellants' arguments and instead rested its decision on their alleged failure to show that there was no adequate remedy by appeal or otherwise. (Vol. V., Env. I.) The next day, as a last resort, Appellants sought a writ of mandamus in this Court and also requested intermediate relief under CR 76.36(4). (Vol. V, R. at Env. I.)

In the meantime, the Boone Circuit Court moved forward with an evidentiary hearing on Appellees' request for a preliminary injunction on July 16. (Vol. VI, R. at Env. V.) During this hearing, the circuit court allowed the Attorney General to elicit

irrelevant testimony regarding unemployment insurance. (*Id*.) The circuit court also qualified certain Appellees' witnesses as "experts" without allowing a KRE 702 assessment[39] of the methodology upon which they based their "expert" testimony. (*Id*.) At the conclusion of the hearing, the circuit court indicated that it would enter a temporary injunction enjoining the Governor's entire public health response. (*Id*.)

On July 17, 2020, before the Boone Circuit Court issued any written order on the temporarary injunction motion, and pursuant to its authority under Section 110 of the Kentucky Constitution, this Court ordered a stay of all orders of injunctive relief by the lower courts "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 court[]." (Vol. VI.) This Court permitted the Boone Circuit Court to proceed with the case and "issue all findings of fact and conclusions of law [it] find[s] appropriate[,]" but ordered that "no order, however characterized, shall be effective[]" pending this Court's review. (*Id*.)

On July 20, 2020, the Boone Circuit Court entered its order, stating that "it would have granted the temporary injunctions sought[]" and enjoined all orders and actions taken by the Governor pursuant to KRS Chapter 39A. (Vol. VI, R. 627-664.) On August 7, 2020, this Court found that, with the entry of the Boone Circuit Court's July 20 order, the matter is ripe for review. (Order, Aug. 7, 2020.)

[39] *See Dixon v. Com*., 149 S.W.3d 426, 430 (Ky. 2004) (trial court should hold a hearing unless "the record is complete enough to measure the proffered testimony against the proper standards of reliability and relevance[,]" and the record upon which a trial court can make an admissibility decision without a hearing usually will consist of "the proposed expert's reports, affidavits, deposition testimony, and existing precedent." (internal citations omitted); *see also*, *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d at 577-78 (Expert testimony based on "'scientific, technical, or other specialized knowledge[]'" must be "both relevant and reliable.").

STANDARD OF REVIEW

In this action, the parties request this Court to decide purely issues of law: specifically, the Governor's authority under KRS Chapter 39A to protect the public health from the imminent and rapid spread of a highly contagious, deadly, and previously unknown disease: COVID-19. This Court's review of the issues is *de novo*. *Caniff v. CSC Transp., Inc*., 438 S.W.3d 368, 372 (Ky. 2014). This Court must uphold KRS Chapter 39A and the validity of the emergency response actions.

ARGUMENT

The Governor – above all else – has a constitutional duty to protect the public safety and welfare of all Kentuckians from this emerging and deadly disease. Recognizing this, the General Assembly articulated the tools to lead a comprehensive statewide emergency response when it enacted KRS Chapter 39A. Upon the first confirmed case of COVID-19, the Governor and CHFS issued Orders (the "Orders") pursuant to the plain language of KRS Chapter 39A and in reliance on the scientific and medical advice provided by DPH, the CDC, and the White House regarding how best to respond to COVID-19. Such executive action taken in a time of emergency and amidst uncertainty, and in reliance on the expertise of public health officials is entitled to substantial deference by the judiciary.

Appellees recklessly challenge the constitutionality of KRS Chapter 39A and the Governor's public health response to COVID-19. In essence, they ask the judiciary to interfere with the executive branch's comprehensive, statewide response to a deadly pandemic. Not only are their claims dangerous, but they are contrary to the plain language of KRS Chapter 39A and application of the Constitution.

Indeed, the legal issues raised by Appellees are not complex. The plain language of KRS Chapter 39A authorizes the Governor and CHFS to implement public health orders to protect Kentuckians from the spread of COVID-19. In doing so, KRS Chapter 39A does not violate the separation of powers, but, instead, defines the Governor's executive authority during times of an emergency. Additionally, the challenged Orders are not arbitrary because they reasonably relate to the state's interest in slowing the spread of COVID-19 and, thereby, protecting the public health.

COVID-19 is unquestionably contagious and deadly, and it can spread whenever humans interact. New "hotspots" develop weekly. Thus, the need for a flexible, immediate response is paramount. KRS Chapter 39A provides the Governor authority for such a response. The Orders issued under that authority – which are based on both public health criteria and input from Kentucky businesses – reduce COVID-19 spread, protect Kentuckians, and allow for a gradual return to normalcy before the disease is controlled.

I. The Governor Possesses Authority To Address This Once-In-A-Generation COVID-19 Global Health Emergency.

A. KRS Chapter 39A Authorizes the Governor to Respond to Emergencies.

The Orders represent the Governor's exercise of powers specifically and unambiguously set forth in KRS Chapter 39A. In that Chapter, the General Assembly confirmed that it intended to "establish and support a statewide comprehensive emergency management program for the Commonwealth . . . [and] [t]o confer upon the Governor . . . the emergency powers provided in KRS Chapters 39A to 39F." KRS 39A.010. It created the Division of Emergency Management and placed it under the direct operational control of the Governor. KRS 39A.030(1).

It is through thea emergency response system created in KRS Chapter 39A that the Governor issued the Orders to respond to this pandemic. That statutory scheme was enacted in 1998 to address any actual or imminent disaster or emergency that threatens the public safety and welfare. The General Assembly recognizes that the rationale and purpose of the statewide emergency response system "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 (emphasis added).

The General Assembly further recognized that "the Commonwealth is subject at all times to disaster or emergency occurrences which can range from crises affecting limited areas to widespread catastrophic events." KRS 39A.010. It thus stated an intent to provide for a response to "all major hazards" or "emergency occurrences; or catastrophe[s]; or other causes; and the potential, threatened, or impending occurrence of any of these events; and in order to protect life and property of the people of the Commonwealth, and to protect public peace, health, safety, and welfare, and the environment; and in order to ensure the continuity and effectiveness of government in time of emergency, disaster, or catastrophe in the Commonwealth." *Id.* The General Assembly went on to define "catastrophe" to mean "a disaster or series of concurrent disasters which adversely affect *the entire Commonwealth of Kentucky* or a major geographical portion thereof." KRS 39A.020(2) (emphasis added).

More specifically, the Governor is empowered to declare that a state of emergency exists upon the "occurrence or threatened or impending occurrence of any of the situations or events contemplated by KRS 39A.010, 39A.020, or 39A.030[,]" including biological or etiological[40] hazards like this pandemic. KRS 39A.100(1). While the state of emergency exists the Governor has the authority, among others:

> (a) To enforce all laws, and administrative regulations relating to disaster and emergency response and to assume direct operational control of all disaster and emergency response forces and activities in the Commonwealth;
>
> . . .
>
> (f) To exclude all nonessential, unauthorized, disruptive, or otherwise uncooperative personnel from the scene of the emergency, and to command those persons or groups assembled at the scene to disperse. A person who refuses to leave an area in which a written order of evacuation has been issued in accordance with a written declaration of emergency or a disaster may be forcibly removed to a place of safety or shelter, or may, if this is resisted, be arrested by a peace officer. Forcible removal or arrest shall not be exercised as options until all reasonable efforts for voluntary compliance have been exhausted;
>
> (g) To declare curfews and establish their limits;
>
> (h) To prohibit or limit the sale or consumption of goods, excluding firearms and ammunition, components of firearms and ammunition, or a combination thereof, or commodities for the duration of the emergency;
>
> . . .
>
> (j) Except as prohibited by this section or other law, to perform and exercise other functions, powers, and duties deemed necessary to promote and secure the safety and protection of the civilian population; . . . .

Id. These powers, as intended by the Chapter, are comprehensive, yet specific.

[40] *Etiology*, "The science of the causes or origins of disease." WEBSTER'S NEW WORLD DICTIONARY 481 (2d College Ed. 1978).

To carry out these powers, the General Assembly provided the Governor multiple resources to respond with immediacy and flexibility to the ongoing demands of an emergency like COVID-19. Indeed, the Governor "may make, amend, and rescind *any executive orders as deemed necessary* to carry out the provisions of KRS Chapters 39A to 39F." KRS 39A.090 (emphasis added). Furthermore, KRS 39A.180 permits "[t]he political subdivisions of the state and other agencies designated or appointed by the Governor [to] make, amend, and rescind orders and promulgate administrative regulations necessary for disaster and emergency response purposes." KRS 39A.180(1). That statute further recognizes the primacy of such emergency orders or regulations, providing, "*All written orders and administrative regulations* promulgated by the Governor, the director, or by any political subdivision or other agency authorized by KRS Chapter 39A to 39F to make orders and promulgate administrative regulations, shall have the full force of law, when, if issued by the Governor, the director, or any state agency, a copy is filed with the Legislative Research Commission, or, if promulgated by an agency or political subdivision of the state, when filed in the office of the clerk of that political subdivision or agency." KRS 39A.180(2) (emphasis added).

KRS Chapter 39A controls. This Court has held, when interpreting statutes, courts must give words their literal meaning. *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017) (citation omitted). If the plain language of a statute is clear, that plain language dictates and the inquiry ends. *See id.*; *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). As recently as 2019, this Court recognized that when the plain language of a statute gives the Governor authority to act, that plain language controls. *Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 679 (Ky. 2019).

Here, the plain language of KRS Chapter 39A confirms that the Governor has the power to issue executive orders to stop the spread of a deadly disease. It is clear he may respond by issuing executive orders, by promulgating regulations, and by using his Cabinets or other political subdivisions of government. KRS Chapter 39A provides for the state's comprehensive response to emergencies, disasters, and catastrophes such as a global pandemic that threaten the health, safety and lives of Kentucky citizens. It, and the ensuing Chapters – 39B through 39F – demonstrate the General Assembly's foresight in setting out a comprehensive emergency plan for the Commonwealth. In doing so, it allows for swift and effective executive action that becomes necessary in a biological or etiological emergency. Facing the threats posed by COVID-19, the Governor used the statutory authority plainly given to him under KRS Chapter 39A to develop a response to protect the public health and safety of the Commonwealth.

B. The Constitution Empowers the Governor to Respond to Emergencies.

Under the Kentucky Constitution, "[t]he 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. This executive power includes the Governor's role as "commander-in-chief of the army and navy of this commonwealth, and of the militia thereof[,]" KY. CONST. § 75, and his duty to "take care that the laws be faithfully executed." KY. CONST. § 81.

Here, reinforcing the Governor's constitutional power, the General Assembly has created a unified emergency response system, all of which reports to the Governor in his role as Commander-in-Chief. *See* KY. CONST. § 75. Specifically, in KRS Chapter 36, the General Assembly created the Department of Military Affairs and attached it to the

Office of the Governor. 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." KRS 36.010. Within that Department, the General Assembly placed the Division of Emergency Management, which administers the unified emergency response program established by KRS Chapter 39A. 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.

The Governor's command over emergency responses is necessary to fulfill his duty to execute the laws. During a prior emergency, this 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, then this provision of the Constitution 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. He may on his own initiative order out the state militia, or he may wait until requested so to do by the local authorities in the community in which they are needed. He may place the militia at the disposal of the civil authorities, or he may, through military channels, control and direct, within lawful bounds, their movements and operations. Which of these courses he will pursue, he alone is to judge. The Constitution and statute have given him this power, and we could not if we desired abridge it.

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.

Put differently, 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. The Governor's statutory powers

under KRS Chapter 39A and the Orders issued under it are a proper exercise of his executive role in the Constitution.

C. COVID-19 Necessitates the Issuance of a Statewide Emergency and Statewide Response to Preserve Resources and Reduce Its Spread.

Relying on the CDC, the White House, and other public health guidelines, Appellants issued orders to reduce the spread of COVID-19. The Executive Branch is entrusted by our Constitution and statutes with responding to emergencies. The General Assembly has expressly confirmed and defined those duties in KRS Chapter 39A. Thus, judicial review of that response is necessarily limited by the separation of powers.

As Chief Justice Roberts recently stated: "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *South Bay United Pentecostal Church v. Newsom*, ___ U.S. ___, 140 S.Ct. 1613 (Roberts, C.J.) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). *See also In re Abbott*, 954 F.3d 772, 795 (5th Cir. 2020) ("[The governor's] interest in protecting public health during such a time is at its zenith."). When public officials face the unenviable task of responding to an emergency to protect the "safety and health of the people . . . in areas fraught with medical and scientific uncertainties, their latitude must be especially broad." *South Bay*, 140 S.Ct. at 1613-14 (internal quotations and citations omitted).

Kentucky courts also defer to the Governor when he or she makes decisions based on evolving scientific knowledge and when responding to public health emergencies. This Court has held that courts must be especially wary of second-guessing executive action when responding with immediacy to public health emergencies, where, as here, the legislature has expressly confirmed the specific powers exercised by the Governor. *See*

Graybeal v. McNevin, 439 S.W.2d 323, 331 (Ky. 1969) (statutorily-authorized action by an agency that relies on expertise and accumulated experience fortifies the agency's judgment against judicial review).

As this Court's predecessor recognized in *Franks*, "[a]ny attempt on the part of the judicial department of the state" to interfere with the Governor's actions in emergency circumstances "would be an interference by one department of the government with the power lodged in another department, and a violation of [S]ection 27 of the Constitution of the state." 134 S.W. at 487.

The Orders at issue plainly survive judicial review because they are grounded in evolving science concerning how best to reduce the spread of COVID-19. As Dr. Stack testified, "…with our rapid learning curve with our ability to as rapidly as possible calibrate our interventions to save the greatest number of lives with the least unintended consequences…we have followed the phased reopening plan that was outlined by the federal government[.]" (Vol. 6, R. at Env. V, pg. 403-404:22-2.) In short, the Orders are supported by science and follow both White House and CDC guidance as to when and how public health restrictions should be implemented, safely eased, and ultimately lifted.

1. <u>Reduced capacities for indoor restaurants</u>

Appellee Beans Café challenges restrictions on restaurant capacity, but indoor restaurants have proven particularly dangerous for the spread of COVID-19. As Dr. Stack testified, eating and drinking increases saliva and spreads respiratory droplets. (Vol. VI, R. at Env. V, pg. 407:17-19.) Consuming food or drinks is incompatible with wearing masks, which has proven an extremely effective intervention to stop the spread of disease. In bars and restaurants, people eat, drink, and talk loudly. These are also

settings where individuals "are mixing and matching from outside their household unit," leading to an "elevated" likelihood of spread. (Vol. 6, R. at Env. V, pg. 408:15-19.)

Moreover, people often remain in restaurants for longer than in other public places like grocery stores, and they remain in the same location, often "talking across the table from others." (Vol. 6, R. at Env. V, pg. 409:15.) Viral load appears to be an important factor in whether exposed individuals get sick[41] and in how severe their illness may become. Thus, restaurants contribute to disease by allowing increased exposure.[42]

One CDC study bears this out. At a restaurant in Guangzhou, China, 10 patrons seated in the same airflow as an infected (but asymptomatic) individual for a prolonged period of time all became sick.[43] Importantly, none of the wait staff – who had only brief, transitory encounters with the infected person – became ill.[44]

Across the country, COVID-19 outbreaks have been tied to restaurants and bars – including 12% of all cases in Maryland and 9% of all cases in Colorado.[45] Closer to

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[41] Carl Heneghan, et al., SARS-CoV-2 viral load and the severity of COVID-19, Centre for Evidence-Based Medicine, Nuffield Department of Primary Care Health Sciences, University of Oxford, Mar. 26, 2020, available at https://www.cebm.net/covid-19/sars-cov-2-viral-load-and-the-severity-of-covid-19/ (last visited Aug. 26, 2020) (summarizing evidence that length and extent of exposure may affect severity of disease, contributing to increased mortality among healthcare workers).

[42] Emily Heil, *As restaurants reopen, here's what you should know about air conditioning, air flow and the coronavirus*, May 28, 2020, available athttps://www.washingtonpost.com/news/voraciously/wp/2020/05/28/as-restaurants-reopen-heres-what-you-should-know-about-air-conditioning-air-flow-and-the-coronavirus/ (last visited Aug. 25, 2020) ("How the virus is transmitted might be more important in restaurants than in many other venues, notes L. James Lo, an assistant professor at Drexel University in Philadelphia who studies airflow and how viruses circulate, because people linger there far longer than they do in, say, a grocery store. Exposure to the virus can come from encountering a high dose for a short time or a low dose over a longer period, he says.") (last visited Aug. 26, 2020).

[43] Jianyun Lu et al., COVID-19 Outbreak Associated with Air Conditioning in Restaurants, Guangzhou, China, 2020, Emerging Infectious Diseases, Vol. 26, No. 7 (July 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article (last visited Aug. 26, 2020).)

[44] *Id.*

[45] Jennifer Steinhauer, *The Nation Wanted to Eat Out Again. Everyone Has Paid the Price*, N.Y. Times, Aug. 12, 2020, available at https://www.nytimes.com/2020/08/12/health/Covid-restaurants-bars.html (last visited Aug. 27, 2020).

home, "some of Lexington's best restaurants" have given rise to COVID-19 clusters.[46] For these reasons, Dr. Deborah Birx, the Coronavirus Response Coordinator for the White House, specifically recommended that Kentucky close bars and reduce restaurant capacities to slow the spread of disease.[47]

Based on this evidence and White House guidance, the Governor has taken multiple steps to slow the spread of disease in bars and restaurants, including by reducing capacity and, at times, requiring bars to close. Lowering the density of people in a space (even an outdoor space) "absolutely" results in risk reduction. (Vol. VI, R. at Env. V, pg. 407-408: 2-4, 8-20.) At the same time, Kentucky officials have adapted their guidance to reflect new evidence, including by encouraging outdoor dining facilities as the scientific consensus has grown that remaining outdoors helps keep people safe.

2. Reduced capacities for childcare facilities

Plaintiff Little Links has argued against the restrictions that reduce capacities at childcare facilities. But children in daycares represent a unique challenge because children may not wear masks or social distance. Thus, as Dr. Stack testified, "other interventions that reduce density" are necessary. (Vol. VI, R. at Env. V, pg. 413:19.) While early evidence suggested that children were unlikely to contract COVID-19 or become sick, recent cases of a new, potentially fatal multisystem inflammatory syndrome

[46] Janet Patton, *What do some of Lexington's best restaurants have in common?* COVID clusters., Lexington Herald-Leader, July 30, 2020, available at https://www.kentucky.com/lexgoeat/restaurants/article244569387.html (last visited Aug. 27, 2020).
[47] Deborah Yetter, *Dr. Deborah Birx, top U.S. COVID-19 official, advises closing bars on visit to Kentucky*, Louisville Courier-Journal, July 26, 2020, available at https://www.courier-journal.com/story/news/politics/2020/07/26/deborah-birx-white-house-covid-19-coordinator-urges-closing-bars/5511992002/ (last visited Aug. 27, 2020).

– including here in Kentucky – have shown otherwise.[48] Indeed, new evidence shows that asymptomatic children may carry a higher viral load than adults in the ICU.[49] Even when kids with COVID-19 do not become ill, they spread the disease to caretakers.[50] Based on these risks, Appellants reduced the capacity of childcare facilities to 10 children per group to help minimize exposure and risk of COVID-19 spread in childcare facilities.

3. Limitations on venue capacity

Plaintiff Florence Speedway objects to restrictions on venues where people congregate. However, since the beginning of the emergency, public health experts have recommended that people not congregate in large groups. As Dr. Stack testified, large venue gatherings have been shown in some cases to be directly related to superspreading events, "where one event causes a large increase in cases". (Vol. VI, R. at Env. V, pg. 410:11-18.) Such gatherings include weddings,[51] funerals,[52] and worship services.[53]

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[48] CDC Guidance, For Parents: Multisystem Inflammatory Syndrome in Children (MIS-C) associated with COVID-19, May 30, 2020, available at https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/children/mis-c.html (last visited Aug. 26, 2020).

[49] Lael Yonker, et al., Pediatric SARS-CoV-2: Clinical Presentation, Infectivity, and Immune Responses, Journal of Pediatrics, Aug. 19, 2020, available at https://www.jpeds.com/article/S0022-3476(20)31023-4/fulltext (last visited Aug. 27, 2020).

[50] *See, e.g.*, Elizabeth Doran, *At least 16 sick after coronavirus exposure at DeWitt in-home day care: 'Take this seriously ... stay home if sick at all'*, The (Syracuse) Post Standard, July 13, 2020, available at https://www.syracuse.com/coronavirus/2020/07/at-least-16-sick-after-coronavirus-exposure-at-dewitt-in-home-day-care-take-this-seriously-stay-home-if-sick-at-all.html (last visited July 13, 2020); Franchesca Hackworth and J. Frazier Smith, *Coronavirus Pandemic: 18 cases lead to shut down of Dayton child care center*, WHIO, available at https://www.whio.com/news/local/coronavirus-pandemic-18-cases-lead-shut-down-dayton-child-care-center/RUOV6EJWMFF6TMK5NTNTHJ7B5M/ (last visited July 13, 2020); 28 COVID-19 cases reported at Lake Oswego day care center, KGW, July 1, 2020, available at https://www.kgw.com/article/news/health/coronavirus/covid-19-at-lake-oswego-day-care-center/283-ee91f570-534c-442d-9ddd-f1dcc8d4fe05 (last visited Aug. 26, 2020).

[51] Arshad Zargar*, Groom may have been coronavirus super-spreader at his own big Indian wedding*, CBS News, July 1, 2020, available at https://www.cbsnews.com/news/groom-may-have-been-coronavirus-super-spreader-at-his-own-big-indian-wedding/ (last visited Aug. 27, 2020).

[52] Ellen Barry, *Days After a Funeral in a Georgia Town, Coronavirus 'Hit Like a Bomb'*, N.Y. Times, Mar. 30, 2020, available at https://www.nytimes.com/2020/03/30/us/coronavirus-funeral-albany-georgia.html (last visited Aug. 27, 2020).

[53] Bailey Loosemore and Mandy McLaren, *Kentucky county 'hit really, really hard' by church revival that spread deadly COVID-19*, Courier-Journal, Apr. 1, 2020, available at https://www.courier-

These events do not just affect those who choose to attend. A genetic study has traced 20,000 cases in Boston to a single healthcare conference with only 175 attendees.[54] Health officials in Maine recently traced 53 cases of COVID-19 to an August wedding.[55] Those cases include secondary and tertiary cases among individuals who did not even attend the event, but were infected by those who did, demonstrating that even those who make safe decisions are put at risk by people who attend such events.

Sporting events are also concerning. As Dr. Stack testified, "…people are shouting and cheering quite often very passionately…" – which leads to increased spread of the respiratory droplets that transmit the virus. (Vol. VI, R. at Env. V, pg. 410:25; 411:1-2.) This creates an enhanced risk, even outdoors. (*Id.*).

Based on this overwhelming evidence, public health officials, including those at the White House, have recommended limiting large gatherings in places like Kentucky where the disease is widespread.[56] Accordingly, public health officials have instructed venues to limit indoor and outdoor capacities.

KRS Chapter 39A and our Constitution give the Governor the authority to respond to emergencies. The Orders placing capacity and class size limitations where groups gather in public businesses are within that authority as an effective and necessary response to slow the spread of COVID-19. As will be further demonstrated below in Part

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journal.com/story/news/2020/04/01/coronavirus-kentucky-church-revival-leads-28-cases-2-deaths/5108111002/ (last visited Aug. 27, 2020).

[54] Jacob E. Lemieux, et al., Phylogenetic analysis of SARS-CoV-2 in the Boston area highlights the role of recurrent importation and superspreading events, MedRxiv (pre-print), Aug. 25, 2020, available at https://www.medrxiv.org/content/10.1101/2020.08.23.20178236v1.full.pdf. (last visited Aug. 27, 2020).

[55] Rob Wolfe, *Maine CDC now links 53 COVID-19 cases to Millinocket wedding reception*, Portland Press Herald, Aug. 22, 2020, available at https://www.pressherald.com/2020/08/22/maine-cdc-reports-32-cases-of-coronavirus-one-death/ (last visited Aug. 27, 2020).

[56] Josh Bazan, *White House doc recommends KY close bars, restrict restaurants to stem infection spread*, WCPO, available at https://www.wcpo.com/news/coronavirus/white-house-doc-recommends-ky-close-bars-restrict-restaurants-to-stem-infection-spread (last visited Aug. 28, 2020).

III, the capacity and distancing restrictions are rationally related to the goals of Chapter 39A and are not arbitrary or capricious. But first, Appellants must address the spurious claims that Chapter 39A is unconstitutional.

II. KRS Chapter 39A Is Constitutional.

KRS Chapter 39A sets forth a comprehensive and detailed approach for the state's preparation, response, and recovery from an emergency. It empowers the Governor to take executive and administrative action that he deems necessary to protect the lives and resources of the Commonwealth. It does not – as Appellees vaguely allege – violate the separation of powers set forth in Sections 27 and 28 of the Kentucky Constitution.

A. The Governor's Response to COVID-19 is an Executive Action.

Appellees challenge KRS Chapter 39A as a violation of the separation of powers doctrine because it provides the Governor with the responsibility of taking action to respond to an emergency. (Vol. III, R. 327-328.) They are incorrect. KRS Chapter 39A recognizes, defines, and constrains the Governor's executive and administrative authority to direct the Commonwealth's comprehensive response to emergencies.

As the "supreme executive power of the Commonwealth," KY. CONST. § 69, with the responsibility to "take care that the laws be faithfully executed," KY. CONST. § 81, by directing the Commonwealth's emergency response to COVID-19, the Governor faithfully executes KRS Chapter 39A. Moreover, by declaring an emergency and assuming operational control of the response, the Governor acts in his constitutional role as the "commander-in-chief" of military affairs. KY. CONST. § 75. Thus, the Governor's actions, though defined by KRS Chapter 39A, are taken under his constitutional role.

Even if this were not the case, by enacting KRS Chapter 39A and empowering the Governor to issue executive orders he deems necessary to protect the public health during an emergency, the General Assembly determined such action to be an executive function. As this Court stated in *L.R.C. ex rel. Prather v. Brown*, 664 S.W.2d 907, 930 (Ky. 1984), "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." And KRS Chapter 39A creates a purely executive role for the Governor. He may issue executive orders to protect the public health and resources of the Commonwealth. KRS 39A.100. He may direct and coordinate an immediate and effective response from other state agencies. KRS 39A.180. And, he oversees statewide emergency operations to ensure coordination amongst all state, local and federal officials. KRS 39A.050, .060, and .070.

To be sure, the General Assembly enacted KRS Chapter 39A under Title V of the Kentucky Revised Statutes, titled "Military Affairs," and created the Division of Emergency Management within the Department of Military Affairs. KRS 39A.030(1); KRS 36.010(2). This is because, as noted above, the General Assembly recognized that response to a disease may require a response only the military may provide. *See* KRS 39A.030. In other words, the General Assembly recognized that the Commonwealth's response to an emergency like COVID-19 requires the executive authority held by the "commander-in-chief[.]"

This Court's predecessor agreed. In *Franks*, the Court recognized:

> The 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." If this power was not lodged in him, then this provision of the Constitution 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 upon him. It is only through and with the aid of the state militia that he can make effective the authority conferred by the Constitution, and it was for this purpose that the Legislature enacted [the emergency powers law].

134 S.W. at 487. This Court, too, recognized the inherent executive power to respond to an emergency, comparing a Governor's statutory power to reorganize state government when necessities demand with the command of troops and battle missions, stating the role "*is essentially an executive action . . . and is not an exercise of legislative power by the chief executive*." *Brown v. Barkley*, 628 S.W.2d 616, 623 (Ky. 1982) (emphasis added). The Governor's response to COVID-19 is no different. It is akin to commanding troops in to defeat the gravest public health threat facing the Commonwealth in over a century – an enemy that has already killed hundreds of Kentuckians and sickened thousands more.

The actions taken by the Governor in response to COVID-19 are rooted in his constitutional authority, with resources specified by KRS Chapter 39A. They are inherently and expressly executive. As such, there can be no doubt that the Governor does not violate the separation of powers when he exercises the powers plainly and expressly set forth in KRS Chapter 39A.

B. Even if KRS Chapter 39A Delegates Legislative Authority, it Contains Appropriate Procedural Safeguards.

Even assuming, *arguendo*, Appellees are correct that KRS Chapter 39A is a delegation of legislative authority, that delegation is constitutional. Under the nondelegation doctrine, the delegation of legislative power to the executive department is not totally prohibited. *Beshear v. Bevin*, 575 S.W.3d 673, 683 (Ky. 2019); *Bd. of Trs. of Jud. Form Ret. Sys. v. Attorney General*, 132 S.W.3d 770, 781 (citing *Mistretta v. U.S.*, 488 U.S. 361, 372, (1989)). Rather, while the General Assembly cannot delegate its

power to make law, it can make a law that delegates the power to determine some fact or state of things upon which the law makes its own action depend – so long as the law establishes policies and standards governing its exercise. *Fletcher v. Com.* 163 S.W.3d 852, 862-63 (Ky. 2005) (citing *L.R.C.*, 664 S.W.2d at 915; *Bloemer v. Turner*, 137 S.W.2d 387, 391 (1939)); *see also, TECO Mechanical Contractor, Inc. v. Com.*, 366 S.W.3d 386, 397 (Ky. 2012).

Thus, "[t]he General Assembly may validly vest legislative . . . authority in [another branch] if the law delegating that authority provides 'safeguards, procedural and otherwise, which prevent an abuse of discretion by the agency.'" *TECO*, 366 S.W.3d at 397-98 (internal quotations and citations omitted). Indeed, this Court has held that "[t]he purpose of the non-delegation doctrine should no[ ] longer be either to prevent delegation or to require statutory standards; the purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power." *Miller v. Covington Development Authority*, 539 S.W.2d 1, 5 n. 9 (Ky. 1976) (internal quotation omitted).

The reason the General Assembly may delegate legislative authority with appropriate safeguards is simple. "The nondelegation doctrine recognizes that . . . given the realities of modern rule-making, [the legislature] neither has the time nor the expertise to do it all; it must have help." *Beshear*, 575 S.W.3d at 683 (quoting *Bd. of Trs. of Jud. Form Ret. Sys.*, 132 S.W. 3d at 781. As stated in *Holsclaw v. Stephens*: "It must not be overlooked that legislatures in Kentucky are not in continuous session and of necessity they cannot undertake to determine all facts incident to the administration of the laws which they enact." 507 S.W.2d 462, 471 (Ky. 1973).

Here, again, the Governor is not legislating. Instead, he is faithfully executing the laws by acting under the executive authority the General Assembly has given him and constrained in KRS Chapter 39A. *See Beshear*, 575 S.W.3d at 681. In the authority granted by KRS Chapter 39A, the General Assembly set forth its policy, which created:

> 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 . . . including . . . mass-casualty or mass-fatality emergencies [or] other . . . biological [or] etiological hazard[s].

KRS 39A.010. The policy behind the Chapter is to protect the Commonwealth and its citizens prior to, during, and after an emergency, disaster, or catastrophe. *Id.* Consistent with this policy, the legislature created a comprehensive scheme for the Commonwealth to respond to emergencies of all types. *See* KRS 39A.010, *et seq.*[57] Of course, the context of the law and the nature of emergencies must be considered. The legislature acknowledged the inherent nature of emergencies in its policy statement and throughout the Chapter, including its direction to create a specialized division with a centralized and coordinated response to emergencies. *Id.*

[57] For example, the statutory scheme includes: definitions (KRS 39A.020); a statement of legislative rationale (KRS 39A.030); the Powers and Responsibilities of the Division of Emergency Management (KRS 39A.050); the scope of the comprehensive emergency management program, including the legislature's acknowledgment that the program requires the "full support" of executive branch agencies (KRS 39A.060); a prescription of the powers and duties of the Division of Emergency Management (KRS 39A.070); the authority of the Governor to make and amend executive orders to carry out the provisions of the Chapter (KRS 39A.090); the emergency powers of the Governor and local chief executives (KRS 39A.100); the authority of the Governor to delegate to agencies (KRS 39A.180); a requirement that executive orders be filed with the legislature (KRS 39A.180(2)); the authority to enforce the orders and administrative regulations (KRS 39A.180(3)); the authority to receive federal aid (KRS 39A.200); requirements for employees to swear an oath to the constitution (KRS 39A.210); a requirement for centralized command and management for emergencies, disasters, and catastrophes (KRS 39A.230); the creation of a State Emergency Operations Center (KRS 39A.240); authority to enter into agreements with other states (KRS 39A.260); provisions for the use of public resources before, during, and after the emergency (KRS 39A.270).

Further, KRS Chapter 39A contains appropriate safeguards to prevent unnecessary or uncontrolled discretionary power. *Miller*, 539 S.W.2d at 5 n. 9. "Factors to consider in determining whether the law in question provides sufficient safeguards include the experience of the agency to which the authority is delegated, the subject matter of the law, and the availability of judicial review." *TECO*, 366 S.W.3d at 398 (citation omitted). The Appellees focus on a single statute, KRS 39A.090, which gives the Governor the authority to "make, amend, and rescind any executive order as deemed necessary to carry out the provisions of KRS Chapters 39A to 39F." They argue that this statute represents an unconstitutional delegation. (Vol. IV, R. 464-489.)

In making this argument, Appellees ignore the nature of a state of emergency – particularly one surrounding a pandemic – and the Governor's constitutional authority to protect the citizens of the Commonwealth during an emergency. Emergency events and occurrences are perhaps the most suitable and necessary of circumstances for the legislature to delegate authority to the Executive. It is axiomatic that Kentucky's part-time General Assembly has neither the expertise nor ability to respond to rapidly developing and constantly changing emergency circumstances – like those that have arisen during the COVID-19 global health pandemic.

Here, the General Assembly wrote safeguards preventing "unnecessary and uncontrolled discretionary power" into KRS Chapter 39A. *Beshear*, 575 S.W.3d at 683. First, the General Assembly required that before any Governor may act, there must be an emergency, disaster, or catastrophe to trigger the authority to issue Executive Orders. *See* KRS 39A.020; KRS 39A.090. The General Assembly further limits the delegation by mandating any orders issued under the Chapter must relate only to the emergency or its

effects. *See* KRS 39A.090. Thus, the Governor's authority under KRS Chapter 39A must be triggered and his orders must relate solely to that event and its effects.

In this case, the emergency is a global health pandemic that permeates all aspects of Kentuckians' daily lives. Thus, the Orders apply to protect the public health and combat the spread of COVID-19. Other emergencies, such as floods or wind-storms, are more limited in geographic scope and effect on daily routines. Orders relating to these more concentrated emergencies must correspond to the circumstances surrounding those emergencies. *See id.* Contrary to Appellees' arguments, the Orders are restricted to the subject-matter of the specific emergency. *See TECO*, 366 S.W.3d at 398.

Appellees argue that the legislature failed to specify a limited subject matter within the statute. (Vol. V, R. 514-527, 587-617.) This argument ignores the entirety of KRS Chapter 39A. KRS 39A.010 specifically identifies certain types of emergencies, including etiological emergencies like COVID-19, and KRS 39A.100 provides the specific actions the Governor may take in response to the emergency. Appellees also ignore the nature of emergencies. As recognized by this Court in *Commonwealth ex rel. Meredith v. Johnson*, the legislature properly permitted the Governor to expend funds during a state of emergency. 166 S.W.2d at 412. There, this Court held:

> Foreseeing such possible emergencies, but being unable to determine at the time of its regular session what specific situation might arise, the Legislature *wisely* delegated to the Governor the right in his administration capacity to determine the fact that such an emergency has arisen. The authority is strictly administrative and does not violate sections 27, 28, 29, or 230 of the Constitution.

Id. at 415. Of course, in enacting KRS Chapter 39A the legislature could not envision every emergency which might befall the Commonwealth, and so it wisely gave the Governor executive authority to act quickly to address the emergency.

Further, every executive order or agency order must be filed with the Legislative Research Commission, which is the administrative arm of the General Assembly. KRS 39A.180(2). This is similar to the notification requirement found in KRS 12.028(1) that this Court cited in upholding the constitutionality of the reorganization statute in *Beshear*. *See* 575 S.W.3d at 683 n. 28. There, this Court held the legislature's grant of authority to the Governor in KRS 12.028 to temporarily reorganize executive agencies and boards was not an illegal delegation of its law-making authority. *Id.* at 683. That case involved one single statute granting authority – not a comprehensive chapter. *Id.* The controls in place were simple: the legislature had approved it on the front-end – through enacting the statute – and maintained approval on the back-end by reviewing the statute in the next regular session. *Id.* In addition, the Court in *Beshear* noted that the General Assembly controlled KRS 12.028 and could amend it during its next session. *Id.* at 684.

Moreover, any delegation in KRS Chapter 39A calls upon the expertise of agencies that administer laws protecting public health and safety. (Vol. V, R. 514-527, 587-617.); *TECO*, 366 S.W.3d at 398 (internal citation omitted) (A factor in determining whether sufficient safeguards exist is "the experience of the agency.") Again, the General Assembly, a part-time legislature, does not have the "expertise to do it all[,]" particularly when it is not in session. *Bd. of Trs. of Jud. Form Ret. Sys.*, 132 S.W.3d at 781.

Here, the General Assembly recognized that the Governor – as Commander-in-Chief – has the expertise to determine when an emergency has arisen and how to effectively respond. The General Assembly further recognized the Governor would need to call upon state agencies with relevant subject-matter expertise. The integrated emergency management system further requires coordination with state and local

officials. KRS 39A.020(13); 39A.180. With a centralized command attached to the Commander-in-Chief and experts at his disposal the Governor and his designees possess the appropriate subject-matter expertise. *TECO*, 366 S.W.3d at 398.

Fourth, the General Assembly placed safeguards in KRS Chapter 39A by requiring coordination with federal and local officials. *See e.g.,* KRS 39A.010; KRS 39A.020(12); KRS 39A.070(18); KRS 39A.050; KRS 39A.260. Coordination with these agencies requires compliance with federal laws and regulations. KRS 39A.260(9). For example, KRS 39A.070(17) requires compliance with the Federal Disaster Assistance Program and KRS 39A.260(9) requires compliance with "all applicable federal law" regarding mutual aid agreements and workers' compensation. Plainly, the legislature placed tremendous thought into these statutes in order to ensure that even during a state of emergency, the Governor and his designees comply with these federal laws. This is a clear control put in place by the legislature. *See Miller* 539 S.W.2d 1, 5 n.9. The Orders in this case reflect this federal-state cooperation.[58]

Finally, to remove all doubt, the General Assembly itself passed a special law related to the COVID-19 emergency in the 2020 regular session. In SB 150, the legislature sought to address the public health emergency. *See* 2020 SB 150. The legislature passed this law on March 30, 2020, nearly a month after the Governor issued Executive Order 2020-215 declaring the state of emergency.

[58] Indeed, many restrictions Governor Beshear has imposed have been directly recommended to him by the White House, including mandatory mask requirements, reduced capacities for indoor restaurants, and greater restrictions on bars. *See* Deborah Yetter, *Dr. Deborah Birx, top U.S. COVID-19 official, advises closing bars on visit to Kentucky*, Louisville Courier-Journal, July 26, 2020, available at https://www.courier-journal.com/story/news/politics/2020/07/26/deborah-birx-white-house-covid-19-coordinator-urges-closing-bars/5511992002/ (last visited Aug. 27, 2020).

In SB 150, the General Assembly "recognize[d] the efforts of the Executive Branch to address the state of emergency in the Commonwealth declared by Executive Order 2020-215 due to the outbreak of COVID-19 virus, a public health emergency." *Id.* It proceeded to enact specific provisions relating to numerous areas, ranging from suspending licensing fees (§ 1(1)(a)) and extending tax filings (§ 1(3)) to expanding telehealth (§ 1(4)). Thus, the General Assembly recognized there was an emergency, recognized the Executive Branch had taken action to curtail the emergency, and augmented that action by enacting specific provisions relating to a multitude of different laws and public policy. In Section 4, it declared an emergency. Further, while unnecessary due to the safeguards in KRS Chapter 39A, the legislature placed an additional safeguard on the timing of this particular state of emergency:

> Notwithstanding any state law to the contrary, the Governor shall declare, in writing, the date upon which the state of emergency in response to COVID–19, declared on March 6, 2020, by Executive Order 2020–215, has ceased. In the event no such declaration is made by the Governor on or before the first day of the next regular session of the General Assembly, the General Assembly may make the determination.

SB 150 § 3. While the General Assembly could already act when it comes into session in 2021 as described above, this provision leaves no doubt as it relates to this state of emergency. The legislature, as in *Beshear*, has acknowledged the emergency, the Governor's statutory authority to respond to COVID-19, and may change or effectuate laws relating to the emergency in future sessions. 575 S.W.3d at 683.

Taken to its conclusion, Appellees' argument is absurd. It would ensure the Governor has no authority to issue orders to protect flooded areas[59] or to fight wildfires

[59] *See e.g.* Executive Order 2020-136 (Feb. 8, 2020), State of Emergency related to flooding in southeastern Kentucky. https://governor.ky.gov/attachments/20200207_State-of-Emergency_EO.pdf (last visited August

threatening Kentuckians.[60] Surely, the Governor may act to protect citizens harmed by natural disasters. But Appellees' arguments would eviscerate the Governor's authority to do just that.

The citizens of the Commonwealth would have to wait until the legislature returned to session to address these disasters. Kentucky's officials must be able protect the Commonwealth during emergencies when the legislature is not sitting. Appellees' position is untenable and irresponsible, with no support in the law. The legislature clearly recognized the need for immediate and responsible action. KRS Chapter 39A does not violate the non-delegation doctrine.

III. In Light Of This Statutory And Constitutional Authority, Appellees' Challenges To The Orders Must Fail.

The Governor has the authority to respond to emergencies. *See* Part I, *supra*. His actions as Commander-in-Chief are inherently executive, and any powers granted under Chapter 39A are well within the bounds of the nondelegation doctrine. *See* Part II, *supra*. However, Appellees challenge the Orders responding to COVID-19, arguing that they are arbitrary under Sections 1 and 2 of the Kentucky Constitution. They also argue that the Orders suspend statutes in violation of Section 15 of the Kentucky Constitution. Finally, Appellees claim the Governor violated KRS Chapter 39A by declaring the statewide emergency and issuing executive orders rather than promulgating regulations. They are wrong. Each claim is refuted by the plain language of KRS Chapter 39A and well-established law recognizing the Governor's constitutional executive authority to respond

17, 2020); Executive Order 2018-137 (Feb. 23, 2018), Statewide State of Emergency related to storms across the Commonwealth. http://web.sos.ky.gov/execjournalimages/2018-MISC-2018-0137-254352.pdf (last visited Aug. 27, 2020).

[60] *See* Executive Order 2016-792 (Nov. 3, 2016), Statewide State of Emergency relating to wild fires. http://web.sos.ky.gov/execjournalimages/2016-MISC-2016-0792-247191.pdf (last visited Aug. 27, 2020).

to emergencies detailed above. But their claims are also defeated by the straightforward application of the Kentucky Constitution.

A. The Orders Do Not Violate Sections 1 or 2 of the Kentucky Constitution Because They Bear a Reasonable Relationship to Slowing the Spread of COVID-19.

Appellees allege the Orders are arbitrary. Yet, as evidenced from the proceedings before the Boone Circuit Court, their challenge reflects mere disagreement with medically and scientifically supported policy decisions as to how best to limit the spread of COVID-19. Indeed, Appellees did not challenge the initial response of closing public-facing businesses to the public. And, Appellees do not contest that the Orders limit the spread of COVID-19. Instead, they assert that the Orders protecting the public from the spread of COVID-19 "make it difficult . . . for the business to turn a profit[]" and present other "limitations" on operation of their businesses. (Vol. I, R. 23-24.) Further, they argue the Governor and CHFS should not have applied the same response statewide because some counties have fewer cases than others. These policy disagreements fly in the face of the recommendations of the CDC, the White House, and local public health officials and the responses crafted by the rest of the country.

Sections 1 and 2 of the Kentucky Constitution prohibit the exercise of arbitrary power by government. *Zuckerman v. Bevin*, 565 S.W.3d 580, 594 (Ky. 2018). Kentucky courts understand these provisions to assure citizens "fundamentally fair and unbiased procedures." *Commonwealth Nat. Res. and Envtl. Prot. Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 724 (Ky. 2004) (citing *Smith v. O'Dea*, 939 S.W.2d 353 (Ky. App. 1997)). But a claim of arbitrariness is defeated by reasonableness, and what is reasonable to protect the state's public health is not arbitrary. *Id*. (citing *Sanitation Dist. of Jefferson*

Cty. v. Louisville, 213 S.W.2d 995 (Ky. 1948). "The question of reasonableness is one of degree and must be based on the facts of a particular case." *Id*. (citation omitted). The constitutional limitation on the exercise of power to regulate private property in the interest of public health comes down to a question of "reasonability." *Adams, Inc. v. Louisville & Jefferson Cty. Bd. of Health,* Ky., 439 S.W.2d 586 (1969).

The Orders are not arbitrary. They are reasonable, supported by scientific and medical data, and directly related to the objective of protecting the state's interests in reducing the spread of COVID-19. The Orders adhere to guidelines published by the White House and the CDC, as well as recommendations by local public health officials to establish a data-driven, phased reopening of businesses and services.[61] This approach – requiring face coverings, limiting capacity, and increasing hygiene and sanitation measures in public spaces – allows for some sense of normalcy even as COVID-19 continues to spread. It also creates a controlled environment for public health officials to monitor community spread, trace contacts, and craft a targeted response to outbreaks.

1. Emergency public health orders relying upon advice of public health officials are entitled to extraordinary deference by courts.

Appellees cannot meet the almost insurmountable bar they face with respect to this challenge. *See Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 823 (Ky. 1942) ("Always the burden is upon one who questions the validity of an [a]ct to sustain his contentions."). Courts owe public health measures responding to a public health emergency substantial deference and a presumption of constitutionality. This

[61]White House Guidelines: Opening Up America Again, available at https://www.whitehouse.gov/openingamerica/ (last visited Aug. 28, 2020).

Court has long held that "an [a]ct should be held valid unless it clearly offends the limitations and prohibitions of the constitution. . . ." *Johnson*, 165 S.W.2d at 823; *see also Zuckerman v. Bevin*, 565 S.W.3d 580, 587 (Ky. 2015). Moreover, any doubt must be resolved "in favor of constitutionality rather than unconstitutionality." *Hallahan v. Mittlebeeler*, 373 S.W.2d 726, 727 (Ky. 1963) (citation omitted). Indeed, courts are to draw all fair and reasonable inferences in favor of constitutionality. *Kentucky Indus. Util. Customers, Inc. v. Kentucky Util. Co.*, 983 S.W.2d 493, 499 (Ky. 1998).

In times of an emergency, Kentucky courts afford the Governor and Executive Branch agencies The Governor has broad discretion when crafting public health measures in reliance on evolving scientific data. In *Graybeal*, this Court's predecessor acknowledged that the general rules of judicial review do not apply to public health measures composed by specialists in an area where courts have limited understanding. 439 S.W.2d at 326. To warrant interference from the courts, arbitrary exercise of power in such an instance would need to be "palpable[.]" *Id*. COVID-19 presents the unique situation of an unknown, rapidly spreading, deadly disease, to which an immediate, aggressive response is required. The Orders were issued during an emergency and in a field of scientific and medical uncertainty. They are owed the highest deference.

The Supreme Court of the United States has given deference when addressing executive action in response to COVID-19. Speaking specifically to reviewing restrictions on social interactions, Chief Justice Roberts, in a concurring opinion, noted:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905). When those officials

> "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad*." Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people*. See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

South Bay United, 140 S.Ct. at 1613-14 (Mem). The Sixth Circuit relied on the *South Bay United* concurrence to uphold Michigan Governor Whitmer's orders closing gyms under a similar challenge. *League of Ind. Fitness Facilities and Trainers, Inc. v. Whitmer*, 814 Fed.Appx. 125, 129 (6th Cir. 2020). The Sixth Circuit further recognized that:

> Among other uncertainties of the decision making process, the Order does not close every venue in which the virus might easily spread. Yet the Governor's order ***need not be the most effective or least restrictive measure possible to attempt to stem the spread of COVID-19***. *Heller*, 509 U.S. at 321, 113 S.Ct. 2637. Shaping the precise contours of public health measures entails some difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people. *South Bay*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring) (citing *Jacobson*, 197 U.S. at 38, 25 S.Ct. 358) (observing that where the "broad limits" of rational basis review "are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people"). Even if imperfect, the Governor's Order passes muster under the rational basis test. *Williamson v. Lee Optical*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others.").

Id. Unequivocally, courts have recognized the emergence of COVID-19 and the public health response as necessitating the strictest application of judicial restraint.

Yet, even putting the threat of COVID-19 aside, because the challenged Orders undoubtedly promote public health at the expense of economic interests, judicial review is limited to whether the Orders are reasonable. *Lexington Fayette Cty. Food and Beverage Ass'n. v. Lexington-Fayette Urban Cty. Gov.*, 131 S.W.3d 745, 752 (Ky. 2004). Here, the

Orders at issue must only clear the low bar of having a "reasonable relation" to the state interest of slowing the spread of COVID-19. *See City of Louisville v. Kuhn*, 145 S.W.2d 851, 854 (Ky. 1940). Such review also requires the presumption of a law's constitutionality. *Seum v. Bevin*, 584 S.W.3d 771, 775 (Ky. App. 2019). To pass "reasonable relation" review, an order "need not be supported by scientific studies or empirical data; nor need they be effective in practice." *Id*. (citation omitted). "Rather, [i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular . . . measure was a rational way to correct it." *Id*. (citation and internal quotation marks omitted).

This is true because the police power offers "wide latitude" to pass laws that promote "the health, safety, morals or general welfare of the people." *U.S. Mining and Exploration Nat. Res. Co. v. City of Beattyville*, 548 S.W.2d 833, 834 (Ky. 1977). Citing *Graybeal,* 439 S.W.2d at 325, this Court recognized the state "power to promote and safeguard public health ranks at the top. If the right of an individual runs afoul of the exercise of this power, the right of the individual must yield." *Frederick v. Air Pollution Control Dist. of Jefferson Cnty,* 783 S.W.2d 391, 394 (Ky. 1990). Because there is "no broader field of police power than that of public health[,]" even "private property may become of public interest" in order to protect the public health. *Adams, Inc.*, 439 S.W.2d at 589. Such power has prevailed even in the instance of a law requiring the forced fluoridation of the water supply in Pulaski County. *See Graybeal*, 439 S.W.2d at 331(relying on *Jacobson*, 197 U.S. 11 (1905), to overturn a lower court's enjoinment of law and hold that it did not violate Section 2 of the Kentucky Constitution).

This Court addressed similar challenges to an ordinance prohibiting smoking in public buildings. *See Lexington Fayette Cnty. Food and Beverage Ass'n.*, 131 S.W.3d at 752. In that case, plaintiffs asserted that the ordinance infringed their constitutional property rights because the ordinance "dictates the character of their business under the guise of promoting public health and that certain businesses which attract large numbers of smokers may suffer economic harm and be forced to close." *Id*. In four brief paragraphs, this Court dismissed the claim, finding first that "a long history of Kentucky precedent . . . is contrary to the[se] arguments." *Id*. The Court held "the constitutional limitations upon the exercise" of police power concerning public health "come down to a question of 'reasonability.'" *Id*. (citing *Adams, Inc.*, 439 S.W.2d at 590). The Court held the smoking ban ordinance was reasonable, finding that "[b]oth federal and state courts have determined numerous times that where public interest is involved it is to be preferred over property interests even to the extent of destruction if necessary." *Id*. (citing *Mansbach Scrap Iron Co. v. City of Ashland*, 235 Ky. 265, 30 S.W.2d 968 (1930)).

2. The Orders do not violate Sections 1 and 2 of the Constitution.

COVID-19 spreads via human contact. (Vol. 6, R. at Env. V, pg. 393-394.) As a result, the challenged Orders restrict the capacity of the Appellee businesses and require each to observe sanitation and hygiene measures. It is indisputable that these measures are aimed at limiting the spread of COVID-19. As Dr. Stack unequivocally stated: "It has all been about attempting to prevent the rampant spread of an incredibly dangerous pathogen that will cause the very things we are all experiencing at this time in addition to the loss of a lot of human life. . . ." (Vol. VI, R. at Env. V, pg. 402:11-15.) In light of this

important state interest, Appellees' challenge – asserting arbitrary economic harm under Sections 1 and 2 of the Kentucky Constitution – must fail.

Indeed, Appellees' disagreement with the capacity percentages and childcare class size permitted by Appellants' orders is not appropriate for judicial review. *See Jacobson*, 197 U.S. at 30 ("It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease."); *City of Lebanon v. Goodin*, 436 S.W.3d 505, 519 (Ky. 2014). And Appellees' contention below – that the Orders are arbitrary because they apply statewide – belies common sense, as already recognized by the Supreme Court of Pennsylvania:

> Petitioners' second argument, namely that there is no significant risk of the spread of COVID-19 in locations where the disease has not been detected (including at their places of business), is similarly unpersuasive. As previously discussed, COVID-19 does not spread because the virus is "at" a particular location. Instead it spreads because of person-to-person contact, as it has an incubation period of up to fourteen days and that one in four carriers of the virus are asymptomatic.

Friends of Danny Devito v. Wolf, 227 A.3d 872, 891 (Pa. 2020). With even a novel understanding of how a respiratory disease spreads, it was reasonable to assume COVID-19 would reach all parts of the Commonwealth – and it has.

The record below demonstrates that the Appellants implemented the Orders to limit the spread of COVID-19 and to protect Kentuckians. Public protection is a legitimate and fundamental state interest. *See South Bay United*, 140 S.Ct. 1613 (Roberts, C.J.) ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'") (quoting *Jacobson*, 197 U.S. at 38); *In re Abbott*, 954 F.3d 772, 795 (5th Cir. 2020) ("[The governor's] interest in protecting public health during such a time is at its zenith.").

For the reasons set forth above, the Orders bear a reasonable relationship to slowing the spread of COVID-19. They limit the number of individuals that may gather in one location so that individuals may maintain a distance of six feet from others. The Orders also allow for fewer social interactions so that public health departments may trace the contacts of infected individuals. Moreover, the phased approach t creates a controlled environment allowing for the monitoring of the spread of COVID-19 as the restrictions are loosened. This permits a targeted emergency response to outbreaks as opposed to the statewide closures implemented.. These are the recommendations of the CDC, the White House and local public health officials. This approach is aimed at controlling the spread of the virus.

Appellees erroneously argue that the Orders are subject to more stringent judicial review because they infringe on fundamental rights secured by Section 1 of the Kentucky Constitution. But Section 1 does not – in its plain language – prevent the regulation of businesses. *See* KY. CONST. § 1. Nor would it when the state seeks to protect public health and welfare. *See Graybeal*, 439 S.W.2d at 326. Taken to its logical conclusion, Appellees' argument would prevent the state from performing its essential duties under the police power.

Regardless, Kentucky law confirms that Appellees' claims do not invoke a fundamental right. *See Wynn v. Ibold, Inc.*, 969 S.W.2d 695, 696 (Ky. 1998) (A law "involving the regulation of economic matters or matters of social welfare" complies with substantive due process if "it is rationally related to a legitimate state objective."); *Stephens v. State Farm Mut. Ins. Co.*, 894 S.W.2d 624, 627 (Ky. 1995) ("When economic and businesses rights are involved, rather than fundamental rights, substantive due

process requires that a statute be rationally related to a legitimate state objective.");

Bobbie Preece Facility. v. Com., Dep't of Charitable Gaming, 71 S.W.3d 99, 103 (Ky. App. 2001) (no fundamental right exists to operate a business); *Reynolds Enters., Inc. v. Kentucky Bd. of Embalmers and Funeral Dirs.*, 382 S.W.3d 47, 50 (Ky. App. 2012) (economic or business-related right is not considered fundamental).

Contrary to Appellees' assertion, Section 1 was never intended as protection from all governmental regulation. As noted in *Commonwealth v. Wasson*, 842 S.W.2d 487, 494 (Ky. 1992), during the 1890 Kentucky Constitutional Convention, J. Proctor Knott of Marion County remarked on the purpose of Section 1:

> "[T]hose who exercise that power in organized society with any claim of justice, derive it from the people themselves. That with the whole of such power residing in the people, the people as a body rest under the highest of all moral obligations to protect each individual in the rights of life, liberty, and the pursuit of happiness*, provided that he shall in no wise injure his neighbor in so doing*." [Emphasis added.]

(citing OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE 1890 CONVENTION, E. Polk Johnson, Vo. 1, p. 718). Interpreting the liberty secured by the United States Constitution, federal courts have posed a similar understanding, stating:

> [T]he 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. *This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state*; of the perfect right of the legislature to do which no

> question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.'

Jacobson, 197 U.S. at 26 (citations omitted) (emphasis added). *See also Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (noting that "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease"); *Caltex,* 344 U.S. 149, 154 (acknowledging that "in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved"). Thus, even fundamental rights may be restrained in a manner reasonably designed to protect the public health.

Appellants' public health measures are directly related to reducing the spread of COVID-19. In *Jacobson*, the Supreme Court held that an emergency health measure should be struck down only if it "has no real or substantial relationship to [the public health], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31. Kentucky courts rely on *Jacobson* and similarly require courts to apply greater deference when reviewing public health measures "by an agency composed of specialists in an area in which the courts must acknowledge a limited understanding." *Graybeal*, 439 S.W.2d at 326. Thus, in *Graybeal*, the Court further stated "'[i]t may be that an arbitrary exercise of the power could be restrained, but it would have to be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health.'" *Id*. (quoting *Hutchinson v. City of Valdosta*, 227 U.S. 303, 307 (1913)).

The Governor and his designees, in responding to the COVID-19 pandemic, are operating during an emergency and in reliance on the medical expertise of local, state and

national public health officials to craft temporary public health orders designed to limit the spread of the disease. Section 1 of the Kentucky Constitution contains no provision expressly prohibiting reduction of capacity limits in public businesses, class sizes in child care centers, or the imposition of additional hygiene and safety measures in public settings. Section 1 is not implicated under these measures and thus does not provide a basis for Appellees' requested relief. Yet, even if these measures could be seen as restricting fundamental rights of these businesses, the measures reasonably relate to a legitimate state interest: preventing the spread of COVID-19 and protecting the public. Thus, Appellees cannot demonstrate a "palpable" exercise of arbitrary power to warrant relief under these circumstances. *See Graybeal*, 439 S.W. at 326. Their claims under Sections 1 and 2 of the Kentucky Constitution are meritless.

B. The Public Health Measures Issued Under KRS Chapter 39A Do Not Violate Section 15 of the Kentucky Constitution.

Appellees further allege the public health measures enacted by Appellants unlawfully suspend law in violation of Section 15 of the Kentucky Constitution. Their argument ignores the plain text of KRS 39A.180, the Constitution, and the dispositive opinion this Court issued just last year. In short, they are wrong.

Section 15 of the Constitution provides, "No power to suspend laws shall be exercised unless by the General Assembly *or its authority*." (Emphasis added). Appellees argue that public health measures enacted in response to COVID-19 have suspended statutes that govern the automobile, restaurant, and childcare center industries. (Vol. III, R. 199-324.) Yet, Appellees failed to identify a single statute actually suspended by any action of the Governor, the Secretary, or the Commissioner. Nor do Appellees point to a

single instance in which a public health measure has expressly suspended a statute. Their allegations lack any specificity and should be summarily disregarded.

Indeed, the Governor has not suspended any law in response to COVID-19. Rather, in KRS 39A.180(2), the General Assembly expressly provides that any law conflicting with an order issued by the Governor under KRS Chapter 39A "shall be suspended during the period of time and to the extent that the conflict exists." Thus, to the extent the Governor has taken any action in response to the pandemic that would conflict with existing law, it is the General Assembly that has suspended that law during the time of the emergency. Because the General Assembly itself preemptively suspended any law conflicting with an emergency order, no violation of Section 15 has occurred.

Further, even if this Court agrees with Appellees – that the Governor has suspended law in his executive orders relating to the COVID-19 state of emergency – such suspension is authorized by the General Assembly and therefore does not run afoul of Section 15. Just last year, in *Beshear*, this Court rejected a similar claim relating to a Governor's reorganization power under KRS 12.028. There, the Court found that by allowing the Governor to reorganize administrative bodies in that single statute, the General Assembly implicitly granted the Governor authority to suspend laws. 575 S.W.3d at 680. Thus, the Court not only held that a reorganization that suspended law did not violate Section 15, but that it actually conformed to that constitutional provision because it suspended law under the "[General Assembly's] authority." *Id.*

The same logic applies here. Even if Appellees identified a specific suspension of statute, and even assuming the General Assembly itself did not suspend the statute via-KRS 39A.180(2), that statute and the whole of KRS Chapter 39A give the Governor authority

to suspend statutes in conflict with efforts to respond to the COVID-19 state of emergency. Appellants have not violated Section 15 of the Kentucky Constitution.

C. KRS Chapter 39A Expressly Authorizes the Governor to Declare a Statewide Emergency in Response to a Global Pandemic and Issue Executive Orders to Protect the Public Health and Safety During the Emergency.

Appellees allege the Governor exceeded the authority granted to him under KRS Chapter 39A. They claim the Governor is without authority to declare a state of emergency until a local emergency response agency determines an incident is beyond its capabilities. They also claim that the Governor may not issue executive orders in response to an emergency. They are wrong on both counts.

1. The Governor appropriately declares a state of emergency in response to the emergence and spread of COVID-19.

To be clear, nowhere does KRS Chapter 39A require the Governor to wait until a local emergency response agency determines a situation is beyond its capabilities before declaring a state of emergency. Appellees manufacture this claim based on the definition of an emergency in KRS 39A.020(12), which reads:

> any incident or situation which poses a major threat to public safety so as to cause, or threaten to cause, loss of life, serious injury, significant damage to property, or major harm to public health or the environment and which a local emergency response agency determines is beyond its capabilities[.]

Their argument ignores the whole of KRS Chapter 39A and distorts its very purpose.

KRS 39A.100(1) empowers the Governor to declare that a state of emergency exists "[i]n the event of the occurrence or threatened or impending occurrence of *any of the situations or events contemplated by KRS 39A.010, 39A.020, or 39A.030*." (Emphasis added). KRS 39A.010 recognizes that "disaster or emergency occurrences . . . can range from crises affecting limited areas to widespread catastrophic events." It further provides

what constitutes an emergency occurrence, specifically identifying "etiological" hazards that threaten public safety. KRS 39A.010. And while KRS 39A.020(12) provides a definition for an emergency, it also defines a disaster as "any incident or situation declared as such by executive order of the Governor, or the President of the United States, pursuant to federal law[.]" KRS 39A.020(9). It defines a catastrophe as "a disaster or series of concurrent disasters which adversely affect the entire Commonwealth of Kentucky or a major geographical portion thereof[.]" KRS 39A.020(2). Finally, it defines a declared emergency as " any incident or situation declared to be an emergency by executive order of the Governor, or a county judge/executive, or a mayor, or the chief executive of other local governments in the Commonwealth pursuant to the provision of KRS Chapters 39A to 39F[.]"

This is evident given the whole of KRS Chapter 39A. *See Cosby v. Commonwealth*, 147 S.W.3d 56, 58 (Ky. 2004) ("General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole statute and its object and policy.") (citation omitted). For instance, KRS 39A.050(1) recognizes "an emergency, declared emergency, disaster, or catastrophe as contemplated by KRS 39A.010, 39A.020, or 39A.030[,]" as four distinct events when requiring the Division of Emergency to coordinate "all matters pertaining to the comprehensive emergency management program and disaster and emergency response of the Commonwealth." So, too, do KRS 39A.230 and 39A.070. This context must control; not only due to principles of statutory construction, but KRS 39A.015 also commands that the definitions in KRS Chapter 39A apply "unless the language or context of a particular statute requires otherwise."

Moreover, KRS Chapter 39A comprehensively provides for responses to "all major hazards," "emergency occurrences," and "catastrophes." Catastrophes and other disasters which "adversely affect the entire Commonwealth of Kentucky" are by definition not "local" events that are not amenable to a "local emergency response." Floods and fires cannot be carried from community to community by people, car, bus, or plane. Thus, Dr. Stack testified, "[a]ddressing [COVID-19] on a county-by-county basis is impractical and would be ineffective…" (Vol. 6, R. at Env. V, pg. 397:2-11.) In a world where people have more geographic mobility than ever, the introduction into the Commonwealth of a highly contagious virus, to which *no one* has innate or acquired immunity, is precisely the type of threat that requires a statewide response. It is the type of "etiological hazard" that threatens the public safety contemplated as a basis for declaring a statewide emergency under KRS 39A.010. Appellees' claim that the Governor lacked authority to declare a state of emergency is even more absurd given the context in which this pandemic rapidly spread throughout the country. (*See Supra*, *Statement of the Case*).

2. The Governor appropriately issues executive orders to carry out his duties under KRS Chapter 39A.

As set forth above, KRS 39A.090 authorizes the Governor to issue executive orders in response to the COVID-19 emergency. Appellees' argument that he must do so by promulgating administrative regulations has no basis in law.

By its plain language, KRS Chapter 39A recognizes the use of either executive orders *or* administrative regulations to carry out its intent. *See Hall v. Hospitality Res., Inc.*, 276 S.W.3d 775, 784 (Ky. 2008) (use of the disjunctive "or" between two terms means the terms must be given separate meanings) (citations omitted). KRS 39A.180(1)

authorizes the political subdivisions of this state to "make, amend, and rescind orders *and* promulgate administrative regulations necessary for disaster and emergency purposes[.]" KRS 39A.180(2) states that "[a]ll written orders *and* administrative regulations promulgated by the Governor, the director, or by an political subdivisions or other agency . . . shall have the full force of law when . . . filed with Legislative Research Commission[.]" It also suspends any existing law, ordinance or regulation inconsistent with the provisions of KRS Chapter 39A "or of any order *or* administrative regulation" issued by the Governor. KRS 39A.180(2). Thus, the General Assembly provided the Governor multiple tools for administering KRS Chapter 39A: the issuance of an executive order, the promulgation of an administrative regulation, or the designation of Cabinets and Departments to issue orders or promulgate regulations. As statutory construction mandates, the plain language of KRS 39A.090 and KRS 39A.180 controls.

Moreover, Appellees' argument that the Governor and Executive Branch agencies must use KRS Chapter 13A during states of emergency violates the "well-established rule that, '[w]here there is an apparent conflict between statutes or sections thereof, it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both sections or statutes if possible.'" *Com. v. Halsell*, 934 S.W.2d 552, 555 (Ky. 1996) (quoting *Ledford v. Faulkner*, 661 S.W.2d 475, 476 (Ky. 1983)). Their argument, if accepted, would eviscerate the plain words of the General Assembly when it enacted KRS Chapter 39A: allowing for an immediate response to impending or occurring emergencies. *See* KRS 39A.010, *et seq.* It would also render meaningless KRS 39A.090 and 39A.180, which give the Governor the authority to issue orders in an emergency. KRS Chapter 39A and KRS Chapter 13A can be harmonized to give both full effect. In

fact, the General Assembly has authorized Appellants under KRS 39A.090 to issue Executive Orders with or without the use of KRS Chapter 13A. Thus, there is no conflict.

However, even if a conflict existed, KRS Chapter 39A would prevail. Where a "*later-enacted* and *more specific* statute conflicts with an earlier-enacted and more general statute, the subsequent and specific statute will control." *Stogner v. Commonwealth*, 35 S.W.3d 831, 835 (Ky. App. 2000); *see also Pearce v. Univ. of Louisville, by and through its Bd. of Trustees*, 448 S.W.3d 746, 759 (Ky. 2014).

Here, KRS Chapter 13A was enacted in 1984, 1984 Ky. Acts Ch. 417, § 35, while KRS Chapter 39A was enacted in 1998, 1998 Ky. Acts Ch. 226, § 1.[62] The more general of those statutes, KRS Chapter 13A, governs the process agencies of the Commonwealth must generally follow for the promulgation of regulations. The more specific, KRS Chapter 39A, governs the authority of the Governor to protect Kentuckians during an emergency and provides for a separate mechanism to issue orders and administrative regulations. Thus, KRS Chapter 39A – the later-enacted and more specific statute – must prevail, to the extent a conflict exists.

Moreover, Appellees' incorrect legal theory that the Governor must implement KRS Chapter 39A powers via KRS Chapter 13A regulation procedures, does not even yield the relief they seek. (Vol. IV, R. 394.) They imply that they were denied certain "procedural due process protections" provided in KRS Chapter 13A. (Vol. I, R. 6.) However, even Appellees acknowledge the Governor could simply issue emergency administrative regulations, as set forth in KRS 13A.190. (Vol. I, R. 20.)

[62] Indeed, the General Assembly amended, and reenacted, KRS 39A.100 just this year. *See* 2020 HB 351. 2020 Ky. Acts Ch. 91 § 74.

Issuing emergency regulations would not afford Appellees the additional procedural due process to which they claim they are entitled. KRS 13A.190 plainly allows emergency administrative regulations to remain in effect for two hundred seventy (270) days after the date of filing plus additional days. *Id*. Thus, even if the Governor had issued emergency regulations as Appellees suggest on the day he was notified of the first reported COVID-19 case in Kentucky, those administrative regulations would still be in effect. In sum, under KRS Chapter 39A, the General Assembly has recognized that the Governor may address emergencies by order or regulation. As Appellees concede, this includes emergency regulations.

Further still, Appellees' claim that they were denied the ability to articulate their concerns and thereby contribute to the public policy formulation process because the Governor did not follow the KRS Chapter 13A process is unsupported. (Vol. I, R. 6; Vol. IV, R. 402-03.) On the contrary, the Governor went beyond what is required in either KRS Chapter 13A or KRS Chapter 39A. While Appellees mention the Governor's "Healthy at Work" phased reopening plan throughout their Complaint, they conveniently fail to mention that the "Healthy at Work" webpage, where the complained of restrictions are posted, including a submissions portal for the express purpose of considering public concerns. Indeed, the webpage states, among other things:

> The Governor encourages industry groups, trade associations, and individual businesses to submit reopening proposals, discussing strategies and challenges they face in safely reopening. Your proposals will aid the Governor and the Department for Public Health in evaluating at what point different types of businesses may reopen safely . . . .[63]

[63] https://govstatus.egov.com/ky-healthy-at-work (last visited Aug. 26, 2020).

As of August 25, the webpage submission portal had received nearly 1,700 proposals. Here, the Governor asked citizens and businesses – including Appellees – to share their concerns. This goes even beyond the KRS Chapter 13A process, which itself would not have provided Appellees the relief they claim to seek.

Finally, Appellees complain that "none of the Governor's executive orders are easily accessible or prominently advertised in a defined place known to the public." (Vol. IV, R. 402.) Appellees' statement is verifiably false. The Orders and requirements for reopening are available on the Healthy at Work webpage.[64] The Governor has mentioned the Healthy at Work webpage on many occasions during press conferences and the page is linked to the KyCovid19 webpage.[65]

Notably, as of the filing of the Complaint on June 24th, the Healthy at Work webpage had been viewed 887,082 times. In total, the page has been viewed over 1,000,000 times and been shared over 111,000 times across 18 different social media platforms. The page itself provides sharing capability to other platforms. Tellingly, Appellees' businesses attached numerous Healthy at Work requirements documents, CHFS Orders, and Executive Orders as exhibits to their Complaint. Even the first exhibit attached to the Intervening Complaint is the Governor's May 20, 2020 Executive Order, and the second contains both a CHFS Order and the Healthy at Work requirements for Restaurants, which were effective June 8, 2020. (Vol. IV, R. 409-16.) Appellees' claim that the public cannot access these documents is simply wrong – clearly they can and they have.

[64] https://govstatus.egov.com/ky-healthy-at-work (last visited Aug. 26, 2020).
[65] https://govstatus.egov.com/kycovid19 (last visited Aug. 28, 2020).

IV. The Equities Favor Upholding The Governor's Executive Authority.

Finally, the equities weigh in favor of the plain language of KRS Chapter 39A and the Governor's executive authority in public health emergencies such as the COVID-19 pandemic. Accepting Appellees' arguments would substantially harm public health – the same public health that is of the greatest importance to protect. *See Graybeal*, 439 S.W.2d at 331, *Frederick,* 783 S.W.2d at 394 (relying on *Jacobson*, 197 U.S. 11); *Adams, Inc.*, 439 S.W.2d at 590; *U.S. Mining and Exploration Nat. Res. Co. v. City of Beattyville*, 548 S.W.2d 833, 834 (Ky. 1977)).[66]

Appellees complain about the economic harm COVID-19 caused their businesses. To be clear: All Kentuckians are suffering. Through medically and scientifically backed measures, Appellants are attempting to protect the public from the spread of a highly contagious, deadly disease which has killed nearly 1,000 Kentuckians. Appellees would prevent any statewide response to COVID-19 and would threaten the ability to protect the public health and, in turn, Kentuckians' lives.

The public health measures restrict the capacity of places where people gather and require each to observe additional sanitation and hygiene measures. Unquestionably, these measures are directly aimed at limiting the spread of COVID-19 by promoting social distancing of six feet between individuals and disinfecting high touch surfaces where the virus can live.[67] These are basic principles provided by the CDC, the White

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[66] Long-standing Supreme Court precedent recognizes the deeply rooted power of the States to prevent the spread of an infectious disease. *See, e.g., Bowditch v. City of Boston,* 101 U.S. 16 (1879); *Lawton v. Steele*, 152 U.S. 133 (1894)*; Compagnie Francaise de Navigation a Vapeur v. State Board of Health,* 186 U.S. 380 (1902); *Jacobson*, 197 U.S. 11; *United States v. Caltex,* 344 U.S. 149 (1953).

[67] "Q. And Doctor, part of that – I think we should talk about this, but part of that transition – or transmission is when someone coughs or speaks or sneezes or yells or sings, it projects tiny droplets; right? A. Yes.

House, and the Kentucky Department for Public Health to slow and prevent the spread of COVID-19.[68] Appellants have relied on "basic public health knowledge and principles. And, in fact, this is particularly foundational public health in recommending these sorts of [] interventions, [], which are public health distancing measures."[69] Look no further than May and June, when for "two months [Kentucky was] steadily fluctuating in a roughly 100-300 positive per day range." (Vol. 6, R. at Env. V, pg. 510:23-25.) Now, the positivity rate has increased to 5.2%, and case range between 500-1000. As Dr. Stack explained the concern: "[i]t has all been about attempting to prevent the rampant spread of an incredibly dangerous pathogen that will cause the very things we are all experiencing at this time in addition to the loss of a lot of human life. . . ." (Vol. VI, R. at Env. V, pg. 402:11-15.)

Appellees' arguments would unravel these public health measures. They would also undo measures that: prohibit price gouging during the state of emergency (Executive Orders 2020-215); initiated changes to Medicaid to eliminate prior authorization and any fees associated with COVID-19 testing and treatment (*See* 907 KAR 1:604E); waive copays, deductibles, cost-sharing and diagnostic testing fees for private insurance and

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Q. And then someone else, in terms of transmission, would – would essentially breathe that in; right? A. It could come in contact with their eyes, their nose, or their mouth, or it could be inhaled into the respiratory tract. All of those avenues are common ways to receive those respiratory droplets from another person.

Q. And so being closer than six feet, for instance, to someone else would make them more at risk of receiving some of those droplets; right? A. The evidence supports that, yes." (Vol. III, R. 237, Stack Dep. 13:4-13.) "And the recommendations that I have offered have been ones that are risk-reduction strategies that can lower the likelihood of disease transmission." (Vol. III, R. 241, Stack Dep. 30:13-16.)

[68] "So in this case it could well be that the World Health Organization referenced this specific research and that they said that three feet is the distance beyond which it is less likely you get exposed, and that a different public health expert body has determined that adding a margin of safety is in the best interest of public health; hence we arrive at this CDC guidance of six feet, which Kentucky has generally followed." (Vol. III, R. 239, Stack Dep. 23:2-10.)

[69](Vol. III, R. 255, Stack Dep. 87:8-13.)

state employees (Executive Order 2020-220); expand telehealth operations (Executive Order 2020-257); allow pharmacists to dispense 30-day refills, (Executive Orders 2020-224; 2020-323; 2020-450); provide remote instruction, and ensure SEEK funds are provided to districts using remote instruction (702 KAR 7:125E and 702 KAR 3:270E); provide teachers and school employees with emergency leave in the event of COVID exposure or quarantine (702 KAR 1:190E); and provide for a manner of safely conducting the 2020 general election (Executive Orders 2020-688 and 2020-701).

In light of the important state interest of protecting the public health, Appellees' claims that the Orders violate Sections 1 and 2 of the Kentucky Constitution solely because they prevent the businesses from operating at a profit must fail. These claims implicate only economic and business matters.[70] These are policy differences that are not proper questions for a court to decide. The balancing of equities weighs heavily in favor of Appellants' reasonable exercise of their executive authority in implementing measures directly related to protecting the public health. *See Lexington-Fayette Cnty. Food and Beverage Ass'n.*, 131 S.W.3d at 752 (2004) (citing *Adams, Inc.*, 439 S.W.2d at 590).

CONCLUSION

The COVID-19 pandemic presents the gravest threat to public health in over a century. KRS Chapter 39A provides the tools for the Governor to exercise his executive authority to protect the public health and slow the spread of COVID-19. Appellees'

[70] "I am appreciative of and cognizant of the fact that there are very serious costs and consequences that stem from these public health measures. And, and those are not lost on me in their general sense, and they weigh heavily on me personally as I make these recommendations. In making these recommendations, we are attempting to reduce the risk to a level that protects people as well as we are able while permitting them to engage in these human interactions that are otherwise important in, in their conduct of their daily lives." (Vol. III, R. 245, Dr. Steven Stack Deposition, June 10, 2020, 46:10-15.)

challenge to KRS Chapter 39A and the Governor's Orders threaten that response. This Court should uphold KRS Chapter 39A and the Orders implementing public health measures directly related to protecting Kentuckians from COVID-19.

Respectfully submitted,

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