COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2021-SC-0107-T
(2021-CA-0328-I)

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

MOVANT

On Appeal from Franklin Circuit Court
Honorable Phillip J. Shepherd, Judge
Case No. 21-CI-00089

v.

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

RESPONDENTS

RESPONDENTS' INITIAL BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this brief was served on May 5, 2021, via electronic and U.S. mail upon S. Chad Meredith, Matthew F. Kuhn, and Brett R. Nolan, Office of the Attorney General, 700 Capitol Ave., Ste. 118, Frankfort, KY 40601; David E. Fleenor, Office of the Senate President, 702 Capitol Ave., Rm. 236, Frankfort, KY 40601; Eric Lycan, Office of the Speaker of the House, 702 Capitol Ave., Rm. 332, Frankfort, KY 40601; Greg Woosley, 702 Capitol Ave., Frankfort, KY 40601; and via U.S. Mail upon Phillip J. Shepherd, Circuit Judge, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601; and Kentucky Court of Appeals, Attn: Clerk, 360 Democrat Drive, Frankfort, KY 40601.

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TABLE OF POINTS AND AUTHORITIES

Respondents Andy Beshear, in his official capacity as Governor of the Commonwealth of Kentucky, and Eric Friedlander, in his official capacity as Secretary of the Cabinet for Health and Family Services, by counsel, hereby file this brief in support of the Franklin Circuit Court's temporary injunction. As set forth below, the Franklin Circuit Court has jurisdiction and properly entered the injunction.

INTRODUCTION & BACKGROUND

I. COVID-19 Remains A Highly Infectious, Deadly Virus.

As described by this Court:

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

Beshear v. Acree, 615 S.W.3d 780, 789 (Ky. 2020). Because COVID-19 spreads through airborne transmission, it spreads more easily in poorly ventilated indoor spaces. (R. 9 (Verified Complaint ("VC") ¶ 3).) As the disease has progressed, studies have shown that places where people congregate indoors for extended periods of time are the locations most associated with spread, especially if people do not wear masks or if they remove their masks while indoors. These outbreaks can race through a community, affecting people who did not choose to assume any risk by engaging in activities posing a higher risk of infection. While it is not possible to entirely prevent the spread of COVID-19, public health interventions can substantially reduce transmission rates. (R. 9; 13-15 (VC ¶¶ 2-3; 12-14).)

While vaccines create a path to victory – and have allowed the easing of some restrictions – new strains of COVID-19 are circulating that are as much as 50% more contagious and more fatal.[1] To date, five variants of concern have reached the United States and Kentucky.[2] According to the CDC:

> These variants seem to spread more easily and quickly than other variants, which may lead to more cases of COVID-19. An increase in the number of cases will put more strain on health care resources, lead to more hospitalizations, and potentially more deaths.
>
> So far, studies suggest that antibodies generated through vaccination with currently authorized vaccines recognize these variants. This is being closely investigated and more studies are underway.
>
> Rigorous and increased compliance with public health mitigation strategies, such as vaccination, physical distancing, use of masks, hand hygiene, and isolation and quarantine, is essential to limit the spread of the virus that causes COVID-19 and protect public health.[3]

Because of this concern – and the rise of the new variants – public health experts agree that strong state mitigation efforts are critical. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Disease, stated that while the vaccine is cause for celebration, active public health measures must continue until a sufficient percentage of the population is vaccinated: "The eventual vaccine is 'not going to do it alone, though,' he said. 'That's the important point. ***This should not be a signal to pull back on the public health measures that we must continue to implement.***"[4]

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[1] About Variants of the Virus that causes COVID-19, Centers for Disease Control and Prevention, updated April 2, 2021, available at: https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html (last visited May 4, 2021).
[2] COVID Data Tracker, Variant Proportions, Centers for Disease Control, available at https://covid.cdc.gov/covid-data-tracker/#variant-proportions (last visited May 4, 2021).
[3] About Variants of the Virus that Causes COVID-19, Centers for Disease Control, April 2, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html (last visited May 4, 2021).
[4] James Doubek, Fauci: Vaccine Results Are 'Important Advance,' But Virus Precautions Are Still Vital, NPR, Nov. 17, 2020, available at https://www.npr.org/2020/11/17/935778145/fauci-vaccine-results-are-important-advance-but-virus-precautions-are-still-vita (last visited May 4, 2021).

Public health authorities warned in January that the coming months would be deadly.[5] These experts have cautioned that the variants pose a particularly serious risk to hospital systems.' Some states have seen these predictions come true: Michigan's surge driven by the B.1.1.7 variant has overtaxed its health care system, with younger patients being particularly hard hit.[6] Indiana has seen a concerning increase in cases since lifting its face covering order.[7] If there was any doubt the danger is still present, the unfolding catastrophe in India – where hundreds of thousands of new cases have been diagnosed each day, filling hospital beds and depleting medical oxygen supplies – shows that the risk still exists.[8]

To date, COVID-19 has caused or contributed to the deaths of 3,209,109 people worldwide,[9] 574,679 in the United States,[10] and 6,532 in Kentucky.[11] It is now the third highest cause of death in the United States, behind only heart disease and cancer, and

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[5] Maggie Fox, New variants could add up to 85,000 Covid-19 deaths to US toll by May, influential model forecasts, CNN Health, Jan. 29, 2021, available at https://edition.cnn.com/world/live-news/coronavirus-pandemic-vaccine-updates-01-29-21/h_5c168180a4c46f9c0203abb55997ce08 (last visited May 4, 2021).
[6] Mitch Smith and Sarah Mervosh, "Michigan's Covid Wards Are Filling Up With Younger Patients," New York Times, April 25, 2021, available at https://www.nytimes.com/2021/04/25/us/michigan-covid-younger-people-hospitalized.html (last visited May 4, 2021).
[7] John Boyle, After Indiana's Mask Mandate Expired, COVID-19 Cases Statewide Increased, WFPL, April 26, 2021, available at https://wfpl.org/after-indianas-mask-mandate-expired-covid-19-cases-statewide-increased/ (last visited May 4, 2021).
[8] Sameer Yasir and Suhasini Raj, "Deaths Mount at an Indian Hospital After Oxygen Runs Out," New York Times, May 3, 2021, available at https://www.nytimes.com/2021/05/03/world/asia/India-coronavirus-deaths-oxygen.html (last visited May 4, 2021).
[9] World Health Organization, WHO Coronavirus (COVID-19) Dashboard, last updated May 4, 2021, available at https://covid19.who.int/ (last visited May 4, 2021).
[10] Centers for Disease Control and Prevention, COVID Data Tracker, United States COVID-19 Cases and Deaths by States, last updated May 4, 2021, available at https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited May 4, 2021).
[11] KY COVID-19 Report 04MAY21, available at https://chfs.ky.gov/agencies/dph/covid19/COVID19DailyReport.pdf (last visited May 4, 2021).

outpacing accidents of all kinds, chronic respiratory disease, stroke, and Alzheimer's disease.[12]

II. Governor Beshear Aggressively And Effectively Fights The Virus.

Faced with this pandemic, Governor Beshear has taken effective measures – through his emergency powers – to protect the citizens of the Commonwealth. In doing so, he has followed the recommendations and guidance of state, national, and global experts, including those at the White House, the CDC, the World Health Organization, and the Kentucky Department for Public Health.

With the evolution of COVID-19 and our understanding of it, the Governor's approach has moved to a surgical and targeted approach based on expert advice, scientific studies, and real-time experience in fighting the virus. The current approach involves a calibrated assessment of the risks posed by specific activities, and implementation of tailored measures to mitigate those risks with specific characteristics of Kentucky in mind. (R. 12-13 (VC ¶¶ 8-10).) Notably, the White House "commended" the Governor for the widely-celebrated success of his "active measures."[13]

Kentucky has fared better than other states, seeing fewer cases and significantly fewer deaths. Adjusted for population, Kentucky has lost many fewer lives than Tennessee and North and South Dakota, states that resisted public health measures, including mask mandates.[14] Studies confirm that compliance with mask mandates

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[12] Jacqueline Howard, Covid-19 likely ranks as the third leading cause of death in the US in 2020, CDC statisticians say, CNN (Jan. 5, 2021), available at https://www.cnn.com/2021/01/05/health/covid-third-leading-cause-of-death-cdc-wellness/index.html (last visited May 4, 2021).

[13] *White House Coronavirus Task Force Report for Kentucky*, Kentucky Cabinet for Health and Human Services, Nov. 15, 2020, available at https://dnks20yxl1c2u.cloudfront.net/381d0fbb43b611527a8f1c329301ef51fd555fcf/Kentucky%20%2011.17.pdf (last visited May 4, 2021).

[14] *See* Coronavirus in the U.S.: Latest Map and Case Count, NY Times, available at https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states (last visited May 4, 2021).

prevents COVID-19 outbreaks.[15] The lesson is clear: when a governor takes action, his or her state experiences fewer deaths. When a governor does not, the results are tragic.

While the Governor's measures have slowed the spread of the virus, Kentucky experienced its highest numbers of cases and deaths in January, with a reported record high 5,742 new cases of COVID-19 on January 6, 2021. Of those, 670 cases were in people ages 18 and under.[16] On that day, 1,778 Kentuckians were hospitalized for COVID-19, with 428 patients in the intensive care unit and 244 fighting for their lives on ventilators.[17] The state's positivity rate had increased to 12.34% on January 14.[18] Kentucky reported a record number of new deaths, 69, on January 28, 2021.[19] Since that time, Kentucky's numbers have improved, with a reported 776 new cases, a positivity rate of 3.47%, and seven new deaths, as of May 4, 2021.[20]

III. The General Assembly Passes Unconstitutional Emergency Legislation.

During the 2021 Regular Session, the General Assembly passed unconstitutional legislation over the Governor's vetoes – Senate Bill 1 (R.S. 2021) (R. 78 (VC Exhibit C)), Senate Bill 2 (R.S. 2021) (R. 105 (VC Exhibit E)), House Bill 1 (R.S. 2021) (R. 99

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[15] *See* Fischer, Charlie B., et al., Mask adherence and rate of COVID-19 across the United States, PLOS One, Apr. 14, 2021, available at https://doi.org/10.1371/journal.pone.0249891 (last visited May 3, 2021). *See also* Borchering, Rebecca K., et al., CDC, Morbidity and Mortality Weekly Report (MMWR), Modeling of Future COVID-19 Cases, Hospitalizations, and Deaths, by Vaccination Rates and Nonpharmaceutical Intervention Scenarios – United States, April-September 2021, Early Release, Vol. 70, May 5, 2021, available at https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7019e3-H.pdf (last visited May 5, 2021) (finding that increases in cases occurring in March and early April 2021 despite a large-scale vaccination program coincided with the spread of variants and relaxation of nonpharmaceutical interventions (NPI), and that Lower NPI adherence could lead to substantial increases in severe COVID-19 outcomes, even with improved vaccination coverage).

[16] KY COVID-19 Report, 06 JAN 21, available at https://chfs.ky.gov/cvdaily/COVID19DailyReport010621.pdf (last visited May 3, 2021).

[17] *Id.*

[18] KY COVID-19 Report, 14 JAN 21, available at https://chfs.ky.gov/cvdaily/COVID19DailyReport011421.pdf (last visited May 3, 2021).

[19] KY COVID-19 Report, 28 JAN 21, available at https://chfs.ky.gov/cvdaily/COVID19DailyReport012821.pdf (last visited May 5, 2021).

[20] KY COVID-19 Report 04MAY21, available at https://chfs.ky.gov/agencies/dph/covid19/COVID19DailyReport.pdf (last visited May 4, 2021).

(VC Exhibit D)), and House Joint Resolution 77 (R.S. 2021)[21] – that is the subject of the underlying litigation in this case.

A. House Bill 1

HB 1 expressly overrides the Governor's current public health response to COVID-19. Entitled "An Act relating to reopening the economy in the Commonwealth of Kentucky in response to the state of emergency declared by the Governor of Kentucky beginning in March 2020 and continuing throughout the year of 2021 and declaring an emergency," it attempts to abrogate the successful actions of the Governor and Secretary in addressing the COVID-19 pandemic and to prevent them from taking similar, effective actions in the future. (*See* R. 99 (VC Exhibit D).) Section 1 of HB 1 states that during the current state of emergency "or any future state of emergency related to any virus or disease," certain entities may remain open and fully operational if they meet or exceed all applicable guidance issued by the CDC or the executive branch, whichever is least restrictive. (*See id.* at 100-101.) HB 1 applies to virtually all entities in the state, including businesses, for-profit or not-for-profit organizations, local governments, associations, and any school or school district, whether public, private, or religiously affiliated. (*See id.* at 100.) It further prohibits any state or local agency from enforcing restrictions related to the state of emergency against any of the entities listed in HB 1 that meet applicable CDC guidance. (*See id.* at 101.)

HB 1 incorporated the CDC guidelines notwithstanding the fact that the CDC is clear its guidance should not take the place of state rules or regulation. Indeed, many of its documents explicitly warn against their adoption as regulatory material. In its

[21] Available at https://apps.legislature.ky.gov/recorddocuments/bill/21RS/hjr77/bill.pdf (last visited May 4, 2021).

"Considerations for Events and Gatherings,"the CDC states, "This guidance is meant to supplement – **not replace** – any state, local, territorial, or tribal health and safety laws, rules, and regulations with which gatherings must comply."[22] Guidance related to community based organizations contains the same statement and warning. *See also* CDC, Considerations for Community-Based Organizations (noting same restriction on the use of guidance as law, rule or regulation).[23]

HB 1 prevents enforcement of the vast majority of public health measures that have limited the spread of COVID-19, including the face covering order and the capacity limits for indoor venues, notwithstanding the precarious state of the pandemic and the new, developing and highly transmissible variants. While Kentucky and the United States try to stave off a fourth wave driven by the variants, HB 1 would allow businesses, organizations, local governments, associations and schools to craft their own plans to meet CDC guidance that was never intended to be adopted as regulation.

B. Senate Bill 1 and House Joint Resolution 77

SB 1 attempts to strip the Governor of executive authority to respond to emergencies and subject any response to the supervision, control and micromanagement of the General Assembly, the Attorney General and local governments. In particular, SB 1 amends KRS Chapter 39A so that, among other things, after 30 days responding to any emergency becomes a legislative function where the General Assembly must be called in special session each month to approve, modify, or terminate a responsive measure. SB 1,

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[22] CDC, COVID-19, Guidance for Organizing Events and Gatherings, last updated Apr. 27, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html (last visited May 4, 2021).

[23] CDC, Considerations for Community-Based Organizations, last updated Apr. 19, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/community-based.html (last visited May 4, 2021).

§ 2 (R. 82.) Additionally, SB 1 seeks to allow local governments to request the termination of actions taken under KRS Chapter 39A, and would only allow an extension beyond 30 days if requested by the local government. *Id.* Additionally, SB 1:

- Prevents the Governor from extending a state of emergency based on the "same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly." *Id.* (R. 82-3.)
- Grants the General Assembly the power to terminate a declaration of emergency "at any time." *Id.* (R. at 83.)
- Limits the enforcement authority of state administrators and investigators during an emergency. *Id.* § 7 (R. at 94-5.)

Finally, SB 1 adds a new provision to KRS 39A.180 that allows the Governor to suspend a statute by executive order under KRS Chapter 39A ***only if the suspension is approved by the Attorney General.*** *Id.* § 4. (R. at 88.)

By seeking to create a scenario whereby the Governor is required to call the General Assembly into session to address emergencies, SB 1 creates an end run around Sections 55 and 80 of the Kentucky Constitution, extending the days the General Assembly convenes and forcing special sessions. If this provision had been in place from the beginning of COVID-19, the Governor would have been required to call the General Assembly into session 11 times for at least a total of 55 days, at an estimated minimum cost to the Commonwealth of over $3,600,000. Rather than meeting with public health experts, the Governor would have been forced to spend his time coordinating the General Assembly for an extraordinary session prior to the expiration of any order, responding to requests for termination of public health measures by local governments, and seeking approval by the Attorney General before taking any action that would suspend a statute.

In an effort to implement SB 1 with respect to the emergency declaration in Executive Order 2020-215, the General Assembly passed House Joint Resolution 77 (HJR 77) on March 16, 2021.[24] Notably, HJR 77 purports to terminate a number of the Governor's, Secretary's, and Commissioner's public health orders intended to reduce the spread of COVID-19, including the facial covering order and regulation. It also purports to extend Executive Order 2020-215 for a total of 90 days, as well as certain additional actions of the Governor during the COVID-19 pandemic. It extends some orders by 60 days, and a part of another executive order by 30 days. Presumably, the Governor would need to call the General Assembly into three special sessions over the next three months to seek additional extensions of these measures.

C. Senate Bill 2

SB 2 seeks to limit and control the Governor's ability to respond to emergencies through emergency regulations. Among other things, SB 2:

- Amends KRS 13A.030(2) by no longer making the determination of the Administrative Regulation Review Subcommittee "nonbinding." SB 2 § 2.
- Amends KRS 13A.190 to subject emergency administrative regulations to the public comment provisions established under SB 2. *Id.* § 4.
- Amends KRS 13A.190 to allow a legislative committee to review an emergency administrative regulation at a subsequent meeting, which may find the emergency administrative regulation deficient. *Id.*
- Amends KRS 13A.190 to permit a legislative committee to amend an emergency administrative regulation *Id.* §§ 4, 16.
- Amends KRS 13A.312 to add a new section that provides that if an executive order transfers authority over a subject matter to another administrative body or changes the name of an administrative body during the interim between regular sessions of the General Assembly, and the

[24] Available at https://apps.legislature.ky.gov/recorddocuments/bill/21RS/hjr77/bill.pdf (last visited May 4, 2021).

> General Assembly does not codify or confirm the executive order during the next regular session, any and all administrative regulations promulgated to implement the executive order must return to their original form by the administrative body. *Id.* § 14.

In addition to amending the administrative regulation process in KRS Chapter 13A, Section 22 of SB 2 purports to amend KRS 214.020, the statute governing the Cabinet for Health and Family Services' ability to respond to infectious or contagious disease in Kentucky. Under Section 22 of SB 2, an administrative regulation issued under the authority of KRS 214.020 must be in effect no longer than 30 days if it: (1) places restrictions on the in-person meeting or functioning of the following: elementary, secondary, or postsecondary institutions; private businesses or non-profit organizations; political, religious, or social gatherings; places of worship; or local governments; or (2) imposes mandatory quarantine or isolation requirements. (R. 162-63.) Section 22 of SB 2 requires any administrative regulation issued under the authority of KRS 214.020 to include the penalty, appeal, and due process rights for violations of the administrative regulation, and to contain the public hearing and written comment period notice required under Section 9 of SB 2. (*Id.* at 163.)

IV. Governor Beshear and Secretary Friedlander File Suit.

The Governor and the Secretary promptly filed the underlying declaratory judgment action in Franklin Circuit Court after the General Assembly overrode his vetoes of HB 1, SB 1 and SB 2, seeking a declaration that the legislation is unconstitutional. Along with their Complaint, the Governor and the Secretary moved for a temporary restraining order and temporary injunction to maintain the status quo pending a ruling on the merits.

A. The Franklin Circuit Court Issues Temporary Injunctive Relief.

The trial court initially granted a partial restraining order as to certain provisions of HB 1 on February 3, 2021. (*See* R. 245-53.) In its partial restraining order, the Court found that the enjoined portions of HB 1 "could create chao s and undermine any effective enforcement of public health standards to prevent the spread of this deadly disease during this pandemic. Moreover, in the absence of injunctive relief, it appears that these provisions of House Bill 1 could likely wreak havoc with public health." (R. 247). The court then wrote: "Under the provisions of House Bill 1, it is likely that hundreds, or even thousands, of individual operating plans could be adopted, with no meaningful oversight or review, and with great variations as to the rules that would apply throughout the state. The Governor's power—indeed, duty—to effectively enforce any uniform public health standards would be severely undermined, if not destroyed." (*Id.* at 247-48.) The court held that the Verified Complaint "demonstrates that there will be immediate and irreparable injury to the Governor's right and constitutional duty to adopt emergency measures to curb the spread of the COVID-19 virus and address the real, imminent and extreme public health crisis facing the public," and that the public interest requires that the effectiveness of those portions of House Bill 1 be enjoined. (*Id.* at 248.)

On March 3, 2021, after full briefing and an evidentiary hearing,[25] the trial court granted Respondents' temporary injunction motion under CR 65.04. (*See* R. 590-612.) The Attorney General did not respond to the merits of the temporary injunction motion, instead filing a combined response and motion to dismiss, arguing the Governor and the Secretary failed to set forth an actual controversy and lacked standing. (*See* R. 447-66.)

[25] While the video recording of the February 18, 2021 hearing on the motion for a temporary injunction is in the record, the transcript of the hearing is attached as Exhibit A for the Court's convenience.

No defendant addressed the necessary elements of irreparable injury or the balancing of the equities.

The court entered its temporary injunction order before full briefing and argument on the Attorney General's motion to dismiss because, under the subject legislation, certain emergency executive orders issued in response to COVID-19 would expire on March 4.[26] In its order, the court found that the Governor and the Secretary presented substantial legal questions concerning the constitutionality of the legislation, that the Governor and the public will suffer immediate and irreparable injury in the absence of injunctive relief, and that the public interest and the balance of the equities require the granting of injunctive relief. (R. 591.) The court held that the emergency orders and administrative regulations currently in effect to address the COVID-19 pandemic shall remain in full force and effect, notwithstanding HB 1, SB 1 and SB 2, until amended or ended by the Governor, according to law, pending a final judgment of the court. (*Id.* at 609.)

In particular, the court enjoined the provisions of SB 1 and SB 2 that limit emergency orders and emergency regulations to 30 days without the General Assembly's approval, and it enjoined the provisions of SB 2 that limit to 30 days administrative regulations promulgated under KRS Chapter 214. (*Id.*) The court also enjoined the provision of SB 1 that requires the Attorney General's written approval before the Governor may suspend a statute that conflicts with an emergency order. (*Id.* at 609-10.) The court further extended its orders enjoining certain provisions of HB 1. (*Id.* at 10.)

[26] The trial court heard argument on the Attorney General's motion to dismiss on March 23, 2021, issuing its Order denying that motion on April 12, 2021. (*See* R. 741-59.)

The Court specifically found that it had jurisdiction over the dispute because the Complaint appeared to present a justiciable controversy under Sections 2, 3, 27, 28, 36, 42, 43, 69, 80 and 81 of the Kentucky Constitution and *Legislative Research Comm'n By and Through Prather v. Brown*, 664 S.W.2d 907 (Ky. 1984). (R. 610-11.) The Court concluded:

> As to the Attorney General's argument that the case is not justiciable, and the Governor lacks standing, the Court finds that these three pieces of legislation seek to diminish the Governor's power under the Constitution to ensure "that laws be faithfully executed." Ky. Const. § 81. They raise issues of the Governor's powers under Kentucky Constitution Section 69, and they raise profound questions concerning the separation of powers between the Governor and the General Assembly under Kentucky Constitution Sections 27 and 28. The Governor has alleged irreparable injury to his constitutional powers and has made a preliminary showing that the bills will impair the exercise of his constitutional duty. That is sufficient to demonstrate a justiciable controversy in which the Governor has standing to sue. If the Attorney General agrees with the Governor that the legislation is unconstitutional, then the Court will reconsider whether there is a case or controversy for adjudication. But, in the event the Attorney General believes the challenged legislation is valid and constitutional, he has a duty to defend the laws under KRS 15.020 and his oath of office, and the Court has a duty to decide the case.

(*Id.* at 608.) As the court further explained in its order denying the Attorney General's motion to dismiss, this case presents a justiciable controversy because "[t]here can be no reasonable question that the Attorney General, as chief legal officer of the Commonwealth, and the Governor, as chief magistrate of the Commonwealth, have a serious legal dispute about the scope of the Governor's emergency powers and the validity of the legislature's enactments to limit the Governor's powers and to exercise increased oversight and control of the Governor's executive actions." (R. 748.)

In its order, the court recognized that the HB 1, SB 1 and SB 2 raise serious separation of powers issues, as well as issues under Sections 69 and 81 of the Kentucky

Constitution concerning the appropriate definition of executive power and allocation of power to prescribe rules, regulations, and policies for public health between the legislative and executive branches. (R. 604, 606.) The court also found that HB 1, SB 1 and SB 2 present questions under Sections 2, 59 and 60. (*Id.* at 606.)

According to the court, not enjoining HB 1, SB 1 and SB 2, and letting the current emergency public health measures expire would create "a chaotic legal environment in which everyone would make their own rules, and state and local health officials would be barred from any kind of effective enforcement of statewide standards and rules." (*Id.* at 605.) For instance, allowing HB 1 to take effect "would be an invitation to disaster." (*Id.* at 606.) The court determined that the testimony of witness for the Governor and the Secretary Dr. Steven Stack, Commissioner of the Department for Public Health, "supports the Court's finding that this wholesale repeal of all applicable Executive Orders and E-regs would likely result in a public health catastrophe." (*Id.*) The Attorney General and other defendants offered nothing to counter this vital point. (*Id.*)

On April 7, 2021, the Franklin Circuit Court amended its temporary injunction against provisions of HB 1, SB 1 and SB 2, by further enjoining HJR 77, as the legislative mechanism to execute SB 1. (R. 732-40.) In its Order, the court incorporates by reference its Temporary Injunction Order entered on March 3, 2021, and expressly directs that the temporary injunctions shall apply statewide. (R. 739.) The Order became effective immediately upon its entry and shall be in effect *nunc pro tunc* to the effective date of HJR 77. (R. 740.) Under the Order, the orders and administrative regulations issued by the Governor and the Secretary during the COVID-19 public health emergency remain in full force and effect, until amended or terminated by the Governor, according

to law, pending a final judgment in the Franklin Circuit Court, notwithstanding HB 1, SB 1, SB 2, and HJR 77. (*Id.*)

B. The Attorney General Seeks Review in this Court Under CR 65.07.

The Attorney General now asks this Court for relief from the Franklin Circuit Court's temporary injunction order. Notably, the other defendants in the litigation – Kentucky Speaker of the House David Osborne, Kentucky Senate President Robert Stivers, and the Legislative Research Commission – did not seek such relief, but have belatedly filed a writ of mandamus in the Court of Appeals on immunity grounds. They have also appealed the Circuit Court's denial of their motion to dismiss on the same grounds, and have moved this Court to accept transfer of the writ and appeal. They did not appeal the entry of the temporary injunction. While the Attorney General sought this appeal on the limited grounds of whether the Governor sufficiently pled a case or controversy or had standing, the record below demonstrates that the Franklin Circuit Court properly granted a statewide temporary injunction.

LEGAL STANDARD

Pursuant to Kentucky Rule of Civil Procedure ("CR") 65.07(1), "When a circuit court by interlocutory order has granted, denied, modified, or dissolved a temporary injunction, a party adversely affected may within 20 days after the entry thereof move the Court of Appeals for relief from such order." Further, "[t]he basis of affirmative relief shall be the grounds specified in CR 65.04(1) . . . ." CR 65.07(5)(b). Under that rule,

> A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.

CR 65.04(1). Or, as stated in *Maupin v. Stansbury*, "A Court should grant a temporary injunction if the movant shows irreparable injury, the existence of a substantial legal question on the merits, and a weighing of the equities favor injunctive relief." 575 S.W.2d 695, 697-98 (Ky. App. 1978).

"Realizing that the elements of CR 65.04 must often be tempered by the equities of any situation, injunctive relief is basically addressed to the sound discretion of the trial court." *Id.* (citation omitted). Accordingly, on review of a motion under CR 65.07, "Unless a trial court has abused that discretion, this Court has no power to set aside the order below." *Id.* at 698 (citations omitted); *see also Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162 (Ky. 2009) (identifying the standard as a "clear abuse of discretion"). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Thompson*, 300 S.W.3d at 162. In light of this standard, "a party seeking interlocutory relief from a trial court's decision to grant or deny a temporary injunction bears an "enormous burden ...." *Id.* (citation omitted).

ARGUMENT

The Circuit Court correctly enjoined enforcement of HB 1, SB 1, SB 2 and HJR 77 because each violates the Kentucky Constitution. In particular, the bills violate Kentucky's strict separation of powers set forth in sections 27 and 28; they place the Governor's emergency response authority under the supervision and control of the General Assembly, the Attorney General and local government officials in violation of section 69; they are arbitrary, vague and unenforceable in violation of Section 2; they usurp the Governor's role as commander in chief and his duty to faithfully execute the

law in violation of sections 75 and 81; they seek to convert the General Assembly into a continuous body in violation of sections 36, 42 and 80; and they constitute special legislation in violation of sections 59 and 60.

If not enjoined, these bills would irreparably harm the Governor, the Secretary, and the people of Kentucky by preventing a comprehensive emergency response to COVID-19 and its mutations. As this Court has recognized, it serves the public interest to maintain "a clear and consistent statewide public health policy" to slow the spread of this deadly disease. *See* Order, *Beshear v. Acree*, 2020-SC-000313-OA (Ky. July 17, 2020) (R. 71-74 (VC Exhibit A).) For these reasons, this Court should uphold the circuit court's injunction.

I. HB 1, SB 1, SB 2 And HJR 77 Are Unconstitutional.

As the circuit court found, Respondents raise a substantial question that the legislation violates the Constitution. Specifically, HB 1 overrides the Governor's COVID-19 public health policy and establishes the General Assembly's response that favors industry adopted measures interpreting shifting and ambiguous CDC guidance. SB 1 places the Governor's emergency response actions under the supervision and control of the General Assembly, Attorney General and local government officials. It also seeks to convert the General Assembly into a continuous body during an emergency by forcing a governor to call a special session. Through HJR 77, the General Assembly enforced SB 1 by attempting to manage the public health response, including by terminating measures such as the facial coverings mandate. SB 2 similarly places the response to public health emergencies under the control of the General Assembly by imposing an arbitrary 30-day limit on certain emergency public health regulations.

A. HB 1, SB 1, SB 2 and HJR 77 Violate the Separation of Powers Set Forth in the Kentucky Constitution.

Kentucky's Constitution creates three distinct branches of government and expressly forbids any branch from exercising the powers of another branch. KY. CONST. §§ 27, 28. Kentucky is a ***strict*** adherent to the separation of powers doctrine. Kentucky's constitutional separation of powers doctrine is perhaps the strictest doctrine of any state in the United States. *See Diemer v. Commonwealth, Ky. Transp. Cabinet, Dep't of Highways*, 786 S.W.2d 861, 864-65 (Ky. 1990) (citing *Sibert v. Garrett,* 246 S.W. 455, 457 (Ky. 1922)).

Sections 27 and 28 of the Kentucky Constitution, as recognized by our Supreme Court, were intended primarily "to curb the power of the General Assembly." *L.R.C. v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984). Indeed, the Framers of our current constitution "intended the legislature to discuss and enact laws, and *to do nothing else*." *Id.* (quoting *Pratt v. Breckinridge*, 23 Ky. Law Rep. 1858, 112 Ky. 1, 65 S.W. 136, 140 (1901)). Recognizing this, the Supreme Court instructs that the separation of powers must be "strictly construed." *Id.* (quoting *Arnett v. Meredith*, 121 S.W.2d 36, 38 (Ky. 1938)).

Here, through HB 1, SB 1, SB 2 and HJR 77, the General Assembly unlawfully terminates and replaces executive orders, directives and regulations responding to the COVID-19 emergency. Additionally, it gives itself an ongoing role to supervise, control and micromanage the executive response to emergencies. In doing so, the General Assembly has gone beyond just enacting law, assuming the duties and authority reserved to the executive branch under the Kentucky Constitution.

1. The Power to respond to emergencies lies in the Executive Branch.

The Kentucky Constitution creates a full-time executive, but a part-time legislature. KY. CONST. §§ 36, 42, 69 and 80. Because of this constitutional relationship, the Governor holds the primary responsibility and authority to respond to emergencies. Indeed, in *Beshear*, 615 S.W.3d at 808, this Court recognized that the Constitution "impliedly tilts to authority in the full-time executive branch to act in such circumstances." As the Court observed, "[T]he structure of Kentucky government as discussed renders it impractical, if not impossible, for the legislature, in session for only a limited period each year, to have the primary role in steering the Commonwealth through an emergency." *Id.* at 808-809. In other words, "if the Governor is not empowered to adopt emergency measures . . ., the Commonwealth is left with no means for an immediate, comprehensive response because either the General Assembly is not in session and cannot convene itself or even if in session it will have limited time to deal with the matter under constitutionally mandated constraints on the length of the session." *Id.* at 809. Thus, when the Governor's actions in response to COVID-19 were challenged as violations of the separation of powers, this Court held that "the emergency powers the Governor has exercised are executive in nature, never raising a separation of powers issue in the first instance." *Id.*

That conclusion is consistent with the intent of our Framers, who understood that the Constitution required the Governor to exercise his powers to protect the public from emergencies. During the Constitutional Convention, Delegate DeHaven stated that the "take care" clause of Section 81 means "that all executive power with which the

Governor is vested shall be exercised ***whenever an emergency arises***..." Official Report of the Proceedings and Debates in the 1890 Convention, E. Polk Johnson, Vol. 1, p. 1051.

Those powers reinforce the concept. Section 69 of the Kentucky Constitution places the supreme power of the executive with the elected Governor of the Commonwealth. Section 75 appoints the Governor as "Commander-in-Chief" of the Commonwealth's militia. And Section 81 requires the Governor to "take care" to faithfully execute the laws. KY. CONST. § 81; *Beshear*, 615 S.W.3d at 806. Notably, however, Section 80 is permissive: it states the Governor "may . . . convene" the General Assembly during an emergency. Thus, "[e]ven in times when the Commonwealth is confronted with something extraordinary, to include enemies and contagious diseases, the decision to convene the General Assembly in a special session is solely the Governor's." *Beshear*, 615 S.W.3d at 806. Yet, even then – in a special session - the legislature may "*do nothing else*" but discuss and enact laws. *L.R.C. v. Brown*, 664 S.W.2d at 912. (citation omitted).

Taken together, as held in *Beshear v. Acree*, the Constitution recognizes emergency power residing in the full-time executive branch. That conclusion is not new. Kentucky courts have long recognized the Governor's obligation to act during an emergency pursuant to these constitutional provisions. In 1911, Kentucky's then-highest court recognized that, as Commander-in-Chief, the Governor must possess a power "ample ***to meet every emergency*** that may present itself." *Franks v. Smith*, 134 S.W. 484, 487 (Ky. 1911) (emphasis added). This is because "there should not be a moment in the life of any orderly, well-established and republican form of government, like ours, when

it has not the means and the ability to give to every citizen that peace, safety, happiness, and protection guaranteed to him by the Constitution."[27] *Id.* at 488.

Governors have regularly exercised this power. "Since 1996, an emergency of some magnitude has been declared on approximately 115 occasions, leaving aside the accompanying orders in the face of those occurrences which prohibit price gouging or allow pharmacists to address prescription needs." *Beshear*, 615 S.W.3d at 800. Moreover, the emergency powers described in KRS Chapter 39A "have been invoked by every Governor who has served since the law's adoption in 1998." *Id.*

Finally, emergencies exceeding 30 days are not new. The Spanish Flu pandemic lasted for almost two years, infecting an estimated 500 million people and causing the deaths of around 100 million people. Smaller and more recent emergencies often exceed 30 days as well. Notably, at least 20 percent of the emergencies declared over the past 10 years have lasted more than 30 days.[28] For these reasons, the Governor, acting in a full-time capacity, maintains the power to respond. Indeed, KRS 39A.010 recognizes the Governor's responsibility not only to a respond to an emergency, but also to use his authority for "adequate assessment and mitigation of, preparation for, response to, and recovery from" emergency threats to the public safety.

The General Assembly once recognized this, too. In enacting KRS Chapter 39A, the General Assembly created a unified emergency response system, all of which reports

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[27] The Framers of the United States Constitution reached the same conclusion. "Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy." The Federalist No. 70 (March 15, 1788) (Alexander Hamilton).

[28] And, if those emergencies had been arbitrarily terminated at 30 days, the Commonwealth – and especially its counties – would have lost millions of dollars in FEMA funding for infrastructure repairs. (R. 177 (VC Exhibit I).)

to the Governor in his role as Commander-in-Chief. *See* KY. CONST. § 75. *See also* KRS 39A.010, *et seq.* In KRS Chapter 36, the General Assembly created the Department of Military Affairs and attached it to the Office of the Governor. KRS 36.010. That Department "is responsible to the Governor for the proper functioning of the Kentucky National Guard, militia, and all other military or naval matters of the state." *Id.* Within that Department, the General Assembly placed the Division of Emergency Management, which administers the unified emergency response program established by KRS Chapter 39A. *Id.* The Division of Emergency Management carries out all duties "under the general direction of the Adjutant General," who answers to the Governor. KRS 36.010, KRS 39A.030, KRS 39A.060(2). The statutory structure thus makes clear that the legislature envisioned the response to emergencies as part-and-parcel to the Governor's role as Commander-in-Chief. Recognizing this, the General Assembly enacted KRS Chapter 39A in 1998 to establish a "statewide comprehensive emergency management system," KRS 39A.010, under the authority of the Governor.

2. By terminating, approving and altering emergency response actions of the Executive Branch, the General Assembly exercises executive authority.

Through HB 1, SB 1, SB 2 and HJR 77, the General Assembly gives itself an active, ongoing role to terminate, approve or alter emergency actions of the executive branch in response to COVID-19 and future emergencies. This Court called such an approach "impractical, if not impossible." *See Beshear*, 615 S.W.3d at 808. Such an approach also violates the separation of powers, because the General Assembly is no longer just discussing and enacting laws, but engaging in the executive function of responding actively to ongoing emergencies.

Through HB 1, the General Assembly seeks to overtake management of the COVID-19 response by terminating existing capacity limitations and social distancing requirements for businesses, schools, local governments and other entities and replacing them with its own response. HB 1, § 1. In short, in HB 1, the General Assembly informs these entities they no longer must comply with the Governor's measures as long as they comply with applicable CDC guidance. Similarly, SB 1 provides the General Assembly with active supervision over any executive action during future emergencies. It gives the General Assembly authority to terminate any state of emergency at any time. SB 1, § 2(4). It gives the General Assembly sole authority to approve, modify or terminate executive action. It then did so, through HJR 77, purporting to extend certain measures for 90 days, others for 60 days, and part of one order for 30 days, while terminating a host of actions, including the facial coverings mandate and regulation. SB 2 removes the word "nonbinding" in describing the power of legislative committees to disapprove emergency regulations and allows the committee to find emergency regulations deficient. SB 2, §§ 2, 4.

This Court has already struck down legislation that purports to provide the General Assembly such powers. In *L.R.C. v. Brown,* the Court struck down legislation giving the legislature, through the legislative research commission, the authority to *prevent* administrative regulations from becoming effective until *reviewed* and *accepted* by the commission or *placed before* and *not disapproved* by the General Assembly. 664 S.W.2d at 917. The Court held that because the adoption of administrative regulations is executive in nature, laws "providing legislative or LRC review of proposed regulations" violate the separation of powers "and are a legislative encroachment into the power of the

executive branch." *Id.* at 919; *see also id.* n. 13. (adopting *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (stating, "Under *Chadha, supra,* we conclude that the legislative veto of the action of the executive is also a violation of the separation of powers.")).

Here, as in *L.R.C. v. Brown*, the General Assembly has violated the separation of powers by giving itself – and actually exercising – veto power over executive actions responding to emergencies. As explained above, crafting a statewide, comprehensive public health response is a function of the executive branch. Determining the when, where and extent of emergency action is a function of the executive branch. HB 1, SB 1, SB 2 and HJR 77 do not seek to remove that authority from the executive branch. Instead, they give the General Assembly the power to step in to veto, modify and replace the executive action. This plainly violates the separation of powers strictly construed under our Constitution.

B. HB 1, SB 1, SB 2 and HJR 77 Subvert the Supremacy of Executive Power Vested With the Governor.

Under Section 69 of the Kentucky Constitution, "The supreme executive power of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the 'Governor of the Commonwealth of Kentucky.'" As interpreted by this Court, this means that the Governor's authority cannot be placed under the supervision or subject to the approval, veto or control of the General Assembly or any other executive officer.

Any law infringing the Governor's executive power violates Section 69 of the Kentucky Constitution. *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 472 (Ky. 1998) (citing *Kentucky Ass'n of Realtors, Inc. v. Musselman*, 817 S.W.2d 213 (Ky. 1991); *L.R.C. v. Brown*, Ky., 664 S.W.2d at 911–14)). Moreover, if a law purports

to grant executive branch authority to the legislative branch or a nongovernmental person, it is in violation of Section 69, as the Governor's executive authority would no longer be supreme. *Id.* And, under Section 69, that authority cannot be placed under the control or supervision of another. *See Brown v. Barkley*, 628 S.W.2d 616, 622 n. 12 (Ky. 1982) ("Sec. 69 makes it clear that these [constitutional] officers are inferior to the Governor and that no other executive office can be created which will not also be inferior to that of the Governor."). This remains true regardless of the source of the Governor's authority. *L.R.C. v. Brown*, 664 S.W.2d at 930 (even if the legislature placed the power with the Governor, once placed there, the power is purely executive and not subject to veto by the legislative branch).

The enjoined legislation violates these well-established principles of constitutional authority. Here, for the same reasons address above, *see* Arg. I.A, through HB 1, SB 1, SB 2 and HJR 77, the General Assembly infringes on executive power by terminating, replacing and modifying the existing COVID-19 response of the executive branch. Although such action violates the separation of powers, it also prevents the supremacy of the Governor's executive power. Additionally, as addressed below, the legislation makes the Governor's actions responding to emergencies subject to approval, termination, and modification by the General Assembly, the Attorney General, and local governments. In an emergency response, Section 69 would mean nothing.

1. The enjoined legislation unconstitutionally places the Governor's power to respond to emergencies under the legislature's control.

HB 1, SB 1, SB 2 and HJR 77 purport to provide the General Assembly an ongoing role to micromanage and control, to the point of ending or modifying, a state of emergency declared by the Governor and any subsequent executive action addressing the

emergency. Through SB 1 and HJR 77, the General Assembly can terminate any existing executive emergency response action. Irrespective of that newly-created control, through HB 1 the General Assembly did terminate and replace the Governor's existing public health response to COVID-19 with respect to businesses, nonprofits, associations, schools and local governments. Further, through SB 2 the General Assembly seeks the power to veto emergency administrative regulations.

Simply put, if the General Assembly possesses ultimate veto power over any executive order, administrative regulation or directive addressing an emergency, the Governor's response can never be supreme. *See L.R.C. v. Brown*, 664 S.W.2d at 919. Bottom line: If the responsibility to respond to emergencies is executive – which it remains even under HB 1, SB 1 and SB 2 – that responsibility cannot be subject to veto by the General Assembly or anyone else. *Id.* HB 1, SB 1, SB 2 and HJR 77 each give the General Assembly not just executive power, but ***ultimate*** power to maintain continuing control over the Governor's executive actions. Because that power resides with the Governor under the Constitution, *see* Arg. I.A, and remains with the Governor even under the enjoined legislation, the General Assembly cannot maintain or exercise veto power over actions taken pursuant to that authority. Doing so violates Section 69.

2. SB 1 places the Governor's ability to suspend statutes in response to an emergency under the control of the Attorney General.

SB 1 also purports to place an executive function of the Governor under the supervision of the Attorney General. It provides that the Governor may suspend statutes in response to an emergency *only* if he obtains the written approval of the Attorney General. SB 1, § 4. Such authority – whether delegated by the General Assembly or inherently vested under the Constitution with the Governor cannot be placed under the

control of another constitutional officer. *Brown v. Barkley*, 628 S.W.2d at 624. In *Brown v. Barkley*, the Kentucky Supreme Court held that "Sec. 69 makes it clear" that constitutional officers such as the Attorney General "are inferior to the Governor ... ." 628 S.W.2d 616, 622 n. 12 (Ky. 1982). As the "'supreme executive power,' it is not possible for the General Assembly to create another executive officer or officers who will not be subject to that supremacy." *Id.* at 622. Thus, just as the General Assembly cannot retain veto power over the executive because it would violate the separation of powers and supremacy of the Governor, it cannot delegate that veto power to an officer who is not the Chief Magistrate with the supreme executive powers. *See L.R.C. v. Brown*, 664 S.W.2d at 919. This remains true even if the General Assembly delegated the Governor the authority to suspend statutes. *See Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 681 (Ky. 2019) (Once a function is placed with the executive, the function "is purely an executive function."). Subjecting the Governor's ability to suspend statutes during an emergency to the approval of the Attorney General violates Section 69.

3. HB 1 and SB 1 place the Governor's emergency response under the control of local governments.

SB 1 provides local government officials with authority to terminate or modify executive orders, administrative regulations or directives, upon written request to an unidentified source. In application, this would have allowed a local judge-executive or mayor to terminate an executive order requiring facial coverings at the height of the COVID-19 pandemic. SB 1 would create an unworkable patchwork of public health measures across the state.

Additionally, HB 1 allows local governments to ignore statewide emergency orders, administrative regulations and directives of the Governor if they adopt plans that

meet applicable CDC guidance. It does so even though the CDC never set forth guidance for local governments, as it does for restaurants, bars and other indoor spaces.

For the same reasons the General Assembly cannot retain veto power over executive actions or delegate veto power to the Attorney General, Section 69 forbids a Governor's emergency actions from being subject to termination or modification by local governments. *See* Arg. I.B.(1-2). Moreover, in *Beshear v. Acree*, this Court addressed *this very emergency* and upheld the Governor's lawful exercise of executive power to implement statewide public health measures regardless of disagreement by local executives. 615 S.W.3d at 804. It directly rejected the argument that the Governor must obtain local or county approval to address a statewide emergency. *Id.* 803-804 (recognizing the Governor "has ultimate authority 'for all purposes," over all local emergency management agencies[.]") (internal citation omitted). Indeed, the "prospect that a Governor would need to . . . defer to 120 different local agencies . . . in the face of an immediate and fast-moving threat to the entire Commonwealth strains rational understanding." *Id.* at 804. "The confusion and inconsistency brought about by this approach in the face of a threat to the entire state is obvious." *Id.*

C. By Assuming Ultimate Control of Emergency Responses, the General Assembly Usurps the Governor's Role as Commander in Chief and Duty to Take Care the Laws Be Faithfully Executed.

By naming the Governor as the "Commander-in-Chief" and assigning him the authority to execute the laws of the Commonwealth, the Kentucky Constitution places the responsibility and authority to respond to emergencies within the executive branch. KY. CONST. §§ 75, 81. Any attempt to usurp that authority "would be an interference by one department of the government with the power lodged in another department, and a violation of [the separation of powers.]" *Franks v. Smith*, 134 S.W. 484, 487 (Ky. 1911).

But this legislation amounts to the General Assembly directly violating Sections 75 and 81 by taking action reserved for the Governor as Commander-in-Chief and in place of his duty to faithfully execute the laws.

In *Franks*, the Court acknowledged the Governor's duties under both Sections 75 and 81, noting that "[t]he power to call out the state militia was vested in the Governor, the chief executive officer of the state, for the wise and wholesome purpose of enabling him to carry into effect the mandate of the Constitution that he 'must take care that the laws be faithfully executed.'" *Id.* "If [these] power[s] were not lodged in him," the Court recognized that the Commonwealth's government "would be too weak and inefficient to maintain itself or afford due measure of security or protection to the people who create and established it; and in many instances it would entirely fail to accomplish the purpose of its existence." *Id.* The Court also stated that Section 81 "would be an idle and meaningless phrase, because, although charged with the duty of taking care that the laws of the state should be faithfully executed, he would have no authority to enforce the obligation imposed upon him." *Id.*

HB 1, SB 1, SB 2 and HJR 77 violate Sections 75 and 81 of the Kentucky Constitution because they usurp and limit the Governor's ability to fulfill his duties as Commander-in-Chief and to execute the laws. *Franks* leaves no doubt that if an emergency arose necessitating the Governor to call out the state militia, as Commander-in-Chief, the Governor maintains ultimate discretion to command its response. The same is true here, although rather than calling out the state militia, the Governor has deployed the Department for Public Health and the Division of Emergency Management. And rather than evacuating homes and businesses due to enemy threat or natural disaster, this

emergency response requires implementation of social distancing, hygiene and quarantine measures. Through the enjoined legislation, the General Assembly seeks to assume command of this response. But, just as the General Assembly could not enact a law altering the Governor's orders to the state militia, it cannot veto, alter or assume command of the Governor's response to COVID-19. Under HB 1, SB 1, SB 2 and HJR 77, the Governor's constitutional role as Commander-in-Chief and duty to take care that the laws be faithfully executed "would be [] idle and meaningless phrase[s]." *See Franks*, 134 S.W. at 487. The Governor would be deprived of the executive power reserved to protect Kentuckians from COVID-19 or any emergency.

D. SB 1 Seeks to Convert the Part-Time General Assembly into a Body of Continuous Session During an Emergency in Violation of the Kentucky Constitution.

Through the enjoined bills, the General Assembly not only seeks to micromanage the executive branch's emergency response. It also attempts to create a full-time legislature of continuous session despite the express language of the Kentucky Constitution, the recorded intent of the Framers of the Constitution, and the history of prior constitutions that it be a part-time legislature. This Court should affirm the injunction against SB 1 for violating Sections 36, 42 and 80 of the Kentucky Constitution, which make the General Assembly a part-time legislature that only the Governor has authority, in his discretion, to convene after the session has ended. Since entry of the injunction, the General Assembly has adjourned *sine die*, heightening the need for injunctive relief.

1. The General Assembly is a part-time legislature for a specific, non-continuing session.

Under Section 36 of the Kentucky Constitution, the General Assembly shall meet in odd-numbered years for a period not to exceed a total of 30 days, KY. CONST. § 36(1), not to extend beyond March 30, KY. CONST. § 42. Also under Section 42, a session of the General Assembly in even-numbered years shall not exceed 60 legislative days and cannot extend beyond April 15. *Id.*

As this Court noted fewer than six months ago, "At least two commentators have opined that '[t]he sixty-day limit on biennial sessions was the most significant restriction placed on the General Assembly in the [1890] Constitutional Convention.'" *Beshear v. Acree*, 615 S.W.3d at 806-807 (citing Sheryl G. Snyder & Robert M. Ireland, *The Separation of Governmental Powers under the Kentucky Constitution: A Legislative and Historical Analysis of L.R.C. v. Brown*, 73 Ky. L.J. 165, 181 (1984)). Before the 1890 Constitutional Convention, "'the legislature had the power to hold continuous sessions,'" but "framers of the present Constitution took that power away ... and, for the first time in the history of Kentucky, put an absolute limit on the number of days the legislature could sit." *Id.* at 807. During the Constitutional Convention, Delegate Carroll explained, "The people in Kentucky are more in danger from abuses by the Legislative Department than they are from abuses by any other Department of the State Government." I OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY (1890) ("1890 Debates").

The prohibition on a legislature of continuous session survived multiple attempts to change it or remove it in the past 60 years. *See* Snyder et al., *The Separation of*

Governmental Powers under the Kentucky Constitution: A Legislative and Historical Analysis of L.R.C. v. Brown, 73 Ky. L.J. at 182. Each time, the people of Kentucky defeated the attempts. *Id.* The same absolute limitation on the time the legislature can convene remains today.

2. The Kentucky Constitution gives the Governor sole authority to convene an extraordinary session.

Section 80 of the Kentucky Constitution provides that only the Governor can convene the General Assembly for an extraordinary session, and that he may limit what the General Assembly can consider during that session. KY. CONST. § 80. In *Beshear v. Acree*, this Court observed that this power reflected the "implied tilt of the Kentucky Constitution toward executive powers in times of emergency," which it found "not surprising." 615 S.W.3d at 806-808. *See also Gevedon v. Commonwealth*, 142 S.W.3d 170, 172 (Ky. App. 2004) (noting "[w]hether to summon an Extraordinary Session of the General Assembly and what matters are to be addressed at such a session are questions entrusted to the discretion of the Governor under Section 80 of our state constitution." in refusing to grant a preliminary injunction to compel the Governor to call a special session, which would have violated the separation of powers and "jettison settled and basic constitutional principles") (citing *Royster v. Brock*, 79 S.W.2d 707 (1935)); *Brown v. Barkley*, 628 S.W.2d at 621 (recognizing that calling an extraordinary session under Section 80 is one of the constitutional powers expressly conferred upon the Governor).

3. SB 1 violates Sections 36, 42 and 80 of the Kentucky Constitution.

SB 1 is the latest attempt by the General Assembly to circumvent the absolute limitation the Framers of the 1891 Constitution placed on the number of days that the legislature can meet for a regular session by forcing the Governor to call a special session

to extend emergency orders. SB 1 would effectively rewrite Sections 36 and 42 of the Kentucky Constitution to allow the General Assembly to meet for 30 legislative days during odd-numbered years and 60 legislature days in even-numbered years, *unless an emergency exists*. If an emergency exists under SB 1 the General Assembly must meet monthly to consider whether or not to extend executive orders, administrative regulations, or directives the Governor has issued for the emergency under his executive powers. SB 1 would also effectively rewrite Sections 36 and 42 by allowing the General Assembly to, when an emergency exists, convene after the March 30 and April 15 dates that the sections expressly establish for the end of regular sessions.

Plainly, SB 1 would also force the Governor to call an extraordinary session of the part-time General Assembly in cases of an emergency. Such an approach would violate the explicit language of Section 80, which provides the Governor the sole authority for the convening of any extraordinary session. As stated in the Kentucky Supreme Court's ruling in *Beshear v. Acree*, "Even in times when the Commonwealth is confronted with something extraordinary, to include enemies and contagious diseases, the decision to convene the General Assembly in a special session is solely the Governor's." 615 S.W.3d at 806.

SB 1 would further violate the intent of the Framers, which specifically and solely entrusted the calling of a special session to the judgment of the Governor, who they described as "knowing the wishes of the people." I 1890 Debates at 1047. During the passage of SB 1, its proponents were clear they wanted to replace the Governor's judgment with their own. For example, Senator Thayer claimed superior knowledge of the "wishes of the people," claiming "people have been weary ... and they feel like their

voice has not been heard in this Capitol." He was then more explicit about replacement of judgment, stating: "The executive has the bully pulpit. We've got it back now and we're trying to restore the people's voice to the process."[29]

SB 1 would effectively make the General Assembly a continuous body in violation of Sections 36 and 42 of the Kentucky Constitution and the Framers' intent in creating a part-time legislature. And SB 1 violates Section 80 of the Kentucky Constitution by attempting to create a continuous legislature that the Kentucky Constitution does not allow through the forced calling of an extraordinary session. The Governor cannot be compelled to convene an extraordinary session. *Gevedon*, 142 S.W.3d at 172.

SB 1 seeks to erase the intent of the Framers and render Sections 36, 42 and 80 of the Kentucky Constitution meaningless. It is unconstitutional.

E. HB 1 Is Arbitrary, Vague and Unenforceable.

HB 1 is also unconstitutional because it is arbitrary, vague, and unenforceable. Its incorporation of "CDC guidance" as enforceable regulation does not specify which of the nearly 180 guidance documents are now Kentucky law, nor does it address how those documents are updated often and without notice to the public. HB 1 further fails to address that CDC guidance is not written in terms of clear and enforceable rules or *restrictions*. Instead, the guidance documents provide general, often overlapping, and sometimes contradictory advice. For these reasons, HB 1 does not give clear instruction

[29] Senate Floor Debate, Jan. 7, 2021, Part 2, at 41:09, 41:45 available at https://www.ket.org/legislature/archives/?nola= WGAOS+022015 &stream =aHR0cHM6Ly81ODc4ZmQxZWQ1NDIyLnN0cmVhbWxvY2submV0L3dvcmRwcmVzcy9fZGVmaW5zdF8vbXA0OndnYW9zL3dnYW9zXzIyMjAxNS5tcDQvcGxheWxpc3QubTN1OA%3D%3D&part=2 (last visited May 4, 2021).

to the people of Kentucky, public health officials enforcing the law, or the courts that must apply it. HB 1 therefore violates the due process rights of the public and the separation of powers.

1. HB 1 is Void for Vagueness.

Section 2 in the Bill of Rights of the Kentucky Constitution provides: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." This prohibition on arbitrary power "embrace[s] the traditional concepts of both due process of law and equal protection of the law." *Kentucky Milk Mktg. & Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985) (citing *Pritchett v. Marshall*, 375 S.W.2d 253, 258 (Ky. 1963)).

HB 1 violates Section 2 because it is unconstitutionally vague, in violation of the public's due process rights. To pass constitutional muster, a law must state explicitly what it mandates and what is enforceable, and vague terms must be defined. *See generally City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (finding the term "humane" unconstitutionally vague); *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001) ("'legal adult pornography' was unconstitutionally vague because it posed a danger the prohibition might ultimately turn on whatever the officer personally found titillating); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) (the court ruled a statute unconstitutionally vague where the FCC had not defined "obscene", "vulgar", "profane", and "indecent"); *Sessions v. Dimaya*, 138 U.S. 1204 (2018) (a statute designating violent crimes for immigration purposes was unconstitutionally vague). The vagueness doctrine "addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act

accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox*, 567 U.S. at 253. Vagueness is of particular concern where, as here, compliance with the law may have penal consequences. *Commonwealth v. Looper*, 294 S.W.3d 39, 41 (Ky. App. 2009).

HB 1 cannot clear this hurdle because it fails to notify the people what public health measures apply to them or their businesses. Instead, it nebulously provides that businesses may follow either CDC guidance or executive branch orders, whichever is "least restrictive." But CDC guidance is continuously updated and changed with little-to-no public notice.[30] (R. 15-16 (VC ¶ 16).) In *Fox*, the Supreme Court struck down regulatory penalties against broadcasters who displayed fleeting indecency because the changed interpretation of the law reflected "abrupt" "regulatory change" that failed to give notice to the broadcasters. 567 U.S. at 254.

HB 1 also fails this test because CDC guidance changes often and is not organized to provide such notice. As of February 2, 2021, the CDC had issued at least 175 guidance documents, some of which are not relevant to the United States.[31] That guidance totaled 180 documents just a few days earlier, and it is not clear what guidance was removed.

HB 1 also fails because it provides no means for businesses or individuals to identify what CDC guidance documents apply. CDC guidance is not organized by industry or degree of community transmission of COVID-19. Indeed, multiple guidance documents can apply to a single type of business. Food service providers could

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[30] CDC, COVID-19 Guidance Documents, updated Apr. 30, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc (last visited May 4, 2021).

[31] CDC, COVID-19 Guidance Documents, updated Apr. 30, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc (last visited May 4, 2021).

conceivably be subject to, among others, the Guidance for Organizing Large Events and Gatherings,[32] Cleaning and Disinfecting Your Facility,[33] the Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19),[34] the Considerations for Restaurant and Bar Operators,[35] and the guidance on Personal and Social Activities.[36] HB 1 does not specify how a specific entity is to determine what CDC guidance applies to it or provide a mechanism for the entity to know if the guidance applicable to it has changed.

HB 1 is also unconstitutionally vague because there is no way for an individual to discern whether CDC guidance is less restrictive than a state public health measure. For example, the CDC has said that the lowest risk gatherings are "shorter events" with "physical distancing" held "outdoor[s]," while higher risk activities are "indoor events, especially in places with poor ventilation," in areas of high community transmission, and where people are close together.[37] Those principles are designed to help individuals balance risk, but they ultimately fail to provide any clear limitation on what people can and cannot do. The CDC restaurant guidance is similarly unclear. It provides that "[f]ood

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[32] *Id.*; CDC, Guidance for Organizing Large Events and Gatherings, updated Apr. 27, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html (last visited May 4, 2021).
[33] CDC, Cleaning and Disinfecting Your Facility, updated Apr. 5, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html (last visited May 4, 2021).
[34] CDC, Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), updated Mar. 8, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html (last visited May 4, 2021).
[35] CDC. Considerations for Restaurant and Bar Operators, updated Dec. 16, 2020, available at https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html (last visited May 4, 2021).
[36] CDC, Personal and Social Activities, updated Apr. 20, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html (last visited May 4, 2021).
[37]CDC, COVID-19, Guidance for Organizing Large Events and Gatherings, updated Apr. 27, 2021, available at https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html (last visited May 4, 2021).

service limited to drive-through, delivery, take-out, and curb-side pick up" is lowest risk, while the highest risk comes from "[o]n-site dining with indoor seating."[38] It then lists strategies that restaurants and bars "may implement," some of which simply direct the restaurant to comply with state and local regulations.[39] As the CDC has said, such decisions are ultimately for state and local officials: "The size of an event or gathering should be determined based on state, local, territorial or tribal safety laws and regulations."[40] CDC guidance and considerations are meant to supplement – not replace – any state and local health and safety laws, rules, and regulations.

The incorporation of this guidance by HB 1 renders it unconstitutionally vague, for reasons discussed in the *Looper* case. There, the court held the word "importation" in a statute unconstitutionally vague because it could be read to prohibit any of four activities: bringing the item into the Commonwealth, transporting it through the Commonwealth, bringing the item with the intent for it to remain in the Commonwealth, or bringing the item to the Commonwealth to sell it. *Looper*, 294 S.W.3d at 42. The court struck down the statute, because any of the possible constructions was "reasonable," resulting in "confusion" and failing to provide notice to the public. *Id.* at 42-43. HB 1 presents a similar problem. Businesses cannot know what conduct they can lawfully engage in. For instance, under current orders, restaurant and venue capacities are limited. It is equally reasonable for such businesses to presume that they must follow these

[38] CDC, Considerations for Restaurant and Bar Operators, updated Dec. 16, 2020, available at https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html (last visited May 4, 2021).
[39] *Id.*
[40] *Id.*

current orders *or* that they may engage in the "highest risk" activities laid out in CDC guidance. HB 1 provides no clarity on the correct standard.

Indeed, in a letter to the Governor dated January 11, 2021, the CDC Director confirmed the non-regulatory intent of CDC guidance, stating: "I want to make it clear that CDC guidance should not be interpreted as regulation; rather, they are meant as recommendations. It should be used in consideration for specific state and/or local regulations, but this guidance is meant to be flexible and adaptable. It is not meant to be prescriptive or interpreted as standards that can be regulated. CDC provides ongoing guidance to individuals, businesses, schools, and states. We have and will continue to be available for technical assistance and guidance, but we expect each jurisdiction to modify this guidance to meet their state's needs." (R. 77 (VC Exhibit B).)

Because citizens regulated by HB 1 cannot track the ever-changing CDC guidance or discern from that guidance what is and is not prohibited, HB 1 is unconstitutionally vague.

2. HB 1 is void for unintelligibility.

For the reasons stated above, HB 1 is also unconstitutionally unintelligible. The doctrine of void-for-unintelligibility "is not found in the Bill of Rights but rather [is] the bedrock principle of separation of powers." *Util. Mgmt. Grp., LLC v. Pike Cty. Fiscal Court*, 531 S.W.3d 3, 12 (Ky. 2017) (citation omitted). Like void-for-vagueness, however, this doctrine renders void statutes that are so unclear a court cannot apply them. *See id.* ("[W]here the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative and void.").

HB 1 provides no direction to local health departments and other agencies enforcing public health measures beyond that the standard for compliance is the bare minimum suggested by undefined "CDC guidance" and the directives of an undefined executive branch charged with administering the law. Courts that would subsequently hear cases regarding violations will have an ever-changing set of standards to compare to reach their own understanding of which is the least restrictive. Where a court cannot determine which regulations apply to an entity and what they require, the regulatory scheme is void for unintelligibility. *See Bostic v. E. Const. Co.*, 497 F.2d 712, 715 (6th Cir. 1974). In *Bostic*, the court applied Kentucky law to hold that where it was impossible to determine what fire regulation applied to a particular apartment building, the regulation was unintelligible. *Id.* ("[E]ven the Deputy Fire Marshall could not indicate to the satisfaction of the district judge where in the regulations it states that any particular number of fire extinguishers are required in such a building. Those portions of the standards here involved simply do not possess that degree of clarity necessary for validity...."). HB 1 creates the same problem: in many instances, no health official, court, or business will be able to determine which CDC "guidance" is operative, or what that guidance permits or prohibits.

HB 1 does not give notice to the public about what is permitted and what is prohibited. Indeed, it interferes with the Executive Branch's efforts to provide that notice. And HB 1 fails to give the requisite guidance to public health officials and the courts about how to apply public health law. For these reasons, it is unconstitutionally vague, in violation of Section 2 of the Kentucky Constitution, and unconstitutionally unintelligible, in violation of the separation of powers under the Constitution.

3. HB 1 improperly delegates authority.

HB 1 compounds the confusion it causes by outsourcing to private, paid-membership organizations the power to develop plans that businesses may adopt, and by suggesting that adopting such plans is a get-out-of-jail free card for businesses. As the trial court observed, the delegation by HB 1 delegation of "legislative power to private entities to prescribe their own public health rules. . . could be compared to Justice Cardozo's observation regarding the National Industrial Recovery Act, that '[t]his is delegation running riot.'" (R. 606) (quoting *Schechter Poultry v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)). "[T]he legislature must establish the principles and policies, and leave to such agencies only the details of administration." *Young v. Willis*, 305 Ky. 201, 204–05, 203 S.W.2d 5, 7 (1947). Legislation is invalid if it empowers unaccountable agencies or private persons to decide either what the law shall be or when a law shall be effective. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

HB 1 is an unconstitutional delegation because it leaves far more than details entirely undefined. Specifically, the bill gives private entities – the local or state chamber of commerce, a trade association, or other recognized affiliated organization – the power to prepare an operating plan. HB 1 then provides that businesses following such a plan will be in compliance with the law.

As in *Anderson's Adm'r v. Granville Coal Co.*, 265 S.W. 472, 474 (Ky. 1924), HB 1 itself impermissibly fails to set any rules, and instead defers to private members-only organizations to set public health plans. In *Granville Coal Co.*, the General Assembly authorized mine operators to formulate the rules for mining and provided that those rules

became effective when signed by the chief mining inspector. The Court of Appeals held that the General Assembly was unlawfully delegating its duty to enact the rules, particularly because the regulated business then formulated the rules itself. *Id.* In HB 1, the General Assembly here similarly unlawfully delegates regulation to bought-and-paid for trade associations.

Because HB 1 is vague, unenforceable, and an improper delegation, it is unconstitutional.

F. HB 1, SB 1 and SB 2 Are Special Legislation.

Sections 59 and 60 of the Kentucky Constitution prohibit the General Assembly from enacting special laws, where a general law can be made. These sections prohibit acts of the legislature that depend "not on the discretion of the legislature but upon the discretion of another." *Young* , 203 S.W.2d at 7. The test for special legislation is "whether the statute applies to a particular individual, object or locale." *Calloway Cty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 573 (Ky. 2020).

HB 1 addresses one special object: allowing businesses, schools, local governments, and other entities to remain open and fully operational during the COVID-19 state of emergency. It depends entirely on the discretion of these entities to adopt plans meeting CDC guidance or to comply with executive orders and regulations. Similarly, SB 1 and SB 2 seek to exempt educational institutions, private businesses or non-profit organizations, political, religious or social gatherings, places of worship and local governments from generally applicable public health guidance. *See* SB 1, § 2; SB 2, § 22. Accordingly, the challenged legislation violates Sections 59 and 60.

G. The Attorney General's Motion Is Without Merit.

The Attorney General, rather than engaging with the merits of the arguments, instead inexplicably challenges the Governor's and Secretary's standing and whether there is a case or controversy. As the Franklin Circuit Court recognized, the Attorney General is wrong. Respondents allege a sufficient actual controversy against the Attorney General under the Declaratory Judgment Act, and they unquestionably have standing to bring suit.

1. Respondents' Complaint sets forth an actual controversy.

The Declaratory Judgment Act allows Kentucky courts to issue a declaration of rights when an "actual controversy" exists. KRS 418.040. Specifically, the Act provides:

> In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

Id. The nonexclusive statutory list of persons who may obtain a declaration of rights includes "[a]ny person . . . whose rights are affected by statute . . . ." KRS 418.045.

Here, the Governor's rights as the Commonwealth's chief executive and the Secretary's rights as the head of CHFS have been affected by recently enacted legislation or statutes – HB 1, SB 1 and SB 2. An actual controversy exists concerning those rights. Indeed, an actual controversy particularly exists with respect to the Attorney General, who, under SB 1, is granted unfettered unconstitutional authority to approve – or disapprove – any suspension of statute deemed necessary by the Governor to respond to an emergency. SB 1 thus gives the Attorney General, an officer who is not the Chief

Magistrate with the supreme executive powers of the Commonwealth, unrestrained veto power over the Governor.

Respondents' Complaint identifies adversarial parties, and the Attorney General's position – that the legislation is constitutional, as evidenced by statements made by Movant's counsel publicly and during the underlying court proceedings[41] – would impair, thwart, obstruct, and defeat the Governor in his rights. As the Franklin Circuit Court recognized in its order disposing of the Attorney General's motion to dismiss, there is undeniably an actual controversy under the holding of *Board of Education of Boone County v. Bushee*, 889 S.W.2d 809 (Ky. 1994). In *Bushee*, this Court held an actual controversy existed with respect to the Boone County Board of Education's new policy of requiring its approval of certain plans submitted by local school councils, even though no such plan had yet been submitted for approval. *Id.* at 811. As the trial court explained in this case, "Similar to the circumstances in *Bushee*, whether the Attorney General and the General Assembly in the present case are able to approve or disapprove certain actions taken by the Governor constitutes a justiciable controversy . . . ." (R. 749.)

As to the Attorney General, specifically, a justiciable controversy certainly exists under *Bushee*. The Governor is the Chief Magistrate with the supreme executive powers of the Commonwealth under Section 69 of the Kentucky Constitution, not the Attorney General. Yet SB 1 empowers the Attorney General to approve any suspension of the law

[41] During the very first hearing before the Franklin Circuit Court, Movant's counsel stressed the constitutionality of the provision of SB 1 giving the Attorney General unilateral veto authority over the Governor's suspension of any law in response to an emergency, stating, "So we know that KRS 39A.180(2) was a constitutional delegation when it gave the Governor the power to suspend laws. . . . Now, to the extent that the legislature has the constitutional authority under the delegations doctrine to provide for the Governor to suspend statutes, it surely has the power to modify its own delegation of that authority to provide additional restraint or guidelines for the exercise of that authority. So I would anticipate that this office, Your Honor, would, in fact, defend the constitutionality of that provision." *See* Transcript of Feb. 3, 2021 Hearing, at 21:7-21 (attached as Exhibit B)(video recording included in the Record on Appeal).

effectuated by the Governor's emergency orders. Thus, upon its passage, SB 1 immediately – and unconstitutionally – placed the Governor's emergency authority under the supervision of the Attorney General. Under *Bushee*, whether the Attorney General's approval of an act by the Governor can even be required presents a justiciable controversy under the Declaratory Judgment Act. Respondents do not have to wait for the disapproval to occur before filing suit. *See Com. v. Kentucky Ret. Sys.*, 396 S.W.3d 833, 839 (Ky. 2013) ("The Act allows courts to determine a litigant's rights before harm occurs....").

Because there is a live controversy between the Movants and Respondents, the Franklin Circuit Court had jurisdiction to enter the injunction.

2. Respondents have standing.

As the Franklin Circuit Court also correctly held, the Governor and the Secretary have standing. In Kentucky, a plaintiff must have "the requisite constitutional standing ..., defined by three requirements: (1) injury, (2) causation, and (3) redressability." *Commonwealth Cabinet for Health and Family Servs., Dep't for Medicaid Servs. v. Sexton by and through Appalachian Regional Healthcare, Inc.*, 566 S.W.3d 185, 196 (Ky. 2018).

As the Franklin Circuit Court noted in its temporary injunction order, here the Governor has alleged irreparable injury to his constitutional powers. (R. 608.) Still, the Attorney General argues the Governor lacks standing because he cannot demonstrate an injury. According to the Attorney General, if the Governor believes he has constitutional authority to act despite the provisions of KRS Chapter 39A, then he cannot be injured by any changes to those provisions, and thus can take action in violation of the challenged

legislation.[42] As discussed above, however, Respondents do not have to take action in violation of the challenged legislation before filing suit for declaratory relief. *See Ky. Ret. Sys.*, 396 S.W.3d at 839.

Despite the Attorney General's arguments to the contrary, the Governor does not claim that he has a constitutionally protected interest in the ability to suspend statutes or a legally protected interest in enforcing KRS 39A.180(2) as it existed before SB 1. By its express terms, Section 15 of the Kentucky Constitution provides that "[n]o power to suspend laws shall be exercised unless by the General Assembly or its authority." Having determined to grant authority to suspend the law, however, the General Assembly cannot do so in an unconstitutional manner. Here, the amendment to KRS Chapter 39A by SB 1 to require and allow the Attorney General to unilaterally and without any explanation approve or disapprove the Governor's suspension of law during an emergency violates Section 69 of the Kentucky Constitution. Respondents therefore ask the Franklin Circuit Court to declare SB 1 unconstitutional, relief that that court can provide.

Thus, the Governor has standing to sue the Attorney General under the Declaratory Judgment Act. Respondents' Complaint alleges sufficient injury against and caused by the Attorney General, and that injury is redressable by the court.

II. Absent An Injunction, The Governor And The People Of Kentucky Would Be Irreparably Harmed.

The Franklin Circuit Court correctly issued an injunction because these bills violate the Constitution and would have "likely result[ed] in a public health catastrophe" had they taken effect. (R. 606.) This Court has held that an ongoing constitutional

[42] The Attorney General also contends that the temporary injunction has no effect on him. Thus, by the same reasoning, it is unclear why he needs relief from it.

violation represents irreparable injury and warrants immediate injunctive relief. *Legislative Research Commission v. Fischer*, 366 S.W.3d 905, 909-10 (Ky. 2012). As the Governor and Secretary have shown, HB 1, SB 1 and SB 2 violate Sections 2, 27, 28, 36, 42, 69, 75, 80, and 81 of the Kentucky Constitution. Each of the bills prevent a Governor-led, comprehensive and statewide approach to the COVID-19 pandemic and future emergencies and in doing so violate the Kentucky Constitution. As such, the bills irreparably harm the Governor and the people of Kentucky.

Moreover, as this Court has held, "the required showing for issuance of an injunction is relaxed when an injunction is sought by a governmental entity to enforce its police powers. In such case, any alternative legal remedy is ignored and irreparable harm is presumed." *Boone Creek Properties, LLC v. Lexington-Fayette Urban Cty. Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014) (citation omitted). That presumption applies here, where the three bills immediately interfere with the Governor's constitutional power and duty to respond to an ongoing public health emergency.

Finally, HB 1, SB 1 and SB 2 each have emergency clauses and, if not enjoined, would have caused immediate and concrete harm to the people of the Commonwealth by preventing the Governor and the Secretary from exercising supreme executive authority to enact public health measures to slow the spread of COVID-19. In particular, HB 1 would immediately undermine the emergency public health measures currently in place. State and local officials, local health departments, and businesses would be unable to discern what public health measures remain in effect. That confusion would imperil compliance with and enforcement of the measures.

SB 1 places an artificial time limit on the public health measures that has no basis in science and would allow local executives to seek their immediate termination or modification. As this Court ruled, "[I]f the Governor is not empowered to adopt emergency measures . . . the Commonwealth is left with no means for an immediate, comprehensive response because either the General Assembly is not in session and cannot convene itself or even if in session it will have limited time to deal with the matter under constitutionally mandated constraints on the length of the session." *Beshear v. Acree*, 615 S.W.3d at 809. SB 2 would prevent the executive branch – and CHFS in particular – from crafting immediate and responsive administrative regulations to address the evolving circumstances presented by COVID-19.

The existing public health measures that would be eliminated by these bills have saved countless lives. One study concluded that Kentucky's social distancing measures had saved 2,000 lives by April 25, 2020.[43] The Trump White House agreed and repeatedly praised the Governor's active response. Absent an injunction, Kentucky could be faced with the severe outcomes we have seen in other jurisdictions that have failed to implement strong public health measures – ICUs filled to capacity, ventilators in short supply, and refrigerated trucks pulling up to hospitals "as bodies pile up at hospital morgues."[44]

Indeed, these bills come at a perilous time. While vaccines show a light at the end of the tunnel, public health officials have warned that vigilance is required to prevent a

[43] 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 May 4, 2021).
[44] https://ktla.com/news/local-news/refrigerated-trucks-arrive-in-l-a-as-bodies-pile-up-at-hospital-morgues-amid-rising-covid-19-death-toll/

spike in cases in light of the presence of dangerous and highly transmissible variants of COVID-19 in Kentucky. *See* Introduction & Background, § I, *supra.*

These emerging threats show the need for clear, continuing public health measures, including social distancing requirements in places of high-risk spread and facial covering mandates – the very measures HB 1, SB 1, and SB 2 prohibit or curtail. Without these measures, Kentucky's hospitals may become quickly overwhelmed. These threats also underline how essential it is that the executive branch is able to respond to changing circumstances. Public health guidance is already evolving in response to these strains. The government must be able to respond quickly to save lives.

III. The Equities Favor Injunctive Relief.

The equities favor issuing an injunction that will preserve the status quo and save lives. Just last summer, this Court acknowledged "the need for a clear and consistent statewide public health policy" in issuing an extraordinary writ to stay a lower court order that would have undermined the Governor's public health measures. Order, *Beshear v. Acree*, No. 2020-SC-000313-OA (Ky. July 17, 2020). And this Court later held that, notwithstanding the hardship of complying with public health measures, "the greater public interest lies [] with the public health of the citizens of the Commonwealth as a whole." *Beshear v. Acree*, 615 S.W.3d at 830. Because the need for clear, consistent public health measures that will save lives favors an injunction here, the Circuit Court correctly enjoined the General Assembly from interfering with the Governor's actions.

CONCLUSION

For the foregoing reasons, Respondents respectfully ask the Court to uphold the Franklin Circuit Court's temporary injunction orders.

Dated: May 5, 2021

Respectfully submitted,

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