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

FLORENCE SPEEDWAY, INC., *et al.,*
On behalf of themselves, and others similarly situated **PLAINTIFFS**

AND

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

VS.

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

ORDER

This matter was before the Court July 16, 2020, for a hearing on the Motion of Plaintiffs Florence Speedway, Inc. (hereinafter, "Florence Speedway"), Theodore J. Roberts, Ridgeway Properties, LLC (d/b/a Beans Café & Bakery, hereinafter "Beans Café"), and Little Links to Learning, LLC (hereinafter, "Little Daycare") for Temporary Injunction; and, also, on the Commonwealth of Kentucky, *ex rel.* Attorney General Daniel Cameron's Motion for Temporary Injunction. Hon. Christopher D. Wiest and Hon. Thomas Bruns appeared for Plaintiffs; Hon. Barry L. Dunn, Deputy Attorney General, Hon. S. Chad Meredith, Solicitor General, and Hon. Victor Maddox, Assistant Deputy Attorney General, appeared for the Commonwealth *ex rel.* Cameron; Hon. Claire Parsons and Hon. Olivia Amlung appeared for the Northern Kentucky Independent Health District and Dr. Lynn Saddler M.D. (collectively hereinafter, "NKIHD"); Hon. S. Travis Mayo, Chief Deputy General Counsel, Hon. Taylor Payne, Deputy General Counsel, La Tasha Buckner, General Counsel, appeared for Hon. Andrew Beshear, as Governor, Hon. Wesley W. Duke appeared for Mr. Eric Friedlander, as acting Secretary of the Cabinet for Health and Family Services (hereinafter, "CHFS") and Dr. Steven Stack, M.D., as commissioner

for the Kentucky Department of Public Health (hereinafter, "CDPH") (the Governor, CHFS and CDPH are sometimes referred to hereinafter as, "Defendants"), and Hon. Amy Cubbage appeared for the Kentucky Labor Cabinet, the Education and Workforce Development Cabinet and the Office of Unemployment Insurance.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff Florence Speedway filed a Complaint on June 16, 2020 and, on June 22, 2020, an Amended Verified Class Action Complaint for Declaratory and Injunctive Relief. At a hearing on July 1, 2020, the Court granted the Motion of Commonwealth *ex rel.* Cameron to intervene by order entered July 2, 2020, and set the matter for an evidentiary hearing. Also in that Order, the Court granted an emergency restraining order against Defendants, the Governor, CHFS, and CDPH, prohibiting enforcement of certain of their measures against Florence Speedway and Little Daycare, as well as similarly situated racetracks and daycares statewide. Finally, on July 1st, to allow Defendants time to respond[1] to Intervening Plaintiff's Motion for Emergency Restraining Order, the Court set the matter for an evidentiary hearing to proceed under CR 65.04 at a time and date agreeable to all parties. That hearing occurred on July 16, 2020.

Plaintiffs and Intervening Plaintiff seek to restrain Defendants from enforcing various orders issued pursuant to the Governor's declaration of emergency relating to the 2019 coronavirus, SARS-COV-2, commonly referred to as Covid-19. The people of the Commonwealth, through Attorney General Daniel Cameron (*i.e.*, on their behalf *ex relatione*), argues that KRS Chapter 39A violates the separation of powers required by the Kentucky Constitution and its non-delegation doctrine. Commonwealth *ex rel*. Cameron further argues that

[1] No Response was filed in Opposition to Intervening Plaintiff's Motion for Emergency Restraining Order, or his Motion for Temporary Injunction.

the Governor's orders are arbitrary, disproportionate, violate Sections 1 and 2 of Kentucky's Constitution and Bill of Rights, and exceed the purported delegation attempted by KRS Chapter 39A. Plaintiffs join these arguments in addition to those recited in the Order this Court entered on July 2, 2020.

At the outset, concerning Intervening Plaintiff's challenges, as a rule "constitutional adjudication should be avoided unless it is strictly necessary for a decision in the case." *Trigg v. Commonwealth*, 460 S.W.3d 322, 330 (Ky.2015). Injunctive relief, although an extraordinary remedy, is not a final decision or adjudication in the case. Therefore, to determine whether Intervening Plaintiff has shown the likelihood of irreparable harm due to a violation of constitutional rights, the Court will address that question as well, independent of the findings on the statutory question, as the issues differ.

Defendants argue that they have the power to issue the challenged orders pursuant to KRS Chapter 39A to prevent exposure to coronavirus. They further contend that movants failed to meet the elements required for injunctive relief. Defendants assert movants failed to show the potential for suffering irreparable harm without injunctive relief, that the equities favor Defendants' interest in maintaining the Governor's orders, and that movants have not shown that a substantial question exists on the merits of their claims. Further arguments of the parties will be addressed within the portion of this Order analyzing those specific issues.

At the evidentiary hearing conducted on July 16, 2020, Plaintiffs and Intervening Plaintiff presented testimony from Christine Fairfield, Jennifer Washburn, Bradley Stephenson, Greg Lee, Larry Roberts, Josh King, Richard Haho, John Ellison, and John Garren, Ph.D. Defendants presented testimony from Dr. Sara Manover, and Dr. Steven Stack, M.D. The parties entered 35

evidentiary exhibits. Following is a summary of the evidence concerning the individual Plaintiffs[2]:

1. Florence Speedway and Others Similarly Situated

Josh King testified[3] that his parents bought the Florence Speedway when he was eight years old. His family has operated the track continuously and built it up throughout the years. Along with racing, they offer concessions. All seating and everything they offer to patrons is outdoors. Their peak season runs from March to August, during which they receive 90% of their annual revenue. From August to October, because school is in session, they host only a few races. Nearly 60% of their patrons are comprised of family groups who come to watch relatives or friends of family who are racing. When the challenged orders required that Florence Speedway shut its business, it had already ordered a significant quantify of fuel, foodstuffs and other goods for the racing season. Because it had no customers, the food items perished.

King testified that but for the emergency restraining order, Florence Speedway would have had to permanently close within a month. Even without closing, he explained their business has already lost the good-will of some customers. According to King, several resented his decision to close but the orders left him no choice, as his insurance carrier told him that he could not operate the track in violation of the orders without losing coverage. Further, the challenged orders require that everyone be spaced six feet apart, without distinction for those of the same family. During Dr. Steven Stack's testimony, he acknowledges that there was no rational basis for requiring people from the same household to be seated six feet apart during races, other than his preference that people not go out at all.

[2] Evidence presented by the other parties will be presented in the Analysis portion of this Order.
[3] V.R., 07/16/2020, *circa* 11:00:00-11:46:00

2. Little Daycare and Others Similarly Situated

At the hearing, Christine Fairfield, owner of Little Daycare, testified concerning her operation and experience.[4] According to Fairfield, her dream was to own a daycare. To achieve that goal, she worked three jobs for nine years to save enough money to pursue that dream. She used all her savings, and $500,000 of her 401k funds, investing $1 million, to start her business in 2012. She testified that, before 2020, her business was debt free and consistently produced profit. For example, in 2019, her business produced profits of $37,761.00. But between March 20th and July 31st of 2020, her business has lost $691,544.00.

Little Daycare is an accredited daycare and follows the standards required to maintain accreditation. A substantial portion of her clientele is frontline workers in the health care industry. She employs approximately 48 employees. Fairfield testified that if she is forced to operate under the challenged orders, her business will not survive more than six weeks.

According to Fairfield, the challenged orders prohibit "class" sizes of children greater than ten. Her accreditation standards require a minimum number of "teachers" be present based upon the number of children. Under accreditation standards, the number of young children and infants that can be monitored by one teacher is less than that required for older children. However, under her accreditation standards, so long as she has the minimum number of teachers to meet the required ratio, she can have greater numbers of children in the class.

The accreditation standards also establish minimum room capacity requirements. Thus, if she has to use a full room for ten children under the challenged orders without regard to the fact that the room has greater capacity, she cannot charge enough to cover her costs. For example, in regards to one class, under the challenged order limiting the maximum class size to ten children, she is required to put out nearly eighteen students, forcing her to operate her

[4] V.R., 07/16/2020, *circa* 11:00:00-11:46:00.

business as a loss.[5] Further, under the challenged orders, she would have to have one teacher for each 10 students. Whereas, under the accreditation standards, she needs one teacher to fifteen students. She sought to divide the rooms but was told she would have to construct hallways around each room to further isolate the rooms. In addition to the added cost, this also would result in decreasing the size of the room too greatly for her accreditation. She testified that, with the accreditation standards and room sizes, she could function with maximum class sizes of at least fifteen.

Dr. Sara Manover, who testified for Defendants[6], works with CHFS and is involved in regulation of daycares. When asked, Ms. Manover indicated the only reason she could think of for limiting class sizes to ten would be the report of increases in positive cases overall. She acknowledged, however, that appearance of the virus at daycares has not been a problem in Kentucky, mentioning that she had only heard of cases at one center. That center was a Limited Duration Center ("LDC"), where less restrictions are imposed with no specific classroom maximum.[7] She also testified that quite a few states did not close daycares at all.

Accreditation standards also prohibit young children from being combined with older children, but provides exceptions for one-half hour after their arrival, and the last half hour prior to pick up before closing time. However, the challenged orders prohibit any mixing of children outside of the group of ten they are placed with based upon their age range, without regard to time of day. This mandate applies even if the children in different age sets are siblings, or otherwise ride in the same car to get there. The challenged orders also prohibit "tours" of parents who may be interested in meeting daycare personnel and viewing the facility. This prohibition is absolute, and applies even during hours the facility is closed.

[5] V.R., 07/16/2020, *circa* 11:17:00-11:22:00.
[6] V.R., 07/16/2020, *circa* 06:00:00.
[7] V.R., 07/16/2020, *circa* 06:04:00-6:50:00.

In contrast to the restrictions on licensed daycares, the challenged orders make exceptions for daycares that CHFS designated as a Limited Duration Center ("LDC"). For these, there are no restrictions on class sizes, child grouping, or tours if the facility is an LDC. To be an LDC, the facility has to partner with a health care provider in making the request. LDCs are allowed for the business pursuits deemed essential, such as health care workers. Further, CHFS established preferences favoring YMCA facilities in granting LDC status. Fairfield sought to obtain approval as an LDC.[8] Despite having partnered with St. Elizabeth,[9] and St. Elizabeth joining the request for Little Daycare to be so designated, CHFS declined to grant the designation. No evidence was presented to explain the reasons for the disproportionate treatment.

Jennifer Washburn testified[10] that she owns an accredited daycare center in Marshall County. Within a week after daycares were ordered closed, she requested and obtained status as an LDC. As an LDC, her business received government financial assistance, including "hero funds." She confirmed that LDCs could operate free of the restrictions placed upon class sizes, child grouping, and tours. However, in contrast to Fairfield's circumstances, Washburn's facility has small rooms. Because of this, the class size restriction did not impair her ability to operate to the same degree, although she has lost over $58,000[11]. When phased reopening began, she ceased operating as an LDC. She, too, testified that the class size requirement needs to be at least 15 for her to operate at a profit. And, like Fairfield, she testified that the restrictions on grouping children from different classes, without regard to their being siblings, is burdensome. She testified that if the mandates in the challenged orders continue unaltered, she will have to close her doors on October 12, 2020.

[8] Hearing Exh. 2.
[9] Hearing Exh. 1.
[10] V.R., 07/16/2020, *circa* 11:46:00-12:28:00.
[11] Id.

Washburn has experience as a health care worker, and is currently pursuing a Ph.D. She provides occupational therapy, physical therapy, speech therapy, walking therapy and autism therapy to those in her care. Washburn explained that, especially for children with those needs, their inability to attend daycare is detrimental to their well-being. She testified that she sees a lot of regression in the children that were away due to the challenged orders. Further, she explained that the challenged orders also restrict class and group sizes of children in her large outdoor playground. She has a large outdoor play area that could accommodate large numbers of children with vast spacing capabilities. However, she is limited to ten children in the outdoor play area under the challenged orders. She contends this is irrational when compared to the lack of restrictions on LDCs, and when compared to the fact that many children under her care, upon leaving her facility, go to play t-ball on teams, play at bouncy-ball houses, or go swimming after leaving. She finds the harsh restrictions imposed on daycares unreasonable and disproportionate.

Bradley Stephenson also testified concerning the impact of the challenged orders on daycare centers and children.[12] He has served as executive director of the Child Care Council of Kentucky since 2003 and worked within the organization since 1997. The Court found that he qualified as an expert on issues of daycare operations and management. Stephenson, too, testified that the LDCs may operate free of the restrictions on daycare facilities contained within the challenged orders.

Stephenson testified that daycares are regulated through the Kentucky Inspector General, under the Cabinet for Health and Family Services (CHFS). Therefore, he opined that the orders imposed by the Governor were not necessary. For reasons similar to the witness testimony recited above, Stephenson testified that restricting class sizes to ten, the rules that result in prohibiting grouping of siblings, and the absolute prohibition on tours, are arbitrary and lack any

[12] V.R., 07/16/2020, *circa* 12:28:00-01:17:00

rational basis. He pointed out that the CDC guidance contains no recommendation that class sizes be limited to ten, or restrictions on grouping children who are siblings at the beginning and end of the day. According to Stephenson, the profit margin for daycare facilities is approximately six to seven percent. He further testified that lack of access to daycare has long-term, adverse effects for many children. Stephenson stated that he has requested information on any case outbreaks that occurred in daycare centers but, as of yet, has received nothing. Based upon his knowledge, there has been only one person diagnosed with Covid-19 at a daycare and understood that to have been a staff worker.

3. Beans Café and Others Similarly Situated

Richard Hayhoe owns Beans Café and Bakery. He testified[13] concerning the losses he is sustaining in his restaurant business. He came to Kentucky from Canada nine years ago and invested in his café. Over the years his business grew, and he recently purchased "Paradise Donuts" in Boone County to expand his operation. According to Hayhoe, Paradise Donuts was under contract to another buyer when the Governor ordered the closure of restaurants, causing that buyer to cancel the sale. Consequently, that put the seller in financial distress. When Hayhoe bought the Boone County location, he had to pay only the seller's outstanding equipment costs. Despite that, Hayhoe is concerned about the viability of his operations under the challenged orders.

Hayhoe explained that, although the challenged orders limit maximum capacity at 50%, the six foot distancing requirement limits his available seating to 30%. This substantially restricts his ability to function because all of his business occurs before 2:00 pm. Under these mandates he cannot adequately function. He stated he could at least break-even if he could space the portion of customer seating that is back-to-back three feet apart, rather than six feet, and be

[13] V.R., 07/16/2020, *circa* 04:21:00-04:38:00

allowed capacity to two-thirds. He fears that, without that modification, he will not be able to operate past November. Hayhoe testified that he was afforded no opportunity to provide input or challenge the Governor's orders.

Mr. John Ellison is the general manager and part owner of Hofbräuhaus in Newport, Kentucky. He has been in the restaurant business for 28 years and serves on the Board of Directors of the Kentucky Restaurant Association. The Court found he qualified as an expert concerning issues of restaurant operation and management.[14] Ellison testified that the business at Hofbräuhaus was fine through the first two weeks of March, until the Governor's orders forced the restaurant to shutdown except for carry-out orders. Then revenues plummeted 87%, with the drive-through providing the only sales. He estimates that over 20% of Kentucky restaurants will close for good, an estimate he called "conservative." For those who are operating now, he said survival is day-by-day. Ellison testified that, before the challenged orders, restaurants already had to comply with health and safety rules enforced through the local health departments.

ANALYSIS

The spine of our constitutional system is the limitation on governmental power. To preserve those limits, the powers it does grant are divided into separate spheres. The founders of these United States, and of our Commonwealth, insisted that if liberty is to exist, this separation must be maintained. James Madison, the father of our (federal) Constitution, explained that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[15] According to Madison,"[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and

[14] V.R., 07/16/2020, *circa* 04:38:00.
[15] James Madison, FEDERALIST NO. 47 (*New York Packet*, Wednesday, January 30, 1788), quoted from http://constitution.org/fed/federa47.htm, last accessed July 17, 2020.

whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[16]

In designing our system, the Framers studied the rise and fall of numerous governments throughout the long march of history. Although fluent in the rights afforded under British law, they pondered Montesquieu (1689-1755), and sought wisdom from ancient sages like Polybius (*circa* 200-118 B.C.) and Cicero (*c.* 106-43 B.C.).[17] John Adams, in his *Defense of the Constitutions*, pointed to Rome when explaining the need to separate governmental powers:

> The Roman constitution formed the noblest people, and the greatest power, that has ever existed. But if all the powers of the consuls, senate, and people, had been centered in a single assembly of the people, collectively or representatively, will any man pretend to believe that they would have been long free, or ever great?[18]

Drawing from this deep well, the Framers built on the cornerstones of antiquity. More than that, by applying hindsight gleaned from Greece, Rome, and a myriad of subsequent nations, they chiseled our system to provide even greater protections. As John Adams put it, "[t]he constitutions of several of the United States, it is hoped, will prove themselves improvements, both upon the Roman, the Spartan, and the English commonwealths."[19] Thus, they doubled-down to protect—and expand upon—this ancient recipe for liberty. Quoting the Greek historian Polybius, Adams insisted that, "*it is impossible to invent a more perfect system of government*" than one with a definitive separation of powers.[20]

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[16] *Id*.
[17] See, generally, FEDERALIST NO.'S 47, 51 and 63.
[18] John Adams, LL.D., *A Defence of the Constitutions of Government of the United States of America*, Vol. I, XXX (1787-88), Da Capo Press ed. (Plenum Publishing: NY), quoted from http://constitution.org/jadams/ja1_30.htm, (emphasis in original), last accessed July 17, 2020.
[19] John Adams, LL.D., *A Defence of the Constitutions of Government of the United States of America*, Vol. I, XXX (1787-88), Da Capo Press ed. (Plenum Publishing: NY), quoted from http://constitution.org/jadams/ja1_30.htm, (emphasis in original).
[20] John Adams, LL.D., *A Defence of the Constitutions of Government of the United States of America*, Vol. I, XXX (1787-88), Da Capo Press ed. (Plenum Publishing: NY), quoted from http://constitution.org/jadams/ja1_30.htm, (emphasis in original).

The value of separating governmental powers finds mention even in Scriptural history, specifically the account of Judas Maccabaeus, the great warrior-general who fought and won independence for Judea during 167-160 B.C.[21] Judas, it relates, looked with favor upon Rome's political structure during that time because "none . . . wore a crown, or was clothed in purple."[22] Judas observes how, instead, the Romans had "made themselves a senate house . . . that sat in council always for the people, that they might do the things that were right."[23] Of course, this was before the Romans surrendered to imperial rule by an emperor, the occurrence of which Cicero so often lamented,[24] and which the Framers sought mightily to prevent with our constitutions. These limitations are what the United States Constitution vows it "shall guarantee to every State in this Union." U.S. CONST., Art. IV, § 4.

Our Kentucky Constitution mandates a separation of powers with far greater ferocity than does the federal constitution, or even that of any other state. *Board of Trustees of the Judicial Form Ret. Sys. v. Attorney General*, 132 S.W.3d 770, 781 (Ky. 2003). Section 27 divides the powers between Legislative, Executive and Judicial. Section 28 prohibits any person in one branch from exercising the authority reserved to either of the other branches, unless "expressly directed or permitted" by the Constitution. By this, Kentucky goes beyond merely establishing separation but *requires* separation, and with great rigor. It adds a positive prohibition against any delegation—something Kentucky's courts have dubbed a "double-barreled" protection against usurpation. *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984).

[21] See, generally, 1 Maccabees, 2 Maccabees.
[22] 1 Maccabees, 8:1, 14-15.
[23] 1 Maccabees, 8:1, 14-15.
[24] See, for example, CONSTITUTIONAL RIGHTS FOUNDATION, BILL OF RIGHTS IN ACTION, *Cicero: Defender of the Roman Republic*, Vol. 23 Fall 2007 No. 3,"By Cicero's time, however, a number of fatal weaknesses had undermined the system. . . . One feature of the Roman Republic worked in favor of power falling into the hands of one man. During wartime and other emergencies, the Senate could appoint a dictator with absolute powers for a six-month period. After this period, the dictator's power ended. In 83 B.C., however, Sulla, a Roman general, forced the Senate to appoint him dictator indefinitely. . . . The 24-year-old Cicero witnessed it all." Available at: https://www.crf-usa.org/bill-of-rights-in-action/bria-23-3-b-cicero-defender-of-the-roman-republic.

The initial question to be answered here is whether Defendants are acting within constitutional limitations. Asserting that they are not, Intervening Plaintiff advances several arguments (which Plaintiffs share or have joined). Among those arguments are that KRS Chapter 39A purports to delegate too much legislative power and, therefore, violates the separation of powers required by the Constitution. Further, they argue that the challenged orders exceed even the breadth of KRS 39A. The people of Kentucky (through Commonwealth *ex rel*. Cameron), also argue that the challenged orders violate the Kentucky Bill of Rights in Section 1 of its Constitution, and the prohibition in Section 2 against the exercise of "[a]bsolute and arbitrary power over the lives, liberty and property" of citizens, "even" if those actions find support "in the largest majority." KY. CONST. § 2.

They complain that the executive's decrees are the product of value judgments that unfairly devastates the livelihood and pursuits of some, like themselves, while sparing others, *i.e*., allowing spectators to attend baseball games but not auto races, and allowing children in groups of 30 at daycares for children in LDCs, but not for others. Plaintiffs argue that the law provides specific procedures for the quarantining of individuals and that, before a person may be quarantined, there must be sufficient proof that they are contagious with a serious disease. In contrast to this, however, they argue that no law justifies locking down the entire population to hide them from the potential of encountering pathogens. Commonwealth *ex rel.* Cameron asserts that the executive's orders are unconstitutional on several grounds, and that any statute purporting to grant such power to the executive is likewise unconstitutional. They ask the Court to so find, and to issue a temporary injunction against Defendants during the pendency of this action.

CR 65.04(1) provides the standard the Court is to apply on a Motion for injunctive relief:

> 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.

The purpose of this rule "is to insure that the injunction issues only where absolutely necessary to preserve a party's rights pending the trial of the merits." *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978). In *Maupin*, the Kentucky Court of Appeals established a three-part test for issuance of a temporary injunction. First, Plaintiff must show that, without the temporary injunction, he will suffer immediate and irreparable injury to his rights pending trial. *Id*. at 699. Second, the Court must weigh any equities that may be involved. *Id*. Third, the Court should determine whether a substantial question on the merits has been shown. *Id*. "If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded." *Id*. If one or more of these criteria are not satisfied, the temporary injunction should be denied. *Sturgeon Min. Co., Inc. v. Whymore Coal Co., Inc.*, 892 S.W.2d 591 (Ky. 1995).

A. Irreparable Harm

Plaintiffs Florence Speedway and Little Daycare testified that the challenged orders will result in permanent closure of their business. Based upon the testimonial evidence, the Court agrees the loss of good will constitutes irreparable harm. *Underhill v. Murphy*, 78 S.W. 482, 483 (Ky. 1904). The same analysis contained in this Court's Order entered July 2, 2020 applies and need not be repeated here. These Plaintiffs have also presented substantial evidence of arbitrary restrictions in the challenged orders that do not apply to similarly situated activities. Beans Café, with evidentiary support in testimony concerning Hofbräuhaus , has demonstrated injury, but has not presented as clear a case for a permanent loss of good will. Therefore, the relief they seek

must stand or fall on the larger question of whether the executive has authority to impose the orders at issue.

Commonwealth *ex rel.* Cameron asserts that the violation of the people's rights, in and of itself, constitutes irreparable harm. The question of whether or not Intervening Plaintiff has demonstrated irreparable harm by a purported violation will, to some extent, overlap the question of whether they have also demonstrated a substantial question on the merits, namely, whether or not there is substantial grounds to find the people's rights are being violated. Therefore, some analysis relevant to the latter question is needed here.

On March 6th, the Governor began issuing a series of wide-ranging orders. Among these, he ordered the closure of all businesses except for certain pursuits that he deemed essential for life.[25] He, through CHFS, ordered the closure of churches and houses of worship.[26] Following his directives, CHFS prohibited individuals from meeting together in certain types of mass gatherings, later allowing meetings in numbers not to exceed ten persons.[27] The Governor prohibited citizens from peaceably assembling for the purpose of petitioning a redress of these grievances but allowed and even joined assemblies for other causes.[28] He had prohibited travel, with limited exceptions, and decreed those daring to travel across state lines in violation of his order must quarantine for 14 days.[29] He has ordered all citizens to remain at home unless

[25] Ky. Exec. Order No. 2020-246, Gov.'s Resp., p. 4, Available at https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf .
[26] *Id.* CHFS Order, Mar. 19, 2020, Gov.'s Resp., p. 4, available at https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf .
[27] Order of CFHS Re: Mass Gatherings, available at https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf. See also, Gov. Beshear Updates Kentuckians on the Fight to Defeat COVID-19, available at https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=168.
[28] Testimony of Dr. Stack, V.R. 07/16/202, circa 07:42:00; and Exh. 31 to July 16, 2020 hearing.
[29] Ky. Exec. Order No. 2020-258, Available at https://governor.ky.gov/attachments/20200330_Executive-Order_2020-258_Out-of-State-Travel.pdf ;See also Ky. Exec. Order No. 2020-266. Available at https://governor.ky.gov/attachments/20200402_Executive-Order_2020-266_State-of-Emergency.pdf ; and Ky. Exec. Order No. 2020-315, available at https://governor.ky.gov/attachments/20200506_Executive-Order_2020-315_Travel.pdf.

engaged in a pursuit deemed by the government to be essential for life.[30] Following his directives, the CHFS ordered hospitals and doctors to cease providing any health care, including surgeries, unless said treatment was deemed emergent (that is, likely to result in serious, irreparable harm if not provided within 24 hours), thereby prohibiting the people from access to procedures such as cancer-screenings, dental care and physical therapy.[31] He has ordered citizens to wear masks and threatened fines and penalties for violations.[32] It can hardly be denied that these orders constitute lawmaking and policy setting.

Defendants do not appear to dispute that the Governor's orders are broad, and include policy making, which would be legislative powers not granted to the executive in the Constitution. Rather, they argue the "Governor's orders cannot violate Sections 15, 27 and 28 of the Kentucky Constitution because the General Assembly expressly granted him the authority to take this action."[33] Defendants point to KRS § 39A.180(2), insisting that, once the Governor declares an emergency, his orders control because "[a]ll existing laws, ordinances and administrative regulations inconsistent" with "any order . . . issued under . . . KRS Chapter 39A . . . shall be suspended during the period of time and to the extent that the conflict exists."[34] According to Defendants, KRS §§ 39A.010 and 39A.100 allow the Governor to declare an emergency, "in response to any potential, threatened, impending, or ongoing disaster or emergency occurrence."[35]

Commonwealth *ex rel*. Cameron insists that this violates the double-barreled protections of separation of powers and the non-delegation doctrine under §§ 27, 28 and 29 of the Kentucky

[30] https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=10.
[31] See Ky. Exec. Order No. 2020-323, Available at https://governor.ky.gov/attachments/20200323_Directive_Elective-Procedures.pdf.
[32] Ky. Exec. Order No. 2020-586, available at https://governor.ky.gov/attachments/20200709_Executive-Order_State-of-Emergency.pdf.
[33] Defendants' Resp., p. 14.
[34] Defendants' Resp., p. 11.
[35] Defendants' Resp., p. 10.

Constitution, as well as § 15, which states: "No power to suspend laws shall be exercised unless by the General Assembly or its authority."

The Kentucky Supreme Court, in analogizing federal precedent relating to limited delegation to administrative agencies, declared that "Kentucky holds to a higher standard. . . . [And] is more "restrictive of powers granted" than the federal Constitution. *Board of Trustees of the Judicial Form Ret. Sys. v. Attorney General*, 132 S.W.3d 770, 782 (Ky. 2003). It further held that, in no event can there be any delegation without, at a minimum, the "standards controlling the exercise of administrative discretion." *Id*.

Because "Kentucky is a strict adherent to the separation of powers doctrine," Kentucky law mandates that "the legislature must lay down policies and establish standards" for any limited delegation to be constitutional. *Id.* See, for example, *Miller v. Covington Development Authority*, 539 S.W.2d 1 (Ky. 1976) (holding statute delegating broad powers to preserve historic or economic areas to be unconstitutional for not including detailed legislative criteria of what that entailed); and, *Fawbush v. Bond* 613 S.W.2d 414, 415 (Ky. 1981) (finding KRS 67.045 unconstitutional because it delegated responsibilities to district courts to evaluate and establish new boundaries from proposed redistricting plans on grounds that the statute failed to provide the criteria for such a review); and, *Legislative Research Commission v. Brown*, 664 S.W.2d 907, 915 (Ky. 1984) (declaring a statute unconstitutional for delegating authority to the Legislative Research Commission because the delegation lacked standards to control the exercise of administrative discretion).

KRS Chapter 39A further provides criminal penalties for violations of orders issued following the declaration of an emergency. Violations are categorized as a Class A

misdemeanor and punishable with up to 12 months in jail, up to $500 in fines, or both.[36] This, too, is problematic. The legislature cannot criminalize activity without clearly identifying the bad act. "[N]o penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it." *Louisville & N.R. Co. v. Commonwealth*, 35 S.W. 129, 130 (Ky. 1896).

Nor can the General Assembly allow the Governor to fill in the blanks of what constitutes a bad act. "The Legislature cannot confer . . . arbitrary power to use . . . as [the recipient] may see proper." *Board of Trustees*, 132 S.W.3d, at 784. But that is precisely what KRS Chapter 39A purports to do. Further, based upon the disproportionate treatment meted out to different businesses versus that allowed for substantially similar activities, the Court also finds Plaintiffs and Intervening Plaintiff have made sufficient showing that the challenged orders violate Section 2 of the Kentucky Constitution as an attempt to exert "[a]bsolute and arbitrary power over the lives, liberty and property" of Kentucky citizens.

Moreover, and no less importantly, ***all laws—including those enacted by the General Assembly—are subject to the Bill of Rights***. Our Kentucky Constitution is emphatic on this point:

> To guard against the transgression of the high powers which we have delegated, We Declare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.[37]

Commonwealth *ex rel*. Cameron begins the argument section of his Motion by reciting the entirety of Kentucky's Bill of Rights. That is apropos. For it specifically enumerates the "right of worshipping Almighty God . . ., of acquiring and protecting property . . ., of assembling

[36] KRS 39A.990; KRS 532.090(1); KRS 534.040(1), (2)(a).
[37] KY. CONST. § 26.

together . . ., and of applying to those invested with the power of government for redress of grievances . . . ."[38] Kentucky's Constitution defines these rights as "inherent and inalienable rights."[39] Therefore, by definition, these rights are "permanent,"[40] meaning they "cannot be transferred or surrendered . . . [and thus, are] natural."[41] A natural right exists and is held by the people "without receiving that right, faculty or ability from another. . . ."[42]

An inherent and inalienable right is a *natural* right that comes not from government, but pre-exists government. "This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). Thus, as the founders announced to the world: "We hold these truths to be self-evident, that all men . . . are endowed by their Creator with certain unalienable Rights . . . ."[43] Government may not take from the people what they received directly from God. Further, government may not take these rights even if it be in legislation unanimously enacted by the entire General Assembly, or even if all branches acquiesce. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S., at 636.

"An unconstitutional statute is void ab initio. Any statute or ordinance passed in contravention of the Constitution is without force or effect, and any action had or taken under such ordinance or statute is a nullity." *City of Henderson v. Liebe's Ex'r*, 192 S.W. 830, 831 (Ky. 1917). This truth, however, does not change the fact that the challenged orders are being mandated under threat of punishment or penalty. And this strikes at the very purpose of

[38] KY. CONST. § 1.
[39] *Id*.
[40] See BLACK'S LAW DICTIONARY, 7th ed., West Group, p. 787 (St. Paul MN: 1999) (defining "inhere").
[41] *Id*., at 1323 (defining "inalienable right").
[42] See BLACK'S LAW DICTIONARY, 4th ed., West Publishing Co., p. 1029 (St. Paul, MN: 1951) (defining "inherent power").
[43] DECLARATION OF INDEPENDENCE, § 2.

constitutions: protecting liberty. Although "an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected . . . constitutional right." *U. S. v. Goodwin*, 457 U.S. 368, 372 (1982). "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *Id*.

Irreparable harm is sufficiently demonstrated where it is shown there is potential for the "abrogation of a concrete personal right," and where such rights are threatened with immediate impairment. *Maupin v. Stansbury*, 75 S.W.2d 695, 698 (Ky. 1978). The Court finds that is the case here.

B. Balance of Equities

The Governor, CHFS and CDPH assert that the existence of coronavirus constitutes an emergency; that it justifies—in fact requires—that the executive wield all of the authority concerning which Plaintiffs and Intervening Plaintiff complain. This is required, they insist, to save lives. Defendants point to statements by the World Health Organization ("WHO"), the Center for Disease Control ("CDC"), various press articles, and the explanations provided in the testimony of Steven J. Stack M.D.[44], as establishing grounds that justify the measures taken.[45] Further, in their Response to Plaintiffs, Defendants point to recent press accounts reporting that the number of positive tests for Covid-19 is on the rise and that, to "avoid similar calamities" in the Commonwealth, the equities favor keeping the Governor's orders in place.[46]

Plaintiffs insist that Defendants have presented no rational basis for the harshly disproportionate restrictions placed upon racetracks, daycares and cafés as compared to similarly situated activities such as baseball, auctions, and LDCs. Plaintiffs further contend much of the

[44] V.R., 07/16/2020, *circa* 07:42:00 – 09:46:00.
[45] Defendants' Resp. to Plaintiffs, pp. 2-3.
[46] Defendants' Resp., p. 19; .

restrictions differ from various available guidelines or studies. However, Plaintiffs express a willingness to apply similar measures, and to require their employees and customers to wear masks, but object to any governmental enforcement of those requirements that could result in closure of their businesses for infractions by patrons. Nonetheless, they insist that the challenged orders are not only arbitrary and unfair, but are inflicting injury on them to such an extreme that their businesses are sure to close, resulting in the loss of their livelihood and the goodwill built up over many years.

Within their memoranda, Plaintiffs present certain medical studies for the premise that it has not been established as a fact that asymptomatic people can even spread coronavirus.[47] One of the studies Plaintiffs presented was published by Respiratory Medicine and concludes that the ability of asymptomatic Covid-19 carriers to infect others "might be weak."[48] On this, Dr. Stack acknowledged that "the jury is out," but stated he nonetheless has concerns based upon other articles suggesting it might be transmittable in 20% to 40% of asymptomatic cases.[49] Plaintiffs presented another study on the use of masks that concludes with a "caution against the use of cloth masks," explaining that "[p]enetration of cloth masks by particles was almost 97%" in the study, and advising there to be an increased risk of infection with cloth masks due to "[m]oisture retention, reuse . . . and poor filtration . . . ."[50]

Intervening Plaintiff argues the equities weigh in favor of an injunction because "the government can have no legitimate interest in violating the constitutional rights of its citizens."[51] Taken altogether, the arguments pit the Constitution and Bill of Rights against the projections of

[47] Pl.s' Mot., p. 16.
[48] RESPIRATORY MEDICINE, *A study on infectivity of asymptomatic SARS-CoV-2 carriers,* 169 (2020) 106026, 12 May 2020, p. 5.
[49] Pl.s' Mot., p. 16; Dr. Steven Stack depo., p. 15, and hearing testimony .
[50] MacIntyre CR, Seale H, Dung TC, *et al*., *A cluster randomized trial of cloth masks compared with medical masks in healthcare workers,* BJJ OPEN, 26 Mar. 2015, p. 1.
[51] Int. Pl.'s Mot., p. 24.

certain medical professionals. Principles from the former are well established, whereas the positions advanced from the latter are still developing and not all in agreement.[52] As Dr. Stack testified in his deposition, "there's an incredible volume of research being published daily, not all of which agrees with each other. . . ."[53] From what has been presented to this Court thus far, and based upon the short span of time since coronavirus appeared, the studies pertaining to it are, as of yet, developing and have not been tested under the scrutiny of competing experts or by cross-examination or challenged.

In mid-March 2020, a team led by Neil Ferguson at the Imperial College in London developed mathematical models to project the impact from coronavirus.[54] According to the New York Times, the projections of this group directly influence the WHO and the policies of many governments, including in the United States.[55] Ferguson predicted that 2.2 million would die in the United States from the spread the coronavirus, and 510,000 in the UK,[56] peaking in June.[57] But Sunetra Gupta, an epidemiologist who led a research team at Oxford University, disagreed.[58] Under the models prepared by Gupta and Oxford, the virus had been spreading at least a month earlier than suspected.[59] Gupta predicted that nearly half the population had already been exposed in both the U.K., and potentially the U.S.[60] This fact, she contended, would drastically

[52] Dr. Steven Stack depo., at 15:18-21
[53] Dr. Steven Stack depo., at 15:18-21, specifically pertaining to studies indicating asymptomatic persons may not be contagious.
[54] Mark Landler and Stephen Castle, *Behind the Virus Report That Jarred the U.S. and the U.K. to Action*, THE NEW YORK TIMES, March 17, 2020 (updated April 2, 2020), available at, https://www.nytimes.com/2020/03/17/world/europe/coronavirus-imperial-college-johnson.html, last accessed July 14, 2020.
[55] *Id.*
[56] *Id.*
[57] Amanda Prestigiacomo, *Oxford Epidemiologist: Here's Why That Doomsday Model Is Likely Way Off*, THE DAILY WIRE, Mar 24th, 2020, https://www.dailywire.com/news/oxford-epidemiologist-heres-why-that-doomsday-model-is-likely-way-off, last accessed, July 14, 2020.
[58] *Id.*
[59] *Id.*
[60] *Id.*

reduce the number of deaths predicted in Ferguson's model.[61] Purportedly, if the number of persons infected were vastly greater than estimated, the percentage of fatalities in her model would likewise be considerably less.

The CDC's National Center for Health Statistics compiles, analyzes and tabulates "provisional" data that counts deaths involving Covid-19, pneumonia, influenza, and other causes of death.[62] The data illustrates a decreasing trend in deaths attributed to COVID-19 since mid-April 2020, and also indicates that deaths attributed to COVID-19 represent—thankfully—but a small fraction of the total causes of death threatening the lives and well-being of Kentuckians.[63] According to the U.S. Census Bureau, the population in Kentucky is estimated at 4,467,673 persons.[64] According to the CDC, between the weeks ending on January 4, 2020 and June 27, 2020, a total of 508 persons have died in Kentucky from what is coded as "COVID-19 (U071, Multiple Causes of Death)."[65]

During the same period in Kentucky, deaths from all causes are reported at 23,706. Thus, the data suggests that of the entire population of Kentucky, approximately 0.011% had Covid-19 as one of "multiple causes of death." The leading ten causes of death in Kentucky, in descending order, are, First: heart disease, Second: cancer, Third: chronic lower respiratory diseases, Fourth:

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[61] *Id*.

[62]Table 1. Provisional Death Counts for Coronavirus Disease (COVID-19), By Week Ending Date and Age Group, February 2, 2020 to July 4, 2020. https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm#AgeAndSex Last accessed July 15, 2020.

[63] Weekly Counts of Deaths by State and Select Cause, Filtered by the State of Occurrence as Kentucky and the year 2020. This resource provides tabulated national data with filters narrowing results to those of solely Kentucky in the year 2020. The tabulation shows provisional death counts by the week the deaths occurred and by select underlying causes of death for 2020. Included in the compilation are deaths resulting from: (1) All causes; (2) natural causes; (3) Septicemia; (4) Malignant Neoplasms; (5) Diabetes Mellitus; (6) Alzheimer Disease; (7) Influenza and Pneumonia; (8) Chronic lower respiratory diseases; (9) Other diseases of the respiratory system; (10) Nephritis, Nephrotic Syndrome and Nephrosis; (11) Symptoms, Signs and Abnormal Clinical and Laboratory Findings, not elsewhere classified; (12) Diseases of the Heart; (13) Cerebrovascular diseases; (14) COVID-19 (U071, Multiple cause of death); and (15) COVID-19 (U071, Underlying Cause of Death). https://data.cdc.gov/NCHS/Weekly-Counts-of-Deaths-by-State-and-Select-Causes/muzy-jte6/data. Last accessed July 15, 2020.

[64]U.S. Census Bureau, Population Estimates Program (PEP), updated annually. Population and Housing Unit Estimates. July 1, 2019, (V2019). https://www.census.gov/quickfacts/KY. Last accessed July 15, 2020.

[65] *Supra*, note 60.

accidents, Fifth: stroke (cerebrovascular disease), Sixth: Alzheimer's disease, Seventh: Diabetes Mellitus, Eighth: Kidney Disease, Ninth: Septicemia, and Tenth: Influenza and Pneumonia.[66]

In comparison, also according to the CDC, between February 2, 2020 and July 4, 2020, of the estimated 327,167,434 U.S. population, a total of 1,324,958 persons have died from all causes.[67] Of those, the CDC attributes 0.086% (114,741 deaths), as being in some way related to COVID-19.[68] The precise number of deaths solely attributable to COVID-19 is not separated in the available data as currently reported and coded, because these are reported as deaths "involving" Covid-19.[69] In the U.S., the leading ten causes of death for all ages, in descending order, are, First: heart disease, Second: cancer, Third: accidents (unintentional injuries), Fourth: chronic lower respiratory diseases, Fifth: stroke (cerebrovascular disease), Sixth: Alzheimer's disease, Seventh: Diabetes Mellitus, Eighth: Influenza and Pneumonia, Ninth: Nephritis, Nephrotic Syndrome and Nephrosis, and Tenth: intentional harm (suicide).[70]

At the hearing, Dr. Stack indicated that, as of July 16th, an additional 142 persons have died with coronavirus as being one of multiple causes of their death.[71] These would not be included in the CDC's data referenced above. Dr. Stack acknowledged that the vast majority of

[66] https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_08-508.pdf Martin JA, Hamilton BE, Osterman MJK, Driscoll AK, Drake P. Births: Final data for 2017. National Vital Statistics Reports; vol 67 no 8. Hyattsville, MD: National Center for Health Statistics. 2018. See also: https://www.cdc.gov/nchs/pressroom/states/kentucky/kentucky.htm. Last accessed July 15, 2020.
[67] CDC, *supra* note 1 (Updated July 8, 2020) Last accessed July 15, 2020.
[68] *Id*.
[69] Last accessed July 15, 2020. Based on the tabulation of the CDC's National Center for Health Statistics, the following categories appear to represent COVID-19 deaths from February 2, 2020- July 4, 2020: (1) All Deaths involving COVID-19; (2) Deaths involving pneumonia, without or without COVID-19, excluding Influenza deaths; (3) Deaths involving COVID-19 and Pneumonia, excluding Influenza; (4) Deaths involving Influenza, with or without COVID-19 or Pneumonia; and (5) Deaths involving Pneumonia, Influenza, or COVID-19. For analysis purposes, the only relevant columns are (1) All deaths involving COVID-19 and (2) Deaths from All Causes. The other four categories are mutually inclusive to some degree, with no way to determines deaths attributable to COVID-19 exclusively. https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm#AgeAndSex.
[70] https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_06-508.pdf. Heron M. Deaths: Leading Causes for 2017. National Vital Statistics Reports; Vol. 68 No. 6. Hyattsville, MD: National Center for Health Statistics. 2019. See also: https://www.cdc.gov/nchs/fastats/leading-causes-of-death.htm. Last accessed July 15, 2020.
[71] Because the data obtained from the CDC was for the period ending June 27th, the Court used the CDC's numbers to estimate the percentages in the foregoing paragraphs.

the deaths attributed to Covid-19 also involved comorbidities and were among persons advanced in age. During the hearing, Dr. Stack testified that he reviews voluminous news media articles, reports and studies relating to coronavirus every day, including the WHO study on social distancing, information put out by the CDC, and consults with teams of epidemiologists. According to Dr. Stack, in the measures being taken or those he's recommending, he is trying to balance what is not known about coronavirus with the risks commonly accepted, including how rapidly it is believed to spread. He pointed to the experiences reported from Wuhan, China, Italy and New York as examples of what Defendants are trying to avoid by their executive orders. Dr. Stack testified that, because there is no treatment for coronavirus and no vaccine, the challenged orders are necessary to keep hospital space available.

Defendants stress that new cases of Covid-19 are currently increasing in other states and that, therefore, there is greater need for their restrictions to continue. For example, Defendants warn that, "ICUs in Arizona and Texas are nearing capacity, threatening not just the health of COVID patients but also anyone else needing emergency or intensive care."[72] According to the source Defendants cite, Fox10Phoenix, "87% of the adult ICU beds and 86% of all inpatient beds statewide were in use" as of June 26, 2020. But, like the studies, not all press reports agree. Other news sources suggest this is not cause for alarm.

The Texas Medical hospitals are a consortium that is said to constitute "the world's largest medical complex."[73] Dr. Marc Boom, CEO of Houston Methodist, along with three of his peers from Memorial Hermann, Texas Children's Hospital, and CHI St. Luke's, held a recent

[72] Defendants' Resp., pp. 18-19, citing Fox 10 Phoenix.
[73] Mike Morris and Zach Despart, *Claiming confusion, Texas Medical Center changes how it reports ICU capacity amid COVID-19*, HOUSTON CHRONICLE, June 28, 2020 (updated: June 29, 2020), available at: https://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-hospitals-hit-100-base-ICU-capacity-15372256.php, last accessed July 15, 2020.

video press conference to address news reports that they are at capacity.[74] Dr. Boom is quoted as saying the data "is being misinterpreted," and causing "a level of alarm in the community that is unwarranted right now."[75] Reportedly, he explained that their hospitals always try to operate at full capacity to keep costs low, and pointed out that their numbers from one year ago, June 25, 2019—long before Covid-19—show they were operating at 95%.[76] He is further quoted as saying, "[t]here is not a scenario, in my opinion, to where the demand for our beds, especially ICUs, ventilators, PPE, etc., would eclipse our capability."[77]

According to the Houston Chronicle, Dr. Boom also stated that in April 2020, after a full month of the Texas ban on elective procedures, Houston's health care sector had to cut approximately 33,000 jobs due to the enormous drop in emergency room visits and outpatient surgeries.[78] Memorial Hermann hospital is quoted as reporting that the $92 million it received from the federal government did not cover what it lost from displacing scheduled elective surgeries to make way for potential virus patients.[79] In the same article, the CEOs are further reported as saying that the government's restrictions impair their ability to provide the care needed by other patients, and they warn that this will cause the community to suffer serious and lasting harm if they cannot resume treating other conditions, including heart disease and cancer.[80]

A report by the American Hospital Association expresses concern that "[t]he number of people without insurance could increase to over 40 million," citing unemployment claims

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[74] *Id*.
[75] Jeremy Beaman, *A Texas-sized misunderstanding about hospital capacity in Houston*, WASHINGTON EXAMINER, July 02, 2020, https://www.washingtonexaminer.com/opinion/a-texas-sized-misunderstanding-about-hospital-capacity-in-houston, last accessed July 15, 2020.
[76] *Id*.
[77] *Id*.
[78] Morris and Despart, HOUSTON CHRONICLE, note ___.
[79] *Id*.
[80] *Id*.

through April.[81] Another national hospital report states that hospitals across the country saw such drastic declines in hospital occupancy rates that, "nearly half of the nation's hospital beds sat empty in anticipation of the coronavirus surge."[82]

However, while the Court can take judicial notice of data published by the CDC, newspaper articles or published hospital reports do not carry the same presumption.[83] As to the latter (including those referenced by the parties), the Court can recognize that the same exists but cannot take any of the facts recited therein as true. See KRE 201(c), and *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 264 (Ky. App. 2005), holding a court can take judicial notice of a fact that is generally known and "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." They do show, however, that the articles do not all agree.

Dr. Stack testified concerning the emergency hospitals constructed in Louisville and Lexington in anticipation that hospitals would exceed capacity. He acknowledged that none of those beds were used. To be sure, that is cause for relief. But it also is cause to question the projections on which Defendants relied when imposing restrictions having such breathtaking scope.

Labor Cabinet Secretary Larry L. Roberts testified[84] at the hearing concerning the numbers of unemployment applications in Kentucky. According to Mr. Roberts, Kentucky saw approximately 880,000 unemployment claims filed between March and June 4, 2020. In the

[81] AMERICAN HOSPITAL ASSOCIATION, *Hospitals and Health Systems Face Unprecedented Financial Pressures Due to COVID-19*, May 2020, https://www.aha.org/system/files/media/file/2020/05/aha-covid19-financial-impact-0520-FINAL.pdf, last accessed, July 14, 2020.
[82] Jim Blake, KAUFMANHALL, *National Hospital Flash Report*, April 2020, available at: https://www.kaufmanhall.com/ideas-resources/article/covid-19-hits-hospitals-hard-march, last accessed, July 15, 2020.
[83] See KRE 201(c), and *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 264 (Ky. App. 2005), holding a court can take judicial notice of a fact that is generally known and "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."
[84] V.R., 07/16/2020, *circa* 01:50:00 - 02:20:00.

month since June 4th, the number of unemployment claims swelled to 1,163,000. One of those claimants, Greg S. Lee, testified[85] that he has been calling the Department every day, throughout the day, to inquire about his application. He testified that he has called over 500 times, sent letters and emails, has driven from his home in Taylor Mill to Hopkinsville, and again to Prestonsburg, seeking information about his claim. According to Lee, he has never received a substantive response. Mr. Lee provides entertainment at events, such as weddings and corporate events. His wife works as an event planner. Both lost their employment as a result of the Governor's orders and their livelihoods have been devastated. Lee testified that only recently was he able to work a job. According to Lee, it was an event that had been scheduled to occur in Kentucky but, because of the restrictions imposed in the challenged orders, the event was moved to Ohio.

John Edward Garen, Ph.D., also testified at the hearing.[86] Dr. Garen has been a professor with the University of Kentucky in the Department of Economics since 1985, has served as that Department Chair and on numerous boards, and has published over 40 articles in academic journals. Dr. Garen was accepted as an expert in economics without objection. Dr. Garen testified that the government's shut down orders have devastated Kentucky's economy. In analyzing the cause, Dr. Garen explained that 880,000 unemployment claims cannot be attributed to 508 deaths, or 2,043 hospitalizations, or the total 12,045 positive diagnoses that were reported as of June 13, 2020, which was the latest date on which he had both the virus numbers and unemployment data. Moreover, concerning the total number of cases, Dr. Stack confirmed that the numbers being reported are a running total of all positives ever reported, and would therefore include the cases that have recovered.

[85] V.R., 07/16/2020, *circa* 01:17:00– 01:50:00.
[86] V.R., 07/16/2020, *circa* 05:02:00- 05:47:00.

Dr. Garen explained that employment is the best indicator for gauging the health of an economy. And, for Kentucky, he said the prognosis is grim. According to Dr. Garen, this is the highest unemployment rate in Kentucky since the Great Depression. Dr. Garen explained that drops in employment correlate to drops in gross domestic production ("GDP"), which translates to loss of money for Kentuckians. He stated that, even if the unemployment situation were now to begin improving and continue that trend, Kentuckians will suffer a loss of $25.9 Billion annualized. That translates to a loss of $5,798 per person, and $14,988 per family. It is also notable that Dr. Garen was using the June unemployment number of 880,000, not the more recent 1,163,000. Dr. Garen expressed further concern that, unless things turn around, losses in GDP will likely drive further loss in employment. Garen mentioned that, during the Great Depression, it took a much longer period of time to reach this level of unemployment. Making this more ominous is that Dr. Stack, when asked, could project no estimate as to when the emergency could end, other than that there will be no vaccine this year.

The parties do not dispute that the Governor and his advisors are acting with the best of intentions. But good intentions are beside the point. However good the intentions, the question turns on the constitution and its limits. In studying the balance of what the law allows, an excerpt from Robert Bolt's play, *A Man for All Seasons*, bears mention. In it, St. Thomas More's family and his son-in-law, Will Roper, encourage him to arrest a man whom they fear, insisting that he is bad, and dangerous. St. Thomas resists, insisting that—however accurate their fear may be—the law must be respected. The discourse is instructive here:

> **Roper**: Then you'd set man's law above God's!
>
> **More**: No, far below; but let me draw your attention to a fact—I'm *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester. . . . [So, free he should go, even] if he was the Devil himself, until he broke the law!

> **Roper**: So now you'd give the Devil benefit of law!
>
> **More**: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> **Roper**: I'd cut down every law in England to do that!
>
> **More**: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil himself benefit of law, for my own safety's sake.[87]

To borrow words from the United States Supreme Court: "This quotation illustrates not only the fundamental character of the rule of law . . . but also the pernicious consequences of official disobedience of [it]. . . . Repetition of that literary allusion is especially appropriate today: "The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm *not* God." *National Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 694–95 (2007).

The Constitution and Bill of Rights must not be cut down to shield the population from a pathogen. Our natural rights, and the need for their protection, are no less important today than when our Commonwealth was founded.

Defendants insist that equity supports the challenged executive orders. The Court disagrees. It appears, at this stage of the proceedings, that the challenged orders were neither constitutionally enacted nor narrowly tailored. If, because of a virus, that doesn't matter, then the constitutional chains are broken, and Pandora is out of her box. As a matter of law, and on the evidence thus far presented, the scale of equity tips decidedly to the Constitution and Bill of Rights.

[87] Robert Bolt, *A Man for All Seasons*, a Play in Two Acts, pp. 65-66 (Vintage Books: New York, 1990).

C. Substantial Question on Merits

Commonwealth *ex rel*. Cameron argues that, before an emergency may be declared, KRS 39A.020(12) requires the local emergency response agency must first determine the situation is beyond its capabilities. No evidence has been presented that any county made any such certification. Dr. Stack testified that, subsequent to the declaration, most if not all counties requested funding assistance. At the hearing, Defendants argued that is tantamount to compliance. But that is not the same as a certification by the local government that the matter is beyond its capabilities before emergency is declared. Commonwealth *ex rel.* Cameron points to an opinion issued by then Attorney General Beshear before he became Governor. In it, he found that a county judge-executive could not fill the position of County Road Supervisor by invoking emergency powers under KRS Chapters 39A-39F because that was, "not a circumstance that a local emergency response agency would determine to be beyond its capabilities."[88] Further, Commonwealth *ex rel*. Cameron argues that no details were provided as to specific determinations by any local agency and that, in any event, the declaration of emergency is insufficient because it did not identify the specific nature of the emergency, or state what criteria would result in its dissipation. Those defects appear problematic for Defendants.

Commonwealth *ex rel*. Cameron's primary argument is that the challenged orders violate the separation of powers, the Bill of Rights, the absolute right to travel under § 24 of Kentucky's Constitution, and the prohibition against exercising absolute and arbitrary power under § 2. The Court has addressed these arguments in the part of this Order pertaining to irreparable harm.

In opposition to the constitutional and statutory challenges advanced by movants, Defendants essentially present two arguments. The first is that KRS Chapter 39A grants the executive full authority for the challenged orders, and that it does so without limits on extent or

[88] Int. Pl. Mot. for TRO, pp. 19-20, fn. 8, quoting Ky. OAG No. 19-021, 2019 WL 6445355 (Nov. 18, 2019).

duration. For the reasons already set out in this Court's analysis, Defendants' reliance on KRS Chapter 39A is ineffectual because Commonwealth *ex rel*. Cameron is likely to succeed on the merits of his claim that the powers purportedly granted thereunder violate Kentucky's Constitution, namely, §§ 1, 2, 15, 27, 28, and 29.

Second, Defendants point to the concurring opinion of Chief Justice Roberts in *South Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613, (U.S. 2020), and to *Jacobson v. Commonwealth of Massachusetts*, 197 US 11, 31 (1905). *South Bay* was a 5-4 decision that denied a request to enjoin stay-at-home orders issued by the Governor of California. Justice Roberts, one of the five, wrote a separate concurrence wherein he cites *Jacobson v. Commonwealth of Massachusetts*, 197 US 11, 31 (1905), a case that upheld Massachusetts' vaccination requirements. Using that analogy, Justice Roberts opined that the federal courts should not intervene, and it is to Justice Roberts' statements that Defendants point. Defendants argue his concurrence stands for the premise that these matters should be left solely to the governors.

South Bay, however, is of no help to Defendants. First, *South Bay* merely declined to grant injunctive relief. Thus, it was not dispositive on the merits of the question presented. *See Teague v. Lane*, 489 U.S. 288, 296 (1989) (holding that denial of injunctive relief pending appeal is not a decision on the merits). Second, because no other justice joined Roberts' concurrence, its value is merely persuasive and not precedential. Third, *South Bay* does not state that these matters should be left to governors, but to the states.

Finally, and most importantly, *South Bay* is a federal decision. Therefore, even if it could be taken as tantamount to a decision on the merits, it relates only to the rights protected under the federal constitution, not that of California's—and certainly not Kentucky's. This is well recognized by Supreme Courts of both the United States and that of Kentucky. *See PruneYard*

Shopping Center v. Robins, 447 U.S. 74, 81 (1980) (states retain the sovereign right to more expansively protect individual liberty under their own constitution than is provided in the federal forum); *and Sevier v. Commonwealth*, 434 S.W.3d 443, 467 (Ky. 2014) (explaining the federal constitution "serve[s] as a "'floor' in setting the minimum level of protections"). And, as set out above, it is likewise well established that Kentucky's Constitution provides its citizens greater protections against legislative delegation than does the federal government, or even any other state. *Board of Trustees*, 132 S.W.3d, 781.

Defendants are correct that, in *Jacobson*, the U.S. Supreme Court upheld a state's vaccination requirement as not violating the federal constitution. *Jacobson*, 197 U.S., at 39. But that opinion does not address the issues presented here, or Kentucky's greater protection against delegation of powers. Regardless, however, in considering *Jacobson*, its infamous progeny also bears mention—especially while on the topic of subverting inherent rights to the hypotheses of medical science. The infamous progeny is *Buck v. Bell*, 274 U.S. 200, 205 (1927), which ruled that a state may forcibly sterilize its citizens.

Virginia enacted "The Racial Integrity Act" in 1924,[89] declaring that: "the health of the patient and the welfare of society may be promoted . . . by the sterilization of mental defectives." It empowered physicians to sterilize anyone they diagnosed as defective or those the state identified as undesirable. Carrie Buck then lived in Virginia. Among her misfortunes was that she was under the care of one Dr. Albert Priddy, a zealous advocate of "genetic science."[90] Priddy diagnosed Carrie as defective, concluding—as a matter of science—that she could provide no offspring useful to society. Carrie did not agree, but Virginia's courts did. So, Carrie asked the United States Supreme to protect her against the state.

[89] *Buck v. Bell*, 274 U.S. 200, 205 (1927).
[90] Trevor Burrus, *The United States Once Sterilized Tens of Thousands—Here's How the Supreme Court Allowed It*, Jan 27, 2016, https://medium.com/@trevorburrus/the-united-states-once-sterilized-tens-of-thousands-here-s-how-the-supreme-court-allowed-it-327c3ee04ccb.

Writing for an 8-1 majority, Oliver Wendell Holmes gave her this answer: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[91] Holmes, speaking for our highest court, declared that "three generations of imbeciles are enough."[92] Holmes assured posterity that, on the certitude of science, his court had properly adjudicated Carrie, her mother, and Carrie's little girl Vivian imbeciles. But Vivian would prove the fallibility of Holmes, his court, and the eugenics science he so avowed. For in the ensuing years, Vivian was placed on the honor roll at her school in Charlottesville.[93]

According to the ruling in *Buck*, "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[94] The question here is whether it is broad enough to extinguish the separation of powers, and the inherent rights of Kentuckians, including the right to attend church, to pursue a livelihood, to peaceably assemble, and to seek the health care that *they* may deem to be essential. It is the opinion of this Court that the answer is "no," regardless of what answer the federal courts may ultimately give. "State constitutions may offer greater protections for their citizens than the federal constitution." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 908 S.W.2d 104, 107 (Ky. 1995).

As counsel for Commonwealth *ex rel*. Cameron pointed out during his closing argument, there is federal precedent on the very question of using emergency powers during times of calamity, *i.e.*, *Ex parte Milligan*, 71 U.S. 2 (1866). Milligan was arrested during the time our country was embroiled in civil war. Citing the emergent needs of war, and the necessity to quickly deal with those engaged in sedition, the executive claimed power to dispense with

[91] *Buck*, 274 U.S. at 207.
[92] *Buck*, 274 U.S. at 207.
[93] Claude Moore, Historical Collections at the Claude Moore Health Sciences Library, *Eugenics: Three Generations, No Imbeciles*, University of Virginia (2004), available at: http://exhibits.hsl.virginia.edu/eugenics/5-epilogue/, last accessed July 17, 2020.
[94] *Buck*, 274 U.S. at 207.

Constitutional safeguards, pointing to various statutes that he contended granted authority for him and his agents to so act. The executive claimed it had emergency need to dispense with constitutional rights in times of grave peril. Here is part of the Supreme Court's answer:

> Time has proven the discernment of our ancestors . . . . Those great and good men foresaw that troublous times would arise, when rulers and people would . . . seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. ***No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false*** . . . .[95]

The founders knew that calamities would arise to seemingly justify, for good cause, the wielding of too great a power by government. They knew because "the history of the world told them."[96] Therefore, as the court in *Ex parte Milligan* explains:

> For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. ***Not one of these safeguards can the President, or Congress, or the Judiciary disturb***, except the one concerning the writ of *habeas corpus*.[97]

"The Governor, as the chief executive of this Commonwealth, has only the authority and powers granted to him by the Constitution and the general law." *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 369 (Ky. 2016). To again quote James Madison, "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law."[98] Plaintiffs and Intervening Plaintiff have demonstrated that the Constitutions of Kentucky, and that of the

[95] *Ex parte Milligan*, 71 U.S., at 118–21, emphasis added.
[96] *Id*., at 125.
[97] *Ex parte Milligan*, 71 U.S., at 125, emphasis added.
[98] Madison, FEDERALIST NO. 47, quoted from http://constitution.org/fed/federa47.htm, last accessed July 17, 2020.

United States, support the propositions they have advanced. Therefore, the Court finds that they have presented substantial question and are likely to succeed on the merits.

Finally, the Court would be remiss in not crediting a truth mentioned by Defendants (in a separate action arising out of this case), namely, that: "This is not a game of politics, of business versus government, or of Democrat versus Republican."[99] This Court could not agree more. At issue are the limitations placed upon government by the Constitution and the Bill of Rights, especially those defined in Kentucky's as "inherent and inalienable."[100] These protections apply to all people in this Commonwealth, without regard to whether they affiliate with the Constitution Party, or one of the two major parties, or some other party, or if they reject them all and identify as independent.

As in so many other areas, our nation's founders provided sage guidance on this issue as well. Benjamin Franklin cautioned against falling into "the infinite mutual abuse of parties, tearing to pieces the best of characters."[101] George Washington dedicated a substantial portion of his Farewell Address to warn against "the baneful effects of the Spirit of Party."[102] And Washington's successor in office, John Adams, said that "a division of the republic into two great parties . . . is to be dreaded as the greatest political evil under our Constitution."[103]

The question presented here is not about politics. Rather, it is whether the constitution applies during a virus. Under our constitutions, government may not uproot liberty on a hope that it can hide society from pathogens. Individuals, not government, should decide if the risk of walking out their front door is worth the potential reward.

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[99] *Hon. Andrew Beshear, et al. v. Hon. Richard Brueggemann*, Memo of Petitioner,[get correct cite], Ky. App. 20-CA-000834-OA, p. 4.
[100] KY. CONST. § 1.
[101] *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 83, at fn. 3 (1990), J. Stephens, concurring, quoting from R. Hofstadter, *The Idea of a Party System*, 2–3 (1969).
[102] *Id*.
[103] *Id*.

Our Constitution, together with its Bill of Rights, is designed to protect the rights of all the people. This is especially true for those rights recognized as coming, not from government, but from our Creator—a truth that the nation's founders declared "to be self-evident."[104] Being human, government officials are not perfect. Thus, despite their having the best intentions at heart, they may err. That is why the Constitution limits authority. "If angels were to govern men, neither external nor internal controls on government would be necessary. . . . but experience has taught mankind the necessity of auxiliary precautions."[105]

The freedoms we enjoy were born out of sacrifice, the sacrifice of patriots whose creed valued principles of freedom more than their life here on Earth. After their great struggle yielded independence, they sought to preserve that freedom so dearly bought, and chiseled in our constitutions absolute limits upon government. Adhering to constitutional constraints is sometimes unpleasant. Sometimes it may result in freeing one who was accurately—but unconstitutionally—convicted of a heinous crime. Sometimes it may prevent prosecution altogether, or even arrest. But, just as the Constitution may not be cut down to protect people from a criminal, it must not be cut down to protect them from a virus.

With freedom comes risk, all sorts of risk. Those who bequeathed to us our freedom risked all that they had in doing so. At Valley Forge, Washington's men were sick from disease, as typhus and typhoid "ran rampant" through their ranks.[106] Despite the risk of disease, not to mention hunger, exposer, shot and shell, they volunteered, stayed and fought on. And many died alone, with the dirt of the battlefield drinking in their blood.

[104] Declaration of Independence, ¶ 2.
[105] James Madison, Federalist No. 51, (*Independent Journal*, Wednesday, February 6, 1788), available at: http://constitution.org/fed/federa51.htm, last accessed July 10, 2020.
[106] EyeWitness to History, *The Continental Army at Valley Forge*, 1777, available at: www.eyewitnesstohistory.com (2006), citing Chevalier de Pontgibaud, *A French Volunteer of the War of Independence* (1898) (Robert Douglas, ed.), and others.

In a recent case involving the challenged orders at issue, the Sixth Circuit U.S. Court of Appeals said: "While the law may take periodic naps during a pandemic, we will not let it sleep through one." *Roberts v. Neace*, 958 F.3d 409, 414-15 (6th Cir. 2020). The people, through Commonwealth ex rel. Cameron, say it is time to wake up. This Court agrees.

* * *

By the Order our Kentucky Supreme Court entered on July 17, 2020 (2020-SC-313-OA), all injunctive relief is stayed concerning this matter pending full review and final Order of that Court. That Order further directs this Court to issue an Order containing the findings and conclusions it deems appropriate; and, upon entry, to immediately transmit that Order to the Clerk of the Supreme Court. This Court would maintain the status quo with regard to Defendant NKIHD. However, because this Court would have found the Motions of Plaintiffs and Intervening Plaintiffs to be well taken, it would have granted the temporary injunctions sought.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that this Order shall, upon entry, be immediately transmitted to the Clerk of the Kentucky Supreme Court for its consideration, and that the grant or denial of injunctive relief is **DEFERRED** for final Order of that Court.

IT IS SO ORDERED.

/s/ HON. RICHARD A. BRUEGGEMANN
electronically signed
7/20/2020 5:00:25 PM ET

JUDGE RICHARD A. BRUEGGEMANN
BOONE CIRCUIT COURT

CC: ALL COUNSEL AND PARTIES OF RECORD.