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**COMMONWEALTH OF KENTUCKY
SUPREME COURT
Case No. 2020-SC-0313-OA**

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

v. On Appeal From Boone Circuit Court
No. 20-CI-678

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

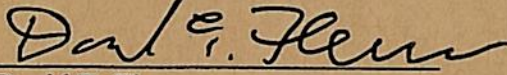
**BRIEF OF AMICUS CURIAE, ROBERT STIVERS, IN HIS OFFICIAL
CAPACITY AS PRESIDENT OF THE KENTUCKY SENATE, IN SUPPORT OF
APPELLEES**

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Certificate of Service

This is to certify that true and accurate copies of the foregoing Brief of *Amicus Curiae* were served by mailing, postage prepaid, U.S. mail, to: Hon. Kelly Stephens, Clerk of the Supreme Court of Kentucky, Rm. 209, 700 Capitol Ave., Frankfort, KY 40601 (10 copies); Hon. Glenn Acree, 300 Democrat Drive, Frankfort, KY 40601; Hon. Richard A. Brueggemann, 6025 Rogers Lane, Burlington, KY 41005; Hon. Travis Mayo, Counsel for Governor Beshear, 700 Capitol Ave., Ste. 106, Frankfort, KY 40601; Hon. Wesley Duke, Counsel for the Cabinet, Secretary Friedlander, and Dr. Steven Stack, 275 East Main Street, 5W-A, Frankfort, KY 40621; Hon. Jeffrey Mando, Counsel for Dr. Lynne Saddler and NKIHD, 40 W. Pike Street, Covington, KY 41011, Hon. Daniel Cameron, Office of the Attorney General, 700 Capitol Ave, Ste. 118, Frankfort, KY 40601, Hon. Christopher Wiest, 25 Town Center Blvd, Ste. 104, Crestview Hills, KY 41017, Hon. Thomas Bruns, 4750 Ashwood Drive, Ste, 200, Cincinnati, Ohio 45421, Hon. Robert A. Winter Jr., P.O. Box 175883, Ft. Mitchell, KY 41017, Counsel for Real Parties in Interest, on this first day of September, 2020, and by electronic mail.


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PURPOSE AND INTEREST OF AMICUS CURIAE

Did the Governor exceed the scope of the authority that the General Assembly provided to him in KRS Chapter 39A by issuing his executive orders declaring an emergency as a result of the novel coronavirus pandemic (“COVID-19”)? That is the issue presented in this action. The Kentucky Constitution places paramount importance on the preservation of the Separation of Powers Doctrine and the prohibition on one branch of the government attempting to usurp the powers vested in another branch. The Senate President, Robert Stivers (“Senate President Stivers”), is the duly elected head of the Kentucky Senate. Senate President Stivers has a substantial interest in preserving the separation of powers embodied in the Kentucky Constitution and is particularly qualified to present to the Court the intent of the General Assembly and the scope of the power of the Governor pursuant KRS Chapter 39A as well as the power provided to the Governor in the Kentucky Constitution to call the General Assembly into special session as necessary to address issues critical to the citizens of the Commonwealth including the novel coronavirus pandemic.

ARGUMENT

I. BACKGROUND

There is no doubt that COVID-19 poses a significant threat to public health and presents a substantial challenge to the citizens of the Commonwealth and to the many public officials seeking the proper measures to address this pandemic. COVID-19 has claimed lives, resulted in hospitalization and sickness of many of our citizens, and caused great economic hardship. In the midst of this pandemic, as difficult as it is, we cannot ignore the fact that we are governed by the rule of law including the Separation of Powers

Doctrine that is firmly rooted in the Kentucky Constitution. We must adhere to these principles even in these most difficult times and avoid the temptation to distort existing laws to fit our inconvenient and challenging circumstances. The proper path is for the Governor to utilize the powers granted to him by the General Assembly in existing laws and adhere to the parameters and requirements of those laws. If the Governor feels that existing laws do not provide him with the tools needed to address COVID-19, the Governor has the authority under Section 80 of the Kentucky Constitution to call the General Assembly into special session to provide legislation to address COVID-19. The General Assembly has already provided the Governor with significant COVID-19 legislation to assist the Governor in addressing COVID-19 during the 2020 regular session which ended on April 15, 2020. The Governor has not sought the assistance or input of the General Assembly in the approximately six months since he declared a state of emergency in the Commonwealth as a result of COVID-19. The General Assembly remains prepared to assist.

On March 6, 2020, Governor Andrew Beshear (“Governor Beshear”) declared by virtue of the authority vested in him by KRS Chapter 39A that a state of emergency exists in the Commonwealth of Kentucky as a result of COVID-19. *See*, Executive Order No. 2020-215. Since that initial declaration, Governor Beshear has issued a series of executive orders in the wake of this pandemic including a number of mandates deemed necessary by Governor Beshear to address the threats posed by COVID-19. In each of his executive orders, Governor Beshear confirms his declaration of a state of emergency pursuant to KRS Chapter 39A and specifies KRS Chapter 39A as authority for his mandates.

II. GOVERNOR BESHEAR EXCEEDED THE SCOPE OF HIS AUTHORITY THAT THE GENERAL ASSEMBLY PROVIDED TO HIM IN KRS CHAPTER 39A.

The Kentucky Supreme Court has spoken emphatically and frequently on the paramount importance that the Kentucky Constitution places on the Separation of Powers Doctrine and the prohibition on one branch of the government attempting to usurp the powers vested in another branch. Section 29 of the Kentucky Constitution vests the legislative power in the General Assembly of the Commonwealth of Kentucky. Section 69 of the Kentucky Constitution vests the executive power in the Governor. In *Legislative Research Commission v. Brown*, 664 S.W 2d 907 (Ky. 1984), the Kentucky Supreme Court devotes an entire section of its opinion to the Separation of Powers Doctrine as established in the Kentucky Constitution. See, *Id.*, Section V. The Separation of Powers Doctrine, at 911–914.

The Kentucky Supreme Court states in *Legislative Research Commission v. Brown*:

“The extent to which a country can successfully resolve the conflict among the three branches of government is, to a very great extent, the measure of that nation’s capacity to self-govern.

The framers of Kentucky’s four constitutions obviously were cognizant of the need for separation of powers. Unlike the federal constitution, the framers of Kentucky’s constitution included an express separation of powers provision. They were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of the government were usurped by one or more branches of that government. Our present constitution contains explicit provisions which, on the one hand, mandate separation among the three branches of government, and on the other hand, specifically prohibit incursion of one branch of government into the powers and functions of the others. Thus, our constitution has a double-barreled, positive-negative approach:

Section 27. *The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another, and those which are judicial, to another.* (Emphasis added.)

Section 28. No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”

Id., at 911-912.

KRS § 39A.100 provides the Governor with the power to declare that a “state of emergency” exists and specifies the “emergency powers” that the Governor may exercise during the period in which the “state of emergency” exists. KRS § 39A.020 (12) defines “emergency” as follows:

“(12) ‘Emergency’ means any incident or situation which poses a major threat to public safety so as to cause, or threaten to cause, loss of life, serious injury, significant damage to property, or major harm to public health or the environment **and which a local emergency response agency determines is beyond its capabilities;**” (Emphasis added.)

By Governor Beshear’s admission in this action through the testimony of Dr. Steve Stack, there has been no determination by any local emergency response agency that addressing COVID-19 is beyond its capabilities. *See*, Testimony of Dr. Stack (Tr. pp. 425; 507-508). Therefore, Governor Beshear failed to comply with this important prerequisite to declaring a “state of emergency” and exercising “emergency powers” pursuant to KRS § 39A.100 through his executive orders.

The legislative history of KRS Chapter 39A demonstrates the importance that the General Assembly placed on the local emergency response agency’s determination that response to the emergency is beyond its capabilities before the Governor can declare a state of emergency or exercise emergency powers pursuant to KRS § 39A.100. In the 1998 regular session, the General Assembly enacted House Bill 453 (“HB 453”) entitled “An Act relating to emergency management” which created the new KRS Chapter 39A. The Kentucky House of Representatives specifically added the phrase “and which a local

emergency response agency determines is beyond its capabilities” to the definition of “emergency”, now codified at KRS § 39A.020 (12), through House Floor Amendment 1 (“HFA 1”) to HB 453. The fact that the General Assembly specifically focused on this requirement in HFA 1 demonstrates the importance that the General Assembly placed on this requirement.

KRS Chapter 39A establishes a “statewide comprehensive emergency management program and integrated emergency management system” for the Commonwealth of Kentucky which involves participation and coordination among state, county, and local governments. The General Assembly declared its legislative intent in KRS § 39A.010:

“The General Assembly realizes the Commonwealth is subject at all times to disaster or emergency occurrences which can range from crises affecting limited areas to widespread catastrophic events, and that response to these occurrences is a fundamental responsibility of elected government in the Commonwealth. It is the intent of the General Assembly to establish and to support a statewide comprehensive emergency management program for the Commonwealth, and through it an integrated emergency management system, in order to provide for adequate assessment and mitigation of, preparation for, response to, and recovery from, the threats to public safety and the harmful effects or destruction resulting from all major hazards, including but not limited to: flood, flash flood, tornado, blizzard, ice storm, snow storm, wind storm, hail storm, or other severe storms; drought, extremes of temperature, earthquake, landslides, or other natural hazards; fire, forest fire, or other conflagration; enemy attack, threats to public safety and health involving nuclear, chemical, or biological agents or weapons; sabotage, riot, civil disorder, or acts of terrorism, and other domestic or national security emergencies; explosion, power failure or energy shortages, major utility system failure, dam failure, building collapse, other infrastructure failures; transportation-related emergencies on, over, or through the highways, railways, air, land, and waters in the Commonwealth; emergencies caused by spill or release of hazardous materials or substances; mass-casualty or mass-fatality emergencies; other technological, biological, etiologial, radiological, environmental, industrial, or agricultural hazards; or other disaster or emergency occurrences; or catastrophe; or other causes; and the potential, threatened, or impending occurrence of any of these events; and in order to protect life and property of the people of the Commonwealth, and to protect public peace, health, safety, and welfare, and the environment; and in order to ensure the continuity and effectiveness of government in time of emergency, disaster, or catastrophe in the Commonwealth, it is hereby declared to be necessary:

- (1) To create a Division of Emergency Management as the emergency management agency of state government and to authorize the creation of local emergency management agencies in the cities, counties, and urban-county or charter county governments of the Commonwealth;
- (2) To confer upon the Governor, the county judges/executive of the counties, the mayors of the cities and urban-county governments of the Commonwealth, and the chief executive of other local governments the emergency powers provided in KRS Chapters 39A to 39F;
- (3) To establish provisions for mutual aid among the cities, counties, and urban-county or charter county governments of the Commonwealth, with other states, and with the federal government with respect to the performance of disaster and emergency preparedness, response, recovery, and mitigation functions; and
- (4) To authorize the establishment of a statewide comprehensive emergency management program and integrated emergency management system, the promulgation of orders or administrative regulations, and the taking of other steps necessary and appropriate to carry out the provisions of KRS Chapter 39A to 39F.”

In declaring its intent, the General Assembly placed great importance on the coordination of responses to emergencies among state and local authorities and declared it necessary “to authorize the creation of local emergency management agencies in the cities, counties, and urban-county or charter county governments of the Commonwealth” in addition to the creation of the Division of Emergency Management to serve as the emergency management agency of state government. *Id.* The General Assembly also declared it to be necessary to confer upon the “county judges/executive of the counties, the mayors of the cities, and urban-county governments of the Commonwealth, and the chief executive of other local governments the emergency powers provided in KRS Chapters 39A” in addition to the Governor. *Id.* The General Assembly makes quite clear the importance that it has placed on the full participation and empowerment of local authorities in responding to both statewide and local emergencies. The General Assembly did not vest all of the emergency powers and authority in the Governor. The requirement that the General Assembly included in the definition of “emergency” that there must first be a local

emergency response agency determination that the emergency is beyond its capabilities before the Governor may declare a “state of emergency” or exercise “emergency powers” pursuant to KRS § 39A.100 is consistent with this legislative intent.

The Governor may argue that the General Assembly did not contemplate a pandemic in the nature of COVID-19 when it enacted KRS Chapter 39A, and that the requirement of the local emergency response agency determination is inconvenient, burdensome, unnecessary, does not fit the circumstances, and should be ignored in this case. However, the Governor’s own actions just three days after he declared a state of emergency demonstrate that it was not inconvenient or burdensome and was in fact important to communicate with local officials throughout all of the Commonwealth’s one hundred and twenty counties regarding COVID-19 and specifically regarding the emergency management network embodied in KRS Chapter 39A. Governor Beshear reports on the portion of his official website entitled “Kentucky’s Response to COVID-19” on March 9, 2020: “Called all 120 county judge-executives to update them and discuss the emergency management network.” *See*, <https://governor.ky.gov/covid-19> There is no question that Governor Beshear had the opportunity to comply with the requirement set forth in KRS Chapter 39A that there be a determination by local emergency response agencies that addressing COVID-19 is beyond their capabilities before the Governor can declare a “state of emergency” or exercise “emergency powers” pursuant to KRS § 39A.100.

To reach the conclusion that the requirement of the local emergency response agency determination should be ignored in this case, the Governor and this Honorable Court would have to substitute their judgment for the judgment of the legislative branch

which is strictly prohibited by the Separation of Powers Doctrine firmly embodied in the Kentucky Constitution. If it is true that the General Assembly did not contemplate an emergency in the nature of COVID-19 when it enacted KRS Chapter 39A, then Chapter 39A does not apply to this emergency, and the Governor has no powers to declare a “state of emergency” or exercise “emergency powers” pursuant to KRS § 39A.100.

Clearly, the General Assembly contemplated a wide variety of statewide as well as local emergencies as set forth in KRS § 39A.010. Consistent with great importance that the General Assembly placed on the coordination of responses to emergencies among state and local authorities, the General Assembly included the requirement of the local emergency response agency determination that is applicable to all emergencies. If the General Assembly desired to make an exception to the requirement of the local emergency response agency determination that is applicable to all emergencies, the General Assembly could have added a simple phrase at the end of the definition of “emergency” in KRS § 39A.020 (12) such as the following:

“(12) ‘Emergency’ means any incident or situation which poses a major threat to public safety so as to cause, or threaten to cause, loss of life, serious injury, significant damage to property, or major harm to public health or the environment and which a local emergency response agency determines is beyond its capabilities **except for statewide emergencies;**” (Emphasis added.)

However, the General Assembly did not make that exception or any other exception in KRS Chapter 39A to the requirement of the local emergency response agency determination. Neither the Governor nor this Honorable Court have the power to read that exception or a similar exception into KRS Chapter 39A and to substitute its judgment and intent for that of the General Assembly.

The Kentucky Supreme Court has consistently ruled that the courts are not at liberty to add or subtract words in legislation. *See, Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000) (“Where a statute is intelligible on its face, the courts are not at liberty to supply words or insert something or make additions which amount, as sometimes stated, to providing for a *casus omissus*, or cure an omission.”); *Beckham v. Board of Education*, 873 S.W.2d 575, 577 (Ky. 1994) (“As with any case involving statutory interpretation, our duty is to ascertain and give effect to the intent of the General Assembly. We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used.”); *Gateway Construction Company v. Wallbaum*, 356 S.W.2d 247, 248-249 (Ky. 1962) (“However, it is neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has not put there.”); *Edwards v. Harrod*, 391 S.W.3d 755, 757 (Ky. 2013).

The General Assembly has demonstrated its ability and desire to assist Governor Beshear in addressing COVID-19 for the protection of the health and welfare of the citizens of the Commonwealth of Kentucky. On March 26, 2020, both the House and the Senate unanimously passed Senate Bill 150 which includes a wide variety of measures to address COVID-19. Governor Beshear signed Senate Bill 150 on March 30, 2020. On April 15, 2020, both the House and the Senate passed House Bill 387 which authorized Governor Beshear to use certain unbudgeted Restricted Funds for the purchase of personal protection equipment for use in evaluating and treating COVID-19 patients. On April 24, 2020, Governor Beshear issued his Veto Message purporting to exercise line item veto power over House Bill 387 which is the subject of an action pending in the Franklin Circuit Court.

The General Assembly remains willing and prepared to assist Governor Beshear in addressing COVID-19. However, Governor Beshear has indicated no desire to seek the assistance of the General Assembly with respect to a request to enhance his legal authority to implement measures to address COVID-19 or otherwise. If the Governor feels that he does not have the proper tools to address COVID-19, he has the authority under Section 80 of the Kentucky Constitution to call the General Assembly into special session. Approximately six months have passed since Governor Beshear issued his Executive Order 2020-215 declaring a state of emergency as a result of COVID-19. He has had ample opportunity to seek the assistance of the General Assembly but has not done so.

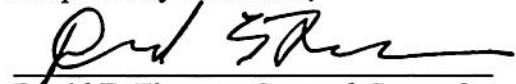
The argument presented by the *Amicus Curiae* may at first blush appear overly technical, highlighting the failure to comply with a procedural step during the pendency of an unprecedented pandemic. The Governor has, however, used his purported powers to issue executive orders that inhibit or completely abrogate fundamental constitutional rights of the citizens of the Commonwealth. Nowhere in KRS Chapter 39A is the Governor given the express authority to limit freedom to worship, freedom to assemble, freedom to travel or to effectively shut down the economy of the Commonwealth. The *Amicus Curiae* highlights this technical failure as demonstrative that the Governor's interpretation of his powers under KRS Chapter 39A exceed those granted by the General Assembly. By progressing beyond those bounds the action of the Governor becomes an act of legislating that violates the Separation of Powers Doctrine.

CONCLUSION

KRS § 39A.100 requires that there be a local response agency determination that addressing the emergency is beyond its capabilities before the Governor is authorized to declare a “state of emergency” or exercise “emergency powers.” The undisputed fact is that there has been no determination by any local emergency response agency that addressing COVID-19 is beyond its capabilities. Therefore, Governor Beshear failed to comply with this important prerequisite to declaring a “state of emergency” and exercising “emergency powers” pursuant to KRS § 39A.100 through his executive orders, and the Governor’s orders are void *ab initio*.

The Governor may find this requirement inconvenient and advocate that this requirement be read out of KRS Chapter 39A for purposes of his executive orders. The Kentucky Constitution prohibits the Governor and the judicial branch from exercising legislative powers reserved exclusively to the General Assembly. This rule applies no matter how honorable or important that the Governor may deem his executive orders to be.

Respectfully submitted,



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