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 1, 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 Emergency Temporary Restraining Order and Temporary Injunction; and, also, on the Commonwealth of Kentucky, *ex rel.* Attorney General Daniel Cameron's Motion to Intervene and Motion for Temporary Restraining Order. 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. Brett R. Nolan, Special Litigation Counsel, 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. Taylor Payne appeared for Hon. Andrew Beshear, as Governor, Hon. David T. Lovely and 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").

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. Prior to the hearing, Responses in Opposition to Plaintiffs' Motion were filed on behalf of the Office of the Governor, CHFS, CDPH, and NKIHD. As noted by counsel for the Governor, Commonwealth *ex rel.* Cameron filed its Motion to Intervene on June 30, 2020, and its Motion for Temporary Restraining Order on July 1, 2020. Although the Court heard arguments and ruled on the Motion to Intervene, the Court reserved action on the latter Motion until July 16, 2020, to allow Defendants additional time for response. Having considered the memoranda filed by the parties, exhibits presented in support thereof, arguments of counsel and, being in all ways sufficiently advised, the Court enters this Order.

ARGUMENTS PRESENTED

Plaintiffs, respectively, seek to restrain Defendants from enforcing various orders issued by the Governor arising from his declaration of emergency in response to the 2019 Coronavirus, SARS-COV-2 ("COVID-19"). According to Plaintiffs, certain of the Governor's orders transgress the separation of powers and, in particular, violate §§ 1, 2, 15, 27 and 28 of Kentucky's Constitution, as well as K.R.S. Chapter 13A, specifically § 13A.190. Plaintiffs maintain that the orders were not properly issued under Chapter K.R.S. 13A, that the orders exceed the power granted to CHFS under K.R.S. § 194A.025, and that the Governor has no authority to make "value judgments" or "arbitrarily invade liberty or property rights under the guise of police protection,"[1] and further that K.R.S. Chapter 39A provides no authority for "any

[1] Pl's Mot. & Memo., p. 25; citing *Bond Bros. v. Louisville & Jefferson County Metropolitan Sewer Dist*., 307 Ky. 689, 696 (1948).

emergency powers to exist for a perpetual . . . potentially never-ending disease outbreak, particularly where K.R.S. 214.020 covers the precise subject matter."[2]

Additionally, Plaintiffs argue that, although K.R.S. § 214.020 grants CHFS power to establish quarantines and issue orders, it is first required to adopt rules and regulations. Plaintiffs assert that "no Kentucky case has ever permitted the perpetual lockdown (*i.e.* quarantine and isolation) of healthy people, not to mention entire segments of Kentucky's economy,"[3] and that quarantine authority is meant only for persons shown to be ill with serious, contagious disease. The respective arguments of the individual Plaintiffs, and that of Intervening Plaintiff concerning intervention, will be addressed within the portion of this Order analyzing their specific claims. Arguments relating to Defendant NKIHD are addressed below in Part C of this Order.

In their Response in Opposition, Defendants Governor Beshear, CHFS and CDPH argue that Plaintiffs' claims are "not only dangerous, they are wrong."[4] In particular, they assert that Plaintiffs' case lacks merit and, thus, fails to raise a substantial question upon which injunctive relief may be granted under CR 65.03. Defendants assert that the Governor amended the restriction on racetracks, thus allowing Florence Speedway to operate in the manner identified in its brief, and that Beans Café and Little Daycare can partially operate under the current restrictions. Thus, they argue, the respective claims of these Plaintiffs' are either moot, or fail to state claims that can be granted. Defendants further contend Plaintiffs' claims fail because "the regulation of business operations does not 'impinge on fundamental rights,'"[5] that Plaintiffs' claims of discrimination fail because they are not identified as a suspect or protected class, that the legislature granted the Governor emergency powers under K.R.S. Chapter 13A, and K.R.S. §§ 194A.025 and 39A.100, that existing precedent supports the Governor's action, that the

[2] Pl's Mot. & Memo., p. 30.
[3] Pl's Mot. & Memo., p. 32.
[4] Gov., CHFS and CDPH Resp. In Opp., p. 1.
[5] *Id*., at p. 9, citing *Levin, Tax Comm'r of Oh. v. Commerce Energy, Inc.*, 560 U.S. 426 (2010).

Governor's orders are not arbitrary but, rather, a valid exercise of the Commonwealth's police power and within his statutory authority to respond to emergencies, that Plaintiffs fail to allege irreparable harm, and that the equities do not favor Plaintiffs.

ANALYSIS

Because the Court reserved on the Commonwealth *ex rel*. Cameron's Motion until July 16, 2020 to allow Defendants time to respond, the issues raised therein is deferred. The other matters presented at the hearing are addressed below.

A. Attorney General's Motion to Intervene

Hon. Daniel Cameron asserts that, as Attorney General of Kentucky, he may intervene in this action "as a matter of right to protect the constitutional rights of the Commonwealth's citizenry." In support of this premise, he points to CR 24.01, K.R.S. 15.020, and *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 361 (Ky. 2016).

At the hearing, the Governor, CHFS and CDPH objected to intervention by the Attorney General. However, under both statute and precedent, the Attorney General has the right to intervene on matters in litigation here. K.R.S. 15.020 provides in relevant part as follows:

> The Attorney General is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state officers, departments, commissions, and agencies . . . . He . . . shall appear for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested, and shall also commence all actions or enter his appearance in all cases, hearings, and proceedings in and before all other courts . . . in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or agency may have in connection with, or growing out of, his or its official duties . . . .

On the question of intervention by the Attorney General, the Kentucky Supreme held that:

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> It is unquestioned that '[a]t common law, [the Attorney General] had the power to institute, conduct and maintain suits and proceedings for the enforcement of the laws of the state, the preservation of order, and the protection of public rights.'" . . . Significantly, the Attorney General was empowered under the common law to bring any action thought "necessary to protect the public interest." . . . Indeed, the Attorney General has not only the power to bring suit when he believes the public's legal or constitutional interests are under threat, but appears to have even the duty to do so.

Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin, 498 S.W.3d 355, 362 (Ky. 2016) (internal citations omitted, alterations in original).

Concerning the Attorney General's rights and duty to intervene, the Kentucky Supreme Court explained the history and source of his authority:

> [T]he source of authority of the Attorney General is the people who establish the government, and his primary obligation is to the people. . . . The Attorney General, as chief law officer of this Commonwealth, charged with the duty of protecting the interest of all the people . . . had such a vital interest in this litigation that he had a right to intervene at least insofar as the public issues advanced in the action were involved.
>
> . . .
>
> If the Attorney General has the power to initiate a suit questioning the constitutionality of a statute, he must also have the power to initiate a suit questioning the constitutionality or legality of an executive action. There are no grounds for treating allegedly unconstitutional executive actions differently from allegedly unconstitutional legislative actions. It is certainly in "the interest of all the people" that there be *no* unconstitutional or illegal governmental conduct

Id., at 363 (internal citations omitted).

Plaintiffs in this case assert that the Governor has, by his actions and those of CHFS and CDPH, violated Plaintiffs' constitutional rights and the rights of others similarly situated. The Attorney General states that he agrees with Plaintiffs, stating that the Governor's orders are "constitutionally suspect."[6] The Attorney General asserts related claims in his Intervening

[6] Commonwealth *ex rel.* Cameron's Mot. to Intervene, p. 3.

Complaint. Thus, according to Attorney General Cameron, he should be allowed to intervene on behalf of the people as a matter of right. The Court agrees.

B. Claim of Theodore J. Roberts

Prior to the hearing, Plaintiff Theodore J. Roberts filed a Notice of Withdrawal of his claims without prejudice. Mr. Robert' claim related to the requirement placed upon barbers that all patrons, without exception or accommodation, must wear a mask. Asserting that masks cause him breathing difficulty, he avers this requirement precludes him from the services of his barber. However, by a revision made effective June 25, 2020, the Governor revised those requirements. According to Mr. Roberts, the revision enables him to obtain services from his barber without being required to wear a mask. Thus, he sought to withdraw his claim. There being no objection, Mr. Roberts' request to withdraw his claim without prejudice is well taken.

C. Motion for Temporary Injunction Against NKIHD

Defendant NKIHD argues that it has never taken or threatened any enforcement action against any of the Plaintiffs. Thus, it asserts, Plaintiffs request for relief is premised on a hypothetical concern that it will do so in the future. NKIHD insists that, under the law, a temporary injunction may not issue where the feared wrong is a "remote possibility" or premised merely upon an "anticipated danger or an apprehension of it."[7] Thus, it argues, courts should not use a "shotgun" approach.[8] NKIHD further argues that any remote enforcement from NKIHD is wholly dependent upon the success of Plaintiffs' and Intervening Plaintiff's claims. According to NKIHD, however the Court rules on those issues would prove dispositive on its ability to enforce.

D. Motions for Temporary Injunction Against the Governor, CHFS and CDPH

[7] NKIHD Resp., at 4, citing *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. 1978).
[8] *Id*., at p. 4, citing *Morrow v. City of Louisville*, 249 S.W.2d 721 (Ky. 1952).

Movants seek relief under CR 65.03 and 65.04. Rule 65.03 specifies the conditions on which a court may issue restraining orders "without written or oral notice to the adverse party or his attorney." Here, notice was provided to all Defendants against whom relief is sought. In fact, all Defendants appeared at the hearing through counsel.

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).

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). Florence Speedway points to provisions in the Governor's orders proclaiming that, "[r]acetracks must prohibit fans and

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outside media."[9] In contrast to this, Florence Speedway points to provisions in the Governor's orders allowing attendance at outdoor auctions, and indoor attendance at movie theaters. According to Plaintiffs, and Intervening Plaintiffs, there is no basis for this disparate treatment. Rather, they insist, this is the product of improper value judgments by the executive as to what business pursuit has sufficient value to be deemed essential. Florence Speedway avers that it cannot function without fans and media present, and that it is in such a precarious situation that it will not likely survive if it cannot open within the upcoming week or so.

Plaintiff Little Daycare likewise states it is facing closure based upon restrictions in the Governor's orders. Most immediately egregious to it and similar day care operations is the prohibition against grouping of children in groups of ten or less, including children who are siblings. This requires far more "teachers" or monitors than the rates for child care can support. Plaintiffs complain that there is no basis for the separation.

The ability to procure business, to work and obtain the fruits of one's labor, is "the pursuit of happiness," a right so fundamental it is enshrined in the Declaration of Independence. As stated by Kentucky's highest Court in *Underhill v. Murphy*:

> When a man has, by years of toil and fair dealing with his customers, built up a valuable business and good will, he is as much entitled to protection by the law in this species of property as in the home that shelters him, or the coat that protects him from the winter's cold. The right of the plaintiff to carry on his business and to carry out the contracts which he had made was a valuable property right . . . . Among the inalienable rights which by the first section of the state Constitution are guarantied as inherent in all men is "the right of acquiring and protecting property." The right to acquire and protect property is as sacred in the case of intangible property as tangible, and an injunction may be granted to protect intangible rights no less than those that are tangible.

78 S.W. 482, 483 (Ky. 1904).

[9] Pl's Mot. & Memo., pp. 7-8, citing Pl's. Exh. 12 at ¶ 31.

The Court finds that the entire loss of Plaintiffs' business—including the good will build up through years of serving customers—would constitute irreparable harm.

The Court also finds that the balance of equities weighs in favor of these Plaintiffs and, also, those similarly situated. First, counsel for the Governor represented that, in the June 29, 2020 revision of the Governor's orders, the intention is to allow attendance at auto racetracks. As Plaintiff Florence Speedway points out, however, the language in the Governor's revised order still indicates the restriction applies. Counsel for Florence Speedway further represents that that is how its insurance agents interpret it. Whatever the case, the statement by counsel for the executive that the Governor now intends that racetracks should be (or will soon ultimately be) opened, demonstrates that the equities favor Plaintiff. There is no reason not to remove all doubt.

Concerning Little Daycare, counsel for the CHFS and CDPH further expressed awareness of the "pain" that the grouping restrictions are causing daycare operators. He further indicated that they are looking at revisions in that regard. Again, then, the equities weigh in favor of Plaintiff. As Plaintiff argues, if children ride in the same car to get to a daycare, there can be little harm in allowing them to be grouped together while at daycare. And as Plaintiffs further point out, the same grouping requirements do not exist and have not existed for Limited Duration Child Care centers, for the children of essential workers, including health care workers, which are and have been permitted to operate without these requirements since March 2020, and throughout the COVID-19 pandemic.

The Court also finds that Plaintiffs have shown a substantial question exists on the merits, at least as to claims of Florence Racetrack and Little Daycare. 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), for the premise that courts should not enjoin orders similar to those

being challenged here. But, as Plaintiffs argued, Roberts' concurrence in *South Bay* speaks only to the fact that five out of four justices opted to leave the question to the states.

As yet, it is unclear what criteria is being used to establish which businesses may survive versus those that must shutter. Attendance at movie theaters is allowed and—according to memoranda of Commonwealth *ex rel*. Cameron—the Governor has permitted horse races. But attending auto races are not allowed. These are all parts of Americana. To be sure, people have preferences concerning which of these, if any, they'd choose to participate. But that is a value judgment. And it is a value judgment best left to individuals. Commonwealth *ex rel.* Cameron asserts that the Governor's orders "constitutionally suspect."[10] For all the foregoing reasons, as to Florence Speedway and Little Daycare, Plaintiffs' Motion is well taken.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Commonwealth of Kentucky, *ex rel.* Attorney General Daniel Cameron's Motion to Intervene is **GRANTED** and the Intervening Complaint shall be filed *instanter*.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for Emergency Temporary Restraining Order and Temporary Injunction is **GRANTED in part**, as follows:

1. Defendants, Hon. Andrew Beshear, Governor, Secretary Eric Friedlander, Dr. Steven Stack, the Cabinet for Health and Family Services, and their officers, agents, and attorneys and other persons in active concert or participation with them who receive actual notice of the restraining order by personal service or otherwise, are hereby **ENJOINED** from enforcing the requirements in their June 1, 2020 "Requirements for Automobile Racing Tracks" that prohibit fans, outside media, or guests or family members from attending events or races; they are also prohibited from enforcing footnote 1 of the June 29, 2020 "Requirements for Venues and Event Spaces" to the extent the footnote is in conflict with this paragraph. Thus, automobile racetracks may operate at 50% capacity, assuming all individuals attending are able to maintain 6-foot social distancing between households.

[10] Commonwealth *ex rel.* Cameron's Mot. to Intervene, p. 3.

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2. Defendants, Governor Andrew Beshear, Secretary Eric Friedlander, Dr. Steven Stack, the Cabinet for Health and Family Services, and their officers, agents, and attorneys and other persons in active concert or participation with them who receive actual notice of the restraining order by personal service or otherwise, are hereby **ENJOINED** from enforcing the requirements in their June 8, 2020 "Requirements for Childcare Programs" as to the requirements that "All childcare programs will need to utilize a maximum group size of ten children per group" and "Children will remain in the same group of ten children all day without being combined with another classroom." Childcare programs shall be permitted the maximum group size of 28.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for Emergency Temporary Restraining Order and Temporary Injunction specifically as requested against Defendant Northern Kentucky Independent Health Department, is **DENIED**.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that the Court **RESERVES** on Intervening Plaintiff's Motion for Temporary Restraining Order [to be taken as sought under CR 65.04], and Plaintiffs' Motion for Temporary Injunction, pending hearing which shall be held by the Court on July 16, 2020, at 10:00 a.m., and Counsel shall then appear to present any further testimony, evidence or argument.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that this Order shall remain in effect until the entry of an Order on, or following, the hearing that is scheduled in this matter for July 16, 2020.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Pursuant to C.R. 65.05(1), the Court finds it in the public interest to waive the bond requirement.

IT IS SO ORDERED.

/s/ HON. RICHARD A. BRUEGGEMANN
electronically signed
7/2/2020 7:20:28 PM ET

JUDGE RICHARD A. BRUEGGEMANN
BOONE CIRCUIT COURT

CC: ALL COUNSEL AND PARTIES OF RECORD.

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