

COMMONWEALTH OF KENTUCKY
SCOTT CIRCUIT COURT
CIVIL ACTION NO. 20-CI-____

Electronically Filed

RYAN QUARLES, in his official capacity as Commissioner of Agriculture,

and

EVANS ORCHARD AND CIDER MILL, LLC,

PLAINTIFFS

v.

ANDY BESHEAR, in his official capacity as Governor,

ERIC FRIEDLANDER, in his official capacity as Secretary of the Cabinet for Health and Family Services,

STEVEN STACK, in his official capacity as Commissioner of the Kentucky Department for Public Health,

CRYSTAL MILLER, in her official capacity as Director of Public Health of the WEDCO District Health Department,

The CABINET FOR HEALTH AND FAMILY SERVICES,

The KENTUCKY DEPARTMENT FOR PUBLIC HEALTH,

and

The WEDCO DISTRICT HEALTH DEPARTMENT,

DEFENDANTS

COMPLAINT

On March 6, 2020, Governor Andy Beshear issued Executive Order 2020-215 which “declare[d] that a State of Emergency exists in the Commonwealth of Kentucky.” During this State of Emergency, which is now more than 100 days old (with no end in sight), the Governor and other Defendants issued numerous orders, policies, procedures, memorandums, and other forms of action that restrict the rights

and liberties of members of the public—all in violation of the Administrative Procedures Act and Sections 2, 27, 28, and 29 of the Kentucky Constitution.

KRS 13A.100(1) requires that any “statement of general applicability, policy, procedure, memorandum, or other form of action that implements [or] prescribes law or policy [or] affects private rights or procedures available to the public” shall be promulgated by means of an administrative regulation. The Defendants’ numerous orders, policies, procedures, and other forms of action restricting the rights of members of the public during the State of Emergency violate this requirement in law.

KRS13A.130 requires that officers and other administrative bodies “shall not by internal policy, memorandum, or other form of action . . . limit a right guaranteed by” law and that any such action “violative of this section or the spirit thereof is null, void, and unenforceable.” The Defendants’ numerous orders, policies, procedures, and other forms of action restricting the rights of members of the public during the State of Emergency violate this requirement in law and therefore they are null, void, and unenforceable.

Section 2 of the Constitution provides: “Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” The Defendants’ numerous orders, policies, procedures, and other forms of action restricting the rights of members of the public during the State of Emergency, and disregarding the specific requirements in law that are set forth in Administrative Procedures Act, are arbitrary and therefore unconstitutional.

The Defendants' lawlessness causes real harms that go beyond the theoretical. By presuming to rule by dictation, the Defendants sideline members of the public (and the General Assembly) whose legal right to participate in the policy-formulation process is enshrined within the Act. Some of those members of the public—including the family-run business in Scott County that is a Plaintiff in this lawsuit—have suffered (and will continue to suffer) serious financial harm as a result of the Defendants' lawlessness.

FACTUAL ALLEGATIONS

1. Ryan Quarles is the Commissioner of Agriculture and the head of the Department of Agriculture. Commissioner Quarles' duties include advocating for, and working on behalf of, Kentucky's farm families and agribusinesses.
2. The mission of the Department's Office of Agritourism is to promote, sustain, and expand agritourism businesses in Kentucky, pursuant to KRS 247.800.
3. There are 548 agritourism businesses in Kentucky currently registered with the Department.
4. One of the agritourism businesses currently registered with the Department is Evans Orchard and Cider Mill, LLC ("EO&CM"), a family-owned and operated business entity organized under the laws of Kentucky in 2000.
5. Five generations of members of this family have farmed in Scott County, producing at various times tobacco, beef cattle, alfalfa, and other farm products.
6. EO&CM is an agritourism business that grew out of the family's efforts to diversify their farming operations beginning in the 1990's.

7. In the past twenty years, EO&CM has employed hundreds of people who reside in Scott County and surrounding communities.
8. At the peak season for agritourism businesses (in September and October), EO&CM typically employs approximately 40 people.
9. In the past twenty years, the EO&CM has expanded its agritourism attractions to include:
 - pick-your-own strawberries, blueberries, pears, flowers, pumpkins, and apples;
 - a retail market for selling food products and other products;
 - a café and bakery;
 - a 96,000 square-foot outdoor Playing Area and Barnyard for children; and
 - an Event Barn for weddings and other outdoor/indoor ceremonies and events.

The Playing Area and Barnyard

10. EO&CM has invested at least \$219,000 in the various attractions within the Playing Area and Barnyard.
11. Spread out across more than two acres, EO&CM's Playing Area and Barnyard has sufficient capacity for more than 2,000 people under normal circumstances.
12. In the 2019 calendar year, EO&CM received \$266,969 in revenues from ticket sales for admission to the Playing Area and Barnyard.
13. Between January 1, 2019 and June 25, 2019, EO&CM received approximately \$30,484 in revenues from ticket sales for admission to the Playing Area and Barnyard.

14. Between January 1, 2020 and June 25, 2020, EO&CM received approximately \$2,115 in revenues from ticket sales for admission to the Playing Area and Barnyard.

The Event Barn

15. EO&CM has invested approximately \$200,000 to pay for renovations and improvements to the Event Barn.

16. In the 2019 calendar year, EO&CM hosted 21 events in the Event Barn, with most of those events resulting in rental fee receipts of \$5,000 to \$7,000.

17. In the 2019 calendar year, EO&CM received \$125,800 in revenues from rental fees.

18. For the 2020 calendar year, EO&CM scheduled 20 weddings and other events to occur in its Events Barn.

19. Of the 20 events that EO&CM scheduled to occur in its Events Barn in 2020:

- None of the scheduled events have occurred;
- 7 of the scheduled events have been canceled or re-scheduled;
- Several events remain on the schedule, including one set for July 11; and
- There are likely to be additional event cancellations (or re-scheduled events).

The Pandemic and the State of Emergency

20. On March 6, 2020, Governor Beshear issued Executive Order 2020-215, “declar[ing] that a State of Emergency exists in the Commonwealth” and invoking certain powers pursuant to KRS Chapter 39A.¹

21. On March 16, 2020, Secretary Friedlander and Commissioner Stack issued an Executive Order requiring that restaurants cease on-site meal service and purporting to delegate to local health departments authority to take measures to implement it.

¹ The Defendants are likely to take the position that the ongoing, months-long “State of Emergency” means that the Governor is empowered to dictate policy unilaterally by means of executive orders, see KRS 39A.090, for however long he pleases and on a statewide basis.

But the law’s definition of “emergency” shows the General Assembly intended for this statute to be exercised only on a localized basis. *See* KRS 39A.020(12) (defining “Emergency” as “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.***”).

In addition, the various contingencies listed in the law pertain to a short-term/ high-intensity “disaster or emergency or catastrophe” such as a flood, tornado, or hazardous-material release. The statutes do not contemplate a protracted, months-long unilateral exercise of extraordinary powers, and the Defendants’ efforts to exercise them in such a manner goes beyond the General Assembly’s limited grant of authority in KRS Chapter 39A.

Moreover, even if the General Assembly did intend to delegate its legislative authority to the Executive Branch in such a manner that it could be exercised on a months-long, open-ended basis by means of executive orders issued under the guise of KRS 39A.090, such a delegation of power would be invalid because it would violate constitutional separation-of-powers principles. *See* Count 3, below, asserting a constitutional claim for violation of the non-delegation doctrine.

22. On March 17, 2020, Secretary Friedlander and Commissioner Stack issued an Executive Order requiring the closure all “public facing businesses that encourage public congregation” and public facing businesses that “cannot comply with CDC guidelines concerning social-distancing.” The Executive Order stated that “[t]hese public facing businesses that must close include entertainment, hospitality and recreational facilities.” The Executive Order purported to delegate to local health departments authority to take measures to implement it.

23. On March 18, 2020, Governor Beshear issued Executive Order 2020-243, directing that “all state agencies shall take all reasonable and necessary steps to ensure appropriate social distancing, while ensuring the continued provision of services to the public.” The Executive Order also stated: “Pursuant to KRS 39A.180, any state statute or regulation that conflicts with the provisions of this Order is hereby suspended.”

24. On March 19, 2020, Secretary Friedlander and Commissioner Stack issued an Executive Order prohibiting “mass gatherings,” requiring the closure of all “public facing businesses that encourage public congregation” and public facing businesses that “cannot comply with CDC guidelines concerning social-distancing.” The Executive Order stated that “[t]hese public facing businesses that must close include entertainment, hospitality and recreational facilities.” The Executive Order purported to delegate to local health departments authority to take measures to implement it.

25. On March 22, 2020, Governor Beshear issued Executive Order 2020-246, ordering the closure of all in-person retail businesses deemed “not life sustaining” (according to a table that was appended to the Executive Order) by the end of the following day. The Executive Order stated that: “Retail businesses that are not life-sustaining may provide local delivery and curbside service of online or telephone orders.”

26. On March 25, 2020, Governor Beshear issued Executive Order 2020-257, ordering that: “All businesses that are not life sustaining shall cease operations effective Thursday, March 26, 2020, at 8:00 p.m., except as needed to continue Minimum Basic Operations, as defined in this Order.” The Executive Order authorized certain officials, including the Commissioner of Public Health, to issue additional orders and guidance, and also purported to delegate to local health departments authority to take measures to implement it.

27. On April 21, 2020, Governor Beshear announced a “Healthy At Work Initiative,” a process to be led by the Department of Public Health that would “determine whether Kentucky has met certain public health benchmarks for reopening Kentucky’s economy” (in Phase One) and then “evaluate individual businesses’ ability to safely reopen” (in Phase Two).

28. On April 28, 2020, Governor Beshear announced that the “10 rules to reopening a business under the Healthy at Work plan are:

- Continue telework where possible
- Phased return to work
- Onsite temperature/health checks
- Universal masks and other necessary PPE

- Close common areas
- Enforce social distancing
- Limit face-to-face meetings
- Sanitizer/hand wash stations
- Special accommodations
- Testing plan”

29. On May 4, 2020, Governor Beshear announced “new details on guidelines for businesses and health care providers looking to restart safely as we continue to fight the novel coronavirus 2019 (COVID-19).” “Under the schedule outlined by Gov. Beshear, more businesses will be allowed to open May 11 with new minimum requirements, as well as industry specific requirements. Among the businesses that will be allowed to operate:”

- “Manufacturing, distribution and supply chain businesses”
- “Construction”
- “Vehicle or vessel dealerships”
- “Office-based businesses (at 50% pre-pandemic capacity)”
- “Horse racing (no fans in attendance)”
- “Pet care, grooming and boarding”
- “Photography”

30. On May 7, 2020, Governor Beshear “announced the second phase of reopening the commonwealth’s economy.” “All businesses should follow the 10 rules of staying healthy at work as well as industry-specific guidance, which will be issued as soon as possible.”

31. On May 14, 2020, Governor Beshear “announced that beginning May 22, groups of 10 people or fewer may gather.”

32. On May 21, 2020, Governor Beshear announced that:

- on June 8, 2020, “outdoor attractions” could reopen; and

- on June 29, 2020, “venues that hold 50 people or fewer can reopen if they meet guidelines.”

33. On June 8, 2020, Secretary Friedlander and Commissioner Stack issued an Executive Order amending some of the earlier Executive Orders with respect to several categories of businesses:

- “Educational and cultural activities (aquariums, distilleries, libraries, museums, wineries, and limited outdoor attractions)”;
- “Horse shows”; and
- “Some childcare (in-home programs).”

34. The June 8, 2020, Executive Order purported to delegate to local health departments authority to take measures to implement it. It included these three documents:

- “Requirements for Childcare Programs (VERSION 1.1 – Effective June 8, 2020)” (8 pages);
- “Requirements for Horse Shows (VERSION 1.1 – Effective June 8, 2020)” (2 pages);
- “Requirements for Educational and Cultural Opportunities and Attractions” (VERSION 1.0 – Effective June 8, 2020)”.

35. The “Requirements for Educational and Cultural Opportunities and Attractions” document that was included with the June 8, 2020 Executive Order imposed the following mandates for outdoor attractions (like EO&CM’s Playing Area and Barnyard):

Outdoor facilities and businesses must limit the persons, not including employees, present in any given tourism facility or business to an amount small enough to permit at least six (6) feet of social distancing between all individuals or households. Additionally, tourism facilities and businesses must follow the [Healthy at Work Guidance for Gatherings of Up To Ten \(10\) People](#).

Outdoor facilities and businesses must promote safe and healthy experiences by following the Healthy At Work minimum requirements, to the greatest extent practicable.

Outdoor facilities must develop and implement a plan and protocols to create transmission barriers, where possible, and promote and enforce social distancing; implement touchless solutions, where practical; and enhance and promote sanitation and hygiene practices.

36. On June 16, 2020, Governor Beshear issued an Executive Order, titled “Guidance for Gatherings of Up To Fifty (50) People (Version 1.0 – Effective June 29, 2020)” which stated that “Groups Must

- Communicate to individuals to stay home if sick and not attend a group event;
- Remain at least (6) feet apart from people who are not a part of your household;
- Wear a cloth face covering or mask over your nose and mouth if you will be closer than six (6) feet to someone outside your own household;
- Wash or sanitize hands frequently;
- Screen and exclude persons with fever, symptoms of COVID-19, and/or direct exposure to COVID-19; and
- Not share food, drink, containers, napkins or utensils.”

37. On June 22, 2020, Governor Beshear issued an Executive Order, titled “Guidance for Gatherings of Up To Fifty (50) People (Version 1.2 – Effective June 29, 2020)” which stated that “Groups Must

- Communicate to individuals to stay home if sick and not attend a group event
- Remain at least (6) feet apart from people who are not a part of your household;
- Wear a cloth face covering or mask over your nose and mouth if you will be closer than six (6) feet to someone outside your own household;
- Wash or sanitize hands frequently;

- Screen and exclude persons with fever, symptoms of COVID-19, and/or direct exposure to COVID-19; and
- Not share food, drink, containers, napkins or utensils.”

38. The practical effect of the prohibitions contained in the June 16 and 22 Executive Orders, including the prohibition against gatherings of more than 50 people and the prohibition against “shar[ing] food, drink, containers, napkins, or utensils,” is that EO&CM will be unable to host weddings and other events at its Event Barn for the remainder of the 2020 calendar year, so long as those Executive Orders remain in effect.

39. The practical effect of the prohibitions contained in the June 16 and 22 Executive Orders, including the prohibition gatherings of more than 50 people is that EO&CM will be unable to profitably operate the Playing Area and Barnyard for the remainder of the 2020 calendar year, so long as those Executive Orders remain in effect.

40. The enforcement of the Executive Orders has been selective. For instance, during certain mass gatherings that occurred in Louisville, Frankfort, and in other communities across the Commonwealth in May and June 2020, Governor Beshear, Secretary Friedlander, Commissioner Stack, and local health departments failed to enforce the March 19 Executive Order prohibiting mass gatherings.

41. The enforcement of the Executive Orders has been haphazard, unresponsive, and ill-informed. For instance, in a telephone conversation that occurred on or about June 10, 2020, a WEDCO representative told EO&CM that an attorney in the

Governor’s Office said that the Play Area and Barnyard could not open until June 29. On June 12, 2020, EO&CM sent an email to a representative of its local health department, the Defendant WEDCO, “to respectfully request your prompt approval of the opening of the Evans Orchard outdoor attraction facility.” EO&CM further explained that it had “reviewed and implemented the Healthy at Work Guidelines specifically pertaining to Outdoor Attractions and have addressed each point in the attached document.” EO&CM’s five-page document explained, in detail, how EO&CM would comply with the “Healthy at Work Guidelines” Executive Order. For instance, there would be additional staffing to ensure that customers remained spread out, regular sanitation of surfaces would occur throughout the day, and total occupancy would not exceed 100 people at any one time, even though the 96,000 square foot facility in previous years accommodated numbers more than ten times that amount. The Defendant WEDCO took no action at all in response to EO&CM’s request. In a telephone conversation on June 18, 2020, a second WEDCO representative admitted to EO&CM that he had not seen the “Healthy at Work Guidelines” pertaining to outdoor attractions. Minutes later, EO&CM sent an email to the WEDCO representative with an attachment containing the Executive Order titled, “Requirements for Educational, Cultural, and Entertainment Facilities (VERSION 1.1 – Effective June 8, 2020).” In a subsequent telephone conversation, the WEDCO representative told EO&CM that he could not approve its proposal to allow up to 100 individuals (i.e., approximately 25 families) at a time to use the

Playing Area and Barnyard attraction (even with additional staffing and sanitation measures) and that only 10 individuals (i.e., approximately 2-3 families) at a time could be allowed to use it until June 29, at which time up to 50 individuals (i.e., approximately 12-13 families) could be allowed.

42. The actions of the Defendants, in violation of law, have caused substantial financial and operational hardships for EO&CM and other agritourism businesses that are registered with the Department.

43. The actions of the Defendants cause EO&CM to believe there is a reasonable probability that the Defendant WEDCO will order the shut-down of some or all of EO&CM's outdoor attractions if it proceeds with its plans to open the Play Area and Barnyard with a capacity of 100 people, as set forth in the written plan it submitted to WEDCO's representatives earlier this month.

44. Pursuant to KRS 452.405, venue is proper in this court because Scott County is the county where EO&CM's principal place of business is located and "the county where this action, or some part thereof, arose" "[a]gainst a public officer for an act done by him in virtue or under color of his office." *Cnty. Servs. Project, Inc. v. BAWAC Cleaning Servs.*, 226 S.W.3d 852, 854-55 (Ky. App. 2007).

COUNT ONE: Violation of the Administrative Procedures Act

45. KRS 13A.100 states that "Subject to limitations in applicable statutes, any administrative body that is empowered to promulgate administrative regulations shall, by administrative regulation, prescribe, consistent with applicable statutes . . . "[e]ach statement of general applicability, policy, procedures, memorandum,

or other form of action that implements; interprets; prescribes law or policy . . . or affects private rights or procedures available to the public.”

46. KRS 13A.130(1) states that “An administrative body shall not by internal policy, memorandum, or other form of action . . . limit a right guaranteed by the Constitution of the United States, the Constitution of Kentucky, a statute, or an administrative regulation.”

47. KRS 13A.130(2) states that “Any administrative body memorandum, internal policy, or other form of action violative of this section or the spirit thereof is null, void, and unenforceable.”

48. The Executive Orders identified in this Complaint are “statements of general applicability, policy, procedures . . . or other form of action that implements [or] prescribes law or policy [and] affects private rights or procedures available to the public.”

49. The Defendants, in developing and implementing the Executive Orders identified in this Complaint, did not use any of the three forms of administrative regulations that are authorized by KRS 13A.170:

- ordinary administrative regulations, as defined in KRS 13A.180;
- emergency administrative regulations, as set forth in KRS 13A.190; or
- administrative regulations in contemplation of a statute, as set forth in KRS 13A.200.

50. The Executive Orders do not comply with the requirements of KRS 13A.220, whose purpose is to give adequate notice to the public about the subject of a regulation, the statutory basis for its promulgation, and its impact.
51. The Executive Orders do not comply with the requirements of KRS 13A.240, whose purpose is to require public agencies to evaluate the regulation's "regulatory impact" on the people who are likely to be affected by its implementation.
52. The Executive Orders do not comply with the requirements of KRS 13A.250, whose purpose is to require public agencies to evaluate the regulation's "costs to local and state government" caused by its implementation.
53. The Executive Orders do not comply with the requirements of KRS 13A.270 and 13A.280, whose purpose is to require public agencies to engage in a "public hearing and comment" process that allows members of the public to articulate their concerns and thereby contribute to the public policy formulation process.
54. The Executive Orders do not comply with the requirements of KRS 13A.290, whose purpose is to require public agencies to appear before members of the General Assembly's Administrative Regulation Review Subcommittee so that elected representatives of the people of the Commonwealth may contribute to the public policy formulation process.
55. Because the Executive Orders do not comply with the requirements of the APA yet purport to limit the rights, liberties, and freedoms guaranteed by the

Constitution of the United States, the Constitution of Kentucky,² and various statutes and regulations, the Executive Orders are null, void, and unenforceable.

56. Pursuant to the Declaratory Judgment Act, KRS Chapter 418, Plaintiffs seek a declaratory judgment that the Executive Orders are null, void, and unenforceable.

57. Plaintiffs seek a permanent injunction prohibiting the Defendants, or any person, from attempting to enforce the Executive Orders.

COUNT TWO: Violation of Section 2 of the Kentucky Constitution

58. Section 2 of the Constitution provides: “Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.”

59. The Executive Orders are an unlawful and unconstitutional attempt to exercise absolute and arbitrary power.

60. The Defendants’ have enforced the Executive Orders in a manner that is selective, haphazard, unresponsive, and ill-informed.

61. Defendants’ Executive Orders and other forms of action restricting the rights of members of the public, and disregarding the specific requirements in law that are set forth in APA, are arbitrary and therefore unconstitutional.

² For instance, Section 1 of the Kentucky Constitution acknowledges that: “All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned” the right of “enjoying and defending their lives and liberties”; the right of “seeking and pursuing their safety and happiness,” the right of “acquiring and protecting property”; and the right of “assembling together in a peaceable manner for their common good.”

62. Pursuant to the Declaratory Judgment Act, KRS Chapter 418, Plaintiffs seek a declaratory judgment that the Executive Orders are null, void, and unenforceable.

63. Plaintiffs seek a permanent injunction prohibiting the Defendants, or any person, from attempting to enforce the Executive Orders.

COUNT THREE: Violation of Sections 27, 28, and 29 of the Kentucky Constitution

64. Section 27 divides the powers of government into three separate branches: “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.”

65. Section 28 states that branch of government shall not be permitted to exercise the rights of another: “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.”

66. Section 29 states that the power to legislate is entrusted solely to the General Assembly: “The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the ‘General Assembly of the Commonwealth of Kentucky.’”

67. According to the Kentucky Supreme Court, The nondelegation doctrine” in Kentucky’s constitutional law is “more restrictive of powers granted than the federal Constitution. . . . Indeed, in the area of non-delegation, Kentucky may be

unsurpassed by any state in the Union.” *Bd. of Trustees of the Judicial Retirement Sys. v. Attorney General*, 132 S.W.3d 770, 782 (2004).

68. Kentucky’s nondelegation doctrine requires that any grant of policymaking authority from the General Assembly to the Executive Branch must be limited by “standards controlling the exercise of administrative discretion.” *Id.*

69. KRS Chapter 39A, and particularly the statute invoked by the Governor as the basis for the Executive Orders, contain none of the constitutionally-required “standards controlling the exercise of administrative discretion”:

- KRS 39A.090: “The Governor may make, amend, and rescind any executive orders as deemed necessary to carry out the provisions of KRS Chapters 39A to 39F.”

70. In addition, the text of KRS Chapter 39A lacks any explicit time limitation to restrain how long a State of Emergency may persist.

71. KRS 39A, in whole or in part, is void because it violates the nondelegation doctrine that is grounded in Sections 27, 28, and 29 of the Kentucky Constitution.

72. The Executive Orders and other actions of the Defendants that are recounted in this Complaint are unlawful, arbitrary, and unenforceable.

73. Pursuant to the Declaratory Judgment Act, KRS Chapter 418, Plaintiffs seek a declaratory judgment that the Executive Orders are null, void, and unenforceable.

74. Plaintiffs seek a permanent injunction prohibiting the Defendants, or any person, from attempting to enforce the Executive Orders.

Wherefore, the Plaintiffs respectfully pray for the following relief:

1. Declaratory judgment that the Executive Orders are null, void, and unenforceable;
2. A permanent injunction prohibiting the Defendants, or any person, from attempting to enforce the Executive Orders; and
3. An award of their costs;
4. All other relief to which they may be entitled.

Respectfully submitted,

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