



Andy Beshear
GOVERNOR

**OFFICE OF THE GOVERNOR
OFFICE OF THE GENERAL COUNSEL**

The State Capitol
700 Capitol Avenue, Suite 108
Frankfort, Kentucky 40601
Phone: (502) 564-2611
Fax: (502) 564-6858

Amy D. Cabbage
GENERAL COUNSEL

S. Travis Mayo
CHIEF DEPUTY GENERAL COUNSEL

February 1, 2021

Via Electronic Mail

Representative Jason Nemes, Chair
Representative George Brown, Jr.
Representative Angie Hatton
Representative Kim King
Representative C. Ed Massey
Representative Suzanne Miles
Representative Patti Minter
Representative Felicia Rabourn
Representative Buddy Wheatley
Elishea Schweickart, Committee Clerk
Regular Session 2021 Impeachment Committee
702 Capitol Avenue
Frankfort, KY 40601

Re: Request for Additional Information

Dear Rep. Nemes and Committee Members:

This submission is in response to your correspondence requesting additional information received approximately 1:40 p.m. on Thursday, January 28, 2021. In that correspondence, you requested the following to assist your “investigation” by 5 p.m. on February 1:

1. Any communications by any means, including, but not limited to, telephone communication, electronic communication, digital communication, written communication, facsimile communication, by and between the Governor or his designee and entities involved with the enforcement of Executive Orders specifically relating to churches and religious organizations, including, but not limited to, any Cabinet member, member of the Governor’s executive staff, the KSP Commissioner, or any other sworn or unsworn employee of the KSP, any peace officer, any employee of the State or a local health department, and any local official either elected or appointed.
2. Any communications by any means, including, but not limited to, telephone communication, electronic communication, digital communication, written communication, facsimile communication, by and between the Governor or his

designee and entities involved with the proposed travel ban including, but not limited to, any Cabinet member, member of the Governor's executive staff, the KSP Commissioner or any other sworn or unsworn employee of the KSP, any peace officer, any employee of the State or a local health department, any employee of the Kentucky Transportation Cabinet, any local official either elected or appointed, any uniformed or civilian employee of the National Guard, any local or state official from a state bordering Kentucky, and any officer or employee of the Federal government.

As a preliminary matter, we are concerned with your letter's use of the term "investigation" to describe the Committee's questions. The Committee's charge, as announced upon its formation, was to evaluate the sufficiency of the Petition. It now appears the Committee has decided to seek additional and extraneous information not contained in the original Petition, which does not and cannot form the basis for impeachment. As demonstrated in the Governor's Response, the Petition fails to establish a knowing violation of KRS 522.030(1)(a) sufficient to support impeachment. The proper job of the Committee is to therefore dismiss the Petition.

Further, the letter implies the Committee may be mistakenly equating a court ruling finding a potential constitutional violation with grounds for impeachment. Such an implication is not only erroneous as a matter of law, *see* Ky. Const. § 68, but would further open the "Pandora's Box" created by the recent departure from the traditional procedure for handling impeachment petitions. Indeed, the General Assembly was recently found to have violated the Kentucky Constitution through numerous pieces of legislation, including a pension bill, an attempt to create medical review panels, and a defective ballot question for a constitutional amendment. The Committee's implication would or could render all of these actions impeachable offenses.

Moreover, the Governor has not violated any constitutionally-protected rights, either in enforcing the neutrally-applicable mass gathering restrictions on churches, or in enacting restrictions on interstate travel.

First, no court has entered a final judgment finding the Governor acted in violation of the Constitution. The issuance of a preliminary injunction is not a final judgment and does not constitute a finding of unconstitutional acts. Those preliminary decisions are not binding on the court when deciding the merits. *Kelly v. City of Fort Thomas, Ky.*, 2008 WL 5000161, at *5 n. 10 (E.D. Ky. Nov. 24, 2008) (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Cyberspace Communs., Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000)). In *Engler*, the court noted that final conclusions on the ultimate issues involved in a lawsuit are premature and inappropriate at the preliminary injunction stage of the proceedings. *Engler*, 238 F.3d 420. The decision of whether a constitutional violation occurred is a later finding in a final judgment.

No court or case – including the *Maryville Baptist*, *Roberts*, or *Ramsek* cases – have rendered a final judgment that finds any violation. In fact, the only final decision rendered by a court on Governor's actions has been the Kentucky Supreme Court's ruling that the Governor's actions were legal and necessary. *Beshear v. Acree*, No. 2020-SC-0313-OA, 2020 WL 6736090

(Ky. Nov. 12, 2020). Petitioners admit their anger in losing before the Kentucky Supreme Court led them to file the Petition.

Second, as noted in the Governor’s response, United States Supreme Court precedent clearly supported these actions at the time they were taken, *see Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (holding that “under the pressure of great dangers” even constitutional rights may be reasonably restricted “as the safety of the general public may demand.”); *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (noting that “[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease”).

United States Supreme Court precedent entered after the mass gathering orders affirmed that orders prohibiting or limiting mass gatherings during the COVID-19 pandemic are constitutional. On May 29, 2020, the United States Supreme Court upheld public health measures issued by the Governors of California and Illinois that limited in-person gatherings for religious services. *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020). The *South Bay United* case arose from several executive orders issued by Governor Newsom that are comparable to Kentucky’s mass gatherings order. *Id.* In particular, the Supreme Court held that the California Order prohibiting mass gatherings passed First Amendment review because it applied similar restrictions to “lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time,” while treating differently “only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods,” which is precisely what Governor Beshear’s order did. *Id.* at *2. *See also Elim Romanian Church, et al. v. Pritzker, Gov. of Illinois*, 19A1046, 2020 WL 2781671 (Order List 590 U.S.) (U.S. May 29, 2020). Courts throughout the country overwhelmingly rejected free exercise challenges to public health measures during the COVID-19 pandemic, relying predominantly on *South Bay United* after its issuance. *See* Governor’s Response at 31 fn. 35.¹

With respect to the Governor’s travel orders, United States Supreme Court precedent and multiple court decisions upholding travel restrictions issued during the COVID-19 pandemic confirm their solid legal basis. *See Zemel v. Rusk*, 381 U.S. 1 (1965); *Bowditch v. City of Boston*, 101 U.S. 16 (1879); *Lawton v. Steele*, 152 U.S. 133 (1894); *Compagnie Francaise de Navigation a Vapeur v. State Board of Health*, 186 U.S. 380 (1902); *Jacobson*, 197 U.S. 11; *United States v.*

¹ The Trump Administration itself initially believed mass gathering bans could or should include houses of worship. Indeed, the White House did not change its position until May 22, 2020. When it did so, it was not on First Amendment grounds, but was based on the President’s belief they were “essential” under CDC guidance. *See* Coronavirus government response updates, ABC News, May 22, 2020, available at <https://abcnews.go.com/Politics/coronavirus-government-response-updates-trump-declares-churches-provide/story?id=70832416> (last visited Feb.1, 2020). Indeed, the White House did not assert there was any First Amendment concern until May 29, 2020, when it added a line to CDC guidance. *See* 5/29/2020 CDC quietly revises coronavirus warnings on reopening of religious sites, adds First Amendment Note, CNBC, May 29, 2020, available at <https://www.cnbc.com/2020/05/29/cdc-quietly-revised-coronavirus-warnings-on-reopening-religious-sites.html> (last visited Feb. 1, 2021). The Governor’s mass gathering order exempted churches effective May 9, 2020, several weeks before the CDC revised its guidance.

Caltex, 349 U.S. 149 (1953); *In re Abbott*, 954 F.3d 772 (5th Cir. 2020); *Page v. Cuomo*, --- F.Supp.3d ---, 2020 WL 4589329 (N.D.NY Aug. 13, 2020). See also *Hartman v. Acton*, 2020 WL 6445830 (6th Cir. Nov. 3, 2020) (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)).

Notwithstanding those objections, the Governor states as follows with respect to each of the irrelevant requests:

Request 1: Church Enforcement

The Governor did not direct any enforcement action to be taken against any church during the COVID-19 pandemic. As noted in the Governor’s Response at pages 28-34, the mass gathering order covered all public places equally. Various local, county and state-level agencies were tasked with enforcement of the mass gathering order, including local health departments, local law enforcement, the Kentucky Labor Cabinet, and the Kentucky State Police (KSP). With respect to KSP in particular, then-Commissioner Rodney Brewer and Lt. Col. Phillip Burnett, Jr. confirmed under oath that KSP received complaints of *all* types regarding violations of the mass gathering order, and duly investigated those complaints when received. See Brewer Affidavit (Exhibit 1) ¶¶ 3-8; Burnett Declaration (Exhibit 2) ¶¶ 3-5. ***Not a single person was arrested or cited by KSP for violations of the mass gathering order.*** Exhibit 2 ¶¶ 5, 9. Given that KSP did not arrest or cite anyone related to mass gathering order, the Kentucky Supreme Court has ruled they do not have a valid legal grievance with the Governor:

As recently explained in *Commonwealth Cabinet for Health & Family Services, Department for Medicaid Services v. Sexton by & through Appalachian Regional Healthcare, Inc.*, 566 S.W.3d 185, 195 (Ky. 2018), in order for Kentucky courts to have constitutional jurisdiction to decide a claim, the litigant must have standing. Standing is achieved when “[a] plaintiff ... allege[s] a personal injury fairly traceable to the defendant's allegedly unlawful conduct and [which is] likely to be redressed by the requested relief.” *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *overruled on other grounds* by *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). The injury must be a distinct and palpable injury that is actual or imminent. *Id.* at 751, 104 S.Ct. 3315; *Massachusetts v. EPA*, 549 U.S. 497, 517, 127 S. Ct. 1438, 1453, 167 L.Ed.2d 248 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). ***Here, because the Plaintiffs’ injury is only hypothetical, they have failed to show the requisite injury for adjudication of their claim***

Beshear v. Acree, 2020 WL 6736090 at *35 (emphasis added). Petitioners cannot establish that they – or anyone else – were on the receiving end of enforcement action based on the mass gathering order. They thus lack standing to pursue any claims here related to that order.

Moreover, KSP provided proof that it monitored all types of potential gatherings, and did not single out churches. Commissioner Brewer stated under oath that KSP received approximately 70 complaints about violations of the mass gathering order from March 19 to

April 21, including complaints about a hair salon, an arcade, gas stations, flea markets, neighborhoods, and residences. KSP also increased patrols of retail operations, with KSP performing 6,173 patrols of retail during that same time period. Exhibit 1 ¶¶ 3-4, 12-13.

In response to complaints received through various channels regarding churches in particular, various agencies coordinated to attempt to ensure compliance through persuasive means, with local health departments doing outreach to churches to educate them about dangers posed by COVID-19. Most of these complaints involved simultaneous violations of social distancing requirements in addition to the mass gathering order. Notably, orders requiring social distancing in various venues have never been challenged. Specific to KSP, that agency received 42 complaints on April 12, 2020 regarding churches violating both social distancing requirements and the mass gathering order. Exhibit 1 ¶¶ 6-7. A disproportionate number of complaints to KSP involved Maryville Baptist Church, the only church that publicly refused to comply with the mass gathering order and social distancing requirements. *Id.* ¶ 9; Exhibit 2 ¶ 6; Eileen Street, *Maryville Baptist Church Holds In-Person Service*, Spectrum News 1 (Apr. 12, 2020).² While KSP placed a notice on cars at the service indicating that (1) the occupant was likely at a mass gathering prohibited by the order; (2) their presence places them at risk of a COVID-19 infection; and (3) they may be contacted by a local health department with a request to self-quarantine, it took no further action with respect to those attendees.

In accordance with your request, we are attaching only documents not previously given to the Committee, namely, the Affidavit and Declaration attached as Exhibits 1 and 2.

Request 2: Travel Order Enforcement

There are no documents demonstrating enforcement of the three travel orders. As noted in the attached video clip from the Governor’s March 30, 2020 press conference, the Governor publicly stated that “The reality is the only way that we’re going to get people to do the right thing is because they agree to. Because they see it as their duty and they know that their actions can harm other people.” As noted in an order entered by Judge Gregory Van Tatenhove in dismissing claims challenging the Governor’s travel orders, the plaintiffs “failed entirely to show a history of past enforcement of the previous Travel Orders or Third Travel Order against Plaintiffs or anyone else.” *W.O. v. Beshear*, E.D.Ky., Case No. 3:20-cv-0023-GFVT (May 9, 2020), at 10. Indeed, the plaintiffs in *W.O.* could not show the existence of any enforcement of the travel restrictions because there was none.

Further, during the same time period as Governor Beshear issued the travel orders, 21 states and territories imposed similar mandatory orders. These 21 included Arizona, Florida, South Carolina, and Texas. Another 11 states and territories issued voluntary travel orders similar to Governor Beshear’s third travel order.

* * *

² Available at <https://spectrumnews1.com/ky/lexington/news/2020/04/13/maryville-baptist-church-easter-sunday-in-person-service> (last visited Jan. 29, 2021).

Governor Beshear has adopted a nimble, targeted approach based on the best available data and proven science, all while balancing his obligations to respect individual citizens' constitutional rights. Applicable case law has evolved as the pandemic has evolved. Indeed, Judge Van Tatenhove has expressly recognized the heavy burden of finding this balance, and has noted the Governor's good faith in navigating these difficult questions:

Governor Beshear's executive orders have been subjected to numerous constitutional challenges, both in this Court and the Sixth Circuit. It has never been alleged that the Governor issued the executive orders for any reason other than to protect Kentuckians from the threat of the virus. *See Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614-15 (6th Cir. 2020) ("We don't doubt the Governor's sincerity in trying to do his level best to lessen the spread of the virus or his authority to protect the Commonwealth's citizens."). At no point has the Governor's sincerity been called into question.

Cameron v. Beshear, No. 3:20-CV-00023-GFVT, 2020 WL 2573463, at *2 (E.D. Ky. May 21, 2020).

Petitioners bore the heavy burden of establishing a knowing violation of KRS 522.030(1)(a). In requesting withdrawal of one of petitioners, attorney Robert Sexton accurately noted "impeachment is not a proper response when public officials make policy decisions with which a citizen disagrees. Even if, as does not presently appear, the Governor has done something unconstitutional, that too is not grounds for impeachment. Elected officials and state employees can, and sometimes do, make good-faith errors as to the requirements of the Constitution. The remedy for that is rarely impeachment." As conceded by Mr. Sexton, petitioners failed to carry their burden on every claim in their Petition, including their claims related to the mass gathering order and the travel orders. This Committee's review has now gone beyond any reasonable review of the failed Petition. You must put an end to this process and reject the Petition.

Respectfully submitted,



Amy D. Cabbage
General Counsel

cc: Kent Westberry, Committee Counsel

EXHIBIT 1

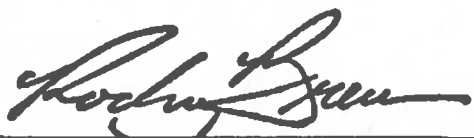
AFFIDAVIT OF COMMISSIONER RODNEY BREWER

Comes the affiant, Rodney Brewer, having been duly sworn and states as follows:

1. My name is Rodney Brewer. I am the Commissioner of the Kentucky State Police (KSP). I was appointed to this position on January 3, 2020. I make this affidavit on personal knowledge.
2. On March 19, 2020, an Order was issued by the Cabinet for Health and Family Services (CHFS) prohibiting mass gatherings.
3. From March 19, 2020 through April 21, 2020, KSP received approximately 70 complaints regarding groups of people not complying with the March 19, 2020 CHFS Order.
4. These groups were gathered at various locations, including but not limited to a hair salon, an arcade, gas stations, flea markets, in neighborhoods and personal residences.
5. The majority of these groups dispersed prior to KSP's arrival. The remaining complaints were deemed unfounded or it was determined that the groups were compliant with the order.
6. On April 12, 2019, KSP posts throughout Kentucky received complaints of groups of people violating the social distancing requirements set forth by the March 19, 2020 Order.
7. Approximately 42 complaints were received related to faith based mass gatherings and failure to observe social distancing at those gatherings.
8. Troopers were dispatched to respond to these complaints.
9. Troopers received approximately six complaints regarding Maryville Baptist Church and responded to those complaints.

- 10. Following a thorough investigation, all of the complaints except the complaints regarding Maryville Baptist Church were determined to be either compliant with the order or unfounded.
- 11. No citations were issued and no arrests were made at the Maryville Baptist Church on April 12, 2019.
- 12. KSP has increased routine patrols overall due to the statewide COVID-19 pandemic.
- 13. Between March 19, 2020 and April 21, 2020, KSP patrolled approximately 839 retail locations a total of 6,173 times.


Further affiant sayeth naught.



Rodney Brewer

Commonwealth of Kentucky)
County of Franklin)

Subscribed and sworn before me by Rodney Brewer, the 22nd day of April, 2020.



Notary Public
State At Large

My commission expires: Nov. 8, 2023.

EXHIBIT 2

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE**

MARYVILLE BAPTIST CHURCH, INC.,)
et al.,)

Plaintiffs,)

v.)

ANDY BESHEAR, in his official capacity)
as the Governor of the Commonwealth of)
Kentucky,)

Defendant.)

Civil Action No. 3:20-cv-00278-DJH

DECLARATION OF LEIUTENANT COLONEL PHILLIP BURNETT, JR.

Phillip Burnett, Jr. states as follows:


1. My name is Phillip Burnett, Jr. I am a Lieutenant Colonel, Executive Director of the Operations Division of the Kentucky State Police (KSP). I was appointed to this position in February, 2020. I make this affidavit on personal knowledge.
2. On March 19, 2020, an Order was issued by the Cabinet for Health and Family Services (CHFS) prohibiting mass gatherings.
3. From March 19, 2020 through April 21, 2020, KSP received approximately 70 complaints regarding groups of people not complying with the March 19, 2020 CHFS Order.
4. Uniformed KSP visited all locations of the complaints, including but not limited to, a hair salon, an arcade, gas stations, flea markets, in neighborhoods and personal residences, and issued no citations and took no other enforcement action.
5. Uniformed KSP responded to these complaints and did not intervene – they did not cite or arrest any individual.

6. Troopers received approximately six complaints regarding Maryville Baptist Church having in-persons services on April 12, 2020 and responded to the complaints.
7. Uniformed KSP recorded license plate information of vehicles in the parking lot of Maryville Baptist Church on April 12, 2020.
8. Uniformed KSP placed notices on vehicles in the parking lot of Maryville Baptist Church that provided notification of the potential consequences of participating in a mass gathering.
9. Uniformed KSP did not intervene, did not issue any citations and did not arrest any individual at Maryville Baptist Church on April 12, 2020, and have not issued any citations or made any arrests at Maryville Baptist Church subsequent to April 12, 2020.
10. KSP provided the license plate information of vehicles in the parking lot of Maryville Baptist Church to local public health officials.
11. KSP has not returned to Maryville Baptist Church parking lot since April 12, 2020.
12. KSP has not mailed any document to any individual present at Maryville Baptist Church on April 12, 2020, or any other date.
13. KSP has increased routine patrols overall due to the statewide COVID-19 pandemic.
14. Between March 19, 2020 and May 4, 2020, KSP patrolled approximately 2,175 retail locations a total of 9,240 times.

Further declarant sayeth naught.

Dated: May 6, 2020

I declare that the statements herein are true under penalty of perjury pursuant to 28 U.S.C. § 1746.


Phillip Burnett, Jr.