

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 5th Meeting of the 2020 Interim

October 22, 2020

Call to Order and Roll Call

The 5th meeting of the Interim Joint Committee on Judiciary was held on Thursday, October 22, 2020, at 10:30 AM, in Room 171 of the Capitol Annex. Senator Whitney Westerfield, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Whitney Westerfield, Co-Chair; Representative Jason Petrie, Co-Chair; Senators Danny Carroll, Alice Forgy Kerr, Gerald A. Neal, Michael J. Nemes, John Schickel, Wil Schroder, Robert Stivers II, Robin L. Webb, Stephen West, and Phillip Wheeler; Representatives Kim Banta, John Blanton, Charles Booker, Kevin D. Bratcher, McKenzie Cantrell, Daniel Elliott, Joseph M. Fischer, Angie Hatton, Nima Kulkarni, Stan Lee, Derek Lewis, Savannah Maddox, C. Ed Massey, Chad McCoy, Reginald Meeks, Patti Minter, Kimberly Poore Moser, Jason Nemes, Brandon Reed, Maria Sorolis, and Rob Wiederstein.

Guests: Treasurer Allison Ball, Noah Friend, and Owen Fielding.

LRC Staff: Katie Comstock and Yvonne Beghtol.

Approval of the Minutes

Senator Nemes made a motion to approve the September 17, 2020 minutes, seconded by Representative Blanton, and passed by voice vote.

Accountability for State Expenditures During the Pandemic

Allison Ball, Kentucky State Treasurer, stated that her job is to insure that state expenditures are constitutional, legal, and correct. The Kentucky Supreme Court has held that the Treasurer may question the validity of an expenditure based on the ground that it violates the Constitution. Treasurer Ball stated that she took an oath to uphold the constitutions of the United States and the Commonwealth of Kentucky. The U.S. Constitution has strong first amendment protections, and the Kentucky Constitution has even stronger free exercise of religion, freedom of speech, and freedom of assembly protections. Treasurer Ball said that state unconstitutional expenditures have been made infringing the free exercise of religion and the freedom of assembly. Federal courts have been clear in their holdings that the Governor's Executive Order has violated the

constitution. The declaring of a state of emergency does not warrant unconstitutional actions.

Treasurer Ball stated that her office's review showed police officers being sent to the Maryville Baptist Church to provide notice to churchgoers and to stop church activity. Federal court filings led the Treasurer's Office to investigate. Open records requests were sent out in mid-June 2020 to geographically diverse areas to determine if this practice was widespread. Responses received by September 2020 revealed that police officers being put in a position to either obey the Governor or follow the Constitution was a widespread problem.

The three categories of findings include: statewide directives, specific interactions with the Governor's administration and local county officials, and the coordinated efforts and responses to the Governor's directives.

The statewide directives include the Governor's initial order on March 19, 2020 banning all mass gatherings sent to Kentucky State Police (KSP) and local health departments. KSP Commissioner Rodney Brewer sent an email to KSP officials with a flyer from the Governor's Office via the local health departments, directed at churches expected to be non-compliant, to be placed on the windshields of vehicles in church parking lots. The notice stated that failure to comply may result in further enforcement measures, and would be subject to Open Records. The email also included a list of churches to be monitored by at least two uniformed officers. A "Church Protocol" document was circulated to all Sheriffs and many local health officials listing possible offenses non-compliant church officials could be charged with. The document also noted this could be a first amendment issue and any action taken could have significant potential to result in litigation, as well as the potential for the need for force, although a very low potential.

Specific communications with the Governor's administration include:

- Contacting at least two County Judge/Executives about non-compliant churches within their counties;
- Documentation from the health department to Dr. Steven Stack, Commissioner for the Kentucky Department for Public Health, discussing a church that intended to continue with services but limiting the number of people to maintain safe distancing;
- Commissioner Brewer sent a report to La Tasha Buckner, Chief of Staff and General Counsel to the Governor, with the results of church surveillance from Easter Sunday;
- Wesley Duke, General Counsel for the Cabinet for Health and Family Services, received a list containing license plate numbers of churchgoers; and
- Emails exchanged between Dr. Stack, Wesley Duke, and Kelly Alexander, Chief of Staff for the Department of Public Health, regarding the Maryville Baptist Church.

Treasurer Ball stated that these communications confirm that the Governor's closest advisors were acting in furtherance of these unconstitutional orders. The coordinated efforts to follow the Governor's directives involve law enforcement being assigned to conduct surveillance and distribute notice of possible violations, as well as interaction and coordinated efforts with health departments and law enforcement. Treasurer Ball mentioned that correspondence discussing church gatherings would receive a quick response, but no action was taken when a large business reported employees with flu-like symptoms. Treasurer Ball noted that requesting law enforcement to monitor and give notices on Sundays results in overtime pay and comp time. One county indicated that it would probably need law enforcement assistance in closing a church that had been having a service. Treasurer Ball stated that she received an email stating how difficult it was to enforce the Governor's mandatory closings, and the reply from the health department stating that their issues are with churches.

Treasurer Ball stated that the funding of these directives involves KSP salaries and funding to local health departments, and it would be almost impossible to determine what specific part of their salary was used to do something unconstitutional.

Treasurer Ball stated that this information is helpful to legislators in making reforms to KRS Chapter 39A regarding freedom of religion, freedom of speech, and freedom to assemble. The information is important for constituents to be able to hold elected officials accountable. Treasurer Ball also stated that Governor Beshear stated in his filings against the Maryville Baptist Church that he wanted the federal courts to restore his leeway in this area.

In response to Representative Bratcher, Treasurer Ball stated that she did not see anything from the Governor's Office indicating similar treatment towards protestors, but there was a directive stating that there was to be no enforcement of the Governor's orders against protestors.

In response to Representative Maddox, Treasurer Ball clarified that it was a local health department member who stated in an email that "no one feels comfortable crossing that religion line". Representative Maddox agreed that reforms to KRS Chapter 39A needs to be considered due to the unequal application of laws to different groups.

In response to Representative Sorolis, Treasurer Ball clarified that the Supreme Court did not declare that a state can limit in-person gatherings of church members. This does not cause a disagreement between the Kentucky Constitution and the US Constitution. Treasurer Ball indicated that a crisis situation does not impact the constitutionality of behavior.

In response to Representative Hatton, Treasurer Ball explained that it would be incredibly difficult to go through each KSP officer's and health department employee's salary to determine what portion was used for an unconstitutional action. Treasurer Ball reiterated that her job is to ensure that expenditures are constitutional, legal, and correct. Regardless of the amount, she is informing the committee that an unconstitutional expenditure occurred so that they can consider how to deal with it legislatively. The delay of this report is due to the information not being received until September 2020.

Senator Wheeler stated that the pandemic has confirmed that some leaders in this country want to decide what speech is appropriate or inappropriate. People were not allowed to hold religious gatherings, yet protestors were not kept from gathering and caused massive damage. Religious organizations not being allowed to gather has caused a spiritual desolation throughout our society.

In response to Representative Massey, Treasurer Ball stated that there has been no communication from the Governor's Office to the Office of the Kentucky State Treasurer.

In response to Senator Carroll, Treasurer Ball clarified that her report spans from March 1, 2020 to June 15, 2020. The bulk being before any federal court cases were decided.

In response to Representative Kulkarni, Noah Friend, General Counsel of the Kentucky State Treasurer's Office, stated that he would try to formulate figures indicating how many hours the Treasurer's Office spent on investigating and preparing this report. Secretary Ball advised that her testimony did not require a document presentation, but she felt it would be helpful for the members to have a report. She also clarified that the intention of this investigation was to confirm whether or not this unconstitutional activity was widespread or limited, not to come up with an amount on the spending.

Senator Neal commented that we need to join together in these times to protect the citizens of the Commonwealth and not try to pull each other down.

In response to Representative Cantrell, Secretary Ball stated that her job is to verify that all state expenditures do not violate the constitution.

In response to Senator Nemes, Mr. Friend advised that the list of license plates of church attendees was forwarded to the local health department, KSP, the Cabinet for Health and Family Services, and the health departments of any other county where a church member lives. Treasurer Ball added that the list is subject to public records, so the public can request it.

In response to President Stivers, Treasurer Ball confirmed that she took an oath to uphold the constitution. Mr. Friend provided a brief overview of the cases brought against

the Governor and their current status. The case filed by the Tabernacle Baptist Church is closed, due to an agreed order by the Governor stating that a suit could be brought again if the Governor attempts to violate the order. Treasurer Ball confirmed that the notices placed on churchgoer cars declared that their actions could result in one year of jail and a \$500 fine, a Class A misdemeanor. President Stivers mentioned that if the court's decision was that this action against church worshipers is wrong, then the people need to admit that it is wrong.

Chairman Westerfield commented that constitutional rights need to be protected, and should not be based on cost, and that this report will be useful when considering changes to KRS Chapter 39A during the upcoming session.

NET Recovery Treatment

Chairman Westerfield stated that he watched a documentary entitled "The Final Fix" about addicts in Kentucky being treated with NeuroElectric Therapy (NET) by the Isaiah House. As such, he reached out to NET to present to the committee.

Owen Fielding, Operations Manager for NET Recovery Corporation, commended Kentucky for supporting non-profit enterprises such as the Isaiah House in treating those with substance use disorders (SUD). Mr. Fielding stated that NET Recovery Corp is a U.S. company that developed NET as a non-medication monotherapy which attenuates withdrawal symptoms and cravings during opioid discontinuation and shows improved rates of relapse prevention. The technology was discovered in the 1970s by Doctor Margaret Patterson. The neuro-stimulation is delivered across the skull, applied to the skin and is noninvasive, using the company's NET Model 90 stimulator device. It is powered by a 9V battery and connected to adhesive electrode pads behind each ear for a 5-day treatment. Programming capabilities, patient management, and client support are provided through the company's software application, NETVue. NET works by accelerating the rate in which the body restores depressed neurotransmitter production, which gets disrupted during the addiction cycle. NET removes long-term cravings, enabling patients to be more successful with recovery. Patient studies in Kentucky show patients from two and half years ago continue to be drug-free, are employed, and paying rent. Wayne State University completed 26 studies comparing NET with 38 different medications used for inpatient opioid discontinuation. Results concluded that NET is a promising approach that merits prospective, randomized, sham-controlled efficacy studies for opioid discontinuation and relapse prevention. Mr. Fielding reviewed the success of over 250 Kentuckians, from 2011 to 2016, who received a 5-day treatment at the Isaiah House. "The Final Fix" documentary covers the Subjective Opiate Withdrawal Scale that measures the reduction of withdrawal symptoms. "The Final Fix" was filmed at the Isaiah House in Willisburg, Kentucky in 2018 and is available on Amazon Prime.

Mr. Fielding believes that using NET reduces pressure on drug courts and county jails by giving treatment to individuals with SUDs, improving relapse prevention, and

reducing reoffending behavior. However, NET can only be used in the U.S. as an investigational device until FDA clearance is granted. Mr. Fielding noted that Kentucky could work with a university to design and lead a study of individuals with co-occurring substance misuse disorder and offending behavior, measuring long-term relapse prevention rates and the reduction in offending behavior. The cost of the study would depend on the size of the study group and could cost up to \$2,000,000. In comparison, Methadone costs \$600 per month for a five year treatment, whereas NET is a onetime treatment that costs less than one years' worth of Methadone. While on Methadone a patient may not be able to work or drive, but a NET patient would be cognitively aware and engaged in 5 days.

In response to Representative Moser, Mr. Fielding clarified that The Bridge is minimally invasive, using needles, whereas NET is non-invasive. In addition, The Bridge is not a drug discontinuation device. It “bridges” a patient from opioids to a medicated treatment. NET is not on the commercial market, but the cost would be less than a methadone prescription.

Chairman Westerfield commented that it is good to be skeptical and to research, but you have to be open to new possibilities, and he encouraged members to watch “The Final Fix” on Amazon Prime to gather more information about NET.

There being no further business, the meeting adjourned at 12:05 PM.