IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CASE NO. 3:21-cv-00019

Matt Schweder, et al)
)
Plaintiffs,)
vs.)
)
GOVERNOR ANDREW GRAHAM)
BESHEAR, in his official and personal)
capacities, and)
)
KENTUCKY DEPARTMENT OF PUBLIC)
HEALTH COMMISSIONER)
STEVEN J. STACK, in his official and)
personal capacities, and)
)
CABINET FOR HEALTH AND FAMILY)
SERVICES SECRETARY)
ERIC C. FRIEDLANDER in his official)
And personal capacities, and)
)
JANE AND JOHN DOES 1-20,)
)
Defendants.)
_____)

PLAINTIFFS' RESPONSE TO DEFENDANTS' 12B
MOTION TO DISMISS

Plaintiffs, by and through their attorneys of record, hereby submit this Response to Defendants' 12(b) Motion to dismiss. For the foregoing reasons, this Motion should be denied.

Response

Several glaring issues must be addressed at the outset. First, the motions to dismiss contain numerous recitations presented by the Defendants as fact. Plaintiffs dispute each and every "factual recitation" in the motions and assert that the time to argue the facts of the case is not in a

motion where the facts are to be construed as alleged. Note that even post *Iqbal/Twombly* courts have recognized that a 12b(6) motion does not allow examination of the merits. Leal v. McHugh, 731 F.3d 405, 410 (5th Cir. 2013); Damnjanovic v. United States Dep't of Air Force, 135 F. Supp. 3d 601, 605 (E.D. Mich. 2015); Turner v. Pleasant, 663 F.3d 770, 775 (5th Cir. 2011); compare Garrett v. Wexford Health, 938 F.3d 69, 91 (3d Cir. 2019) ("decision to dismiss a complaint should not be entered lightly because it 'forecloses inquiry into the merits'").

Further, some courts have noted that 12b(6) motions are "especially disfavored" when related to novel legal theories Wright v. N. Carolina, 787 F.3d 256, 263 (4th Cir. 2015); Citibank N.A. v. City of Burlington, 971 F. Supp. 2d 414, 429 (D. Vt. 2013).

Despite this, Defendants acknowledge multiple factual allegations within the Complaint and then ***argue*** that the facts are false, misleading, or conspiracy theories. Plaintiffs decline to argue the facts here, other than to point out that science may always be challenged. Science is a question of fact – not law. If we cannot challenge the science then the science becomes law, and creating law is not the role of the executive.

> *"The Complaint recites a series of factual allegations concerning COVID-19, many of which are false or misleading characterizations. Among other things, a Table on page 47 indicates that wearing facial coverings causes cardiovascular disease, cancer, diabetes, and Alzheimer [sic] disease. On page 48, the Complaint claims that Governor Beshear's optimistic statements about the vaccine – that they promise an "end of this virus" – are "a pre-text to continue to devastate small businesses." It also rehearses, at length, various conspiracy theories concerning case counts, death counts, COVID-19 testing, and the efficacy of facial coverings and other mitigation strategies."* (p.3 fn.8)

All of this is irrelevant and certainly does not appear to be a good faith approach to arguing a 12b motion, which is a matter of law.

Moments before filing this motion, counsel became aware of a shocking admission by defendant Beshear, consistent with their well plead averments throughout the body of the

complaint. On June 11, 2021 Defendant issued an executive order in which he declares anew the now seemingly perpetual state of emergency, ***not because an emergency exists, but because by his own published admission, declaring an ongoing state of emergency will help him tap into extra federal money***.[1] Does he think the promise of a few federal dollars will cleanse the Commonwealth's memory of the economic trauma he has inflicted upon its citizens with the aid of the other defendants over the last 14 months?

In support of their various legal arguments attempting to support a science reason for the executive declaration of ongoing emergency (again, misplaced in a 12(b) motion) Defendants wield a recent Kentucky Supreme Court ruling, discussed further below, as if it is a sovereign talisman, when in fact that case represents an answer to five specific discrete questions, none of which are present in the Complaint they now seek to dismiss.

Sufficiency of the Complaint

As the Defendants accurately admitted on page 4 of their memorandum, in considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must construe the complaint in a light most favorable to the plaintiff and ***accept all factual allegations as true***. *Prater v. City of Burnside, Ky.*, 289 F.3d 417, 424 (6th Cir. 2002).). [EMPHASIS ADDED].

Indeed, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, ***accepted as true***, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). [EMPHASIS ADDED].

Under Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)**,** a complaint must include sufficient facts to state a claim to relief that is plausible on its face for it to avoid dismissal for

[1] https://governor.ky.gov/attachments/20210611_Executive-Order_2021-386.pdf

failure to state a claim. The Sixth Circuit balances these requirements, that is, making a short and plain statement of the grounds, claim, and relief sought, while including sufficient facts, especially in light of Erickson v. Pardus, 550 U.S. 89, 127 S. Ct. 2197 (2007).

In Erickson, the Supreme Court affirmed that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only 'give the Defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Id. at 2200 (quoting Twombly, 127 S. Ct. at 1964) See Sensations v. City of Grand Rapids, 526 F.3d 291, 296 (6th Cir. 2008) The Court in Sensations went further, pointing out that the civil rules and controlling case law required "more concrete allegations only in those instances in which the complaint, on its face, does not otherwise set forth a plausible claim for relief." Sensations at 296 footnote 1.

Here – underlying many of the claims – is the specific allegation that no emergency exists to justify these extraordinary steps. Those fact allegations are recited throughout the complaint and factual disputes must be resolved at trial, not by way of a 12b motion.

Standing

Defendants have pointed to the correct 3-factor test for determining standing. The plaintiffs must show: "(1) 'injury in fact,' *(*2) 'a causal connection between the injury and the conduct complained of' and (3) redressability." *Taylor*, 680 F.3d at 612. Plaintiffs have done this throughout the complaint with sufficient specifity. The question here is only whether the Plaintiffs have stated a cognizable claim for relief. They have. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In a recent Order from Boone Circuit Court in Kentucky, a Judge found a causal

connection between the substantially same conduct of the exact same Defendants and the injuries complained of, which the Boone Circuit Court went on to redress, after a final hearing. The Plaintiffs were a private business and the Attorney General of the Commonwealth of Kentcky against the herein Defendants.

It is preposterous for the Defendants to claim that the Plaintiffs in this matter lack standing.

1. Each Plaintiff was injured in numerous ways, including through Constitutional violations, which are described in detail in the body of the Complaint. These fundamental violations include, but are not limited to, the following examples:

a. RIGHT TO PEACEFULLY ASSEMBLE AND GATHER; AND MOVE FREELY ABOUT - Lockdowns, closures and restrictions of recreational and entertainment businesses, restaurants, being under house arrest, and ceasing all visitation - depriving each and every Kentuckian (together with all of the Plaintiffs) of freedom to peacefully assemble and gather; and move freely about.

b. RIGHT TO PERSONAL AUTONOMY AND BODILY INTEGRITY - Defendants deliberately interefered with the right *to be free from* unwanted medical intervention, and the right *to obtain* medical intervention, causing harms as alleged in the Complaint.

c. FUNDAMENTAL RIGHT TO ENGAGE IN COMMON OCCUPATION (WORK) – Executive Orders deprived Plaintiffs Larry Nichols, Joshua Nichols, Wesley Anglin, Frank Anglin, Maggie Anglin, Robin, and Charles W. Burton of this fundamental right.

d. DUE PROCESS VIOLATIONS – all Plaintiffs, as set forth in the Complaint.

e. FREE EXERCISE OF THEIR FAITH - As a direct and proximate result of the Emergency Mandates, Plaintiffs Larry Nichols, Joshua Nichols, Wesley Anglin, Frank Anglin, Maggie Anglin, Robin Harboldt and her minor child P, and Charles W. Burton have been

burdened in the free exercise of their faith, and related rights of association. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U. S. 347.

f. Increased stress, anxiety and psychological deterioration due to the oppressive restrictions that have nothing to do with controlling a virus with over 99% survival rate (all plaintiffs);

g. Loss of liberties for school aged children who were deprived of the right to assemble for graduation, sports and the like (Schweder)

2. These injuries are either ongoing or clearly have the potential of occurring based on the fact that the Governor of Kentucky has made it clear he is more than willing to reinstitute these.

3. The Court has the ability to remedy these injuries by granting the requested relief.

4. Plaintiffs finds shocking the State's apparent argument that, under the guise of a declared public health emergency, the Plaintiffs and the public should be denied the right to contest the stripping away of their Constitutional and other rights on the basis of a 12(b) motion. Even requesting 12(b) relief for a Complaint with numerous clearly stated Constitutional violations that otherwise met the Federal standards for sufficiency frankly indicates a true lack of appreciation for the gravity of the situation. Further, this illustrates the State's malice in issuing these unconstitutional mandates.

5. Ultimately this motion cannot stand, and Plaintiffs believe that instead of wasting the Court's and Plaintiff's time, the Defense should be rushing to provide discovery demonstrating that the emergency is real and they have nothing to hide.

Sovereign Immunity & the 11th Amendment

6. Before beginning this discussion, it is worth noting that the State is conflating 11th Amendment immunity between injunctive relief and damages between the State and officials in their individual capacity. They are different questions, and all end up working in favor of the Plaintiffs. Injunctive relief is always available against officials for violations of Constitutional rights as discussed below. Further, new precedent from the Supreme Court makes it clear that damages are also available for violations of such rights.

7. Plaintiffs point out that even under *Ex parte Young*, 209 U.S. 123 (1908), the Court made it exceedingly clear that jurisdiction over unconstitutional actions of officials is within the Court's purview for review. *Young* has made clear that individual officials may be restrained from violating Constitutional law. *Young* was based on the legal fiction that separated individual officials from their role as parts of the state when they violated the Constitution. This was further supported in the more recently decided, *Tanzin v. Tanvir*. 141 S. Ct. 486 (2020). Here, the State officials were named both individually and as representatives of the State within the complaint as Plaintiffs believe both should apply but the case moves forward if either applies.

8. Further, under the Religious Freedom Restoration Act and *Roman Catholic Diocese of Brooklyn, New York v. Andrew M Cuomo, Governor of New York*, 141 S.Ct. 63 (2020), it certainly appears that sovereign immunity is waived by statute regarding violations of religious freedom which have been discussed in the complaint.

9. Further, The Court in *Tanzin* noted the following, which have bearing on standing, immunity, and damages:

> "The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the Federal Government from imposing substantial burdens on religious exercise, absent a compelling interest pursued through the least restrictive means. 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.* It also gives a person whose religious exercise has been

> unlawfully burdened the right to seek "appropriate relief." The question here is whether "appropriate relief" includes claims for money damages against Government officials in their individual capacities. We hold that it does." *Tanzin v. Tanvir*, 141 S. Ct. 486, 208 L. Ed. 2d 295, 2020 U.S. LEXIS 5987, 28 Fla. L. Weekly Fed. S 611, 2020 WL 7250100.
>
> "In the context of suits against Government officials, damages have long been awarded as appropriate relief. In the early Republic, "an array of writs . . . allowed individuals to test the legality of government conduct by filing suit against government officials" for money damages "payable by the officer." Pfander & Hunt, Public Wrongs and Private Bills: Indemnification and Govt Accountability in the Early Republic, 85 N. Y. U. L. Rev. 1862, 1871–1875 (2010); see *id.*, at 1875, n. 52 (collecting cases). These common-law causes of action remained available through the 19th century and into the 20th. See, *e.g.*, *Little* v. *Barreme*, 2 Cranch 170 (1804); *Elliott* v. *Swartwout*, 10 Pet. 137 (1836); *Mitchell* v. *Harmony*, 13 How. 115 (1852); *Buck* v. *Colbath*, 3 Wall. 334 (1866); *Belknap* v. *Schild*, 161 U.S. 10 (1896); *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 619–620 (1912) ("The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded")."
>
> "Damages are also commonly available against **state and local government officials** {EMPHASIS ADDED]. In 1871, for example, Congress passed the precursor to §1983, imposing liability on any person who, under color of state law, deprived another of a constitutional right. 17Stat. 13; see also *Myers* v. *Anderson*, 238 U.S. 368, 379, 383 (1915) (affirming award of damages against state election officials)."
>
> "There is no doubt that damages claims have always been available under §1983 for clearly established violations of the First Amendment. See, *e.g., Sause* v. *Bauer*, 183 S.Ct. 2561 (2018) (*per curiam*) (reversing grant of qualified immunity in a case seeking damages under §1983 based on alleged violations of free exercise rights and Fourth Amendment Rights); *Murphy* v. *Missouri Dept. of Corrections*, 814 F.2d 1252, 1259 (CA8 1987) (remanding to enter judgment for plaintiffs on a §1983 free speech and free exercise claims and to determine and order "appropriate relief, which . . . may, if appropriate, include an award" of damages)."

10. Another recent Supreme Court decision, *New York State Rifle & Pistol Association, Inc. v. City of New York*, 140 S.Ct. 1525 (2020), is also relevant here. In that case a Constitutional question related to the Second Amendment was asked of the Court. The Court ruled that the question was moot but remanded the case while allowing the petitioners to add the damages

claim. This is a clear statement from the Court that damages are a legitimate remedy in the event of a Constitutional violation and also a further demonstration of the absurdity of Defendants' proposition that this Court does not have authority to decide this case.

11. The Civil Rights Act of 1964 bans religious discrimination and allows sovereign immunity to be set aside. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (this applies to religious exemptions for masks, testing, and vaccinations), and Plaintiffs intend to argue that the Americans with Disabilities Act also allows for such actions.

12. With very few exceptions, the questions presented in the complaint involve violations of federal statutes and Constitutional rights throughout the state that negatively impact the Plaintiffs.

13. This brings us to *Young*. The *Young* Court cites *Hans* v. *Louisiana*, 134 U.S. 1, where the Court noted that sovereign immunity stems from legislative actions taken by the state – NOT executive fiats. The Court specifically says:

> "The legislative department of a state represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself. To deprive the **legislature** **[EMPHASIS ADDED]** of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure of a state to discharge its public debts, would be attended with greater evils than such failure can cause."

14. In this case the legislature acted and Governor Beshear vetoed the law which they enacted, limiting his emergency powers. The legislature then overrode his veto with a supermajority and Governor Beshear obtained a restraining order against the law properly enacted by the legislature. In this manner, defendant Beshear deprived the legislature of the

power of judging what the honor and safety of the Commonwealth of Kentucky requires, in just the way the Supreme Court predicted would be attended with great evils.

15. Defendants offer *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) for the blanket proposition that "The Eleventh Amendment bars claims for monetary damages against State officers in their official capacities" It seems a conspicuous omission to fail to note that the *Edelman* Court begins its analysis by conceding that "…***the [11th] Amendment by its terms does not bar suits against a State by its own citizens***…".)[EMPHASIS ADDED].

16. This leads to the question of whether there is such a thing as absolute sovereign immunity. The Supreme Court has answered with a resounding NO on multiple occasions. Perhaps the most applicable NO is articulated with depth and finesse in *Home Bldg. & Loan Asso. v. Blaisdell*, 290 U.S. 398 (1934). The Court in *Blaisdell* made it abundantly clear that, for example, that the State authority to act in any lawful manner is always inherently restrained by the Contract Clause of the US Constitution. The *Blaisdell* Court speaks of finding a harmonious balance between minimizing the restraint upon the State while keeping a realistic check upon the State's police powers.

> "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other." (*id* at 439) […] Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, -- a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

Notwithstanding the desire to find balance and harmony, the *Blaisdell* Court lays down a blanket principle. "**The legislature cannot bargain away the public health or the public morals**." (*id* at 239)[EMPHASIS ADDED]. The Court continues with its principle of construction. "**The question is** not whether the legislative action affects contracts incidentally, or directly or indirectly, but **whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end**." (*Id* at 240).

In this case, the Defendants have departed from their state roles and have played the part of the legislature, as averred in the complaint, and as determined by more than one court of competent jurisdiction in the Commonwealth of Kentucky. Plaintiffs maintain that the legislative acts in question, which are thinly disguised as executive orders and mandates, are no longer addressed to a legitimate end, if they ever were, and that the measures taken are not reasonable or appropriate to the end they claim to serve. As such, they remain subject to the review of the court through the unavoidable restrictions against improper use of emergency and police power that remain inherent through the contracts clause and other substantive portions of the United States Constitution. These are cognizable claims which, if true, may be redressed by the relief requested, and it is clear that under *Blaisdell* this Court has authority to hear the claims and adjudicate upon them once the factual disputes have been resolved in the course of litigation.

17. Further, the cases of *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924) and *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) where state or District of Columbia laws were created under an emergency - clearly put this case within the the Court's jurisdiction as, "Whether the emergency still exists upon which the continued operation of the law depends is **always open to judicial inquiry**." *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934). P. 290 U. S. 442. [EMPHASIS ADDED].

18. All of this makes clear that this Court has jurisdiction over this suit and that the Defendants are subject to liability. The concept of "prospective relief" was not followed by the Supreme Court in any of the above-cited law, nor is it relevant here.

19. Plaintiffs also note that the Complaint named both the State of Kentucky and the various officials. These officials were included individually and are being sued both as representatives of the state and in their individual capacities. Prior to discovery it is unclear whether the violations of the law that have occurred were done in bad faith (which would bar any claimed immunity that may or may not apply) or simply in their official capacity - though Plaintiffs do not believe damages should be barred in either event. What is *not* unclear is that the actions taken by these officials is and were unconstitutional and that both damages and injunctive relief are available for Constitutional violations.

20. Defendant Stack is a medical doctor with a great deal of experience and credentials behind his name. Defendant Friedlander's curriculum vitae boasts of his being a leader in implementing the Affordable Care Act with a tremendous amount of experience in the medical life of the community. As such, it is reasonable to presume that both Defendants are qualified for their positions and will make informed decisions. Accordingly, Plaintiffs believe that decisions made that were not in line with those made by someone that is "qualified" under the law would still be subject to that same high standard of review. Given the facts of this case, as laid out in the complaint, it certainly rises to the level of a legitimate question of fact and/or law as to whether either Defendant violated the law, and if so whether it was done intentionally or negligently.

21. In assessing whether officials actions violate the due process clause of the constitution, the standard is whether the actions in question "shock the conscience".

> In the context of the "shocks the conscience" standard for a *Fourteenth Amendment* violation inquiry, the critical question in determining the appropriate standard of culpability is whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct. This time to deliberate consideration, however, does not transform any reckless action from a tort to conscience-shocking behavior simply because the government actor had time to appreciate any risk of harm. Time is instead one element in determining whether the actor's culpability inches close enough to harmful purpose to spark the shock that implicates substantive due process. The court's focus instead is upon the entirety of the situation—the type of harm, the level of risk of the harm occurring, and the time available to consider the risk of harm are all necessary factors in determining whether an official was deliberately indifferent.
> […]
> In the context of the "shocks the conscience" standard for a *Fourteenth Amendment* violation inquiry, when such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. (*Guertin v Michigan*, 912 F.3d 907 (2019).

22. In this case the defendants had a great deal of time. This was not a true emergency by any meaningful definition of the word. Plaintiffs contend that this is like a seasonal influenza, that will always be with us. The defendants had the knowledge, the training, the time, and the extended opportunities to do better. Instead, they chose to act in the place of our lawmakers and smothered the state, the people of the state and the plaintiffs with one injurious order or mandate after another.

23. As the timeline included with the complaint shows, there was ample information readily available to governors and health secretaries and commissioners, such that willful ignorance can scarcely describe what plaintiffs contend has been taking place over the last 14 months. There has arguably never been play more painful example of state actors abundantly satisfying the “shocks the conscience” standard for violating due process.

24. One example the bears noting is that in or around March of 2019, multiple emergency hospitals were built to accommodate anticipated overflow from COVID patients. Within a matter of weeks two a few months they were dismantled or mothballed as unneeded and unused.

Nevertheless, in March of 2020, the defendant were still frightening the people of Kentucky into compliance with the executive orders by declaring repeatedly that our hospitals were in danger of being overrun.

State Law Claims

25. State law claims are properly before this Court under 28 USCS § 1332. Count 2 is the only question before this Court not involving federal questions and is properly before the Court under 280 USCS § 1332. Plaintiffs assert that and argue Count 3 under both federal and state law and so this Count is also properly brought before the Court.

26. Plaintiffs are somewhat confused by the fact that the Defense has cited District, Circuit and/or state supreme court decisions as a basis to ignore the two controlling Supreme Court decisions regarding this case while affirming the controlling nature in a footnote that states those cases were, "reviewable by the Supreme Court because the emergency question was inextricably part of a federal constitutional challenge." *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924) and *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934).

27. The list of unconstitutional actions taken by the state under the guise of an emergency is endless in this case. Plaintiffs contend that quarantining healthy people statewide, closing and restricting business activities and lawful livelihoods, interfering with religious freedom, abridging freedom of movement, and other violations of fundamental liberties are "inextricably part" of this federal Constitutional challenge, and that they are clearly plead in the complaint.

28. Ultimately it appears that the Defense would ask the Court to (i) ignore these violations, as well as controlling Supreme Court precedent, (ii) pretend that this is simply a state law question, and then (iii) endorse their legal theory that under an emergency the Constitution

should not apply to a state action. While it probably goes without saying, this argument is unconstitutional and borders on absurdity. It also has no place in a 12(b) motion to dismiss.

The Merits

Conspiracy Theory

29. We begin the discussion on the merits by restating the previous section, and noting that throughout the Complaint numerous specific examples of Constitutional violations that the Plaintiffs have endured were given.

30. Defendants assert that the Complaint "…*rehearses, at length, various conspiracy theories concerning case counts, death counts, COVID-19 testing, and the efficacy of facial coverings and other mitigation strategies*." (p.3 fn.8). However, in a 30 page Order from Hon. Richard A. Brueggeman of Boone Circuit Court entered June 08, 2021, the following were found by the Court to be so persuasive as evidence grounded in logic that it based portions of its ruling upon them (citation)[EMPHASIS ADDED]:

- "…**the measures imposed in Kentucky have had no appreciable effect when compared to other states**." (p.12)
- "…**government actions such as border closures, full lockdowns and a high rate of COVID-19 testing, were not associated with statistically significant reductions in the number of critical cases or overall mortality**." **Similarly**, […]"**[s]tringency of measures settled to fight pandemia, including lockdown, did not appear to be linked with the death rate**." (p. 13 citing expert witness testimony regarding published studies(
- "**It isn't just that the government lockdowns did not help. Rather, she opined, the government's actions have inflicted more harm and death.**" (p. 14 quoting from an expert witness).
- "**both the six-foot-distancing rule, and mask mandates, are wholly ineffective at reducing the spread of this virus. Masks are worthless, […], because they are not capable of filtering anything as small as Covid-19 aerosols**." (p. 16 quoting from another expert witness).
- "…**mask wearing provides no benefit whatsoever, either to the wearer or others.**" (p.17 quoting from an expert witness)

- "…**both the medical and non-medical face masks are ineffective to block human-to-human transmission of viral and infectious diseases, such as SARS, CoV-2 and COVID-19**." (p.18 citing a Stanford Study)

- "…**the data comparison demonstrate there to be no emergency justification for continuing Governor Beshear's orders**." (p.20 comparing Kentucky to freer states).

- "**Case counts have been the poster child for the need to deprive people of their liberty**." (p.21 discussing faulty CDC case counts and problems with PCR testing).

- "**If a purported emergency that would extend beyond 30 days is not sufficiently urgent to call a special session, then it is not sufficiently urgent to justify the imposition of indefinite and open-ended rulemaking by executive decree. As John Adams counseled, *"The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty***." (p.25 discussing the Constitutionality of new legislation limiting the Governor's emergency powers).

31. These quotes from Judge Brueggeman's Order punch fatal holes in the Defendants derogatory use of the term "conspiracy theory" to disparage Plaintiffs claims. However, if Defendant's are in effect admitting to a conspiracy, then it is a matter of discovery to determine how deep the conspiracy runs and to which Defendants the terms applies.

The Actual State of the Law

32. Defendants rely on *Jacobson* as the core of its defense on the merits.

33. Plaintiffs have briefly discussed in the complaint that *Jacobson* was meant to be a narrow ruling with an extremely limited reach. The Court in *Jacobson* noted:

> ""Before closing this opinion, we deem it appropriate, in order to prevent misapprehension as to our views, to observe -- perhaps to repeat a thought already sufficiently expressed, namely -- that the police power of a State, whether exercised by the legislature or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression."[2]

[2] Jacobson v. Mass., 197 U.S.11(U.S. 1905)

34. The Court plainly states that the ruling was not meant to bar further review: "We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error." *Id.*

35. Plaintiffs also believe the Courts were not properly informed on the current state of the law in that case. The *Jacobson* ruling has been substantially limited since the time of its issuance, though no one seems to have noted this. In *Planned Parenthood v. Casey,* 505 U.S. 833, the Court stated:

> *Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe's* view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990); cf., *e. g.*, *Riggins v. Nevada*, 504 U.S. 127, 135, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (1992); *Washington v. Harper*, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); see also, *e. g.*, *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30, 49 L. Ed. 643, 25 S. Ct. 358 (1905).

36. To reiterate – "**a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims**." [EMPHASIS ADDED] It must be noted that the Court actually cites *Jacobson* in its justification for this quote.

37. If a State's interest in the protection of life falls so short of being able to override individual liberties that it may not be used to prevent the killing of a fetus, how then can the state possibly argue that it may forgo individual liberties in an attempt to force ineffective and unproven methods of preventing and/or treating a disease that has a 99.996% overall recovery rate?

38. To further support Plaintiffs' position that the overly broad reading of *Jacobson* does not apply we point the Court to *Roman Catholic Diocese of Brooklyn, New York v. Andrew M Cuomo, Governor of New York,* 141 S.Ct. 63 (2020). That case contained no challenge as to whether or not COVID-19 presents a compelling interest which is one of the challenges included here. Despite that, the Court held that the restrictions on religious institutions in New York violated equal protection standards and were unconstitutional.

39. The Supreme Court has held that "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U. S. 347, 373 (1976), and that strict scrutiny still applies to such restrictions regardless of whether an emergency exists. This clearly indicates that a case and controversy exists as it applies to questions pertaining to the Constitutional authority of the Defendants as laid out in this case.

40. In a concurring opinion Justice Gorsuch very pointedly notes:

> What could justify so radical a departure from our First Amendment's terms and long-settled rules about its application? Our colleagues offer two possible answers. Initially, some point to a solo concurrence in South Bay Pentecostal Church v. Newsom, 590 U. S. ___ (2020), in which THE CHIEF JUSTICE expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency and how little was then known about the disease. Post, at 5 (opinion of BREYER, J.). At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from South Bay, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.
>
> Not only did the South Bay concurrence address different circumstances than we now face, that opinion was mistaken from the start. To justify its result, the concurrence reached back 100 years in the U. S. Reports to grab hold of our decision in Jacobson v. Massachusetts, 197 U. S. 11 (1905). But Jacobson hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.

41. After other relevant discussion, Justice Gorsuch then goes on to say in regards to *Jacobson*:

> "That was the first case South Bay cited on the substantive legal question before the Court, it was the only case cited involving a pandemic, and many lower courts quite understandably read its invocation as inviting them to slacken their enforcement of constitutional liberties while COVID lingers."

And:

> "Why have some mistaken this Court's modest decision in Jacobson for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do."

And finally:

> "It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."

42. As a matter of law, rational speculation is not the proper standard here. The Supreme Court has clearly stated that the standards of strict scrutiny apply regardless of the existence of an emergency. Plaintiffs object to Defendants' characterization of their mandates as "reasonably justified" or even as "…based in an interest of protective lives…". These statements represent controversies that lie at the heart of the Complaint. Further, it has been ruled that facts presented in opposition but not in the complaint cannot be considered in a motion to dismiss. *Halebian v. Berv*, 644 F.3d 122, 131 n.7 (2d Cir. 2011); *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015). Also, the 6th Circuit has held, ""[i]f a court does consider material outside the pleadings, the motion to dismiss must be treated as a motion for summary judgment under Rule 56 and all parties must be given a reasonable opportunity to present all material pertinent to the motion." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016).

43. Defendants assert that there is no fundamental right to travel. However, The Supreme Court disagrees and did so as far back as 1900 in *Williams v. Fears*, 179 U.S. 270, 274, (1900).

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.

More recently, in *Shapiro v Thompson*, 394 US 618, 629-631 (1969);

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 48 U. S. 492 (1849):
>
> "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

In addition, as the Supreme Court so eloquently articulated in *KENT v. DULLES*, 357 U.S. 116, 125-126, 78, (1958);

> **The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment**. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Three Human Rights in the Constitution of 1787 (1956), 171-181, 187 *et seq.*, shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. **It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.** "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."
>
> Freedom of movement also has large social values. As Chafee put it: "Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers

> in the United States by instruction in foreign universities. **Then there are reasons close to the core of personal life -- marriage, reuniting families, spending hours with old friends**. (internal citations omitted, EMPHASIS ADDED].

44. Regarding the fundamental right to education, The Supreme Court in Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) put it this way:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In [****16] these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Plaintiffs contend that shutting down the schools, when school-age children are statistically at a zero percent chance of death from Covid, puts an undue burden on working parents and serves no legitimate state interest. Again, this is a colorable claim that may be redressed by the relief sought.

45. Defendants assault the fundamental right to work by citing case law that says you have no right to work in a specific profession. This is a red herring. We are addressing sweeping executive "laws" that effectively prohibit entire categories of people from working at any job whatsoever, and as the Yale Law Journal pointed out, "in cases involving unenumerated rights claims brought under the Due Process Clause, the Court has been ignoring prior doctrine and instead balancing the importance of the right at issue against the government's interest in infringing upon that right."[3] Plaintiffs contend that the right to work at some job, rather than non

[3] https://www.yalelawjournal.org/forum/the-due-process-right-to-pursue-a-lawful-occupation-a-brighter-future-ahead

at all, is fundamental, and the Defendants restraint by fiat was arbitrary and capricious and served no legitimate Government purpose.

46. In the recent Order from Judge Brueggeman, cited above, the Court held that "…clearly, what has been ordered by the Governor's emergency decrees constitute legislation." The Court went on to point out that:

> It is obvious from even a cursory review that the orders issued over the past fifteen months of "attempt to control" and seek "to form and determine future rights and duties" Kentucky citizens. These included ordering the closure of all businesses, except those the Governor deemed essential. He ordered churches closed, prohibited social gatherings, including at weddings and funerals, prohibited travel, and through CHFS, even prohibited citizens from receiving scheduled surgeries and access to medical care. And then there is the order that everyone wear a mask. These are, undeniably, attempts to control, set policy, and determine rights and duties of the citizenry. Except in those instances where the federal courts have stepped in, Defendants assert authority to modify or re-impose these orders at their sole discretion. Consider, for example, the recent modification of the mask mandate. It orders persons who did not get vaccinated for Covid-19 to wear masks but lifts that requirement for others. That is setting policy and determining future rights and duties. (*id* at pp. 26, 27).

47. In light of this ruling, Defendants are effectively contending that they have an unassailable right to create laws under the guise of the Governors "emergency" declaration to close all businesses save those that they alone deem "nonessential", and that great deference must be given to their "lawmaking" because they are motivated by a self-described effort to save lives. Plaintiffs, together with Hon. Judge Brueggeman, contend otherwise.

Standards for 12b(6)

48. While the State does not specifically state the grounds for dismissal on the merits it appears that motions to dismissed are based on rule 12b(6).

49. In regards to 12b(6) motions, the 6th Circuit has stated that, ""A motion to dismiss for failure to state a claim is disfavored, especially when one's civil rights are at stake." *McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012).

50. The Defendants bear the burden of showing that no adequate claim for relief has been presented. *Bruni v. City of Pittsburgh*, 824 F.3d 353, 361 n.11 (3d Cir. 2016); *Davis v. Wells Fargo*, 824 F.3d 333, 350 (3d Cir. 2016); *Cohen v. Bd. of Trustees of the Univ. of the D.C.*, 819 F.3d 476, 481 (D.C. Cir. 2016) ("Rule 12(b)(6) places this burden on the moving party"); *Crugher v. Prelesnik*, 761 F.3d 610, 614 (6th Cir. 2014); see Moore's Federal Practice - Civil § 12.34[1].

51. In ruling on a Rule 12(b)(6) motion to dismiss, the Court must construe the complaint in favor of the non-moving party, accept the plaintiff's factual allegations as true, and determine whether plaintiff's factual allegations present plausible claims. *Bowman v. U.S.*, 564 F.3d 765, 769 (6th Cir., 2008).

52. For the Defense to be successful they may only meet this burden by demonstrating that the facts do not show the claim has substantive plausibility. *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

53. As noted above, in ruling on a Rule 12(b)(6) motion to dismiss, the Court must construe the complaint in favor of the plaintiff, accept the plaintiff's factual allegations as true, and determine whether plaintiff's factual allegations present plausible claims. *Bowman v. U.S.*, 564 F.3d 765, 769 (6th Cir., 2008).

54. If, as laid out in the complaint, the Defendants have misled the public as to the dangers of this disease, the Defendants have taken numerous actions that have violated both Constitutional and other rights of citizens under the false pretense of an emergency, and the taking of these actions caused injury (which is a proper presumption when Constitutional rights are violated - *Roman Catholic Diocese of Brooklyn, New York v. Andrew M Cuomo, Governor of New York,*

141 S.Ct. 63 (2020) and *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020)), then how can the Defendants suggest that there is no plausible claim?

WHEREFORE, For the reasons set forth herein Plaintiffs humbly request that the Motions to dismiss be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was submitted electronically through the PACER System on June 11, 2021.

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