M E M O R A N D U M

To: Kentucky Governor Andy Beshear
From: Douglas L. McSwain, Wyatt Tarrant & Combs, LLP
Date: April 2, 2021

Re: Constitutionality Analysis of SB 5 (as passed on 3/31/2021)

Question: Is SB 5 as passed by the General Assembly on 3/31/2021 constitutional under Kentucky's jural rights doctrine?

Answer: Yes. The jural rights doctrine stems from a collective reading of three provisions in the Kentucky Constitution, Sections 14, 54, and 241. The doctrine is forceful and Kentucky's highest court (*i.e.,* the former Kentucky Court of Appeals, and post-Judicial Article, the Kentucky Supreme Court) has interpreted it to preclude the General Assembly from enacting legislation that would abolish or infringe upon common law actions for wrongful death or personal injury. *See, e.g., Williams v. Wilson,* 972 S.W.2d 260, 265-267 (Ky. 1998)(striking as unconstitutional KRS 411.184, the punitive damages statute, to the extent of that statute's omission of gross negligence as a judicial remedy in common law negligence actions and discussing extensively the scope and origins of Kentucky's jural rights doctrine); *see also Commonwealth of Kentucky v. Claycomb by and through Claycomb*, 566 S.W.3d 202, 206-210 (striking as unconstitutional the Medical Review Panel Act due to its violation of the "open-courts" prong of the jural rights doctrine within Kentucky Constitution Section 14).

Kentucky's jural rights doctrine is not, however, immutable. It is counter-balanced by Kentucky Constitution Section 231, which preserves Kentucky's "sovereign immunity" unless and until the General Assembly waives such immunity "by law." Specifically, Section 231 provides: "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." Under Section 231, the General Assembly possesses complete discretion whether, and in what manner to waive immunity or permit "[s]uits against the Commonwealth." In other words, Section 231 *preserves* "the Commonwealth's" sovereign immunity, and nothing in the jural rights doctrine in Section 14, 54, or 241 infringes upon, or overrides the General Assembly's complete discretion whether or how to preserve or waive the immunity of "the Commonwealth." Moreover, Section 231 has never been interpreted to mean the General Assembly *must* affirmatively allow for any "suits" or permit any form of legal recourse against "the Commonwealth."

Kentucky courts have furthermore determined that the jural rights doctrine is not violated if the General Assembly enacts legislation that establishes or even *displaces* common law legal duties owed by premises owners' to others. *See, e.g., Poore v. 21st Century Parks, Inc.*, 2020 WL 4498825 at *6-*8 (Ky. App. 2020)(construing KRS 411.190 as consistent with the jural rights doctrine notwithstanding its alteration of premises owners' duties to others consistent with the common law, citing *Sublett v. United States,* 688 S.W.2d 328, 329 (Ky. 1985) and in footnote 12, *citing Bransom's Adm'r v. Labrot*, 81 Ky. 638, 643 (1884)); *Johnson v. Bond*, 2019 WL 1302397 at *5 (Ky. App. 2019)("Recreational Use Statute *displaces* the common law duties with which [a] landowner would be charged in the statute's absence," (emphasis added), quoting *Collins v. Rocky*

Knob Assocs., Inc., 911 S.W.2d 608, 612 (Ky. App. 1995)); *see also Page v. City of Louisville,* 722 S.W.2d 60, 61 (Ky. App. 1986)(construing *Sublett* to mean "an owner of land, who makes it available . . . for recreational purposes . . . is under no general [legal] duty. . ."). In sum, there are multiple appellate cases upholding the General Assembly's ability to statutorily modify premises owners' legal duties pursuant to KRS 411.190, the Recreational Use Statute. And all of these cases are premised on the legislature's doing so constitutionally and consistently with jural rights.

Both Section 231 of the Kentucky Constitution that preserves "the Commonwealth's" sovereign immunity and the above-mentioned appellate cases construing and upholding the Recreational Use Statute inform our opinion that SB 5 as passed by the General Assembly on March 31, 2021 is consistent with, and constitutional under, Kentucky's jural rights doctrine.

SECTION 1(2) OF SB 5

Section 1(2) of SB 5 establishes the legal duties owed by "owners" of "premises" during an emergency declared pursuant to KRS Chapter 39A. Section 1 of the bill creates a "New Section" to KRS Chapter 39A, and because it is a new section to Chapter 39A, which is a part of Kentucky's Emergency Management statutes, the courts are likely to construe this new section as indicative of the General Assembly's intent for the bill to be applied in declared emergency situations *only*. Consistent with this intent, section 1(2) affirmatively states, in part, that it is applicable "*while* a COVID-19 declared emergency affecting the premises *remains in effect or continues*. . . ." SB 5EN, Sec. 1(2)(emphasis added).

Section 1(1), subsections (e), (g), and (j) of SB 5 define the terms "executive action," "owner," and "premises" as used in Section 1(2) of the bill. Construed together, the courts should see SB 5 as providing for a limited adjustment of legal duties of owners of premises during declared emergencies if the owner "follows" any executive action to prevent the spread of COVID-19 during the. . . the declared emergency. SB 5EN, Sec. 1(2). Subdivisions (a), (b), and (c) of Section 1(2) go on to spell out what legal duties owners do not extend or owe to invitees or permittees who enter the owner's premises during the declared COVID-19 emergency.

We believe Section 1(2) is constitutional. The General Assembly has constitutionally enacted statutes adjusting the legal duties of premises owners before – *see, e.g.,* the Kentucky Recreational Use Statute which has been upheld despite jural rights challenges. *Poore*, 2020 WL 4498825 at 6-*8; *Sublett*, 688 S.W.2d at 329 & n. 12; *Johnson*, 2019 WL 1302397 at *5; *Collins*, 911 S.W.2d at 612; *Page*, 722 S.W.2d at 61. Section 1(2) of SB 5 should easily be upheld given the long line of case authority upholding the legal duty alterations provided for in the Recreational Use Statute. For this reason, we are of the opinion that Section 1(2) is constitutional in its adjustment of legal duties owed by premises owners during the declared COVID-19 emergency, and notwithstanding any potential challenge predicated on Kentucky's jural rights doctrine.

SECTIONS 1(8), 5 & 6 OF SB 5 – WHAT THEY PROVIDE AND WHY

Section 1(8)(a) of SB 5 provides: "Any essential service provider during the declared emergency of the COVID-19 pandemic shall not be liable for any COVID-19 claim." SB 5EN, Sec. 1(8)(a). Section 1(8)(b) goes on to provide: "Nothing in this subsection limits any liability of

an essential service provider for gross negligence, or wanton, willful, malicious, or intentional misconduct." SB 5EN, Sec. 1(8)(b). Likely, Section 1(8)(a) is the portion of SB 5 that some may suggest is unconstitutional. However, Governor Beshear, you should know that a cadre of attorneys together with Sen. Robert Stivers and other lawyer-legislators in the General Assembly have reviewed the applicable law in Kentucky and worked diligently to fashion SB 5 in an appropriate and constitutional manner for this state so as to provide only *limited* liability immunity for "essential service providers" whose services or businesses you declared "essential" during the COVID-19 emergency and who the General Assembly agrees with you are indeed "essential."

Pursuant to the current, pre-SB 5 provisions of KRS 39A.270 and 39A.280, the General Assembly has long provided for liability immunity for public and private actors called on to assist the Commonwealth in disaster and emergency situations. KRS 39A.280, as shown by its title, provides for "immunity" for certain public and private actors who perform "emergency response functions" or "activities" to assist the Commonwealth in fighting or mitigating a disaster or emergency. *See* Title of KRS 39A.280 ("Nature of disaster and emergency response functions provided by state or local management agency, licensed professional engineer, or licensed architect -- Immunity, exceptions."). Note that the current provisions of subsection (2) of KRS 39A.280 envision individual "workers," "representatives," "agents," and "volunteers" or "any person appointed or acting as" a "disaster and emergency services member," and "engaged in any emergency management or disaster and emergency services or disaster and emergency response activity" to be included within the "immunity" protections afforded by KRS 39A.280(2).

Likewise, current subsection (3) of KRS 39A.280 affords "immunity" (but not for willful misconduct, gross negligence, or bad faith) to "employees, agents, or representatives of the state or any of its political divisions," and to "response worker[s]," or "member[s]" of any "volunteer or auxiliary emergency management agency," "any agency engaged in any emergency management or disaster and emergency services or disaster and emergency response activity, complying with or reasonably attempting to comply with this chapter or any order or administrative regulation promulgated pursuant to the provisions of this chapter." And further, subsection (5) of KRS 39A.280 affords "immunity" to real estate and premises owners who permit their property to be used for emergency management functions or activities.

In short, the current (pre-SB 5) provisions of KRS 39A.280(2), (3), and (5) already afford "immunity" protection by extending state sovereign immunity to persons or organizations – public or private – who act, in effect, as agents of the Commonwealth in carrying out, or assist in carrying out the statewide policies, functions, and activities of state or local emergency management agencies in declared disasters or emergencies under KRS Chapter 39A. That these agents – *i.e.,* persons and organizations – covered by 39A.280's "immunity" provisions include ***both public and private persons or entities*** is apparent from KRS 39A.270(2)(current version), which authorizes the "Governor, the Adjutant General, or the Director . . . when necessary or desirable, [to] authorize the use of public employees, equipment, supplies, materials, funds, or any other publicly owned or supported resource to assist in the operations of government, ***or the private sector***, [as] necessary to deal with the disaster or emergency, regardless of whether the use is on public or private property." KRS 39A.270(2)(current version)(emphasis added).

Section 5 of SB 5 adds a new subsection to the current provisions of KRS 39A.270(***3***) that spells out the "essential services" of those individuals and businesses whose services are "necessary to deal with the [state's] response to the disaster or declared emergency or that protect the life and health of Kentucky citizens; … that otherwise constitute[] a critical infrastructure sector. . .; or . . . that are charged with responsibility for a governmental function related to a declared emergency or that is not in the ordinary course of conduct or business, including responsibilities that require changes to the medical, manufacturing, or educational environment in which they typically operate." SB 5EN, Sec. 5(3)(a)-(c). The addition of this new subsection (3) to KRS 39A.270 is perfectly consistent with the intent of the legislature from the time of adopting Kentucky's emergency management statutes in KRS Chapter 39A to provide incentives or encouragement to both public ***and private actors*** to lend a hand and assist the state in declared disasters or emergencies, and this assistance is especially important given that oftentimes, the state by itself is ill-equipped to provide a sufficient or adequate response to, or mitigation of, a disaster or emergency. The COVID-19 pandemic has certainly been a clear example of the Commonwealth not being able, on its own and without assistance from the *private sector*, to adequately fight against, or mitigate the effects of the COVID-19 pandemic. Senate Bill 5, Section 5 appropriately spells out the kinds of "essential services" that may need to be called upon in any future declared disaster or emergency, not to mention the current COVID-19 pandemic.

Under the current (pre-SB 5) provisions of KRS 39A.280, the "immunity" provided to public or private persons or entities is limited "to the extent" that insurance coverage does not otherwise exist. This limitation was derived from case law that existed prior to 1998 – the year when KRS Chapter 39A was first enacted. Under a line of cases traceable to 1942 and through at least 1997, sovereign immunity was construed by Kentucky courts to be waived or abrogated to the extent of insurance or self-insurance for an otherwise immune entity or person. *See, e.g., Taylor v. Knox Co. Bd. of Educ.,* 167 S.W.2d 700, 702 (Ky. 1942); *see also Grayson Co. Bd. of Educ. v. Casey*, 157 S.W.3d 201, 204-206 (Ky. 2005) (discussing the pre-1998 history of implied waiver of sovereign immunity by insurance coverage); *Franklin Co., Ky. v. Malone*, 957 S.W.2d 195, 203-204 (Ky. 1997) (same). This line of pre-1998 case law started eroding, however, and was later rejected outright by the Kentucky Supreme Court beginning with *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 345-346 (Ky. 1997), and it was seriously undermined in the rationale of the landmark immunity case, *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001)(which modernized Kentucky's sovereign, governmental, and official immunity doctrines). Since at least 2005, Kentucky courts have fully recognized and rejected the old notion that sovereign immunity was implicitly waived or abrogated solely because of insurance or self-insurance. *See Casey*, 157 S.W.3d at 204-206.

Accordingly, Section 6 of SB 5 appropriately strikes the old limitations on "immunity" that existed in KRS 39A.280(2), (3) and (5), and that limited immunity "to the extent" of insurance coverage because those limitations were archaic and wholly unnecessary under modern case law. Section 6 of SB 5 accomplishes a much-needed modernization of Kentucky's emergency management statutes by removing those unnecessary limitations on "immunity" for those acting on behalf of, as agents of, the Commonwealth – limitations that, as a matter of public policy, undermine the ability of the Commonwealth to call upon, and encourage, both public and private actors who may be needed by the state to assist in carrying out the Commonwealth's disaster and emergency response and management functions, activities and services.

SECTION 1(8)(a) & 1(9)'S PROVISIONS AND THEIR CONSTITUTIONALITY

The key "immunity" provisions of SB 5 arising out of the declared emergency surrounding the COVID-19 pandemic are set out in Section 1's "New Section" of KRS Chapter 39A and specifically in Sections 1(8)(a) and 1(9). Section 1(8)(a) extends "immunity" to "any ***essential service provider*** during the declared emergency of the COVID-19 pandemic," and it further provides that such provider "shall not be liable for any COVID-19 claim." SB 5EN, Sec. 1(8)(a)(emphasis added). Section 1(1)(c) defines "COVID-19 claim" to mean "any claim or cause of action for an act or omission ***arising from COVID-19*** that accrued on or after the date the emergency was declared [by Governor Beshear] on March 6, 2020, and until the emergency declaration is withdrawn, revoked, or lapses." SB 5EN, Sec. 1(1)(c)(emphasis added). "Arising from COVID-19" is further defined to mean "injury or harm that allegedly occurred on or after the emergency was declared . . . [and] caused by or resulting from: (1) The actual, alleged, or possible exposure to, transmission of, or contraction of COVID-19; (2) Services, treatment, or other action performed to limit or prevent the spread of COVID-19; or (3) Services performed by an entity outside the normal course of its business in response to COVID-19." SB 5EN, Sec. 1(1)(a)(1)-(3).

The lead-in language of SB 5, Section 1(9) specifies "the following businesses and service providers shall be deemed ***essential service providers*** and shall be considered an ***agent of the Commonwealth of Kentucky*** for the limited purpose of providing essential services arising from COVID-19**:** . . ." SB 5EN, Sec. 1(9)(emphasis added). After the colon following this lead-in language, a number of critical service providers and businesses are listed, including those "identified in [Governor Beshear's] Executive Order No. 2020-257 dated March 25, 2020," and others that are also listed within Section 1(9)(b)-(h). *Id.* Each of these listed businesses and essential service providers fit within the three categories of "essential services" envisioned within new Section 5(3)(a)-(c) of SB 5 added into KRS 39A.270 – *i.e.*, those that (a) protect Kentuckians' life and health, (b) provide critical infrastructure, or (c) provide governmental functions related to a declared emergency. *Compare* SB 5EN, Sec. 1(9)(a)-(h) *with* SB 5EN, Sec. 5(3)(a)-(c).

We believe SB 5's provision of limited "immunity" to "essential service providers" in Section 1(8)(a) and 1(9) to be constitutional notwithstanding Kentucky's jural rights doctrine. For the same reasons that the current "immunity" provisions of KRS 39A.280 are constitutional and necessary in disaster and emergency situations, it is necessary and proper for the General Assembly to extend the Commonwealth's sovereign (governmental) immunity to "essential service providers," whether public or private actors, arising out of their performance of actions as "agent[s] of the Commonwealth" in a statewide effort to fight against, and mitigate the COVID-19 pandemic. SB 5's definitions in Section 1(1)(a) narrowly tailor the scope and time period for which immunity is extended, and exclude any protection for grossly negligent or intentional misconduct. SB 5EN, Sec. 1(8)(b). From a policy perspective, the General Assembly must be able to encourage public and private actors to carry out, or assist in carrying out, critically important "essential services" necessary for the Commonwealth to appropriately respond to, and mitigate, the declared emergency stemming from the COVID-19 pandemic. The Commonwealth must rely on private sector actors in addition to state and local government resources to continue to carry on the fight and mitigation because the government alone cannot sufficiently respond to the pandemic.

Consistent with the current provisions of KRS 39A.270(2), it is clear the General Assembly believes it must be able from time-to-time in emergency management situations to call upon, encourage, or even conscript, the essential services of private-sector "persons or organizations" as needed for the Commonwealth to adequately respond to, or mitigate a declared disaster or emergency. SB 5, Section 1(8)(a) and 1(9) does this very thing, but it narrowly tailors its immunity protection to specified "essential service providers" for the narrow purpose and duration of the COVID-19 pandemic. We believe that Section 1(8)(a) and 1(9) of SB 5 embody the same immunity concepts as are already contained in KRS 39A.270 and 39A.280: That the state's sovereign immunity – as preserved under Kentucky Constitution Section 231 – is capable of extension to, and may be shared by, not just state and local agencies and employees ***but also*** private actors whose "essential services" are critical for assisting the Commonwealth "to [properly] deal with the [declared] . . . emergency." *Cf.* KRS 39A.270(2) & 39A.280 (current versions).

CONSTITUTIONALITY OF EXTENDING "SOVEREIGN IMMUNITY"

Based on how we read KRS 39A.270 and 39A.280 and SB 5's Section 1(8)(a) and 1(9), the question of the constitutionality of SB 5's "immunity" provisions can be simplified to: May the General Assembly constitutionally enact legislation that extends the sovereign (governmental) immunity of "the Commonwealth" to private actors consistent with the jural rights doctrine?

We believe the Kentucky Supreme Court has already answered this question in *Caneyville Vol. Fire Dep't v. Greens Motorcycle Salvage, Inc.,* 286 S.W.3d 790 (Ky. 2009). The *Caneyville* decision upheld the extension of state sovereign (governmental) immunity to a local volunteer fire department incorporated under KRS Chapter 75. This fire department would not ordinarily be entitled to sovereign or governmental immunity under the Supreme Court's modern immunity case law beginning with *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001). The plaintiff in *Caneyville* argued that the General Assembly's extension of immunity to this department and its chief was unconstitutional under jural rights, but the Court upheld the extension because the legislature treated fire suppression activities under KRS Chapter 75 to be of statewide importance, and so the extension of state sovereign (governmental) immunity to protect the fire department and its chief from liability was fully sustained. Kentucky's emergency management statutes in KRS Chapter 39A are of similar statewide importance as KRS Chapter 75. Thus, the General Assembly has the complete constitutional authority to extend "the Commonwealth's" sovereign immunity to public or private actors not otherwise entitled to immunity when their services are required and needed to carry out and assist the state with its "emergency response" to the COVID-19 pandemic.

The *Caneyville* case involved several Justices' opinions that upheld its result sustaining the immunity of the fire department. *See* 286 S.W.3d at 793-812 (J. Scott opinion), at 812-813 (J. Venters concurring), at 813-817 (C.J. Minton concurring in result only), and at 817 (J. Abramson, concurring in result only). Reading these various opinions makes it difficult to glean a controlling constitutional principle from the decision. But we know the *Caneyville* precedent remains good law because it has been cited and applied many times since when it was handed down in 2009. *See, e.g., Jacobi v. Holbert*, 553 S.W.3d 246, 252-253, 255 (Ky. 2018); *Williams v. City of Glasgow*, 2018 WL 379473, *5-6 (Ky. App. 2018). And it is noteworthy that the Kentucky Court of Appeals expressly stated in *Williams* that it is valid for the General Assembly to extend its sovereign immunity to otherwise non-immune entities. *Williams,* 2018 WL 379473 at *6 ("It is

valid public policy for the legislature to extend the judicial doctrine of sovereign immunity to municipalities," citing *Caneyville*). Because the *Caneyville* case stands for the principle that the General Assembly may validly extend the state's sovereign or governmental immunity as preserved in Kentucky Constitution Section 231 in certain circumstances, we believe that SB 5's extension of such immunity to private actors such as those who provide "essential services" in an emergency situation such as the COVID-19 pandemic, is valid legislation despite jural rights.

We recognize the General Assembly could not likely grant immunity, consistent with the Constitution, for every business or service that may operate during the COVID-19 pandemic if the services provided were not "essential" to the Commonwealth's ability to properly respond to, or mitigate the pandemic or its effects. But consistent with this, the General Assembly has not chosen in SB 5 to extend immunity except in a narrowly tailored fashion such that only those "***essential*** service providers" are deemed to be "an agent of the Commonwealth of Kentucky." SB 5EN, Sec. 1(9). Likewise, the General Assembly could not attempt to immunize any and all conduct regardless of its connection or relation to the declared emergency, and here again, SB 5's immunity provisions are narrowly related to "COVID-19 claims" *only* and *time-limited* to the period of the declared emergency for the COVID-19 pandemic. *See* SB 5EN, Sec. 1(1)(a), (c), and 1(8)(a).

Some could argue that Kentucky courts will not sustain any extension of immunity and base their argument on, for example, the "Immunity Analysis Framework" discussed in the Kentucky Supreme Court's decision in *Jacobi*, 553 S.W.3d at 252-53. Others might argue that the "ministerial acts" exception or the "proprietary function" exception to sovereign immunity may preclude the extension of sovereign or governmental immunity to "essential service providers." We believe, however, that *Caneyville* and its varying rationales that sustain its holding eviscerate such arguments. It would make no sense in light of the text of Kentucky Constitution Section 231, for the General Assembly not to be able to "deputize" public or private actors whom the legislature deems necessary and "essential" to help the Commonwealth carry out its emergency response to a declared disaster or emergency such as COVID-19. It would, furthermore, be terrible public policy if the General Assembly could not call upon public or private actors to assist the state in a statewide effort to render aid and assistance to its citizens during a disaster or emergency. For this reason, we believe that Section 1(9)'s express invocation that those providing "essential services" during the COVID-19 pandemic are "agent[s] of the Commonwealth of Kentucky" aligns completely with the decision in *Caneyville.* Indeed, with respect to SB 5, Section 1(9)'s inclusion of this agency language, we note that *Caneyville* construed that same language – "agent of the Commonwealth," which is found within the provisions of KRS 75.070. *See Caneyville*, 286 S.W.3d at 809-810.

For the foregoing reasons, the many lawyers who reviewed and helped the General Assembly and many of its lawyer-legislators such as Sen. Robert Stivers to shape the language that appears in SB 5, we believe that its provisions are perfectly constitutional. Of course, we respect the opinions of others who may believe otherwise, but in the end, we believe the courts of the Commonwealth will fully uphold the provisions of SB 5 for the reasons discussed above.