



Horowitz: KY judge rules Gov. Beshear's COVID, mask orders unconstitutional in breakthrough lawsuit

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It took 15 months for a judge to finally apply the Constitution against the most severe and arbitrary violations of our most basic civil liberties, but it's better late than never.

On Tuesday, Boone County, Kentucky, Circuit Judge Richard A. Brueggemann [issued a permanent injunction](#) against all of Gov. Andy Beshear's COVID restrictions, including the mask mandate. Unlike the few judicial victories for civil liberties over the past year, this one was broad and sweeping, as it declared these mandates unconstitutional. In granting declaratory relief to a store owner who didn't want to

enforce masks on customers, Judge Brueggemann ruled that "all emergency orders imposed by said Defendants, or that are being continued by said Defendants, are unconstitutional, void and without any legal effect."

Although Gov. Beshear planned to let the mask mandate expire on Friday anyway, this ruling is still significant because it finally lays down the marker that such mandates are unconstitutional headed forward. The problem champions of civil liberties have had in recent weeks is that, with expiring mandates, many of the lawsuits were dismissed as moot, denying them the opportunity to prevent such restrictions from being implemented in the *future*, say, for the flu season.

It was somewhat defensible for judges to give leeway for the 15 days or so of the pandemic last March, but shortly thereafter, it became apparent that the situation was no longer emergent and that the restrictions netted absolutely no results in slowing the pandemic. As such, at some point, judges should have held hearings on the facts and evidence behind mask mandates and other restrictions and subjected them to an interest balancing test against the fundamental rights those restrictions infringed upon. The rights to bodily integrity and free movement have long been held as the most grounded fundamental rights that require strict scrutiny of any attempted state-imposed restriction on them.

Judge Brueggemann has done just that. In this lawsuit, a restaurant owner, backed by state legislators and the state's attorney general, claimed that the mask mandate, social distancing, capacity limitations, and time limitations for serving customers served absolutely no purpose but harming the businesses without keeping anyone safer. They also claimed that the governor violated newly passed legislation (enacted over the governor's veto), which limited his emergency powers to 30 days and prevented him from placing restrictions on businesses. For the first time, this judge actually listened to expert testimony showing that non-pharmaceutical interventions netted zero results in stopping the virus, and he ruled accordingly.

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The defendants presented evidence from senior certified industrial hygienist Stephen Petty, one of the top experts in the country on exposure to hazardous materials, who served as an expert witness in approximately 400 cases relating to toxic or infectious exposure. Petty first made his national foray into the COVID mask debate [on my podcast](#) three months ago.

"He testified that both the six-foot-distancing rule, and mask mandates, are wholly ineffective at reducing the spread of this virus," wrote Judge Brueggemann in summing up Petty's testimony. "Masks are worthless, he explained, because they are not capable of filtering anything as small as Covid-19 aerosols. In addition, masks are not respirators and lack the limited protections that respirators can provide."

"The Court finds the opinions expressed by Mr. Petty firmly established in logic," concluded the judge. "The inescapable conclusion from his testimony is that ordering masks to stop Covid-19 is like putting up chain-link fencing to keep out mosquitos. The six-foot-distancing requirements fare no better."

Moreover, the judge ruled that all of the data from neighboring states with fewer restrictions demonstrate that none of these restrictions have made a difference in the natural progression of the virus, and therefore, "the data comparison demonstrate there to be no emergency justification for continuing Governor Beshear's orders."

The judge also questioned the use of PCR testing as the primary means for denying people their liberties, especially given that the CDC now has a different standard of cycle thresholds for those who are vaccinated.

This invites many questions, such as why Ct values in Covid tests should differ based upon whether or not the individual being tested has been vaccinated; and, why a federal government agency has ordered labs to 'not include Ct values on laboratory reports . . . to inform patient management,' even though the CDC indicates that PCR Ct values should be ≤ 28 . These are important questions. Case counts have been the poster child for the need to deprive people of their liberty.

While much of the lawsuit stemmed from the fact that the governor ignored specific bills passed by the legislature, and some states did not pass these laws, this ruling still creates the foundation for broad constitutional lawsuits against the remaining federal mandates on airplanes. This ruling establishes the fact that mask mandates can no longer withstand even a rational basis test, much less intermediate or strict scrutiny.

Aside from constitutional challenges, this ruling also forms a solid foundation for challenging these edicts – both at the federal and state levels – on grounds that they are circumventing the legislative process. The judge noted that "what has been ordered by the Governor's emergency decrees constitute Legislation," a charge that really applies to both the CDC and state governments.

Dr. Stack's testimony demonstrates that he and others engage in a process of collaboration and review of CDC guidelines and other documents, the

purpose of which is to impose rules on persons and businesses in Kentucky, and that in formulating these rules they tailor them to apply uniformly across the Commonwealth. This is formulating policy. He further testified that they have repeatedly amended and revised their orders, thus showing they deem to have the power to make laws and alter them at discretion. Indeed, he described the orders imposed as having a "breathhtaking scope."

It is obvious from even a cursory review that the orders issued over the past fifteen months "attempt to control" and seek "to form and determine future rights and duties" of Kentucky citizens.

Judge Brueggemann then addresses the unilateral imposition of a mask mandate by the executive branch:

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.

Again, this charge should apply to the CDC and TSA requiring such a draconian change to one's life without Congress enacting it (even if it were constitutional).

The lawsuit is also important in setting the standard for suing against the vaccine mandates or requirement that people wear masks unless they are vaccinated. The notion that one who is not vaccinated is a threat to one who is vaccinated is even more illogical and could not pass even a rational basis test.

We cannot afford to shy away from lawsuits and let the issue become moot even if the airplane mask mandate and vaccine mandates were ultimately dropped. The genie of wielding executive power over bodily integrity under the guise of emergency powers will not be placed back into the bottle. [CNN already published](#) an article yesterday warning without any evidence of a "doozy" of a flu season this year and how mask-wearing will help to stop it. Fauci and others have [hinted](#) at mask-wearing for the flu

becoming commonplace. We must learn the lessons of the past 15 months today and begin inoculating ourselves against future tyranny *now*.

What the people have endured over the past fifteen months—to borrow a phrase from United States District Judge Justin R. Walker —"is something this Court never expected to see outside the pages of a dystopian novel," concluded Judge Brueggemann. "Yet, Defendants contend that the Governor's rule by mere emergency decree must continue indefinitely, and independent of legislative limits. In effect, Defendants seek declaratory judgment that the Constitution provides this broad power so long as he utters the word, "emergency." It does not. For this Court to accept Defendant's position would not be honoring its oath to support the Constitution; it would be tantamount to a coup d'état against it.

