



Commonwealth of Kentucky
Office of the Attorney General

Daniel Cameron
Attorney General

Capitol Building, Suite 118
700 Capital Avenue
Frankfort, Kentucky 40601
(502) 696-5300
Fax: (502) 564-2894

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OAG 20-06

- Subject:* Whether, during a declared state of emergency, the Governor may suspend Kentucky's laws governing elections, beyond merely rescheduling the date of the election?
- Requested by:* Jason Snead, Executive Director
Honest Elections Project
- Written by:* Carmine G. Iaccarino, Executive Director
Brett R. Nolan, Special Litigation Counsel
Office of Civil & Environmental Law
- Syllabus:* Under KRS 39A.100(1)(l), the General Assembly has granted the Governor the specific authority to declare by executive order a "different time or place" for holding elections. The General Assembly has not granted the Governor any other election-related authority.

Opinion of the Attorney General

This Office recently described the outbreak of a never-before-seen disease, COVID-19, caused by a novel coronavirus known as SARS-CoV-2.¹ The disease and its rapid spread quickly led to declarations of emergency issued by the President of the United States, the Governor of the Commonwealth and every other state in the Union, and the executives of numerous counties across Kentucky. Subsequently, at

¹ See Opinion of the Attorney General 20-05.

the recommendation of the Secretary of State on March 16, 2020, the Governor issued an executive order delaying “Kentucky’s Democratic primary election, the Republican primary election, special elections, and local option elections” from May 19, 2020, to June 23, 2020.² The order also instructed the Kentucky State Board of Elections to “establish procedures for election officials to follow[.]”³

With elections approaching, this Office is now asked its opinion on the extent of the Governor’s authority to “suspend Kentucky’s duly enacted laws, beyond merely rescheduling the date of the election[.]” Request at 2.

Our analysis is informed, as it always is, by basic legal principles, the text of controlling statutes, and the Kentucky Constitution. *Owen v. Univ. of Ky.*, 486 S.W.3d 266, 270 (Ky. 2016) (“[T]he first rule of statutory interpretation is that the text of the statute is supreme.”). On the basis of that authority, it is the Opinion of this Office that the Governor’s election-related authority during this declared state of emergency is not limited to “merely rescheduling the date of the election.” Request at 2. Instead, the Governor may do just what the statute says. “[U]pon the recommendation of the Secretary of State,” he may declare by executive order “a different *time* or *place* for holding elections.” KRS 39A.100(1)(l) (emphasis added).

It is well established that the Governor has only those powers and duties conferred upon him by statute. *Brown v. Barkley*, 628 S.W.2d 616, 624 (Ky. 1982). Ordinarily, the Governor has no power to suspend statutes to declare a different time or place for an election. That is a legislative function reserved to the General Assembly. Ky. Const. §§ 15, 29; *Beshear v. Bevin*, 575 S.W.3d 673, 682 (Ky. 2019) (“The making and changing of laws is the hallmark of the legislative power[.]”); *Fletcher v. Com.*, 163 S.W.3d 852, 869 (Ky. 2005) (“The Governor has no constitutional authority to exercise legislative powers[.]”). But the Kentucky Supreme Court has recognized that “[t]he General Assembly may validly vest legislative . . . authority in [the Governor] if the law delegating that authority provides ‘safeguards, procedural and otherwise, which prevent an abuse of discretion[.]’” *Beshear*, 575 S.W.3d at 683.

In KRS 39A.100(1)(l), the General Assembly provided a specific delegation of election-related legislative authority to the Governor during a declared state of emergency. “Upon the recommendation of the Secretary of State,” the Governor is authorized “to declare by executive order a different time or place for holding elections in an election area for which a state of emergency has been declared for part or all of

² Executive Order 2020-236, *available at* <http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2020-MISC-2020-0236-266347.pdf> (last accessed March 26, 2020).

³ *Id.* The State Board of Elections has already established the procedures called for in Executive Order 2020-236. See 31 KAR 4:160 (“Elections Emergency Contingency Plan”). Unless validly amended, those procedures govern administration of the election scheduled to occur on June 23, 2020.

the election area.” KRS 39A.100(1)(l). Moreover, the election must “be held within thirty-five (35) days from the date of the suspended or delayed election.” *Id.* Under this provision, the grant of authority is as specific as the division of labor is clear: First, the Secretary of State must recommend a change to the time or place of an election during an emergency. Then, subject to the scope of that recommendation, the Governor may “declare by executive order a different *time* or *place* for holding elections.” *Id.* (emphasis added).

The Commonwealth’s primary elections were scheduled to occur on May 19, 2020. *See* KRS 118.561(1) (requiring that the Commonwealth conduct its presidential preference primaries “on the first Tuesday after the third Monday in May” in each presidential election year). However, the Governor exercised his specific authority under KRS 39A.100(1)(l) to delay the primary election, upon the recommendation of the Secretary of State, until June 23, 2020—thirty-one days after the election date set by statute. This act might be reasonably construed as an exercise of legislative authority because the effect of the executive order was to alter the statutory date of the Commonwealth’s primary elections. *Compare* KRS 118.561(1) *with* Executive Order 2020-236. But the Governor’s executive order complied with the statutory “safeguards” imposed by the General Assembly in the specific grant of authority in KRS 39A.100(1)(l): the order was issued during a declared state of emergency, it followed the recommendation of the Secretary of State as required, and it moved the primary election to a date “within thirty-five (35) days” from the original date. *See Beshear*, 575 S.W.3d at 683. Thus, the Governor’s executive order was a lawful exercise of his authority under KRS 39A.100(1)(l). *Id.*

The Governor’s election-related authority following an emergency declaration is not limited to merely delaying the date of the election, but also extends to his or her power to “declare by executive order a different . . . place for holding elections.”⁴ KRS 39A.100(1)(l). In that case, the “different place” for the election, *i.e.* each polling location, must comply with controlling Kentucky law. For example, “voting in all elections shall be by secret ballot on voting machines,” KRS 118.025(1), with the American flag displayed at each voting location, KRS 118.045(1).

Finally, that the Governor’s election-law authority is limited to what is specifically contained within KRS 39A.100(1)(l) is a conclusion compelled by Kentucky’s Constitution. Sections 147 and 153 of the Kentucky Constitution vest exclusively in the General Assembly the authority to pass laws to provide for the registration of voters, assistance to voters who need it, and the manner of voting,

⁴ The “place” of the election refers to a specific location. *See, e.g., Merriam-Webster* (defining “place” to mean a “physical environment,” “a building or locality used for a special purpose,” “a particular region, center of population, or location,” among others), *available at* <https://www.merriam-webster.com/dictionary/place> (last accessed March 26, 2020).

among other things. The General Assembly has not given the Governor any relevant election-related authority other than what appears in KRS 39A.100(1)(l).

Ours must remain a “government of laws and not of men”—even in times of emergency. *Bloemer v. Turner*, 137 S.W.2d 387, 390 (Ky. 1939). As explained above, the Governor has only those powers and duties conferred upon him by law. *Brown*, 628 S.W.2d at 624. And under the law, the Governor may, “upon the recommendation of the Secretary of State,” declare by executive order “a different *time* or *place* for holding elections.”⁵ KRS 39A.100(1)(l) (emphasis added). Other than the specific delegation of power in that statute, the Governor has no authority to “supersede or suspend Kentucky [election] law.” Request at 1; *see* Ky. Const. §§ 2, 15, 26, 27, 28, 29, 81; *Beshear*, 575 S.W.3d at 683.⁶

Daniel Cameron
ATTORNEY GENERAL

Carmine G. Iaccarino, Executive Director
Brett R. Nolan, Special Litigation Counsel

⁵ This opinion does not reach the question whether a Governor may exercise any delegated authority to declare a different time or place for the election of the President and Vice President, *see* 3 U.S.C. § 1, or the regular election of “State, county, city, town, urban-county, or district officers,” *see* Ky. Const. § 148.

⁶ To the extent that there is any disagreement on these fundamental principles of basic constitutional law, the current emergency has fallen during the legislative session. *See* Ky. Const. § 36. Therefore, the General Assembly may, if desired, take any action that may be needed to address the situation. Moreover, Kentucky’s Constitution provides a mechanism by which the Governor may call an extraordinary session to address such important questions. *See* Ky. Const. § 80.