

**COMMONWEALTH OF KENTUCKY
48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 21-CI-00089**

**ANDY BESHEAR, in his official capacity as
Governor of the Commonwealth of Kentucky,**

and

**ERIC FRIEDLANDER, in his official capacity as
Secretary for the Cabinet for Health and Family Services**

PLAINTIFFS

v.

**DAVID W. OSBORNE, in his official capacity as
Speaker of the Kentucky House of Representatives**

**BERTRAM ROBERT STIVERS II, in his official capacity as
President of the Kentucky Senate;**

THE LEGISLATIVE RESEARCH COMMISSION; and

**DANIEL J. CAMERON, in his official capacity as
Kentucky Attorney General**

DEFENDANTS

**ORDER GRANTING PARTIAL RESTRAINING ORDER UNDER CR 65.03
CONCERNING HOUSE BILL 1,
and SETTING BRIEFING SCHEDULE AND HEARING**

This action is before the Court on the motion of the Plaintiff, Governor Andy Beshear, for a restraining order, or temporary injunction, pursuant to CR 65, to enjoin the provisions of House Bill 1, Senate Bill 1, and Senate Bill 2, which were recently enacted by the 2021 General Assembly over the Governor's veto. This action was filed on February 2, 2021, and the Court set the matter for a status conference to address the motion for injunctive relief filed by the Governor for February 3, 2021. The Defendants are House

Speaker David W. Osborne, Senate President Bertram Robert Stivers II, the Legislative Research Commission, and Attorney General Daniel J. Cameron.

The Court conducted the status conference at the close of its motion hour docket on Wednesday, February 2, 2021. The Governor was represented by Hon. Amy Cabbage, General Counsel, along with Deputy General Counsels Travis Mayo, Taylor Payne, Marc Farris and Laura Tipton. Secretary Friedlander was represented by Hon. Wesley Duke. Speaker Osborne was represented by Hon. Eric Lyan. President Stivers was represented by Hon. David Fleenor. The Legislative Research Commission was represented by Hon. Greg Woolsey. Attorney General Cameron was represented by Hon. Victor Mattox, along with Deputy Attorney General Barry Dunn and Deputy Attorney General Chad Meredith.

Counsel for the Governor summarized his request for injunctive relief. She emphasized the Governor's allegations that implementation of the challenged legislation should be delayed until the constitutional validity of the bills can be adjudicated. As set forth in the Governor's Complaint, he alleges that the bills in question would seriously undermine the effectiveness of the state's response to the COVID-19 pandemic, and would place the lives of many Kentuckians unnecessarily at risk. Counsel for the Defendants all responded, and all parties appeared to be in agreement that the bills do not have retroactive effect, and that accordingly the Executive Orders and Administrative Regulations promulgated by the Governor remain in full force and effect for at least 30 days after the final enactment of these Bills by overriding the Governor's vetoes on February 2, 2021, at least with regard to Senate Bill 1 (which places limits on the Governor's power to issue Executive Orders during an emergency under KRS Chapter 39A) and Senate Bill 2 (which

provides for increased legislative oversight and control over Emergency Administrative Regulations issued by the Governor under KRS Chapter 13A).

A more difficult issue arises concerning the immediate implementation of House Bill 1, which provides for allowing essentially all businesses, schools, non-profit organizations and churches to make their own rules by adopting “an operating plan” that complies with “guidance” published by the federal Center for Disease Control (CDC) “or the executive branch, whichever is least restrictive.” House Bill 1 also has an emergency clause which makes the legislation effective immediately upon final enactment. *See House Bill 1, Section 2.*

Thus, House Bill 1, on its face, allows for thousands of Kentucky businesses, schools, churches, local governments, and other agencies to make their own rules and adopt their own policies that may be at variance with the duly promulgated Executive Orders and Administrative Regulations, which have been enacted by the Governor to prevent disease and death that is inevitable with the spread of COVID-19. The Governor has supplied a letter from the CDC which states that its guidance “is not meant to be prescriptive or interpreted as standards that can be regulated.” Letter from Robert Redfield, Director, CDC, to Gov. Beshear, Jan. 11, 2021, attached as Exhibit B to the Complaint.

The Court is concerned that this portion of Section 1 of House Bill 1 could create chaos and undermine any effective enforcement of public health standards to prevent the spread of this deadly disease during this pandemic. Moreover, in the absence of injunctive relief, it appears that these provisions of House Bill 1 could likely wreak havoc with public health. Under the provisions of House Bill 1, it is likely that hundreds, or even thousands, of individual operating plans could be adopted, with no meaningful oversight or review,

and with great variations as to the rules that would apply throughout the state. The Governor's power—indeed, duty—to effectively enforce any uniform public health standards would be severely undermined, if not destroyed. As noted by the CDC, there is a difference between “guidance” and “standards,” and between abstract advice and enforceable regulation. Under House Bill 1, it appears likely that there will be no enforceable standards governing the operation of businesses, schools, colleges, local government or non-profit agencies. The Court finds that the Verified Complaint demonstrates that there will be immediate and irreparable injury to the Governor's right and constitutional duty to adopt emergency measures to curb the spread of the COVID-19 virus and address the real, imminent and extreme public health crisis facing the public. The Court finds that the public interest requires that the effectiveness of those portions of House Bill 1 (Section 1, paragraphs 1(a), (b), and (c)) should be delayed until the parties can fully brief those issues, and the Court can conduct a full hearing on the merits.

The Court specifically reserves ruling on the Governor's motion for injunctive relief on all other issues, pending full briefing and a hearing on the merits of that motion. But with regard to House Bill 1, Section 1(1)(a)(b) and (c),¹ the Court finds that the public interest demands immediate issuance of a Restraining Order under CR 65.03 to delay the implementation of that portion of House Bill 1 pending a full hearing. As noted in the Governor's veto message, there is a serious question as to whether those provisions of House Bill 1 are void for vagueness and whether they constitute an improper delegation of legislative power. *See, e.g., Butler v. United Cerebral Palsy of Northern Kentucky*, 352.

¹ This Order does not restrain the implementation of paragraphs (2)(3)(4) and (5) of House Bill 1, which deal with unemployment insurance contributions, court orders regarding child visitation, long term and personal care visitation, and family visitation in long term care facilities.

S.W.2d 203 (Ky. 1964), *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Court finds that the Governor has presented a substantial legal issue on the merits of those questions regarding House Bill 1, that the public interest demands a delay in implementation of that portion of the legislation, that immediate implementation of that portion of House Bill 1 would pose a clear and present danger to public health and would undermine any effective public health strategy to contain COVID19, and that the balance of the equities and public interest weigh heavily in favor of issuance of a temporary restraining order on this limited point. *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978).

Accordingly, for the reasons stated above, **IT IS ORDERED:**

1. The enforcement and implementation of House Bill 1, Section 1(1)(a)(b) and (c), is **RESTRAINED AND ENJOINED** pursuant to CR 65.03, pending a ruling on the merits of the Plaintiff's motion for a temporary injunction. This Restraining Order shall remain in effect for a period of thirty (30) days unless extended by Order of this Court after full briefing and a hearing on the merits;
2. The Court **RESERVES** ruling on the Plaintiff's motion for temporary injunction under CR 65.04, pending full briefing and a hearing, as set forth below;
3. The parties are directed to meet and confer to attempt to resolve the legal disputes that are addressed in the Complaint;
4. The Court recognizes the special appearances made by counsel for Speaker Osborne, President Stivers, and the LRC, and reserves their

rights to assert legislative immunity under the Kentucky Constitution.

The Court further take judicial notice of its prior rulings dismissing the Speaker and the Senate President from similar litigation, and urges the parties to reach agreement concerning their participation as defendants.

The Court will grant any motion by Speaker Osborne and/or President Stivers to participate as *amicus curiae* in the event they are dismissed as parties;

5. To the extent that LRC may seek dismissal as a defendant by asserting legislative immunity under Section 43 of the Kentucky Constitution or other applicable law, the Court requests that counsel for LRC address the applicability of *Legislative Research Commission v. Brown*, 664 S.W.2d 907 (Ky. 1984);
6. The Court also notes counsel for the Attorney General, at the status conference, raised the issue of whether the Governor has standing to assert these claims, whether there is a justiciable case or controversy presented by the Complaint, and whether the Governor is seeking an advisory opinion. The Court will reserve final ruling on all these issues until they are fully briefed and a hearing is conducted, but the Court makes a preliminary finding that there are at least some issues, including the limits on the Governor's power to enact executive orders in an emergency, the role of the Attorney General in approving the Governor's executive actions, the role of the legislature in making binding determinations on the validity of administrative regulations, the

application of the separation of powers provisions of the Kentucky Constitution (Sections 27 and 28), whether House Bill 1 is void for vagueness, and whether House Bill 1 is an improper delegation of legislative power, that appear to present justiciable issues;

7. The Court directs that any defendants who oppose the Plaintiff's motion for a temporary injunction under CR 65.04 shall file a memorandum of law in opposition by Friday, February 12, 2021;
8. The Governor may file a Reply Brief in support of his motion for a temporary injunction by Wednesday, February 17, 2021;
9. The Court will conduct a hearing on the motion for temporary injunction at 9:00 a.m. on Thursday, February 18, 2021;
10. The Court further directs any party who intends to provide expert testimony in the fields of public health, epidemiology, or related relevant fields of expertise, at the hearing on the motion, shall provide an Expert Report, with a summary of the expert's opinions, and the facts on which they are based, plus all other information required by Rule 26.02(4). This information shall be disclosed to opposing counsel by Monday, February 15, 2021;
11. Any Defendant seeking to dissolve the Restraining Order issued herein shall file a motion to dissolve on or before February 12, 2021, and that motion shall also be heard on February 18, 2021 at 9:00 a.m.;

12. The Restraining Order issued herein shall remain in effect for a period of thirty (30) days, or until the Court issues its ruling on the motion for a temporary injunction, whichever is later;
13. No bond shall be required pursuant to CR 81A; and
14. This Restraining Order shall be in effect immediately upon its entry, as indicated by the electronic signature of the undersigned judge. It shall be binding on the Defendants, and all others who have notice of its provisions, or who are acting in concert with the Defendants.

So **ORDERED**, this 3rd day of February, 2021.



The image shows a rectangular box containing a circular seal on the left and a handwritten signature on the right. The seal is the official seal of the Franklin Circuit Court of the Commonwealth of Kentucky. The signature is in cursive and reads 'Phillip J. Shepherd'. Below the signature, there is a line of small text that reads: 'HON. PHILLIP J. SHEPHERD', 'electronically signed', and '2/3/2021 5:10:25 PM ET'.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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