

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

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**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**

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**ORDER GRANTING TEMPORARY INJUNCTION  
UNDER CR 65.04**

This matter is before the Court on a Motion for a Temporary Restraining Order and Temporary Injunction brought by Plaintiffs Andy Beshear, in his official capacity as Governor of Kentucky, and Eric Friedlander, in his official capacity as Secretary of the Cabinet for Health and Family Services. Plaintiffs argue that the recently passed House Bill 1, Senate Bill 1, and Senate Bill 2 are an unconstitutional infringement upon the Governor's executive powers under Sections 27, 28, 69 and 81 of the Kentucky Constitution. The Governor further argues that the challenged legislation undermines state

government's ability to respond to the ongoing COVID-19 pandemic and creates a public health crisis that will result in increased disease and death. The Defendants are Speaker of the House David Osborne, Senate President Robert Stivers, the Legislative Research Commission (LRC), and Attorney General Daniel Cameron. The legislative defendants (Osborne, Stivers and LRC) have all filed motions to dismiss based on legislative immunity, which will be ruled on separately. The Attorney General has asserted that the Complaint does not present a justiciable issue, that the Governor lacks standing, and that the Complaint improperly seeks an advisory opinion. The Attorney General has not yet filed a Motion to Dismiss, but he has properly reserved those arguments. Thus, the Governor's request for injunctive relief is the only motion currently before the Court for ruling.

The parties have briefed the issues on injunctive relief, and the Court held an evidentiary hearing at which Commissioner of Public Health Dr. Steven Stack testified extensively on February 18, 2021. The Defendants did not present any witnesses at the evidentiary hearing. Having reviewed the record, and being sufficiently advised, the Court finds that the Plaintiff has presented substantial legal questions concerning the validity of the legislation, that the Governor and the public will suffer immediate and irreparable injury in the absence of injunctive relief, and that the public interest and the balance of the equities require the granting of injunctive relief. *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. 1978). Accordingly, the Court **GRANTS** the Plaintiffs' motion for a temporary injunction under CR 65.04 and partially **STAYS** the effectiveness of House Bill 1, Senate Bill 1 and Senate Bill 2 for the reasons set forth below. More specifically, the Court **ENJOINS** the implementation of Section 1 of House Bill 1, the 30-day limitation on

emergency Executive Orders issued under KRS Chapter 39A (absent legislative ratification) set forth in Senate Bill 1, and the 30-day limitation on Emergency Administrative Regulations (E-Regs) under KRS Chapter 13A (absent legislative ratification) set forth in Senate Bill 2.

In balancing the equities, the Court is mindful that the challenged legislation seeks to address a legitimate problem of effective legislative oversight of the Governor's emergency powers in this extraordinary public health crisis. The Court is also mindful that the Governor and the Secretary are faced with the enormous challenge of effectively responding to a world-wide pandemic that has resulted in the deaths of thousands of Kentuckians and over 500,000 people in the United States. The Court believes all parties are acting in good faith to address public policy challenges of the utmost importance. The Governor has made a strong case that the legislation, in its current form, is likely to undermine, or even cripple, the effectiveness of public health measures necessary to protect the lives and health of Kentuckians from the COVID-19 pandemic.

The legislature has a legitimate concern in effective oversight of the Governor's executive authority. Yet, even with the injunction regarding portions of these three bills, the General Assembly retains many effective tools apart from the challenged legislation—from the budget, to oversight hearings, to the ability to pass legislation—that can restrict the Governor's actions in specific areas if the legislature determines there has been overreach of executive authority. Likewise, if the Governor exceeds his executive authority in a way that injures the rights of citizens or businesses, those parties adversely effected have a readily available and highly effective remedy by challenging the Governor's actions in state or federal court, as the Attorney General has noted.

Accordingly, in balancing the equities, this Court finds that the equities and public interest weigh in favor of injunctive relief to maintain the validity of the Governor's public health Executive Orders and Emergency Administrative Regulations, until the merits of this case can be fully adjudicated. During the pendency of the litigation, the Court expects the Governor to continue to adjust the requirements set forth in Executive Orders and Emergency Regulations to relax those requirements as conditions warrant and the public health concerns abate, as the testimony of Dr. Stack explained. But the Court believes those decisions should be made based on medical and scientific evidence, not on arbitrary deadlines imposed by statutes irrespective of the spread of the virus.

#### **FINDINGS OF FACT AND BACKGROUND**

To combat the spread of COVID-19, Governor Beshear declared a state of emergency through issuance of Executive Order 2020-215 on March 6, 2020. This emergency declaration was followed by several executive orders designed to stymie the spread of COVID-19 in Kentucky, as well as orders from the Cabinet from Health and Family Services. These orders included a prohibition of mass gatherings and temporary closure of businesses where people would be in close contact with one another, such as gyms. Issuance of new executive orders continued as the pandemic and our understanding of the virus continued to change. Temporarily closed businesses were eventually permitted to reopen subject to limitations on capacity and compliance with sanitation and social distancing requirements.

Multiple lawsuits were filed in various Kentucky Circuit Courts response to the directives of Governor Beshear and CHFS. In *Beshear v. Acree*, plaintiffs across multiple lawsuits challenged Governor Beshear's orders on a variety of constitutional and statutory

grounds, obtaining injunctions against various executive actions at the circuit court level. *Beshear v. Acree*, 2020 WL 6736090 at \*4 (Ky. 2020). They argued that the Governor's orders were violative of: Section 1 of the Kentucky Constitution's protection of life, liberty, pursuit of safety and happiness, and acquiring and protecting property; Section 2 of the Kentucky Constitution as an arbitrary exercise of power; the separation of powers provided by Section 27 and Section 28 of the Kentucky Constitution; in excess of the authority provided to the Governor by KRS 39A.100 to respond to emergencies; and the procedures provided by KRS Chapter 13A for adopting regulations. *Id.*

The Supreme Court of Kentucky disagreed. It found Governor Beshear's actions to not be violative of either the Kentucky Constitution or the above-cited statutes, and to be necessary and appropriate to combat COVID-19. It found that Governor Beshear had properly invoked his emergency power pursuant to KRS 39A.100 by declaring his state of emergency in response to one of the situations or events that the statute contemplated. *Id.* at \*12. It also found that the Governor had not violated the separation of powers between the branches of government, and to any extent that he had exercised legislative authority that such authority had been delegated to him by the General Assembly during emergencies. *Id.* at 16. And, it held that KRS Chapter 13A did not limit his ability to act under either the Kentucky Constitution or KRS Chapter 39A to respond to emergencies. *Id.* at 22. Thus, the Supreme Court of Kentucky upheld the Governor's ability to act in response to emergencies in accordance with the Kentucky Constitution and the then-effective statutory scheme, and found that entry of the temporary injunctions was an abuse of discretion. *Id.* at 37. The legislation challenged here, in large part, is the General Assembly's response to the Supreme Court's ruling in *Beshear v. Acree*.

The General Assembly entered its Regular Session on Tuesday, January 5, 2021. On January 9 during the 2021 Regular Session, the General Assembly passed three bills related to the Governor and CHFS's ability to respond to public health emergencies through executive action: Senate Bill 1 ("SB 1"), House Bill 1 ("HB 1"), and Senate Bill 2 ("SB 2"). Each bill contains an emergency clause, and thus take effect upon their passage and approval by Governor Beshear or by otherwise becoming law.

HB 1, named "[a]n Act relating to reopening the economy in the Commonwealth of Kentucky in response to the state of emergency declared by the Governor of Kentucky beginning in March 2020 and continuing throughout the year of 2021 and declaring an emergency," allows certain businesses and other entities to remain open despite any executive order, state law, or administrative regulation so long as they meet the requirements contained in the bill. *See* H.B.1, R.S. 2021. A business or other organization that wants to stay open must formulate a plan that meets applicable guidance from either the CDC or the executive branch (whichever is least restrictive), and explains how the safety of persons on the premises will be promoted. *Id.* The plan must be conspicuously posted on both the entrance to the business or entity as well as on its website, if it has one. *Id.* Entities may choose to prepare a plan of their own, or may choose a plan created by a government agency: "[a] business, for-profit or not-for-profit organization, local government, association, or school or school district, whether public, private, or religiously affiliated, may prepare the plan detailed in paragraph (a) of this subsection itself or may utilize a plan prepared by a local or state government agency, local or state chamber of commerce, trade association, or any other recognized affiliated organization." *Id.* HB 1 does not specify whether it is referring to the federal or state executive branch. *See id.* The

bill also prohibits state or local authorities from enforcing restrictions stemming from a state of emergency if those restrictions would keep a business from being open and fully operational, if that business is otherwise compliant with HB 1. *Id.*

SB 1, titled “[a]n Act relating to emergencies and declaring an emergency,” amends KRS Chapter 39A to modify the ability of the Governor to respond to emergencies. Under Section 2 of the bill, any executive order, administrative regulation, or other directive under KRS Chapter 39A that restricts functioning of educational institutions, private businesses, or nonprofit organization, is not effective for more than thirty (30) days unless the general assembly approves an extension. S.B.1, R.S. 2021. This restriction also applies to places of worship, local governments, and political, religious, or social gatherings. *Id.* Any order or directive that imposes mandatory quarantine or isolation is also subject to this requirement. *Id.* Other executive order and regulations that do not fit into this description may exceed thirty (30) days, but only if an extension was requested by the chief executive or the legislative body of a local government; the order would then only apply to that locality and would only last as long as requested by that local government. *Id.* Further, SB 1 prohibits the Governor from declaring a new emergency or issuing new orders based on “the same or substantially similar facts and circumstances as the original declaration” unless the General Assembly provides prior approval. *Id.* SB 1 allows the General Assembly to terminate a declaration of emergency at any time. *Id.* And, while SB 1 would allow the Governor to suspend statutes in respond to emergencies declared under KRS Chapter 39A, such suspension may only occur when the statute is specifically listed by the Governor in the applicable executive order and when the Attorney General approves the suspension. *Id.*

In Section 3 of SB 1, the bill amends KRS 39A.100(1)(k) to prohibit the Governor, upon recommendation of the Secretary of State, from providing a different manner for holding elections via executive order. *Id.* Further, SB 1 adds KRS 39A.100(1)(l), which provides to the Governor the authority “to take action necessary to execute those powers enumerated in paragraphs (a) through (k) of this subsection” “except as prohibited by this section or other law.” *Id.* And, Section 3 amends KRS 39A.100(4) to add that KRS 39A.100 shall not be construed to permit a governmental entity to impose restrictions on the rights of people to free speech, freedom of the press, to petition the government for redress, to peaceably assemble, to worship in-person, or “to act or refuse to act in a manner motivated by a sincerely held religious belief.” *Id.* The bill also adds KRS 39A.100(5), which reinforces that KRS 39A.100 shall not be construed “to allow any governmental entity to impose restrictions on the right of people to: (a) Peaceably assemble; or (b) Worship, worship in person, or to act or refuse to act in a manner motivated by a sincerely held religious belief.” *Id.*

Section 4 of SB 1 removes language of KRS 39A.180(2) that suspends existing laws, ordinances, and administrative regulations which conflict with an order or regulation issued under KRS Chapters 39A-39F so long as such conflict exists. *Id.* Section 4 also requires administrative regulations promulgated under KRS Chapter 39A to conform to the requirements of KRS Chapter 13A. *Id.* Section 4 allows suspension of particular statutes by executive order, but only if the Attorney General approves the suspension in writing. *Id.* Such suspension is only in effect while the emergency is still in effect. *Id.* SB 1 also modifies the penalty for violation of any provision of KRS Chapter 39A from a Class A

misdemeanor to an unspecified penalty resulting in a fine of \$100 for a first offense and \$250 for subsequent offenses. *Id.*

SB 2 is titled “[a]n Act relating to administrative regulations and declaring an emergency,” and this legislation restricts the ability of the executive to issue emergency regulations in response to emergencies. S.B.2, R.S. 2021. The bill removes the word “nonbinding” from KRS 13A.030(2) in describing the power of the Administrative Regulation Review Subcommittee to disapprove a proposed administrative regulation, in apparent conflict with *Legislative Research Commission v. Brown*, 664 S.W.2d 907 (Ky. 1984).<sup>1</sup> *Id.* The bill also amends KRS 13A.190 to establish a public comment requirement for emergency administrative regulations. *Id.* KRS 13A.190 is also amended to allow a legislative committee to review emergency administrative regulations for deficiencies. *Id.*

Section 22 of SB 2 amends KRS 214.020, the statute that provides CHFS with the ability to respond to disease outbreak. The bill states that CHFS must determine that an infectious disease will actually invade Kentucky, rather than establishing a probability that such disease will invade before it can promulgate administrative regulation under KRS 214.020. *Id.* Similar to SB 1, SB 2 amends KRS 214.020 to add that administrative regulations promulgated in response to infectious disease outbreak by CHFS under KRS Chapter 13A that place limits on the functioning of educational institutions, private businesses, non-profit organizations, places of worship, or local governments, or which place limits on political, religious, or social gatherings, may be effective for no longer than

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<sup>1</sup> The Court notes that counsel for President Stivers argued that the removal of “non-binding” from the statute was meaningless, as the legislature recognizes that the action of legislative committees cannot be binding under *LRC v. Brown, Id.* Nevertheless, the Court cannot assume that the removal of a critical word from the statute is meaningless, and this raises a substantial legal question that requires additional briefing and argument.

thirty (30) days. *Id.* The 30-day restriction also applies to administrative regulations that impose mandatory quarantining or isolation. *Id.*

Governor Beshear vetoed all three bills on January 20, 2021. That same day, the Governor suggested in a letter to the legislature that legislation similar to these three bills wait until after the COVID-19 pandemic. The Governor asked that if the General Assembly still insisted on passing legislation that such legislation be narrowly tailored to address their concerns. Speaker Osborne and President Stivers responded to the Governor in a letter dated February 1, 2021 which stated that they would proceed with votes to override all three vetoes. However, Speaker Osborne and President Stivers welcomed future discussions with the Governor regarding improvements that could be made to the legislation.

The Governor and Secretary Eric Friedlander filed the present lawsuit on February 2, 2021. Speaker Osborne, President Stivers, the Legislative Research Commission, and Attorney General Daniel J. Cameron were named as defendants. In their Complaint, Plaintiffs seek a declaration that each of the bills violates the Kentucky Constitution and both preliminary and permanent injunctive relief that prevents enforcement of each bill.

Presently before the Court is Plaintiffs' Motion for a Temporary Restraining Order and Temporary Injunction, which was filed contemporaneously with their Complaint. Therein, Plaintiffs argue that each of these bills are violative of the Kentucky Constitution, and that ongoing constitutional violations are sufficient irreparable harms that support preliminary injunctive relief. They also argue that the Governor and Secretary Friedlander's ability to unilaterally respond to the ongoing pandemic will is necessary to continue to save lives and therefore that equities support issuance of an injunction. And,

they argue that they have a substantial likelihood of eventual success on the merits of their claims: that the bills are constitutionally deficient both as a violation of separation of powers and for being arbitrary and vague.

On February 18, 2021, the Court held an evidentiary hearing on Plaintiffs' present Motion. At the hearing, Commissioner of Public Health Dr. Steven Stack testified regarding what he perceived would be the effects of these three bills. Dr. Stack's testimony was extremely credible in explaining why an effective public health response to the COVID 19 pandemic requires executive action that is developed on a constantly evolving basis to respond to the changing nature of the public health crisis, and evaluation of medical and scientific data regarding the spread of the disease. This process requires the participation of hundreds of public health experts and employees in the fields of epidemiology, infectious diseases, and public health. He explained the efforts of the state Department of Public Health (DPH), in conjunction with 61 local health departments, to develop policies that are discretely tailored to prevent spread of this highly transmissible disease while allowing economic, social, educational and religious gatherings to be conducted as safely as possible. He explained the process by which the state DPH promulgates the rules and standards in consultation with medical and scientific experts, and how the local health departments enforce those rules to ensure uniformity and efficacy in the regulatory response to the crisis.

The rules promulgated by the DPH are designed to be based on the best available data, and to be tailored to the incidence rate. DPH follows guidance from the federal Center for Disease Control (CDC), and tailors that guidance to the situation on the ground throughout Kentucky. An effective response requires statewide data sharing, evaluation of

data by medical reference laboratories, genomic sequencing and other highly sophisticated scientific analysis. Dr. Stack explained that such a far reaching, and constantly evolving, scientific and medical effort is uniquely suited to development and implementation by the executive branch team of state and local public health experts. Dr. Stack testified that an effective response to the COVID-19 pandemic requires a constant review and calibration of the applicable regulations. Dr. Stack testified that such a massive public health effort cannot be effectively undertaken by the legislative branch unless it met full-time, with the ability to focus on all the relevant science and medicine necessary to promulgate effective rules and standards.

Dr. Stack testified that HB 1, as a practical matter, would render the state DPH and local health departments powerless to effectively address the COVID19 pandemic. It would prohibit the state from enforcing effective standards, and would allow all businesses, non-profits, schools and other organizations to bypass state regulations and to adopt their own rules. Dr. Stack explained that the guidance documents of the CDC were not intended for implementation as regulations, and would be effectively impossible to oversee or administer, with no effective mechanism for DPH to review such private plans or to enforce compliance. Likewise, Dr. Stack testified that SB 1 and SB 2 would drastically undermine any effective public health response to the pandemic by limiting Executive Orders and E-Regs to thirty (30) days unless ratified by the General Assembly. He testified such limitations would egregiously endanger public health, and make it impossible to protect against mutations and variants of the disease that are already emerging. He emphasized that the ability to effectively respond to such a medical crisis requires quick action, which

would be prohibited by the thirty (30) day limitations coupled with the prohibition against re-promulgating such Executive Orders and E-regs in the Senate Bills.

### STANDARD OF REVIEW

“A party may obtain injunctive relief in the circuit court by (a) restraining order, (b) temporary injunction, or (c) permanent injunction in a final judgment.” CR 65.01. “An injunction may restrict or mandatorily direct the doing of an act.” *Id.* A court may grant a temporary injunction if it finds that absent an injunction “the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.” CR 65.04(1). The landmark case in Kentucky on temporary injunctive relief is *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978). In *Bingo Palace v. Lackey*, 310 S.W.3d 215, 216 (Ky. 2009), the Supreme Court of Kentucky discussed the standard for granting injunctive relief established by the Court of Appeals in *Maupin*:

In *Maupin*, the Court of Appeals stated: “Because the injunction is an extraordinary remedy, sufficiency of the evidence below must be evaluated in light of both substantive and equitable principles.” *Id.* at 697. CR 65.04 authorizes the granting of a temporary injunction (interlocutory relief) if the movant's rights are being violated and the movant will suffer immediate and irreparable injury pending a final judgment, or if waiting would render the final judgment meaningless. According to *Maupin*, “In order to show harm to his rights, a party must first allege possible abrogation of a concrete personal right.” *Id.* at 698 (citing *Morrow v. City of Louisville*, 249 S.W.2d 721 (Ky.1952)). “[D]oubtful cases should await trial of the merits.” *Id.* (citing *Oscar Ewing, Inc. v. Melton*, 309 S.W.2d 760 (Ky.1958)). And further, there must be “a clear showing that these rights will be immediately impaired.” *Id.*

*Bingo Palace*, 310 S.W.3d at 216. In other words, granting an injunction requires demonstrating “(1) that the movant's position presents ‘a substantial question’ on the underlying merits of the case, i.e. that there is a substantial possibility that the movant will

ultimately prevail; (2) that the movant's remedy will be irreparably impaired absent the extraordinary relief; and (3) that an injunction will not be inequitable, *i.e.* will not unduly harm other parties or disserve the public.” *Price v. Paintsville Tourism Com’n*, 261 S.W.3d 482, 484 (Ky. 2008) (citing *Cyprus Mountain Coal Corporation v. Brewer*, 828 S.W.2d 642 (Ky. 1992)).

In this case involving state government’s response to a once-in-a-century public health crisis, the Court is especially mindful that the lives and health of all citizens are implicated. If this legislation results in the elimination of all current Executive Orders and E-regs that govern the state’s COVID-19 response (as is likely absent injunctive relief), then it is highly likely that the spread of the disease cannot be effectively contained. In these circumstances, a final judgment in favor of the Governor would be meaningless if the legislation is implemented during the pendency of the lawsuit. The damage would be done. The Civil Rules provide for this circumstance, authorizing temporary injunctive relief when “the acts of the adverse party will tend to render such final judgment ineffectual.” If the Attorney General and the legislative defendants prevail, the legislation can still be implemented, with no injury to their institutional interests in the proper balance of power. If the Governor prevails and demonstrates that the current Executive Orders and E-regs are necessary and appropriate under his executive powers, the lives of Kentuckians would needlessly be placed at risk in the absence of injunctive relief.

### **LEGAL ANALYSIS and CONCLUSIONS OF LAW**

The Court recognizes that a serious conflict between the Executive and Legislative branches of government is at the root of this lawsuit. The General Assembly has an important interest in proper oversight of the Executive Branch in its implementation of

emergency authority in the field of public health to fight a once-in-a-century deadly pandemic of a highly transmissible disease. The Executive has an equally important interest in promulgating and enforcing effective public health measures to fight the pandemic, and an equally valid concern that proper legislative oversight cannot justify legislative micro-management of public health concerns that require medical, scientific and technical expertise to be effective. The legislature has every right, and even the duty, to adopt standards and rules to govern the Governor's exercise of emergency executive authority. But when the legislative role shifts from oversight and policymaking to micromanagement of administrative rules and orders, there is a clash that implicates the separation of powers provisions of Sections 27 and 28 of the Kentucky Constitution. *See Legislative Research Commission v. Brown*, 664 S.W.2d 907 (Ky. 1984). The challenged legislation here—HB 1, SB 1 and SB 2—all raise serious separation of powers issues. Under *Maupin v. Stansbury*, *supra*, once a serious legal question is raised, injunctive relief is proper if the Plaintiff demonstrates the violation of a right, and it is supported by the public interest and a balance of the equities.

Here, the Governor has made a *prima facie* showing that the challenged legislation infringes on the authority of the Executive Branch of state government, and crosses the line between proper legislative oversight and improper legislative micro-management. Section 69 of the Kentucky Constitution provides that “supreme executive authority of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the ‘Governor of the Commonwealth of Kentucky.’” This case directly raises the question of whether the Executive Orders and E-regs governing the COVID19 crisis are fundamentally executive or legislative in nature.

No discovery has yet been taken, and no trial on the merits has occurred. The Court is aware that this is a highly complex dispute, and that additional facts, expert opinion, testimony, and legal briefing will be necessary in order to fully and fairly adjudicate the dispute. In addition, the legislative defendants (Speaker Osborne, President Stivers and LRC) have raised serious questions about whether legislative immunity protects them from being sued in this kind of dispute. The Attorney General has indicated he will contest the issue of whether the Governor has standing, and whether this suit presents a justiciable case or controversy. Those issues all will require careful consideration of the Court, and therefore extensive briefing and argument.

But until all those legal and factual issues are resolved, the Court is faced with a dilemma: should the Court allow the new legislation to go into effect immediately, and thus effectively wipe out all of the Executive Orders, Regulations, and public health rules that are currently in effect to “sunset” in the absence of legislative approval? The parties to this case have all stipulated that the Executive Orders and E-Regs in effect at the time these bills went into effect (February 4, 2021) remain in effect for thirty additional days (until March 4, 2021) under the terms of SB 1 and 2. Thereafter, they all would lose legal effect, and the Governor arguably would be barred from re-promulgating rules on the same subject matter. This would result in a chaotic legal environment in which everyone would make their own rules, and state and local health officials would be barred from any kind of effective enforcement of statewide standards and rules. As HB 1 provides, Kentucky businesses, school districts, and other organizations may either prepare a plan themselves that complies with HB 1 or “may utilize a plan prepared by a local or state government

agency, local or state chamber of commerce, trade association, or any other recognized affiliated organization.” H.B.1, R.S. 2021.

In the Court’s judgment, this would be an invitation to disaster. Dr. Stack’s testimony supports the Court’s finding that this wholesale repeal of all applicable Executive Orders and E-regs would likely result in a public health catastrophe. The Defendants have offered no testimony or affidavit to counter Dr. Stack’s testimony on this vital point.

All three bills raise issues under the separation of powers provisions of Kentucky Constitution Sections 27 and 28. They also raise issues under Sections 69 and 81 concerning the appropriate definition of executive power, and allocation of power to prescribe rules, regulations, and policies for public health between the legislative and executive branches. Likewise, the challenged legislation presents questions as to whether the thirty day limitation period for Executive Orders and E-regs is arbitrary under Section 2 of the Kentucky Constitution, and whether the bills are special legislation under Sections 59 and 60 of the Kentucky Constitution.

What measures are appropriately within the scope of executive power, and how extensive is the legislature’s right to prescribe the limits of executive power? While the legislature has extensive power to define the powers of the executive, its power to delegate legislative power is not unlimited. HB 1 appears to delegate legislative power to private entities to prescribe their own public health rules, a delegation that could be compared to Justice Cardozo’s observation regarding the National Industrial Recovery Act, that “[t]his is delegation running riot.” *Schechter Poultry v. United States*, 295 U.S. 495 (1935) (Cardozo, J., concurring, at 553).

The legislature has the right and duty to prescribe “safeguards, procedural and otherwise, which prevent an abuse of discretion by the agency.” *Kentucky Commission on Human Rights v. Fraser*, 625 S.W. 852, 854 (Ky. 1981). However, it is another question as to whether the legislature can make a broad delegation of legislative power to the executive, and then attempt to revoke it in thirty (30) days unless the legislature extends those rules. The issue is whether the legislature has crossed the line distinguishing prescribing policy, limitations and safeguards into micro-managing the executive’s implementation of the legislature’s grant of authority. *See Young v. Willis*, 203 S.W.2d 5 (Ky. 1947).

The thirty (30) day time limit raises additional questions under the Kentucky Constitution, which vests the sole authority for calling a special legislative session in the Governor. Ky. Const. § 80. Recent history has demonstrated that many emergencies last beyond thirty (30) days, including forest fires, floods, utility failures, water contamination, as well as various outbreaks of communicable disease. Kentucky courts have held that the Governor’s power to call an extraordinary session of the General Assembly is solely within his discretion. *See Geveden v. Commonwealth*, 142 S.W.3d 170 (Ky. App. 2004). This legislation, which purports to require legislative approval for executive orders and emergency administrative regulations that will last for more than thirty (30) days, could be viewed as an infringement of this power that is solely vested in the Governor. It could also be viewed as circumventing the constitutional limitations on meetings of the General Assembly under Sections 36 and 42 of the Kentucky Constitution.

The Senate President has argued that many other states have limited the executive power of the Governor to curb the potential for abuses in the pandemic. However,

Kentucky has uniquely strong provisions in its Constitution regarding separation of powers, and limitations on both legislative and executive powers. While the experience of other states may be informative, it is not dispositive. These issues must be analyzed under Kentucky constitutional law, which requires a part-time legislature, a full-time executive, and a strict separation of powers.

As to the Attorney General's argument that the case is not justiciable, and the Governor lacks standing, the Court finds that these three pieces of legislation seek to diminish the Governor's power under the Constitution to ensure "that laws be faithfully executed." Ky. Const. § 81. They raise issues of the Governor's powers under Kentucky Constitution Section 69, and they raise profound questions concerning the separation of powers between the Governor and the General Assembly under Kentucky Constitution Sections 27 and 28. The Governor has alleged irreparable injury to his constitutional powers and has made a preliminary showing that the bills will impair the exercise of his constitutional duty. That is sufficient to demonstrate a justiciable controversy in which the Governor has standing to sue. If the Attorney General agrees with the Governor that the legislation is unconstitutional, then the Court will reconsider whether there is a case or controversy for adjudication. But, in the event the Attorney General believes the challenged legislation is valid and constitutional, he has a duty to defend the laws under KRS 15.020 and his oath of office, and the Court has a duty to decide the case.

## CONCLUSION

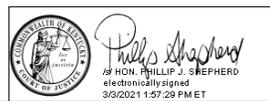
For the reasons stated above, **IT IS ORDERED AND ADJUDGED PURSUANT TO CR 65.04** as follows:

1. The Executive Orders related to COVID-19 promulgated by Governor Beshear under KRS Chapter 39A, and the Emergency Administrative Regulations promulgated by the Governor, Secretary Friedlander and the Cabinet for Health and Family Services, promulgated under KRS Chapter 13A that are listed in Exhibit 1 to the Governor's filing in this Court on February 19, 2021, shall remain in full force and effect, notwithstanding HB 1, SB 1, and SB 2, until amended or terminated by the Governor, according to law, pending a final judgment in this Court;
2. The requirement of SB 1 that all Executive Orders promulgated by the Governor under KRS Chapter 39A be limited to thirty (30) days unless ratified by the General Assembly is **TEMPORARILY ENJOINED** pursuant to CR 65.04 pending a final judgment in this action;
3. The requirement of SB 2 that all Emergency Administrative Regulations promulgated by the Governor or the executive branch of state government under KRS Chapter 13A be limited to thirty (30) days unless ratified by the General Assembly is **TEMPORARILY ENJOINED** under CR 65.04 pending final judgment in this action;
4. The requirement of SB 1 that the Governor must obtain the written approval of the Attorney General in order to affect a suspension of a statute that is required to be suspended as a result of an emergency under

- KRS Chapter 39A is **TEMPORARILY ENJOINED** pursuant to CR 65.04 pending a final judgment in this action;
5. The Attorney General, and all agents, employees, attorneys and others acting in concert with him, are **TEMPORARILY ENJOINED** pursuant to CR 65.04 from implementing or enforcing those portions of HB 1, SB 1 and SB 2 enjoined under this Order, pending a final judgment in this action;
  6. The Legislative Research Commission, and all agents, employees, attorneys and others acting in concert with LRC are **TEMPORARILY ENJOINED** pursuant to CR 65.04 from implementing or enforcing those portions of HB 1, SB 1 and SB 2 enjoined above, pending a final judgment in this action;
  7. The motions to dissolve the Restraining Order are **DENIED**;
  8. The Court incorporates by reference the Order entered February 3, 2021 granting a partial Restraining Order and the Order entered February 18, 2021 extending the partial Restraining Order involving HB 1, and extends those Orders until a final judgment is rendered in this action;
  9. Pursuant to CR 81, no bond shall be required;
  10. This Temporary Injunction shall be effective immediately upon its entry, and shall be binding on all parties, and all others acting in concert with them, who have notice of the provisions of this Order; and
  11. The Court makes a preliminary finding that it has jurisdiction over this dispute, as it appears to present a justiciable controversy under Sections

2, 3, 27, 28, 36, 42, 43, 69, 80 and 81 of the Kentucky Constitution and *Legislative Research Commission v. Brown*, 664 S.W.2d 907 (Ky. 1984). The Court will reserve judgment on the arguments of the legislative defendants for legislative immunity under Section 43 of the Kentucky Constitution, and the arguments of the Attorney General regarding standing and justiciability until those matters have been fully briefed and argued. But, pending a decision on those matters, the Court finds that the public interest requires that the provisions of HB 1 and SB 1 and 2 identified above, must be **STAYED** pending a final adjudication of the issues presented in this case.

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



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

DISTRIBUTION:

Amy Cabbage  
S. Travis Mayo  
Taylor Payne  
Laura Tipton  
Marc Farris  
Office of the Governor  
700 Capital Avenue, Suite 106  
Frankfort, Kentucky 40601

Wesley W. Duke  
LeeAnne Applegate  
Cabinet for Health and Family Services  
Office of Legal Counsel  
275 East Main Street Suite 5W-A  
Frankfort, Kentucky 40621

Barry L. Dunn  
Victor B. Maddox  
Chad Meredith  
Office of the Attorney General  
700 Capital Avenue, Suite 118  
Frankfort, Kentucky 40601

David E. Fleenor  
Office of the Senate President  
Capitol Annex, Room 236  
702 Capitol Avenue  
Frankfort, Kentucky 40601

Eric Lycan  
Office of the Speaker of the House  
Capitol Annex, Room 332  
702 Capitol Avenue  
Frankfort, Kentucky 40601

Greg Woolsey  
Legislative Research Commission  
State Capitol, Room 316  
Frankfort, Kentucky 40601