
Supreme Court of Kentucky

Case No. 2021-SC-0228

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

Appellants

v. On Transfer from the Court of Appeals
Case No. 2021-CA-0702

Appeal from the
Boone Circuit Court
Civil Action No. 20-CI-00678

RIDGEWAY PROPERTIES, LLC, d/b/a Beans Café &
Bakery

and

DANIEL CAMERON, in his official capacity as Attorney
General of the Commonwealth of Kentucky

Appellees

ATTORNEY GENERAL'S RESPONSE TO THE GOVERNOR'S MOTION FOR LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY

"[T]he Governor, like everyone, is bound by the law." *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 369 (Ky. 2016). Yesterday, the Governor defied this uncontroversial principle by issuing an executive order imposing a mask mandate that he lacks the power to issue and is in fact enjoined from issuing.

Three facts are undisputed. First, Kentucky law as amended by the General Assembly during its 2021 session prohibits the Governor from re-

issuing a mask mandate. Second, the Boone Circuit Court entered a permanent injunction prohibiting the Governor from violating Kentucky's new laws. And third, both the Court of Appeals and this Court have refused to stay that injunction.

The Governor frames his motion as one to notify the Court of "supplemental authority." What's his authority? He cites his own executive order requiring children above age two and adults to wear masks at all schools and daycares. But the *relevant* authority, of course, is what the General Assembly has passed into law. Nine months ago, this Court told the General Assembly it could end the emergency. The "duration of the state of emergency . . . is also limited by the aforementioned 2020 Senate Bill 150, Section 3, which requires the Governor to state when the emergency has ceased but, in any event, allows the General Assembly to make the determination itself if the Governor has not declared an end to the emergency 'before the first day of the next regular session of the General Assembly.'" *Beshear v. Acree*, 615 S.W.3d 780, 811–12 (Ky. 2020). House Joint Resolution 77, enacted over the Governor's veto, declared an end to the state of emergency as of June 29, 2021. 2021 Ky. Acts ch. 168 (HJR 77). And Senate Bill 1, also enacted over the Governor's veto, prohibits a new declaration of emergency based "upon the same or substantially similar facts and circumstances as the original declaration or implementation without the prior approval of the General Assembly." 2021 Ky. Acts ch. 6 (SB 1) § 2(3); *see also id.* § 2(2)(a), 2(4). Senate

Bill 1 also removes the Governor’s ability to impose requirements like a mask mandate. *See id.* § 3 (repealing previous subsection “j”). Accordingly, there is simply no foundation for the Governor to exercise a power under KRS Chapter 39A.

On top of all that, the Governor’s executive order is questionable at best under House Bill 192, which limits the Governor’s authority, with an exception not applicable here, to spend more than \$10,000 on an executive order not otherwise authorized by the General Assembly. 2021 Ky. Acts ch. 169 (HB 192), Part III § 37. What is not questionable, however, is that the Governor has failed to comply with House Bill 192’s reporting requirements, which are a “condition precedent” for the issuance of any executive order. *Id.* at Part III § 37(1)–(5). The General Assembly could not have been any clearer: the Governor cannot unilaterally issue executive orders under KRS Chapter 39A including a mask mandate.

Not only has the General Assembly given the Governor crystal-clear directions, but so has the Boone Circuit Court. Its permanent injunction says that the Governor and his appointees “are **ENJOINED** from issuing or enforcing, against any person within this Commonwealth, any emergency order, emergency decree, or emergency regulation to the extent that the same are in conflict with, or are otherwise contrary to, House Bill 1, Senate Bill 1, Senate Bill 2, and House Joint Resolution 77, as passed in the 2021 session of the General Assembly.”

So, in sum, the General Assembly has spoken and the Boone Circuit Court has ruled. But there's still more. The Governor asked this Court to stay the Boone Circuit Court's permanent injunction, and the Court unanimously denied that motion only three weeks ago. The Governor then asked the Court to reconsider that decision, but so far the Court has not ruled on the Governor's second stay motion.

No matter, says the Governor. Rather than wait for a ruling, the Governor imposed his mask mandate anyway while continuing to ask this Court to stay the Boone Circuit Court's injunction. The Governor's mask mandate makes it clear—at least in the Governor's mind—that he does not need a stay from this Court because he can do whatever he wants no matter what our courts say. His unmistakable message is that this Court's resolution of his motion for relief from the Boone Circuit Court's permanent injunction matters not. This conduct “create[s] a perfect storm, an unprecedented collision of the constitutional powers accorded the three separate branches of government.” *See Beshear v. Haydon Bridge Co., Inc.*, 416 S.W.3d 280, 296 (Ky. 2013).

The legitimacy of the Judiciary—indeed, the very “judicial power of the Commonwealth,” Ky. Const. § 109—depends on our elected leaders respecting judicial decisions, especially those with which they disagree. Until now, those we elect have done just that. For example, the General Assembly followed this Court's decision invalidating Kentuckians' first attempt to adopt Marsy's Law.

Westerfield v. Ward, 599 S.W.3d 739 (Ky. 2019). Governor Bevin accepted this Court’s decision overturning Senate Bill 151, the pension reform bill. *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74 (Ky. 2018). And most recently, Attorney General Cameron, and the Kentuckians he represents, have honored this Court’s decision in *Acree*, which upheld most of the Governor’s Covid-related executive orders from 2020.

In each of these cases, Kentucky’s leaders accepted this Court’s decision and moved on. Judged against this rich tradition of Kentucky’s leaders respecting the judiciary as a coequal branch of government, the Governor’s disregard of the Boone Circuit Court’s permanent injunction and this Court’s denial of his motion to stay stands alone.

The Governor’s filing justifies his mask mandate by noting that various groups and individuals support his executive order. [Notice at 1–2]. But this case cannot be about who is right or wrong about masks. Citizens from Pikeville to Paducah disagree about this topic.¹ Nor can this case be driven by fear of Covid-19. This case, instead, must be about the fact that under our constitutional charter only the General Assembly possesses the “legislative power.” Ky. Const. § 29. That body has told the Governor, over his repeated vetoes, that he now lacks the power to re-impose a mask mandate. If the Governor wants that power again, he needs to call a special session and make

¹ As do healthcare professionals. See Dr. Marty Makary & H. Cody Meissner, *The Case Against Masks for Children*, Wall Street Journal (Aug. 8, 2021), available at <https://perma.cc/6X7R-K7TQ>.

his case to Kentucky's legislators. The Governor has a ready-made remedy—one written into our Constitution—at his disposal.

It should not be lost on the Court that its *Acree* decision gave the General Assembly a roadmap for modifying the Governor's emergency powers. The "checks" on the Governor's authority, this Court unanimously held, include "legislative amendment or revocation of the emergency powers granted the Governor." *Acree*, 615 S.W.3d at 813. Why is this check essential? Because "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 871 (Ky. 2005) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring)). Otherwise, unchecked emergency powers given to a single executive "would tend to kindle emergencies." *Id.* (quoting *Youngstown Sheet*, 343 U.S. at 650 (Jackson, J., concurring)).

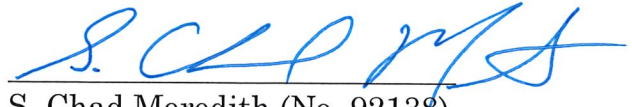
It cannot be the case that our Constitution altogether boxes the General Assembly out of deciding how 4.5 million Kentuckians live their daily lives just because the Governor declares an emergency. More to the point, our Constitution does not vest nebulous, unwritten, and unlimited authority in the Governor to issue whatever directives he sees fit if he perceives an emergency. If the Court green-lights the Governor's mask mandate and backtracks on the roadmap it gave the General Assembly in *Acree*, our separation of powers will suffer grievous damage. If the Court stays the Boone Circuit Court's

permanent injunction, it will give cover to future Governors to wield emergency powers without limit and will encourage them to ignore judicial injunctions with impunity.

* * *

American government, John Adams told us, is one of “laws and not of men.” *See also Marbury v. Madison*, 5 U.S. 137, 163 (1803). The rule of law matters. It matters that the General Assembly expressly prohibited the Governor from re-imposing a mask mandate. It matters that the Governor is under a permanent injunction from the Boone Circuit Court prohibiting him from violating these laws. And it matters that the Court of Appeals and this Court have refused to lift that injunction. Regardless of whether the Governor’s mask mandate is a good or bad idea, his issuance of it offends the rule of law. This Court should remind the Governor that the executive branch is but “one of the three partners in Kentucky state government.” *See Jefferson Cnty. Police Merit Bd. v. Bilyeu*, 634 S.W.2d 414, 416 (Ky. 1982). The executive branch is bound by the Constitution and the rule of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this response was served on August 11, 2021 via electronic mail to counsel of record and by U.S. mail to Amy D. Cubbage, S. Travis Mayo, Taylor Payne, Marc Farris, & Laura C. Tipton, Office of the Governor, 700 Capitol Avenue, Suite 106, Frankfort, KY 40601; Wesley W. Duke & David Lovely, Office of Legal Services, Cabinet for Health & Family Services, 275 East Main Street 5W-A, Frankfort, KY 40621; Chris Wiest, 25 Town Center Blvd., Suite 104, Crestview Hills, KY 41017; Thomas Bruns, 4750 Ashwood Dr., Suite 200, Cincinnati, OH 45202; Zach Gottesman, 404 E. 12 St., 1st Floor, Cincinnati, OH 45202; Hon. Richard Brueggemann, 6025 Rogers Ln., Room 141, Burlington, KY 41005.

