Supreme Court of Kentucky

Case No. 2021-SC-0126

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

v.

On Transfer from the Court of Appeals
Case No. 2021-CA-0391-I

Motion for relief from the
Scott Circuit Court
Civil Action No. 21-CI-00128

GOODWOOD BREWING CO, LLC, *et al.* — *Plaintiffs-Respondents*

BRIEF OF THE COMMONWEALTH OF KENTUCKY AS *AMICUS CURIAE* SUPPORTING THE PLAINTIFFS-RESPONDENTS

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Brief was served on May 20, 2021 via U.S. mail to Oliver J. Dunford, Pacific Legal Foundation, 4440 PGA Blvd., Suite 307, Palm Beach Gardens, FL 33410; Joshua S. Harp, Baughman Harp, PLLC, 401 W. Main St., Frankfort, KY 40601; Amy D. Cubbage, S. Travis Mayo, Taylor Payne, Marc Farris, & Laura C. Tipton, Office of the Governor, 700 Capitol Ave., Suite 106, Frankfort, KY 40601; Wesley W. Duke & David Lovely, Office of Legal Services, Cabinet for Health & Family Services, 275 E. Main St. 5W-A, Frankfort, KY 40621; Judge Brian Privett, Scott Circuit Court, Scott County Justice Ctr., 310 Main St., Georgetown, KY 40361.

STATEMENT OF POINTS AND AUTHORITIES

INTERESTS OF *AMICUS CURIAE* AND PURPOSE OF BRIEF

The Attorney General plays a special role in protecting the Rule of Law within the Commonwealth. By law, "[t]he Attorney General is the chief law officer of the Commonwealth of Kentucky," and "he shall appear for the Commonwealth in all cases in the Supreme Court or Court of Appeals wherein the Commonwealth is interested." KRS 15.020. But his role goes far beyond merely representing the State and its agencies. *See Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974). Indeed, the Attorney General's highest and primary obligation is to protect the interests of the *people* of the Commonwealth. *See Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (Ky. 1974). And, as the people's lawyer, the Attorney General's most important duty is defending the Constitution and upholding the Rule of Law.

Fulfilling that role naturally involves different approaches in different contexts. When, for example, the constitutionality of a statute is challenged in a suit that lacks justiciability and amounts to a request for an advisory opinion, the Attorney General's job is to protect the Constitution's separation of powers by contesting the court's ability to decide the case. *See, e.g., Cameron v. Beshear*, No. 2021-SC-0107-T, Br. for the Att'y Gen. But when the constitutionality of a statute is drawn into question in litigation involving an actual, justiciable case or controversy—like this case—the Attorney General's job is to defend the statute if he can do so consistent with the Rule of Law. This Brief seeks to vindicate that interest in upholding the Rule of Law by providing

the Commonwealth's perspective on the matters at issue, and this Brief also seeks to fulfill the Attorney General's statutory obligation to "appear for the Commonwealth in all cases in the Supreme Court . . . wherein the Commonwealth is interested." KRS 15.020.

ARGUMENT

The Governor wants to be free of any checks and balances that the General Assembly places on his ability to exercise unilateral statutory authority during declared emergencies. To that end, he makes the calculated decision to only discuss the merits of his position in the context of the case that he brought in Franklin Circuit Court—a case that does not present a justiciable controversy and that merely seeks an unconstitutional advisory opinion.

More importantly, the Governor has not shown that the Scott Circuit Court abused its discretion in granting the Plaintiffs-Respondents' request for a temporary injunction. Thus, he is not entitled to a vacatur of that injunction. *See Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978). There are many reasons why this Court should not vacate the Scott Circuit Court's temporary injunction, but this Brief addresses the three most prominent. First, contrary to Governor's arguments, the Franklin Circuit Court's temporary injunction does not prevent the Scott Circuit Court from hearing this case and entering an injunction of its own. Second, the equities support maintaining the Scott Circuit Court's injunction, not vacating it. And, third,

the Scott Circuit Court's injunction is not precluded by *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020). To the contrary, *Beshear v. Acree* supports the Scott Circuit Court's injunction.

I. The Franklin Circuit Court's temporary injunction does not preclude other circuit courts from considering challenges to the Governor's actions and entering injunctions of their own.

The Governor is wrong in arguing that the Franklin Circuit Court's temporary injunction precludes the Scott Circuit Court from entering a temporary injunction in a separate case with different parties. Indeed, he is both factually and legally incorrect.

Factually, the Governor misstates the scope of the Franklin Circuit Court's temporary injunction. He contends that the Franklin Circuit Court's temporary injunction precludes all other circuit courts in the Commonwealth from entering injunctive relief on any similar claims pertaining to the Governor's emergency orders. But the Franklin Circuit Court itself did not view its order as having that kind of sweeping preclusive effect. During a February 18 hearing, the Franklin Circuit Court explained on the record:

> I've never been of the view that any Circuit Court can enjoin in [*sic*] a proceeding in another Court and . . . there's a whole host of context [*sic*] in which these issues can arise and certainly they can be litigated in any venue where . . . controversy arises . . . .

Beshear v. Osborne, Franklin Cir. Ct. Civil Action No. 21-CI-00089, Tr. of Feb. 18, 2021 Hr'g at 143–44, attached to Respondents' Initial Br. as Appendix 5. Thus, not even the Franklin Circuit Court viewed its order as expansively as the Governor wants to read it. If the Franklin Circuit Court did not

contemplate its order as having such far-reaching preclusive effect, it must not now be interpreted that way.

Ultimately, however, it would not matter even if the Franklin Circuit Court had intended to preclude the Scott Circuit Court from issuing injunctive relief. The law simply does not allow the Franklin Circuit Court to preclude parties who were not before it from obtaining injunctive relief of their own from the Scott Circuit Court. In arguing to the contrary, the Governor focuses on the notion that the Franklin Circuit Court's temporary injunction was a "statewide" injunction, as if that precludes all other circuit courts from entertaining actions related to his emergency orders. But that is a red herring. Whether it is statewide or not is beside the point. What really matters is that the parties purportedly enjoined by the Franklin Circuit Court are not parties in the Scott Circuit Court action. This simple fact means that the Franklin Circuit Court's temporary injunction cannot have any effect on the parties who sued in Scott County. The Rules of Civil Procedure specifically provide that a temporary injunction is "binding on *the party* enjoined." CR 65.04(4) (emphasis added). Thus, non-parties to an action cannot be bound by injunctive relief granted in that action.[1]

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[1] There are narrow, limited circumstances when an injunction can bind a non-party's conduct, such as when a non-party knowingly conspires with a party to violate the terms of an injunction. *See* CR 65.02(2) ("Every restraining order or injunction shall be binding upon the parties to the action, their officers, agents, and attorneys; and upon other persons in active concert or participation with them who receive actual notice of the restraining order or injunction by personal service or otherwise."). But no such circumstances are present here.

The point of such restrictions on the scope of injunctive relief is "[t]o prevent abuse by the 'strong arm of equity.'" *Commonwealth v. Mountain Truckers Ass'n, Inc.*, 683 S.W.2d 260, 263 (Ky. App. 1984). Such rules are "a codification of the ancient requirement of equity jurisprudence that an injunction be neither too broad nor too vague." *Id.* To ignore the restriction in CR 65.04(4) and allow the Franklin Circuit Court's injunction to bind parties who were not before it would be "directly contrary to the restriction against broad and overly vague injunctive orders," *id.*, and would also "ignore[ ] the in personam nature of injunctive relief," *id.*

Adopting the Governor's preclusion argument would also violate the maxim that because injunctive relief is only directed to the parties, it "is in no sense a prohibition on [another court] in the exercise of its jurisdiction." *Id.* (quoting 42 Am. Jur. 2d *Injunctions* § 201 (1969)). In other words, "while the courts have power to enjoin disputing parties presently before them from seeking relief in another judicial forum, they have no equitable power to prevent those other forums from hearing issues founded on identical statutory or common law principles but involving different parties." *Id.* at 263–64. Yet that is precisely what the Governor is trying to accomplish here. Even though none of the Plaintiffs-Respondents here are parties in the Franklin Circuit Court action, the Governor still contends that the Scott Circuit Court lacks any

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Thus, the normal rule against applying an injunction to a non-party applies here.

authority to hear their arguments and grant them any relief. The Governor has cited no authority to support the proposition that an injunction from one circuit court can deprive a different circuit court of authority to decide similar—or even identical—issues raised by different parties. And as far as the Attorney General knows, no such authority exists. In fact, the existing authority is to the contrary. *See id.*

The Governor's argument seems to conflate the binding effect of injunctions with the binding effect of precedent. That is, there are two basic ways that judicial decisions can have binding effect. One is that parties to a lawsuit must comply with a court's orders lest they be held in contempt. *See, e.g., Crowder v. Rearden*, 296 S.W.3d 445, 450 (Ky. App. 2009). But in general, a person cannot be bound by an order if that person is not a party in the litigation in which the order is entered.[2] Thus, court orders are binding on *parties* who are subject to those orders. *See* CR 65.02(2); CR 65.04(4). But the Plaintiffs-Respondents here obviously are not bound in this way by the Franklin Circuit Court's injunction. There is no way the Franklin Circuit Court could hold them in contempt for anything they have done.

The second way that a judicial decision can have a binding effect is if it is precedential. In Kentucky, decisions from the Supreme Court and Court of Appeals are precedential, meaning circuit courts must follow them when

[2] As Footnote 1 explained, there are narrow exceptions to this rule, but they are inapplicable here.

applicable. *See* SCR 1.040(5). But a decision from a circuit is *not* precedential for other circuit courts.[3] All circuit courts in Kentucky are equal in authority. The Franklin Circuit Court is not a super-circuit that sets precedent that is binding on all other circuits. *See Bell v. Cabinet for Health & Family Servs., Dep't for Cmty. Based Servs.*, 423 S.W.3d 742, 751 (Ky. 2014) (holding that even final judgments from a trial court have no precedential value). To the contrary, the Franklin Circuit Court is no different than any other circuit. The Commonwealth "has a unitary court system" with "but one circuit court[;] and all circuit judges are members of that court and enjoy equal capacity to act throughout the state." *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162–63 (Ky. 2009) (quoting *Baze v. Commonwealth*, 276 S.W.3d 761, 767 (Ky. 2008)). Thus, just as the Franklin Circuit Court's injunction is not binding on the Plaintiffs-Respondents here, it also is not binding on the Scott Circuit Court.

Of course, the equal footing of each circuit generally means that parties who are enjoined by one circuit court cannot obtain relief from that injunction by collaterally attacking it through a suit filed in another circuit. The Governor's Brief spends a lot of time arguing that this is what is happening here, but that is incorrect. This case is not a collateral attack because the

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[3] Of course, the doctrines of issue preclusion and claim preclusion can keep parties from re-litigating something that has already been litigated in another circuit court, but that is not because one circuit court's decisions are precedential for other circuit courts.

parties purportedly enjoined by the Franklin Circuit Court are not the parties who sought injunctive relief in Scott Circuit Court. Put differently, this is not a situation in which parties to an action are asking one circuit court to relieve them from a decision issued against them by another circuit court. Rather, this is simply a situation in which the Plaintiffs-Respondents are asking a circuit court to consider issues similar to those already under consideration in a different lawsuit involving different parties in a different circuit. And no rule says the second circuit court in that scenario cannot consider the issues being litigated in the first action. If the circuits reach incompatible outcomes in such a scenario, it might be appropriate for this Court to step in to resolve the conflict. *See Thompson*, 300 S.W.3d at 158. But no rule says only the first circuit court to consider the issues can grant any injunctive relief.

If there were such a rule, it would set a dangerous precedent in which a party who faces the prospect of getting sued can rush to a courthouse of his or her choosing and obtain preclusive relief in a non-justiciable suit with an opposing party against whom there are no real claims for relief. Such preemptive lawsuits would create opportunities for collusion that would harm the interests of those whose rights are affected but who have not been made a party to the lawsuit—just as the Governor's arguments would deprive the Plaintiffs-Respondents of the right to protect their interests here. More generally, this Court acknowledged the dangers of preemptive lawsuits in *Mammoth Medical, Inc. v. Bunnell*, 265 S.W.3d 205 (Ky. 2008). Allowing the

Governor to preempt the action in Scott Circuit Court would conflict with *Mammoth Medical.*

One final point on this topic: Giving preclusive effect to the Franklin Circuit Court's temporary injunction here would deprive citizens in other counties—like the Plaintiffs-Respondents here—of the ability to access the courts to vindicate their constitutional rights. The Governor's emergency orders have affected individuals and businesses in all corners of the Commonwealth. And our courts should be open to every one of them. The Constitution specifically provides that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Ky. Const. § 14. It has no exception that would bar the courthouse doors to the citizens of Scott County because of an interlocutory ruling in a case pending in another county to which they are not parties. *See id.*

II. The equities support the Plaintiffs-Respondents, not the Governor.

An appellate court's decision on whether to vacate a temporary injunction depends in some measure on a weighing of the equities. *See Maupin*, 575 S.W.2d at 699. And the equities strongly disfavor vacating the Scott Circuit Court's injunction here.

As the Plaintiffs-Respondents explain in their Initial Brief, they will suffer irreparable harm if the Scott Circuit Court's injunction is vacated. But

they are not the only ones who will suffer harm. Vacatur of that injunction will harm the public interest as well. More specifically, vacatur of the Scott Circuit Court's injunction will almost certainly mean that the Governor will not adhere to the checks and balances placed on his statutory emergency powers by Senate Bill 1, Senate Bill 2, House Bill 1, and House Joint Resolution 77. The public interest strongly favors adherence to this legislation. *See Boone Creek Props., LLC v. Lexington-Fayette Urban Cty. Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014). Indeed, the very fact that a statute is enacted "constitutes [the legislature's] implied finding" that the public will be harmed if the statute is not enforced. *Id.* (quoting 42 Am. Jur. 2d *Injunctions* § 147). Thus, if the Court allows the Governor to sidestep the checks and balances in that legislation, the Commonwealth itself will suffer irreparable harm. *See Abbott v. Perez*, --- U.S. ---, 138 S. Ct. 2305, 2324 & n.17 (2018); *see also Boone Creek Props., LLC*, 442 S.W.3d at 40–41 (holding that non-enforcement of a statute constitutes irreparable harm to the government).

In contrast, the Governor will suffer no harm if the Scott Circuit Court's temporary injunction is left in place. The Governor's interest—indeed, his *duty* under the Constitution—is in executing the new legislation, not trying to sidestep it or invalidate it. *See* Ky. Const. § 81.

While not entirely clear, the Governor seems to argue that he has some inherent constitutional authority to issue whatever emergency executive orders he believes to be prudent. Any argument that the Governor has

inherent constitutional authority is contradicted by decades of decisions from this Court, but even the Governor's view of the law does not in any way establish that he is harmed by the Scott Circuit Court's temporary injunction. In fact, it would prove the opposite. Consider the lack of injury this way: The Governor appears to claim that he has inherent constitutional authority that trumps whatever statutory authority the General Assembly enacts. Even if that were true, it would only mean the challenged legislation does not injure the Governor because his authority exists outside the positive grant of power in—and is therefore unaffected by changes to—KRS Chapter 39A. That is, the Governor would not be injured by whatever KRS Chapter 39A might say or not say because—according to the Governor—he does not need those statutes anyway since the Constitution already grants him the power he needs. Thus, at its root, the Governor's claim is not that he has suffered some injury to his constitutional prerogatives—after all, he claims that he still possesses them—but that the scope of statutory authority granted under KRS Chapter 39A is not as broad as he wants it to be. But if he is right that he has all the power he needs under the Constitution, then the General Assembly's changes to the scope of authority granted by KRS Chapter 39A are irrelevant because he can keep issuing whatever emergency orders he desires under his inherent constitutional powers. And if the changes to KRS Chapter 39A are irrelevant, then he cannot be injured by them.

On the other hand, if the Governor *does* need KRS Chapter 39A to take certain emergency actions, then his emergency powers are not inherently constitutional. And if they are not inherently constitutional, then he is not harmed by their alteration. After all, the General Assembly could simply repeal all of KRS Chapter 39A because nothing in the Constitution obligates the legislature to grant the Governor emergency powers in the first instance. Thus, no matter how one views the situation, the Scott Circuit Court's temporary injunction does not harm the Governor.

Finally, the Governor suggests that COVID-19 continues to pose such a threat to public health that it is inequitable to allow any restrictions to be imposed on his ability to respond to that threat. His Brief suggests that any limitation on his COVID-related orders is itself a threat to the public, and therefore inequitable. But the Governor recently announced that he would end his mask mandate and allow businesses to resume operating at 100% capacity on June 11. *See, e.g.*, Billy Kobin & Sarah Ladd, *The Courier Journal*, "Gov. Andy Beshear: Kentucky to Resume 100% Capacity, End Mask Mandate in June," (May 14, 2021), available at https://www.courier-journal.com/story/news/local/2021/05/14/kentucky-mask-mandate-end-date-june-11/5088741001/. This is inconsistent with his objection to the Scott Circuit Court's temporary injunction. If the situation were so dangerous that it is inequitable for the Scott Circuit Court to require the Governor to adhere to the new legislation limiting his emergency powers, then why would the

Governor himself be voluntarily lifting his COVID-related restrictions? The Governor's self-imposed limitations on his orders cannot be any less threat to the public than the Scott Circuit Court's limitation of his orders—which is to say that neither poses a threat. There is thus no basis to say that the equities support vacating the Scott Circuit Court's temporary injunction.

III. The Scott Circuit Court's temporary injunction is not precluded by *Beshear v. Acree.*

The closest the Governor's Initial Brief comes to discussing the merits is his argument that *Beshear v. Acree* preclude the Scott Circuit Court's temporary injunction. He is wrong. *Acree* actually supports the Scott Circuit Court's injunction.

As it relates to this case, the most important part of *Acree* is the Court's holding that "[w]hile the authority exercised by the Governor in accordance with KRS Chapter 39A is necessarily broad," there are many "checks on that authority," including "legislative amendment or revocation of the emergency powers granted the Governor." *Acree*, 615 S.W.3d at 812–13 (citing *In re Certified Questions from U.S. Dist. Ct., W. Dist. of Mich., S. Div.*, --- N.W.2d ---, No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020) (McCormack, C.J., concurring in part and dissenting in part)). Thus, *Acree* expressly held that the General Assembly could amend—or even revoke—the Governor's emergency powers. As a result, the Governor has no basis to object to the constitutionality of legislation doing precisely that.

The bottom line here is that Senate Bill 1, Senate Bill 2, House Bill 1, and House Joint Resolution 77 are constitutional. To hold otherwise would require this Court to overrule—or ignore—the months-old *Acree* decision. And it would also require this Court to overrule decades of precedent holding that the Governor has no inherent or implied powers. *See, e.g.*, *Brown v. Barkley*, 628 S.W.2d 616, 623 (Ky. 1982). After all, the only way the challenged legislation is unconstitutional is if the Governor possesses inherent, unexpressed constitutional power to take whatever actions he finds to be necessary in emergencies. But this Court has held for decades that: (1) the Governor has no inherent constitutional powers; and (2) even if he did, they would be subordinate to the General Assembly's ability to alter them by statute. *See id.* The Governor has given the Court no good reason to jettison these long-held principles, and in fact there is none.

The Governor's emergency powers were created by statute, and they can be changed by statute, just as this Court held mere months ago in *Acree*.

CONCLUSION

The Court should deny the Governor's request to vacate the Scott Circuit Court's temporary injunction.

Respectfully submitted,

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