Supreme Court of Kentucky

Case No. 2021-SC-0107

DANIEL J. CAMERON, in his official capacity as Attorney General of the Commonwealth of Kentucky — *Defendant-Movant*

v.

On Transfer from the Court of Appeals
Case No. 2021-CA-0328-I

Motion for relief from the
Franklin Circuit Court
Civil Action No. 21-CI-00089

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

and

DAVID W. OSBORNE, in his official capacity as Speaker of the Kentucky House of Representatives, *et al.* — *Defendants-Respondents*

RESPONSE BRIEF FOR THE ATTORNEY GENERAL

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Brief was served on May 25, 2021 via 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 & LeeAnne Applegate, Office of Legal Services, Cabinet for Health & Family Services, 275 East Main Street 5W-A, Frankfort, KY 40621; David E. Fleenor, Office of the Senate President, 702 Capital Avenue, Room 236, Frankfort, KY 40601; Eric Lycan, Office of the Speaker of the House, 702 Capital Avenue, Room 332, Frankfort, KY 40601; Greg Woosley, 702 Capital Avenue, Frankfort, KY 40601; & Phillip J. Shepherd, Circuit Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601.

STATEMENT OF POINTS AND AUTHORITIES

ARGMUMENT

The Governor's Initial Brief is a capitulation. Despite knowing that the *only* issues raised in the Attorney General's CR 65.07 Motion were the lack of a justiciable case or controversy and the lack of standing, the Governor devoted slightly more than *three* pages of his 50-page Brief to those issues. And it was not until page 43 of his Brief that he addressed either one. There is only one reason a litigant would go to such lengths to evade *the only issues* being litigated: He has no convincing arguments.

The sum of the Governor's arguments is this: This case must be justiciable because his "Complaint identifies adversarial parties." *See* Governor's Initial Br. at 44. In other words, the Governor contends that the very act of suing the Attorney General and the leaders of the legislature is itself enough to create a justiciable case or controversy. But this circular reasoning is wrong. Simply filing a lawsuit—no matter how important the issues it seeks to raise might be—is not enough to create a justiciable case or controversy. If the rule were otherwise, when would justiciability ever matter?

Despite the manifest lack of justiciability here, the Governor claims it is "inexplicabl[e]" that the Attorney General would object to this lawsuit on that basis. *Id.* at 43. But justiciability is the irreducible minimum of a valid lawsuit, *see Commonwealth v. Hughes*, 873 S.W.2d 828, 829–30 (Ky. 1994), and it is a key component of the constitutional separation of powers, *see Appalachian Racing, LLC v. Commonwealth*, 504 S.W.3d 1, 6 (Ky. 2016). No

party should ever be forced to litigate a non-justiciable lawsuit, and, in fact, courts lack any authority to decide such a lawsuit. *See Hughes*, 873 S.W.2d at 829–30. Given the Attorney General's special role in defending the Rule of Law, it is his duty to make justiciability objections when applicable. What is inexplicable here is not that the Attorney General would contest the justiciability of this lawsuit, but that the Governor would have filed it in the first place. It is the Governor's constitutional duty to execute Kentucky's statutes, not to file non-justiciable lawsuits to have the laws he has sworn to enforce declared unconstitutional. *See* Ky. Const. § 81.

I. There is no justiciable case or controversy here.

The existence of a justiciable case or controversy depends "on whether there is a live controversy for the court to decide. 'Questions which may never arise or which are merely advisory, academic, hypothetical, incidental or remote, or which will not be decisive of a present controversy' do not present justiciable controversies." *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 112 (Ky. App. 2014) (quoting *Hughes v. Welch*, 664 S.W.2d 205, 208 (Ky. App. 1984)). Put differently, the Commonwealth's courts can decide "only rights and duties about which there is a present actual controversy presented by adversary parties, and in which a binding judgment concluding the controversy may be entered." *Veith v. City of Louisville*, 355 S.W.2d 295, 297 (Ky. 1962) (quoting *Black v. Elkhorn Coal Corp.*, 26 S.W.2d 481 (Ky. 1930)). Thus, the courts have no jurisdiction to issue advisory

opinions. That is, they cannot answer abstract legal questions that are not tied to an actual controversy between two parties. *See id.* (citations omitted).

But that is precisely what the Governor is asking the courts to do here. Rather than seeking to vindicate any rights in a claim for actual relief *against* the Defendants, he has simply asked the courts to tell him that he is right about the abstract, academic objections he has to the newly enacted legislation. The Governor's request for relief exemplifies a non-justiciable request for an advisory opinion.

To see why this is so, one need only ask how this case would be any different if the Governor had filed a lawsuit that did not name any defendants but merely asked for the new legislation to be declared unconstitutional. The Attorney General has posed this question repeatedly throughout this litigation, and the Governor has never even tried to answer it. The reason for his silence is obvious: This lawsuit would not be any different if there were no defendants.

That answer proves the Governor is seeking a non-justiciable advisory opinion because it makes clear that the Governor is not seeking relief *against* any of the Defendants. Instead, he is simply asking the courts to declare the challenged legislation unconstitutional in an abstract setting that does not present a real controversy. The courts cannot do that. *See Veith*, 355 S.W.2d at 297. Rather, they can only grant relief *against* another party—and only when there is an actual, concrete controversy that can be resolved by a judicial

order. *See id.*; *see also* CR 65.04(4) (requiring that a temporary injunction be entered against a "party"). No such controversy exists here.

This case is remarkably similar in this regard to *Revis v. Daugherty*, 287 S.W. 28 (Ky. 1926). In *Revis*, a potential candidate to fill an unexpired term in the office of Leslie County sheriff sued the Attorney General asking for a declaration about whether the election should be in 1926 or 1927. *Id.* at 28. The Attorney General argued that there was no justiciable case or controversy, and this Court's predecessor agreed. It held that the existence of a justiciable controversy would require the plaintiff to allege that the Attorney General claimed some right or duty that, "if exercised, would impair, thwart, obstruct, or defeat plaintiff in his rights." *Id.* at 29. But justiciability was lacking there because nothing of the kind was alleged, "nor, indeed, could there have been since nowhere in the act, or any other statute, or in the Constitution, is [the Attorney General] given any official duties pertaining to the question presented for determination." *Id.* In other words, there was no justiciable claim against the Attorney General because he had no role in enforcing or executing the laws at issue. And the Court held that the plaintiff could "not convert his academic question into a justiciable one by inserting the name of the Attorney General after 'v.' in the caption of his petition . . . ." *Id.* His complaint, in essence, was "of no more legal efficacy than would have been a letter written to the judge of the court to obtain his opinion upon a purely academic question." *Id.*

So too here. There is nothing for the Attorney General to enforce against the Governor.[1] In fact, the legislation is generally self-executing in that it merely alters the scope of the Governor's statutory emergency powers. The Attorney General's lack of a role in enforcing or executing the legislation is reflected in the fact that the Franklin Circuit Court's temporary injunction does not compel the Attorney General to do or refrain from doing anything. Thus, not only is the Governor's Complaint ultimately no different than "a letter written to the judge of the court to obtain his opinion upon a purely academic question," *id.*, but the Franklin Circuit Court's temporary injunction has no greater effect than a letter responding with the court's opinion on that purely academic question. In reality, the Franklin Circuit Court's temporary injunction is without effect because it purports to enjoin defendants who have no role in enforcing the statutes at issue—which only underscores the lack of a justiciable case or controversy. A court cannot abstractly enjoin a statute itself, but must enjoin a party who is tasked with enforcing or executing the statute. *See* CR 65.04(4). Yet the Franklin Circuit Court's temporary injunction only does the former.

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[1] The only conceivable exception here is the statutory-suspension provision in SB 1. But that provision does not give the Attorney General any enforcement mechanism against the Governor. If there were an actual, justiciable dispute over the Governor's attempt to suspend a particular statute without the Attorney General's consent, the Attorney General would have to sue the Governor. Plus, for the reasons expressed below, there is not now a justiciable claim regarding the statutory-suspension provision because any dispute over it is merely abstract and hypothetical.

The Governor's Initial Brief ignores this. Instead, the Governor argues that his claims must be justiciable because the Attorney General will not concede the unconstitutionality of the challenged legislation. In other words, the Governor takes a heads-I-win-tails-you-lose approach in which a party can only contest justiciability if the party first concedes his opponent's arguments on the merits. That approach is wrong. It does not matter that the Governor and Attorney General disagree about the constitutionality of the legislation. The Commonwealth's courts exist to adjudicate *actual* controversies involving legal rights *between* parties, not to settle a "mere difference of opinion." *Jefferson Cnty. ex rel. Coleman v. Chilton*, 33 S.W.2d 601, 605 (Ky. 1930) (quoting *Axton v. Goodman*, 265 S.W. 806 (Ky. 1924)). But here, there is merely a difference of opinion. There are no actual, concrete disputes involving the legal rights *between* the Governor and the Attorney General. And contrary to the Governor's views, "[e]very dispute between lawyers on a subject of law . . . is not a justiciable controversy to be settled in a declaratory action." *Id.*

The Governor's only attempt to identify a specific justiciable controversy between himself and the Attorney General is his argument about the provision in SB 1 that allows the Governor to suspend statutes only with the Attorney General's consent. But even that falls short because the Governor's argument about that provision still amounts to a mere difference of opinion on an abstract, academic question that is yet to materialize into a concrete dispute.

Despite being given many opportunities throughout this litigation, the Governor has identified no statutes that he wishes to suspend and that he believes the Attorney General will try to prevent him from suspending. Thus, his claim about the statutory-suspension provision of SB 1 is speculative and abstract. It is not only a mere academic difference of opinion over the constitutionality of that provision, but a difference of opinion over a dispute that might not ever arise. That is, it is not clear that there will ever be a situation involving a true dispute between the Governor and the Attorney General over the suspension of any particular statute. At best, the suspension issue poses a hypothetical question rather than an actual, concrete controversy. And hypothetical questions cannot create a justiciable claim.[2] *See Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007) (quoting *Doe v. Golden & Walter, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005)); *Veith*, 355 S.W.2d at 297.

Still, the Governor's claim about the statutory-suspension provision in SB 1 would fail even if it were justiciable. That is because the Governor's claim improperly conflates his authority as Chief Magistrate under Section 69 of the Constitution with the separate authority to suspend statutes under Section 15. The power to suspend statutes is a legislative—not executive—function. *See Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 679–80 (Ky. 2019).

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[2] But even if the Governor had pled a justiciable claim about the statutory-suspension provision in SB 1—which he did not—that would not mean that his other claims would automatically become justiciable as well. There is no such thing as pendent justiciability. Every claim that a plaintiff makes must be justiciable. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

But unlike the veto power, which is a legislative function that the Constitution authorizes the executive branch to exercise, *see Fletcher v. Commonwealth*, 163 S.W.3d 852, 862 (Ky. 2005) (citing *Arnett v. Meredith*, 121 S.W.2d 36, 37 (Ky. 1938)), the power to suspend statutes is not lodged in any particular executive branch official in the first instance. Instead, Section 15 of the Constitution provides that statutes may not be suspended "unless by the General Assembly *or its authority*." Ky. Const. § 15 (emphasis added). Thus, the Constitution allows the General Assembly to either suspend statutes itself, or specify how some other body or official may do so. *See Beshear*, 575 S.W.3d at 679–80. And because he is merely acting as the agent of the legislature in performing a legislative function—not an executive function—when the General Assembly allows the Governor to have a role in suspending statutes, the Governor cannot claim any right to be "supreme" in that role.[3] Nothing in the Constitution says that once the Governor is allowed to unilaterally exercise the legislative function of suspending statutes, he must always be allowed to do so. In fact, the Constitution does not even require the General Assembly to grant the

[3] It is not even clear what it means for the Governor to be supreme in the realm of *executive* authority. For example, it cannot mean that other elected executive officials are completely incapable of being authorized to second-guess the Governor in the exercise of executive authority. If that were the case, the Attorney General would not have the authority to second-guess the Governor through litigation. *See, e.g., Commonwealth ex rel. Beshear v. Commonwealth, Office of the Governor, ex rel. Bevin*, 498 S.W.3d 355, 361–66 (Ky. 2016). But regardless of exactly what it means for the Governor to be supreme in executive authority, it is clear that this issue does not even come into play here because the power to suspend statutes is a legislative function, and Section 15 allows the legislature to grant suspension authority to whomever it wishes.

Governor suspension power at all. The General Assembly could just as well give that authority to the Treasurer or the Auditor, and so it can certainly condition any exercise of the suspension-power on two different constitutional officers agreeing that it is necessary.

The Governor relies almost entirely on *Board of Education of Boone County v. Bushee*, 889 S.W.2d 809 (Ky. 1994), but that case is inapt. *Bushee* involved a clash between a statutory delegation of authority to local school councils to "set school policy consistent with district board policy," *id.* at 810, and a Boone County Board of Education policy that required school councils to submit "for Board review and *approval*" a plan containing measureable goals and objectives for the coming school year, *id.* (emphasis in original). In other words, *Bushee* involved a situation where the General Assembly gave certain authority to school councils, and the Boone County Board of Education adopted a policy that would have taken it away. Obviously a school board cannot undo a grant of power from the General Assembly. But no such conflict exists here. This case deals with a grant of authority from the General Assembly, and then a subsequent alteration of that grant of authority *by the General Assembly.* There is no conflict between applicable rules here, nor is there a conflict between governmental bodies. Instead, this case only involves a statutory amendment by the one body authorized to amend the statute. That is, the General Assembly granted the Governor the authority to exercise the legislative function of suspending statutes, and so the General Assembly can

take away or alter that grant of authority at its discretion. *See Beshear v. Acree*, 615 S.W.3d 780, 812–13 (Ky. 2020) (holding that the General Assembly could amend the Governor's powers under KRS Chapter 39A if it were dissatisfied with the Governor's use of those powers (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))).

More importantly, the conflict in *Bushee* between the school board policy and the statute was an actual, concrete controversy. In *Bushee*, the Boone County Board of Education was trying to impose on school councils a policy that the schools councils believed to conflict with a state statute. *See Bushee*, 889 S.W.2d at 810. That requirement would have mandated the school councils to submit—against their wishes—a particular report and receive Board approval for that report *by a date certain*. *See id.* Thus, there was nothing abstract about the dispute; it had materialized into a concrete dispute with an impending deadline that could not be avoided. One way or another, the parties in *Bushee* were on a collision course. The same cannot be said here. Here, it is purely speculative whether there will ever be a conflict between the Governor's claim to unilateral authority to suspend statutes and the limit the General Assembly placed on that power in SB 1. By failing to identify any particular statutes that he desires to suspend without the Attorney General's

consent, the Governor has given no reason to believe that the purported conflict is anything but speculative and abstract.

Recognizing the speculative nature of his statutory-suspension claim, the Governor makes a last-ditch effort to save it by citing *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013), for the proposition that he does not have to wait for the actual harm of being deprived of the ability to unilaterally suspend a statute before suing to invalidate the suspension provision of SB 1. He is technically correct that a party need not wait until it has incurred injury before seeking a declaratory judgment, but that does not mean that the courts can entertain speculative, abstract claims like his claims here. Instead, while a plaintiff might not have to incur harm before seeking a declaratory judgment, "[a] threatened injury must be 'certainly impending.'" *Commonwealth v. Bredhold*, 599 S.W.3d 409, 417 (Ky. 2020) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). And here it is not. The Governor's Initial Brief fails to acknowledge this point.

It also fails to address this Court's precedents disallowing preemptive lawsuits. There is a difference between a lawsuit that a potential defendant preemptively files to avoid liability and a valid declaratory judgment action that is filed when harm is impending but has not yet occurred, such as the day before a statute takes effect. In *Mammoth Medical, Inc. v. Bunnell*, 265 S.W.3d 205, 213 (Ky. 2008), this Court held that the former is not allowed. But that is what this case is. The Governor's Initial Brief glosses over *Mammoth Medical*

as though it does not exist. Rather than suing preemptively in a forum of his choosing, with the issues framed to his liking, and against parties with whom he has no real case or controversy, the Governor must litigate his claims against parties who are truly affected by his orders—*i.e.*, those with whom he has a justiciable controversy. One such case is already before this Court—the *Goodwood Brewing* case. The present case, however, lacks justiciability and so this Court should vacate the temporary injunction and remand with instructions to dismiss.

II. The Governor lacks standing.

The Governor argues that he has standing to sue the Attorney General simply because he has alleged an injury. If that were good enough, no case would ever be dismissed for lack of standing because *every* plaintiff claims to have suffered some kind of injury.

A plaintiff cannot establish standing merely by alleging an injury. Instead, the allegation of injury, when taken as true, must constitute an injury under the law, and it must be *caused* by the defendant. *See generally Overstreet v. Mayberry*, 603 S.W.3d 244 (Ky. 2020). Here, the Governor has made no such allegations. The only particular injury that he identifies in his Initial Brief is the one purportedly caused by the statutory-suspension provision in SB 1.[4] But, as explained above, that provision does not injure the

[4] As with justiciability generally, the Governor does not even try to explain how he has standing to sue the Attorney General on the other provisions in the challenged legislation. It is elementary that a lawsuit challenging the

Governor. Even if it did, however, he never asserts—nor could he assert—that there is a present or impending injury, much less one caused by the Attorney General.

The bottom line here is that the Governor is complaining about legislation that amended his *statutory* emergency powers. Because his interest—indeed, his *duty*—is in executing Kentucky's laws as enacted by the General Assembly, *see* Ky. Const. § 81, it is impossible for him to be harmed when powers that are given to him by statute are later altered by statute. *Cf. Acree*, 615 S.W.3d at 812–13 (holding that the General Assembly could amend the Governor's powers under KRS Chapter 39A if it were dissatisfied with the Governor's use of those powers (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))). Given the lack of any injury—much less injury *caused by* the Attorney General—the Governor has no standing to bring this suit.

III. Vacating the Franklin Circuit Court's temporary injunction will not cause any harm, much less irreparable harm.

The Governor's Initial Brief claims that if the Franklin Circuit Court's temporary injunction is vacated, his existing public health measures will be

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constitutionality of a statute must be brought against the official or governmental entity charged with enforcing the statute. *See Commonwealth v. Mountain Truckers Ass'n, Inc.*, 683 S.W.2d 260, 263 (Ky. 1984). Here, the Attorney General has no role in enforcing or executing the other provisions of the challenged legislation. There is thus no way that he could harm the Governor through those provisions.

eliminated and "bodies [will] pile up at hospital morgues." Governor's Initial Br. at 48. Curiously, however, the Governor announced shortly after filing his Initial Brief that he would end his mask mandate and allow businesses to resume operating at 100% capacity on June 11—the day after this case is set for argument. *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/.

If ending the Governor's mandates is as dangerous as the Governor's Initial Brief claims, then why would the Governor choose to end those mandates himself? Regardless of the answer to that question, the Governor—in light of his abrupt about-face—has no other option than to admit that vacating the Franklin Circuit Court's temporary injunction will not harm—much less irreparably harm—the public. His own actions demonstrate as much.

The Governor also argues that vacating the Franklin Circuit Court's temporary injunction will irreparably harm his ability to exercise police powers. But that argument stems from a fundamental misunderstanding of the police power. It is true that the required showing for injunctive relief is relaxed when the government is seeking to enforce its police powers. *See Boone Creek Props., LLC v. Lexington-Fayette Urban Cnty. Bd. of Adjustment*, 442

S.W.3d 36, 40 (Ky. 2014). But the police power is a legislative function. *See, e.g., City of Louisville v. Kuhn*, 145 S.W.2d 851, 853 (Ky. 1940); *see also Chambers v. Stengel*, 37 S.W.3d 741, 743 (Ky. 2001) ("Pursuant to *its* police power, the General Assembly may enact legislation to protect the Commonwealth's citizens' health and welfare . . . ." (emphasis added)). It is a term of art referring to the power to legislate for the public welfare. *See id.* Thus, it belongs to the General Assembly in the first instance, not the Governor. And so it makes no sense to say that the *Governor* will be harmed if he cannot enforce *his* police powers. He has no police powers of his own. He can merely execute the Commonwealth's police powers as enacted by the General Assembly, or as validly delegated to him by the General Assembly.

If the Governor is concerned about making sure the Commonwealth's police power is enforced, he ought to be taking measures to ensure that the General Assembly's will is carried out, not thwarted. But the only thing blocking the Commonwealth's police power is the Franklin Circuit Court's temporary injunction. And by thwarting the people's will in that way, it is the injunction itself—not the prospect of its vacatur—that causes irreparable harm. *See Boone Creek Props., LLC*, 442 S.W.3d at 40.

Finally, the Governor suggests that vacating the injunction will make it harder for him to take any new measures that might be needed to protect the public. There are at least two answers to this. First, this is a policy matter to be resolved by the General Assembly, and it has spoken. Second, the

legislation that the Governor is challenging does not prevent him from responding to emergencies. At most, it requires him to work collaboratively with other officials—including the legislature—if a long-term emergency response is needed. This should be applauded, not decried as a source of irreparable injury. In fact, it is hard to imagine how collaboration and cooperation could be viewed as an irreparable injury.[5]

IV. The equities do not favor keeping the Franklin Circuit Court's temporary injunction in place.

The Governor's final argument is that the equities weigh against vacating the Franklin Circuit Court's temporary injunction because the injunction is essential for maintaining a clear and consistent statewide health policy. The problem with this argument, however, is that the General Assembly—not the Governor or the courts—is the policymaking body for the Commonwealth. And the General Assembly has decided that the best policy for the Commonwealth is what is expressed in SB 1, SB 2, HB 1, and HJR 77. The courts cannot usurp that policymaking function under the guise of

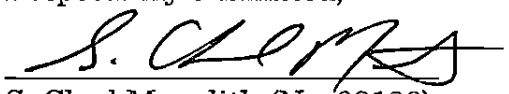
[5] Although this point should be fundamental, the Attorney General again notes that the Governor sued him for co-authoring a letter with the Speaker of the House of Representatives and Senate President in which the trio urged the Governor to collaborate with other elected officials during his response to the pandemic. In yet another action, the Franklin Circuit Court held that the letter created a sufficient case or controversy to permit the Governor to sue the Attorney General. The Attorney General sought a writ of prohibition from the Court of Appeals, where the action has been pending since October 2020. *See Cameron v. Shepherd*, 2020-CA-1214 (Ky. App.). The way the Governor has used litigation, particularly in response to a letter, underscores the need for this Court to issue an opinion underscoring the importance of justiciability.

weighing the equities. To the contrary, this Court has held that equitable considerations support enforcing a legislative body's policy choices. In short, non-enforcement of a statute constitutes irreparable harm to the public and the government. *See Boone Creek Props., LLC*, 442 S.W.3d at 40–41.

CONCLUSION

The salient question here—which the Attorney General has posed repeatedly, and the Governor has never even tried to address—is how would this case be any different if the Governor had filed a complaint that did not name any defendants? Quite simply, it would be no different because nothing in the temporary injunction compels the Attorney General to do or refrain from doing anything. Rather than seeking actual relief *against* the Attorney General, the Governor is merely seeking a non-justiciable advisory opinion. And he has tried to manufacture a justiciable controversy by naming the Attorney General as a defendant. But the Governor cannot "convert his academic question into a justiciable one by inserting the name of the Attorney General after 'v.' in the caption of his petition . . . ." *Revis*, 287 S.W. at 29. That is black-letter law in Kentucky, and the Governor cannot overcome it. Simply put, the Governor has asked for an unconstitutional advisory opinion, and that is what the Franklin Circuit Court gave him under the guise of a temporary injunction. That injunction should be vacated, and this matter should be remanded with instructions for the Franklin Circuit Court to dismiss this case for lack of jurisdiction.

Respectfully submitted,



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