United States District Court
Eastern District Of Kentucky
Central Division At Frankfort

HOPE OF KENTUCKY, LLC, *et al.*, Plaintiffs, v. DANIEL CAMERON, in his official capacity as the Attorney General of the Commonwealth of Kentucky, Defendant.	)	CIVIL ACTION NO.: 3:22-CV-62-GFVT Removed from Franklin Circuit Court, Case 22-CI-00842

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO ABSTAIN, DISMISS AND REMAND

By: */s/ M. Thurman Senn*
John T. McGarvey (KBA #46230)
jtm@mpmfirm.com
M. Thurman Senn (KBA #82343)
mts@mpmfirm.com
401 South Fourth Street, Suite 120
Louisville, Kentucky 40202
(502) 589-2780
Counsel for Plaintiffs

Of Counsel:
Debra K. Stamper (KBA #83890)
dstamper@kybanks.com
Kentucky Bankers Association
600 West Main Street, Suite 400
Louisville, Kentucky 40202
(502) 582-2453

Certificate of Service

On November 18, 2022, I electronically filed this document through the Court's ECF filing which will send a notice of electronic filing to all counsel of record.

/s/ M. Thurman Senn
M. Thurman Senn (KBA #82343)

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Plaintiffs, Hope Of Kentucky, LLC and Kentucky Bankers Association, by counsel, state as following in support of their motion that this Court abstain from deciding Plaintiffs' claims against Defendant, Daniel Cameron in his official capacity as the Attorney General of the Commonwealth of Kentucky ("AG Cameron"), dismiss this action without prejudice as to the parties' claims and defenses, and remand this case back to the Circuit Court of Franklin County, Kentucky, from which it was removed.

I. INTRODUCTION.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), Justice Black instructed that "questions of regulation of the industry by the State administrative agency … so clearly involves basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them." *Id.* at p. 332. The abstention doctrine in that case has come to be known as *Burford* abstention, and it is a subset of a number of abstention doctrines that instruct federal courts to abstain from hearing cases that for various prudential reasons should remain in state court. *See also Younger v. Harris,* 401 U.S. 37 (1971) (discussing what has become known as *Younger* abstention); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (19410) (discussing what has become known as *Pullman* abstention); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (discussing what has become known as the *Rooker-Feldman Doctrine*).

This is a case where this Court is required to abstain from deciding the fundamental questions of state law in this case – whether Defendant, Daniel Cameron, in his official capacity as the Attorney General of the Commonwealth of Kentucky ("AG Cameron"), is exceeding his powers and authority under Kentucky state law in issuing subpoenas to participants in the banking and financial services industry that plainly create unreasonable burdens upon, and governmental investigations, against businesses and people who might worry about, discuss, or

even think about global climate change or environmental activities.

While the Plaintiffs believe AG Cameron's actions grossly violate and exceed his regulatory powers and improperly expend Kentucky taxes, that is not the question presented by this motion. The question presented by the Plaintiffs' motion is whether the Kentucky state courts or this Court are the proper place to resolve the matter. Longstanding *Burford*, *Younger* and *Pullman* abstention doctrines demonstrate that the Franklin Circuit Court (and potentially the Kentucky appellate courts) are where the merits of this case should be decided. This Court should abstain from deciding Plaintiffs' claims, dismiss this case without prejudice, and remand this case back to the Franklin Circuit Court where it was originally filed.

II. PLAINTIFFS' CLAIMS ARE INEXTRICTABLY INTERTWINED WITH VITAL KENTUCKY STATE LAW QUESTIONS ABOUT THE AUTHORITY AND POWERS OF AG CAMERON AND THE ROLE OF KENTUCKY COURTS TO SUPERVISE HIS ACTIONS.

On October 19, 2022, Plaintiffs were shocked and surprised to read a press release issued by AG Cameron announcing that he was issuing six subpoenas to six participants in Kentucky's banking industry demanding records going back to January 1, 2015, seeking to investigate potential "violations related to ESG (environmental, society, governance) investment practices." *See* AG Press Release (Exhibit 7 to Plaintiffs' Complaint).[1]

The first basis for Plaintiffs' surprise is that Kentucky has addressed by statute the extent to which financial institutions are to be supervised and regulated by Kentucky governmental entities, and that authority under state law is assigned by KRS 286.1-011 exclusively to the Kentucky Department of Financial Institutions. KRS 286.1-011(2) states as follows:

[1]The term "AG Press Release" is defined in Paragraph 13 of Plaintiffs' Complaint. Unless otherwise defined in this memorandum, capitalized terms defined in Plaintiffs' Complaint have the same meaning when used in this memorandum.

> (2) The Department of Financial Institutions shall exercise all administrative functions of the state in relation to the regulation, supervision, chartering and licensing of banks, trust companies, savings and loan associations, consumer loan companies, investment and industrial loan companies, and credit unions, and in relation to the regulation of securities.

This case will address how Kentucky allocates investigatory powers between its various regulatory agencies and entities, including its Attorney General.

The second basis for Plaintiffs' surprise was the overwhelming scope of the information demanded in the CIDs. There are 24 separate Demands For Information and 20 separate Demands For Documents, and the demands are of gargantuan breadth and scope. Huge amounts of taxpayer resources, of both the subpoenaed entities and of AG Cameron's office, will be expended assembling and reviewing the records being demanded. The Plaintiffs also noted that the Demand For Information ¶24 sought information about "any interactions or engagements … related to … trade association activities…."

The third basis for Plaintiffs' surprise was AG Cameron's attempt to sidestep Kentucky's allocation of state regulatory authority over the business of banking by claiming that the CIDs are issued "Pursuant to the authority granted in KRS 367.240 and KRS 367.250," two statutes that are part of the Kentucky Consumer Protection Act, KRS 367.110 to KRS 367.300 (the "KCPA"). The Plaintiffs were not surprised, however, that AG Cameron's press release did not identify how or which Kentucky consumers are claimed to be harmed by the activities he was demanding to investigate.

The purpose of the KCPA is stated in KRS 367.120(1): "to protect the public interest and the well-being of the consumer public and the ethical sellers of goods and services." KRS 367.170 of the KCPA defines unlawful acts prohibited by the KCPA as follows:

> **367.170 Unlawful acts.**
> (1) Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
> (2) For the purposes of this section, unfair shall be construed to mean unconscionable.

A business' decision as to the extent to which it will or will not consider any of the ESG Factors or any other of the subjects of the CIDs in its business operations is not an unfair, false, misleading or deceptive act or practice within the meaning of KRS 367.170. The CIDs misconstrue the meaning and scope of the KCPA, and this misapplication is an important part of the Kentucky state law dispute to be decided.

Also important for this motion is that the KCPA contains its own oversight provision. Specifically, KRS 367.260 addresses unreasonable investigations by AG Cameron.[2] The statute states:

> **367.260 Unreasonable investigation.**
> Any person may apply to a Circuit Court for an appropriate order to protect such person from any unreasonable investigative action taken pursuant to KRS 367.110 to 367.300.

This is exactly what HOPE and the Bankers Association did. On October 31, 2022, they filed their Complaint For Declaration Of Rights And For Injunctive Relief in Franklin Circuit Court alleging that AG Cameron was engaged in an "unreasonable investigative action." *See* Complaint ¶36.

The Kentucky General Assembly expressly allocated to its own state Circuit Courts the initial task of supervising the scope of "any … investigative action" taken by AG Cameron pursuant to the KCPA. However, his removal to this Court will deprive the Franklin Circuit Court, and Kentucky's appellate Courts, of their express and exclusive authority under Kentucky law to review the CIDs and determine if they are "unreasonable" under the KCPA

[2]A similar challenge right specifying the Franklin Circuit Court as the appropriate venue for seeking to "modify or set aside" a CID is contained in KRS 367.240(2).

In addition to the above limitations on AG Cameron's actions, Count 3 of Plaintiffs' Complaint describes how AG Cameron's activities are directly inconsistent with the regulatory scheme and policies created by the Kentucky General Assembly when it enacted SB 205 in 2022 to address "energy company boycotts." Plaintiffs' Complaint presents the statutory provisions enacted by SB 205 that assign to the Kentucky State Treasurer the primary responsibility of preparing, maintaining, and providing to each Kentucky state governmental entity a list of all financial companies that, to the Treasurer's knowledge, have engaged in energy company boycotts. *See* Complaint ¶3; KRS 41.474.

Moreover, Section 4(2) of SB 205 (codified at KRS 41.472(2)), while providing joint authority to the Kentucky State Treasure and the Kentucky Attorney General to enforce the provisions of SB 205, that enforcement authority only allows them to "bring any civil action necessary to enforce" the provisions of SB 205 and does not contain any stand-alone subpoena authority. AG Cameron's issuance of the CIDs is a direct violation of Senate Bill 205, Section 4(2) (KRS 41.476(2)), which requires that he first bring a civil action. That places the scope of his investigation under the applicable Kentucky civil rules of discovery and Circuit Court oversight. AG Cameron's issuance of the CIDs improperly circumvent this process and oversight. *See* Complaint ¶50(c).

In sum, Plaintiffs' Complaint concerns important, interrelated, and novel questions of Kentucky state law bearing on state agency powers and state policy problems of substantial public import. As explained below, the federal abstention doctrines require that these questions are to be decided by Kentucky state courts.

III. ARGUMENT.

A. The *Burford* Abstention Doctrine Requires Remanding This Case Back To Franklin Circuit Court.

The United States Supreme Court and the Sixth Circuit have consistently ruled that federal courts must abstain from exercising jurisdiction over disputes like the present one that seek to have a federal court address state matters that are already the subject of a complex state regulatory regime.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the United States Supreme Court upheld a district court's dismissal of a complaint by an oil company to enjoin enforcement of the Texas Railroad Commission's order granting a drilling permit to a competitor. The Supreme Court assumed federal courts had jurisdiction. However, it held abstention was appropriate because regulation of that industry by the state agency involved basic questions of state policy that the state's court should have the first opportunity to consider. *Id.* at p. 332. The Supreme Court noted that the state provided a unified method for the formation of policy and that federal intervention would result in conflicting interpretations of state law and jeopardize the success of state policies. *Id.* at pp. 333-334.

The Supreme Court continued to develop the Burford abstention doctrine in *New Orleans Public Service, Inc. v. Council of the Cities of New Orleans*, 491 U.S. 350 (1989) ("NOPSI"). In *NOPSI*, the Court held that federal courts should not interfere with state administrative agency proceedings. In the Court's words:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

NOPSI, 491 U.S. at p. 361 (quoting, *Colorado Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

This Court in *Ohio Valley Environmental Coalition v. River Cities Disposal, LLC*, 2016 WL 1255717 (Case No. 15-cv-47-DLB), properly abstained from interfering with Kentucky's solid waste regulatory process and cited *NOPSI* for establishing a four-part test for *Burford* abstention:

(1) the availability of timely and adequate state-court review,

(2) a request for equitable relief,

(3) the existence of a complex state regulatory scheme, and

(4) either difficult questions of state law bearing on policy problems of substantial public import or the potential for disruption of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

See Ohio Valley Environmental at p. 5 (citing *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004), and other federal cases applying abstention).

These four elements are easily met in this case.

(1) The Franklin Circuit Court already had a case pending on this matter, and there can be no question as to its adequacy.

(2) HOPE and the Kentucky Bankers Association are seeking equitable relief in the form of requesting a declaration of rights and the quashing of the CIDs.

(3) There is a complex state regulatory regime relating to the regulation of the business of banking, the implementation of SB 205, state policy regarding ESG matters, and the powers of a Kentucky attorney general under the KCPA.

(4) The questions presented are of substantial public import relating to how Kentucky deals with banking regulation and ESG activities, which state agencies act in these important

areas, and whether the state agencies are exceeding their powers. Moreover, a decision by this Court not to abstain plainly has the potential for disruption of Kentucky's efforts to establish a coherent policy with respect to these matters, particularly in areas as longstanding as banking regulation and as novel as the legislation of SB 205 enacted by the 2022 Kentucky General Assembly.

The *Burford* abstention requirements mandate that Kentucky courts, not this federal court, decide these issues and Plaintiffs' claims.

B. The *Younger* Abstention Doctrine Requires Remanding This Case Back To Franklin Circuit Court.

Complementing *Burford* abstention is the *Younger* abstention doctrine, and it also requires abstention in this case.

Abstention under *Younger v. Harris*, 401 U.S. 37 (1971), addresses abstention when there are pending state proceedings. *Younger* abstention dictates "that federal courts not interfere with state court proceedings by granting equitable relief – such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings – when such relief could adequately be sought before the state court." *Reinhardt v. Kelly*, 164 F.3d 1296, 1302 (10th Cir. 1999).

While *Younger* arose out of dispute involving a parallel state criminal proceeding, the "[Supreme] Court has extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions." *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975)). The Supreme Court in *Spring Communications* noted that "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions" is a class of proceedings that should not be interfered with by federal courts. *Id*. at p. 73.

AG Cameron's CIDs are plainly "akin to criminal prosecutions" as they expressly state that he claims to be issuing them because he "ha[s] reason to believe that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful …." This language is set forth in the very first sentence of each of the six CIDs filed as exhibits to Plaintiffs' complaint. *See Doe v. University of Kentucky*, 860 F.3d. 365, 370 (6th Cir. 2017) (state university disciplinary proceedings sufficiently akin to criminal prosecutions to warrant *Younger* abstention).

Three considerations have emerged for determining whether abstention is appropriate under the *Younger* doctrine: "(1) whether the underlying proceedings constitute an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is an adequate opportunity in the state proceeding to raise a constitutional challenge." *Tindall v. Wayne Cnty. Friend of the Court*, 269 F.3d 533, 538 (6th Cir. 2001), c*ert. denied*, 530 U.S. 988 (2002)*; Doe v. University of Kentucky*, 860 F.3d. 365, 369 (6th Cir. 2017). Where a review of these considerations suggests that the state court should properly adjudicate the matter, a federal court should abstain. *Id*.

In *Cross River Bank v. Meade,* 2018 WL 1427204 (D.Colo. 2018) (copy attached as Exhibit A), the Colorado Administrator of the Uniform Commercial Code brought a state enforcement action alleging that Marlette Funding, LLC was engaged in improper lending activity. The case was removed to federal court, and a purchaser of the loans intervened. In that case, the Colorado federal court granted the Administrator's motion to remand the dispute to state court under *Younger* abstention. The irony here is that AG Cameron is attempting in this case to be in federal court while in *Cross River* the state official challenging lending practices in Colorado wanted to stay in state court. Forum shopping considerations aside, the Younger abstention requirement in this dispute over AG Cameron's CIDs is the same the same ultimate

result as in *Cross River* – the Younger abstention considerations are easily satisfied and this Court should abstain and the case should be in the state court where it began and belongs.

C. The *Pullman* Abstention Doctrine Requires Remanding This Case Back To Franklin Circuit Court.

A third line of abstention cases is the *Pullman* abstention doctrine, and it additionally requires abstention in this case.

Pullman abstention allows a federal court to refrain from deciding federal constitutional questions when state law issues may moot or narrow the constitutional questions. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Federal courts should abstain under *Pullman* from a decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). *Pullman* abstention does not exist for the benefit of either of the parties but rather "because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." *See Pullman*, 312 U.S. at p. 501. *Pullman* abstention occurs when a federal district court postpones the exercise of jurisdiction to avoid needless friction with state policies and premature constitutional adjudication. *Jones v. Coleman*, 848 F.3d 744 (6th Cir. 2017). It also avoids federal court error in incorrectly deciding unsettled state law questions which precede federal constitutional issues. *Id*.

Abstention under *Pullman* is an appropriate course if (1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) the possible determinative issue of state law is uncertain. *Courtney v. Goltz*, 736 F.3d 1152, 1163 (9th Cir. 2013). Alternatively stated, declining to exercise jurisdiction under Pullman is warranted where (1) substantial uncertainty

exists over meaning of state law in question, and (2) settling questions of state law will or may well obviate need to resolve significant federal constitutional question. *See* ***Gonzalez-Cancel v. Partido Nuevo Progresista, 696 F.3d 115 (1st Cir. 2012)***; *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139 (7th Cir. 2011).

Here, Plaintiffs have raised challenges under the free speech protections of the First Amendment and of the Kentucky Constitution. *See* Complaint Count 2. Plaintiffs also raise dormant commerce clause challenges to the extent AG Cameron is investigating conduct occurring outside of Kentucky. *See* Complaint ¶33. However, those constitutional questions become completely moot if the CIDs are quashed as being beyond AG Cameron's authority, and they may be significantly narrowed or limited depending upon the extent to which the CIDs are found to be unreasonable investigative action under KRS 367.260. These are the exact considerations to which *Pullman* abstention was designed to respond, and *Pullman* abstention should be applied in this case.

Where *Pullman* abstention properly applies, the federal court has discretion to stay its case pending the completion of the state case or to dismiss the case for further state proceedings. *See Chamber of Commerce v. Ohio Elections Comm'n*, 135 F.Supp.2d 857, 870 (S.D. Ohio 2001) (citing *Quackenbush v. Allstate Ins.* Co., 517 U.S. 706, 716-32 (1996)). There is no other state proceeding to wait for because AG Cameron has removed the Plaintiffs' state lawsuit, so the proper step in this case is to dismiss and remand the case to Franklin Circuit Court.

IV. CONCLUSION.

For all the foregoing reasons, this Court should abstain from deciding the important state law questions raised by this case concerning AG Cameron's authority to issue the CIDs, dismiss this case without prejudice to the parties' claims and defenses, and remand the dispute to Franklin Circuit Court.

Respectfully submitted,

MORGAN POTTINGER MCGARVEY

By: */s/ M. Thurman Senn*

John T. McGarvey (KBA #46230)
jtm@mpmfirm.com
M. Thurman Senn (KBA #82343)
mts@mpmfirm.com
401 South Fourth Street, Suite 120
Louisville, Kentucky 40202
(502) 589-2780
Counsel for Plaintiffs

Of Counsel:
Debra K. Stamper (KBA #83890)
dstamper@kybanks.com
Kentucky Bankers Association
600 West Main Street, Suite 400
Louisville, Kentucky 40202
(502) 582-2453