No. 25-5137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VAPOR TECHNOLOGY ASSOCIATION, et al.,

Plaintiffs-Appellants,

v.

ALLYSON TAYLOR, in her official capacity as Commissioner of the Kentucky Department of Alcoholic Beverage Control, et al.,

Defendants-Appellees,

RUSSELL MATTHEW COLEMAN, in his official capacity as Attorney General of the Commonwealth of Kentucky,

Intervenor-Appellee.

O R D E R

Before: NORRIS, MOORE, and READLER, Circuit Judges.

Plaintiffs Vapor Technology Association, E-Town Marketing & Distributing, LLC, and Legendary Vapes Inc. appeal the district court's order dismissing their action challenging Kentucky House Bill 11 ("HB 11"). HB 11 establishes new guidelines and enforcement mechanisms relating to vapor products that are not authorized by the FDA. *See generally* 2024 Ky. Acts. ch. 111. Plaintiffs move to enjoin pending appeal the enforcement of HB 11—except § 6, which imposes heightened penalties for selling vapor products to minors. Kentucky's

Attorney General and Secretary of State (collectively, "Kentucky") oppose an injunction pending appeal.[1]

Plaintiffs' motion for an injunction pending appeal presents questions on both substance and procedure. Together, these questions convince us that Plaintiffs have not met their burden to show that an injunction pending appeal is warranted.

A. Procedural Questions

As an initial matter, Plaintiffs' motion for an injunction pending appeal presents procedural questions.

"Under Rule 8 of the Federal Rules of Appellate Procedure, '[a] party must ordinarily move first in the district court' for an injunction pending appeal. This is '[t]he cardinal principle of stay applications.'" *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (per curiam) (alterations in original) (first quoting Fed. R. App. P. 8(a)(1)(C); and then 16A Wright, Miller, & Cooper, Federal Practice and Procedure § 3954 (3d ed. 1999)). Plaintiffs therefore "must show that moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i).

Plaintiffs argue that it would have been impracticable to file a motion first in the district court due to time constraints. But Plaintiffs do not explain why time is of the essence. We note the governor of Kentucky signed HB 11 into law on April 5, 2024, with an effective date of January 1, 2025. Yet, Plaintiffs filed their complaint on December 12, 2024. R. 1 (Compl.) (Page ID #1). Not only did Plaintiffs wait over eight months to file this suit, but also they filed their complaint only three weeks before HB 11's effective date. Plaintiffs then waited three weeks after their case

[1]We must also resolve three other motions. First, the Commissioner of the Kentucky Department of Alcoholic Beverage Control ("ABC") moves for an extension of time to file her response. Second, Plaintiffs move to file under seal documents in support of their motion. Finally, Wages and White Lion Investments, L.L.C., doing business as Triton Distribution ("Triton"), moves to file an amicus brief in support of Plaintiffs' motion for an injunction. We address these motions following our analysis of Plaintiffs' motion for an injunction pending appeal.

was dismissed on standing grounds to file this appeal. *Compare Vapor Tech. Ass'n v. Taylor*, No. 3:24-CV-74-KKC, 2025 WL 348684, at *3 (E.D. Ky. Jan. 30, 2025), *with* R. 42 (Notice of Appeal at 2) (Page ID #329) (Feb. 21, 2025). Any time constraints appear to be of Plaintiffs' own making.

Plaintiffs also argue that the district court's order dismissing on jurisdictional grounds makes it futile to file a motion there first. Plaintiffs have not convinced us that this case is unlike other appeals in a similar posture. For example, in *Kentucky v. US EPA*, we granted an injunction pending appeal after the plaintiffs first sought that relief in the district court. Nos. 23-5343/5345, D. 24 at 1, 7 (6th Cir. May 10, 2023) (order). As here, the district court had dismissed the suit in *Kentucky* for lack of standing. *Id.*

B. Substantive Questions

Even if we did not have questions about Plaintiffs' burden under Fed. R. App. P. 8(a)(2), we would still face difficult questions regarding the merits of their motion.

"In determining whether a stay should be granted . . ., we consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction." *Kentucky v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (alterations in original) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). These factors are: "(1) whether the moving party has shown a likelihood of success on the merits; (2) whether the moving party will be irreparably injured absent an injunction; (3) whether issuing an injunction will harm other parties to the litigation; and (4) whether an injunction is in the public interest." *Kentucky v. Biden*, 57 F.4th 545, 550 (6th Cir. 2023) (quoting *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021)).

Regarding their likelihood of success on the merits, there are questions as to whether Plaintiffs have standing to bring suit in the first instance. *See Vapor Tech.*, 2025 WL 348684, at

*1–3. Even if Plaintiffs do have standing, there are questions as to what effect the newly enacted SB 100 has on the merits of Plaintiffs' claims. *See* D. 41-1, Rule 28(j) Letter and Attachment.

There are also questions as to whether Plaintiffs have demonstrated irreparable harm. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to establish irreparable harm. *Id.* (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam)). As for their allegations regarding a loss of reputation and goodwill, although "loss of reputation and goodwill appears genuine, [] it is difficult to assess based on the record." *Babler v. Futhey*, 618 F.3d 514, 524 (6th Cir. 2010). Plaintiffs' showing of irreparable harm is also undermined by their delay in filing suit. *See Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[A]ny such presumption of irreparable harm is inoperative if the plaintiff has delayed either in bringing suit or in moving for preliminary injunctive relief."); *see also RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009) ("[D]elay in seeking preliminary relief cuts against finding irreparable injury." (citation omitted)); *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("[A] party's failure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm.").

Even assuming that Plaintiffs could satisfy the first two factors, there are yet more questions regarding the final two factors. "Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the [g]overnment is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Plaintiffs argue that an injunction pending appeal will not harm any other parties, and that enforcement of HB 11 may even cause harm because customers will seek nicotine

from more harmful sources. This must be balanced against the state's interest in enforcing its duly enacted legislation. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Thompson v. DeWine*, 976 F.3d 610, 619 (6th Cir. 2020) (per curiam) (alteration in original) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012)).

Ultimately, Plaintiffs' motion presents too many questions to convince us that they have met their burden. For these reasons, we deny Plaintiffs' motion for an injunction pending appeal.

C. Motion to Seal

Plaintiffs also move to file under seal declarations from two of the owners of the Plaintiff companies containing information about the financial impacts of HB 11. Plaintiffs submitted these documents in the district court, which permitted them to be filed under seal.

"Documents sealed in the lower court or agency must continue to be filed under seal in this court." 6 Cir. R. 25(h)(5). "[T]he public has a strong interest in obtaining the information contained in the court record." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir. 2016) (quoting *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983)). Thus, this court has long recognized "a 'strong presumption in favor of openness'" of court records. *Id.* (quoting *Brown & Williamson*, 710 F.2d at 1179). Accordingly, where a movant seeks to seal court records, the movant must establish a compelling reason to overcome this presumption, "[a]nd even where [the movant] can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason." *Id.* Because the exhibits Plaintiffs move to seal are documents sealed in the district court, they have satisfied their burden. 6 Cir. R. 25(h)(5). Plaintiffs are directed to file publicly available redacted versions of the declarations.

D. Motion to File Amicus Brief

Triton "manufactures bottled e-liquids that contain nicotine and are intended for use in" Electronic Nicotine Delivery Systems, which it says will be subject HB 11. It moves for leave to file an amicus brief in support of Plaintiffs' motion for an injunction pending appeal. We may grant leave to file an amicus brief when the brief states "the movant's interest," and states why the brief "is desirable and why the matters asserted are relevant to the disposition of the case," so long as the brief complies with the necessary formatting requirements. Fed. R. App. P. 29(a)(3), (a)(4). The brief proffered by Triton meets the formatting requirements, includes substantive law, and offers insight from an entity with interests relevant to the case. No party opposes Triton's appearance as amicus, *see* Fed. R. App. P. 29(a)(2), and its appearance will not result in a judge's disqualification from the panel, *see id.* The motion for leave will therefore be granted.

E. Motion for Extension of Time

Finally, the Commissioner of Kentucky's ABC moves for an extension of time to file her response. We grant her motion.

F. Conclusion

Accordingly, the motion for an injunction pending appeal is **DENIED**, and the motions for leave to file an amicus brief and for an extension of time are **GRANTED**. The motion to seal is **GRANTED IN PART**. Plaintiffs' declarations will remain sealed on the docket. Plaintiffs are **DIRECTED** to file redacted versions of their declarations within ten (10) days of entry of this order. However, if the court later determines that any of the redacted information should be made available to the public, the court may reconsider this ruling. *See Carter v. Welles-Bowen Realty, Inc.*, 628 F.3d 790, 791 (6th Cir. 2010). Should either party wish for this court's opinion to be

sealed or redacted, either in whole or in part, a separate motion must be filed, which will be considered by the panel that is assigned to decide the merits of the appeal.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 04/09/2025.

Case Name: Vapor Technology Association, et al v. Allyson Taylor, et al
Case Number: 25-5137

Docket Text:
ORDER filed - Accordingly, the motion for an injunction pending appeal is DENIED, and the motions for leave to file an amicus brief and for an extension of time are GRANTED. The motion to seal is GRANTED IN PART. Plaintiffs' declarations will remain sealed on the docket. Plaintiffs are DIRECTED to file redacted versions of their declarations within ten (10) days of entry of this order. However, if the court later determines that any of the redacted information should be made available to the public, the court may reconsider this ruling. See Carter v. Welles-Bowen Realty, Inc., 628 F.3d 790, 791 (6th Cir. 2010). Should either party wish for this courtís opinion to be sealed or redacted, either in whole or in part, a separate motion must be filed, which will be considered by the panel that is assigned to decide the merits of the appeal. Alan E. Norris, Circuit Judge; Karen Nelson Moore, Circuit Judge and Chad A. Readler, Circuit Judge.

The following documents(s) are associated with this transaction:
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