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COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
NO. 2021-SC-0139-T
(2021-CA-0479)

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SUPREME COURT

ROBERT STIVERS, in his official capacity as
President of the Kentucky Senate, et al.

APPELLANTS

v. On Appeal from Franklin Circuit Court
Honorable Phillip J. Shepherd, Judge
Case No. 21-CI-00089

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

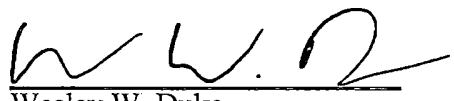
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I hereby certify that a true and accurate copy of this Brief of Appellees was served on June 14, 2022, via U.S. mail, first class and postage prepaid, upon: Hon. David E. Fleenor, Office of the Senate President, 702 Capitol Avenue, Capitol Annex, Room 236, Frankfort, Kentucky 40601; Hon. D. Eric Lycan, Office of the Speaker, Kentucky House of Representatives, 702 Capitol Avenue, Capitol Annex, Room 332, Frankfort, Kentucky 40601; Hon. Gregory A. Woosley, Legislative Research Commission, 700 Capitol Avenue, Capitol Building, Room 300, Frankfort, Kentucky 40601; Hon. Paul E. Salamanca, 279 Cassidy Avenue, Lexington, Kentucky 40502; Hon. Victor B. Maddox, Hon. Carmine Gennaro Iaccarino, and Hon. Aaron J. Silletto, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601; Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601; and the Kentucky Court of Appeals, Attn: Clerk, 360 Democrat Drive, Frankfort, Kentucky 40601.

I further certify that counsel did not withdraw the record on appeal.



S. Travis Mayo

STATEMENT CONCERNING ORAL ARGUMENT

Because the Franklin Circuit Court's ruling on legislative immunity followed clear and longstanding precedent, oral argument is not necessary in this case. Appellees, however, stand ready and able to participate in oral argument in this Court's discretion.

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INTRODUCTION

The Franklin Circuit Court, applying this Court's precedents, correctly held that Appellants ("the Legislative Defendants") are not immune from Appellees' ("the Governor" and "the Secretary") lawsuit over the constitutionality of legislation the General Assembly passed in 2021 that allegedly stripped the authority of the executive branch. Appellants, however, urge this Court to reverse the trial court's well-reasoned decision, arguing that Appellants must violate the law and wait to be sued to challenge legislation that they believe is unconstitutional. Appellants' argument is antithetical to the Governor's duty to ensure the laws are faithfully executed, KY. CONST. § 81, and to the purposes of the Declaratory Judgment Act, as this Court recognized in *Cameron v. Beshear*, 628 S.W.3d 61, 70-71 (Ky. 2021). This Court should affirm the Franklin Circuit Court's decision and find that legislative immunity does not apply to this case.

COUNTERSTATEMENT OF THE CASE

During its 2021 Regular Session, the General Assembly enacted legislation to step into the role of the Executive Branch, override the Governor's public health response to COVID-19, and give itself veto authority over the Governor's ability to further respond to the pandemic and future emergencies. In particular, the General Assembly passed House Bill 1 (R.S. 2021), Senate Bill 1 (R.S. 2021), Senate Bill 2 (R.S. 2021), and House Joint Resolution 77 (R.S. 2021). HB 1 provided that virtually all entities in the state could remain open and fully operational during the COVID-19 emergency and any future emergency relating to a virus or disease so long as they comply with all applicable guidance issued by the federal Centers for Disease Control and Prevention or the Commonwealth's executive branch, whichever is least restrictive. (*See Amended*

Complaint, Ex. D, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089.¹) SB 1 amended KRS Chapter 39A, the emergency response statutes, by, among other provisions, limiting declared states of emergency to thirty (30) days absent extension by the General Assembly, granting the General Assembly the power to terminate a declaration of emergency at any time, and requiring the Attorney General’s written approval before the Governor may suspend a statute during an emergency by executive order. (*See* Amended Complaint, Ex. C, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089.²) SB 2 limited the Governor’s ability to respond to emergencies through emergency administrative regulations and amended KRS 214.020, the statute governing the ability of the Cabinet for Health and Family Services (“CHFS”) to respond to infectious or contagious disease. (*See* Amended Complaint, Ex. E, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089.³) SB 2 limited administrative regulations issued under KRS 214.020 to thirty (30) days if they: (1) place restrictions on the in-person meeting or functioning of elementary, secondary, or postsecondary institutions; private businesses or non-profit organizations; political, religious, or social gatherings; places of worship; or local governments; or (2) impose mandatory quarantine or isolation requirements. (*See id.*) Finally, HJR 77 terminated a number of executive public health orders intended to reduce the spread of COVID-19, including the order and regulation requiring facial coverings to be worn in many public settings.⁴

¹ Also available at <https://apps.legislature.ky.gov/law/acts/21RS/documents/0003.pdf> (last visited June 9, 2022).

² Also available at <https://apps.legislature.ky.gov/law/acts/21RS/documents/0006.pdf> (last visited June 9, 2022).

³ Also available at <https://apps.legislature.ky.gov/law/acts/21RS/documents/0007.pdf> (last visited June 9, 2022).

⁴ House Joint Resolution 77 (R.S. 2021), available at <https://apps.legislature.ky.gov/law/acts/21RS/documents/0168.pdf> (last visited June 9, 2022).

The Governor and the Secretary filed suit challenging the constitutionality of the legislation in Franklin Circuit Court on February 2, 2021, seeking declaratory and injunctive relief. (*See* Complaint, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089.) They alleged that HB 1, SB 1, SB 2, and HJR 77 violated the Kentucky Constitution’s strict separation of powers and usurped executive authority. (*See id.*) They named as defendants David W. Osborne, in his official capacity as Speaker of the Kentucky House of Representatives, Bertram Robert Stivers II, in his official capacity as President of the Kentucky Senate, and the Legislative Research Commission (“LRC”) (collectively the “Legislative Defendants”). (*See id.*) They also named as a defendant Daniel Cameron, in his official capacity as Kentucky Attorney General, due to his role in approving suspensions of the law effectuated by emergency executive orders under SB 1. (*See id.*)

Contemporaneous with the filing of their Complaint, the Governor and the Secretary moved for a temporary restraining order and temporary injunction. The Franklin Circuit Court entered a temporary restraining order enjoining enforcement of provisions of HB 1 on February 3, 2021. (Order Granting Partial Restraining Order Under CR 65.03 Concerning House Bill 1, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089 (Feb. 3, 2021).) Following briefing and an evidentiary hearing, the court converted the temporary restraining order into a temporary injunction that included provisions of SB 1 and SB 2 on March 3, 2021. (Order Granting Temporary Injunction Under CR 65.04, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089 (Mar. 3, 2021).) On April 7, 2021, the court amended its temporary injunction by further enjoining HJR 77, enacted after entry of the initial temporary injunction as the legislative

mechanism to execute SB 1. (Order, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089 (Apr. 7, 2021).)

Instead of responding to the merits of the temporary injunction motion, the Attorney General filed a combined response and motion to dismiss, arguing the Governor and the Secretary failed to set forth an actual controversy and lacked standing. On March 23, 2021, the Attorney General sought relief from the temporary injunction order under Kentucky Rule of Civil Procedure (“CR”) 65.07 on the same grounds. Upon the Court of Appeals’ recommendation, this Court accepted transfer of the Attorney General’s CR 65.07 motion on April 15, 2021.

In the meantime, Defendants Osborne, Stivers, and LRC filed motions to dismiss in Franklin Circuit Court on immunity grounds. After full briefing, the court denied all pending motions to dismiss by Order entered April 12, 2021. (Order, *Beshear v. Osborne*, Franklin Cir. Ct., 21-CI-00089 (Apr. 12, 2021) (attached as Tab 1 to the Appendix to the Appellants’ Brief).) With respect to the Legislative Defendants, the court noted that it had “previously found on multiple occasions that legislative immunity functioned to bar suits against the House Speaker and the Senate President” (*Id.* at p. 11.) The court explained, however, that it had never before been confronted with the precise question raised by the Governor and the Secretary’s lawsuit: “whether legislative immunity shields members of the General Assembly or the LRC from suits centering upon an allegation that the General Assembly has violated the separation of powers by expanding its oversight and control of executive actions, and limiting the power of the Governor to act without legislative approval.” (*Id.* at 13.) The court found that its ruling on the questions was “dictated” by “longstanding precedents,” including *Legislative Research Comm’n v.*

Brown, 664 S.W.2d 907 (Ky. 1984) (“*LRC v. Brown*”), *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), and *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992), which “establish that a lawsuit for declaratory judgment concerning the legislature’s discharge of its constitutional duties may be brought against the legislature by naming the Speaker of the House and the President of the Senate.” (*See id.* at 14-16.)

The Franklin Circuit Court also expressly rejected the Legislative Defendants’ argument that KRS 418.075(4) prohibits declaratory judgment actions against legislators, legislative leaders and staff. As the court wrote, “While that statute properly may be applied to prohibit suits against legislators that involve interpretations of the legal rights of others (whether citizens or public agencies) and to protect legislators from personal liability for official actions, it cannot be applied to insulate legislators from judicial review of its own actions, especially in a dispute involving the separation of powers.” (*Id.* at 16.) The court emphasized that “[i]t is the fundamental duty of the judiciary to decide whether statutes comply with the Constitution[,]” and “[t]he legislature cannot avoid constitutional accountability by immunizing itself from suit when the Supreme Court has held that legislative leaders, in their representative capacity, are subject to suit when the case concerns the constitutional validity of the legislative actions of the General Assembly.” (*Id.* at 17.)

The Legislative Defendants appealed the Franklin Circuit Court’s Order denying them immunity on April 22, 2021. This Court granted the Legislative Defendants’ motion to transfer the appeal on October 27, 2021. In the same order granting transfer, this Court ordered the parties to show cause why the appeal should not be dismissed as moot. The Court’s show cause order implicitly referred to its August 21, 2021 Opinion resolving the

Attorney General's CR 65.07 motion. In that opinion, the Court determined that the Governor and the Secretary set forth an actual case or controversy against and had standing to sue the Attorney General. *Cameron*, 628 S.W.3d at 70-71. The Court also, however, held improper the Franklin Circuit Court's issuance of temporary injunctive relief, finding the Governor and the Secretary had not set forth a substantial legal question on the merits regarding the constitutionality of the challenged legislation. *See id.* at 78.

Following review of the parties' show cause responses, the Court determined that further review of the Legislative Defendants' appeal was appropriate and ordered the Legislative Defendants to file their brief within sixty (60) days. The Governor and the Secretary now respond under CR 76.12.

LEGAL STANDARD

Whether the Legislative Defendants are immune from suit is a question of law reviewed *de novo*. *Louisville Arena Auth., Inc. v. RAM Eng'g & Const., Inc.*, 415 S.W.3d 671, 677 (Ky. App. 2013) (citing *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006)).

ARGUMENT

As set forth more fully below, the Franklin Circuit Court correctly held that the Legislative Defendants are not immune from the Governor and the Secretary's lawsuit challenging the constitutionality of legislation passed during the 2021 Regular Session of the General Assembly. This Court's precedents demonstrates that where the constitutionality of legislative actions is at issue, including those that invade the powers of another branch of government, the Speaker of the House, the Senate President, and the LRC are properly named defendants. Section 43 of the Kentucky Constitution and KRS

418.075(4) do not dictate a different result. Thus, this Court should affirm the Franklin Circuit Court.

I. Under This Court’s Precedents, Legislative Immunity Does Not Bar The Action Against The Legislative Defendants.

As the Franklin Circuit Court recognized, this Court’s precedents foreclose immunity for the Legislative Defendants in this case. The Franklin Circuit Court expressly relied on *LRC v. Brown*, *Rose v. Council for Better Educ., Inc.*, and *Philpot v. Patton*. This Court’s decision in *Jones v. Board of Trustees of Kentucky Retirements Systems*, 910 S.W.2d 710 (Ky. 1995), stands for the same.

In *LRC v. Brown*, the Governor and Attorney General sued LRC, by and through then-Senate President Joseph W. Prather and then-House Speaker Bobby H. Richardson, individually and as co-chairmen of the LRC, over the constitutionality of legislation the General Assembly passed in 1982. 664 S.W.2d at 909. The case broadly concerned “the relative constitutional powers of the Governor of the Commonwealth as opposed to those of the General Assembly” *Id.* It specifically dealt with legislation conferring powers on the LRC, at the expense of the powers of the Governor, that were “designed to be exercised by that body when the General Assembly [was] adjourned.” *See id.*

In *Rose v. Council for Better Educ., Inc.*, a non-profit Kentucky corporation whose membership consisted of local school districts, two local boards of education, additional local school districts, and multiple public school students filed a declaratory judgment action against, among others, the Kentucky Senate President and House Speaker. 790 S.W.2d at 190. The plaintiffs sought a declaration that the system of school funding provided for by the General Assembly resulted in an inefficient system of common schools in violation of Section 183 of the Kentucky Constitution. *Id.*

Considering the named legislative defendants, the Court held that a plaintiff does not need to effect service upon all individual legislators “in order to bring the Kentucky General Assembly within the jurisdiction of a court[.]” *Id.* at 204. Instead, service on both the Senate President and House Speaker is sufficient, as they can “defend the constitutionality of an act or acts.” *Id.*

Philpot v. Patton involved a constitutional challenge to a Senate Rule that two Kentucky senators brought against the Senate President and the remaining Senate members in their official capacities. 837 S.W.2d at 491-92. This Court disagreed with the trial court’s ruling that the case was “nonjusticiable because the Senate is immune from suit or because members of the General Assembly are immune from suit in their official capacity, or because it violates the separation of powers principle for the judiciary to decide that the General Assembly, or either of its bodies, has acted or failed to act in a constitutional manner.” *Id.* at 493. The Court found that the decision in *Rose* “put[] these arguments to rest.” *Id.* As the Court explained, “[w]hile it would be a violation of the separation of powers doctrine in the Kentucky Constitution, Sections 27 and 28, for our Court to tell the General Assembly what to do, *i.e.*, what system or rules to enact, it is our constitutional responsibility to tell them whether the system in place complies with or violates a constitutional mandate, and, if it violates the constitutional mandate, to tell them what is the constitutional ‘minimum.’” *Id.* at 494.

Here, the Governor and Secretary alleged that the General Assembly violated the Kentucky Constitution, including its separation of powers, with the passage of HB 1, SB 1, SB 2, and HJR 77 in 2021. They properly named the House Speaker, Senate President, and the LRC as defendants under *LRC v. Brown*, *Rose*, and *Philpot v. Patton*. Although

the courts cannot tell the General Assembly what laws to enact, they can tell the General Assembly whether the “system” represented by the challenged legislation violates constitutional mandates, such as those in Sections 27 and 28.

The Legislative Defendants attempt to distinguish *Rose* and *Philpot* by arguing that they involved affirmative constitutional duties on the part of the legislature found in Section 183 of the Kentucky Constitution, which requires that the General Assembly “shall, by appropriate legislation, provide for an efficient system of common schools throughout the State[,]” and Section 39, which grants to the General Assembly the power to “determine the rules of its proceedings[.]” But this argument overlooks *Jones v. Board of Trustees of Kentucky Retirement Systems*, which did not involve any legislative constitutional duty. In *Jones*, the Kentucky Employees Retirement System (“KERS”) Board of Trustees filed a declaratory judgment action under KRS Chapter 418, “claim[ing] that the 1992 Budget Bill usurped the authority of the Board to act independently to set actuarially sound employer contribution rates. 910 S.W.2d at 712. Specifically, the Board claimed that “failure to meet its contribution requests impaired KERS member contract rights under KRS 61.692” in violation of Section 19 of the Kentucky Constitution and various provisions of the United States Constitution. *Id.* The Board named various state officials as defendants, including the Kentucky House Speaker and Senate President and the LRC. *See id.* at 711.

Ultimately, the *Jones* Court held that “[t]he 1992 Budget Bill constituted a proper exercise of legislative authority.” *Id.* at 716. Before reaching the merits, however, the Court held that the legislative defendants did not have immunity from the lawsuit. *Id.* at 713. Citing *Rose* and *Philpot*, the Court explained that “[i]t would undermine and destroy

the principle of judicial review to hold that the General Assembly could act with immunity, contrary to the Kentucky Constitution.” *Id.* The Court further stated that it would not “leave citizens of this Commonwealth with no redress for the unconstitutional exercise of legislative power.” *Id.* The same holds true here, where if immunity applies it means the legislature could violate the Kentucky Constitution with impunity without any judicial redress.

Ignoring *Jones*, the Legislative Defendants rely heavily on *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006). In *Baker*, the Court considered “whether the General Assembly may retroactively suspend the salary-increment statute in the middle of a budget cycle, after employee rights may have become vested.” *Id.* at 592. Plaintiff state employees brought the case against only the Governor, even though the General Assembly took the relevant actions. *Id.* Explaining that “[i]t is axiomatic that a plaintiff may not obtain relief from one who did him no wrong[,]” *id.* at 593 (citation omitted), the Court proceeded to address legislative immunity, *sua sponte*, in dicta, and without the benefit of briefing on the issue. *See id.* at 593-97; *Id.* at 601 (Cooper, J. dissenting) (calling the immunity of members of the General Assembly a “non-issue” in the case). Notably absent from that discussion was any analysis of *LRC v. Brown, Rose, Philpot*, or *Jones*. For these reasons, *Baker* is of little precedential value.⁵

⁵ Relying on federal cases interpreting the Speech and Debate Clause of the United States Constitution, *Baker* suggests that if members of the legislature are immune, a plaintiff challenging the constitutionality of legislative acts could sue other ministerial officers who must take future action to implement the legislation. 204 S.W.3d at 596-97. But here, under the challenged bills the General Assembly gave itself the power to take future action to terminate or extend certain emergency executive orders. Furthermore, KRS 418.075(4) purports to bar suit against not only members of the General Assembly, but also all organizations within and officers and employees of the legislative branch. Thus, under KRS 418.075(4) and contrary to *Baker*’s direction, legislative immunity and constitutional judicial review of legislative acts may not “coexist.” *Baker*, 204 S.W.3d at 596.

Moreover, although the plaintiffs in *Baker* filed the case as a declaratory judgment action seeking declaratory and injunctive relief, *see id.* at 591, because they asked to have their annual increment reinstated the case necessarily involved monetary relief; thus, different immunity concerns applied.

In *Kraus v. Kentucky State Senate*, a rejected workers' compensation administrative law judge nominee "challenge[d] the authority of the Kentucky State Senate to grant to itself the power to consent to the employment by an executive board of the Workers' Compensation Commission of an Administrative Law Judge pursuant to K.R.S. 342.230(3)." 872 S.W.2d 433, 434 (Ky. 1993). The Court held that legislative immunity "extends to the voting on executive appointments and [] members of the Kentucky Senate *cannot be sued for damages* on the basis of their vote to confirm or reject such an appointee sent to them for confirmation." *Id.* at 440 (emphasis added). However, the Court further held that the plaintiff had standing to sue the Senate *for injunctive relief regarding the constitutionality of KRS 342.230(3)*. *See id.* at 439.

Here, the Governor and the Secretary did not sue for damages. Rather, they sought only declaratory and prospective injunctive relief relating to alleged usurpation of executive authority in violation of the Kentucky Constitution's strict separation of powers.

Contrary to the Legislative Defendants' attempts to distinguish *Kraus and Jones*, in both decisions – as here – the challenged legislation involved alleged wrongful acts that only the General Assembly can take. For example, under SB 1 only the General Assembly can extend certain emergency executive orders beyond 30 days, and only the General Assembly can terminate such an executive order or any emergency powers under

KRS Chapter 39A at any time. Like in *Jones* and *Kraus*, the Legislative Defendants are proper defendants here.

Under the authority of *LRC v. Brown, Rose, Philpot, and Jones*, legislative immunity does not apply in this case. The Court should affirm the Franklin Circuit Court's decision.

II. Neither Section 43 of the Kentucky Constitution Nor KRS 418.075(4) Entitle The Legislative Defendants To Immunity In This Case.

In support of their claim to immunity, the Legislative Defendants point to Section 43 of the Kentucky Constitution and KRS 418.075(4). Neither renders the Legislative Defendants immune from the underlying suit.

Section 43 of the Kentucky Constitution provides:

The members of the General Assembly shall, in all cases except treason, felony, breach or surety of the peace, be privileged from arrest during their attendance on the sessions of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

The immunity that Section 43 provides is an extension of the state's sovereign immunity. *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001). By its plain terms, Section 43 extends "to legislators in the performance of their legislative functions, but not otherwise." *Id.* It does not grant legislators carte blanche to pass laws that violate the Kentucky Constitution or usurp executive authority. As this Court stated in holding that the state's sovereign immunity does not apply to declaratory judgment actions in *Commonwealth v. Kentucky Retirement Systems*, "On the question of the constitutional appropriateness of governmental actions, there can be no immunity." 396 S.W.3d 833, 840 (Ky. 2013). The Court explained, "To hold that the state has immunity from judicial review of the

constitutionality of its actions would be tantamount to a grant of arbitrary authority superseding the constitution, which no law or public official may have.” *Id.*

Similarly, KRS 418.075 does not bar a suit for a declaration of rights against the Legislative Defendants. In relevant part, the statute provides:

Pursuant to Sections 43 and 231 of the Constitution of Kentucky, members of the General Assembly, organizations within the legislative branch of state government, or officers or employees of the legislative branch shall not be made parties to any action challenging the constitutionality or validity of any statute or regulation, without the consent of the member, organization, or officer or employee.

KRS 418.075(4). The plain language of the statute reflects the General Assembly’s intent that its members not be named as defendants in every constitutional challenge to a statute or regulation. However, KRS 418.075(4) does not shield the General Assembly, its members, or the LRC from a declaratory judgment action concerning the failure to comply with constitutional and statutory mandates when enacting legislation. Nor does it bar a declaratory judgment action against the same parties for legislation that usurps executive powers in violation of the constitutional separation of powers, as alleged below. Notably, KRS 418.075(4) expressly incorporates Section 43 of the Kentucky Constitution. As discussed above, the sovereign and legislative immunities granted by Section 43 do not apply to a declaratory judgment action on the question of the constitutional appropriateness of governmental action. As a result, neither can KRS 418.075(4).

The Franklin Circuit Court correctly analyzed and rejected the Legislative Defendants’ appeal to Section 43 of the Kentucky Constitution and KRS 418.075(4) in its order denying their motion to dismiss. Looking to this Court’s precedents, the trial court correctly found that, while KRS 418.075(4) “may be applied to prohibit suits against

legislators that involve interpretations of the legal rights of others (whether citizens or public agencies) and to protect legislators from personal liability for official actions, it cannot be applied to insulate legislators from judicial review of its own actions, especially in a dispute involving the separation of powers.” (Order, p. 16, *Beshear v. Osborne*, Franklin Cir. Ct., 21-CI-00089 (Apr. 12, 2021) (attached as Tab 1 to the Appendix to the Appellants’ Brief).) The court explained that “[t]he legislative immunity provided in Section 43 of the Kentucky Constitution applies only to speech and debate and ‘voting, reporting, and every act in the execution of their legislative duties while in either house.’” (*Id.* at 17 (citing *Wiggins v. Stuart*, 671 S.W.2d 262, 264 (Ky. App. 1984).) But “[h]ere, it is the constitutional validity of legislative enactments, not any speech, debate, voting, or legislative actions, that is at issue.” (*Id.*) Noting that “[i]t is the fundamental duty of the judiciary to decide whether statutes comply with the Constitution[,]” (*id.* (citing *Sarrilson v. Shepherd*, 585 S.W.3d 748, 758-59 (Ky. 2019)), the court properly ruled that “[t]he legislature cannot statutorily expand the constitutional immunity granted in Section 43 to insulate its actions from judicial review when a constitutional violation of separation of powers has been alleged.” (*Id.*)

Moreover, the Franklin Circuit Court appropriately noted that “even if KRS 418.075(4) provided a defense to the claim for a declaratory judgment under KRS Chapter 418,” it could not prevent the court from issuing a declaration of rights regarding the constitutional validity of the legislation challenged by the Governor and the Secretary. (*Id.*) As the court explained, “Even if the Court were to hold that the Legislative Defendants were not subject to suit under KRS 418.075(4), they would still be subject to suit directly under Sections 27 and 28 of the Kentucky Constitution to

adjudicate the constitutional validity of their actions, as the Supreme Court held in *Rose*.”
(*Id.* at 17-18.)

For these reasons, Section 43 of the Kentucky Constitution and KRS 418.075(4) do not provide the Legislative Defendants with immunity from the underlying action.

III. The Legislative Defendants’ Position That The Governor Must Violate The Law In Order To Challenge The Subject Legislation Is Antithetical To The Governor’s Constitutional Duty And The Declaratory Judgment Act.

For the Governor and the Secretary to ignore the alleged unconstitutional acts of the General Assembly and wait for someone to sue them – as the Legislative Defendants contend they should do – would have resulted not only in the violation of HB 1, SB 1, SB 2 and HJR 77,⁶ but also a derogation of the Governor’s constitutional duty to ensure the laws are faithfully executed. Furthermore, acting contrary to the law before challenging it is not what the Declaratory Judgment Act requires, as this Court recently recognized in *Cameron v. Beshear*, 628 S.W.3d 61, 70-71 (Ky. 2021).

Additionally, in *Commonwealth v. Kentucky Retirement Systems*, the Court explained:

Declaratory judgment actions are simply different. Historically, the Act originated because the courts at that time (1922) were not permitted to adjudge legal rights unless a remediable right had already been violated. *See De Charette v. St. Matthews Bank & Trust Co.*, 214 Ky. 400, 283 S.W. 410, 413 (1926) (“The primary purpose of the Declaratory Judgment Act is to relieve litigants of the common-law rule that no declaration of rights may be judicially adjudged, unless a right has been violated for the violation of which relief may be granted.”) The Act allows courts to determine a litigant’s rights before harm occurs, and requires the existence

⁶ Significantly, the Legislative Defendants concede that in order to make those arguments against other parties, the Governor and the Secretary would first have had to have violated HB 1, SB 1, SB 2, and HJR 77. The Legislative Defendants maintain that the Governor, “[f]irst and foremost, . . . can make his arguments in proceedings to enforce orders that he believes are valid notwithstanding S.B. 1.” (Appellants’ Br., p. 8.) In other words, the Governor would have had to enforce executive orders in violation of SB 1 in order to challenge the constitutionality of SB 1. Second, the Legislative Defendants propose that the Governor “can defend his orders in actions brought against him by regulated entities.” (*Id.*) Again, however, this would have required the Governor to enforce his executive orders in violation of SB 1.

of an actual controversy. Such a controversy occurs when a defendant's position would "impair, thwart, obstruct or defeat plaintiff in his rights." *Revis v. Daugherty*, 215 Ky. 823, 287 S.W. 28, 29 (1926).

396 S.W.3d at 839. In *Jarvis v. National City*, the Court further stated that it "may declare the rights of litigants in advance of action when [we] conclude[] that a justiciable controversy is presented, the advance determination of which would eliminate or minimize the risk of wrong action by any of the parties. Indeed, this is the very purpose of declaratory judgment actions." 410 S.W.3d 148, 153 (Ky. 2013) (citations and internal quotation marks omitted).

Stated another way, it is the purpose of declaratory judgment actions to prevent plaintiffs from having to violate laws they believe to be unconstitutional before obtaining a judicial determination of their claims. Here, the Governor and the Secretary alleged that their rights had been impaired and thwarted by legislation that violated the separation of powers by, among other mechanisms, terminating emergency executive orders after 30 days absent extension by the General Assembly. Thus, the General Assembly, as represented by the House Speaker, the Senate President, and the LRC, are proper defendants. In fact, they were the only potential and proper defendants to the Governor and the Secretary's declaratory judgment action on all claims, other than one involving the Attorney General for which he was a property party. *See Cameron*, 628 S.W.3d at 70-71. For all the reasons discussed herein, the Governor and the Secretary properly filed suit against the Legislative Defendants, and legislative immunity does not apply.

The Court should also reject the Legislative Defendants' assertion that "prudential considerations" support reversal of the Franklin Circuit Court's decision on legislative immunity. (Appellants' Br. at 13.) Specifically, they argue that, "[a]s a practical matter, .

. . legislative immunity can also protect the courts themselves from having to address issues that are not yet sufficiently ripe to permit proper resolution. This is because many statutes, especially procedural statutes like S.B. 1, are hard to assess in the abstract, that is, in the absence of a concrete application.” (*Id.*) According to the Legislative Defendants, “[l]egislative immunity . . . postpon[es] attacks on legislation until it is applied to a particular situation.” (*Id.* at 14.)

Importantly, however, such “prudential considerations” are built into the Declaratory Judgment Act. Under KRS 418.065, “The court may refuse to exercise the power to declare rights, duties, or other legal relations . . . in any case where the declaration or construction is not necessary or proper at the time under all the circumstances.” Here, the trial court did not invoke KRS 418.065, implicitly indicating it believed the constitutional separation of powers issues raised by the Governor and the Secretary’s declaratory judgment action were ripe for review. Furthermore, this Court did not invoke KRS 418.065 in ruling on whether the Governor and the Secretary had raised a substantial legal question on the merits in the CR 65.07 matter filed by the Attorney General arising from the same underlying lawsuit. *See generally Cameron*, 628 S.W.3d 61. Therefore, “prudential considerations” do not support a finding of legislative immunity here. The Court should affirm the decision of the Franklin Circuit Court.

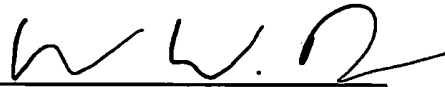
CONCLUSION

For the foregoing reasons, Appellees, Governor Andy Beshear and Secretary Eric Friedlander, respectfully ask the Court to affirm the Franklin Circuit Court’s decision finding that the Legislative Defendants are not immune from the underlying lawsuit.



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