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*

BRIEF FOR THE ATTORNEY GENERAL

Respectfully submitted,

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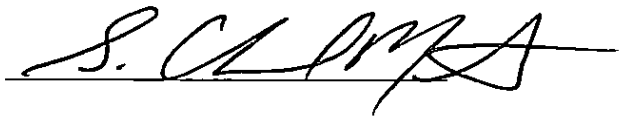
CERTIFICATE OF SERVICE

I certify that a copy of this Brief was served on May 5, 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.



INTRODUCTION

At issue is the Attorney General's request for relief from a temporary injunction that the Franklin Circuit Court entered against certain legislation enacted during the 2021 regular session of the General Assembly. The Court should vacate the injunction because this matter does not present a justiciable case or controversy—meaning that the Franklin Circuit Court lacked jurisdiction to enter the temporary injunction in the first place.

STATEMENT CONCERNING ORAL ARGUMENT

The Court has scheduled oral argument for June 10, 2021.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The sole issue before the Court is whether the Franklin Circuit Court can enter a temporary injunction in the absence of a justiciable case or controversy. The obvious answer is "no." As a result, the Franklin Circuit Court's temporary injunction should be vacated, and this matter should be remanded with instructions to dismiss.

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Six months ago, this Court determined that the Governor's actions last year were valid exercises of the emergency-response powers that the General Assembly had given to him in KRS Chapter 39A. But the Court was quick to emphasize that citizens of Kentucky had options available to them if they remained troubled by the Governor's decisions. In particular, the Court held that "[w]hile the authority exercised by the Governor in accordance with KRS Chapter 39A is necessarily broad," there are many "checks on that authority," including "legislative amendment or revocation of the emergency powers granted the Governor." *Beshear v. Acree*, 615 S.W.3d 780, 812–13 (Ky. 2020) (citing *In re Certified Questions from United States 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)).

The General Assembly took that advice to heart, placing modest restrictions on the Governor's ability to take unilateral actions during declared

emergencies. The Governor vetoed those bills, and the General Assembly quickly overrode his vetoes.

Unwilling to accept this outcome, the Governor decided to go to court. But herein lies the problem: he had no one to sue.

Ordinarily, when a litigant wants to test the validity of legislation through an action for declaratory and injunctive relief, the appropriate way to do that is by suing the official who has the duty of enforcing or implementing the legislation against the litigant. Here, however, there is nothing for anyone to enforce or implement against the Governor because the challenged legislation simply changes the statutory mechanisms by which he exercises emergency power. Given this circumstance, a proper test of the legislation's validity could arise in one of two ways. First, if the Governor were to keep exercising unilateral power in contravention of the new legislation, then a person harmed by his actions could sue the Governor, and the Governor could raise the legislation's purported invalidity as a defense.[1] Alternatively, if the Governor were to ignore the legislation and keep exercising the same emergency powers that were revoked or modified by the new laws, he could

[1] In fact, at least two cases that fit this mold were filed—one each in Scott and Boone Circuit Courts. *See Ridgeway Props., LLC v. Beshear*, 20-CI-00678 (Boone Cir. Ct.) (Third Amended Complaint tendered March 11, 2021); *Goodwood Brewing Co. v. Beshear*, 21-CI-00128 (Scott Cir. Ct.) (Complaint filed March 8, 2021). Another case in Boone Circuit Court also seeks to apply the provisions of SB 1, although the Governor is not a party. *See Gillum v. Boone Cnty. Bd. of Educ.*, 21-CI-00161 (Boone Cir. Ct.) (Complaint filed February 2, 2021).

take legal action against those who violate his orders. Those individuals would likely rely on the new legislation as their defense, which would then tee up the issue of the legislation's validity. But neither of those options occurred here.

Rather than wait for an actual, concrete dispute to arise, the Governor preemptively sued the General Assembly and the Attorney General—parties against whom he has no actual case or controversy for which a court can provide any real relief. In fact, even though his First Amended Complaint is 60 pages long and alleges 24 claims for relief, it requests no specific relief *against* the General Assembly or the Attorney General. And although it purports to seek injunctive relief, it does not ask the court to order any of the Defendants to do something that they would otherwise not have to do, nor does it request that any of the Defendants be ordered to refrain from doing something that they would otherwise be able to do. In other words, the Governor's First Amended Complaint does not seek any real injunctive relief against the Defendants. Instead, it merely asks for a non-justiciable advisory opinion stating that the new legislation does not limit the Governor's emergency powers. But Kentucky courts lack jurisdiction to issue such advisory opinions. *See, e.g.*, *Commonwealth v. Hughes*, 873 S.W.2d 828, 829–30 (Ky. 1994) (citing Ky. Const. § 110; *In re Constitutionality of House Bill 222*, 90 S.W.2d 692 (Ky. 1936)). In fact, without an actual case or controversy, a Kentucky circuit court lacks authority to take any action.

But the Franklin Circuit Court still issued the requested advisory opinion—at least on a preliminary basis—in the form of a temporary injunction against the Defendants. The Franklin Circuit Court brushed aside the Attorney General's arguments about justiciability, concluding that the First Amended Complaint "is sufficient to demonstrate a justiciable controversy" because "[t]he Governor has alleged irreparable injury to his constitutional powers and has made a preliminary showing that the bills will impair the exercise of his constitutional duty." Mar. 3, 2021 Order Granting Temporary Injunction Under CR 65.04 at 19, attached as Appendix 1. Yet the Franklin Circuit Court failed to explain how the First Amended Complaint stated a justiciable claim against any of the Defendants. And that led to an unusual temporary injunction in which the Franklin Circuit Court—rather than limiting the injunction to particular acts by the Defendants as required by CR 65.01 and CR 65.04—purported to enjoin, for example, "[t]he enforcement and implementation of House Bill 1," without identifying *who* might enforce or implement these laws or what exactly they are enjoined from doing. *Id.* at 5. In doing so, the circuit court's injunction only reaffirmed that the Defendants were simply stand-ins for an advisory opinion that purported to enjoin no one in particular. Given the manifest lack of a justiciable case or controversy, the Attorney General filed a motion under CR 65.07 asking the Court of Appeals to vacate the temporary injunction.

Not long after the Franklin Circuit Court purported to enjoin SB 1, SB 2, and HB 1, the General Assembly passed House Joint Resolution 77—which ratifies and extends many of the Governor's executive orders and regulations for periods of time ranging from 30 to 90 days, and terminates all other COVID-related orders and regulations. The Governor vetoed that resolution, but the General Assembly quickly overrode his veto. Again dissatisfied with the legislative process and the limitations imposed on his exercise of statutory emergency powers, the Governor went back to the Franklin Circuit Court and asked it to enjoin HJR 77 as well.[2]

The Attorney General once again objected, both because the Governor had not filed a pleading seeking to enjoin HJR 77 as required by the Civil Rules, and because there is no justiciable case or controversy. And, once again, the Franklin Circuit Court brushed those objections aside with little consideration, simply concluding that the constitutionality of HJR 77 presents "another substantial legal question that must be addressed on the merits in this case." Apr. 7, 2021 Order at 6, attached as Appendix 2. Thus, the Franklin Circuit Court modified its temporary injunction to put a hold on HJR 77. The Attorney General immediately filed a supplemental motion under 65.07 asking the Court of Appeals to vacate the modified injunction.

[2] The Governor did not file an amended complaint seeking relief on HJR 77. Rather, he simply moved to modify the existing temporary injunction to cover HJR 77.

Soon after, the Franklin Circuit Court denied the Attorney General's Motion to Dismiss, which had been made because of a lack of justiciability. This time, the court engaged in a longer discussion of that issue. But its reasoning was no deeper, and the court failed to discuss several arguments that the Attorney General raised.

The court found the case to be justiciable because the Attorney General, House Speaker, and Senate President had previously written the Governor a letter that was critical of the Governor for failing to consult with other government officials during the pandemic. The Franklin Circuit Court found that this letter—sent in the summer of 2020 (before this Court's *Acree* ruling and long before the 2021 legislative session even began)—properly forms the basis for a justiciable case. *See* Apr. 12, 2021 Order at 7, attached as Appendix 3.[3] Based on that letter, which was neither in the record nor relied on by any party, the court found that there is "little doubt that the Attorney General is adverse to the Governor." *Id.* at 6. The court also held that "[t]he injunctive relief issues have already been vigorously litigated in this matter, leaving little doubt that the Attorney General is adverse to the Governor in terms of the interpretation and application of the legislation that is at issue." *Id.* The court failed to acknowledge that the Attorney General had not litigated the merits

[3] The letter in question is attached to the Franklin Circuit Court's April 12, 2021 Order as an Exhibit. *See* Appendix 3.

of the Governor's arguments against the legislation, but had only "vigorously litigated" the lack of justiciability.

No matter, the court held that the Attorney General has two options: confess that the statutes are unconstitutional, or defend them on their merits. *See id.* at 9. The court expressly articulated those options, holding:

> If the Attorney General agrees with the Governor that HB 1, SB 1, and SB 2 are unconstitutional violations of Sections 27, 28, and 69 of the Kentucky Constitution then the Court will grant the Attorney General's Motion to Dismiss. However, if the Attorney General believes that those legislative enactments are valid and constitutional exercises of the legislature's authority, then there is most definitely a justiciable case or controversy. . . . The Court will expect the Attorney General to honor his oath and defend these statutes if he, as chief legal officer of the Commonwealth, believes they are constitutional. If, on the other hand, he believes these legislative enactments are unconstitutional, he need only notify the Court, and the Court will dismiss the Governor's claims against him as moot.

Id. at 9. In essence, the court held that the very act of being sued is enough to create a justiciable case or controversy as far as the Attorney General is concerned.[4] Thus, the court found that the Governor could proceed with his lawsuit and "is not required to wait until specific executive actions are challenged in future lawsuits by unknown potential plaintiffs." *Id.* Put differently, the Franklin Circuit Court does not think the Governor should have to wait for an actual case or controversy; so long as he places the Attorney

[4] And the suggestion that the Attorney General might not honor his oath of office is inappropriate. The Attorney General is actively defending Kentucky's laws in courts across the Commonwealth. In any event, the Attorney General's duty to represent the people's interests includes ensuring that their courts do not issue advisory opinions.

General's name after the "v." in his complaint, he can obtain whatever advisory opinion he wants when the General Assembly passes legislation that he dislikes.

ARGUMENT

The General Assembly has spoken. As this Court said it could, the General Assembly has taken back some—but far from all—of the statutory emergency powers that it once gave the Governor. The Governor thinks the General Assembly cannot take away statutory powers once it has given them to him. But this appeal is not about that issue. Rather, this appeal simply asks whether the Attorney General is entitled to relief from the Franklin Circuit Court's temporary injunction. And the answer is "yes" because the Franklin Circuit Court lacked jurisdiction to enter a temporary injunction in the first place.

A circuit court cannot grant a temporary injunction unless the plaintiff satisfies the well-known requirements from *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978). As relevant here, that includes showing "a substantial question as to the merits." *Id.* at 699. Such a question exists when "there is a substantial possibility that the movant will ultimately prevail." *SM Newco Paducah, LLC v. Ky. Oaks Mall Co.*, 499 S.W.3d 275, 278 (Ky. 2016) (quoting *Price v. Paintsville Tourism Comm'n*, 261 S.W.3d 482, 484 (Ky. 2008)). But there is no chance—much less a *substantial* possibility—that the Governor will ultimately prevail given that there is no justiciable case or controversy here.

See Hughes, 873 S.W.2d at 829–30 (citations omitted); *see also Freeman v. Danville Tobacco Bd. of Trade, Inc.*, 380 S.W.2d 215, 216 (Ky. 1964) (holding that a justiciable controversy is a "condition precedent to an action under our Declaratory Judgment Act").

As explained below, there are two reasons for this. First, the Governor is seeking a non-justiciable advisory opinion rather than seeking actual relief *against* the Attorney General—or any of the Defendants for that matter. Second, the Governor lacks standing. By proceeding in the face of these issues, the Franklin Circuit Court acted without authority. As a result, its temporary injunction was, by definition, an abuse of discretion. *See SM Newco Paducah, LLC*, 499 S.W.3d at 278 (holding that an abuse of discretion occurs when the judge's decision is "unsupported by sound legal principles" (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999))). Thus, this Court should vacate the temporary injunction.

I. Injunctive relief—temporary or permanent—is unavailable here because there is no justiciable case or controversy.

Justiciability matters. In fact, it matters a lot. As an essential element of the constitutional separation of powers, justiciability is what "define[s] the role assigned to the judiciary in a tripartite allocation of power . . . ." *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *see also Morgan v. Getter*, 441 S.W.3d 94, 99 (Ky. 2014) (acknowledging that separation-of-powers concerns underlie the prohibition on advisory opinions).

Justiciability places guardrails on the permissible scope of judicial decision making, thus preventing courts from exercising power belonging to the other branches. As a result, courts are not "free-range problem solvers." *Hearring v. Sliwowski*, 806 F.3d 864, 868 (6th Cir. 2015), nor are they councils of revision possessing the power to veto legislation, *see Wright v. Spaulding*, 939 F.3d 695, 708 (6th Cir. 2019) (Thapar, J., concurring). Thus, the justiciability doctrine prohibits courts from resolving public-policy debates or settling abstract, academic disputes about the meaning or validity of a law. This means that the Commonwealth's courts exist for one reason and one reason only: to adjudicate actual cases and controversies between parties. *See, e.g.*, *Hughes*, 873 S.W.2d at 829–30; *see also* Ky. Const. § 112(5) (limiting circuit court jurisdiction to "justiciable causes"). It is fundamental that Kentucky courts "do not function to give advisory opinions, *even on important public issues*, unless there is an actual case in controversy." *Newkirk v. Commonwealth*, 505 S.W.3d 770, 774 (Ky. 2016) (emphasis added) (quoting *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992)). Yet that is exactly what the Governor asked the Franklin Circuit Court to do here.

The Governor has not asked the judiciary to adjudicate an actual controversy between him and the Attorney General. In fact, he does not seek any actual relief *against* any of the Defendants. Rather, he seeks relief against legislative acts of the General Assembly, which are not appropriate subjects of injunctive relief. *See* CR 65.01; CR 65.04. Nowhere in the First Amended

Complaint does the Governor state a claim against the Attorney General or allege that the Attorney General *has* or *will* take any action that would "impair, thwart, obstruct or defeat" the Governor's rights. *Commonwealth v. Ky. Ret. Sys.*, 396 S.W.3d 833, 839 (Ky. 2013) (quoting *Revis v. Daugherty*, 287 S.W. 28, 29 (Ky. 1926)); *see also In re Constitutionality of HB No. 222*, 90 S.W.2d at 692–93 (invalidating statute allowing governor and each house of legislature to request advisory opinion on "important constitutional questions"). Apart from three references to him in the case caption and introductory paragraph, the First Amended Complaint only references the Attorney General in these narrow contexts:

- In Paragraph 44, the Governor describes the provision of SB 1 that requires the Governor to specifically enumerate the statutes that he is suspending and that the "executive order specifying the suspension" must be "approved by the Attorney General in writing."
- In Paragraph 49, the Complaint provides that "Section 9 of SB 1 expressly states that the bill shall not affect the authority of the Attorney General to enforce the prohibition on price gouging implemented by the Governor during a declared state of emergency."
- In Paragraph 80, the Complaint claims that venue is appropriate because the Attorney General maintains an office in Frankfort.
- In Paragraph 87, the Complaint merely lists the Attorney General as a party to this suit.

- In Paragraph 133, the Governor claims that "SB 1 violates Section 69 of the Kentucky Constitution by placing the Governor—the Chief Magistrate vested with the supreme executive power—under the supervision and control of an inferior officer, the Attorney General, by requiring the Governor to obtain the inferior officer's written approval before suspending a statute by executive order[.]"
- In Paragraphs 149 and 165, the Governor makes substantially the same claim as in Paragraph 133.

See First Amended Complaint, attached as Appendix 4.

None of these allegations establish a justiciable case or controversy against the Attorney General. Similarly, the Governor's motion to modify the temporary injunction to include HJR 77 contained no mention of the Attorney General at all—presumably because HJR 77 also contains no mention of the Attorney General. *See* Plaintiffs' Notice-Motion to Clarify or, in the Alternative, Amend the Temporary Injunction Order, attached as Appendix 5. At most, the Governor has asked the circuit court to decide an academic question devoid of any real case or controversy and divorced from any actual facts.

The only real attempt—lackluster though it may be—that the Governor has made to show an actual case or controversy is his allegation about the provision in SB 1 that requires the Attorney General's consent before the Governor can suspend a statute. *See* 2021 S.B. 1, § 4(2)(b)(2). The Governor

dislikes this provision, and there might—or might not—come a time when there is an actual case or controversy over whether it is constitutional. But, for now, there is not. All we have now is a statutory provision to which the Governor objects. He has identified no statute that he wants to suspend—much less suspend without the consent of the Attorney General. Thus, there is just an abstract, academic debate over the provision. Whether the Governor will try to suspend a statute, and whether the Attorney General will stand in his way, are speculative matters at this point. There is thus no justiciable case or controversy on this point because the courts "may not declare prospective or future rights." *Veith v. City of Louisville*, 355 S.W.2d 295, 297 (Ky. 1962). Nor may the courts adjudicate "speculative rights or duties which

may or may not arise in the future."[5] *Id.* (citation omitted). But that is all the Governor seeks in his claim about the statutory-suspension issue.[6]

Ultimately, none of his allegations create a justiciable case or controversy. And perhaps nothing better reveals this than asking: How would this case be any different if the Governor had named no defendants at all? Stated simply, there would be no difference. The Governor's chief complaint is

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[5] Even if there were a justiciable controversy over the narrow statutory-suspension issue, that would not justify the extraordinarily broad relief granted below, in which the Franklin Circuit Court purported to "enjoin" provisions of the challenged laws that have nothing to do with the Attorney General. The Franklin Circuit Court gave no explanation—and the Governor has offered none—as to what justiciable controversy supports such far-reaching relief. If the Court believes that the suspension issue creates a justiciable case, it should vacate the temporary injunction and direct the trial court to proceed only on this one discrete issue within one bill. More importantly, even if the statutory-suspension issue presented a justiciable case or controversy, it would not justify any kind of injunctive relief because that provision of SB 1 is constitutional. The power to suspend statutes is a legislative power, but Section 15 of the Kentucky Constitution provides that the General Assembly can authorize executive officials to exercise that power. The General Assembly need not provide such authorization, but if it does so, it can do so however it desires. *See Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 679–80 (Ky. 2019).

[6] In the pending *Ridgeway Properties* case in Boone Circuit Court, the Governor is arguing that the plaintiff's challenge to one of his executive orders does not present a justiciable case or controversy because the Governor has not tried to enforce that order against the plaintiffs. *See Ridgeway Props., LLC, et al. v. N. Ky. Indep. Health Dist., et al.* Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment, at 8, attached as Appendix 6. It would conflict with that argument for the Governor to argue here that the statutory-suspension provision in SB 1 creates a justiciable case or controversy when the Attorney General has not tried to apply that provision. Thus, the Governor should be estopped from arguing that there is a justiciable case or controversy as to the statutory-suspension provision. *See Hisle v. Lexington-Fayette Urban Cnty. Gov't*, 258 S.W.3d 422, 434–35 (Ky. App. 2008).

that the newly passed laws unconstitutionally restrict his power, and so he asks this Court to enjoin the "enforcement" or "implementation" of those laws. But whom does the Governor want enjoined exactly, and from doing what? He never says. His request for relief asks only that the Court abstractly enjoin the statutes themselves from enforcement—*and that is precisely what the Franklin Circuit Court did.* But a court cannot issue an injunction against a statute itself—only a party to a lawsuit can be enjoined. *See* CR 65.01 (providing that "[a]n injunction may restrict or mandatorily direct the *doing of an act*") (emphasis added); CR 65.04(1) (providing that a temporary injunction may issue when a plaintiff shows his or rights are or will be violated "by an *adverse party*") (emphasis added); CR 65.04 (stating that a temporary injunction is binding on the "*party*") (emphasis added).

If the Governor filed a complaint naming no defendants and simply asked a court to proclaim the unenforceability of a statute, that complaint would be dismissed out of hand. Yet that is essentially what he has done here. It makes no substantive difference that the Governor simply added the Attorney General's name to the other side of the "v."[7] *See Revis*, 287 S.W. at

[7] The Governor took this position when he was the Attorney General. In responding to a motion for injunctive relief in a lawsuit challenging the constitutionality of a Kentucky statute, then-Attorney General Beshear explained that injunctive relief against him "would be a nullity with no operative legal effect" because the challenged legislation "does not confer upon the Attorney General the authority or duty to enforce the provisions as enacted." For this reason, "there is no act of the Attorney General or his Office for the Court to enjoin." AG's Response to TRO Motion, *EMW Women's*

29 ("[P]laintiff may not convert his academic question into a justiciable one by inserting the name of the Attorney General after 'v.' . . . ." (citation omitted)). At bottom, this lawsuit is "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." *See id.*

The Franklin Circuit Court's reasoning puts the Attorney General in an impossible *Catch-22* situation. That is, the court held that the very fact the Attorney General had "vigorously litigated" the lawsuit—even if on justiciability grounds—was itself proof of a justiciable case or controversy. *See* Apr. 12, 2021 Order at 6, Appendix 3. Thus, the Franklin Circuit Court's reasoning amounts to this: The Governor has raised legal questions about the validity of the challenged legislation, and therefore the Attorney General—because of the very fact that he has been sued—must either litigate those questions on their merits or else confess judgment. *See* Apr. 12, 2021 Order at 9. This reasoning hollows out any notion of justiciability. If the simple fact of being sued creates a justiciable case or controversy, there would be no such thing as justiciability because every case would be justiciable.

Along with that flawed reasoning, the Franklin Circuit Court also relied on *Board of Education of Boone County v. Bushee*, 889 S.W.2d 809 (Ky. 1994). But *Bushee* is inapt. The Governor cited *Bushee* for the proposition that a

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Surgical Ctr. v. Meier, 3:18-cv-224, R. 42 at 1 (W.D. Ky.) (attached as Appendix 7). The same is true here.

justiciable case or controversy exists whenever one governmental entity adopts a policy or rule affecting the autonomy of another, and the Franklin Circuit Court accepted that reasoning. Such a reading of the case admits of no limits.

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). The plaintiffs argued that the Boone County Board of Education's policy violated school councils' authority under statute to set school policy autonomously. This Court found that dispute to be justiciable. *See id.* at 811. Thus, the Governor has argued—and the Franklin Circuit Court has agreed—that because this Court found the dispute in *Bushee* to be justiciable, this matter is likewise justiciable because SB 1 takes away the Governor's autonomy to suspend statutes. But this oversimplifies the matter and glosses over key points. Most importantly, there was a concrete dispute between the parties in *Bushee* rather than the abstract, academic question raised by the Governor here. In *Bushee*, there was a legal requirement to submit a report and receive Board approval *by a date certain*, *see id.* at 810, and one party claimed it should not have to meet that requirement. In other words, the dispute was not abstract; it had materialized into a concrete dispute with an impending deadline that could not be avoided.

Here, however, there is no such dispute. Nothing *requires* the Governor to suspend any statutes, and he has likewise failed to allege that there are any particular statutes he wants to suspend but cannot do so without the Attorney General's approval. This matter is therefore nothing like *Bushee.*

Rather, this case is the kind of "preemptive" litigation that this Court found to be non-justiciable in *Mammoth Medical, Inc. v. Bunnell*, 265 S.W.3d 205 (Ky. 2008). In *Mammoth Medical*, the Court held that a prospective defendant could not use the Declaratory Judgment Act to have a court declare his or her rights before a plaintiff had ever sued. The ultimate point is that it is up to a legitimately injured party—one with actual standing—to launch a lawsuit that may invoke the judicial power. Here, the Governor is trying to preemptively immunize his actions from an actual suit involving a true case or controversy by forcing the validity of the challenged statutes to be adjudicated in a lawsuit of his own making—rather than one arising out of the claims of someone who is affected by his orders—and with the "issues framed by [the Governor], in a forum chosen by [the Governor]." *Id.* at 213. To grant the Governor's request would "open the courthouse doors to [other] preemptive actions" by the Governor (and others) "seeking forum-favorable, summary disposition of not-yet-filed [ ] claims, or lead to multiple claims in separate courts involving similar subject matter."[8] *Id.*; *see also Saginaw Cnty. v. STAT*

[8] This lawsuit is the Governor's second attempt at engaging in such tactics. The Governor previously sued the Attorney General for sending him a letter—the letter that the Franklin Circuit Court referenced in finding justiciability

Emergency Med. Servs., Inc., 946 F.3d 951, 956 (6th Cir. 2020) ("The public body cannot turn to the federal courts to resolve mere 'differences of opinion' about what its powers permit or what the law requires in a potential future application." (citation omitted)). This is not appropriate, and it is not how the Governor's abstract academic questions can—or should—be decided.

As explained above, there are two ways the Governor's objections to the new legislation could materialize into a concrete, justiciable controversy. First, if the Governor were to keep exercising unilateral power in contravention of the new legislation, then a person who is harmed by his actions could sue the Governor, and the Governor could raise the legislation's purported invalidity as a defense. *See, e.g., Commonwealth v. Mountain Truckers Ass'n, Inc.*, 683 S.W.2d 260, 263 (Ky. 1984) ("A restraining order granting injunctive relief against the enforcement of a statute or ordinance is to be directed against the acts of those specific public officials charged with enforcing the statute to enjoin their threatened enforcement." (citations omitted)). Second, if the Governor were to ignore the legislation and keep exercising unilateral power as before, he could take legal action against those who violate his orders, and then those individuals would likely rely on the new legislation as their defense, which would properly raise the legislation's validity. But what he may not do is

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even though it was not part of the record. The Attorney General is seeking a writ of prohibition in that matter because the Governor cannot simply sue the Attorney General preemptively when the Attorney General shares his policy views through a letter. *See Cameron v. Shepherd*, 2020-CA-1214 (Ky. App.).

manufacture preemptive claims against the Attorney General and the leaders of the General Assembly to immunize himself from possible future claims that he has violated the rights of possible future litigants who are not parties here. That is not how litigation works in the Commonwealth. *See Mammoth Med.*, 265 S.W.3d at 213; *see also Mountain Truckers Ass'n, Inc.*, 683 S.W.2d at 263 (holding that any "restraining order attempting to bind the Commonwealth in its entirety, all of its executive, judicial and legislative officers, agents and attorneys, simply by the nominal participation of the Commonwealth, must be struck down as overly broad and vague").[9]

Without an actual case or controversy between the Governor and any of the Defendants he has sued, the Franklin Circuit Court lacks jurisdiction and this case must be dismissed. The existence of a pandemic does not change this conclusion. *Cf. Roman Cath. Diocese of Brooklyn v. Cuomo*, --- U.S. ---, 141 S. Ct. 63, 68 (2020) (per curiam) ("But even in a pandemic, the Constitution cannot be put away and forgotten."). Nor does it make a difference that the Governor genuinely believes there are important public policy issues at stake here. *See Appalachian Racing, LLC v. Family Tr. Found. of Ky., Inc.*, 423 S.W.3d 726, 735 (Ky. 2014) ("Neither the great public interest in an important issue nor the urgency in having it judicially resolved will suffice to establish

[9] As explained in footnote 1, there at least two pending justiciable cases in which the parties are litigating the validity of challenged legislation. *See Ridgeway Props., LLC v. Beshear*, 20-CI-00678 (Boone Cir. Ct.); *Goodwood Brewing Co. v. Beshear*, 21-CI-00128 (Scott Cir. Ct.).

the justiciability of an action for a declaration of rights under KRS 418.020 or KRS 418.040."). And a mere difference of opinion, even "between lawyers"—or the constitutional officers involved here—"on a subject of law" does not create a justiciable case. *Jefferson Cnty. ex rel. Coleman v. Chilton*, 33 S.W.2d 601, 605 (Ky. 1930) ("Every dispute between lawyers on a subject of law, whether adjective or substantive, is not a justiciable controversy to be settled in a declaratory action."). Virtually every decision that this Court or its predecessor has issued on justiciability applies to—and weighs against—the Franklin Circuit Court's order below. Yet neither the Governor nor the court below have offered any reason for departing from these well-established principles.

Finally, it also makes no difference that the Governor has sued under the Declaratory Judgment Act. The Declaratory Judgment Act does not give Kentucky courts authority to declare an answer to all conceivable legal questions. It is not a shortcut around the requirement of a justiciable case or controversy. Indeed, it is the "distinction between declaring rights and not declaring the law in a vacuum that allows the Declaratory Judgment Act to pass constitutional scrutiny" in the first place. *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007). Yet declaring the law in a vacuum is precisely what the Governor wants the courts to do. If there are constitutional questions about SB 1, SB 2, HB 1, and HJR 77, they should be adjudicated in a matter that involves an actual case or controversy with a party who has incurred a real injury. They should not be adjudicated here, where the Governor is simply

asking the Franklin Circuit Court to tell him he is right about his abstract, academic objection to the validity of those bills.

There is no justiciable case or controversy here. As a result, the Governor's lawsuit will ultimately have to be dismissed, and so there is no possibility that he will prevail on the merits. This means that the Franklin Circuit Court's entry of such an injunction was necessarily wrong.[10] Thus, that injunction should be vacated.

II. The Governor lacks standing.

Standing is an essential element of a justiciable case or controversy. And it does not exist here.

To have standing to sue, the Governor "must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, and (3) redressability." *Cabinet for Health & Family Servs., Dep't for Medicaid Servs. v. Sexton by & through Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 196 (Ky. 2018). But the Governor has alleged no real injury

[10] The resolution of the other *Maupin* factors flows from this conclusion. Because duly enacted statutes are at stake, the public interest favors allowing these statutes to be in effect. *See Boone Creek Props., LLC v. Lexington-Fayette Urban Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014) ("[T]he statute's enactment constitutes [the legislature's] implied finding that violations will harm the public . . . ." (citation omitted)). And enjoining those laws causes irreparable harm to the Commonwealth. *See Abbott v. Perez*, --- U.S. ---, 138 S. Ct. 2305, 2324 & n.17 (2018); *see also Boone Creek Props., LLC*, 442 S.W.3d at 40–41 (holding that non-enforcement of a statute constitutes irreparable harm to the government).

at all, much less an injury that the Attorney General has caused and that this Court may redress.

The sole injury the Governor attempts to allege against the Attorney General involves only one of the bills at issue—and that claim will be unsuccessful because Section 15 of the Constitution grants the General Assembly alone the power to determine when and how laws shall be suspended. In alleging injury involving the Attorney General, the Governor has ignored SB 2, HB 1, and HJR 77. The *only* allegation of injury he makes against the Attorney General is a vague claim that SB 1 injures him by requiring the Attorney General's consent to suspend a statute. *See* First Amended Complaint ¶ 133, Appendix 4. He does not even attempt to argue that the other pieces of legislation—SB 2, HB 1, and HJR 77—are connected to any injury purportedly caused by the Attorney General. His argument misses the mark on all three requirements—injury, causation, and redressability.

1. Lack of injury.

The Governor's alleged injury is not an injury-in-fact. The *only* injury he has alleged against the Attorney General is the deprivation of the Governor's ability to suspend statutes unilaterally. And that does not amount to a real injury because the Governor has no constitutionally protected interest

in the ability to suspend statutes unilaterally.[11] *See Fletcher v. Commonwealth*, 163 S.W.3d 852, 872 (Ky. 2005) (citation omitted); *see also Brown v. Barkley*, 628 S.W.2d 616, 623 (Ky. 1982) ("[E]xcept for those conferred upon him specifically by the Constitution, [the Governor's] powers, like those of the executive officers created by Const. Sec. 91, are only what the General Assembly chooses to give him").

Suspending statutes is a legislative function, and Section 15 of the Constitution provides that it can be done only "by the General Assembly or its authority." Thus, the manner of suspending statutes is within the control of the General Assembly, and Section 15 provides that the General Assembly can authorize other parts of government to exercise that power. *See Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 679–80 (Ky. 2019). The Governor's ability to suspend statutes therefore depends on the General Assembly. As a result, if the General Assembly decides not to give the Governor the authority to suspend statutes unilaterally—or gives him that authority and later removes it in part, as the General Assembly has done here—then his inability to suspend statutes unilaterally does not amount to an invasion of a legally protected interest. And without "an invasion of a legally protected interest," he has suffered no injury of the kind needed for

[11] Even if the Court finds an injury-in-fact on the discrete issue of statutory suspension (it should not, as discussed), that does not open the courthouse doors to all of the Governor's claims. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press.").

standing.[12] *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

In addition, as discussed above, the Governor has not tried to suspend any statutes, nor has the Attorney General objected to such a plan. Thus, any alleged injury to the Governor is not imminent enough. Under *Sexton*, plaintiffs "cannot manufacture standing merely . . . based on their fears of hypothetical future harm that is not certainly impending." *Sexton*, 566 S.W.3d at 197 (alteration in original) (citation omitted). Instead, there must be a showing that "the injury is *certainly impending*.'" *Overstreet v. Mayberry*, 603 S.W.3d 244, 252 (Ky. 2020) (citation omitted). In sum, "allegations of possible future injury do not satisfy the requirements of standing." *Commonwealth v. Bredhold*, 599 S.W.3d 409, 417 (Ky. 2020) (cleaned up) (citation omitted).

The Governor argues that his interests as the "supreme executive power" have been injured, but that argument rests on a not-so-subtle sleight of hand. The "supreme executive power" is the power to *execute* the laws, not the power to *suspend* them, which is a legislative power. *Compare* Ky. Const. § 15 *with* Ky. Const. § 81. The Constitution provides the Governor only limited express powers and duties, and the power to suspend laws is not among them. *See Brown*, 628 S.W.2d at 621 (listing the limited powers and duties of the

[12] In fact, the Governor's interest here should be in *following* SB 1, not undermining it. After all, his constitutional duty is to "take care that the laws be faithfully executed." Ky. Const. § 81.

Governor found in Sections 75,[13] 76, 77, 78, 79, 80, and 81); *see also id.* at n.11 (noting that the General Assembly "is under no compulsion to give such prerogatives or 'substantial things'" to an executive officer in the first place). Indeed, this Court has held that "[t]he suspension of statutes by a Governor is . . . antithetical to the constitutional duty to 'take care that the laws be faithfully executed.'" *Fletcher*, 163 S.W.3d at 872 (citing Ky. Const. § 81).

More generally, the Governor has a constitutional *duty* to enforce the laws of the Commonwealth. *See* Ky. Const. § 81. Thus, his legally protected interest is in enforcing the existing laws of the Commonwealth, not the laws that once existed or that he wishes would exist. Here however, the Governor is essentially arguing that he has a legally protected interest in enforcing his statutory emergency powers as they existed before SB 1, SB 2, HB 1, and HJR

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[13] Throughout this case, the Governor has made repeated and puzzling references to Section 75 of the Constitution, which pertains to the Governor's command of the army and navy. The power to command the army and navy is irrelevant in this lawsuit. In any event, Section 75 cannot possibly grant the unfettered power that the Governor claims. If legislators do not hide "elephants in mouseholes," the Framers did not hide such vast unstated authority in Section 75. *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 791 (Ky. 2019) ("[T]he General Assembly 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'" (citation omitted)). Moreover, Kentucky law has long recognized that Section 75 does not exempt the Governor from following all other constitutional requirements, even when he is acting as commander in chief. *See Franks v. Smith*, 134 S.W. 484 (Ky. 1911). Lastly, as if Section 75 were not plain enough, Section 219 of the Constitution defines the militia as consisting of "all able-bodied male residents of the State between the ages of eighteen and forty-five years." To claim that Section 75 provides executive powers outside of the military context is unavailing.

77. But that cannot be the case. Otherwise, the Governor would have standing to sue the General Assembly to make it pass bills that he prefers on the theory that he is being injured by their non-passage. Or he could sue to prevent the General Assembly from repealing or amending laws that he likes. This cannot be the law because it would create a separation-of-powers disaster of unimaginable proportions. *See* Ky. Const. §§ 27–28.

2. Lack of causation.

Setting aside the fact that the Governor has demonstrated no injury, he also has made no allegations showing *causation* of any injury by the Attorney General. The legislation that he complains of was not enacted by the Attorney General.[14] Nor does the Attorney General enforce or execute the legislation—except perhaps for the suspension provision. In any event, there is no way to know whether the Attorney General would block any attempt to suspend a statute because the Governor has identified no statutes that he wishes to suspend. And the Governor has not even tried to allege that the Attorney General has caused him any injury through SB 2, HB 1, HJR 77, or the non-suspension provisions of SB 1. Given these circumstances, it is impossible to understand how any injury allegedly suffered by the Governor could be caused by the Attorney General.[15] *See Sexton*, 566 S.W.3d at 196 (holding that an

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[14] And the legislative Defendants enjoy absolute immunity against suit. *See, e.g., Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001).

[15] In fact, the Court of Appeals recently held—in a case in which the Governor was a defendant—that where a state official does not enforce the challenged

injury must be "fairly traceable to the defendant's allegedly unlawful conduct" to create standing).

3. Lack of redressability.

The injury that the Governor complains of—even if it were real, which it is not—cannot be redressed by any relief ordered *against* the Attorney General.[16] The injunction itself reveals this as it does not really require the Attorney General to do—or refrain from doing—anything. It purports to enjoin the Attorney General, but there is nothing in it that constrains him, nor is there anything in it that requires him to do anything. Such an injunction does not really redress anything. In fact, it is not even a proper injunction. *See Mountain Truckers Ass'n, Inc.*, 683 S.W.2d at 263 (requiring that injunctions "describe in reasonable detail the act to be restrained"). Injunctive relief can only "restrict or mandatorily direct the doing of an act," CR 65.01, and it must be "binding upon the parties to the action," CR 65.02(2). The temporary injunction does not bind the Defendants in any way because it does not restrict or direct the doing of any acts on their part. And, if granted, the Governor's

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legislation, the state official's alleged conduct cannot cause an injury-in-fact sufficient to confer standing. *Kasey v. Beshear*, --- S.W.3d ---, 2021 WL 1324395, at *4 (Ky. App. 2021) ("[W]e cannot say the cause of those injuries was the Governor or the Commissioner of Agriculture's failure to enforce the animal shelter statutes."). The losing parties have sought discretionary review in this Court. *See Kasey v. Beshear*, 2021-SC-127 (Ky.).

[16] The same goes for the General Assembly.

requested permanent injunctive relief would not be any different. This is the opposite of redressability.

CONCLUSION

This matter is missing the one thing that is necessary for the invocation of judicial power—the existence of a justiciable case or controversy. Without a justiciable case or controversy, the Franklin Circuit Court had no jurisdiction to take any action at all. Thus, its temporary injunction was necessarily an abuse of discretion and should be vacated.

Respectfully submitted,

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