

RECEIVED  
MAY 25 2021  
CLERK  
SUPREME COURT

COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
NO. 2021-SC-0107-T  
(2021-CA-0328-I)

FILED  
MAY 25 2021  
CLERK  
SUPREME COURT

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

**MOVANT**

v.

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

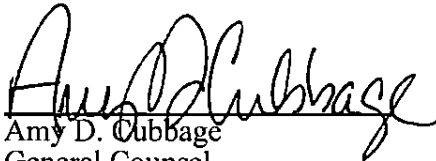
**ANDY BESHEAR**, in his official capacity as  
Governor of the Commonwealth of Kentucky, et al.

**RESPONDENTS**

---

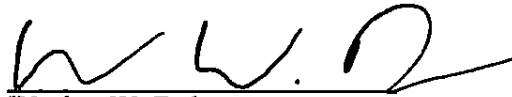
**RESPONDENTS' RESPONSE BRIEF**

---



Amy D. Cabbage  
General Counsel  
S. Travis Mayo  
Chief Deputy General Counsel  
Taylor Payne  
Marc Farris  
Laura C. Tipton  
Deputy General Counsel  
Office of the Governor  
700 Capitol Avenue, Suite 106  
Frankfort, KY 40601  
(502) 564-2611  
amy.cabbage@ky.gov  
travis.mayo@ky.gov  
taylor.payne@ky.gov  
marc.farris@ky.gov  
laurac.tipton@ky.gov

*Counsel for Governor Beshear*



Wesley W. Duke  
Executive Director  
Office of Legal Services  
LeeAnne Applegate  
Deputy General Counsel  
Cabinet for Health and Family Services  
275 East Main Street 5W-A  
Frankfort, KY 40621  
(502) 564-7042  
WesleyW.Duke@ky.gov  
LeeAnne.Applegate@ky.gov

*Counsel for Secretary Friedlander*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this brief was served on May 25, 2021, via electronic and U.S. mail, upon S. Chad Meredith, Matthew F. Kuhn, and Brett R. Nolan, Office of the Attorney General, 700 Capitol Ave., Ste. 118, Frankfort, KY 40601; David E. Fleenor, Office of the Senate President, 702 Capitol Ave., Rm. 236, Frankfort, KY 40601; Eric Lyan, Office of the Speaker of the House, 702 Capitol Ave., Rm. 332, Frankfort, KY 40601; Greg Woosley, 702 Capitol Ave., Frankfort, KY 40601; and via U.S. mail upon Phillip J. Shepherd, Circuit Judge, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601; and Kentucky Court of Appeals, Attn: Clerk, 360 Democrat Drive, Frankfort, KY 40601.

A handwritten signature in cursive script, appearing to read "Amy D. Hulse", written over a horizontal line.

## TABLE OF POINTS AND AUTHORITIES

INTRODUCTION .....	1
HB 1.....	<i>passim</i>
SB 1.....	<i>passim</i>
SB 2.....	<i>passim</i>
KY. CONST. § 69 .....	1
<i>Commonwealth v. Kentucky Retirement Sys.</i> , 396 S.W.3d 833 (Ky. 2013) .....	1
<b>I. A Justiciable Case Or Controversy Exists Against The Attorney General.....</b>	<b>2</b>
KRS 418.040 .....	2
KRS 418.045 .....	2
<i>Barrett v. Reynolds</i> , 817 S.W.2d 439 (Ky. 1991) .....	2
<i>Veith v. City of Louisville</i> , 355 S.W.2d 295 (Ky. 1962) .....	2
KRS 418.080 .....	2-3
<i>Maas v. Maas</i> , 204 S.W.2d 798 (Ky. 1947) .....	3
<i>Combs v. Matthews</i> , 364 S.W.2d 647 (Ky.1963) .....	3-4
<i>Jamgotchian v. Kentucky Horse Racing Comm.</i> , 488 S.W.3d 594 (Ky. 2016) .....	4,7
<i>Jarvis v. Nat'l City</i> , 410 S.W.3d 148 (Ky. 2013) .....	4,7
<i>Bd. of Educ. of Boone Cty. v. Bushee</i> , 889 S.W.2d 809 (Ky. 1994) .....	5-6, 7
<i>Davro v. Liberty Nat'l Bank &amp; Trust Co.</i> , 267 S.W.2d 95 (Ky. 1954) .....	5
<i>Beshear v. Acree</i> , 615 S.W.3d 780 (Ky. 2020) .....	5-6
<i>Mammoth Medical, Inc. v. Bunnell</i> , 265 S.W.3d 2015 (Ky. 2008) .....	6-7
22A Am.Jur.2d <i>Declaratory Judgments</i> § 56 .....	6-7
<i>Jefferson Cty. ex rel. Coleman v. Chilton</i> , 33 S.W.3d 601 (Ky. 1930) .....	7
<b>II. The Governor Has Standing.....</b>	<b>7</b>
KRS 418.045 .....	7
<i>Baker v. Carr</i> , 369 U.S. 186 (1962) .....	7,8
<i>Rose v. Council for Better Educ., Inc.</i> , 790 S.W.2d 186 (Ky. 1989) .....	7-8
<i>Legislative Research Com'n By and Through Prather v Brown</i> , 664 S.W.2d 907 (Ky. 1984) .....	8
<i>Yeoman v. Com.</i> , 983 S.W.2d 459 (Ky. 1988) .....	8
<i>Brown v. Barkley</i> , 628 S.W.2d 616 (Ky. 1982) .....	8
KRS Ch. 39A .....	8, 10
KRS 39A.180 .....	8-9
Executive Order 2020-243 .....	9
700 KAR 003:270E .....	9
<i>Combs v. Matthews</i> , 364 S.W.2d 647 (Ky.1963) .....	9
<i>Commonwealth v. Kentucky Retirement Sys.</i> , 396 S.W.3d 833 (Ky. 2013) .....	9
<i>Kasey v. Beshear</i> , --- S.W.3d ---, 2021 WL 1324395 (Ky. App. Apr. 9, 2021) .....	9
KRS 418.040 .....	10
CONCLUSION.....	10

## INTRODUCTION

The Franklin Circuit Court did not abuse its discretion in entering the temporary injunction at issue in this appeal. The Attorney General raises one solitary issue on appeal: whether the Franklin Circuit Court had jurisdiction to enter the temporary injunction against him. (Brief for the Attorney General, p. 1.) Because the challenged legislation placed the Governor's exercise of emergency authority under the control of the Attorney General, it did.

Senate Bill 1 ("SB 1") purports to place the Governor's authority to suspend statutes during an emergency under the control of the Attorney General. This violates Section 69 of the Kentucky Constitution. Before the Franklin Circuit Court, the Governor sought a declaration that SB 1 violates Section 69 and obtained a temporary injunction enjoining its enforcement, thereby preventing the Attorney General from exercising this purported control over the Governor's authority. (R. at 68.) The Declaratory Judgment Act expressly provides the Governor the right to seek such relief against the Attorney General. *See Commonwealth v. Kentucky Retirement Sys.*, 396 S.W.3d 833 (Ky. 2013) (a justiciable controversy "occurs when a defendant's position would 'impair, thwart, obstruct or defeat plaintiff in his rights.'") (citation omitted).

Of course, the Attorney General's single argument has no practical effect at this stage of the proceedings. The temporary injunction also applies to the General Assembly and the Legislative Research Commission, neither of which appealed its issuance.<sup>1</sup> Thus, SB 1 still would not take effect. As a result, if this Court were to grant the Attorney General relief from the temporary injunction, the Attorney General would still be

---

<sup>1</sup> The General Assembly and the LRC have appealed the Franklin Circuit Court's subsequent denial of their motions to dismiss. They also have sought relief from that order by direct appeal in the Court of Appeals.

prevented from exercising control over the Governor's emergency power to suspend statutes.

Nevertheless, the Attorney General's argument does not demonstrate that the Franklin Circuit Court clearly abused its discretion in entering the temporary injunction against the Attorney General. Contrary to the Attorney General's position, the underlying case is not about whether the General Assembly can remove emergency powers from the Governor, as the General Assembly did not remove any powers under HB 1, SB 1 or SB 2. Instead, the case is about whether the General Assembly can give itself and others, including the Attorney General and local governments, veto control over the exercise of emergency powers that reside and remain with the Governor. By providing the Governor with authority to suspend statutes, but subjecting that authority to approval or denial by the Attorney General, the passage of SB 1 created a justiciable case or controversy between the Governor and the Attorney General. The Governor has standing to seek a temporary injunction enjoining the Attorney General from possessing or exercising this veto power over the Governor's exercise of emergency authority.

**I. A Justiciable Case Or Controversy Exists Against The Attorney General.**

The Declaratory Judgment Act allows a court to declare the rights between parties "wherein it is made to appear that an actual controversy exists[.]" KRS 418.040. An actual controversy is "a controversy over present rights, duties, and liabilities." *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991). It is a controversy "in which a binding judgment concluding the controversy may be entered." *Veith v. City of Louisville*, 355 S.W.2d 295, 297 (Ky. 1962). "Any person . . . whose rights are affected by statute . . . may apply for and secure a declaration of his rights or duties[.]" KRS 418.045. The

purpose of the act is “remedial; . . . to make courts more serviceable to the people by way of settling controversies, and affording relief from uncertainty and insecurity with respect to rights, duties and relations, and [is] to be liberally interpreted and administered.” KRS 418.080. Indeed, Kentucky’s then-highest court noted that the “Act is broad, flexible and almost unlimited in its scope.” *Maas v. Maas*, 204 S.W.2d 798, 800 (Ky. 1947).

The Governor’s claim against the Attorney General fits these parameters. SB 1 affects the Governor’s rights. Principally, SB 1 placed his right to suspend statutes during an emergency under the veto control of the Attorney General. This right is present: under SB 1 it can be exercised during an emergency, and the Commonwealth was and is currently under a declared state of emergency. Finally, the Franklin Circuit Court can conclude the controversy by deciding whether Section 69 of the Kentucky Constitution prohibits the Attorney General from exercising control over a power assigned to the Governor. An actual controversy exists between the Governor and the Attorney General.

The Attorney General builds his argument on three faulty positions. First, he argues the Governor seeks no actual relief against him. The record shows the opposite. The Governor sought – and received – a temporary injunction preventing the Attorney General from exercising any of the control provided under SB 1 over the Governor’s right to suspend statutes during an emergency. (R. at 610.) Second, the Attorney General remarks on the number of times the Complaint mentions him. Of course, that has no bearing on whether an actual controversy exists. Third, the Attorney General argues no actual controversy can exist until the Attorney General takes action under SB 1. This argument overlooks that the Constitution was violated the moment the Governor’s present right was placed under the veto control of the Attorney General. Moreover, the

Declaratory Judgment Act allows the Governor to seek relief from that constitutional injury without waiting for the Attorney General to cause further harm. *See Combs v. Matthews*, 364 S.W.2d 647, 648 (Ky. 1963) (a court “may declare the rights of litigants in advance of action when it concludes 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.”).

This Court has rejected similar arguments. In *Jamgotchian v. Kentucky Horse Racing Comm.*, this Court addressed a plaintiff’s claim seeking a declaration that the Horse Racing Commission violated the Commerce Clause “by precluding him (via the threatened sanctions) from racing his Kentucky-claimed horse ‘elsewhere.’” 488 S.W.3d 594, 600 (Ky. 2016). The Commission argued that because the horse did not race elsewhere, it never sanctioned the plaintiff. *Id.* at 603. This Court dismissed that argument, holding that the plaintiff’s “eligibility as a licensed owner in good standing to claim horses . . . renders his interests in the constitutionality of Kentucky’s claiming regulations sufficiently concrete to satisfy [the] declaratory judgment statute.” *Id.*

In *Jarvis v. Nat’l City*, this Court addressed a declaratory judgment action brought by trustees regarding their right to charge fees in contradiction to a repealed statute that was in effect at the time the trusts were created. 410 S.W.3d 148, 153 (Ky. 2013). This Court held that a justiciable controversy existed because the risk of wrong action was real. *Id.* Putting it another way, the case presented “the potential for wrong action by one of the parties[]” and, thus, a justiciable actual controversy between the parties. *Id.*

The Attorney General argues for this Court to require a present controversy, as opposed to an actual one, arguing that the controversy only exists if he has vetoed a

suspension of statute deemed necessary by the Governor. But even if the Act requires a present controversy, this case meets that heightened standard because SB 1 presently interferes with the Governor's executive authority to suspend statutes, regardless of whether the Attorney General has yet to veto the exercise of this authority. Thus, even a present controversy exists with respect to the Attorney General. Regardless, this Court recognizes a distinction under the Declaratory Judgment Act: "[T]he question is not one of a present controversy . . . , but rather whether there is a 'justiciable controversy over present rights, duties or liabilities.'" *Bd. of Educ. Of Boone Cty. v. Bushee*, 889 S.W.2d 809, 811 (Ky. 1994) (quoting *Davro v. Liberty Nat. Bank & Trust Co.*, 267 S.W.2d 95, 97 (Ky. 1954)). Thus, whether the Attorney General's "approval can be required at all" is "in itself the justiciable controversy." *Id.* "The result of the [Attorney General's] decision to approve or disapprove would have no effect upon the ability to require the approval in the first place." *Id.* The Franklin Circuit Court had jurisdiction even "before an act of approval or disapproval occurs." *Id.*

The Attorney General attempts to distinguish *Bushee*, which addressed a "a legal requirement to submit a report and receive Board approval by a certain date[.]" claiming, "Nothing *requires* the Governor to suspend any statutes[.]" (Br. of AG at 17-18.) However, just as in *Bushee*, SB 1 *requires* the Governor to seek approval of the Attorney General before suspending a statute during an emergency. Whether the Governor must suspend a statute is only relevant as to when this actual controversy will cause concrete injury in the exercise of his authority, a question the Declaratory Judgment Act does not require the Governor to answer. If the Attorney General draws this distinction to challenge the foreseeability of a concrete injury, somehow, the Attorney General



overlooks or disregards the necessary actions the Governor is duty-bound to take to respond to the COVID-19 emergency and his prior challenges to orders that suspended statutes. *See Beshear v. Acree*, 615 S.W.3d 780, 811 (Ky. 2020) (noting the General Assembly established KRS Chapter 39A to recognize exercise of powers, duties and functions “deemed necessary to promote and secure the safety and protection of the civilian population[]” during an emergency). Moreover, reliance on this distinction overlooks the concrete harm that has already occurred: placement of the Governor’s emergency authority under the veto power of the Attorney General.

In addition, the Attorney General’s reliance on *Mammoth Medical, Inc. v. Bunnell*, 265 S.W.3d 205 (Ky. 2008), is faulty. *Mammoth Medical* involved a law firm’s request for a declaration that it was not liable for a potential legal malpractice claim. *Id.* at 207. The Court thus considered “whether a Kentucky circuit court can adjudicate in a declaratory judgment action a potential tort defendant’s defenses to an allegedly injured party’s prospective negligence claim.” *Id.* The Court held that although the trial court had jurisdiction, under the circumstances declaratory judgment was “not a proper procedure to seek a determination of nonliability for past conduct.” *Id.*

In so holding, the Court observed that “[d]eclaratory relief is not ordinarily available in respect of allegations of past negligence and damage, nor will an action for declaratory relief generally be available to a prospective defendant in a negligence action seeking to obtain a declaration of nonliability as to the prospective plaintiff.” *Id.* at 210 (quoting 22A Am.Jur.2d *Declaratory Judgments* § 56). The Court further explained:

To reverse the roles of the parties to a negligence action would jeopardize those procedures the law has traditionally provided to injured parties seeking judicial relief. An injured party has a right to choose the forum and time, if at all, to assert a claim. To permit a prospective defendant to attempt

to obtain a declaration of nonliability would force an injured party to litigate a claim that party may not have wanted to litigate at a time which might be inconvenient or which might precede the party's determination of the full extent of damages.

*Id.* at 210-11 (quoting 22A Am.Jur.2d *Declaratory Judgments* § 56).

Here, Plaintiffs do not seek a declaration of nonliability for past conduct. Nor do they force an injured tort plaintiff to litigate his or her claims prematurely. Rather, they seek a declaration as to the constitutionality of legislation in order to avoid taking action that could result in future litigation. This is exactly what the Declaratory Judgment Act contemplates. *See Jefferson Cty. ex rel. Coleman v. Chilton*, 33 S.W.2d 601, 603 (Ky. 1930) (“It is true the purpose of the Declaratory Judgment Act was and is to guide parties in their future conduct to avoid useless litigation.”).

This appeal presents a nearly identical situation to that in *Bushee* and presents a controversy similar to those addressed in *Jamgotchian* and *Jarvis*. A justiciable controversy exists between the Governor and the Attorney General under the Declaratory Judgment Act.

## **II. The Governor Has Standing.**

The Governor has standing under KRS 418.045. In relevant part, KRS 418.045 provides, “Any person . . . whose rights are affected by statute . . . may apply for and secure a declaration of his rights or duties[.]” The Governor’s rights were affected by HB 1, SB 1 and SB 2. Under the direct and plain language of KRS 418.045, the Governor has standing to seek a declaration with respect to those rights.

Standing to challenge the constitutionality of statutes requires “a personal stake in the outcome of the controversy[.]” *Baker v. Carr*, 369 U.S. 186, 204 (1962). “In order to have standing to sue, a plaintiff need only have a real and substantial interest in the

subject matter of the litigation, as opposed to a mere expectancy.” *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 202 (Ky. 1989). Here, the Governor alleged that HB 1, SB 1 and SB 2 violate numerous provisions of the Kentucky Constitution in a manner that usurps, limits and controls the duties and authority reserved for his office. The Governor alone is the only plaintiff with “a personal stake in the outcome of th[is] controversy[.]” *Baker*, 369 U.S. at 204.

The Attorney General argues the Governor failed to allege a “real injury” because he “has no constitutionally protected interest in the ability to suspend statutes unilaterally.” (Br. of AG at 22-23.) However, the Governor did not ask the Court to declare that he has unilateral authority to suspend the law. Rather, he asked the Court to declare it unconstitutional to provide the Attorney General with control over the Governor’s use of that power. Here, the amendment of KRS Chapter 39A by SB 1 to require and allow the Attorney General, unilaterally and without any explanation, to approve or disapprove the Governor’s suspension of law during an emergency violates Kentucky Constitution Section 69. *See Legislative Research Com’n By and Through Prather v. Brown*, 664 S.W.2d 907, 930 (Ky. 1984) (even if the legislature placed the power with the Governor, once placed there, the power is purely executive); *Yeoman v. Com.*, 983 S.W.2d 459, 472-73 (Ky. 1988) (“Any law which infringes on the Governor’s executive power would be violative of § 69.”) (internal citations omitted); *Brown v. Barkley*, 628 S.W.2d 616, 622 n. 12 (Ky. 1982) (“Sec. 69 makes it clear that these [constitutional] officers are inferior to the Governor and that no other executive office can be created which will not also be inferior to that of the Governor.”). Moreover, KRS 39A.180, prior to amendment by SB 1, suspended any law conflicting with an emergency

order or regulation issued by the Governor. This allowed the Governor to take immediate emergency action at the precipice of the COVID-19 pandemic, such as relieving public schools of complying with mandatory in-person instruction. Executive Order 2020-243; 700 KAR 003:270E. Now, this authority is placed under the control of the Attorney General. The Governor alleges a “real injury[.]”

The Attorney General next argues that he has not caused the alleged injury because he did not enact SB 1 and has not blocked any attempt to suspend a statute. (Br. at 27.) The Attorney General caused the Governor injury the moment he assumed authority to veto exercises of emergency authority. As discussed above, the Governor does not have to wait for the Attorney General to act under that authority and veto the suspension of a statute before seeking a declaration regarding the constitutionality of SB 1. *See supra* at p. 3 (citing *Combs*, 364 S.W.2d at 648). Nor does the Governor have to take action in violation of the challenged legislation before filing suit for declaratory relief. *See Kentucky Retirement Sys.*, 396 S.W.3d at 839.<sup>2</sup>

Finally, the Attorney General perplexingly argues the injunctive relief entered against him does not redress the alleged injury to the Governor. It does. The Court enjoined the Attorney General from disapproving or otherwise interfering with the

---

<sup>2</sup> In a footnote, the Attorney General cites to the decision of the Court of Appeals in *Kasey v. Beshear*, --- S.W.3d ---, 2021 WL 1324395, at \*4 (Ky. App. Apr. 9, 2021), for the proposition that, “where a state official does not enforce the challenged legislation, the state official’s alleged conduct cannot cause injury-in-fact sufficient to confer standing.” (Br. of AG at 27-28, n. 15.) *Kasey* is inapposite. In *Kasey*, the plaintiffs brought suit as citizens and taxpayers against the Governor and the Commissioner of the Kentucky Department of Agriculture for their alleged failure to monitor or enforce compliance with animal shelter statutes. 2021 WL 1324395, at \*1. The court held the plaintiffs failed to show that their injury was caused or likely to be redressed by the requested relief because neither the Governor nor the Commissioner enforced those laws. *Id.* at \*3-4. Under the statutes, the Governor appointed members of the Animal Control Advisory Board and the Commissioner received the return of funds to counties that failed to adhere to the statutes. *Id.* The decision in *Kasey*, which is not final, does not dictate that the Governor and Secretary do not have standing here. In this action, SB 1 gives direct and enforceable power to the Attorney General to veto an exercise of emergency authority by the Governor. *Kasey* has no application here.

Governor's emergency executive orders. (R. at 610.) Moreover, for purposes of standing, KRS 418.040 permits a plaintiff to "ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked." Thus, even if the Governor did not seek an injunction against the Attorney General, the Governor still has standing to seek a declaration that the Attorney General cannot control or interfere with his emergency authority as provided under SB 1.

The Governor has standing to sue the Attorney General under the Declaratory Judgment Act. The Governor has a personal stake in the protection of his constitutional role and preservation of his authority under KRS Chapter 39A to address emergencies such as COVID-19. The Complaint alleged a sufficient injury caused by the Attorney General, and that injury is redressable by the courts.

#### **CONCLUSION**

The Governor alleged an actual controversy against the Attorney General and has standing to pursue declaratory and injunctive relief to resolve that controversy. For the foregoing reasons, Respondents respectfully ask the Court to uphold the Franklin Circuit Court's temporary injunction orders.

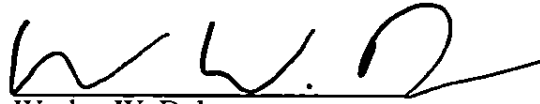
Dated: May 25, 2021

Respectfully submitted,



Amy D. Cabbage  
General Counsel  
S. Travis Mayo  
Chief Deputy General Counsel  
Taylor Payne  
Marc Farris  
Laura C. Tipton  
Deputy General Counsel  
Office of the Governor  
700 Capitol Avenue, Suite 106  
Frankfort, KY 40601  
(502) 564-2611  
amy.cabbage@ky.gov  
travis.mayo@ky.gov  
taylor.payne@ky.gov  
marc.farris@ky.gov  
laurac.tipton@ky.gov

*Counsel for Governor Beshear*



Wesley W. Duke  
Executive Director  
Office of Legal Services  
LeeAnne Applegate  
Deputy General Counsel  
Cabinet for Health and Family Services  
275 East Main Street 5W-A  
Frankfort, KY 40621  
(502) 564-7042  
WesleyW.Duke@ky.gov  
LeeAnne.Applegate@ky.gov

*Counsel for Secretary Friedlander*