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

ROBERT S. STIVERS, in his official capacity as President of the Kentucky Senate; **DAVID W. OSBORNE**, in his official capacity as Speaker Of the Kentucky House of Representatives; and **THE LEGISLATIVE RESEARCH COMMISSION** — **APPELLANTS**

v

On Appeal from Franklin Circuit Court
The 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.* — **APPELLEES**

BRIEF OF APPELLANTS

Respectfully submitted,

David E. Fleenor (No. 82143)
General Counsel
Office of the Senate President
Capitol Annex Room 236
702 Capital Avenue
Frankfort, Kentucky 40601
T. (502) 564-3120
Dave.Fleenor@lrc.ky.gov

Counsel for Appellant
Robert Stivers,
In his official capacity as
President of the Kentucky Senate

(By David E. Fleenor per authorization)
D. Eric Lycan (No. 86032)
General Counsel
Office of the Speaker
Kentucky House of Representatives
Capitol Annex, Room 332
702 Capital Avenue
Frankfort, Kentucky 40601
T. (502) 564-4434
Eric.Lycan@lrc.ky.gov

Counsel for Appellant
David Osborne,
In his official capacity as
Speaker of the Kentucky House of
Representatives

(Additional counsel for Appellants and Certificate of Service on the next page)

(By David E. Fleenor per authorization)
Gregory A. Woosley (No. 91428)
General Counsel
The Legislative Research Commission
Capitol Building, Room 300
700 Capital Avenue
Frankfort, Kentucky 40601
T: (502) 564-8100
Greg.Woosley@lrc.ky.gov

Counsel for Appellant
The Legislative Research Commission

(By David E. Fleenor per authorization)
Paul E. Salamanca (No. 90575)
279 Cassidy Avenue
Lexington, Kentucky 40502
T: (859) 338-7287

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellants, Robert Stivers, in His Official Capacity as President of the Kentucky Senate, David W. Osborne, in His Official Capacity as Speaker of the Kentucky House of Representatives, and The Legislative Research Commission was served on April 15, 2022, via hand delivery upon S. Travis Mayo, Taylor Payne, Marc Farris, & Laura C. Tipton, Office of the Governor, 700 Capitol Avenue, Suite 106, Frankfort, KY 40601; Barry L. Dunn, Victor B. Maddox, Carmine Gennaro Iaccarino, & Aaron J. Silletto Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601; and via U.S. mail, postage prepaid, upon Wesley W. Duke & LeeAnne Edmonds Applegate, Office of Legal Services, Cabinet for Health and Family Services, 275 East Main Street 5W-A, Frankfort, KY 40621; The Honorable Phillip J. Shepherd, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601 and Kentucky Court of Appeals, Attn: Clerk, 360 Democrat Drive, Frankfort, KY 40601. The record on appeal was not withdrawn by the Appellants.

David E. Fleenor
Counsel for Appellant
Roberts Stivers,
In his official capacity as
President of the Kentucky Senate

INTRODUCTION

This is a case about legislative immunity. Despite the words of Ky. Const. Section 43, which this Court has held should be "liberally construed," despite this Court's broad articulation of "absolute legislative immunity" in *Baker v. Fletcher,* 204 S.W.3d 589 (Ky. 2006), and despite the clear text of KRS 418.075, the court below improperly allowed an action to proceed against members of the legislature solely because they exercised their express power to enact legislation.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants Osborne and Stivers respectfully ask this Court to grant oral argument in this matter. This case concerns legislative immunity, an issue of great constitutional importance and a critical aspect of separation of powers.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 26, 2021, the Governor of Kentucky indirectly threatened members of the General Assembly with contempt if they tried to override a veto. He did this even though the Constitution expressly authorizes the General Assembly to do this. *See* Ky. Const. Section 88. The Governor was able to make this indirect threat because, despite the Constitution's guarantee of legislative immunity, and despite this Court's clear language in *Baker v. Fletcher*, the court below had granted an injunction against members of the legislature simply because they had exercised their express power to enact legislation. *See* Ky. Const. Section 43; *Baker v. Fletcher*, 204 S.W.3d 589, 595 (Ky. 2006); Order Granting Temporary Injunction under CR 65.04 at 20-22, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089 (March 3, 2021). With this forbidden injunction in place, the Governor could, and did, make a credible threat of moving for an order to show cause why members of the General Assembly should not be held in contempt. "I am vetoing this part [of H.B. 192, the executive branch budget]," he wrote, "because it violates the separation of powers under [the] Kentucky Constitution." He went on to write:

> [This part] also directly violates a temporary injunction entered by the Franklin Circuit Court against the General Assembly itself, ***which could subject that body to a contempt of court citation.***

(Emphasis added.) Veto Messages From the Governor of the Commonwealth of Kentucky Regarding House Bill 192 of the 2021 Regular Session (March 26, 2021) at 8, Exhibit A to Supplement to the Record of Kentucky Senate President Robert Stivers, II on Defendants' Motion for Dismissal for Legislative Immunity, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089 (March 30, 2021).

This is an obvious transgression of separation of powers. *See* Ky. Const. Sections 27, 28, 43. This Court can and must reiterate that legislative immunity precludes judicial proceedings against members of the General Assembly for acts that they take in their legislative capacity.

As this Court knows, separation of powers is rough and tumble: It always has been. Not just in Kentucky, but everywhere in every state, at the federal level, even in England. These jurisdictions all recognize that the best way to protect the legislature from "intimidation by the executive and accountability before a possibly hostile judiciary" is via legislative immunity. *United States v. Helstoski*. 442 U.S. 477, 491 (1979).

PROCEDURAL BACKGROUND

In its 2021 session, the General Assembly enacted a series of laws to limit or clarify certain statutory authorities on which the Governor had previously relied. *See* 2021 S.B. 1, S.B. 2, and H.B. 1. It did so consistent with this Court's observation in *Beshear v. Acree* that the legislature may amend or revoke emergency powers that it grants. *See* 615 S.W.3d 780, 812-13 (Ky. 2020). It is axiomatic that the legislature may repeal statutes. It is also axiomatic that the executive cannot create power out of thin air. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) ("[T]he emergency did not create power; it merely marked an occasion when power should be exercised.").

Objecting to this limitation on his authority, the Governor, along with the Secretary for Health and Human Services, brought an action for declaratory and injunctive relief in Franklin Circuit Court.[1] Defendants included "David W. Osborne, in his official capacity as Speaker of

[1]For simplicity's sake, we will refer to the original plaintiffs in this matter, now appellees, as "the Governor."

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"). First Amended Verified Complaint for a Declaration of Rights, a Temporary Restraining Order, a Temporary Injunction and a Permanent Injunction at 1-2, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089 (February 11, 2021). The Attorney General was also a defendant.

The case then proceeded on two very different tracks. First, the Governor pursued his request for declaratory and injunctive relief. Second, the Speaker, the President of the Senate, and the LRC (the "Legislative Defendants") moved to have themselves dismissed on grounds of legislative immunity. They did this in two separate motions, both filed on March 1, 2021.

Events moved slightly more quickly on the first track than on the second. On March 3, 2021, the Franklin Circuit Court granted a temporary injunction in favor of the Governor. *See* Order Granting Temporary Injunction under CR 65.04 at 20-22, *Beshear v. Osborne*, Franklin Cir. Ct., No. 21-CI-00089 (March 3, 2021). It is because of this order that the Governor was able to make his indirect threat of contempt on March 26, 2021. As for the second track, the Franklin Circuit Court denied the Legislative Defendants' motions to dismiss in its Order entered on April 12, 2021, which is the Order that the Legislative Defendants have appealed from. *See* Appendix, Tab 1.

On March 23, 2021, the Attorney General moved for relief from the temporary injunction ordered by the court below. *See* Motion Under CR 65.07 for Relief from Temporary Injunction, *Cameron v. Beshear*, Court of Appeals, No. 2021-CA-0328. On transfer, this Court remanded with instructions to dissolve the injunction. *See Cameron v Beshear*, 628 S.W.3d 61, 78 (Ky. 2021). Among other things, this Court strongly intimated that the Governor's arguments on the

merits were not persuasive. "[C]onsidering that the challenged legislation was lawfully passed," this Court wrote, "the Governor's Complaint does not present a substantial legal question that would necessitate staying the effectiveness of the legislation." *Id*

Although this Court found the Governor's arguments largely unpersuasive, it did decline to resolve one issue that he had raised. Specifically, he had argued that S.B. 1 improperly limits his emergency orders under Chapter 39A to thirty days absent ratification by the legislature. He argued that this provision violates Ky. Const. Section 80 by compelling him to call the legislature into special session to extend an order. In its opinion of last summer, this Court strongly suggested that this argument cannot succeed. Among other things, this Court observed that the Governor and the legislature, as "trustees of the Commonwealth's welfare," can "do the hard work of . . . agreeing on statutory amendment in advance of a special call." *Cameron v. Beshear*, 628 S.W.3d at 75. This Court also explained that "nothing prohibits the Governor and General Assembly from agreeing on emergency powers in excess of 30 days." *Id.* at 76. Nevertheless, the issue was reserved. *See Id.*

Importantly, the subject of this appeal is ***not*** the merits of this issue. Instead, the subject of this appeal is legislative immunity. The Governor named members of the General Assembly and their functional arm, the LRC, as defendants in this action. Because the Constitution, precedent, and statute squarely protect members of the legislature and their functional arm from having to answer for their legislative acts in court, the court below lacked jurisdiction to proceed against them. Dismissal was therefore appropriate.

SUMMARY OF ARGUMENT

Few principles of constitutional law are more clear, or have a more solid historical basis, than the idea that members of the legislature are immune from judicial process for their legislative acts. As this Court properly stated only sixteen years ago in *Baker v. Fletcher*, "no member [of the General Assembly] may be questioned for actions taken or not taken in the capacity of legislator." 204 S.W.3d at 595.

This principle is not just recognized in clear precedent. It is also recognized in clear constitutional text. Section 43 of the Kentucky Constitution provides that:

> 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.***

(Emphasis added.)

Jurisdiction over legislators is also statutorily precluded. KRS 418.075(4) provides that:

> 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.

(Emphasis added.)[2]

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[2]Kentucky Constitution Section 231 provides that: "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." Legislative immunity is also well established at common law. *See Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980).

Because of this abundant and clear authority, the court below should have granted the Legislative Defendants' motions to dismiss.

ARGUMENT

I. Text and precedent support reversal of the decision below.

Section 43 of the Kentucky Constitution squarely precludes judicial process against members of the General Assembly for actions taken in their legislative capacities. This section provides in full as follows:

> 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.***

(Emphasis added). Ky. Const. Section 43

This Court has given Section 43 the broad construction that it deserves. *See Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006). *See also Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001) ("***Absolute immunity*** . . . extends to legislators in the performance of their legislative functions . . .") (Emphasis added.). As this Court explained in *Kraus v. Kentucky State Senate*, "[s]uch a clause is to be liberally construed." 872 S.W.2d 433, 440 (Ky. 1993). *See also Baker v. Fletcher*, 204 S.W.3d at 595 (noting that the federal analog to Section 43 is "liberally interpreted" and that "Kentucky law is in accord.").

Baker arose after the legislature adjourned from its regular session in 2002 without appropriating funds for the executive branch. According to the plaintiffs in that case (certain state employees), this allowed a pre-existing law that granted an automatic yearly raise of five percent to come into effect. In their suit, these employees asked for declaratory and injunctive relief to

compel the Governor to provide this raise. Although this Court recognized that the legislature's adjournment was a cause in fact of this alleged injury, it nevertheless refused to countenance an action against members of the legislature. As this Court wrote, "though the General Assembly and its members would appear to be appropriate parties-defendants as their failure to enact a budget caused the alleged injury, ***no member may be questioned for actions taken or not taken in the capacity of legislator***." *Id.* at 595 (Emphasis added.)

This Court's choice of words in *Baker* is significant: "no member may be questioned for ***actions taken*** or not taken ***in the capacity of legislator***." *Id.* (Emphasis added.) "[A]ctions taken . . . in the capacity of legislator" includes everything that a member of the General Assembly does in respect of his or her legislative functions. As the Court of Appeals explained in *Wiggins v. Stuart*, "[legislative] immunity not only applies to speech and debate, but to ***voting***, reporting, and every act and execution of their legislative duties while in either house." 671 S.W.2d 262, 264 (Ky. App. 1984) (Emphasis added.) The U.S. Supreme Court has made the same point with respect to the federal clause, which is virtually identical to Section 43. As it explained in *Gravel v. United States*, "[c]ommittee reports, resolutions, and the act of ***voting*** are equally covered" by the clause. 408 U.S. 606, 617 (1972) (Emphasis added.) To require the Legislative Defendants to answer for votes they cast or other steps they took on S.B. 1 would constitute "question[ing] [them] for actions taken . . . in [their] capacity [as] legislator[s]." *Baker v. Fletcher*, 204 S.W.3d at 595. This would violate Section 43. Importantly, the Governor's claims here go solely to the validity of statutes that the General Assembly enacted.

II. Legislative immunity is critical to separation of powers.

The court below, along with appellees, has suggested that legislative immunity is inconsistent with separation of powers. This suggestion would turn separation of powers on its head. The idea behind legislative immunity is to *protect* legislators from "intimidation or threats from the Executive Branch." *Gravel v. United States*, 408 U.S. at 616. As this Court correctly noted in *Baker*, "absolute legislative immunity, even with its negative characteristics, is essential if separation of powers is to be respected and the Commonwealth's legislators are to be encouraged to speak ***and act*** candidly on behalf of citizens." 204 S.W.3d at 594 (Emphasis added.) The U.S. Supreme Court made a similar observation in *United States v Helstoski*. 442 U.S. 477 (1979). Legislative privilege, it wrote, was born "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *Id.* at 491.

Allowing the executive to haul members of the General Assembly into court to answer for their legislation, and to threaten them with contempt, is the exact opposite of separation of powers. This is particularly true where, as here, the Governor can make his arguments against other parties. First and foremost, he can make his arguments in proceedings to enforce orders that he believes are valid notwithstanding S.B. 1. Second, he can defend his orders in actions brought against him by regulated entities. In fact, such a classic vehicle for presenting such defenses was presented in parallel litigation to this very case. *See Goodwood Brewing Co , LLC v. Beshear*, Scott Cir. Ct., No. 21-CI-00128. *See also Beshear v. Goodwood Brewing Co., LLC*, 635 S.W.3d 788, 802 (Ky. 2021) (vacating temporary injunction and remanding). If this Court's concern is making sure that there is a way for the Governor to assert or defend his authority in a court of law, that concern is completely and fully addressed without the presence of the Legislative Defendants. In other

words, there is a way for this Court to serve both separation of powers *and* the Governor's asserted need for a venue.[3]

III. *Rose* and *Philpot* do not support the Governor's position.

The court below and appellees have suggested that legislative immunity is inconsistent with *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). This is not the case. First, *Rose* long predates *Yanero*, *Baker*, and KRS 418.075(4). It was handed down in 1989. *Yanero* came down in 2001, fourteen years later. KRS 418.075(4) was enacted in 2003, sixteen years later, and *Baker* was decided in 2006, seventeen years later. Second, legislative immunity was not expressly raised in *Rose*. *See Baker v. Fletcher*, 204 S.W.3d at 595 n. 23. Therefore, the issue could not have been resolved conclusively. Third, *Rose* involved what was seen at the time as an affirmative duty on the part of the legislature to "provide for an efficient system of common schools throughout the State." Ky. Const. Section 183. In light of this perceived duty, and the General Assembly's power of the purse, there was no other apparent defendant for the Council's action. This is demonstrably not the case here. In fact, *Baker* was explicit in recognizing - but not resolving - the special case where "a party wishing to obtain judicial review of some aspect of legislative conduct would be unable to identify a proper non-legislator defendant." 204 S.W.3d at 596 n. 32. If allowing a case to proceed against a member of the

[3]The court below also appeared to suggest that the House Speaker and Senate President waived immunity by writing a letter to the Governor, along with the Attorney General, in which they raised certain legal issues. But writing a letter is neither illegal nor actionable. In fact, it is constitutionally protected. *See* U.S. Const. Amend. I; Ky. Const. Section 1, cl. 4, 6. In any case, the letter falls far short of the standard for waiver of legislative immunity, which "can be found only after explicit and unequivocal renunciation of the protection." *United States v. Helstoski*, 442 U.S. 477, 491 (1979).

legislature is at most a last resort, it follows that it cannot be allowed where, as here, a party has other options.

Philpot v. Patton is not to the contrary. *Philpot* involved an attempt to compel a Senate committee to report a bill to the floor. 837 S.W.2d 491, 491-92 (Ky. 1992). Although *Yanero*, *Baker* and KRS 418.075(4) now call the validity of *Philpot* into question, it too involved a situation where the only apparent defendant was the presiding officer of the relevant chamber.

Much the same can be said for *Kraus v. Kentucky State Senate*, 872 S.W.2d 433 (Ky. 1993), and *Jones v. Board of Trustees of the Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995). First, both *Kraus* and *Jones* long preceded this Court's clear articulation of "absolute legislative immunity" in *Baker*. In addition, both cases involved situations where the alleged wrong was the General Assembly's failure to do something that only it could do. In *Kraus*, this was to allow Kraus to serve as an ALJ notwithstanding the Senate's refusal to confirm his nomination. *See Kraus v. Kentucky State Senate*, 872 S.W.2d at 434. In *Jones*, this was to appropriate an amount of money that the Kentucky Retirement Systems thought was adequate to sustain its operations. *See Jones v. Board of Trustees of the Kentucky Retirement Systems*, 910 S.W.2d at 712.

IV. KRS 418.075(4) precludes declaratory relief against the Legislative Defendants.

KRS 418.075(4) also precludes the court below from exercising jurisdiction over the Legislative Defendants. This subsection provides in full as follows:

> 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.

(Emphasis added.) The preclusive effect on the Franklin Circuit Court's jurisdiction could not be more clear: the Legislative Defendants "shall not be made parties to any action challenging the constitutionality or validity of any statute." This includes 2021 S.B. 1.

The court below, as well as appellees, suggest that KRS 418.075(4) cannot be allowed to prevent the courts from discharging their functions. But this Court has reserved the issue of what should happen if no viable defendant exists other than a member of the General Assembly, and this is not that case. *See Baker v. Fletcher*, 204 S.W.3d at 596 n. 32. Moreover, this suggestion assumes that actions for declaratory relief are somehow guaranteed by the Constitution. This is clearly not the case. KRS Chapter 418 is a statute. As in the federal courts, declaratory actions did not exist before the legislature authorized them. *Cf. Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("Prior to [the Federal Declaratory Judgment] Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction . . ."). Moreover, consistent with its power to waive sovereign immunity, the General Assembly has broad authority to establish the terms on which the Commonwealth may be sued. *See* Ky. Const. Section 231.

V. Section 43 protects the LRC as well as individual members.

All of the foregoing logic extends as well to the LRC, the legislature's functional arm. In *Gravel v. United States*, the executive sought to subpoena an aide to Senator Mike Gravel of Alaska. The executive argued that the Speech or Debate Clause did not protect a legislative aide. But the U.S. Supreme Court refused to limit the scope of that provision to members of Congress, correctly observing that a modern legislature cannot operate without the benefit of staff. As the Court wrote, "the day-to-day work of [legislative] aides is so critical to the Members' performance

that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause - - to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary - - will inevitably be diminished and frustrated." *Gravel v. United States*, 408 U.S. at 616-17 (internal citation omitted). KRS 418.075(4) operates to the same effect. It provides that "organizations within," or "officers or employees of the legislative branch shall not be made parties to any action challenging the constitutionality or validity of any statute." The LRC is thus fully immune from having to answer the Governor's and the Secretary's complaint.

VI. Interlocutory appeal is justified.

It is no answer that the Legislative Defendants can take an appeal if the court below holds against them on the merits. To be sure, denial of a motion to dismiss is not usually grounds for an interlocutory appeal. That is because, typically, there is no bell that cannot be unrung. If a party ought to be dismissed, but the trial court wrongly denies the motion, the error can generally be corrected on appeal. But this is not so where the grounds for dismissal is a rule of law that is designed not only to protect the moving party from liability, but also to protect the moving party from having to defend him or herself in litigation. As this Court recognized in *Breathitt County Board of Education v. Prater* "an entitlement [to absolute immunity] cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action." 292 S.W.3d 883, 886 (Ky. 2009).

This is exactly the kind of rule that is at issue here. Section 43 of the Kentucky Constitution clearly provides that no member of the General Assembly may be "***questioned*** in any other place" for legislative acts - not held liable, but simply "***questioned.***" (Emphasis added.)

As the U.S. Supreme Court observed with respect to federal clause, the words of Section 43 were "designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel*, 408 U.S. at 616. KRS 418.075(4) works the same way. The only way to protect members of the legislature from "intimidation or threats from the Executive Branch" - such as the Governor's indirect threat of contempt last March - is to protect them not only from liability, but also from having to endure litigation. Because the bell that cannot be unrung is having to defend the case at all, the availability of appeal after a final order from the court below is not an adequate remedy. This Court should reiterate the significance of Ky. Const. Section 43, *Baker*, and KRS 418.075 now.

VII. Prudential considerations also support reversal.

The words of the Constitution, the words of KRS 418.075, this Court's precedent, and history conclusively establish that the Franklin Circuit Court was wrong to deny the Legislative Defendants' motions to dismiss. For these reasons alone, this Court should reverse. As a practical matter, however, 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. As this Court knows, adding facts to abstract principles makes hard cases much easier to resolve. As this Court observed in *W.B. v. Cabinet for Health and Family Services*, "[t]he basic rationale of the ripeness requirement is 'to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]'" 388 S.W.3d 108, 114 (Ky. 2012) (quoting *Abbott Labs. v Gardner*, 387 U.S.

136,. 148 (1967)). Legislative immunity facilitates this process by postponing attacks on legislation until it is applied to a particular situation.

W.B. is instructive. That case began with an administrative investigation into whether W.B. had abused a minor. *See W.B. v. Cabinet for Health and Family Services, 388 S.W.3d* at 109-10. While administrative proceedings were pending, W.B. brought a collateral attack in Jefferson Circuit Court against the entire investigatory apparatus upon which the Cabinet for Health and Family Services relied. This Court properly construed this action as "a facial constitutional challenge to the Cabinet's administrative process" under KRS 418.040. *Id.* at 109. Given the abstract nature of the issues W.B. was raising, this Court properly elected to dismiss the matter on grounds of prudential ripeness. "We do not have before us," this Court observed, "an actual record of an administrative case contextualizing the operations of the statutory and regulatory process as it functions in day-to-day practice, which is ***the very nucleus of our review***, and ***the absence of such a record unduly hinders our ability to review the constitutional issues presented***." *Id.* (Emphasis added.)

As this Court knows, such premature actions can arise in a variety of contexts, at both the state and federal level. When this happens, courts generally presume that the case is not ripe "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by ***some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him***." (Emphasis added.) *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) ("*NWF*")

There are many decisions by the courts of Kentucky, like *W.B.*, and by the U.S. Supreme Court to this effect. In *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), for example,

that Court applied *NWF* to reject an attack on regulations issued by the Immigration and Naturalization Service. Those regulations would be applied in individual adjudications to decide if an alien was eligible for legalization, a form of immigration relief. The Court explained that newly promulgated regulations, much like S.B. 1, may be ripe for judicial review outside the context of a specific application by the agency only if they "present[] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and ***risking serious penalties for violation***." (Emphasis added.) *Id at* 57

The logic of *Reno* applies here. The Governor has not tried to issue an Executive Order that would last more than thirty days. In fact, we have no idea if he ever would try to issue such an order, or what that order would be about. Nor would the Governor "risk[] serious penalties for violation" of S.B. 1. As a consequence, if the courts were to disavow legislative immunity and address the Governor's arguments on the merits, they would have to do so in the abstract, without the benefit of the kinds of facts that come from concrete applications and that permit practical, granular decisions. That is the opposite of judicial economy.

Ohio Forestry Association v. Sierra Club, 523 U.S. 726 (1998), is another case in point. In this case, the U.S. Supreme Court held that a facial challenge to a forest plan for a particular National Forest was not ripe for judicial review. *See Id.* at 732-39. The Court noted that the plan, all by itself, caused the plaintiff no hardship. As the Court observed, it "[did] not give anyone a legal right to cut trees, nor [did] it abolish anyone's legal authority to object to trees being cut." *Id* at 733. Instead, the plaintiff "[would] have ample opportunity later to bring its legal challenge" in the context of a specific logging project "at a time when harm is more imminent and more certain." *Id* at 734. Here, similarly, the Governor will have "ample opportunity" to make

his case about S.B. 1 either in a proceeding to enforce an order that lasts more than thirty days, or in defense against an attack on such an order by a regulated party. In both contexts, as opposed to here, courts will have a specific order and a specific set of facts to work with. This will help facilitate effective judicial review. Thus, although legislative immunity stands independent of its practical utility, prudence as well dictates that this Court should reverse the decision below.

CONCLUSION

The Legislative Defendants respectfully ask this Court to reverse the decision of the Franklin Circuit Court denying their motions to dismiss on grounds of legislative immunity.

Respectfully submitted,

David E. Fleenor (No. 82143)
General Counsel
Office of the Senate President
Capitol Annex, Room 236
702 Capital Avenue
Frankfort, Kentucky 40601
T: (502) 564-3120
Dave.Fleenor@lrc.ky.gov

Counsel for Appellant
Roberts Stivers,
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702 Capital Avenue
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T: (859) 338-7287

Counsel for Appellants