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 Senate of the Commonwealth of Kentucky, et al. — **APPELLANTS**

v.

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

HON. PHILLIP J. SHEPHERD
Judge, Franklin Circuit Court — **APPELLEE**

and

ANDY BESHEAR, in his official capacity as Governor of the Commonwealth of Kentucky, et al. — **REAL PARTIES IN INTEREST/APPELLEES**

REPLY BRIEF OF APPELLANTS

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply 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 June 29th, 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; Victor B. Maddox, Carmine Gennaro Laccarino, & 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 The record on appeal was not withdrawn by the Appellants.

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STATEMENT OF POINTS AND AUTHORITIES

This Court should take this opportunity to reiterate that Section 43 of the Kentucky Constitution, KRS 418.075(4), and the common law each protect legislators from being haled into court to defend bills they enact. As this Court correctly observed not long ago, "no member be questioned for actions taken or not taken in the capacity of legislator." *Baker v. Fletcher*, 204 S.W.3d 589, 595 (Ky. 2006). Nothing in appellees' brief supports an opposite conclusion.

I. The Governor and Secretary Have Ample Means to Assert Their Prerogatives.

In their brief, appellees argue at some length that respect for legislative immunity would leave them with no option but to "violate the law and wait to be sued." Brief of Appellees at 1. *See also id.* at 15-16. This argument is unavailing for two very different reasons. First, it is not accurate. They have plenty of options. Second, it overlooks the fact that the mechanism they decry is a standard component of civil practice. It has been in place for decades, if not centuries.

Notwithstanding their claim to the contrary, the Governor and Secretary have numerous options if they think the legislature has improperly limited their powers, apart from issuing a rule and inviting suit. Most importantly, they could "do the hard work of consulting with the General Assembly" in search for common ground. *Cameron v. Beshear*, 628 S.W.3d 61, 75 (Ky. 2021). As this Court unanimously noted just last summer, "[t]he General Assembly, as well as the Governor, are trustees of the Commonwealth's welfare." *Id.* Nothing prevents the Governor and Secretary from sitting down with members of the legislature and hashing out a path forward for all concerned. As Justice Jackson wrote in *Youngstown*, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

In addition, appellees could promulgate a rule and bring a coercive action to enforce it against a non-compliant party. That party would then bring up the General Assembly's limitation as an affirmative defense, and the constitutional issue would be joined.

Finally, appellees could take the less drastic step of bringing a declaratory action against such a party. *See* KRS 418.040. This is a conventional aspect of civil practice. *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018), is an example. In that case, South Dakota enacted a tax on out-of-sales at a time when such a tax almost certainly violated the Dormant Commerce Clause of the federal Constitution. *See id.* at 2088-89. As the U.S. Supreme Court noted, the state tested this issue by "fil[ing] a declaratory judgment action against respondents in state court, seeking a declaration that the requirements of the Act [were] valid and applicable to respondents . . . ." *Id.* at 2089. "Respondents [then] moved for summary judgment, arguing that the Act [was] unconstitutional." *Id.* The state then "conceded that the Act cannot survive under [applicable precedent] but asserted the importance, indeed the necessity, of asking [the U.S. Supreme Court] to review [its] earlier decisions in light of current economic realities." *Id.* The *Wayfair* Court showed no objection at all to the mechanism by which the state had brought the pertinent legal issues to the attention of the courts.

The foregoing demonstrates that appellees have at least three options at their disposal other than simply promulgating an order and "wait[ing] to be sued."

Moreover, the option that appellees *do* acknowledge (but also decry) is hardly novel. It has been with us for at least a century, if not far longer. In *Ex parte Young*, 209 U.S. 123 (1908), the U.S. Supreme Court unambiguously recognized that a party subject to an allegedly unlawful regulation may bring an action in equity against the responsible executive officer to restrain

enforcement of the regulation. *See id.* at 155-56. That was 114 years ago. And *Ex parte Young* itself reflected a long tradition of "anti-suit injunctions" and similar forms of relief. In such cases, a person who ordinarily would be a defendant in a proceeding to enforce a regulation instead brings an anticipatory action in equity to prevent its enforcement. As one commentator has observed, "*Ex parte Young* approved the use against a state officer of *a standard tool of equity*, an injunction to restrain proceedings at law." John Harrison, "Ex Parte *Young*," 60 Stan. L. Rev. 989, 990 (2007-2008) (emphasis added). This commentator went on to note that "[a]nti-suit injunctions have been *a staple of equity for centuries*." *Id.* (emphasis added). In other words, the mechanism for testing the legality of regulations that appellees decry is standard in civil litigation. Moreover, it was available here. *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).[1]

The remaining option, the one that appellees neither decry nor overlook, is suing legislators themselves for the bills they debate and enact.[2] The Constitution wisely forbids this option, as this Court clearly noted in *Baker*. *See* 204 S.W.3d at 595. Both history and this case

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[1]The option of issuing a regulation and letting *Ex parte Young* run its course brings the total number of options at appellees' disposal other than suing members of the General Assembly over their legislation to four. This refutes their claim that vindicating Ky. Const. Section 43 and KRS 418.075(4) would allow the legislature to violate the Constitution "without any judicial redress." Brief of Appellees at 10. It also refutes their claim that appellants were "the only potential and proper" parties against whom they could assert their position. *Id.* at 16.

[2]Appellees and the court below argue that this case is not about legislative "speech" or "voting," but instead about the "validity of legislative enactments." *See* Brief of Appellees at 14 (quoting the opinion below). This is a distinction without a difference. Legislators make laws by voting. *See* Ky. Const. ' 46. And those votes are expressed as "yeas" or "nays," thus literally constituting speech. *See id.*

illustrate why. As a matter of history, Section 43 of our Constitution is a direct descendent of Parliament's response to various abuses by Tudor and Stuart monarchs. *See Baker*, 204 S.W.3d at 593-94 (noting the direct lineage of the English Bill of Rights of 1689, the federal Speech or Debate Clause, and Ky. Const. Section 43). As two commentators noted:

> The Crown's arsenal included the practices of issuing direct orders to the Speaker to cease debate on sensitive topics, spreading rumors of royal displeasure and threats of retaliation, bribing corruptible members of Parliament, summarily arresting others and arraigning them before the Star Chamber and other secret, inquisitorial bodies, or committing them directly to the Tower of London.

Robert J. Reinstein & Harvey A. Silverglate, "Legislative Privilege and the Separation of Powers," 86 Harv. L. Rev. 1113, 1127 (1973). Of course, none of these tactics was on display here, except the second one, "spreading rumors of [executive] displeasure and threats of retaliation." For this did happen in this case, and it can happen again if this Court does not vindicate Section 43 and KRS 418.075(4). As appellants noted in their opening brief, and as appellees do not deny, the Governor *in this case*: (1) brought suit against two members of the legislature, along with its administrative alter ego; (2) obtained a temporary injunction against them; and (3) tried to use that temporary injunction as leverage to prevent the legislature from overriding one of his vetoes. Brief of Appellants at 1. "I am vetoing this part [of H.B. 192]," he wrote, "because it violates the separation of powers . . . ." He added:

> [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***.

Veto Messages From the Governor of the Commonwealth of Kentucky Regarding House Bill 192 of the 2021 Regular Session at 9 (Mar. 26, 2021) (emphasis added).

If this Court does not take steps to foreclose this mechanism, the Governor will have worked a new and dangerous move into our Constitution. This move has four parts: (1) bring an action against members of the General Assembly over legislation that he or she opposes; (2) obtain equitable relief against those members; (3) veto related legislation; and then (4) use that relief as leverage to deter the legislature from overriding that veto. This cannot possibly be consistent with Ky. Const. Sections 27, 28, 43, and 88. The Governor cannot possibly be authorized to control adverse legislation, or the possibility of an override, with a threat of contempt. As this Court has noted, "[t]he framers of Kentucky's four constitutions . . . . were undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government." *LRC v. Brown*, 664 S.W.2d 907, 911-12 (Ky. 1984). Notably, appellees do not disavow this tactic in their brief. In fact, they describe a motion to *enlarge* an injunction to include additional legislation. *See* Brief of Appellees at 3-4.

It is no answer to the foregoing that the Governor could seek only declaratory relief. This is true for at least two reasons. First, a declaration that has no teeth (and that could not possibly have teeth) would not be justiciable for purposes of the Constitution. As this Court held in *Cabinet for Health & Family Services v. Sexton*, our courts may not hear a case unless a plaintiff shows that relief from his or her injury is "***likely*** to follow from a favorable decision." 566 S.W.3d 185, 196 (Ky. 2018) (internal quotation marks omitted) (emphasis added). Almost a century ago, this Court observed that "[t]he Kentucky [Declaratory Judgment Act] does not confer, or purport to confer, nonjudicial power. The existence of an actual controversy respecting justiciable questions is a condition precedent to an action under this act." *Black v.*

Elkhorn Coal Corp., 26 S.W.2d 481, 483 (Ky. 1930). KRS 418.040 confirms this proposition, requiring "an actual controversy" to exist and providing for a "binding declaration of rights." Thus, any declaration that would satisfy *Sexton* would necessarily pose a threat to legislative autonomy. In other words, if a proceeding for declaratory relief against members of the General Assembly would cast no clouds at all on the law-making process, it would not be justiciable. If, by contrast, it *would* cast a cloud on that process, it would violate separate of powers.

Allowing declaratory relief against members of the General Assembly for laws they enact would also undermine legislative autonomy because it would distract them from their duties, and require them to defend their votes on the floor and in committee against collateral attack. As the Court of Appeals has noted, "legislators engaged in the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *D.F. Bailey, Inc. v. GRW Eng'rs, Inc.*, 350 S.W.3d 818, 821 (Ky. App. 2011) (internal quotation marks omitted). The lines of demarcation between the executive and the legislature are well known and well understood. As Justice Black explained in *Youngstown*, "the [chief executive's] power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." 343 U.S. at 587 (writing for the Court). To permit potentially vexing motion practice and discovery to take place alongside this process would confound these established lines.

Nor is it an answer that the Governor just happened to make a veiled threat in this case, and might not do so next time. The problem is the potential for doing so. Separation of powers should not depend on one branch choosing when (or when not) to usurp the powers of another.

As appellants noted in their opening brief, the Constitution expressly authorizes the legislature to override vetoes. *See* Ky. Const. Section 88. It does not go on to authorize the Governor to frustrate this power with threats of contempt. As this Court has recognized, "the General Assembly establishes the public policy of the Commonwealth." *Cameron v. Beshear*, 628 S.W.3d at 75. Government by threat of contempt was not part of the plan, and Section 43 helps see to that.[3]

II. This Court's Precedent Supports Legislative Immunity in the Case at Bar.

This Court's precedent is entirely consistent with the foregoing analysis. As appellants noted in their opening brief, *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), is easily distinguishable from this case on the ground that it involved an asserted affirmative duty on the part of the legislature to "provide for an efficient system of common schools throughout the State." Brief of Appellants at 9 (quoting Ky. Const. ' 183). Because of this, the legislature was arguably the *only* entity that could defend the statutes at issue. By contrast, where, as here, there are plenty of ways to bring an issue before the courts without bringing legislators into court, Section 43 should receive its full operational scope. As in *Baker*, it is sufficient here for the Court to acknowledge, but not resolve, the unique situation where "a

[3]At one point in their brief, appellees describe legislative immunity as "an extension of the state's sovereign immunity." Brief of Appellees at 12 (citing *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001)). This is not accurate. In *Yanero*, this Court simply provided a catalog of various forms of immunity. To be sure, the paragraph about sovereign immunity preceded the one about absolute immunity for legislators. *See id.* at 517-18. But they were not conjoined. Moreover, the Constitution expressly authorizes the legislature to "direct in what manner and in what courts suits may be brought against the Commonwealth." Ky. Const. Section 231. If, therefore, legislative immunity were derived from sovereign immunity, which it is not, the legislature would appear to have discretion to invoke or waive it under Section 231.

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.

It remains true as well that legislative immunity was not even expressly raised in *Rose*. *See Baker*, 204 S.W.3d at 595 n. 23. In fact, appellees themselves appear to concede this point, describing *Rose* as a case about service of process, rather than one about legislative immunity, which of course it was. *See* Brief of Appellees at 7-8 (quoting *Rose*, 790 S.W.2d at 204).

Philpot v. Patton, 837 S.W.2d 491 (Ky. 1992), can be distinguished on the same grounds. Like *Rose*, *Philpot* involved an asserted duty on the part of the Senate, and only the Senate, to call a bill out of committee. *See id.* at 491. Thus, the Senate was the only viable defendant in the action. Moreover, the case actually turned on mootness. *See id.* at 492-94.[4]

Notably, appellees do not deny this basis for distinguishing *Rose* and *Philpot* in their brief. Instead, they zero in on *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995), arguing that *Jones* "did not involve any legislative constitutional duty." Brief of Appellees at 9. This argument is largely misplaced. To be sure, *Jones* involved both statutory and constitutional claims. At bottom, however, it involved a power the Constitution vests uniquely in the legislature, the power of the purse. *See Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852, 863-64 (Ky. 2005). What the trustees were after in *Jones* was direct access to the treasury. Their claim was that the legislature had both a statutory and constitutional duty to appropriate precisely the amounts of money for the system that they had determined were

[4]The same can be said of *Kraus v. Kentucky State Senate*, 872 S.W.2d 433 (Ky. 1993), where the Senate, and only the Senate, had refused to confirm Kraus as an Administrative Law Judge. *See id.* at 434. Appellees do not argue to the contrary. *See* Brief of Appellees at 11.

actuarially correct. *See Jones*, 910 S.W.2d at 712. "The crucial issue before us," this Court noted, "is whether the General Assembly must blindly defer to the Board in matters of ***state retirement funding***." *Jones*, 910 S.W.2d at 713 (emphasis added). Like *Rose*, *Jones* involved a form of relief that only the legislature could provide.

This Court should also bear in the mind that the author of *Jones* went on to write *Baker*. The latter case pulls no punches on the importance of "absolute legislative immunity," describing it as "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.

Appellees also cite *Brown* as an example of this Court rejecting a claim of legislative immunity. See Brief of Appellees at 7. This is not so, for two reasons. First, as the court below noted, and as appellees do not deny, the LRC was ***plaintiff*** in that case. *See* Order, *Beshear v. Osborne*, Franklin Cir. Ct., 21-CI-00089 (Apr. 12, 2021), at 15. *See also LRC v. Brown*, 664 S.W.2d 907, 909 (Ky. 1984) ("The LRC . . . filed this action in Franklin Circuit Court."). A plaintiff understandably cannot be heard to argue that it is immune from a court's jurisdiction. Second, *Brown* never addresses legislative immunity.

III. Prudential Considerations Also Support Reversal.

In their opening brief, appellants also observed that legislative immunity has the healthy effect of protecting courts from cases that are insufficiently developed for proper resolution. *See* Brief of Appellants at 13-16. As this Court noted 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)).

Appellees respond by arguing that "prudential considerations" are built into KRS 418.065. To be sure, KRS 418.065 does authorize a court to deny declaratory relief if it would not be "proper at the time under all the circumstances." But this very case illustrates appellants' point. Here, the court below granted temporary injunctive relief against S.B. 1 without a single Executive Order in place that purports to last more than thirty days. In other words, the court below had no granular facts or context on which to fashion a graduated decision. As this Court emphasized in *W.B.*, what courts want before them, and what they never had here, is "an actual record of an administrative case contextualizing the operations of the statutory and regulatory process as it functions in day-to-day practice." 388 S.W.3d at 109. "[This] is the very nucleus of our review," this Court added, "and the absence of such a record unduly hinders our ability to review the constitutional issues presented." *Id.* Thus, KRS 418.065 was not up to the task in this very case.

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