Supreme Court of Kentucky

Case No. 2021-SC-139

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

v.

On appeal from Franklin Circuit Court, Case No. 21-CI-00089

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

AMICUS CURIAE BRIEF OF THE COMMONWEALTH OF KENTUCKY IN SUPPORT OF APPELLANTS

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Certificate of Service

I certify that a copy of the Commonwealth's Amicus Curiae Brief in Support of Appellants was served by U.S. mail on May 2, 2022 upon: S. Travis Mayo, Taylor Payne, Marc Farris, and Laura C. Tipton, Office of the Governor, 700 Capitol Avenue, Suite 106, Frankfort, KY 40601; David E. Fleenor, Office of the Senate President, Capitol Annex, Room 236, 702 Capital Avenue, Frankfort, KY 40601; D. Eric Lycan, Office of the Speaker of the Kentucky House of Representatives, Capital Annex, Room 332, 702 Capital Avenue, Frankfort, KY 40601; 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; 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 Commonwealth did not withdraw the record on appeal.

Matthew F. Kuhn

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF BRIEF AND INTRODUCTION

This case typifies a trend in recent years of suing members of the legislature in constitutional challenges to the laws that they pass. Although legislative immunity has a long history in the Commonwealth, this Court has had few opportunities to address it. What this Court has said, however, makes clear that the claims against the Legislative Defendants here must be dismissed. That is not to say that legislators can never be proper defendants. But they cannot be sued merely for *legislating*—for writing, voting on, and overriding vetoes of laws that someone, here the Governor, believes are unconstitutional.

The Commonwealth's amicus brief begins by discussing the history of legislative immunity, followed by a summary of how federal courts and Kentucky courts have applied it. The brief then applies these principles to this case and discusses the decisions on which the circuit court relied. In the end, this case is the quintessential instance when legislative immunity applies.

ARGUMENT

I. Legislative immunity protects against claims arising from the ordinary act of legislating.

1. To understand how legislative immunity applies here, some history is in order. The current Kentucky Constitution—like its three predecessors—provides that "[t]he members of the General Assembly . . . shall not be questioned in any other place" "for any speech or debate in either House." Ky. Const. § 43.

That provision is nearly identical to the U.S. Constitution's Speech or Debate Clause. U.S. Const. art. I, § 6, cl. 1. But the legislative "privilege is a century older than our federal constitution, dating at least to the time of the English Bill of Rights of 1689." *Baker v. Fletcher*, 204 S.W.3d 589, 593–94 (Ky. 2006). "This privilege 'has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries' and was 'taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 48–49 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)).

Legislative immunity serves at least two purposes. First, it "insure[s] that the legislative function may be performed independently without fear of outside influence." *D.F. Bailey, Inc. v. GRW Eng'rs, Inc.*, 350 S.W.3d 818, 821 (Ky. App. 2011). "[T]o enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful." *Tenney*, 341 U.S. at 373 (citation omitted). So "[t]he rationale for absolute immunity is not to protect [individual legislators] from liability for their own unjustifiable conduct, but to protect their offices against the deterrent effect of a threat of suit." *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001); *Tenney*, 341 U.S. at 372–74.

Second, the framers "understood that absolute legislative immunity, even with its negative characteristics, is essential if separation of powers is to be respected." *Baker*, 204 S.W.3d at 594 (footnote omitted). Indeed, "[t]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberations without intimidation or threats from the Executive Branch." *Gravel v. United States*, 408 U.S. 606, 616 (1972). Thus, the legislative privilege "reinforc[es] the separation of powers" by "protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 178–79 (1966).

Legislative immunity is thus not merely a doctrine about tort liability. It is integral to our constitutional structure, providing legislators the breathing room necessary to represent the people with vigor and candor. And it prevents the judicial and executive branches from interfering with the legislative process by threat of litigation. The doctrine, to be clear, is not a free pass for everything that the legislature does. But when exercising the core function of the people's branch of government—legislating—absolute immunity is essential.

2. Much of what federal courts have said about legislative immunity resonates here. That is because legislative immunity in Kentucky operates like its federal counterpart. *See Baker*, 204 S.W.3d at 595–96. Indeed, this Court has long relied on decisions from the U.S. Supreme Court to apply Kentucky's doctrine of legislative immunity. Those decisions help to illuminate the issues here.

The U.S. Supreme Court first considered the contours of the legislative privilege in *Kilbourn v. Thompson*, 103 U.S. 168 (1880). The Speech or Debate Clause, the Court explained, should be interpreted "liberally" to protect all "things generally done in a session of [Congress] by one of its members in relation to the business before it." *Baker*, 204 S.W.3d at 595 (quoting *Kilbourn*, 103 U.S. at 204). So even though the U.S. Constitution references only "Speech or Debate," its protections are not so limited. *See Tenney*, 341 U.S. at 376. Instead, legislative immunity extends to all "act[s] in the sphere of legitimate legislative activity." *Id.*

And that's a large sphere. Legislative activity encompasses *any* "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. The privilege covers conducting official investigations and issuing subpoenas, for example. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502–06 (1975); *Tenney*, 341 U.S. at 377. But nothing is closer to the core of the legislative sphere than drafting and voting on bills. *See, e.g.*, *Kilbourn*, 103 U.S. at 204. Voting is "quintessentially legislative." *Bogan*, 523 U.S. at 55.

And legislative immunity is "absolute." *Eastland*, 421 U.S. at 501. So it bars not only damages claims, but also "actions seeking declaratory or injunctive relief." *See Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980); *see also Spallone v. United States*, 493 U.S. 265, 278 (1990). "The privilege of absolute immunity would be of little value if legislators could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of a pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Bogan*, 523 U.S. at 54 (cleaned up).

What's more, legislative immunity is not limited to the legislators themselves. It also protects legislative staff, so long as they are acting on a legislator's behalf within the "sphere of legitimate legislative activity." *See Gravel*, 408 U.S. at 616–17, 624 (citation omitted). This aspect of legislative immunity reflects that "it is literally impossible . . . for [legislators] to perform their legislative tasks without the help of aides and assistants," and thus "for the purpose of construing the privilege, a Member and his aide are to be treated as one." *Id.* at 616 (internal quotation marks and citation omitted).

While legislative immunity must be robustly applied, it is not meant to "forestall judicial review of legislative action." *Powell v. McCormick*, 395 U.S. 486, 505 (1969). But the question—like so many questions of justiciability—is about who the proper defendant is. Courts do not issue advisory opinions about the constitutionality of a law by allowing suits against nominal defendants who lack

the authority to enforce a law against the plaintiff. *See, e.g.*, *California v. Texas*, 141 S. Ct. 2104, 2116 (2021). Rather, aggrieved plaintiffs may seek recourse against ministerial officers charged with implementing the allegedly unconstitutional legislation. *Powell*, 395 U.S. at 504–05 & n.24. For example, in *Eastland*, the "U.S. Supreme Court dismissed a complaint against nine senators based on immunity, but indicated that the plaintiff could have brought suit against U.S. Marshalls had they" tried to enforce the Senators' allegedly unlawful directions. *Baker*, 204 S.W.3d at 596. And that result harmonizes the ordinary principles of justiciability with the doctrine of legislative immunity.

3. "Kentucky law is in accord." *Id.* at 595. The "full design" of Section 43, this Court has explained, "extend[s] to . . . every . . . act resulting from the nature, and in the execution, of the office"; that includes the "giving of a vote." *Id.* (citation and internal quotation marks omitted); *Kraus v. Ky. State Senate*, 872 S.W.2d 433, 440 (Ky. 1993). And "[a]bsolute immunity . . . extends to legislators in the performance of their legislative functions." *Yanero*, 65 S.W.3d at 518. "[T]o preserve legislative independence, 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*, 350 S.W.3d at 821 (cleaned up).

Indeed, Kentucky has enshrined protections for legislators and their staff in statute. KRS 418.075(4), for example, provides that "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."

Just as in federal court, however, "[l]egislative immunity and constitutional judicial review of legislative acts must coexist" in Kentucky. *Baker*, 204 S.W.3d at 596. And this Court—citing *Powell*, *Eastland*, and *Kilbourn*—has explained that a plaintiff may seek relief against the "ministerial officers charged with implementing the [legislature's] decision." *Id.* That makes sense because any relief—*e.g.*, an injunction against a defendant—would seek to prevent the injury that arises from enforcing the law. *See id.* So legislative immunity in Kentucky is not a roadblock to vindicating constitutional claims; it merely protects legislators from suit where they have no role in enforcing a challenged law against a plaintiff.

II. The Legislative Defendants are immune from suit.

1. The Governor sued the Legislative Defendants because they worked to draft and pass several bills in the 2021 session. His complaint makes that clear. *See* First Am. Compl. ¶¶ 21–24, 84–86. For example, the Governor alleges that Speaker Osborne and President Stivers "led passage of" the challenged legislation in their respective chambers. *Id.* ¶¶ 84–85. And the Governor criticizes the General Assembly for overriding his vetoes rather than, as he desired, having "any legislation wait until after this deadly pandemic." *Id.* ¶ 23. The Governor's

complaint does not hide from the fact that he hauled the Legislative Defendants into court for legislating.

Nor do the particular provisions of the challenged legislation provide the Governor a route to overcome legislative immunity even in part. For example, the Governor's complaint mentions the part of Senate Bill 1 that says the General Assembly may end a declaration of emergency. 2021 SB 1, § 2(4). But that provision simply reiterates the General Assembly's legislative power—a power that the legislature exercised during the 2022 session. 2022 SJR 150; *accord Beshear v. Acree*, 615 S.W.3d 780, 813 (Ky. 2020). If this part of Senate Bill 1 had been enjoined by court order during the 2022 session, that injunction arguably could have prohibited the General Assembly from exercising its legislative power to end the declaration of emergency. And that is precisely the problem that legislative immunity is designed to prevent.[1]

It makes no difference that the Governor seeks only declaratory and injunctive relief against the Legislative Defendants and not money damages. Legislative immunity is absolute. *Baker*, 204 S.W.3d at 596. "[L]egislators engaged

[1] The Governor's complaint also references the part of Senate Bill 2 that removed the word "nonbinding" when discussing the determinations of the Administrative Regulation Review Subcommittee. 2021 SB 2, § 2(2). But this Court has already held that this aspect of Senate Bill 2 does not affect the Governor's purview over administrative regulations. *Cameron v. Beshear*, 628 S.W.3d 61, 75 (Ky. 2021).

in . . . 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*, 350 S.W.3d at 821 (cleaned up). This means that legislative immunity bars claims for damages as well as "actions seeking declaratory or injunctive relief." *Consumers Union*, 446 U.S. at 732. Indeed, legislative immunity long predates declaratory-judgment actions, and the General Assembly explicitly retained immunity under Kentucky's Declaratory Judgment Act. KRS 418.075(4).

Legislative immunity also bars the Governor's suit against the LRC. The LRC is "an independent agency in the legislative branch of state government," composed of the 16 members of leadership in the General Assembly's two chambers. KRS 7.090(1)–(2). Not only is the LRC made up of immune legislators, but its core function is to help members of the General Assembly. So even if the Governor sought relief against LRC staff who assisted members of the General Assembly, "for the purpose of construing the privilege, a Member and his aide are to be treated as one.'" *Gravel*, 408 U.S. at 616. Because legislators are immune for their work on the challenged bills, so are their staffs. *Id.*

To be clear, it is not the case that the Legislative Defendants can never be proper defendants in a lawsuit. There are hard cases on the margins, and "[i]t is not inconceivable" that a case may arise in which "a party wishing to obtain judicial review of some aspect of legislative conduct would be unable to identify a proper non-legislator defendant." *Baker*, 204 S.W.3d at 596 n.32. But this isn't

one of those cases. Because the Governor sued the Legislative Defendants merely for legislating, this is the paradigmatic case in which absolute legislative immunity applies.

2. To deny the Legislative Defendants immunity, the Franklin Circuit Court relied on *Rose v. Council for Better Education Inc.*, 790 S.W.2d 186 (Ky. 1989); *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992); and *Legislative Research Commission v. Brown*, 664 S.W.2d 907 (Ky. 1984). In fairness to the trial court, there is some broad language in two of these cases. But properly understood, especially considering the Court's more recent opinion in *Baker*, these decisions are not a basis to override legislative immunity here.

In *Rose*, the Court considered a claim that the legislature had failed under Section 183 of the Kentucky Constitution to "provide for an efficient system of common schools throughout the State." 790 S.W.2d at 189. To bring such a claim, this Court explained, it is unnecessary to serve every member of the legislature: "service on both the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives, named in their respective capacities is sufficient to acquire jurisdiction over the General Assembly." *Id.* at 205. But importantly, legislative immunity was not an issue in *Rose* because the legislative defendants there did not move to dismiss on that ground. *Baker*, 204 S.W.3d at 595 n.23. And in any event, any implications for legislative immunity from *Rose* are sui generis: *Rose* involved the General Assembly's failure to carry out an affirmative

duty specifically assigned to it by the Constitution. Only legislators can implement Section 183, and this Court has recognized that legislative immunity may give way when "a party wishing to obtain judicial review of some aspect of legislative conduct would be unable to identify a proper non-legislator defendant." *Id.* at 596 n.32. But this case is far removed from the unique protections provided by Section 183.[2]

Philpot dealt with an attempt to compel a Senate committee to report a bill to the floor. *See* 837 S.W.2d at 491–92. The Court dismissed the plaintiff's challenge as moot. *Id.* at 492–94. All the same, it provided dicta about legislative immunity, relying on *Rose*, *see id.* at 493–94—which, again, did not even deal with the issue. *Baker*, 204 S.W.3d at 595 n.23. That dicta therefore carries no weight

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[2] If the legislative defendants had raised legislative immunity in *Rose*, *Baker* suggests that the plaintiffs there could have pursued a different path to seek relief. Much like *Rose*, the injury in *Baker* arose from the General Assembly's "failure to enact [legislation]." 204 S.W.3d at 595. Even though legislative immunity protected legislators from such a suit, the Court suggested that—where the injury arises from the failure of the General Assembly to act—a plaintiff could name "the Clerk of either House (for certifying the passage of the budget bill) or any other official actor who took part in the process." *Id.* at 596. This case, however, is not one in which the General Assembly failed to act in some identified way. The Governor sued the Legislative Defendants because the General Assembly passed legislation.

here.[3] Indeed, this Court did not once cite *Philpot*'s dicta in *Baker*—its most exhaustive foray into legislative immunity. Even still, *Philpot* may well have been a case in which a member of the General Assembly would be the only viable defendant.

Brown is the furthest afield. It is true, as the circuit court noted, that the Legislative Defendants were parties in *Brown*. Ord. Denying Mot. Dismiss at 14. But they were plaintiffs, 664 S.W.2d at 909, and *Brown* lacks any discussion of immunity. That legislators and the LRC may bring affirmative claims in certain contexts does not bear on when they are protected from defending against suits. Nor is there much to glean about legislative immunity from a case that is silent on the topic. And in all events, *Rose*, *Philpot*, and *Brown* were each decided well before this Court's more recent clarifications about the contours of legislative immunity in *Yanero* and *Baker*. Those more recent decisions better conform to federal precedent interpreting an analogous provision and should guide the Court here.

In denying immunity, the Franklin Circuit Court also leaned into the fact that this case involves a "fundamental dispute between the legislature and the executive over the scope [of] the powers of each branch of government." Ord.

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[3] Other cases have similarly misconstrued *Rose*. *See, e.g.*, *Jones v. Board of Trs. of Ky. Ret. Sys.*, 910 S.W.2d 710, 713 (Ky. 1995); *Kraus*, 872 S.W.2d at 435, 439–40. But *Baker* put that issue to rest. *Baker*, 204 S.W.3d at 595 n.23.

Denying Mot. Dismiss at 12. But such a disagreement over the political branches' respective powers warrants *granting* legislative immunity, not making an exception to it. *See Baker*, 204 S.W.3d at 594. As the Legislative Defendants note in their brief (at 1, 8), the Governor used the initial injunction in this case to suggest that the General Assembly might be in contempt if they overrode a veto. The Governor's use of a judicial order in this manner showcases why this case falls within the heartland of legislative immunity.

III. Applying legislative immunity here tracks this Court's recent decisions on justiciability.

This Court has recently revitalized crucial justiciability doctrines like standing and ripeness that preserve Kentucky's separation of powers and ensure that the judiciary exercises only the powers that the Constitution grants it. *See Commonwealth Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton*, 566 S.W.3d 185, 193 (Ky. 2018). Proper enforcement of legislative immunity here compliments and reinforces those same principles.

1. Think about this as a standing case. To establish constitutional standing, a plaintiff, among other things, "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct." *Id.* at 198 (citation and internal quotation marks omitted). But the causal chain between the Legislative Defendants' work to draft and pass the challenged laws is too attenuated from any theoretical

injury that the Governor might suffer because of the laws' eventual implementation. *See Ky. Unemp. Ins. Comm'n v. Nichols*, 635 S.W.3d 46, 52 (Ky. 2021); *see also Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410–11 (2013).

Indeed, if the Governor suffered any injury from the legislation, it would come from enforcement of the law—not the law's mere existence. *See Baker*, 204 S.W.3d at 596. And so, from a standing perspective, the proper defendant in a challenge to the constitutionality of a law is the public official who enforces it, *see California*, 141 S. Ct. at 2116, not the legislators who voted on it. "[M]inisterial employees are essential to the legislative process, and if they act contrary to their constitutional oath, they may be held accountable" as the actor whose conduct is most directly traceable to a plaintiff's injury. *Baker*, 204 S.W.3d at 597. But voting on a bill does not cause an injury for standing purposes.

2. Ripeness also provides a helpful analogy. The Governor asks the Court to resolve the constitutionality of state laws in the abstract, contrary to ripeness principles and this Court's refusal to issue advisory opinions. "The basic rationale of the ripeness requirement is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." *W.B. v. Cabinet for Health & Fam. Servs.*, 388 S.W.3d 108, 114 (Ky. 2012) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). Yet any disagreement between the Legislative Defendants and the Governor about how other state officials will

implement the challenged laws is abstract as between the Governor and the legislature. As in *W.B.*, this Court lacks "an actual record . . . contextualizing the operations of the statutory and regulatory process as it functions in day-to-day practice, which is the very nucleus of [its] review, and the absence of such a record unduly hinders [this Court's] ability to review the constitutional issues presented." *Id.* at 109. Granting legislative immunity here thus allows this Court to avoid weighing in on the constitutionality of new laws without a concrete controversy.

CONCLUSION

The Court should reverse the decision below denying the Legislative Defendants' motions to dismiss.

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