

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 2018-CI-00414**

**COMMONWEALTH OF KENTUCKY, ex rel.  
MATTHEW G. BEVIN, in his official capacity as  
Governor of the Commonwealth of Kentucky**

**PETITIONER**

v.

**ANDY BESHEAR, in his official capacity as  
Attorney General of the Commonwealth of Kentucky**

**RESPONDENT**

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**MOTION TO DISMISS**

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Comes the Plaintiff/Respondent, Commonwealth of Kentucky *ex rel.* Andy Beshear, in his official capacity as Attorney General of the Commonwealth of Kentucky, and moves this Court to dismiss Petitioner Matthew G. Bevin, in his official capacity as Governor of Kentucky's Petition under CR 12.02(a) for lack of subject matter jurisdiction and CR 12.02(f) for failure to state claim upon which relief can be granted. The Attorney General attaches a Memorandum in Support of this Motion as part of its Brief on the Merits and a Proposed Order.

**NOTICE**

Please take notice that, pursuant to the Scheduling Order, this Motion to Dismiss will be heard on Thursday, June 7, 2018, at 9:00 a.m., in Franklin Circuit Court, 222 Saint Clair Street, Frankfort, KY 40601.

Respectfully Submitted,

ANDY BESHEAR  
ATTORNEY GENERAL

By: /s/ La Tasha Buckner  
J. Michael Brown (jmichael.brown@ky.gov)  
Deputy Attorney General  
La Tasha Buckner (latasha.buckner@ky.gov)  
Assistant Deputy Attorney General  
S. Travis Mayo (travis.mayo@ky.gov)  
Executive Director,  
Office of Civil and Environmental Law  
Marc G. Farris (marc.farris@ky.gov)  
Samuel Flynn (samuel.flynn@ky.gov)  
Assistant Attorneys General  
Office of the Attorney General  
700 Capitol Avenue  
Capitol Building, Suite 118  
Frankfort, Kentucky 40601  
(502) 696-5300  
(502) 564-8310 FAX

*Counsel for Plaintiff Commonwealth of  
Kentucky, ex rel. Andy Beshear,  
Attorney General*

### **CERTIFICATE OF SERVICE**

I hereby certify that, on May 2nd 2018, I electronically filed the foregoing Plaintiffs' Brief on the Merits via the Court's electronic filing system, and that on same date I served true and accurate copies of the foregoing electronically and via-email to the following: M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn, Office of the Governor, The Capitol, Suite 100, 700 Capitol Avenue, Frankfort, Kentucky 40601; Brett R. Nolan, Finance and Administration Cabinet, Office of the General Counsel, Room 329, Capitol Annex, Frankfort, Kentucky, 40601; Katherine E. Grabau, Public Protection Cabinet, Office of Legal Services, 655 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40601. I certify that I served true and accurate copies of the foregoing Plaintiffs' Motion to Dismiss on the individuals whose names appear on the following Service List via U.S. mail and/or hand delivery on May 2nd 2018.

**SERVICE LIST**

Robert B. Barnes  
Teachers' Retirement System of the State of Kentucky  
479 Versailles Road  
Frankfort, Kentucky 40601

Mark Blackwell  
Katherine Rupinen  
Joseph Bowman  
Kentucky Retirement System  
Perimeter Park West  
1260 Louisville Road  
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---

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

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Comes the Plaintiff/Respondent, Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, moves this Court as part of its Brief on the Merits to dismiss the Petition for a Declaratory Judgment filed by Defendant/Petitioner, Governor Matthew G. Bevin. The Governor brings his Petition for a declaratory judgment based solely on his hypothetical interpretations of an argument already pending before this Court. Instead of establishing an actual controversy, the Governor seeks an advisory opinion testing a legal theory against indefinite and purely speculative situations, for the purposes of making a collateral attack against the existing pension bill case that is now consolidated with this matter. The Court should dismiss the Governor's Petition pursuant to Kentucky Rule of Civil Procedure 12.02(a) (hereinafter "CR") for lack of subject matter jurisdiction and CR 12.02(f) for failure to state a claim upon which relief can be granted, as it does not state any actual case or controversy as required by KRS 418.040 and KRS 418.045.

## BACKGROUND

1. On April 11, 2018, Respondent Andy Beshear, in his official capacity as Attorney General of the Commonwealth of Kentucky, together with the Kentucky Education Association (“KEA”) and the Kentucky State Lodge Fraternal Order of Police (“FOP”), filed a lawsuit in this Court against the Governor, in his official capacity, Bertram Robert Stivers, II, in his official capacity as President of the Kentucky Senate, David W. Osborne, in his official capacity as Speaker Pro Tempore of the Kentucky House of Representatives, the Board of Trustees of the Teacher’s Retirement System of the State of Kentucky, and the Board of Trustees of the Kentucky Retirement Systems, Case No. 18-CI-00379 (“Pension Case”).

2. The Pension Case alleged the following challenges to the constitutionality and statutory validity of 2018 Senate Bill 151 (“SB 151”):

- (1) It violated Ky. Const. § 19 by substantially impairing “the inviolable contract between the Commonwealth and its public employees established in KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714 by reducing the benefits provided to those employees.” (Complaint, ¶¶ 98-100.)
- (2) It violated Ky. Const. § 46 by receiving only one reading in the House of Representatives (“House”), by not voting to dispense with the second and third readings in the House, and by not receiving any readings in the Senate. (*Id.*, ¶¶ 102-106.)
- (3) It violated Ky. Const. § 56 because it “was signed by Representative Osborne, who is not the Speaker of the House,” and “therefore was not properly signed by the presiding officer of the House.” (*Id.*, ¶¶ 108-11.)
- (4) It violated Ky. Const. § 13 by depriving “public employees of their contractual rights to certain retirement benefits” without any compensation. (*Id.*, ¶¶ 113-17.)

- (5) It violated KRS 6.350(1) by being reported without an actuarial analysis. (*Id.*, ¶¶ 119-222.)
- (6) It violated KRS 6.955 because it was passed “without including a fiscal note, and without a vote . . . to waive the fiscal note requirement.” (*Id.*, ¶¶ 124-27.)
- (7) It violated Ky. Const. § 2 in that it arbitrarily deprived public employees of their constitutional and statutory rights. (*Id.*, ¶¶ 129-31.)

The Pension Case sought injunctive relief against the Governor, the Board of Trustees of the Kentucky Teachers’ Retirement System and the Board of Trustees of the Kentucky Retirement Systems to stop them from the enforcement of the Pension Bill. (*Id.*, ¶¶ 132-56.)

3. On April 18, 2018, the Governor, in his official capacity, initiated this present lawsuit as a petition for a declaration of rights under the Kentucky Declaratory Judgment Act, KRS 418.010-418.090, and CR 57. (Pet. Decl. Rights ¶ 1.) The Governor alleges that he “has no choice but to bring this action to prevent a needless flurry of constitutional challenges and the confusion that would result for so many vital Kentucky laws, and to remove the cloud of uncertainty caused by the Attorney General.” (*Id.* ¶ 46.)

### STANDARD OF REVIEW

In Kentucky, a court should grant a motion to dismiss under CR 12.02 for failure to state a claim only if it appears that the pleading party could not prove any set of facts in support of his claim that would entitle him to relief. *Wood v. Wyeth-Ayerst Laboratories, Div. of Am. Home Products*, 82 S.W.3d 849, 851 (Ky. 2002), citing *Pari-Mutuel Clerks’ Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). In reaching its decision, the trial court is not required to make any factual determination, but the question is purely a matter of law. *D.F. Bailey, Inc. v. GRW Engineers, Inc.*, 350 S.W.3d 818, 820 (Ky.

App. 2011) (*citing James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002)). A court is deprived of subject matter jurisdiction in cases ““where the Court has not been given any power to do anything at all.”” *Gordon v. NKC Hospitals, Inc.*, 887 S.W.2d 360, 362 (Ky. 1994) (*quoting Duncan v. O’Nan*, 451 S.W.2d 626, 631 (Ky. 1970)). In determining subject matter jurisdiction, the pleadings should be taken at face value and so long as the “kind of case” identified in the pleadings is within the court’s jurisdiction, a party claiming a legal bar must plead it affirmatively. *Id.*

“A court does not have *jurisdiction* to decide a question unless there is a real or justiciable controversy involving specific rights of particular parties.” *Veith v. City of Louisville*, 355 S.W.2d 295, 297 (Ky. 1962). “The existence of an actual controversy concerning a justiciable question is a condition precedent to an action under our Declaratory Judgment Act.” *Freeman v. Danville Tobacco Bd. of Trade, Inc.*, 380 S.W.2d 215, 216 (Ky. 1964). “When a motion to dismiss a complaint seeking a declaration of rights has been made, the question presented to the court is not whether the plaintiff will ultimately prevail. Rather, such a motion challenges the sufficiency of the complaint and the court is called on to determine whether the complaint states a cause of action for declaratory relief. In ruling on a motion to dismiss, it is improper for the court to consider whether the plaintiff will ultimately prevail.” *Bank One Kentucky NA v. Woodfield Fin. Consortium LP*, 957 S.W.2d 276, 278 (Ky. App. 1997).

## ARGUMENT

The Governor’s Petition offers only hypothetical situations to test a legal theory in cases that have not been filed or contemplated, which is the definition of a request for an advisory opinion. The only existing controversy is already pending in the Pension Case, and the Governor

institutes this action solely to use as a collateral attack on that case. As there is no actual case or controversy behind the Governor’s Petition, the Court should dismiss it.

**I. The Declaratory Judgment Act Requires A Case Or Controversy.**

“Unless there is ‘an actual case or controversy,’ this Court has no jurisdiction to hear an issue and is prohibited from producing mere advisory opinions.” *Med. Vision Grp., P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008); Ky. Const. § 110. Under KRS 418.040, “in any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may 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.” *Mammoth Medical, Inc. v. Bunnell*, 265 S.W. 3d 205, 209 (Ky. 2008). In pertinent part, KRS 418.045 provides that any person whose rights are affected by statute, municipal ordinance or other government regulation may apply for and secure declaration of her rights or duties, either alone or with other relief, provided that an actual controversy exists with respect to those rights. *Id.*

“This Court does[] not render advisory opinions. . . . A declaratory judgment action under KRS 418.040 . . . provides that a court can make a binding declaration of rights but *only* if a justiciable issue is present. We ‘will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties.’” *Jarvis v. Nat’l City*, 410 S.W.3d 148, 153 (Ky. 2013). “‘An actual controversy for purposes of the declaratory judgment statute requires a controversy over present rights, duties and liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion.’” *Foley v. Commonwealth*, 306 S.W.3d 28, 31 (Ky. 2010) (quoting *Barrett v. Reynolds*, 817 S.W.2d 439, 441 (Ky. 1991)).



“The court may not declare prospective or future rights, unless there is an existing state of facts upon which those rights may be fixed.” *Veith*, 355 S.W.2d at 297. “What makes a declaratory judgment action a proper judicial resolution of a case or controversy, rather than an advisory opinion, is the settling of some dispute which affects the behavior of the defendant toward the plaintiff.” 26 C.J.S. *Declaratory Judgments* § 32. “A declaratory judgment should not or cannot be made as to questions which may never arise or which are merely advisory, or are academic, hypothetical, incidental or remote, or which will not be decisive of any present controversy. . . . The criterion that should govern the courts is not that there is a present controversy but a justiciable controversy over present rights, duties or liabilities.” *Dravo v. Liberty Nat. Bank & Tr. Co.*, 267 S.W.2d 95, 97 (Ky. 1954).

## **II. The Governor’s Petition Presents No Justiciable Case Or Controversy.**

The Governor’s Petition is the paradigm of a request for an advisory opinion, as it seeks to enjoin myriad hypothetical lawsuits which have been neither filed nor even contemplated. Instead of demonstrating any actual justiciable controversy between the Attorney General and the Governor in his Petition, the Governor alleges harm only from “the Attorney General’s theory,” (Pet. Decl. Rights ¶ 39), to prevent a “needless flurry of constitutional challenges.” (*Id.* ¶ 46.) There is no present or prospective “flurry of constitutional challenges,” and legal theories are not actual controversies. In Civil Action No. 18-CI-00389 the Plaintiffs, including the Attorney General, challenge only one enacted bill: SB 151. An analysis of whether other enacted bills must be signed by the Speaker of the House as the presiding officer of the House is not necessary to a holding that SB 151 is unconstitutional because the presiding officer of the House – the Speaker of the House – did not sign it. *See Williams v. Grayson*, Case No. 08-CI-856, Final Judgment at 15 (Franklin Circuit Ct. Jan. 21, 2009) (where the Court modified its

prior Opinion and Order “to reflect that the Court’s analysis of whether all enacted bills must be presented to the Governor prior to *sine die* adjournment is unnecessary to the holding that H.B. 79 is unconstitutional by virtue of the rulings set forth in this Final Judgment.”).

“Courts will not take jurisdiction in actions brought under the statute, unless the alleged controverted questions are justiciable ones, and which do not include abstract legal questions designed merely to furnish information to the inquirer and which, if jurisdiction was taken, would convert courts into a sort of law school for the instruction of the inquisitive mind.” *Commonwealth v. Crow*, 92 S.W.2d 330, 332 (Ky. 1936) (quoting *Oldham Cnty. v. Arvin*, 52 S.W. 2d 657, 658-59 (Ky. 1932). “Consequently, abstract or speculative propositions simply made to satisfy the curiosity of the parties are not appropriate for declaratory relief.” *Bank One Ky. NA*, 957 S.W.2d at 279.<sup>1</sup> “Every dispute between lawyers on a subject of law, whether adjective or substantive, is not a justiciable controversy to be settled in a declaratory action. ‘A mere difference of opinion is not an actual controversy,’ within the contemplation of our statute.” *Jefferson Cnty. ex rel. Coleman v. Chilton*, 33 S.W.2d 601, 605 (Ky. 1930). The Governor’s Petition is purely a dispute over a legal theory and is not justiciable.

Rather, the Governor is using this case as an improper collateral attack on the Pension Case. “An action for a declaratory judgment cannot be instituted to secure a determination of substantive rights involved in a pending suit.” *Mammoth Med., Inc.*, 265 S.W.3d at 210. “Nor is a disputed question of law or procedure raised in a pending suit such an actual controversy as comes within the letter, reason, or spirit of the Declaratory Judgment Act. The questions debated

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<sup>1</sup> See also *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (“For a declaratory judgment to issue, there must be a dispute which ‘calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.’”); *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (“For adjudication of constitutional issues ‘concrete legal issues, presented in actual cases, not abstractions’ are requisite. This is as true of declaratory judgments as any other field.”).

in this case must be settled in the first instance by the court and in the case where they are raised.” *Chilton*, 33 S.W.2d at 605 (citations omitted). Any issue involving the constitutionality of the Pension Bill under KY. CONST. § 56 is already pending before this Court in the Pension Case, and will be resolved in it.

The Governor’s Petition is the very definition of a request for an advisory opinion, as the only controversy present is already pending before this Court in the Pension Case. The sole purpose of this case is to create an improper collateral attack on the Pension Case by testing a legal theory in purely hypothetical situations. Accordingly, this Court should dismiss the Governor’s Petition pursuant to CR 12.02(a) and CR 12.02(f) for lack of an actual case or controversy.

Respectfully Submitted,

ANDY BESHEAR  
ATTORNEY GENERAL

By: /s/ La Tasha Buckner  
J. Michael Brown (jmichael.brown@ky.gov)  
Deputy Attorney General  
La Tasha Buckner(latasha.buckner@ky.gov)  
Assistant Deputy Attorney General  
S. Travis Mayo (travis.mayo@ky.gov)  
Executive Director,  
Office of Civil and Environmental Law  
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Samuel Flynn (samuel.flynn@ky.gov)  
Assistant Attorneys General  
Office of the Attorney General  
700 Capitol Avenue  
Capitol Building, Suite 118  
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*Counsel for Plaintiff Commonwealth  
of Kentucky, ex rel. Andy Beshear,  
Attorney General*

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RESPONDENT

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ORDER

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The Defendant/Respondent, Andy Beshear, in his official capacity as Attorney General of the Commonwealth of Kentucky, through counsel, having moved to dismiss the Petition of the Commonwealth of Kentucky *ex rel.*, Governor Matthew G. Bevin, and the Court being otherwise sufficiently advised:

**IT IS HEREBY ORDERED** that the Attorney General's Motion to Dismiss is **GRANTED**. Petitioner Matthew G. Bevin, in his official capacity as Governor of the Commonwealth of Kentucky's Petition against Respondent is **DISMISSED WITH PREJUDICE**.

**SO ORDERED**, this the \_\_\_\_\_ day of \_\_\_\_\_, 2018.

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Judge Phillip J. Shepherd  
Franklin Circuit Court, Division I

Tendered by:

/s/ La Tasha Buckner

La Tasha Buckner  
Assistant Deputy Attorney General  
Office of the Attorney General  
700 Capitol Avenue  
Capitol Building, Suite 118  
Frankfort, Kentucky 40601-3449  
(502) 696-5300

Counsel for Plaintiff,  
Commonwealth of Kentucky, ex rel.  
Andy Beshear, Attorney General