

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CASE NO. 18-CI-414  
*ELECTRONICALLY FILED*

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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GOVERNOR BEVIN'S COMBINED MOTION FOR SUMMARY JUDGMENT  
& RESPONSE TO THE ATTORNEY GENERAL'S MOTION TO DISMISS

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Petitioner Matthew G. Bevin, in his official capacity as Governor of the Commonwealth of Kentucky, hereby moves for summary judgment and responds in opposition to Respondent Attorney General's motion to dismiss. For the reasons explained in the attached memorandum, the Court should deny the Attorney General's motion and enter judgment in favor of Governor Bevin.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing were served via email this 23rd day of May, 2018, to Andy Beshear, J. Michael Brown, La Tasha Buckner, S. Travis Mayo, Marc G. Farris, Samuel Flynn, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601; Jeffrey Walther, Victoria Dickson, Walther, Gay & Mack, 163 E. Main St., Suite 200, Lexington, KY 40588; David Leightty, Alison Messex, Priddy, Cutler, Naake, Meade, 2303 River Road, Suite 300, Louisville, KY 40206; David Fleenor, Vaughn Murphy, Capitol Annex, Room 236, Frankfort, KY 40601; Eric Lycan, Office of the Speaker, Capitol Annex, Room 332, Frankfort, KY 40601; Mark Blackwell, Katherine Rupinen, Joseph Bowman, Kentucky Retirement Systems, 1260 Louisville Road, Frankfort, KY 40601; Robert B. Barnes, Teachers' Retirement System, 479 Versailles Road, Frankfort, KY 40601.

/s/ M. Stephen Pitt  
*Counsel for Governor Bevin*

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GOVERNOR BEVIN'S MEMORANDUM IN SUPPORT OF HIS COMBINED  
MOTION FOR SUMMARY JUDGMENT & RESPONSE TO THE ATTORNEY  
GENERAL'S MOTION TO DISMISS

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Petitioner Matthew G. Bevin, in his official capacity as Governor of the Commonwealth of Kentucky ("Governor Bevin"), states as follows:

**LEGAL STANDARD**

According to KRS 418.040, where "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." A motion to dismiss a complaint seeking a declaration of rights "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." *Bank One Ky. NA v. Woodfield Fin. Consortium LP*, 957 S.W.2d 276, 278 (Ky. App. 1997). "Furthermore, the complaint must be construed in the light most favorable to the

plaintiff and all allegations taken as true.” *Id.* (citing *Whittington v. Whittington*, 766 S.W.2d 73, 74 (Ky. App. 1989)).

“One reason for dismissing a complaint for declaratory relief . . . is that no justiciable controversy exists for the court to resolve.” *Id.* (citing *HealthAmerica Corp. of Ky. v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 948 (Ky. 1985)). However, for a declaratory judgment petition to survive a motion to dismiss, there need not be a “present controversy” but only a “**justiciable controversy** over present rights, duties or liabilities.” *Bd. of Educ. of Boone Cnty. v. Bushee*, 889 S.W.2d 809, 811 (Ky. 1994) (emphasis in original). Where a justiciable controversy exists—even if the effect of the Court’s judgment would be prospective—the Court may properly adjudicate the case. *Id.*

### ARGUMENT

Because there clearly is a justiciable controversy in this case, the Court should summarily disregard the Attorney General’s Motion to Dismiss. The Attorney General’s motion strings together several pages of quotes that articulate select principles of Kentucky law on the Declaratory Judgment Act, KRS 418.005, *et seq.* The motion, however, wholly fails to actually apply that law to the present case. Moreover, for the reasons stated in the Governor’s Combined Memorandum in Support of his Motion for Summary Judgment and Response to the Plaintiffs’ Motion for Summary Judgment, filed in Civil Action No. 18-CI-379, the Court should grant summary judgment to the Governor in this matter.

The Governor agrees that this Court has no jurisdiction to render advisory opinions, and he not only recognizes but supports the notion that an actual controversy must exist for a declaratory judgment action to lie. *See, e.g., Dravo v. Liberty Nat'l Bank & Trust Co.*, 267 S.W.2d 95, 97 (articulating basic declaratory judgment principles). This declaratory judgment action is needed because an actual controversy of significant import **does** exist, and the Court's expedited resolution of this case is critical to both the Commonwealth's stability and the Governor's ability to faithfully execute the laws of the state. *See* Ky. Const. § 81.

Contrary to the Attorney General's unfounded assertions, Governor Bevin did not file the instant declaratory judgment action "for the purposes of making a collateral attack against the existing pension bill case" or to "test[ ] a legal theory against indefinite and purely speculative situations." *See* Respondent's Memo. at 1. Instead, Governor Bevin seeks a declaratory judgment to determine whether any laws passed during the regular session of the 2018 General Assembly are valid—a legal question in need of judicial resolution, and one that will not receive judicial resolution in the context of the Attorney General's challenge to pension reform.

More than two hundred laws and resolutions were passed this legislative session, and the Attorney General's argument with respect to the "presiding officer" language in Kentucky Constitution Section 56 would invalidate all of them. Surely this presents an actual case or controversy for purposes of the Declaratory Judgment Act, which is undeniably broad in scope. *See, e.g., Mammoth Med., Inc. v. Bunnell*, 265 S.W.3d 205, 209 (explaining a court has "broad discretion to grant declaratory

relief” and further noting “the scope of matters to which a declaratory judgment may be rendered is broad”). As set forth in the Governor’s Petition for a Declaration of Rights, the duly elected Speaker Pro Tempore of the House of Representatives David W. Osborne signed 214 bills and resolutions that passed this legislative session. *See* Petition at ¶¶ 8-9; Exhibit 1 to Petition at ¶ 5(A)-(F). The Attorney General, the Kentucky Education Association, and the Kentucky State Lodge Fraternal Order of Police have alleged it was unconstitutional for Speaker Pro Tempore Osborne to sign one of those bills based on their interpretation of Section 56 of the Kentucky Constitution. *See* Respondent’s Motion at 2 (quoting Civil Action No. 18-CI-379 Complaint). As a matter of course, then, the constitutionality of Speaker Pro Tempore Osborne’s signature on the other 213 bills and resolutions that passed has been called into serious question, and an actual controversy exists. To contend otherwise defies logic and wastes time and resources.

The irony of the Attorney General’s Motion to Dismiss is striking. The motion argues that the Governor’s petition merely seeks an advisory opinion because the Attorney General has challenged the constitutionality of Speaker Pro Tempore Osborne’s signature only with respect to Senate Bill 151, not the rest of the laws and resolutions passed this year. *See* Respondent’s Memo. at 6. In doing so, the motion explicitly admits that the Attorney General is concerned with only the procedural constitutionality of *one law* passed this session. *Id.* (“Plaintiffs, including the Attorney General, challenge only one enacted bill: SB 151.”). Shouldn’t the Commonwealth’s “chief law officer” be concerned to the utmost with the procedural

constitutionality of *every* Kentucky law? Indeed, the Governor's petition presents an actual case or controversy that the Attorney General should want not only to resolve, but to resolve expeditiously. Nevertheless, instead of upholding and defending all the laws of the Commonwealth, the Attorney General has cherry-picked an individual bill that he simply dislikes and has mounted frivolous procedural challenges to that bill, without giving thought to the much broader implications of his arguments.

Declaratory judgment actions that consider the constitutionality of enacted legislation are not advisory in nature but rather commonplace. *See, e.g., Bowling v. Ky. Dept. of Corrections*, 301 S.W.3d 478, 481-82 (Ky. 2009) (describing declaratory judgment actions challenging the constitutionality of the Commonwealth's statutory lethal injection protocol). The Attorney General's presiding-officer theory, if adopted, would invalidate every law and resolution passed this legislative session, including those that are already effective due to emergency clauses. *See, e.g., Senate Bill 61; House Bill 185; House Bill 366*. Therefore, it is not only reasonable but entirely appropriate for the Court to address the procedural constitutionality of these laws and resolutions. *See KRS 418.080* (explaining the purpose of the Declaratory Judgment Act is "to make courts more serviceable to the people by way of settling controversies, and affording relief from uncertainty and insecurity"). If the present action is not contemplated by Kentucky's Declaratory Judgment Act, it is hard to imagine what is.

Importantly, the Court's resolution of Civil Action No. 18-CI-379 will not resolve the controversy at issue in this case. The present action is not one where "the

matters and things asked for . . . can be properly adjudged in [an existing case] which was pending at the time this action was filed.” *Gibbs v. Tyree*, 154 S.W.2d 732, 733 (Ky. 1941). Instead, Civil Action No. 18-CI-379 will address the constitutionality of Speaker Pro Tempore Osborne’s signature on Senate Bill 151, and only Senate Bill 151. This action, then, is required to address the constitutionality of Speaker Pro Tempore Osborne’s signature on the other 213 bills and resolutions that have either already been implemented or are due to be implemented in the coming weeks.

In the end, this action is justiciable under settled Kentucky law and important for the sake of the Commonwealth. The Court should afford Kentucky’s citizens relief from uncertainty and insecurity as contemplated by the Declaratory Judgment Act, *see* KRS 418.080, and the Motion to Dismiss should be disregarded. In addition, the Governor’s Motion for Summary Judgment in this matter should be granted for the reasons explained in the Governor’s Combined Memorandum in Support of his Motion for Summary Judgment and Response to the Plaintiffs’ Motion for Summary Judgment, filed in Civil Action No. 18-CI-379.

### CONCLUSION

For the foregoing reasons, Governor Bevin respectfully requests that the Court deny the Attorney General’s Motion to Dismiss and enter judgment in Governor Bevin’s favor. The present declaratory judgment action presents an actual case or controversy pursuant to Kentucky’s Declaratory Judgment Act, KRS 418.005, *et seq.*, that will not be resolved in any other pending actions. Accordingly, the Motion to Dismiss is improper, and the Court should enter judgment for the Governor.



Respectfully submitted,

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