

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 18-CI-379

COMMONWEALTH OF KENTUCKY  
*ex rel.* ANDY BESHEAR, ATTORNEY GENERAL, *et al.*

PLAINTIFFS

v.

MATTHEW G. BEVIN, in his official capacity as  
Governor of the Commonwealth of Kentucky, *et al.*

DEFENDANTS

---

LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW  
IN SUPPORT OF THEIR MOTION TO DISMISS

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Come the Defendants, Bertram Robert Stivers, II, in his official capacity as President of the Kentucky Senate, and David W. Osborne, in his official capacity as Speaker Pro Tempore of the Kentucky House of Representatives, ("Legislative Defendants"), by Counsel, and in support of their Motion to Dismiss for lack of subject matter jurisdiction in the above-referenced case, do hereby state as follows:

**INTRODUCTION**

The Defendant, Bertram Robert Stivers, II, is the duly elected Senator from the Commonwealth of Kentucky's twenty-fifth (25<sup>th</sup>) Senatorial District, and is also the President of the Kentucky Senate ("President Stivers"). The Defendant, David W. Osborne, is the duly elected Representative from the Commonwealth of Kentucky's fifty-ninth (59<sup>th</sup>) Representative District, and is also the Speaker Pro Tempore of the Kentucky House of Representatives ("Speaker Pro Tem Osborne"). Both President Stivers and Speaker Pro Tem Osborne held their respective

positions during the entirety of the 2018 Regular Session of the General Assembly, and during all times relevant to the present action instituted by the Plaintiffs.

The Plaintiffs' Complaint names President Stivers and Speaker Pro Tem Osborne in their respective official capacities only, and the allegations in Plaintiffs' Complaint refer only to actions taken by President Stivers and Speaker Pro Tem Osborne related to their legislative duties. Additionally, President Stivers and Speaker Pro Tem Osborne do not consent to this suit, and therefore, as is more fully discussed below, they are both cloaked with absolute legislative immunity and must be dismissed from this action as parties.<sup>1</sup>

### ARGUMENT

This Court lacks subject matter jurisdiction over the Plaintiffs' claims because the Legislative Defendants are protected from suit by legislative immunity, and because the declaratory judgment act specifically precludes making members of the General Assembly parties to any action challenging the constitutionality or validity of any statute without the consent of the member. Therefore, Plaintiff's Complaint against President Stivers and Speaker Pro Tem Osborne must be dismissed.

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<sup>1</sup> In the April 20, 2018 Order setting the briefing schedule for this case, the Court stated the President of the Senate and Speaker of the House of Representatives could be dismissed by agreement of the parties, and the President and Speaker granted leave to participate as *amicus curiae*. Counsel for the parties discussed the matter following the hearing on April 19, 2018, as well as following the hearing on Governor Bevin's Motion to Disqualify on April 25, 2018. Counsel for the parties met again to discuss the issue on April 26, 2018. On May 1, 2018, counsel for the Legislative Defendants sent a draft Agreed Order to counsel for the Plaintiff, Attorney General Andy Beshear. See email communication and copy of draft Agreed Order attached as Exhibit 1. More than two (2) weeks passed before the Attorney General's Office responded – noting simply in an email: “[u]nfortunately, we are unable to reach an agreement in this matter, as it appears we are too far apart on the terms for an agreement.” See email from Counsel for Plaintiff, Attorney General Andy Beshear, to Counsel for Legislative Defendants attached as Exhibit 2.

## **I. President Stivers And Speaker Pro Tem Osborne Are Shielded By Absolute Legislative Immunity**

A motion to dismiss is properly granted if a defendant is immune from suit. *See, e.g., R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 438 (6th Cir. 2005) (affirming district court dismissal of city council members entitled to legislative immunity). The concept of legislative immunity is embodied in both the United States Constitution and the Constitution of the Commonwealth of Kentucky. *See* U.S. CONST., Art. I, § 6 (“The Senators and Representatives . . . shall . . . be privileged . . . for any Speech or Debate in either House . . . .”); KY. CONST. § 43 (“The members of the General Assembly shall . . . be privileged from arrest . . . and for any speech or debate in either House they shall not be questioned in any other place.”). “The constitutional privileges granted to members of the Kentucky General Assembly mirror word-for-word the privileges granted to members of the Congress of the United States in the Speech and Debate Clause.” *Baker v. Fletcher*, 204 S.W.3d 589, 593 (Ky. 2006). Additionally, state legislators and their staff are protected by absolute legislative immunity under the common law. *See Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980) (“[S]tate legislators enjoy common-law immunity from liability for their legislative acts . . . .”) (citation omitted)); *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) (“It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities.”); and *Gravel v. U.S.*, 408 U.S. 606, 616 (1972) (“[F]or the purpose of construing the privilege a Member and his aide are to ‘be treated as one’ . . . .”) (citation omitted)).

Legislative immunity applies to all manner of actions because “a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.” *Consumers Union*, 446 U.S. at 733 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503, 95 S.Ct.

1813, 44 L.Ed.2d 324 (1975)). “[O]nce it is determined that Members are acting within the ‘legitimate legislative sphere’ the Speech or Debate Clause is an absolute bar to interference.” *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975) (citing *Doe v. McMillan*, 412 U.S. 306 (1973)). “Such immunity provided by the ‘Speech or Debate Clause’ applies not only to speech and debate, but also to voting, reporting and every official act in the execution of legislative duties while in session.” *Kraus v. Kentucky State Senate*, 872 S.W.2d 433, 440 (Ky. 1993) (citing *Wiggins v. Stuart*, Ky. App., 671 S.W.2d 262 (1984)) (add’l citation omitted). The question then is to “determine whether the activities are ‘an 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.’” *Eastland*, 421 U.S. at 503-04 (quoting from *Gravel v. United States*, 408 U.S. 606, 625 (1972)).

In the present case, there is no question that President Stivers and Speaker Pro Tem Osborne were acting within the legislative sphere when they presided over the Senate and House of Representatives, respectively, when those chambers passed Senate Bill 151 (“SB 151”), and when each of them cast a vote on SB 151. As noted by the United States Supreme Court in *Bogan*, the act of voting for and passing legislation is “quintessentially legislative.” *Bogan*, 523 U.S. at 55. Furthermore, this is directly analogous to the circumstances in *Baker v. Fletcher*, where the Plaintiffs therein sought declaratory and injunctive relief requiring the Governor to implement a 5% salary increment, and the parties agreed “that the legal issue is the scope of legislative authority.” 204 S.W.3d at 592. In *Baker*, the Kentucky Supreme Court held that even “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.

The Plaintiffs may seek to invoke *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989) for the position that legislative immunity does not apply when a plaintiff merely seeks to invalidate a statute on constitutional grounds. However, the Kentucky Supreme Court in *Baker* addressed this point by noting that “[i]n *Rose*, neither the President of the Senate nor the Speaker of the House moved the Court to dismiss based on legislative immunity.” *Baker*, 204 S.W.3d at 595, fn. 23. This is not the circumstances here, as President Stivers and Speaker Pro Tem Osborne are affirmatively asserting that legislative immunity applies.

As in *Baker*, President Stivers and Speaker Pro Tem Osborne may not be questioned for actions taken or not taken in their capacity as a legislator and they are immune from this suit. Therefore, this Court lacks subject matter jurisdiction and the Legislative Defendants respectfully request that the Plaintiffs’ Complaint be dismissed, with prejudice, as to the Legislative Defendants.

## **II. President Stivers And Speaker Pro Tem Osborne Are Not Proper Parties Under KRS 418.075**

“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 . . . .” KRS 418.040. Notwithstanding the Legislative Defendants’ position that immunity applies, and that this case presents non-justiciable questions, *see* Brief on the Merits filed contemporaneously with the Motion to Dismiss and this Memorandum

of Law in Support,<sup>2</sup> the Legislative Defendants are also not proper parties to this action by operation of KRS 418.075. Specifically, the General Assembly amended KRS 418.075 in 2003, to include a new subsection (4), which reads:

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.

KRS 418.075.

This amendment is clear, unambiguous language the General Assembly does not waive legislative immunity in actions brought under the declaratory judgment act against the body, the members, the Legislative Research Commission, or the officers and employees of either. Further, the subsection states that only with consent may a member be made a party to such an action. President Stivers and Speaker Pro Tem Osborne do not waive legislative immunity and do not consent to suit, and are thus not proper parties to this action. Therefore, the Legislative Defendants respectfully request that the Plaintiffs' Complaint be dismissed, with prejudice, as to the Legislative Defendants.

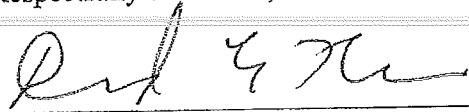
### CONCLUSION

For all of the foregoing reasons, the Legislative Defendants respectfully request that the Plaintiffs' Complaint be dismissed, with prejudice, as to the Legislative Defendants.

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<sup>2</sup> Non-justiciability is an alternate ground for this Court to find it lacks subject matter jurisdiction. However, that issue is not fully briefed herein because the Legislative Defendants assert legislative immunity applies and is a threshold issue that dispenses with the Plaintiffs' Complaint as to them.

Respectfully submitted,



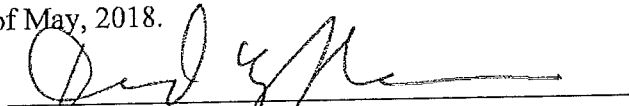
David Fleenor  
Vaughn Murphy  
Tyler Peavler  
Office of the President  
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Frankfort, KY 40601  
*Counsel for Defendant,  
Bertram Robert Stivers, II*

and

Eric Lycan  
Office of the Speaker Pro Tempore  
702 Capitol Avenue, Room 332  
Frankfort, KY 40601  
*Counsel for Defendant,  
David W. Osborne*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Memorandum of Law in Support of Motion to Dismiss, with any attached exhibits, has been served on the following parties or their counsels of record on this, the 23<sup>rd</sup> day of May, 2018.

  
Attorney for Legislative Defendants

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Joseph Bowman

1260 Louisville Road

Frankfort, KY 40601



## **Woosley, Greg (LRC)**

---

**From:** Woosley, Greg (LRC)  
**Sent:** Tuesday, May 1, 2018 4:27 PM  
**To:** Mayo, Travis (KYOAG)  
**Subject:** Beshear et al. v. Bevin, Stivers, Osborne et al. - Agreed Order (DRAFT)  
**Attachments:** Beshear v. Bevin, Stivers, Osborne Agreed Order (DRAFT).docx

Travis,

I know your office is probably busy working on a brief in the pension case, but I wanted to forward our draft Agreed Order for your review when your office has the time.

Please forward it to Deputy Secretary Brown, Ms. Buckner, and anyone else in your office that needs to review it – I simply didn't want to dump it on everybody the day before your briefing deadline.

Note that it is drafted to require agreement by all the Plaintiffs, as is likely necessary; however, I thought getting it in a form mutually agreeable to our offices first would likely be most productive.

Let me know if you have any trouble with the file, any questions, or if you want to discuss the draft.

All the best,

### **Greg Woosley**

General Counsel  
Director's Office  
Legislative Research Commission  
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EXHIBIT

1

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 18-CI-379

COMMONWEALTH OF KENTUCKY  
*ex rel.* ANDY BESHEAR, ATTORNEY GENERAL, *et al.*

PLAINTIFFS

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MATTHEW G. BEVIN, in his official capacity as  
Governor of the Commonwealth of Kentucky, *et al.*

DEFENDANTS

AGREED ORDER OF DISMISSAL

The Plaintiffs, Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, Kentucky Education Association, and Kentucky State Lodge Fraternal Order of Police, and the Defendants, Bertram Robert Stivers, II, in his official capacity as President of the Kentucky Senate, and David W. Osborne, in his official capacity as Speaker Pro Tempore of the Kentucky House of Representatives, being in agreement, and the Court being duly and sufficiently advised, the Court hereby finds as follows:

- (1) The Defendants, Bertram Robert Stivers, II, as President of the Kentucky Senate, and David W. Osborne, as Speaker Pro Tempore of the Kentucky House of Representatives, have absolute immunity from suit for actions taken in their official capacity as elected members of the Kentucky General Assembly;
- (2) The Defendants, Bertram Robert Stivers, II, as President of the Kentucky Senate, and David W. Osborne, as Speaker Pro Tempore of the Kentucky House of Representatives, nonetheless, have an important and potentially beneficial perspective to offer to the Court on the issues of great public interest raised by the Plaintiffs in this action; and

~~(3) The Plaintiffs and Defendants mutually desire to fully brief the Court on the issues raised,~~  
so that an Opinion and Order entered by the Court is based on as complete a record as is possible in this action.

THEREFORE, the Court orders as follows:

- (1) The Defendants, Bertram Robert Stivers, II, as President of the Kentucky Senate, and David W. Osborne, as Speaker Pro Tempore of the Kentucky House of Representatives, are DISMISSED, from the above-styled action, as parties;
- (2) The Defendants, Bertram Robert Stivers, II, as President of the Kentucky Senate, and David W. Osborne, as Speaker Pro Tempore of the Kentucky House of Representatives, are GRANTED the option to brief the Court as AMICUS CURIAE only, on the same schedule as the other Defendants, as established by this Court's Order entered on April 20, 2018; and
- (3) The Defendants, Bertram Robert Stivers, II, as President of the Kentucky Senate, and David W. Osborne, as Speaker Pro Tempore of the Kentucky House of Representatives, and their counsels of record shall remain on the service and distribution lists so that they receive all pleadings and other documents in this action.

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

\_\_\_\_\_  
HON. PHILLIP J. SHEPHERD  
Judge, Franklin Circuit Court

Have seen and Agreed:

---

David Fleenor, Esq.  
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*Counsel for Defendant,  
Bertram Robert Stivers, II*

---

Greg Woosley, Esq.  
Legislative Research Commission  
700 Capitol Avenue, Room 300  
Frankfort, KY 40601  
*Counsel for Defendant,  
David W. Osborne*

---

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J. Michael Brown, Deputy Attorney General  
La Tasha Buckner, Esq.  
Travis Mayo, Esq.  
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*Counsel for Plaintiff,  
Andy Beshear*

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*Counsel for Plaintiff,  
Kentucky Education Association*

---

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*Counsel for Plaintiff,  
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Joseph Bowman  
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**Woosley, Greg (LRC)**

**From:** Mayo, Travis (KYOAG) <Travis.Mayo@ky.gov>  
**Sent:** Tuesday, May 15, 2018 5:39 PM  
**To:** Woosley, Greg (LRC)  
**Cc:** Brown, J.Michael (KYOAG); Buckner, La Tasha A (KYOAG)  
**Subject:** RE: Beshear et al. v. Bevin, Stivers, Osborne et al. - Agreed Order (DRAFT)

Greg:

Thank you for sending the draft proposed agreed order. Unfortunately, we are unable to reach an agreement in this matter, as it appears we are too far apart on the terms for an agreement.

Thanks,  
Travis

S. Travis Mayo  
Executive Director  
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**From:** Woosley, Greg (LRC) <Greg.Woosley@LRC.KY.GOV>  
**Sent:** Tuesday, May 01, 2018 4:27 PM  
**To:** Mayo, Travis (KYOAG) <Travis.Mayo@ky.gov>  
**Subject:** Beshear et al. v. Bevin, Stivers, Osborne et al. - Agreed Order (DRAFT)

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All the best,

**Greg Woosley**

General Counsel

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