COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-379
- AND -
CIVIL ACTION NO. 18-CI-414

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

PLAINTIFFS' RESPONSE TO LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

The Plaintiffs, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, the Kentucky Education Association ("KEA"), and the Kentucky State Lodge Fraternal Order of the Police ("FOP"), submit the following response in opposition to the motion to dismiss of Defendants, Bertram Robert Stivers, II, and David W. Osborne ("Legislative Defendants"). The Court should deny the motion, which is untimely pursuant to CR 12.01,[1] under the well-established precedent of the Kentucky Supreme Court that members of the General Assembly are not immune from a declaratory judgment action such as this action.

I. The Legislative Defendants Are Not Immune From Declaratory Judgment.

In multiple decisions, the Kentucky Supreme Court has squarely rejected the Legislative Defendants' argument that they are entitled to legislative immunity in a declaratory judgment action. Following that precedent, this Court should also reject the argument and deny the

[1] Plaintiffs filed and served their Complaint on April 11, 2018, and the Defendants' answers or responsive pleadings were due on May 1, 2018 pursuant to CR 12.01. All Defendants but the Legislative Defendants filed Answers to the Complaint on or before May 1, 2018. The Legislative Defendants served their motion to dismiss on May 23, 2018, 22 days out of time and without seeking leave to file the motion out of time. Civil Rule 12.02 provides that insufficiency of process and insufficiency of service of process are affirmative defenses that shall be asserted in the responsive pleading or may be made by motion before pleading.

Legislative Defendants' motion. The Legislative Defendants are proper parties to this action seeking only a declaration of rights as to the failure of the General Assembly to comply with constitutional and statutory mandates in enacting SB 151.

In *Jones v. Bd. of Trustees of Ky. Judicial Retirement Sys.*, the Kentucky Supreme Court relied on its well-established precedent holding that members of the General Assembly named as defendants in an action seeking a declaration of rights do not have immunity. 910 S.W.2d 710, 713 (Ky. 1995). There, the Board of Trustees of the Kentucky Retirement Systems named members of the General Assembly in a declaratory judgment action challenging the 1992 Budget Bill and its effect on the Board's authority to set actuarially-sound employer contribution rates, and asserting that failure to meet its contribution requests impaired KERS member contract rights under KRS 61.692. *Id.* at 711-12.

The Court first pointed to *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), which held that the General Assembly was properly before the Court in a declaratory judgment action addressing its constitutional obligations concerning an efficient system of common schools. *Id.* at 713. In *Rose*, the Speaker of the House and the President *Pro Tempore* of the Senate were named as defendants, and the Court held that while they could not by themselves enact legislation, they could "defend the constitutionality of an act or acts." *Id.* (quoting *Rose*, 790 S.W.2d at 204-05). The Court found that it was "only common sense and practical to hold that service [of process] 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.* (quoting *Rose*, 790 S.W.2d at 204-05).

The Court in *Jones* continued by noting that in *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992), which also followed *Rose*, the Court rejected immunity in a declaratory judgment action

concerning whether the General Assembly had failed to carry out a constitutional mandate. *Id.* The Court also cited to *Kraus v. Kentucky State Senate*, 872 S.W.2d 433, 439 (Ky. 1994), holding that "members of the General Assembly are not immune from declaratory judgment relief simply because they are acting in their official capacities." *Id.* Concluding that immunity does not apply to the legislators named in the declaratory judgment action, the *Jones* Court wrote:

> It would undermine and destroy the principle of judicial review to hold that the General Assembly could act with immunity, contrary to the Kentucky Constitution. Any such holding would leave citizens of this Commonwealth with no redress for the unconstitutional exercise of legislative power. This we will not do.

Id. (citing *Fisher v. State Bd. of Elections*, 879 S.W.2d 475 (Ky. 1994.)

The Court additionally recognized in *Jones* that in *Philpot v. Patton* it had rejected the trial court's decision that the controversy regarding the constitutionality of a Senate Rule was nonjusticiable because the Senate was immune from suit, based on official-capacity immunity members of General Assembly members, or based on violation of the separation of powers. 837 S.W.2d 491, 493-94 (Ky. 1992). The Court held:

> Our decision in *Rose v. Council for Better Education, Inc.*, Ky. 709 S.W.2d 186 (1989) puts these arguments to rest. *Rose* held that the General Assembly is not immune from suit in a declaratory judgment action to decide whether the General Assembly has failed to carry out a constitutional mandate and that members of the General Assembly are not immune from declaratory relief of this nature simply because they are acting in their official capacity. *Rose* held a declaratory judgment over constitutionality is not limited to deciding the constitutionality of statutes, but extends to failure to enact statutes complying with constitutional mandate. While it would be a violation of the separation of powers doctrine in the Kentucky Constitution, Sections 27 and 28, for our Court to tell the General Assembly what to do, i.e., what systems or rules to enact, it is our constitutional responsibility to tell them whether the system in place complies with or violates a constitutional mandate, and, if it violates the constitutional mandate, to tell them what is the constitutional "minimum."

Id. at 494.

In *Rose*, the Kentucky Supreme Court held that the Speaker of the House and the Senate President *Pro Tempore* were properly before the Court in a declaratory judgment action concerning the constitutional responsibility of the General Assembly to establish an efficient system of common schools. 790 S.W.3d 186, 203-05 (1989). In finding that the judiciary has a duty to decide such cases, the Court found: "To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty. ***To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.***" *Id.* at 209 (emphasis added). Noting that ". . . the case at bar attacks the constitutionality of an act or series of acts of a legislative body," and that the case was of major statewide importance, the Court rejected the legislators' contention that each member of the General Assembly must be served for a court to acquire jurisdiction over the General Assembly. *Id.* at 204-05. Nowhere in the decision did the Court mention, much less base its holding on, the legislators not filing a motion to dismiss on immunity grounds in the trial court. *See id., generally.*

II. *Rose* Remains The Law In Kentucky.

The Legislative Defendants next argue that *Baker v. Fletcher*, 204 S.W.3d 589, 595 n. 23 (Ky. 2006), upends *Rose* and all of the decisions upholding *Rose*. (*See* Memo. in Support of Motion to Dismiss, at 5.) *Baker* involved the legislature's retroactive suspension of a statute and requests for declaratory, injunctive and monetary relief, and the plaintiffs named only the Governor as a defendant, but not the General Assembly or its members. 204 S.W.3d at 592. The Court affirmed the trial court's decision on the merits in favor of the Governor. *Id.* at 598.

In a footnote, the Court indicated that its proposition on legislative immunity did not call into question the Court's holding in *Rose* because in *Rose* the legislators did not file a motion to

dismiss. *Id.* at 595 n. 23. While the Legislative Defendants assert here that the failure of the legislators in *Rose* to file a motion to dismiss distinguishes that case from this action, that simply was not any part of the Court's analysis or holding in *Rose*. *See Rose*, 790 S.W.2d 186. Thus, *Baker* did not abrogate, reverse or alter the *Rose* decision. Instead, the Kentucky Supreme Court has applied *Rose* and its progeny since *Baker*. In *Commonwealth v. Kentucky Ret. Sys.*, the Court ruled that sovereign immunity did not apply to protect the Commonwealth from suit for a declaratory judgment. 396 S.W.3d 833, 839-40 (Ky. 2013). There, members of CERS filed an action seeking a declaration that KRS 61.637(1) violated the inviolable contract and was unconstitutional. *Id.* at 835. The Court agreed with the trial court that a declaratory judgment action is not a claim for damages, but is a request that the plaintiff's rights under the law be declared. *Id.* at 838.

The Court recognized that sovereign immunity "is founded on the notion that the resources of the state, its income and property, cannot be compelled as recompense for state action that harms a plaintiff through the ordinary suit-at-law process." *Id.* at 836. "There is no harm to state resources from a declaratory judgment." *Id.* at 838. Instead, the Declaratory Judgment Act "allows courts to determine a litigant's rights before harm occurs, and requires the existence of an actual controversy. Such a controversy occurs when a defendant's position would 'impair, thwart, obstruct or defeat a plaintiff in his rights.'" *Id.* at 839 (quoting *Revis v. Daugherty*, 287 S.W. 28, 29 (Ky. 1926)).

The Court continued by stating KRS 61.637 was altered by the legislature to limit retirement benefits upon reemployment by a public agency. *Id.* The Court wrote: "Both versions of KRS 61.637 are state action. Clearly, the Commonwealth has an interest in seeing its laws upheld, and if a legislative 'fix' is required, only the Commonwealth through its legislature may

do so. When the interest at issue is a question of governance of the Commonwealth, only the Commonwealth, in some form, can be the defendant." *Id.* "The alternative–to shield the Commonwealth from being subject to the constitution and its legislative enactments under a claim of sovereign immunity–is to create a 'king' who is beyond review and make the will of the people meaningless. *Id.*

The Court went on to point out that it had addressed the question in *Rose* and *Jones*, 910 S.W.2d 710. Quoting *Jones*' holding that allowing the General Assembly to act with immunity in violation of the Kentucky Constitution would leave citizens with no redress for the unconstitutional exercise of legislative power, the Court reasoned: "The logic of this statement is inescapable. On the question of the constitutional appropriateness of governmental actions, there can be no immunity. To hold that the state has immunity from judicial review of the constitutionality of its actions would be tantamount to a grant of arbitrary authority superseding the constitution, which no law or public official may have." 396 S.W.3d at 840. As the Court's sound ruling reflects, *Baker* had no effect on *Rose* and the cases that applied it.

Neither did the Court's holding in *Kraus v. Kentucky State Senate*. Pointing to the *Rose* and *Philpot* decisions that held that the General Assembly is not immune from a declaratory judgment action regarding their failure to carry out a constitutional mandate in enacting legislation, the Kentucky Supreme Court in *Kraus* held that the plaintiff had standing to sue the defendants, including the Speaker of the House and the President *Pro Tempore* of the Senate. 872 S.W.2d at 433. The Court also held that Section 43 of the Kentucky Constitution provides legislative immunity from suits for damages such as in that case, where the plaintiff brought tort and civil rights claims against the Senate and sought monetary damages against members of the Senate. *Id.* at 440. Unlike in *Kraus*, the Plaintiffs seek no monetary damages, against any

defendant, and seek no injunctive relief against the Legislative Defendants. Regardless, *Kraus* did not hold that legislators are immune from an action seeking a declaration of rights as to whether the General Assembly complied or failed to comply with constitutional and statutory mandates in enacting legislation.

Rose remains the law in Kentucky on the limits of legislative immunity.

II. KRS 418.075(4) Does Not Give The General Assembly Free Rein To Violate the Kentucky Constitution.

The Legislative Defendants also argue that KRS 418.075(4) bars the Plaintiffs, and any plaintiff, from seeking a declaration of rights against members of the General Assembly. Amended in 2003, KRS 418.075(4) provides that members, organizations within the legislative branch, or officers or employees of the legislative branch shall not be named parties in an action challenging the constitutionality or validity of a statute or regulation without consent. The plain language of the statute reflects the intent of the legislature that its members not be named as defendants in every constitutional challenge to a statute or regulation. Otherwise, those listed in KRS 418.075(4) would be forced to appear and defend themselves in the thousands of cases challenging the validity of a statute or regulation each year. The statute does not, as the Legislative Defendants contend, shield the General Assembly or its members from a declaratory judgment action concerning their failure to comply with constitutional and statutory mandates when enacting legislation. As the Court held in *Commonwealth v. Kentucky Retirement Sys.*, which came after the amendment to KRS 418.075(4), allowing the General Assembly to act with immunity contrary to the Kentucky Constitution would "leave citizens with no redress for the unconstitutional exercise of legislative power." 396 S.W.3d at 840.

CONCLUSION

Longstanding Kentucky Supreme Court precedent establishes that legislative immunity does not shield the Legislative Defendants from this declaratory judgment action alleging that the General Assembly failed to enact legislation complying with constitutional and statutory mandates. The Plaintiffs allege that the General Assembly enacted SB 151 in violation of the constitutional mandates of Sections 46 and 56 of the Kentucky Constitution. The Plaintiffs also allege the General Assembly enacted SB 151 in violation of the statutory mandates of KRS 6.350 and KRS 6.955. The Plaintiffs seek a declaration of rights as to the official acts of the General Assembly in failing to follow the process mandated by the Kentucky Constitution and state statute. They do not seek any monetary relief. Neither do they seek any injunctive relief against the Legislative Defendants. Finding that the Legislative Defendants are immune from this declaratory judgment action would "undermine and destroy the principle of judicial review" and "leave citizens of the Commonwealth with no redress for the unconstitutional exercise of legislative power." As the *Jones* Court, this Court should also refuse to reach this result, and should deny the motion to dismiss.[2]

[2]The Attorney General proposed to counsel for the Legislative Defendants on multiple occasions, beginning with the date the parties first appeared before the Court on April 19, 2018, certain terms for counsel to consider regarding a potential agreement on the dismissal of the Legislative Defendants. The proposed Agreed Order counsel for the Legislative Defendants presented contained none of the terms the Attorney General proposed, signaling the Legislative Defendants were unwilling to consider or agree to any of the terms.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 30, 2018, I electronically filed the foregoing Response to the Legislative Defendants' Motion to Dismiss 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' Brief on the Merits on the individuals whose names appear on the following Service List via U.S. mail and/or hand delivery on May 30, 2018.

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