COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-414
CIVIL ACTION NO. 18-CI-379
(CONSOLIDATED)
FILED ELECTRONICALLY

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**

NOTICE

Although the Attorney General declined to notice his motion, the Governor notices the Attorney General's motion to strike for a hearing at 9:00 am on June 27, 2018, or as soon thereafter as the parties may be heard.

RESPONSE IN OPPOSITION TO MOTION TO STRIKE

Faced with the disastrous repercussions of his claims against Senate Bill 151, the Attorney General resorts to asking the Court to strike any evidence of how his ill-conceived suit will wreak havoc on the state. He seems unable to engage the merits of these issues. He would rather bury his head in the sand while repeating his talking point that he represents over 200,000 Kentuckians who await this Court's ruling on Senate Bill 151. What about the other 4.2 million folks living in Kentucky who would

suffer if the Court adopted the Attorney General's unprecedented legal arguments? Apparently, they are not the Attorney General's concern.

Consider the context of the Attorney General's motion to strike for a minute. On April 23, 2018, the Attorney General filed a brief in this Court arguing that he "has the '***obligation*** to protect public rights and interests by ensuring that our government acts legally and constitutionally.'" [4-23-18 AG's Resp. to Gov. Mtn. to Disqualify at 3 (emphasis in original) (quoting *Beshear v. Bevin*, 498 S.W.3d 355, 362 (Ky. 1992))]. This duty, the Attorney General claimed, is so paramount to his office that he is not even required to follow the ordinary conflict-of-interest rules that govern attorneys if doing so prevents him from defending the Constitution. [*Id*. at 1–3]. He must protect the Constitution above all else.

Now it is clear that the Attorney General's duty to defend the Constitution extends only to the issues that garner him political support. The Governor, who is obligated under Section 81 of the Constitution to faithfully execute the laws of the Commonwealth, is seeking an adjudication on the constitutionality of numerous other statutes called into question by the Attorney General's claims. If the Attorney General were serious about his duty to defend the Constitution by challenging laws he believes were unconstitutionally enacted, he would welcome the Governor's declaratory action. But instead, he asks the Court to strike the Amended Petition so that he does not have to deal with the very real consequences of his novel claims.

All of this context is significant because the actual merits of the Attorney General's motion are extraordinarily frivolous. Civil Rule 15.01 permits a party to file

an amended complaint as of right "at any time before a responsive pleading is served." CR 15.01. The Attorney General has not yet served a responsive pleading, instead having filed a motion to dismiss that remains pending. Because of this, the Governor's Amended Petition was timely filed and "the court has no judicial discretion to reject it." *See Whitney Transfer Co. v. McFarland*, 138 S.W.2d 972,975 (Ky. 1940). While the majority of the Attorney General's motion is spent accusing the Governor of bad faith and trying to delay resolution of the challenge to Senate Bill 151, none of these tired accusations matter. The Governor's Amended Petition was filed as of right and cannot be rejected under CR 15.01. The Attorney General's motion must therefore be denied.

ARGUMENT

I. The Amended Petition was filed as a matter of right because the Attorney General has not yet served a responsive pleading.

A quick refresher in civil procedure resolves this motion without difficulty. The Kentucky Rules of Civil Procedure provide that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served." *See* CR 15.01. This is the end of the story. The Attorney General has not served a responsive pleading, which means the Governor is entitled to amend his pleading as a matter of right. *See Ky. Lake Vacation Land, Inc. v. State Prop. & Bldgs. Comm'n*, 333 S.W.2d 779, 781 (Ky. 1960). "[T]he court has no judicial discretion to reject it." *Whitney Transfer Co. v. McFarland*, 138 S.W.2d 972, 975 (Ky. 1940).

So why all the fuss? The Attorney General apparently believes he filed a responsive pleading on May 2, 2018. But the only document filed on May 2 was his

motion to dismiss, and a motion to dismiss is not a responsive pleading. *See* CR 7.01; *Ky. Lake Vacation Land*, 333 S.W.2d at781. This is well-established by both the Kentucky Rules of Civil Procedure and every court that has addressed the issue.

Although many attorneys casually refer to most documents filed in a lawsuit as a "pleading," this colloquial usage of the word is not accurate. A "pleading" is specifically defined in Rule 7.01, which states:

> There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and a third-party answer, if a third-party complaint is served. ***No other pleading shall be allowed***, except that the court may order a reply to an answer or a third-party answer.

CR 7.01 (emphasis added). The general rule is easy to follow: a pleading either initiates a party's claims or responds to them. In the case of the latter, the civil rules refer to it unoriginally as a "responsive pleading." But absent from this list is a motion to dismiss—because a motion to dismiss is not a pleading.[1]

But Rule 7.01 is not the end of the story. Rule 12, which is the rule the Attorney General relied on when he filed his motion to dismiss on May 2, 2018, makes the point even clearer. First, Rule 12.02 establishes the grounds for filing a motion to dismiss. In doing so, the rule draws a distinction between a responsive pleading and a defensive motion:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim ***shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the***

[1] In fact, motions are provided for in the next rule, CR 7.02, which is aptly titled "Motions and other papers."

> ***pleader be made by motion:*** (a) lack of jurisdiction over the subject matter, . . . (f) failure to state a claim upon which relief can be granted . . . . A motion making any of these defenses shall be made ***before pleading*** if further pleading is permitted.

CR 12.02 (emphasis added). Under this rule, a party must file a motion to dismiss *before* filing his responsive pleading. If a motion to dismiss was the responsive pleading, the rule would be facially inconsistent.

The same distinction arises in Rule 12.01, which establishes the time period for filing a responsive pleading. Ordinarily, a party must answer a pleading within twenty days of service. *See* CR 12.01. But the time period changes when a party files a motion to dismiss. In such circumstances, "the responsive pleading shall be served within ten (10) days after entry of the court's order" if the motion is denied. CR 12.01. Again, the rule would be incomprehensible if a motion to dismiss was "the responsive pleading." It is not, which is why Rule 12 draws the distinction between the two.

There is no ambiguity in these rules, but even if there were, countless Kentucky courts have confirmed that a motion to dismiss is not a responsive pleading. *See, e.g., Ky. Lake Vacation Land, Inc.*, 333 S.W.2d at 781; *Fisher v. Kentucky Unemployment Ins. Com'n*, 880 S.W.2d 891, 894 (Ky. Ct. App. 1994) ("Under CR 15.01, Fisher had an absolute right to amend her complaint."); *Hawes v. Cumberland Contracting Co.*, 422 S.W.2d 713, 714 (Ky. 1967) ("Cumberland's motion to dismiss was not a pleading."); *Vincent v. City of Bowling Green*, 349 S.W.2d 694, 696 (Ky. 1961) (holding that an "amended complaint was properly filed" because a motion to dismiss is not a responsive pleading); *White v. Ashland Park Neighborhood Ass'n, Inc.*, No. 2008-CA-001303-MR 2009 WL 1974750, *4 (Ky. App. July 10, 2009)

(unpublished) ("[I]t is well-established that a motion to dismiss is not considered a responsive pleasing for purposes of CR 15.01, so that rule's language providing that a party may amend his pleading once as a matter of course at any time before a responsive pleading is served was still applicable."); *Gerstle v. Clay*, No. 2006-CA-000131-MR, 2007 WL 1575347, *2 (Ky. App. June 1, 2007) ("Clay's motion to dismiss was not a responsive pleading and Gerstle was entitled to amend her complaint."). In *Kentucky Lake Vacation Land*, for example, the Court of Appeals—then Kentucky's highest court—reversed the trial court for making this error. It explained that "[a] motion to dismiss is not a responsive pleading" and "[t]he court erred in refusing to permit the amendment." 333 S.W.2d at 781. Similarly, the Court in *Whitney Transfer Company* held that "the court has no judicial discretion to reject" an amended complaint filed before an answer is served. 138 S.W.2d at 975.

The Attorney General filed a motion to dismiss on May 2, 2018. He has yet to file a responsive pleading. Accordingly, the Governor's Amended Petition was filed as a matter of right under CR 15.01, and this Court has no authority to reject it. The motion to strike must be denied.

II. The Governor's Amended Petition was not filed in bad faith and will not prejudice the Attorney General.

The bulk of the Attorney General's motion is spent arguing that the Court should deny the Amended Petition if construed as a motion to amend. Because a motion to amend is unnecessary, all of the arguments raised by the Attorney General are irrelevant. Nonetheless, the Governor will briefly dispense with their merits.

The Amended Petition was not filed in bad faith to cause delay and it does not create undue prejudice for any party. Notably, the Governor's case was originally filed *separately* from the suit challenging Senate Bill 151 and has never been intended to delay the Court's ruling on the Attorney General's claims. The Court, not the Governor, consolidated the actions on its own initiative, and at no point has the Governor asked the Court to delay ruling on the claims against Senate Bill 151 so that it can also rule on the Governor's declaratory action. Nor is delay necessary: the Governor alleges that the exact same issues that the Attorney General raises with regard to Senate Bill 151 apply to numerous other laws now identified in the Amended Petition. If the Court were to strike down Senate Bill 151 on those grounds, there would be no delay in also striking down every law that suffers from the same purported constitutional defect.

On the other hand, the Attorney General provides no explanation as to why the Court should delay resolving the constitutional issues with respect to other laws not named Senate Bill 151. Why is the Attorney General only interested in enforcing his view of the Constitution for one particular law?[2] Every first-year law student is taught that legal principles must be consistently applied if the law is to be administrable and understandable. Somehow the Commonwealth's "chief law officer" fails to grasp this foundational point. The term "chief law officer" is emptied of any

[2] The Attorney General has repeatedly accused the Governor of attempting to delay the litigation over Senate Bill 151 even though the Governor has not once asked the Court to extend a deadline in the case. While this posturing is likely useful on the Attorney General's campaign trail, it is simply inaccurate. The Attorney General, on the other hand, appears intent on delaying any adjudication regarding the constitutionality of numerous other laws, which has been called into question by his own ill-conceived suit.

meaning if the Attorney General can challenge only those laws that do not suit his political agenda.

Moreover, it is unclear what would be gained from striking the Amended Petition. The only arguments against amendment concern the speed at which this Court resolves the challenge to Senate Bill 151. No one disputes that the Governor could file a *separate* declaratory action regarding the same issues—which is what the Governor originally did before the Court consolidated the claims. Striking the Amended Petition would only delay resolution of the constitutional issues that affect millions of Kentuckians, something the Attorney General claims he is against.

Finally, the Amended Petition is not futile for the reasons stated in the Governor's response to the Attorney General's motion to dismiss, which is incorporated here by reference. The Governor's declaratory action seeks an adjudication on justiciable issues raised by the Attorney General that must be resolved so that the Governor can fulfill his constitutional duty to execute and enforce the law. The Governor is the Chief Magistrate of the Commonwealth charged with the faithful execution of the laws of the state, a task he cannot complete if he does not know what the law is. *See* Ky. Const. §§ 69, 81. Countless laws—some landmark legislation—will be invalidated if the Attorney General's theories are adopted by the Court, and the Governor needs a ruling on the scope and application of any such decision. The Amended Petition, therefore, is not futile.

CONCLUSION

The Amended Petition was filed as of right pursuant to CR 15.01 and this Court has "no judicial discretion to reject it." *Whitney Transfer Co.*, 138 S.W.2d at 975. Accordingly, the Attorney General's motion to strike must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served via email this 18th day of June, 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, Kentucky 40601, Jeffrey Walther, Walther, Gay & Mack, 163 E. Main St., Suite 200, Lexington, KY 40588, David Leightty, Priddy, Cutler, Naake, Meade, 2303 River Road, Suite 300, Louisville, KY 40206, David Fleenor, Capitol Annex, Room 236, Frankfort, KY 40601, Eric Lycan, Office of the Speaker, Capitol Annex, Room 332, Frankfort, KY 40601, Mark Blackwell, 1260 Louisville Road, Frankfort, KY 40601, and Bill Johnson, Johnson Bearse, LLP, 326 West Main St., Frankfort, KY 40601.

/s/ Brett R. Nolan
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ORDER

This matter is before the Court on a motion to strike filed by Respondent, Andy Beshear, in his official capacity as Attorney General of the Commonwealth of Kentucky. The Court, having been sufficiently advised, **HEREBY ORDERS** that the motion to strike is **DENIED**.

Dated this ____ day of June, 2018.

_____
CIRCUIT JUDGE