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' BRIEF ON THE MERITS

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"), pursuant to the Court's April 20, 2018 scheduling order, tender the following Brief on the Merits.

INTRODUCTION

The Plaintiffs are entitled to judgment as a matter of law. In passing Senate Bill 151 ("SB 151"), the Defendants violated critical provisions of Kentucky's Constitution, Bill of Rights, and state statutes. These provisions are mandatory, and their violation voids SB 151 in its entirety. Accordingly, this Court should grant judgment for the Plaintiffs as a matter of law.

On March 29, 2018, the House recessed just after 2:00 p.m., to hold a previously unannounced meeting of the House Committee on State Government. The meeting was held in a small conference room from which the public was excluded. When they arrived, legislators learned that the agenda (also unannounced) contained just one bill: SB 151. SB 151 – an 11-page

sewer bill – was called, and then immediately amended, stripping out all of its original sewer language and substituting 291 pages of new legislation purporting to overhaul Kentucky's public employee retirement systems. SB 151 was then voted out of Committee without public hearings, without an actuarial analysis or fiscal note, and before most legislators could even read the bill. SB 151 then directly proceeded to the House Floor. The House then "passed" the bill, but did so without the constitutionally-required 50 votes, without the constitutionally-required three separate readings on three separate days, and without the constitutionally-required signature of the presiding officer. SB 151 was then sent to the Senate, which likewise hastily and improperly "passed" the bill. Governor Bevin signed the bill on April 10, 2018.

The process by which SB 151 was passed is government at its worst, intended to exclude both the public and large portions of the General Assembly itself. It was further unconstitutional and unlawful, violating Sections 2, 46, and 56 of the Kentucky Constitution as well as KRS 6.350 and KRS 6.955. Even if it had been passed in a constitutional and transparent manner, SB 151 would still be unconstitutional, because it violates and substantially impairs the retirement rights and benefits of Kentucky's public employees, amounting to violations of Sections 13 and 19 of the Kentucky Bill of Rights.

Specifically, SB 151 violates the Kentucky Constitution and Kentucky law in the following ways:

(1) Section 46 requires every bill receive three readings on three separate days in each chamber. SB 151 did not receive the required readings;

(2) Section 46 requires every bill containing an appropriation to receive a 51-member majority vote in the House of Representatives. SB 151 contains self-executing appropriations, but only received 49 votes in favor of passage;

(3) Section 46 requires every bill be read "at length." SB 151 was never read at length in either chamber of the Kentucky General Assembly;

(4) KRS 6.350 requires bills affecting public retirement systems to have an actuarial analysis, and KRS 6.955 requires bills affecting counties to have a fiscal impact note before they are considered by either house of the General Assembly. No actuarial analysis or fiscal note was attached to SB 151;

(5) Section 56 requires the presiding officer of the House to sign each bill. SB 151 was not signed by the Speaker or anyone appropriately exercising the authority of Speaker;

(6) Section 56 requires each bill to be "read at length" before it is signed by the presiding officer of each House. SB 151 was not "read at length" before it was signed;

(7) Section 2 prohibits the General Assembly from exercising absolute and arbitrary power in contravention of law. The General Assembly passed SB 151 in direct contravention of express Kentucky law;

(8) The Contracts Clause of Section 19 prohibits any law impairing contracts. SB 151 contains provisions that violate the inviolable contract by substantially impairing the retirement rights and benefits of Kentucky's public employees; and

(9) The Takings Clause of Section 13 prohibits the taking of private property without just compensation. SB 151 deprives Kentucky public employees of their property rights in the benefits guaranteed under the inviolable contract.

The General Assembly broke its word and the law when it passed SB 151. This Court should grant judgment for the Plaintiffs as a matter of law and declare SB 151 void.

STATEMENT OF FACTS

The facts in this case are uncontroverted. March 29, 2018 was the 57th day of the 2018 Kentucky Legislative Session. By this time, a "pension reform" bill – Senate Bill 1 – had been introduced in the Senate,[1] but had failed to secure the necessary votes to pass that chamber.

[1] Senate Bill 1 was introduced in the Senate on February 20, 2018. *See* Legislative Record For Senate Bill 1, available at http://www.lrc.ky.gov/record/18RS/SB1.htm (last visited May 1, 2018). SB 1 was reported favorably to the Rules Committee with a Committee Substitute on March 7, 2018. *Id*. On March 8, 2018, SB 1 was posted for passage in the Regular Orders of the Day for March 9, 2018. *Id*. On March 9, 2018, the Senate Majority Caucus met for several hours, thereafter, the Senate referred SB 1 back to committee. *Id*.

Strong public opposition led the sponsor of SB 1 to declare the bill was "on life support,"[2] and the President of the Senate stated that there was "little hope" the bill would pass.[3] The Attorney General twice informed the legislature of the numerous ways it violated the inviolable contract for each public retirement system. (*See* Attorney General's Letters to the General Assembly) (Attached as Ex. A.) Nevertheless, just after 2:00 p.m. on March 29th, the Kentucky House of Representatives called for a recess so that its Committee on State Government could meet.

I. The House State Government Committee Hearing On SB 151.

This meeting was a surprise. It had not been previously scheduled or announced to the public, nor was it listed on the legislative calendar. And it was not held in the legislative hearing rooms in the Capitol Annex, but was instead held in a small conference room in the Capitol. The public – including hundreds of teachers rallying outside of both the House chamber and the small conference room – was excluded. Representative Jerry T. Miller, Chairman of the House Committee on State Government, opened the meeting and called SB 151, an 11-page sewer bill that had passed the Senate with little opposition.

Representative John "Bam" Carney immediately introduced a substitute to SB 151, which was adopted on a voice vote. The substitute stripped SB 151's language in its entirety, including all language concerning sewers. The bill instead became a massive 291-page overhaul of Kentucky's public pension systems. Unquestionably, the entire subject of SB 151 changed, with the new topic (pensions) being in no way germane to the original one (sewers). Despite the fact

[2] *Herald Leader: Pension Bill Still on 'Life Support,' Sponsor Says*, available at https://www.lanereport.com/88547/2018/03/herald-leader-kentucky-pension-bill-still-on-life-support-says-sponsor/ (last visited Apr. 30, 2018).

[3] Tom Loftus, *I Don't See A Lot of Hope For It, Kentucky's Pension Reform Bill Is Unlikely To Pass*, available at https://www.courier-journal.com/story/news/politics/2018/03/14/stivers-dont-see-lot-hope-pension-bill/424601002/ (last visited Apr. 30, 2018).

that the majority of the Committee had never seen, much less had time to read the substitute, Chairman Miller stated that the Committee would vote on the new SB 151 during the meeting. (Transcript of Legislative Proceedings at 30 (March 29, 2018)) (Attached as Ex. B); (House Committee on State Government, Video 1) (Attached as Ex. C.)

In the Committee, Representative Carney testified at length about how SB 151 was different from SB 1. He stated that SB 151 made fewer "substantial change[s]" for current teachers, such as "the freezing of the sick days." (Ex. B., p. 32:5-6); (Ex. C., at House State Government, Video 2.) He further stated that, unlike SB 1, SB 151 was "basically try[ing] to put this on future hires." (Ex. B., p. 32:15-16); (Ex. C., at House State Government, Video 2.) In sum, Representative Carney's testimony was that there were substantial differences between SB 151 and SB 1. (Ex. B., p. 39:21); (Ex. C. at House Committee on State Government, Video 6.)

Chairman Miller likewise stated "[t]his is not Senate Bill 1." (Ex. B., p. 31:13-14); (Ex. C. at House Committee on State Government, Video 2.) To ensure absolute certainty, Representative Will Coursey further questioned Representative Carney as to whether SB 151 was the same as SB 1. (Ex. B. p. 39:25-40:10); (Ex. C. at House Committee on State Government, Video 6.) Representative Carney stated, "I would, I would argue that it's not; otherwise, I wouldn't be here … For current employees it's a very significant, different piece of language ..." (Ex. B., p. 40:8-9; p. 40:25-41:1); (Ex. C. at House Committee on State Government, Video 6.)

Few of the legislators – particularly those from the minority party – had an opportunity to read the substitute prior to the Committee meeting. Representative Rick Rand stated that the new SB 151 was a "291-page document that I just saw 10 minutes ago." (Ex. B., p. 33:3-4); (Ex. C. at

House Committee on State Government, Video 3.) Representative Derrick Graham later stated, "[t]his is a bill we have been given today, which we don't really know what's in the bill." (Ex. B., p. 34:18-19); (Ex. C. at House Committee on State Government, Video 4.)

In addition, the Committee's consideration of SB 151 raised several legal concerns. Representative Jim Wayne raised a point of order, asking if the new SB 151 had an actuarial analysis. In response, House Majority Leader Jonathan Shell acknowledged that there was no actuarial analysis for SB 151, stating "[w]e ***do not have an actuarial analysis*** on the full plan before you." (Ex. B. p. 29:2-4); (Ex. C. at House Committee on State Government, Video 1.) Nevertheless, Representative Shell stated the Committee should "move forward without an actuarial analysis." (Ex. B., p. 29:10); (Ex. C. at House Committee on State Government, Video 1.)

Representative Wayne then stated that SB 151 could not be voted out of the Committee without the actuarial analysis under KRS 6.350. (Ex. B., p. 30:5-7); (Ex. C. at House Committee on State Government, Video 1.) Chairman Miller stated that it "…will be dealt with on the floor," and ruled that the Committee would consider SB 151 despite the lack of actuarial analysis. (Ex. B., p. 30:3-4); (House Committee on State Government, Video 1.) Representative Wayne objected, stating that the text of KRS 6.350 prohibited the Committee from voting on SB 151 without the analysis. (Ex. B., p. 31:4-6); (Ex. C. at House Committee on State Government, Video 1.)

There was also no fiscal note analyzing the impact of the bill on local governments as required by KRS 6.955. In the Committee, Representative Wayne inquired whether SB 151 had a fiscal note attached. (Ex. B., p. 38:18-20); (Ex. C. at House Committee on State Government, Video 5.) Chairman Miller acknowledged there was none. (Ex. B., p. 38:21-22); (House

Committee on State Government, Video 5.) Voicing additional concerns, Representative Wayne asked whether SB 151 had a local government impact study attached. (Ex. B., p. 36:20-21); (Ex. C. at House Committee on State Government, Video 5.) Representative Carney responded, "[s]taff is telling there is not one." (Ex. B., p. 37:1-2); (Ex. C. at House Committee on State Government, Video 5.)

The Committee allowed no public testimony. Nor did it make a single copy of the bill available to the public during the meeting. Several legislators, including Representative Graham, argued that it was inappropriate to consider the bill when stakeholders and the public were excluded from the Committee hearing. (Ex. B., p. 34:4-25-35:1-5); (Ex. C. at House Committee on State Government, Video 4.) Representative Wayne specifically asked whether a Kentucky teacher would be permitted to speak on the bill. (Ex. B., p. 35:14-24); (Ex. C. House Committee on State Government, Video 5.) Chairman Miller refused. (Ex. B., p. 35:25- 36:1-2); (Ex. C. at House Committee on State Government, Video 5.) Representative Rand objected to the process, noting when the General Assembly passed pension reform in 2013, it had conducted open public meetings across the state. (Ex. B., p. 33:5-8); (Ex. C. at House Committee on State Government, Video 3.)[4]

Just an hour after SB 151 was entirely stripped of its 11-pages of sewer legislation and 291 pages of pension reform were substituted, Representative Miller called for a vote. He did so despite most Committee members stating they had not seen, much less read the 291-page amendment. Just after 3:00 p.m. the Committee voted SB 151 out of Committee, reporting it

[4] SB 151 stands in stark contrast to the open and deliberative process that marked the 2013 pension reform package. *See* 2013 SB 2; 2013 HB 440. Unlike with SB 151, which was passed in just over eight hours without hearings, an actuarial analysis, or fiscal note, in 2012 the legislature created a bipartisan task force dedicated to addressing growing public-sector pension fund liabilities. *See* 2012 HCR 162. After a year of public meetings and suggestions from a range of stakeholders, the task force made agreed recommendations to the General Assembly. Those recommendations included benefit modifications for future hires and revenue increases to help fund the pension plan. In 2013, the General Assembly passed these reforms with wide bipartisan support.

favorably to the House floor. The circumstances were such that the Committee voted to report SB 151 before it even amended its original title: "An Act relating to the local provision of wastewater services." (Ex. B., p. 41:5-18); (Ex. C. at House Committee on State Government, Video 7.) Only after the Committee vote was the title amended to reflect that the new SB 151 was "An Act relating to retirement."

II. House Floor Proceedings And Vote On SB 151.

SB 151 was then immediately called on the floor of the full House. While SB 151 had received two readings as a sewer bill, its subject and every word of its content had entirely changed. As such, it received its first reading as a pension bill only after it was called on the House Floor, and it was read only by title, not "at length." Despite the constitutional requirement of three readings on three separate days, state representatives were forced to vote on the bill that very day, without reading it, without public testimony, without an actuarial analysis, and without any fiscal note.

On the House floor, several legislators again voiced serious concerns about the manner in which SB 151 was proceeding. House Minority Leader Rocky Adkins questioned whether SB 151 contained an actuarial analysis as required under KRS 6.350. (Ex. B., p. 3:18-22); (Ex. C. at House Floor Debate, Video 1.) Representative Shell responded only that "it is not the responsibility or purview of the Court to establish and interpret the rules by which the legislature conducts business." (Ex. B., p. 4:7-9); (Ex. C. at House Floor Debate, Video 1.) Speaker Pro Tempore David Osborne then ruled from the chair that the requirements of KRS 6.350 were "waived" because "the statute is treated as a rule, that the House does not have the ability to waive that rule." (Ex. B., p. 4:14-16); (Ex. C. at House Floor Debate, Video 1.) Representative Adkins appealed the ruling of the chair. (Ex. B., p. 4:23-25–5:1-3); (Ex. C. at House Floor

Debate Video 1.) The appeal was overruled on a 58-33 roll call vote. Representative Wayne then addressed SB 151's lack of an actuarial analysis, fiscal note, and local government impact study and moved to table the bill. That motion failed. (Ex. B., p. 6:11–8:14); (Ex. C. at House Floor Debate, Video 3.)

Representative Carney then explained SB 151 to the House Floor. (Ex. B., p. 5:6-25–6:12); (Ex. C. at House Floor Debate Video 2.) Only an hour prior to this explanation, SB 151 had been an 11-page sewer bill. In its new form, there had been no public hearings, no public posting of the bill, no actuarial analysis, no fiscal note, and no local government impact study. Nevertheless, Representative Carney stated "[Stakeholders] have been heard" on SB 151. (Ex. B., p. 5:11-12); (Ex. C. at House Floor Debate, Video 2.) As the sponsor, Representative Carney again clarified that SB 151 and SB 1 were substantially different. (Ex. B., p. 13:9-10); (Ex. C. at House Floor Debate, Video 7.)

Representative Jeffery Donohue questioned Representative Carney about why an actuarial analysis had not been provided for SB 151. (Ex. B., p. 10:5-8); (Ex. C. at House Floor Debate, Video 5.) Representative Carney responded that there was no actuarial analysis because "[w]hen I got the [committee] sub[stitute] ready, ***they have not had time to do that***." (Ex. B., p. 10:21-22); (House Floor Debate, Video 5.) (emphasis added). Representative Donohue responded "[t]hat's not a good answer… it's our job to do things right…so that we can make an informed decision." (Ex. B., p.11:3-9); (Ex. C. at House Floor Debate, Video 5.) Twenty minutes later, Representative Carney, again acknowledged the lack of an actuarial analysis stating, "on the specific sub, it's not been done yet because of time." (Ex. B., p. 13:18-19); (Ex. C. at House Floor Debate, Video 7.) Representative Graham stated "[n]o actuary analysis is on hand, and yet the majority party is asking us to pass this bill with no materials for us to help us to make a

proper and sound decision on this important issue." (Ex. B., p. 16:1-4); (Ex. C. at House Floor Debate, Video 9.)

Once again, several legislators voiced concerns that they had not had an opportunity to read the bill. Representative Jeff Greer stated "…we've had a very limited time to read this bill." (Ex. B., p. 18:1-2); (Ex. C. at House Floor Debate, Video 11.) And Representative Jim Wayne observed, "I dare say no one in this chamber has read the bill." (Ex. B., p. 8:13-14); (Ex. C. at House Floor Debate, Video 3.) Notably, the House itself only read the bill once the same day, by title only, not "at length."

Ultimately, Representative Carney moved for the House's final passage of the bill. Only 49 of the 100 state representatives voted for the bill, with 46 voting against and 5 not voting. *See* Vote History of SB 151.[5] The Speaker Pro Tempore of the House nevertheless declared the bill had passed, and signed the bill as the "Speaker-House of Representatives." SB 151 was then immediately sent to the Senate.

III. Senate Floor Proceedings And Vote On SB 151.

The Senate likewise rushed SB 151 through passage, avoiding any hearings or public participation. The Senate Rules Committee met and posted SB 151 in the Orders of the Day. Senate Majority Floor Leader Damon Thayer moved that the House Committee Substitute to SB 151, which was then reported as a wastewater bill, be adopted.

Senate Minority Leader Ray Jones, II, informed the Senate that no "actuarial analysis" was attached to SB 151, that he had not seen one, and that the bill should be reviewed. (Ex. B., p. 18:11-12); (Ex. C. at Senate Floor Debate, Video 3.) He then moved to table the bill. The motion to table the bill failed. (*Id.*)

[5] Available at http://www.lrc.ky.gov/record/18RS/SB151/vote_history.pdf (last visited May 1, 2018).

Shortly thereafter, Senator Joe Bowen, the sponsor of SB 1 and the original wastewater version of SB 151, was called upon to explain the bill. In direct contradiction to Representative Carney (the sponsor of the House Committee Substitute), Senator Bowen claimed that SB 1 and SB 151 were essentially the same. (Ex. B., p. 19:1-9); (Ex. C. at Senate Floor Debate, Video 2.) He therefore argued that the actuarial analysis for SB 1 worked for SB 151 as well. (Ex. B., p. 19:7-8); (Ex. C. at Senate Floor Debate, Video 2.) Responding to questions about whether an actuarial analysis accompanied SB 151, Senator Bowen argued that the actuarial analysis provided for SB 1 "[I]s available" for SB 151. (Ex. B., p. 19:9); (Ex. C. at Senate Floor Debate, Video 2.) Despite constitutional mandates, the Senate did not conduct ***any*** readings of SB 151 in its new 291-page form. Instead, Senator Bowen moved for final passage of the bill, the roll was called, and the bill passed on a 22-15 vote.

On April 10, 2018, Governor Bevin signed the bill. The next day, the Attorney General, KEA, and FOP filed this lawsuit.

STANDARD OF REVIEW

Under CR 56.03, summary judgment should be granted "forthwith" if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." As stated in *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." The Kentucky Supreme Court has acknowledged that the word "impossible" is "'used in a practical sense, not in an absolute sense.'" *O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006) (quoting *Perkins v.*

Hausladen, 828 S.W.2d 652, 654 (Ky. 1992)). Because this dispute is purely a matter of law, summary judgment is appropriate for the reasons below.

ARGUMENT

SB 151 substantially alters and reduces the retirement benefits of the over 200,000 active members of the pension systems, including teachers, police officers, and firefighters. In doing so, it breaks the "inviolable" contract that the Commonwealth made with its public employees under KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714. Under those laws, the legislature promised public employees that, in exchange for their decades of public service, they would be guaranteed certain retirement benefits.

The manner in which the General Assembly passed SB 151 violated Sections 2, 13, 46, and 56 of the Kentucky Constitution, as well as KRS 6.350 and KRS 6.955. Moreover, by enacting SB 151, Governor Bevin and the General Assembly have broken that contract and substantially impaired those benefits in violation of the Kentucky Constitution and state statute.

I. SB 151 Violates The Constitution Because It Did Not Receive Three Readings.

"Section 46 of the Kentucky Constitution sets out certain procedures that the legislature ***must*** follow before a bill can be considered for final passage." *D & W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 422 (Ky. 1980) Any law that fails to follow these procedures is void under Section 26 of the Kentucky Constitution. *Id.* at 424. Courts have a duty to recognize unconstitutionally passed laws "and to declare [them] void." *Id.*

Section 46 provides: "Every bill shall be read at length on three different days in each House . . . ." KY. CONST. § 46. As a part of the Constitution, the "requirement that the reading of the bills shall be on different days is ***mandatory***." *Kavanaugh v. Chandler*, 72 S.W.2d 1003, 1004 (Ky. 1934) (emphasis added).While Section 46 allows that "the second and third readings

may be dispensed with by a majority of all the members elected to the House in which the bill is pending," there is no dispute that, here, there was no vote in either house to dispense with the second and third readings.

The three-readings mandate was created by the Framers of our Constitution to stop "abuses" by the General Assembly. The specific "abuse" they sought to address is exactly what happened here – a secret deal by legislative leadership, followed by a reckless "haste" to pass a bill, all without adequate reflection or time to read the bill by the Legislature, and without any input from the people affected by the law.

In debating Section 46 of the Constitution, Delegate Simon B. Buckner described this exact scenario, stating the three-readings requirement was necessary to protect both the people and the legislature itself:

> We all know that many abuses exist in legislative bodies in the passage of acts. . . . There was, in the opinion of the Committee, a very serious abuse of the legislation in the haste with which bills are passed. . . . On one occasion, during the last Legislature, a bill involving large interests, the interests of the people of two large and populous counties, passed through both bodies of the Legislature in thirty-five minutes, and was laid before the Executive in a short time after that. . . . It is probable that not ten men in the Legislature knew what they were voting on . . . . The people are too apt to criticise legislative bodies, and say, because of hasty legislation like this, the body is corrupt. This hasty mode of legislation ought to be checked, not only in the interest of the people, but in the interest of the legislative body itself.

(*See* E. Polk Johnson, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3868-69 (1891) (attached as Ex. D.)

Thus, Section 46 of the Constitution was specifically designed to prevent "hasty" legislation and to prohibit any bill from being passed in a single day. It was further devised to ensure that all members of the Legislature had time to read and fully understand what they voted on. It was calculated to protect "the interests of the people," so that bills could not be rushed

through without public knowledge and participation. As Delegate Buckner stated, a system that did not satisfy these concerns would be viewed as "corrupt."

The requirements of Section 46 prevent such corruption and address these concerns in two ways: (1) by requiring the printing of the bill, and (2) by mandating it be read at length on three separate days. Again, as stated by Delegate Buckner:

> We have sought, in recommending this to your consideration, to remedy, in great part, the evil, by requiring that, before consideration by the House before which the bill comes, it shall be printed, so that every member shall have an opportunity at least of knowing what he has voted on. Then it shall be read. The report provides three subsequent days….[6]

(*Id.* at 3869.) (emphasis added).

Because it is part of the Kentucky Constitution, the three-readings requirement is mandatory. *Kavanaugh*, 72 S.W.2d at 1004; *see also Bosworth v. State Univ.*, 179 S.W. 403, 407 (Ky. 1915) ("[A]ll the provisions of a Constitution are mandatory.") (citation omitted). When, as here, the General Assembly has passed a law in violation of the procedures prescribed by the Constitution, the courts must strike it down. *See D & W Auto Supply*, 602 S.W.2d at 424 ("The proper exercise of judicial authority requires us to recognize any law which is unconstitutional and to declare it void. . . ."). The judiciary is "sworn to see that violations of the constitution by any person, corporation, state agency or branch of government are brought to light and corrected." *Id. See also Bosworth*, 179 S.W. at 406.

Here, the evidence is uncontested that neither house of the General Assembly met the three-readings requirement of Section 46 after SB 151 was entirely stripped of its original sewer

[6] Delegate Buckner further observed that "the amendment of the Delegate from Shelby, which I believe meets with the approbation of most of the members of the Committee, modifies that by enabling the Legislature itself to dispense with the two subsequent readings." *Id.* As previously noted, there was no such vote to dispense with the second and third readings in this case.

language, its very subject was changed, and 291 pages of new and different text were added. In this new form, it received only one reading, by title, in the House. That reading was on the same day it was passed, only hours after it was revealed to legislators for the first time, and before the public could participate. As such, the process contained the same "abuses" outlined by Delegate Buckner: (1) the haste of passing a bill in one day, (2) whereby Legislators did not have time to read or understand it, and (3) where the "public interest" was excluded, having no chance to testify or otherwise comment on the bill.

The Committee and floor speeches confirm these abuses. Representative Graham raised the haste abuse in that SB 151 was moving so fast that he and others did not have the necessary materials to make an informed vote. (Ex. B., p. 16:1-4); (Ex. C. at House Floor Debate, Video 9.) He stated: "[n]o actuary analysis is on hand, and yet the majority party is asking us to pass this bill with no materials for us to help us to make a proper and sound decision on this important issue." (*Id.*) Representative Wayne raised the abuse of legislators not having read the bill, stating, "I dare say no one in this chamber has read the bill." (Ex. B., p. 8:13-14); (Ex. C. at House Floor Debate, Video 3.) He also noted that the public interest was being excluded, requesting that a Kentucky teacher be permitted to speak on the bill. (Ex. B. p. 35:14-19); (Ex. C. at House Committee on State Government, Video 5.) Chairman Miller denied that request.

The result was exactly as Delegate Buckner predicted. The public has since expressed distrust in the legislative process, including one teacher who described it as "absolutely corrupt government."[7] Indeed, more than 12,000 Kentuckians marched on the State Capitol in Frankfort to protest the passage of SB 151 just days later.

[7] Sarah Jones, *Kentucky Teachers Walk Out*, The New Republic, Apr. 2, 2018, available at https://newrepublic.com/article/147724/kentucky-teachers-walk (last visited Apr. 24, 2018).

The handling of the new SB 151 in the Senate was even more troubling. Despite the Section 46 mandate, the Senate did not conduct ***any*** readings of SB 151 in its new 291-page form. Like the House, the Senate acted as though the previous readings of SB 151 by its prior title – as "An Act relating to the local provision of wastewater services" – satisfied the constitutional requirement. The Senate then passed the new SB 151 without performing any reading of it in its new form, as "An Act relating to retirement."

Importantly, the fact that SB 151 was read by title twice in the House and three times in the Senate *as a sewage bill* cannot and does not satisfy the three readings requirement. Virtually every state that enforces a similar constitutional mandate – and does not follow the enrolled bill rule – has held that if amendments "vital[ly] alter[]" or "wholly change[]" the bill, the amended bill must receive three new readings on three separate days. *Hoover v. Bd. of Cnty. Comm'rs, Franklin Cnty.*, 482 N.E.2d 575, 579 (Ohio 1985). Indeed, even states that provide significant latitude to the Legislature still hold that previous readings only count when the subject of the substituted or amended bill "has a common purpose" with and "is germane to the original bill." *Magee v. Boyd*, 175 So. 3d 79, 114 (Ala. 2015.) *See also Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006) (holding that "a bill does not have to be considered on three separate days, . . . if the amendments to the bill added during the legislative process are germane to and do not change the general subject of the bill."); *People v. Clopton*, 324 N.W.2d 128, 130 (Mich. App. 1982) ("When an original bill has met the procedural constitutional requirements for passage, an amended version or substitute bill need not also meet those requirements in its later form so long as the amended version or substitute serves the same purpose as the original bill, is in harmony with the objects and purposes of the original bill, and is germane thereto."); *Frazier v. Bd. of*

Comm'rs of Guilford Cnty., 138 S.E. 433, 437 (N.C. 1927) (rereading of a bill is necessary only when the bill is amended "in a material matter.").

In *Giebelhausen v. Daley*, 95 N.E.2d 84 (Ill. 1950), the Illinois Supreme Court struck down a bill passed in violation of the three-readings requirement on facts nearly identical to this case. There, the original bill appropriated money for refunds to taxpayers pursuant to that state's Motor Fuel Tax Act. *Id.* at 94. The bill was read three times in the Senate and then adopted. *Id.* In the House, however, "every word of the original bill was stricken," and then "new language, which provided for the salaries and expenses to be paid by the Revenue Department in the Property Division" was substituted. *Id.* at 95. The Court held the law was void, finding "there was a complete substitution of a new bill under the original number, dealing with a subject which was not akin or closely allied to the original bill, and which was not read three times in each House, after it has been so altered, in clear violation of [the Constitution]." *Id.* The court stated that to hold otherwise would render the three readings "clause of the constitution nugatory by construction, and invite disregard of its salutary provisions." *Id.*

So, too, is the case here. Like in *Giebelhausen*, the original SB 151 passed the Senate. Then, in the House, every word was stripped, and the subject was changed from a sewage bill to a pension bill. The new SB 151 was "a complete substitution of a new bill under the original number." *Id.* Therefore, the readings of the old SB 151 – "An Act relating to the local provision of wastewater services" do not satisfy the three-readings requirement. To hold otherwise would render the three readings requirement of Section 46 meaningless.

A decision ruling SB 151 unconstitutional under the three-day reading requirement is further necessary to stop the General Assembly's consistent abuse and violation of Section 46. In the last two sessions alone, the General Assembly violated the three readings requirement in

turning a dog biting bill into higher education law, 2017 SB 12,[8] and attempting to turn a well digger bill into tax law. *See* 2018 SB 197.[9] In both instances, full substitutes were introduced at the last minute, and were then rushed through passage (of one or both chambers) in a single day.

The abuse of constitutionally mandated procedure extends well beyond these two sessions, and raised concerns for this Court in *Williams v. Grayson*. There, the General Assembly turned a House Bill concerning "the operation of taxicabs and limousines" into an entirely new bill "relating to road projects and declaring an emergency." *Williams v. Grayson*, Case No. 08-CI-856, Final Judgment, at 7 (Franklin Cir. Ct. Jan. 21, 2009) (Attached as Ex. E.) In doing so, the original bill was "gutted, amended, and completely re-written in the Senate on the last day of the legislative session to encompass an entirely foreign subject matter controlling hundreds of millions of dollars of highway expenditures with less than *one day's consideration* in both legislative bodies combined." *Id.*

In sum, the Framers adopted the three-readings requirement after substantial debate to ensure that the public and legislature were protected from the passage of a bill in secret, with too much haste, and without due consideration. The General Assembly willfully evaded this three-readings requirement by transforming a sewage bill into a pension bill, and then reading the completely different bill only once, by title, in the House. The General Assembly violated this

[8] The Senate conducted two readings of the 2017 SB 12, a bill relating to dog biting, prior to adopting a committee substitute that completely stripped the bill of its dog biting language and transformed the bill by adding language relating to the membership of the University of Louisville Board of Trustees. Thereafter, the new 2017 SB 12 received only one reading in the Senate prior to passage, being now completely divorced from dog biting, available at http://www.lrc.ky.gov/record/17RS/SB12.htm (last visited May 2, 2018).

[9] Because of the errors caused by the hasty and careless drafting of the House Floor Amendment to SB 197, the House of Representatives unintentionally passed a bill that would have taxed the full amount of retirees' pensions. *See* Joseph Gerth, *Frankfort is so screwed up, it almost taxed all of your Granny's pension*, The Courier-Journal, Apr. 11, 2018, available at https://www.courier-journal.com/story/news/local/joseph-gerth/2018/04/11/kentucky-house-representatives-income-tax-pensions-joseph-gerth/506425002/ (last visited Apr. 30, 2018).

thoughtfully considered clause of Section 46. Therefore, the Court should hold SB 151 is unconstitutional and void.

II. SB 151 Violates The Constitution Because A Majority Of The Members Of the House of Representatives Did Not Vote For It.

To comply with Section 46 of the Constitution, SB 151 also required a vote of a majority of all members elected to each House for passage. But it received only 49 votes in the House of Representatives. SB 151 therefore did not comply with Section 46, and must be declared void. *See D & W Auto Supply*, 602 S.W.2d at 424. Section 46 of the Constitution provides, in relevant part:

> No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each House, and a majority of the members voting, the vote to be taken by yeas and nays and entered in the journal: Provided, ***Any act or resolution for the appropriation of money*** or the creation of debt ***shall, on its final passage, receive the votes of a majority of all the members elected to each House***.

(Emphasis added).

Any bill that provides for an appropriation therefore requires at least 51 votes in the House and 20 votes in the Senate. *See D & W Auto Supply*, 602 S.W.2d at 422 (holding bill containing appropriations void, because it "received less than 51 votes in the House").

The Supreme Court has explained that "[w]here the General Assembly has mandated that specific expenditures be made on a continuing basis, or has authorized a bonded indebtedness which must be paid, such is, in fact, an appropriation." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 865 (Ky. 2005). The Court further explained that "appropriations" can be made outside a budget bill, stating that legislation may "mandate appropriations even in the absence of a budget bill." *Id.*

As an example of such an appropriation, *Fletcher* cited to pension legislation in the form of KRS 61.565(1) ("Each employer participating in the State Police Retirement System . . . and

each employer participating in the Kentucky Employees Retirement System . . . shall contribute annually to the respective retirement system . . . ."). *Id.* That very law is changed, altered, and amended by SB 151. Section 18 of SB 151 provides that KRS 61.565(1)(a) is amended as follows:

> Each employer participating in the State Police Retirement System as provided for in KRS 16.505 to 16.652, ~~[each employer participating in]~~the County Employees Retirement System as provided for in KRS 78.510 to 78.852, and ~~[each employer participating in]~~the Kentucky Employees Retirement System as provided for in KRS 61.510 to 61.705 shall contribute annually to the respective retirement system an amount ***determined by the actuarial valuation completed in accordance with KRS 61.670 and as specified by this section. Employer contributions for each respective retirement system shall be*** equal to the ***sum of***~~[percent, as computed under subsection (2) of this section, of the creditable compensation of its employees to be known as]~~ the "normal ***cost contribution***~~[contributions,]~~" and ~~[an additional amount to be known as]~~ the "actuarially accrued liability contribution**.**"

SB 151, § 18. Section 18 goes on to provide the method of calculating these contributions. *See id.* (amending KRS 61.565(b)-(e)). Because it amends KRS 61.565(1), which the Supreme Court has identified as an "appropriation" under the Constitution, SB 151 required 51 votes for passage.

SB 151 contains numerous other self-executing appropriations nearly identical to KRS 61.565. Like KRS 61.565, SB 151 requires employers – *i.e.*, state agencies – that participate in KERS or CERS to contribute annually to retirement plans. Specifically, Section 12 of SB 151 mandates contributions by these public employers to hybrid cash balance plans of state employees. It requires the state to provide a "contribution of four percent (4%) of the creditable compensation earned by the employee for each month the employee is contributing" to their plan. SB 151, § 12(2)(b). *See also* SB 151, § 14(45). Put simply, these sections of the bill require a contribution – defined in *Fletcher* as an appropriation under law – by public employers based on a set calculation. These annual contributions are the definition of a self-executing appropriation.

Here, as in *Fletcher*, there is a state law requiring public employers to contribute annually to retirement accounts. *Fletcher* definitively ruled that such payments were self-executing appropriations under the state Constitution, namely Section 230. *Id.* at 868 (holding that, "absent a statutory … mandate," such as the statutes establishing self-executing appropriations, "Section 230 precludes the withdrawal of funds from the state treasury except pursuant to a specific appropriation by the General Assembly"). If such payments are "appropriations" for purposes of Section 230 of the Constitution, they must also be appropriations for purposes of Section 46. Thus, SB 151 required 51 votes in the House. KY. CONST. § 46.

In similar circumstances, the Supreme Court held that "logic suggests that the decision of this Court is obvious, viz., since the Act makes an appropriation and since it received less than 51 votes in the House, it is violative of the Kentucky Constitution." *D & W Auto Supply*, 602 S.W.2d at 422. In that case, the Supreme Court overruled the so-called "enrolled bill doctrine" that held that courts could not review whether a bill was passed in accordance with constitutional procedure. *Id.* at 423-24. The Court held that the rule was "not appropriate in today's modern and developing judicial philosophy," particularly in light of technological advances that improved legislative record-keeping. *Id.* at 424. The Court observed that it was "sworn to see that violations of the constitution by any person, corporation, state agency or branch of government are brought to light and corrected. To countenance an artificial rule of law that silences our voices when confronted with violations of our constitution is not acceptable to this court." *Id.* Like SB 151, the bill at issue in *D&W Auto Supply* – the Litter Control Act – appropriated funds, despite not being a budget bill. *Id.* at 425. Also like SB 151, it received a vote of fewer than 51 members of the House of Representatives. *Id.* at 424. Accordingly, the Supreme Court declared the bill unconstitutional, and therefore void. *Id.* at 424-25.

This Court should reach the same conclusion here. According to binding Supreme Court precedent, SB 151 contains appropriations, yet it did not receive the vote of a majority of all members elected to the House of Representatives. It must, therefore, be declared void.

III. SB 151 Violates The Constitution Because It Was Never Read "At Length."

In addition to the majority-vote and three-readings requirements, Section 46 also requires that bills be read "at length." KY. CONST. § 46. SB 151, as passed, was never read at length in either House, in violation of this clear constitutional mandate. Instead, its sole reading – as passed in the House – was by title only.

The debates of the Constitutional Convention demonstrate that, by using the term "at length," the Framers understood that bills would be read in full and not by title. For instance, Delegate Edward J. McDermott noted that the three readings and "at length" requirements in Sections 46 and 56 would slow legislative business, which he believed would beneficially prevent the Legislature from taking up so-called "local" or "special" legislation:

> The time that is wasted in considering these private bills is astonishing; but not only are time and money lost. These private bills bring the lobby here, and the lobby controls and injures legislation to a very great extent. It is unfair and unjust that some persons active in securing special favors should get their favors at the State's expense, and without notice to the public. We have limited the session to sixty days. We have required that all bills shall be read three several times; that before they are signed by the Speaker, they shall be again read at length. If you require all this time in the case of local and special bills, you cannot properly get through with your work. . . . ***If all bills are to be read at length (many of them a hundred pages long), it will necessarily follow that general legislation will be stopped***, and the business of the State can not go on. ***We are, therefore, compelled, by the limitations which we have put in this Constitution, to rid ourselves of this evil of local or special legislation.***

(Polk, *Proceedings and Debates*, at 3991) (Ex. D.) (emphasis added).

Another delegate objected to the requirement of reading at length, noting that reading one bill "may take two hours." (*Id.* at 4321.) Yet the requirement was ultimately adopted by the Framers "to protect that body from its own errors, and from any fraud or corruption." (*Id.* at

4322.) One delegate lauded the reading requirement, observing, "[t]here is no wiser provision in this report than this section." (*Id.*) Thus, the Framers plainly intended that bills be read in full, as demonstrated by their debates and their use of the term "at length," and not by title only.

Kentucky's highest court has confirmed that the term "at length" means in its entirety and not simply by title only. *See generally, Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 445 (Ky. 1986) ("When any person, lawyer or layman, takes up an act of the Legislature, to read and understand what changes have been made in an old law, he ought to have before him in the act that he is reading the whole of the law as it appears when amended or revised by the new act . . . .") (quoting *Bd. of Penitentiary Comm'rs v. Spencer*, 166 S.W. 1017, 1024 (Ky. 1914)). Indeed, Section 51 of the Constitution provides by its own terms that "at length" means *not* simply by title. *See* KY. CONST. § 51 ("No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and ***no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only***, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published ***at length***.") (emphasis added).

The sole reading of SB 151, as amended, received on the floor of the House of Representatives reflected only the title, and it was never read "at length" on the floor of the Senate. Such a reading simply does not satisfy the constitutional mandate. *See* 82 C.J.S. *Statutes* § 34 (noting that reading by title qualifies as reading of the bill "[u]nless the constitution requires that a bill be read at length or in full"); *U.S. Gypsum Co. v. State Dep't of Revenue*, 110 N.W.2d 698, 699 (Mich. 1961) (holding, where the Constitution requires only that the bill "be read 3 times in each house" – *i.e.*, it does not expressly require reading "at length" – that the

requirement is satisfied when the bill is read once "in full," with the second and third readings by title). Therefore, SB 151 is unconstitutional, and this Court should declare it void.

IV. SB 151 Violates State Statute Because The General Assembly Passed It Without An Actuarial Analysis Or A Fiscal Note.

The General Assembly not only violated the Constitution when it rushed through SB 151, it also violated Kentucky statutes. These statutes, like Section 46 of the Constitution, were intended to prevent the passage of bills without due consideration of their impact. Specifically, the General Assembly violated KRS 6.350, which requires an actuarial analysis before public pension bills can be voted out of Committee, and KRS 6.955, which requires a fiscal note before passage. The General Assembly "passed" SB 151 without meeting either statutory mandate.

A. The General Assembly Passed SB 151 in Violation of KRS 6.350.

1. KRS 6.350 required an actuarial analysis.

In relevant part, KRS 6.350(1) provides that "[a] bill which would increase or decrease the benefits or increase or decrease participation in the benefits or change the actuarial accrued liability of any state-administered retirement system shall not be reported from a legislative committee of either house of the General Assembly for consideration by the full membership of that house unless the bill is accompanied by an actuarial analysis." The statute further sets out the requirements of such an actuarial analysis, which must demonstrate, among other things, "the economic effect of the bill on the state-administered retirement system over a twenty (20) year period." KRS 6.350(2). There can be no dispute that KRS 6.350 required an actuarial analysis for SB 151 before it was introduced on the floor of the House, as it unquestionably decreases the benefits provided to state employees, and will decrease participation in the benefits it does provide.

The General Assembly first passed KRS 6.350 into law in 1980. It was passed by majorities of both chambers and signed into law by the Governor. *See* 1980 Ky. Acts, Ch. 246, § 1. At that point, KRS 6.350 became more than a legislative rule, it became a law.

Since its passage, KRS 6.350 has been repeatedly amended to strengthen its requirements. The most recent amendment to strengthen the actuarial analysis requirement occurred in 2017, meaning that *the same* General Assembly that passed SB 151 also voted – by majority – to be bound by a stronger KRS 6.350. The 2017 amendment added subsection (c) to KRS 6.350, which states:

> (c) A statement that the cost is negligible or indeterminable shall not be considered in compliance with this section. If a cost cannot be determined by the actuary in accordance with paragraph (a) of this subsection, then the systems shall certify in writing:
>
> 1. The estimated number of individuals affected;
> 2. The estimated change in benefit payments;
> 3. The estimated change to employer costs; and
> 4. The estimated change to administrative expenses.

The 2017 amendment passed both houses of the legislature *unanimously*, and was signed into law by Governor Bevin on March 10, 2017.[10] This shows the General Assembly's intent to ensure there would always be an actuarial analysis before a pension bill reached a legislative chamber, and that a mere "statement" was insufficient. Moreover, by passing the amendment and enhancing the actuarial analysis requirements, this legislature plainly demonstrated its intent to be bound by KRS 6.350.

The Supreme Court previously addressed judicial review of the General Assembly's compliance with KRS 6.350, in *Board of Trustees. of Judicial Form Ret. Sys. v. Attorney Gen. of Commonwealth*, 132 S.W.3d 770, 777 (Ky. 2003). To the extent *Board of Trustees* can be read to

[10] *See* http://www.lrc.ky.gov/record/17RS/SB2.htm (last visited Apr. 30, 2018).

state that a challenge to a law for violating KRS 6.350 is nonjusticiable, that language is dicta, because the Supreme Court's decision primarily relied on the finding that the General Assembly had "substantial[ly] compli[ed]" with the actuarial analysis requirement. *Id.* at 778. As explained more fully below, there was no compliance in this case.

Moreover, *Board of Trustees* relied on an incorrect reading of a Florida case for the proposition that courts will not review a legislature's procedure rule "even when the procedural rule is, as here, codified in statute." *Id.* at 777 (citing *Moffitt v. Willis*, 459 So.2d 1018, 1021-22 (Fla. 1984)). In *Moffitt*, the statute at issue simply provided that each legislative committee "shall abide by the general rules and regulations adopted by its respective house to govern the conduct of meetings by such committee." *Moffitt*, 459 So.2d at 1021. The *Moffitt* court declined to adjudicate a claim that the statute had been violated because to do so would necessarily require the court to determine whether a legislative committee had followed legislative *rules*. *Id.* at 1022 ("It is a legislative prerogative to make, interpret and enforce its own procedural rules . . . . [W]e may not invade the legislature's province of internal procedural rulemaking."). Thus, *Moffitt* addressed only whether the court would interpret procedural rules made by the legislative body – *not* statutes, like KRS 6.350.

A statute like KRS 6.350 is mandatory and legally distinct from a voluntary legislative procedural rule, in that both houses of the legislature passed it and the Governor signed it into law. Therefore, it became a binding statute.

The power to ignore or suspend such a binding statute does not rest in a single individual, such as Speaker Pro Tempore Osborne or Chairman Miller. Instead, Section 15 of Kentucky's Constitution, which is entitled "laws to be suspended only by the General Assembly," expressly provides that "no power to suspend laws shall be exercised unless by the General Assembly or its

authority." KY. CONST. § 15. The General Assembly exercises this power through the passage of a separate statute or portion of a statute that expressly notwithstands or suspends a law. In fact, the General Assembly has followed this legal process and suspended KRS 6.350 at times, including in the 2004 special session. *See* 2004 (1st Extra. Sess.) Ky. Acts Ch. 1, sec. 19. But to do so, it passed laws – through votes of the majorities of both chambers – specifically stating that the new law "shall be effective, KRS 6.350 to the contrary notwithstanding." *See id.* Here, the General Assembly did not suspend KRS 6.350 in the text of SB 151. It did not pass any separate statute suspending KRS 6.350. Instead, Chairman Miller (and later Speaker Pro Tem Osborne) unilaterally "ruled" that KRS 6.350 did not apply. Such an action cannot suspend a duly enacted statute, and the General Assembly was required to receive an actuarial analysis before considering SB 151.

Nor can there be an argument that passage of SB 151 implicitly repealed KRS 6.350. "It is a well-settled rule of statutory construction that the repeal of an existing law by implication is not favored by the court." *Kentucky Off-Track Betting, Inc. v. McBurney*, 993 S.W.2d 946, 949 (Ky. 1999). Instead, courts understand that "where the legislature intended a subsequent act to repeal a former one, it will so express itself so as to leave no doubt as to its purpose." *Id.* Nothing in SB 151 suggests that the General Assembly intended to repeal KRS 6.350.

Finally, this case does not present the question, as suggested by the dicta in *Board of Trustees*, as to whether one legislature can bind another. As stated above, in 2017 this legislature with very similar leadership confirmed that an actuarial analysis is required for pension legislation by passing SB 2 (2017). Accordingly, the General Assembly was required to comply with KRS 6.350.

2. SB 151 did not comply with KRS 6.350.

In *Board of Trustees*, the Supreme Court held that the General Assembly had "substantial[ly] compli[ed]" with the actuarial analysis requirement. *Id.* at 778. Here, there can be no such finding because the House State Government Committee admitted it had ***no*** actuarial analysis. It therefore failed to comply *at all*, much less substantially, with the actuarial analysis requirement.

It is uncontested that no actuarial analysis was performed on SB 151 before it left the House State Government Committee. In Committee, House Majority Leader Shell admitted "[w]e ***do not have an actuarial analysis*** on the full plan that is before you today," (Ex. B., p. 29:24); (Ex. C. at House Committee on State Government, Video 1.) The sponsor of the committee substitute – Representative Bam Carney – stated: "When I got the [committee] sub[stitute] ready, ***they have not had time to do that***." (Ex. B., p. 10:21-22); (Ex. C. at House Floor Debate, Video 5.) When SB 151 reached the House Floor, even the Speaker Pro Tempore acknowledged there was no analysis. (Ex. B., p. 4); (Ex. C. at House Floor Debate, Video1.) Instead, acting as Chair, he ruled that no such analysis was needed. (*Id*.) "Substantial compliance" was therefore impossible for the House, which admitted it did not have and was not considering an actuarial analysis under KRS 6.350.

When SB 151 proceeded to the Senate, Senator Bowen claimed that the actuarial analysis for SB 1 satisfied the requirement for SB 151. But the bills were substantially different. Indeed, Representative Carney's entire presentation before the House emphasized that SB 151 was not SB 1. (Ex. B., p. 5-6, 12-13); (Ex. C. at House Floor Debate, Video 2 and 7.) Presiding over the Committee, Chairman Miller agreed, stating "[t]his is not Senate Bill 1." (Ex. B., p. 31:13-14); (Ex. C. at House Committee on State Government, Video 2.) As evidence of their differences, Representative Carney pointed to SB 151 not cutting teacher's cost of living adjustments

("COLAs"). (Ex. B., p. 13:1-5) (Ex. C. at House Floor Debate, Video 7.) This exclusion would alone create an approximately $3 billion difference from the actuarial analysis performed on SB1. Based on the House testimony that SB 1[11] and SB 151 were different, and the fact that $3 billion creates a substantial difference, there is no "substantial compliance."

Moreover, the fact that the General Assembly later posted a hastily compiled "actuarial analysis" to the Legislative Research Commission website after the bill was passed does not help its cause. Rather, it merely emphasizes that it was aware of KRS 6.350 and its failure to comply with that statute.

This so-called "actuarial analysis" consists solely of a cover letter attached to the analysis of SB 1. Such a cover letter is the exact type of mere "statement" that the 2017 amendment to KRS 6.350 prohibits, stating it "shall not be in compliance." Not only is such a cover letter insufficient in itself, but the attached analysis for SB 151 only analyzes the KRS-administered systems. (*See* KRS Actuarial Cover Letter (Mar. 29, 2018)) (Attached as Ex. F.) As of the date of this filing, there is still *no* actuarial analysis for KTRS attached to SB 151. As such, the General Assembly did not and could not substantially comply with KRS 6.350 because it directly affected retirement systems (KTRS) for which – even as of today – no actuarial analysis has been performed.

In passing KRS 6.350 without an actuarial analysis, this General Assembly violated the law that the legislature enacted and that this very legislature strengthened in the previous legislative session. In this case, the untimely and incomplete "actuarial analysis" that posted to LRC's website *after* passage of SB 151 failed to include a statement of the costs associated with

[11] The actuarial analysis for SB 1 is available at http://www.lrc.ky.gov/recorddocuments/note/18RS/SB1/AA.pdf (last visited May 1, 2018).

the changes in SB 151. Because the General Assembly failed to comply with KRS 6.350, this Court should declare SB 151 void.

B. The General Assembly Passed SB 151 in Violation of KRS 6.955.

The General Assembly also failed to comply with KRS 6.955 when passing SB 151. That statute provides, in pertinent part:

> No bill or resolution which relates to any aspect of local government or any service provided thereby shall be voted on by either chamber of the General Assembly unless a fiscal note has been prepared and attached to the bill pursuant to KRS 6.960, except that, if in the chamber in which the bill is being considered, two-thirds (2/3) of the members elected vote to waive the fiscal note requirement, no note shall be required. The fiscal note waiver shall be certified by the clerk of the chamber in which the bill is being considered, and such certification shall be attached to the bill. Although waived in one chamber, a fiscal note shall be required when the bill goes to the other chamber unless a majority of the members elected to such chamber vote to waive the fiscal note requirement.

KRS 6.955(1).

SB 151 certainly "relates to" "any aspect of local government." First, it directly impacts the state-administered retirement programs – KTRS and CERS – in which local government employees participate. Second, it requires local governments, as "employers," to make contributions to these retirement plans. *See, e.g.*, SB 151, Section 12(2)(b) (requiring employer contributions). By altering the retirement benefits of local governments' public employees, SB 151 further impacts all the "service[s]" provided by local government. For this reason, prior legislation altering pension plans has included fiscal notes, including the 2013 pension reform. (*See* Local Mandate Fiscal Impact Estimate, Bill No. SB 2 GA) (attached as Ex. G.) That note provided a detailed explanation as to how local government participants in CERS could expect a decrease in contribution rates for employees. *Id.*

Here, it is uncontested that neither the House nor the Senate attached a fiscal note. Nor did either chamber vote to waive the express fiscal note requirement. Thus, the General

Assembly violated KRS 6.955 when it passed SB 151. For this statutory violation and the statutory violation of KRS 6.350, the Court should find SB 151 invalid.

V. SB 151 Is Invalid By Operation Of Section 56 Of The Kentucky Constitution.

SB 151 is further void because the General Assembly failed to meet the requirements of Section 56 of the Kentucky Constitution. Specifically, (1) the presiding officer of the House of Representatives – the Speaker of the House – failed to affix his signature to the bill, and (2) the bill was not read "at length." *See Hamlett v. McCreary*, 156 S.W. 410, 411 (Ky. 1913).

Section 56 provides:

> No bill shall become a law until the same shall have been signed by the presiding officer of each of the two Houses in open session; and before such officer shall have affixed his signature to any bill, he shall suspend all other business, declare that such bill will now be read, and that he will sign the same to the end that it may become a law. The bill shall then be read at length and compared; and, if correctly enrolled, he shall, in the presence of the House in open session, and before any other business is entertained, affix his signature, which fact shall be noted in the journal, and the bill immediately sent to the other House. When it reaches the other House, the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceeding shall thereupon be observed in every respect as in the House in which it was first signed. And thereupon the Clerk of the latter House shall immediately present the same to the Governor for his signature and approval.

Interpreting Section 56, Kentucky's highest court has held "[t]he language is express, sweeping, and mandatory." *Hamlett*, 156 S.W. at 411. Section 56 "prohibits a bill from becoming a law until it shall have been signed by the presiding officer of each house." This Court has expressly held that Section 56 mandates three specific actions be taken before any bill can become law, stating:

> [t]he mandates of Section 56 are extremely specific…[it] requires that before a bill become a law it must be: a) signed in open session by the presiding officer of each House; b) correctly enrolled after being read at length and compared; and c) all bills that have been passed by both House, enrolled must be 'immediately' presented 'to the Governor for his signature and approval.

See Williams v. Grayson, No. 08-CI-856, Order, at 4-5 (Franklin Cir. Ct., July 31, 2008 (Attached as Ex. H.) "The failure to comply with any mandatory requirement of Section 56, under controlling case law, renders the bill invalid." (*Id*. at 5.) "If the legislature fails in discharging this mandatory duty, the legislation is invalid by operation of Section 56 of the Constitution." (*Id*. at 5-6) (Internal citation omitted).

The Framers of the Kentucky Constitution stressed the importance and mandatory nature of these requirements. Upon giving the Report of the Committee on the Legislative Department to the Committee of the Whole Constitutional Convention, Delegate Ignatius A. Spalding stated, the following:

> [Section 56] is about how bills are signed. We think this is a ***very important and salutary change*** also. I will state, generally, from recollection, the nature of the change. You have the report before you. Enrolled bills are to be read in each House, and ***the Speaker*** is to suspend all other business and call attention of the members to the bill before him, thus giving an opportunity to everybody to inquire into the matter, whether the bill is enrolled correctly, or whether any thing wrong has gotten into it by any means. He shall sign it in the presence of the House, and it shall be reported to the other House, where the same process is gone through…***There has been some carelessness in the past sessions of the General Assembly on this subject***…***Bills have been signed when they were perhaps not correctly enrolled***. It has been the custom for the Enrolling Clerk to bring a batch of bills to the Speaker's desk, and the Speaker would have no time to read them, but just simply sign them as a matter of form, not knowing what they were. Sometimes duplicate bills have been signed in that way, and this is to prevent those evils, and to secure the proper enrollment and the proper consideration of all bills by the Speaker and by the House at the time they are signed. This would consume a great deal of time if we were to continue the practice of local legislation; but when that is cut off, and nothing but general laws are enacted, there will be plenty of time to attend to it. It will be very little interruption to the business of the House, and will result, doubtless, in a better system of legislation than we have had in that respect.

(E. Polk Johnson, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3793-3794 (Feb. 17, 1891)) (Ex. D.) (emphasis added).

SB 151 is invalid because the General Assembly failed to meet two of these three constitutional requirements. First, the presiding officer of the House of Representatives – the Speaker of the House – failed to affix his or her name upon the bill. Second, SB 151 was not "read at length and compared" immediately prior to signing. Therefore, "under the strong language of section 56 of our Constitution, no such bill is permitted to become a law." *Hamlett*, 156 S.W. at 413.

A. SB 151 is Invalid Because the Presiding Officer of the Kentucky House of Representatives – the Speaker of the House – Did Not Sign the Bill.

Section 56 of the Kentucky Constitution requires that the presiding officer of each of the two Houses must affix his or her signature to the bill in open session before it can become law. The highest Court in Kentucky held in *Hamlett* that this requirement "is express, sweeping, and mandatory." *Id*. at 411. There, a bill that lacked signature of the President of the Senate was declared constitutionally invalid. *Id.*

Under Kentucky law, the Speaker is the House of Representatives' presiding officer. In *Kirchendorfer*, Kentucky's highest court expressly held:

> "…***the presiding officer over the House is its speaker, which is provided for by section 34 of the Constitution, and he is to be elected from the membership of the body over which he presides***. The presiding officer of the Senate is the Lieutenant Governor, as is prescribed for by section 83 of the Constitution."

264 S.W. at 768-69. (Emphasis added). Lower courts – including Franklin Circuit Court – have agreed as recently as last year. *See Stumbo v. Bevin*, No. 16-CI-522, Order at 4-5 (Franklin Cir. Ct., Feb. 1, 2017) (attached as Ex. I.) In *Stumbo v. Bevin*, this Court held that former Speaker Greg Stumbo lacked standing to bring claims in his official capacity as the "presiding officer" of the House because he was no longer Speaker. (*Id*.) Specifically, this

Court stated "[b]ecause Speaker Stumbo's standing as ***presiding officer of the House*** is no longer applicable, he cannot maintain an action such as this… ." *Id*. (emphasis added).

The General Assembly also informs Kentucky citizens that the Speaker of the House is the presiding officer over the House of Representatives. In its *Citizen's Guide to the Kentucky Constitution*, it states "[t]he presiding officer of the House of Representatives, the Speaker of the House, is a Representative selected by the members of the House."[12]

Finally, the Framers of the Constitution clearly recognized the Speaker of the House was the presiding officer who must affix his signature to the bill. Delegate Simon Buckner, discussing Section 56, stated: "***When the bill is to be signed, it shall be done by the Speaker, in the presence of the House,*** business being suspended, and that fact being announced." (E. Polk Johnson, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3869 (Feb. 19, 1891)) (Ex. D.) (emphasis added).

It is beyond dispute that the "presiding officer" over the Kentucky House of Representatives is the constitutionally elected Speaker of the House referenced in Section 34 of the Kentucky Constitution. Because the Speaker is the presiding officer over the House of Representatives, only the Speaker's signature can meet the mandates of Section 56 of the Kentucky Constitution. *See Hamlett*, 156 S.W. at 411.

It is uncontested that the Speaker did not sign SB 151. The most recent Speaker was Representative Jeff Hoover, who was elected Speaker pursuant to Section 34 of the Kentucky Constitution in January 2017. Based on ethics issues, Representative Hoover resigned as Speaker on January 8, 2018. However, the House did not conduct any election to replace Representative Hoover or elect a new Speaker pursuant to the requirements of Section 34.

[12] *See* Legislative Research Commission, Research Report No. 137, p. 21 (Rev. June 2013), available at http://www.lrc.ky.gov/lrcpubs/rr137.pdf (last visited Apr. 30, 2018).

Instead, they proceeded with the Speaker Pro Tem, Representative Osborne, serving as what they termed "acting Speaker," a concept and title that does not appear in the Constitution or law.[13]

On March 29, 2018, the date the General Assembly purported to pass SB 151, the constitutional office of Speaker of the House was vacant, and remains vacant. (*See* LRC House of Representatives' Leadership webpage) (Attached as Ex. J.)[14] Because there was no Speaker to affix his or her signature to SB 151, as constitutionally required under Section 56 of the Kentucky Constitution, the bill is invalid.

B. SB 151 is Invalid Because it was Not Read at Length Before Signing.

Like Section 45, Section 56 also requires that – before a bill can become law – it must be read at length. Section 56 specifically requires the bill be "read at length" prior to the presiding officer affixing his or her signature to the bill. This directive "is express, sweeping, and mandatory." *Hamlett*, 156 S.W. at 411. Section 56 provides, in pertinent part:

> …before such officer shall have affixed his signature to any bill, he shall suspend all other business, declare that such bill will now be read, and that he will sign the same to the end that it may become a law. ***The bill shall then be read at length and compared***; and, if correctly enrolled, he shall, in the presence of the House in open session, and before any other business is entertained, affix his signature…

(Emphasis added)

As with Section 46, discussed above, none of the readings of SB 151 complied with the requirement in Section 56 that all bills be read "at length." "[A]t length" means in its entirety, and not simply by title. *See Commonwealth ex rel. Armstrong*, 709 S.W.2d at 445 (internal

[13] On Wednesday, December 6, 2017, the Republican House Leadership announced Representative Osborne would be "acting Speaker," without a vote. Jaqueline Pitts, *David Osborne to serve as Acting House Speaker during 2018 session*, available at https://www.lanereport.com/84463/2017/12/david-osborne-to-serve-as-acting-house-speaker-during-2018-session/ (last visited Apr. 24, 2018) ("After a caucus meeting Wednesday, House Republican leadership announced Rep. David Osborne of Prospect will remain as Acting Speaker of the House during the 2018 legislative session.")

[14] Available at http://www.lrc.ky.gov/House.htm (last visited Apr. 18, 2018).

citation omitted). *See also*, 82 C.J.S. *Statutes* § 34 (noting that reading by title qualifies as reading of the bill "[u]nless the constitution requires that a bill be read at length or in full"); *U.S. Gypsum Co. v. State Dep't of Revenue*, 110 N.W.2d 698, 699 (Mich. 1961) (holding, where the Constitution requires only that the bill "be read 3 times in each house" – *i.e.*, it does not expressly require reading "at length" – that the requirement is satisfied when the bill is read once "in full," with the second and third readings by title). SB 151 was not "read at length" immediately prior to either the Senate President or Representative Osborne affixing their signatures to the bill, as constitutionally required. Accordingly, SB 151 is invalid under Section 56 of the Kentucky Constitution.

VI. SB 151 Represents The Arbitrary Exercise Of Power, In Violation Of The Constitution

Section 2 of the Kentucky Constitution – part of the Kentucky Bill of Rights – provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." By (1) converting a sewage bill into a pension bill, and then (2) passing that bill in a rushed process that violated the Kentucky Constitution and state statute, (3) all in a manner that deprived the people of the opportunity to review or comment on the legislation, the General Assembly subjected the people affected by SB 151 to the exercise of arbitrary power. Kentucky's highest court has held, "whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary." *Sanitation Dist. No. 1 v. City of Louisville*, 213 S.W.2d 995, 1000 (Ky. 1948).

Here, the General Assembly did not follow the carefully weighed and thoughtfully enacted procedural requirements for the passage of SB 151, including the constitutional requirements of three readings and a majority vote, and the statutory requirements of an actuarial analysis and a fiscal note detailing the bill's impact on local governments. As set forth more

fully above, these procedures exist to ensure the transparency and accuracy of the legislative process, and to protect the people by making certain that the laws enacted by the General Assembly are the result of deliberation and public input. By failing to follow those procedures, the General Assembly arbitrarily exercised its power in depriving Kentucky's public servants of their contractual and property rights. *See Commonwealth, Transp. Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. App. 2004) (citation omitted) ("[I]t is axiomatic that failure of a [body] to follow its own rule or regulation generally is per se arbitrary and capricious.").

Accordingly, SB 151 violated Section 2 of the Kentucky Constitution, and the Court should declare that it is void.

VII. The Substance of SB 151 Violates The Contracts Clause.

Under Section 19 of the Constitution provides "[n]o ex post facto law, nor any law impairing the obligation of contracts, shall be enacted… ." KY. CONST. § 19. A law violates Section 19 where, as here, (1) there is a contract; (2) the statute at issue substantially impairs that contract; and (3) the impairment of the contract is not "reasonable and necessary to serve an important public purpose." *See generally, U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17, 30 (1977); *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1360 (D. Md. 1984).

A. An Inviolable Contract Exists Between the Commonwealth and its Public Employees.

The Kentucky Supreme Court has definitively ruled that "the retirement savings system has created an inviolable contract between [employees and retirees] and the Commonwealth…." *Jones*, 910 S.W.2d at 713. Pursuant to that contract, the General Assembly promised Kentucky's public employees that, in exchange for decades of public service, they would be guaranteed

certain retirement benefits. The General Assembly specifically made that contract "inviolable"[15] – meaning it could never be broken – and wrote it into our law as KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714. *See also Jones v. Bd. of Trs. of Kentucky Ret. Sys.*, 910 S.W.2d 710, 713 (Ky.1995) (describing pension benefits as contractual); *Baker v. Commonwealth*, No. 2005-CA-001588-MR, 2007 WL 3037718, at *31 (Ky. App. Oct. 19, 2007) (pension rights of a retired public employee "are contractual and inviolable").

The plain language of these statues establish that benefits falling within the inviolable contract – such as sick days, guaranteed returns, or uniform allowance – were reduced by the General Assembly under SB 151.

B. SB 151 Substantially Impairs the Inviolable Contract

When it enacted the inviolable contracts into law, the General Assembly included what would constitute "substantial impairment" of those contracts. In each statute, the General Assembly stated that the "rights and benefits provided" in the contract shall "not be subject to reduction or impairment by alteration, amendment or repeal." *See* KRS 16.652; 61.692; 78.852; 161.714. Thus, the General Assembly – through law – mandated that a reduction of rights or benefits would constitute substantial impairment of the inviolable contracts. The Kentucky Supreme Court recognized as much, stating the General Assembly "can take no action to reduce the benefits promised to participants…." *Jones*, 910 S.W.2d at 713. Indeed, the Court noted that, in the context of pension benefits, even a "threat" of a reduction may qualify as "substantial impairment." *See Jones*, 910 S.W.2d at 713.

SB 151 reduces promised benefits and rights under the inviolable contract—and it does so substantially. It therefore violates the contracts clause. *See Hughes*, 594 F. Supp. at 1360

[15] *Inviolable*, Black's Law Dictionary (10th ed. 2014) *adj*.: Safe from violation; incapable of being violated. *Inviolable*, The American Heritage Dictionary (2d ed. 1985) *adj*.: Secure from violation or profanation.

(citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)). SB 151 violates this inviolable contract in the following ways:

Kentucky Teachers

The inviolable contract in KRS 161.714 protects benefits provided between KRS 161.22 through KRS 161.710. SB 151 violates that inviolable contract as follows:

- KRS 161.623 allows teachers who started before July 1, 2008, to convert accrued sick leave toward retirement, and allows teachers hired after July 1, 2008 to convert up to three hundred days of accrued sick leave toward retirement. Section 74 of SB 151 caps the amount of accrued sick leave members may convert toward retirement to the amount accrued as of December 31, 2018, materially altering and impairing the rights and benefits due under the inviolable contract.

Kentucky Employees

The inviolable contract in KRS 61.692 protects benefits provided to members of the Kentucky Employees Retirement System ("KERS") between KRS 61.510 through 61.705. SB 151 violates that inviolable contract as follows:

- KRS 61.510 allows non-hazardous, Tier I employees to include lump-sum payments in creditable compensation. Section 14 of SB 151 violates the inviolable contract because it expressly excludes lump-sum payments from creditable compensation for non-hazardous, Tier I employees, retiring after July 1, 2023.

- KRS 61.510 allows uniform and equipment allowances to be included in members' creditable compensation. Section 14 of SB 151 violates the inviolable contract because it expressly excludes uniform and equipment allowances as well as undefined "other expense allowances," paid on or after January 1, 2019, from creditable compensation.

- KRS 61.546 allows KERS Tier I employees to use sick leave service credit for retirement eligibility. Section 16 of SB 151 violates the inviolable contract because it prohibits KERS Tier I employees from using sick leave service credit for retirement eligibility, if they retire on or after July 1, 2023.

- Prior to passage of SB 151, KRS 61.702(2)(b) did not require employers of KERS Tier I members, employed after July 1, 2003, to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical

insurance under the plan. Section 30 of SB 151 imposes this new requirement, altering and impairing the ultimate calculation of KERS members' retirements and violating the inviolable contract.

- KRS 61.510 requires Tier I hazardous employees' final compensation be calculated using the creditable compensation from three (3) fiscal years the employee was paid the highest average monthly rate. It requires the highest five (5) years for Tier I nonhazardous employees. In either case, the compensation need not be calculated using complete fiscal years. Section 14 of SB 151 requires, after January 1, 2019, that Tier I hazardous employees' final compensation be calculated using the creditable compensation from their highest three (3) *complete* fiscal years, and that the highest five (5) *complete* fiscal years be used to calculate for Tier I nonhazardous employees' final compensation. This change, altering and impairing the final compensation calculation guaranteed to Tier I employees, is in violation of KRS 61.510.

- KRS 61.597 guaranteed annual interest credit of at least 4% to KERS Tier I and Tier II employees who opted into the hybrid cash balance plan. Section 19 of SB 151 violates the inviolable contract because it removes the guaranteed annual interest credit of at least 4%, reducing it to 0%.

Kentucky State Police

The inviolable contract in KRS 16.652 protects benefits provided to members of the State Police Retirement Systems ("SPRS") between KRS 16.510 through 16.645. SB 151 violates that inviolable contract as follows:

- KRS 16.645 and KRS 61.546 allow SPRS Tier I employees to use sick leave service credit for retirement eligibility. Section 16 of SB 151 violates the inviolable contract by prohibiting SPRS Tier I employees from doing so if they retire on or after July 1, 2023.

- KRS 16.645 and KRS 61.702(b) did not require employers of SPRS Tier I members, employed after July 1, 2003, to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical insurance under the plan. Section 30 of SB 151 imposes this new requirement, altering and impairing the ultimate calculation of SPRS members' retirements and violating the inviolable contract.

County Employees

The inviolable contract in KRS 78.852 protects benefits provided to members of the County Employees Retirement System ("CERS") between KRS 78.510 through KRS 78.852. SB 151 violates that inviolable contract as follows:

- KRS 78.510 allows non-hazardous, Tier I employees to include lump-sum payments in creditable compensation. Section 15 of SB 151 violates the inviolable contract because it expressly excludes lump-sum payments from creditable compensation for non-hazardous, Tier I employees, retiring after July 1, 2023, altering and impairing the ultimate calculation of CERS members' retirements.

- KRS 78.510 allows uniform and equipment allowances to be included in members' creditable compensation. Section 15 of SB 151 violates the inviolable contract because it expressly excludes uniform and equipment allowances as well as undefined "other expense allowances," paid on or after January 1, 2019, from creditable compensation – altering and impairing the ultimate calculation of CERS members' retirements.

- KRS 78.616 allows CERS Tier I employees to use sick leave service credit for retirement eligibility. Section 17 of SB 151 violates the inviolable contract because it prohibits CERS Tier I employees from using sick leave service credit for retirement eligibility, if they retire on or after July 1, 2023.

- Prior to passage of SB 151, KRS 78.545 and KRS 61.702(2)(b) did not require employers of CERS Tier I members, employed after July 1, 2003, to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical insurance under the plan. Section 30 of SB 151 makes this new requirement, altering and impairing the ultimate calculation of CERS members' retirements and violating the inviolable contract.

- KRS 78.510 requires CERS Tier I hazardous employees' final compensation be calculated using the creditable compensation from three (3) fiscal years the employee was paid the highest average monthly rate. It requires the highest five (5) years for Tier I nonhazardous employees. In either case, the compensation need not be calculated using complete fiscal years. Section 15 of SB 151 requires, after January 1, 2019, that Tier I hazardous employees' final compensation be calculated using the creditable compensation from their highest three (3) *complete* fiscal years, and that the highest five (5) *complete* fiscal years be used to calculate for Tier I nonhazardous employees' final compensation. This change violates KRS 78.510 by altering and impairing the final compensation calculation guaranteed to Tier I employees.

- KRS 61.597 and 78.545 guaranteed annual interest credit of at least 4% to CERS Tier I and Tier II employees who opted into the hybrid cash balance plan. Section 19 of SB 151 violates the inviolable contract because it removes the guaranteed annual interest credit of at least 4%, reducing it to 0%.

In this case, the impairments are numerous and substantial. And there is no question that promised benefits and/or rights have been reduced. For instance, the elimination of the use of sick leave has clear and material costs. A newsletter to state employees from 2001, in which KRS encouraged employees to save sick leave for retirement, noted that, for someone retiring at a final salary of $30,000, and who lived for another 25 years, just twelve months' sick leave credit would be worth over $16,500 in retirement benefits. (William P. Hanes, General Manager, Kentucky Retirement Systems, *Maximize Your Sick Leave For Retirement*, 2-3 (Jan. 2001)) (Attached as Ex. K.) (Stating "How can you maximize sick leave credit for retirement purposes? Obviously by hoarding your sick leave and not using it as soon as it accrues."). That amounts to more than half a year's salary, something any Kentucky family would view as substantial.

SB 151 also reduces the creditable compensation by 1% for Tier 1 KERS members hired after July 1, 2003. The average KERS non-hazardous retiree receives an annual pension payment of $21,699,[16] so the 1% reduction is equal to about $217 per year. For a retiree with the average 25-year life expectancy after retirement, (*See* Ex. K.), the total effect of that reduction is $5,425—again, a substantial sum for a retiree on a fixed income.

SB 151 also eliminates the guaranteed return for Tier I and Tier II members in the existing hybrid cash balance plan, from a guaranteed 4% to nothing, (0%). This has the potential

[16] *See* Kentucky Retirement Systems Comprehensive Annual Financial Report, at p. 15, Dec. 7, 2017, available at https://kyret.ky.gov/Publications/Books/CAFR_2017%20(Comprehensive%20Annual%20Financial%20Report).pdf (last visited May 1, 2018).

to cost participants hundreds if not thousands of dollars per year in returns on their retirement plan, and in the case of a recession could cost the member their entire retirement.[17]

SB 151 also substantially impairs the contracts of KERS and CERS participants by eliminating uniform and equipment allowances from creditable compensation. The cost of that change is significant. For instance, under the current collective bargaining agreement between FOP Lodge 614 and Louisville Metro Government, LMPD officers with uniform assignments (as opposed to plainclothes work) are paid allowances of $1,500 for clothing and $900 for equipment, plus $720 in negotiated increases to those allowances, for a total of $3,120 per year. (*See* Excerpt of Collective Bargaining Agreement) (Attached as Ex. L.) The average CERS hazardous active member is currently paid a total of $57,044 per year, so that a $3,120 reduction is equivalent to a 5.5% reduction in creditable compensation. Applied to the average annual benefit payment for such members, that reduction amounts to $1,494.59 per year.

SB 151 also caps the use of sick leave for calculating retirement eligibility by teachers to the amount accrued as of December 31, 2018. For a teacher who may earn ten days of sick leave per year, the elimination of the existing 300-day cap means that teachers may be required to work an additional year or more before he or she can retire. Such a change plainly alters the terms of the contract between the Commonwealth and teachers in a significant way.

Because SB 151 unquestionably reduces benefits, it substantially impairs rights and benefits under the inviolable contract as a matter of law. In *Baker v. Commonwealth*, the Kentucky Court of Appeals found a reduction of little over a hundred dollars per month, amounting to a total reduction of $524.40 of retirement benefits for one public servant, was a substantial impairment of the inviolable contract. 2007 WL 3037718, at *31, 39-40 (KRS policy

[17] *See generally* Kentucky Retirement Systems Comprehensive Annual Financial Report, at p. 39-40, Dec. 7, 2017 (setting forth contribution rates for Tier III members).

of withholding $105.00 of its $175.50 monthly state contribution obligation for one individual public servant's health insurance was an impermissible impairment of the inviolable contract.) In its holding, the Court of Appeals noted "no lesser institution than the General Assembly of the Commonwealth of Kentucky guaranteed those rights by statute in the form of an inviolable contract, never to be reduced or impaired."

Under the express language of the statutes creating the inviolable contract and the Kentucky Supreme Court's decision in *Jones*, "the General Assembly can take no action to reduce the benefits promised to participants…" 910 S.W.2d at 713. SB 151's provisions undoubtedly reduce the retirement rights and benefits of hundreds of thousands of current public employees, which could amount to losses of hundreds – if not thousands – of dollars for each affected public servant. Such reductions substantially impair the inviolable contract. *Baker*, 2007 WL 3037718, at *31, 39-40.

C. SB 151 is Neither Reasonable nor Necessary.

A law that substantially impairs a state's contract "may nevertheless be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust Co.*, 431 U.S. at 25. As the United States Supreme Court held, however, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." *Id.* at 26. Thus, "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* Moreover, courts are even less deferential "when a state's legislation is self-serving and impairs the obligations of its *own* contracts." *See Donohue v. Paterson*, 715 F. Supp. 2d 306, 321 (N.D.N.Y. 2010) (internal citation omitted).

Here, Defendants cannot show that SB 151's impairment of contractual rights is reasonable and necessary to accomplish an important public purpose. It is not enough to claim that the Commonwealth needs money because the "need for money is no excuse for repudiating contractual obligations." *Id.* at 26 n. 25 (citing *Lynch v. United States*, 292 U.S. 571, 580 (1934)). Moreover, if the state policy can be achieved through "alternative means," which could "serve its purposes equally well," the state must follow that course rather than impair the contract. *Id.* at 30. To this end, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *Id.* at 30-31

Defendants bear the burden of making such a showing. They cannot do so here because SB 151 merely sought to cut costs, i.e. reduce benefits, and openly refused to consider any additional revenue measures to address pension obligations. Such a position fails to qualify as "reasonable and necessary" under the law. *See, e.g., Moro v. State*, 351 P.3d 1, 39 (Ore. 2015) (holding respondents had failed to establish that they were entitled to such a defense, because "even if respondents had identified specific public service deficiencies resulting from the current level of funding, they have not demonstrated that those deficiencies could not be remedied through funding from other sources"); *United Firefighters of Los Angeles City*, 259 Cal. Rptr. 65, 73 (Cal. App. 1989) (Holding that "a desire to reduce costs or limit public spending does not justify the abrogation or impairment of a public entity's contractual obligations notwithstanding the legitimacy of such a public purpose").

In *Donohue*, the court found that that the State of New York failed to demonstrate that emergency appropriation "extender bills," impairing state contracts, were "reasonable and necessary." 715 F.Supp.2d at 322-323 (noting, "the Court must see that the impairments were reasonable and necessary, as established by real and demonstrable consideration of needs and

alternatives.") In that case the court held that the State did not demonstrate that certain furlough and wage provisions were reasonable and necessary when the State failed to demonstrate "any legislative consideration of policy alternatives to the challenged terms of the bill," instead choosing to "artificially limit[] the scope of alternatives for addressing the fiscal crisis to retrieving a certain amount of savings from unionized state employees." *Id*. Moreover, the court found that the State imposed "a drastic impairment when an evident and more moderate course was available," and did "not satisfactorily explain why a particular level of savings must be obtained from state personnel, aside from general reference to the fiscal crisis." *Id*.

In this case, SB 151 fails because funding the retirement systems in full is possible, and will eliminate any shortfall. Like *Donohue*, in passing SB 151 the Kentucky General Assembly improperly saddled the under-funding and unfunded liability of the retirement systems on the backs – and retirements – of current public employees. Further, the General Assembly cannot show that alternative funding streams are unavailable because it specifically rejected multiple bills that would provide dedicated funding to the retirement systems. *See* 2018 HB 41, 2018 HB 229, 2018 HB 536, 2018 SB 22, and 2018 SB 241 (each providing dedicated revenue streams directed, at least in part, to funding state retirement systems). Accordingly, Defendants will not be able to show that the impairment of the contractual rights promised to teachers is reasonable and necessary.

For the foregoing reasons, the Court should hold that SB 151 violates Kentucky's Contracts Clause set forth in Section 19 of the Constitution, and grant judgment for the Plaintiffs as a matter of law.

VIII. SB 151 Violates Section 13 Of The Kentucky Bill Of Rights As An Unconstitutional Taking.

The General Assembly made an inviolable contract with the Commonwealth's public employees, guaranteeing them certain contractual rights and benefits in exchange for their public service. Those contractual rights and benefits are the property of Kentucky's public employees. SB 151 violates Section 13 of the Kentucky Constitution because it deprives Kentucky's public employees of their contractual property rights in their retirement benefits without just compensation. Accordingly, this Court should grant judgment for the Plaintiffs as a matter of law.

Section 13 of the Kentucky Constitution provides, in relevant part:

> "[n]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

Kentucky's highest court has held "[t]he obvious meaning of section[] 13…is not only that persons whose property is taken for public use…shall receive just compensation therefor, but that this compensation must be received by them or tendered them before the property is taken." *Bushart v. Fulton Cnty.*, 209 S.W. 499, 503 (Ky. 1919). Since that time, numerous Kentucky courts have recognized. "…This declaration of an "inherent and inalienable" right has been a part of all four Constitutions of Kentucky, and there is no exception in favor of the state or its subdivisions. *See Stathers v. Garrad Cnty. Bd. of Educ.*, 405 S.W.3d 473, 483 (Ky. App. 2012) (quoting *Kentucky State Park Comm'n v. Wilder*, 84 S.W.2d 38 (Ky. 1935)) (citing *Carrico v. Colvin*, 17 S.W. 854 (Ky. 1891)). SB 151 violates the inherent and inalienable rights of the Commonwealth's public employees by depriving them of their inviolable contractual retirement rights and benefits, without just compensation.

Contractual rights and benefits create property interests. The Kentucky Supreme Court has held "[p]roperty rights are created and defined by state law." *See Weiand v. Bd. of Trs. of the Kentucky Ret. Sys.*, 25 S.W.3d 88, 93 (Ky. 2000) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, (1985)). Courts in other jurisdictions have held that contracts *can* create a constitutionally protected property interest. *See e.g.*, *San Bernardino Physicians' Servs. Med. Grp., Inc. v. Cnty. of San Bernardino*, 825 F.2d 1404, 1407–08 (9th Cir.1987). The Kentucky Supreme Court has endorsed the view that contractual rights are property. *Folger v. Com.*, 330 S.W.2d 106, 108 (Ky. 1959).

The guaranteed contractual rights and benefits under the inviolable contracts are the property of the Kentucky's public employees. *See Weiand*, 25 S.W.3d at 93; *Folger*, 330 S.W. at 108. Kentucky law provides – that in exchange for their public service – public employees are guaranteed certain retirement rights and benefits. *See* KRS Chapters 21, 61, 78, and 161. The General Assembly went further, making those retirement rights and benefits part of an "inviolable" contract under KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714. For example, Kentucky teachers' inviolable contract provides:

> It is hereby declared that in consideration of the contributions by members and in further consideration of benefits received by the state from the member's employment, KRS 161.220 to 161.710 shall constitute, except as provided in KRS 6.696, an inviolable contract of the Commonwealth, and the benefits provided herein shall, except as provided in KRS 6.696, not be subject to reduction or impairment by alteration, amendment, or repeal.

KRS 161.714.

The Kentucky Supreme Court has held the "[e]ssence of contractual right of state employees is receipt of promised pension benefits at promised levels…" *Jones*, 910 S.W.2d at 715. The Kentucky Court of Appeals has implicitly recognized such contractual rights and benefits are property stating, "[p]ublic school employees are entitled to retirement benefits

pursuant to KRS Chapter 161." *See Smith v. Teachers' Ret. Sys. of Kentucky*, 515 S.W.3d 672, 674 (Ky. App. 2017). Other courts have also held that both current and retired public employees have property interests in their pension benefits. *See e.gs., Miller v. Ret. Bd. of Policeman's Annuity*, 771 N.E.2d 431, 437 (Ill. App. 2001) (a person's interest in a pension benefit is a property interest); *Katzman v. Los Angeles Cnty. Metro. Transp. Auth.* 72 F.Supp. 3d 1091, 1100-01 (N.D. Cal. 2014) (retiree had property interest in his pension); *Spina v. Consolidated Police and Firemen's Pension Fund Comm'n*, 197 A.2d 169, 174 (N.J. 1964) (employee had a property interest in an existing State pension fund); *NEA v. Ret. Bd. of Rhode Island Employees' Ret. Sys.*, 172 F.3d 22, 29 (D.R.I. 2003).

SB 151 deprives the Commonwealth's public employees of these contractual rights and benefits – thus depriving these public servants of their property. In the instant case, SB 151 deprives public employees of – among other things – their right to use sick leave toward their retirement and retirement eligibility, the right to include certain lump sum payments and uniform allowances toward creditable compensation, reduces the guaranteed annual interest for certain employees that opted into the hybrid cash plan, and ultimately, the agreed-upon formula by which their retirement allowances are calculated. It also requires employers to deduct up to 1% from public employees' creditable compensation for other purposes. As a result, SB 151 substantially impairs public employees' contractual rights and benefits, thus depriving employees of their property rights.

SB 151 deprived the Commonwealth's public employees of their property rights without any just compensation. The Kentucky Supreme Court has held "[w]hen contract rights are taken for the public use, there is a constitutional right to compensation in the same manner as when other property rights are taken." *Folger*, 330 S.W.2d at 108. (citation omitted). It is undisputed

that the General Assembly did not compensate public employees before depriving them of their property rights. Because SB 151 does not provide these employees with any compensation in exchange for depriving them of their property rights, SB 151 violates Section 13 of the Kentucky Constitution.

CONCLUSION

SB 151 is government at its worst. The process by which SB 151 was passed violated Sections 2, 46, and 56 of the Kentucky Constitution as well as KRS 6.350 and KRS 6.955. The content of the bill violates Sections 13 and 19 of the Kentucky Constitution by breaching the inviolable contract the General Assembly made with the Commonwealth's public servants and depriving them of their property without just compensation. This Court must declare SB 151 void and grant judgment for the Plaintiffs as a matter of law.

Respectfully Submitted,

ANDY BESHEAR
ATTORNEY GENERAL

By: */s/ Andy Beshear*

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*

/s/ *Jeffrey S. Walther*, by permission

Jeffrey S. Walther(jwalther@wgmfirm.com)
Victoria Dickson(vdickson@wgmfirm.com)
Walther, Gay & Mack, PLC
163 East Main Street, Suite 200
Lexington, Kentucky 40588
(859) 225-4714

Counsel for Plaintiff
Kentucky Education Association

/s/ *David Leightty*, by permission
David Leightty (dleightty@earthlink.net)
Alison Messex (amessex@pcnmlaw.com)
Priddy, Cutler, Naake & Meade PLLC
2303 River Road, Suite 300
Louisville, Kentucky 40206
(502) 632-5292

Counsel for Plaintiff
Kentucky FOP Lodge

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' 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 2nd 2018.

/s/Andy Beshear
Andy Beshear
Attorney General

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
Frankfort, Kentucky 40601

Eric Lycan
Office of the Speaker
Capitol Annex, Room 332
Frankfort, Kentucky 40601

David Fleenor
Vaughn Murphy
Capitol Annex, Room 236
Frankfort, Kentucky 40601