

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT**

**DIVISION I**

**CIVIL ACTION NOS. 18-CI-00379 and 18-CI-00414**

**Electronically filed**

**COMMONWEALTH OF KENTUCKY** etc. et al.

**PLAINTIFFS**

v.

**MATTHEW G. BEVIN**, etc. et al.

**DEFENDANTS**

\* \* \* \* \*

**REPLY BRIEF OF KY. LODGE STATE FOP  
REGARDING STANDING**

**INTRODUCTION**

The Plaintiff, Kentucky State Lodge Fraternal Order of Police, by counsel, hereby replies to the Defendants’ challenge to the standing of the State FOP in this matter. The State FOP joins in the Reply Brief of all Plaintiffs, regarding all other issues.

Governor Bevin offers two arguments in support of his challenge to the State FOP’s standing. First, the Governor argues that failure “to specifically identify” individual members defeats the State FOP’s standing. Second, Governor Bevin argues that standing fails because neither the State FOP nor any of its members “have actually been harmed” by the Pension Bill, S.B. 151.

As shown below, each of these arguments is without merit.

## STATEMENT OF THE CASE

Plaintiffs' Complaint expressly alleges that the State FOP has among its purposes "bettering the condition under which its individual members serve, and generally promoting the rights and welfare of law enforcement's officers." The complete passage is as follows:

7. Plaintiff, Kentucky State FOP Lodge, is a fraternal organization composed of current and retired law enforcement officers, as well as local and regional lodges throughout the Commonwealth. It is dedicated to, among other things, bettering the conditions under which its individual members serve, and generally promoting the rights and welfare of law enforcement officers. Its members include both current and retired participants in the state and county retirement systems.

Complaint ¶7, p.7. That allegation was verified by Kentucky State FOP President Berl Purdue, in his verification stating:

I, Berl Purdue, Jr. President of the Kentucky State Lodge Fraternal Order of Police, hereby state that I have reviewed the Complaint in this matter and that the factual statements in the Complaint relating to the sworn law enforcement officers, and to the Kentucky State Fraternal Order of Police and its associated Lodges, are true and accurate to the best of my information and belief.

In addition, the affidavit of Nicolai Jilek, President of Fraternal Order of Police Lodge 614 (in the record as Exhibit F to Plaintiffs' Motion to Temporary Injunction) , states:

4. Since the end of the 2017 legislative session, I have heard from many FOP members across the state, both active and retired, all expressing grave concerns about their pensions and their retirement security. In addition, in my position as president of the River City FOP Lodge 614, and as legislative agent for the Kentucky State Lodge, I have kept abreast of police personnel issues across the Commonwealth.

Jilek Affidavit ¶4, p.1. (Copy of Affidavit provided herewith as Exhibit 1). Jilek's affidavit additionally describes the "increase in the number of police retirements based on the fear of what may happen with the pensions." Id. ¶6, p.2, see also ¶9, p.3.

## ARGUMENT

### B. Personal Identification of Individual Members Is Not Required

#### 3. The Applicable Case Law Supports Standing

The governing, and dispositive case in this matter is *City of Ashland v. Ashland F.O.P. #3*, 888 S.W.2d 667 (Ky. 1994), where the Kentucky Supreme Court affirmed the standing of an FOP Lodge to challenge a city's legislation requiring new city employees to become residents of the city. Affirming both the trial court and the Court of Appeals, the Supreme Court stated:

The Ashland F.O.P. #3, Inc. is a nonprofit organization consisting of a majority of the city police officers. The stipulations in the record at oral argument before the Court of Appeals indicate that about 80 percent of the Ashland police officers live within the city limits. The circuit judge found as a fact that the police, as well as all the other citizens of the city had sufficient standing because the nature of police work was such that the lodge members had a real and substantial interest in who became future employees and in the employee pool from which the city would hire police.

888 S.W.2d at 668.

In the case at bar, the State FOP challenges legislation that indisputably affects its members – just as FOP Lodge 3 challenged the City's legislation in *City of Ashland*. And the interests of Lodge 3 members “who would become future employees and in the employee pool from which the city would hire police” is certainly no greater than the interests of State Lodge members in their retirement benefits.

As Governor Bevin acknowledges, a three-part test is generally used to determine the standing of an association:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); see also *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 554, 556-58 (1996); and *Automobile Workers v. Brock*, 477 U.S. 274, 281-82 (1986).

Each of those three elements is satisfied here:

Element (a) is satisfied because individual employees are directly affected by S.B. 151, and have personal interests at stake that would confer standing on State Lodge members. It is undisputed that many of the State FOP's members participate in the County Employees Retirement System ("CERS), which is administered by the Defendant Kentucky Employees Retirement System ("KyRS")—either as active employees or as retirees. And there can be no genuine dispute that S.B. 151 affects the interests of every CERS member, including those who are FOP members. Thus, element (a) of organizational standing is satisfied—the members of the various Plaintiff organizations “would otherwise have standing to sue in their own right[.]” Any of those individuals would have standing to challenge S.B. 151 on an individual basis.

Element (b) is satisfied because the interests which this lawsuit seeks to protect—rights of employees under the retirement plans administered by the KyRS—are obviously “germane” to purposes for which the State FOP exists—“bettering the conditions under which its individual members serve, and generally promoting the rights and welfare of law enforcement officers.”

Finally, element (c) is satisfied because no cause exists—and Defendants have not suggested otherwise—that would require this action to be prosecuted only by individual members.

## 2. Defendants' Reliance on *Commonwealth ex rel. Brown* Is Misplaced

Governor Bevin, however, seeks to rely on the 2010 Kentucky Supreme Court Decision in *Commonwealth ex rel. Brown v. Interactive Media Entm't & Gaming Ass'n*, 306 S.W.3d 32 (Ky. 2010). But that decision actually contradicts the Governor's argument—it cites and

relies on **City of Ashland** in language plainly approving of FOP standing in circumstances such as those present here:

In **City of Ashland v. Ashland F.O.P. No. 3**, 888 S.W.2d 667(Ky. 1994), this Court granted the Fraternal Order of Police standing to challenge a city ordinance that limited public employment to people living within city limits. The F.O.P. had standing because its members--the police--had a "real and substantial interest" in striking the ordinance. *Id.* at 668. Although the ordinance only applied to new employees, other police officers depended on the quality of the new police for their own safety. *Id.* "Such an interest conferred standing on the police association because, according to stipulation, it represented the majority of city police." *Id.*

306 S.W.3d at 38. Indeed, **Commonwealth ex rel. Brown** expressly acknowledged that the **City of Ashland** decision "did not discuss whether the fraternal order had identified affected members" and that "the Ashland F.O.P. may not have provided a membership list." 306 S.W.3d at 39. The State FOP in this case has, through the verified complaint as well as the affidavit of Jilek, provided clear evidence of its standing. And, as the Court itself stated in **Commonwealth ex rel. Brown**:

This is not to say that showing associational standing requires heavy proof. On the contrary, it must simply be proven to the same extent as any other "indispensable part of the plaintiff's case." **Lujan**, 504 U.S. at 561.<sup>1</sup> "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* At the pleading stage, less specificity is required. At that point, an association may speak generally of the injuries to "some" of its members, for the "presum[ption] [is] that general allegations embrace those specific facts that are necessary to support the claim."

306 S.W.3d at 39-40 (Ky. 2010).

Thus, Governor Bevin's attempt to rely on **Commonwealth ex rel. Brown** is in error. There are no special circumstances requiring the naming of individual members here, where the effect of the challenged pension bill on members of the State FOP is beyond dispute.

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<sup>1</sup> The full citation to the case is **Lujan v. Defs. of Wildlife**, 504 U.S. 555 (1992)

**B. The Claim that S.B. 151 Is Not Harmful Goes to the Merits, Not Standing**

Governor Bevin’s second argument in challenging the State FOP’s standing—the claim that “no one has suffered a requisite injury in fact—actually has nothing to do with standing, but instead attempts to convert the Governor’s disagreement with the merits of Plaintiffs’ claims into challenge to standing. As the Governor acknowledges at the outset of his standing argument, “standing” refers to the existence of actual interest in the controversy under litigation. The Plaintiffs’ Reply Brief addressing the merits of this case – in which the State FOP joins, demonstrates the merits of Plaintiffs’ claims. But the merits of the case are outside the scope of a challenge to standing.

**CONCLUSION**

The Defendants’ challenge to the State FOP’s standing is based on an erroneous reading of *Commonwealth ex rel. Brown*, and on a one-sided and irrelevant assessment of the merits of Plaintiffs’ claims. It must be rejected.

RESPECTFULLY SUBMITTED,

*s/David Leightty* \_\_\_\_\_

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KENTUCKY STATE LODGE FRATERNAL

ORDER OF POLICE

## CERTIFICATE

It is hereby certified that a copy of the foregoing was served by mail, and where indicated by email, this 30 day of May, 2018, on the following persons:

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## EXHIBIT 1

**COMMONWEALTH OF KENTUCKY**  
**FRANKLIN CIRCUIT COURT**  
**DIVISION \_\_\_\_\_**  
**CIVIL ACTION NO. \_\_\_\_\_**

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

**PLAINTIFF**

**v.**

**AFFIDAVIT OF NICOLAI JILEK**

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

**DEFENDANTS**

I, Nicolai Jilek, being duly sworn, hereby state as follows:

1. I am currently the elected President of the Fraternal Order of Police (“FOP”) River City Lodge 614 in Louisville, Kentucky and represent approximately 2,400 members who are active and retired police officers of the Louisville Metro Police Department and retired police officers from the former Louisville Police Department and Jefferson County Police Department.

2. I have been employed as a sworn police officer in the Louisville Metro Police Department since 2007 and have served as both in patrol and investigative positions. I have been a legislative agent for the FOP Kentucky State Lodge since 2014.

3. Prior to working at the Louisville Metro Police Department, I worked as a police officer and detective with the Danville Police Department from 2002-2007.

4. Since the end of the 2017 legislative session, I have heard from many FOP members across the state, both active and retired, all expressing grave concerns about their pensions and their retirement security. In addition, in my position as president of the River City FOP Lodge 614, and as legislative agent for the Kentucky State Lodge, I have kept abreast of police personnel issues across the Commonwealth.

5. Recruitment and retention have become critical issues for law enforcement agencies across the state, forcing many of those agencies to lower their qualification requirements for hiring. Applications with the Louisville Metro Police Department alone fell over 40% in the years following the 2013 legislative changes to the state pension system - changes that dramatically reduced benefits and retirement security for new hires.

6. In the past year, there has been an increase in the number of police retirements based on the fear of what may happen with the pensions. The increase was so sudden and dramatic at times in the Fall of 2017 that the KRS retirement counselors could not meet the demand for appointments created from members wanting to retire.

7. On March 29, 2018, the House of Representatives State Government Committee took SB 151, which was a bill dealing with sewers, and very suddenly and with no warning replaced it with a pension reform bill. This occurred less than 24 hours after the Speaker Pro Tempore of the House of Representatives was quoted as describing the probability of passing a pension bill as "low." The Committee quickly passed the bill to the full House of Representatives before anyone had a chance to properly review it, including FOP. The House of Representatives approved the bill that afternoon and sent it to the Senate, who approved it that night. SB 151 was introduced and rushed through the legislature in the space of less than a single day. It also was passed without the required actuarial analysis.

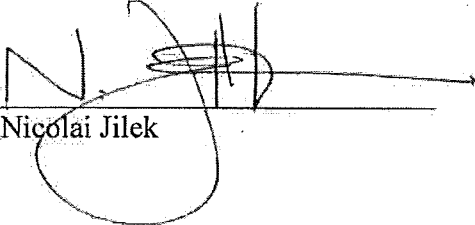
8. SB 151 causes irreparable harm to FOP members, the police who have put their lives on the line every day to serve and protect the public. FOP members as public employees entered into an inviolable contract with the Commonwealth for specific and defined pension benefits. SB 151 violates that contract by taking away or diminishing the benefits they were promised in

return for their service, by altering and amending statutes protected by KRS 61.692 and KRS 78.852.

9. Many FOP members have informed me that they have retired due to anxiety over potential pension reform. With the apparent and perceived blatant disregard for our established and expected deliberative legislative process in how SB 151 was presented and passed as well as the blatant disregard of the intended and literal protections and binding promise of the inviolable contract as described in KRS 61.692 and KRS 78.852, many FOP members have lost faith in their retirement security and the government institutions in place to provide and protect their promised benefits. Now that SB 151 has been passed, I expect that many more FOP members will retire due to increased uncertainty for their future past their law enforcement career. This will irreparably harm Kentucky by depriving it of many of its best and most experienced police officers, and potentially endangering the public.

10. Many FOP member departments have had difficulty recruiting qualified candidates due to the diminished pension benefits, and now that SB 151 further diminishes them and does nothing to improve benefits for new hires, I expect that police departments will have even more difficulty recruiting qualified candidates. This will irreparably harm Kentucky by deterring the best candidates from becoming police officers, and potentially endangering the public.

Further affiant sayeth naught.

  
Nicolai Jilek

COMMONWEALTH OF KENTUCKY )  
 ) ss.  
COUNTY OF Jefferson )

Subscribed and sworn to before me by Nicolai Jilek, Affiant, on this 2<sup>nd</sup> day of April, 2018.

  
Notary Public

Notary Number: 575628  
My commission expires: 5-22-2021