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May 30, 2018

VIA HAND-DELIVERY

Hon. Phillip J. Shepherd
Judge, Franklin Circuit Court
222 St. Clair Street
Frankfort, KY 40601

RE: *Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney General, et al. v. Matthew G. Bevin, et al.* 18-CI-379 (Pension Case)

Dear Judge Shepherd:

The purpose of this letter is to request that the Court consider whether grounds exist requiring your Honor to disqualify himself from further presiding over the above-styled case. We write with great reluctance and do not in any way desire, or intend, to call into question the Court's subjective belief as to its impartiality. Rather, we believe circumstances indicate that your Honor may have a financial interest that could be affected by the outcome of the proceedings, thus giving rise to a reasonable concern as to perceptions about the Court's impartiality. See KRS 26A.015(2)(d). In other words, it appears that the Court has more than a *de minimis* personal interest that could be substantially affected by the proceedings. See SCR 4.300, Rule 2.11(A)(2)(c).

In drafting the "Combined Memorandum in Support of Motion for Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment" that was filed on May 24, we first realized that, as a member of the state judicial retirement plan, your decision in this case could directly affect your personal state pension rights in the future. In addition to the process-based claims advanced by the Plaintiffs, issues you will be called upon to decide include: (1) the meaning and parameters of the term "inviolable contract"—which is used throughout the KRS in reference to public pension benefits, see KRS 61.692; KRS 161.714; KRS 78.852; KRS 16.652, including in reference to judicial pension benefits, see KRS 21.480; and (2) whether the General Assembly

has the legal and constitutional ability to change the terms of any of those pension benefits on a prospective basis (the “Prevailing Rule,” in our Brief), or whether all state employees hired before 2014 have the right for the duration of their employment to accrue the same benefits, and at the same rates, that existed in the pension statutes when they became state employees. Since your Honor is a beneficiary of an “inviolable contract” under KRS 21.480(1), we came to realize that the ultimate decision in this case would likely have the potential to affect your Honor’s accrual of pension benefits.

KRS 21.480(1) provides that judges of the Court of Justice who came to the bench prior to January 1, 2014 have an “inviolable contract” with the Commonwealth, like the aforementioned pension statutes that are directly involved in this case. However, judges who first became members of the Judicial Retirement Plan on or after January 1, 2014, and who were not already members of another state retirement plan, have no such implicated rights since any “inviolable contract” rights afforded under KRS 21.480(1) do not apply to them. *See* KRS 21.480(2).

As your Honor may see, it appears that any judge in Kentucky who became a judge and a member of the Judicial Retirement Plan before January 1, 2014, and who is currently a member of the Judicial Retirement Plan, would have a conflict of interest in deciding the terms and parameters of the “inviolable contract,” as the judge’s decision would potentially have a real and direct effect on the judge’s own pension. For example, if the judge were to decide that the “California Rule” applies in Kentucky, then he or she would be locking in until his or her retirement those terms and conditions of the “inviolable contract” that existed when the judge became a member of the Judicial Retirement Plan. Conversely, if the judge were to interpret the “inviolable contract” according to the “Prevailing Rule,” then the judge would be permitting changes to future, not-already-accrued benefits. The decision by the judge could be affected, or be reasonably seen as being affected, by the judge’s personal financial interest. The reasonable appearance of a conflict of interest is obvious.

Fortunately, not all circuit court judges in Kentucky are hampered by this conflict. Since judges assuming the bench after January 1, 2014 (and who are not otherwise members of another Kentucky employee retirement plan) are part of the hybrid cash balance plan enacted by the 2013 General Assembly, and thus are not beneficiaries of the judicial “inviolable contract,” those judges would not have a conflict of interest in deciding this case since the outcome would not have any direct personal effect on their pensions. Because there are numerous circuit judges currently on the bench who are available to handle this case without the conflict, the “rule of necessity,” which could apply when all judges in the state have a conflict of interest, would not have to be invoked.

As your Honor is aware, the Commonwealth’s pension funds are the worst funded in the United States. Thus, the importance of SB 151, and the General Assembly’s powers in the future regarding the various “inviolable contracts,” cannot be overstated. It is vitally important to the

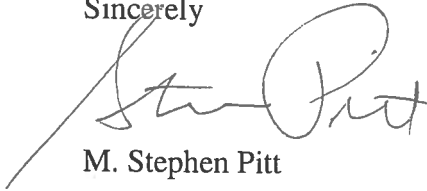
Commonwealth and its thousands of employees, including our public school teachers, that the decision in this case be free of any question of actual or perceived bias or lack of impartiality on the part of the Court. Otherwise, as demonstrated in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), a serious Due Process Clause violation can arise. Failure of the Court to step aside in this case in favor of the appointment of a judge who does not possess “inviolable contract” rights would “violate statutory mandates for impartiality,” see *Marchese v. Aebersold*, 530 S.W.3d 441, 445 (Ky. 2017), in addition to raising constitutional due process implications, see KRS 26A.015(2)(c) (“Any...judge...shall disqualify himself in any proceeding: ... (c) Where he knows that he ... has a pecuniary or proprietary interest in the subject matter in controversy”); see also SCR 4.300 Kentucky Code of Judicial Conduct, Rule 2.11 (“(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including ... [when] (3) The judge knows that he or she ... has an economic interest in the subject matter in controversy”); Judicial Ethics Opinion JE-127 (Dec. 07, 2015) (“a judge is disqualified whenever the judge’s impartiality might reasonably be questioned ...”).

With the utmost respect, this case involves a situation in which the Court’s impartiality can reasonably be questioned. This Court is not alone in that regard. Your Honor, and scores of other judges throughout the Commonwealth, are members of a retirement plan designated as an “inviolable contract.” This action will require the Court to determine the scope of “inviolable contracts” in which state employees, teachers, law enforcement officers, and others are parties. The Court’s ultimate decision is likely to determine whether, and to what extent, the Kentucky General Assembly has the power to make changes on a prospective basis in those, and perhaps other, “inviolable contracts,” including that encompassed in KRS 21.420(1), the judicial retirement “inviolable contract.” That, in the minds of reasonable people, creates a conflict of interest. That conflict of interest can, however, be avoided. Pursuant to KRS 26A.020(3)(a), “Any justice or judge of the Court of Justice disqualified under the provisions of this section shall be replaced by the Chief Justice.” Under KRS 26A.020(1), the Chief Justice is empowered to name a “regular or retired justice or judge of the Court of Justice as special judge.” Fortunately, it appears that there are numerous sitting circuit judges who took the bench and became members of the judicial retirement plan after January 1, 2014, not to speak of retired judges who do not have a conflict. Those judges, who are not considered to be parties to an “inviolable contract,” would be available for consideration by the Chief Justice for appointment as special judge in this action, thus avoiding any suggestion of lack of impartiality.

We hope your Honor understands that this request to disqualify truly gives us no pleasure. This is only the second one I remember making since I began practicing law in 1971. However, given the nature of the case, including its great importance, and the fact that your Honor’s decision in the case could have an effect on your personal pension, we feel we have no alternative but to raise the issue. We do so in this less formal way in the hope that your Honor will see fit to step aside voluntarily. If, however, your Honor does not promptly decide to do so, we will need to

consider making a motion to recuse consistent with this letter. For that reason, we hope your Honor will let us know of his decision at the earliest opportunity prior to June 7, 2018, the date of the next scheduled hearing.

Sincerely

A handwritten signature in black ink, appearing to read "M. Stephen Pitt". The signature is written in a cursive style with a large, prominent "P" at the end.

M. Stephen Pitt
S. Chad Meredith
Matthew F. Kuhn

Cc: Hon. Andy Beshear
Hon. J. Michael Brown
Hon. La Tasha Buckner
Hon. S. Travis Mayo
Hon. Jeffrey Walther
Hon. David Leighty
Hon. David Fleenor
Hon. Eric Lycan
Hon. Mark Blackwell