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' REPLY BRIEF ON THE MERITS
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, by counsel, provide this Reply Brief on the Merits on behalf of over 200,000 public employees whose constitutional rights have been violated. The Kentucky Constitution requires legislation to be passed in a transparent, cautious, and deliberate manner. It further protects the contractual rights of public employees who provide the Commonwealth with decades of service.

Defendants violated the Constitution, state statute, and binding precedent when it turned an 11-page sewer bill into a 291-page pension bill and fully passed it in just six hours. They further violated the Constitution by reducing, altering, and eliminating important retirement benefits that were promised under law to Kentucky's teachers, police officers, firefighters, social workers, and other public servants. This Court should void SB 151.

UNCONTESTED FACTS

This Court has sufficient uncontested facts to enter summary judgment. All parties agree to the following basic facts:

I. The Process By Which SB 151 Was Passed.

On February 15, 2018, SB 151 was introduced in the Senate as a 9-page bill related to "the local provision of wastewater services," *i.e.*, a sewer bill. In the Senate, SB 151 received three readings, but only as a sewer bill. At no time during any of these readings did SB 151 contain any provisions relating to the state pension system. On March 16, 2018, SB 151 passed 36-0 out of the Senate, again as an 11-page sewer bill. (Legs. Defs. Br. 11.)

On March 19, 2018, SB 151 was received in the House of Representatives. It received two readings as "an act relating to the local provision of wastewater services," *i.e.* a sewer bill. During these readings, it did not contain any provisions relating to the state pension system.

Just after 2:00 p.m. on March 29, 2018, the House recessed so that its Committee on State Government could meet. Nothing in any notice of that meeting included or suggested that pensions would be addressed. Instead, the bill listed for discussion was the sewer bill, SB 151.

The meeting began with House Committee Substitute 1 to SB 151 being introduced. The Substitute stripped every word of the 11-page bill, including all provisions related to sewers. It replaced this language with 291 pages of substantial changes to the pension system for Kentucky's teachers, police officers, firefighters, social workers, and other public servants. The Chairman began the meeting by stating a vote would occur on the Substitute during the meeting.

The Committee refused to allow testimony from the public concerning the Substitute. Several representatives objected that they had just seen the 291-page Substitute for the first time, and needed time to read it. Representative Jim Wayne further objected to holding a vote on SB 151 because no actuarial analysis was provided to the members of the Committee, nor was one attached to the bill. Chairman Jerry T. Miller, the substitute sponsor Rep. John Carney, and

House Majority Floor Leader Rep. Jonathan Shell all testified that there was no actuarial analysis. Chairman Miller overruled the objection and called for a vote.

The Committee reported the bill favorably to the House and the title was then amended by a vote of the Committee, changing it from "an act relating to the local provision of wastewater services" to "an act relating to retirement." No one contests these are vastly different subjects, *i.e.*, they are not germane to each other. No fiscal note concerning the bill's impact on local governments was obtained prior to the Committee vote, nor has one been obtained up to the date of the filing of this brief.

The new SB 151 was immediately reported to the House of Representatives. It then received *one* reading on the floor of the House of Representatives in its new form, as "an act relating to retirement." Representative Wayne again objected to the passage of SB 151 without an actuarial analysis, but Speaker Pro Tempore David Osborne overruled him. The House then "passed" SB 151, but only by a vote of 49-46. (Legs. Defs. Br. 51.) Speaker Pro Tempore Osborne then signed the bill on the line labeled "Speaker-House of Representatives." The new 291-page SB 151 was then immediately sent to the Senate. The Senate did not give it any new readings. The Senate then passed the bill by a vote of 22-15. (Legs. Defs. Br. 16-17.)

These facts are sufficient to void SB 151 under Sections 46 and 56 of the Constitution, and KRS 6.350 and 6.955.

II. The Contents Of SB 151.

The contents of SB 151 alter, amend, reduce, and eliminate sections that fall within the inviolable contract as defined by KRS 61.692, KRS 78.852, and KRS 161.714. The parties agree that the following changes to those sections include:

Kentucky Teacher Retirement System

- Active teachers that, at the time of their employment, could convert unused sick days to additional service credit for purposes of their retirement lose that right for any sick days after December 31, 2018.

Kentucky Employee Retirement System

- Non-hazardous, Tier I employees who are retiring after July 1, 2023, are now excluded from lump-sum payments for creditable compensation time.
- Uniform and equipment allowances, as well as undefined "other expense allowances," are now expressly excluded from creditable compensation on or after January 1, 2019.
- Tier I employees retiring on or after January 1, 2023, are now prohibited from using sick leave service credit for retirement eligibility.
- Tier I members employed after July 1, 2003 must now deduct up to 1% of the members' creditable compensation for purposes of hospital and medical insurance.
- After January 1, 2019, Tier I hazardous employees' final compensation must now be calculated using the creditable compensation from their highest three (3) *complete* fiscal years, and the highest five (5) *complete* fiscal years must now be used to calculate Tier I nonhazardous employees' final compensation.
- SB 151 removes the guarantee that Tier I and II employees, who opted into the current hybrid cash balance plan, have an annual interest credit of at least 4% and instead guarantees a return of 0%.

State Police Retirement System

- Tier I employees are now prohibited from using sick leave service credit for retirement eligibility, if they retire on or after January 1, 2019.
- An employer of a Tier I member, employed after July 1, 2003, must now deduct up to 1% of the member's creditable compensation for purposes of hospital and medical insurance under the plan.

County Employee Retirement System

- Tier I employees who retire after July 1, 2023 are excluded from lump-sum payments for compensatory time and SB 151 excludes uniform and equipment allowances as well as "other expense allowances," paid on or after January 1, 2019, from creditable compensation.
- Employees are prohibited from using sick leave service credit for retirement eligibility, if they retire on or after January 1, 2023.
- Section 30 of SB 151 requires an employer of a Tier I member, employed after July 1, 2003, to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical insurance.
- After January 1, 2019, Tier I hazardous employees' final compensation must now be calculated using the creditable compensation from their highest three (3) *complete* fiscal

years, and the highest five (5) *complete* fiscal years must be used to calculate Tier I nonhazardous employees' final compensation.

- SB 151 removes the guarantee to Tier I and II employees who opted into the current hybrid cash balance plan an annual interest credit of 4% to now a return of 0%.

These uncontested alterations, amendments, reductions, and eliminations are sufficient to rule SB 151 is an unconstitutional violation of the inviolable contract, and the Contracts and Takings Clauses of Kentucky's Bill of Rights.

ARGUMENT

I. This Court Has A Duty To Uphold The Constitution.

Defendants argue that this Court cannot decide whether the General Assembly enacted SB 151 in violation of constitutional and statutory mandates, and should not enforce the Constitution to stop the its violations of those requirements. (Gov. Br. 51; Leg. Br. 50-51.) Kentucky law disagrees.

A. This Case Is Justiciable.

In *D & W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 424 (Ky. 1980), Kentucky's highest court held that pursuant to KY. CONST. § 228, the judiciary has an obligation to "support … the Constitution of this Commonwealth" and that courts are therefore "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 [a court's] voice[] when confronted with violations of the constitution is not acceptable… ." Given that Section 26 of the Kentucky Constitution states that any law contrary to the constitution is "void," the Court held that the proper exercise of judicial authority requires Kentucky courts to recognize any unconstitutional law and declare it void. *Id.*

In decision after decision, Kentucky's highest court has followed this precedent and has repeatedly ruled on whether the Legislature's actions violate the mandates of the Kentucky

Constitution. *See Philpot v. Patton*, 837 S.W.2d 491, 494 (Ky. 1992) (holding that suit may be brought to challenge constitutionality of legislative rule); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 208-09 (Ky. 1989) (holding General Assembly had violated constitutional mandate to provide efficient system of common schools); *Farris v. Shoppers Vill. Liquors, Inc.*, 669 S.W.2d 213, 214 (Ky. 1984) (declaring statute unconstitutional, and enjoining enforcement, because it was not germane to the subject matter suggested by the title); *District Bd. of Tuberculosis Sanitarium for Fayette Cnty. v. Bradley*, 222 S.W. 518, 519 (Ky. 1920) ("All provisions of the Constitution are mandatory, and the duty imposed upon the courts is to construe and enforce them in accordance with their meaning and purpose."); *Varney v. Justice*, 6 S.W. 457, 459 (Ky. 1888) (recognizing the fundamental law of Kentucky, the Constitution, "was designed by the people adopting it to be restrictive upon the powers of the several departments of government created by it," including the Legislature); *Norman v. Kentucky Bd. of Mgrs. of World's Columbian Exposition*, 20 S.W. 901, 903 (Ky. 1892) ("… when this court is called upon to exercise a power, respect for a co-ordinate department of the government cannot be suffered to override fundamental law, by virtue of which both act and exist…. If the people desire this appropriation be made, the legislature will doubtless do so; but nothing connected with the matter is more important to all than that it shall be done according to law.").

For instance, in *Rose*, the Kentucky Supreme Court was faced with the specific question of whether the General Assembly had complied with a constitutional mandate. 790 S.W.2d at 208-09. As here, the General Assembly argued that the Court should not "stick" its "judicial nos[e]"' into what is argued to be strictly the General Assembly's business." *Id.* at 209. The Court disagreed, stating "[t]t is our sworn duty, to decide such questions when they are before us by applying the constitution." *Id.* It further held that, "The duty of the judiciary in Kentucky

was so determined when the citizens of Kentucky enacted the social compact called the Constitution and in it provided for the existence of a third equal branch of government, the judiciary." *Id.* "To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty. ***To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.***" *Id.* (Emphasis added). It finally ruled:

> The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to do so. This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.

Id. Several years later, in *Philpot v. Patton*, the Supreme Court likewise decided "important public questions," stating "it is our constitutional responsibility to tell [the General Assembly] whether the system in place complies with or violates a constitutional mandate, and, if it violates the constitutional mandate, to tell them what is the constitutional 'minimum.'" *Id.* at 494.

Even in Defendants' primary cases of *Philpot v. Haviland*, 880 S.W.2d 550 (Ky. 1994), and *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006), the Court performed a constitutional analysis. *See Philpot v. Haviland*, 880 S.W.2d at 551 (upholding trial court ruling on constitutionality of a senate rule); *Baker*, 204 S.W.3d at 592 (affirming the trial court's ruling that an executive order did not violate the Kentucky Constitution).[1]

[1] In *Baker*, which involved the legislature's retroactive suspension of a statute and requests for declaratory, injunctive and monetary relief, the plaintiffs named only the Governor, not the General Assembly or members of it, as a defendant. 204 S.W.3d at 592. The Court affirmed the trial court's decision on the merits in favor of the Governor. *Id.* at 598. In a footnote, the Court indicated that its proposition on legislative immunity did not call into question the Court's holding in *Rose* because in *Rose* the legislators did not file a motion to dismiss. *Id.*at 595 n. 23. However, the Court in *Rose* did not mention a motion to dismiss and the failure of a party file one was simply not an

As the long line of precedent demonstrates, the constitutional questions in this declaratory judgment action are justiciable.

B. The General Assembly's Past Violations of the Constitution Necessitate a Judgment Voiding SB 151.

Realizing the flaws in their justiciability argument, Defendants make a stunning alternative argument and admission: they suggests this Court should not apply the Constitution because the General Assembly violates it too frequently. As the Governor admits, "the General Assembly frequently passes bills the same way SB 151 was passed." (Gov. Br. 72.) And the Legislative Defendants argue that the Court should not declare SB 151 unconstitutional because it was passed in accordance with the General Assembly's "longstanding practices." (Leg. Defs. Br. 73.) This court must reject this argument. As discussed above, it is this court's duty to enforce the Constitution and stop unlawful conduct. *See D & W Auto Supply*, 602 S.W.2d at 424 (courts are "sworn to see that violations of the constitution by any … branch of government are brought to light and corrected.") The argument that the General Assembly has a "longstanding practice" of violating the Constitution only further necessitates a judgment voiding SB 151.

Nevertheless, Defendants offer a "parade of horribles," claiming if the Constitution is enforced, this Court will invalidate other laws. (Gov. Br. 72-75.) This argument was rejected as a matter of law in *D & W Auto Supply*. When it overruled the Enrolled Bill Doctrine, the Supreme Court conceivably called into question hundreds of bills then and into the future. But the Court ruled it had a duty to enforce the Constitution and its provisions. *See D & W Auto Supply*, 602 S.W.2d at 424.

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issue in the case. *See Rose*, 790 S.W.2d 186. *Baker* did not abrogate, reverse or alter the *Rose* decision. *See Commonwealth v. Kentucky Retirement Sys.*, 396 S.W.3d 833, 839-40 (Ky. 2013) (applying *Rose* and its progeny).

More recently, this Court addressed nearly identical arguments in *Williams v. Grayson*. *See Williams v. Grayson*, Case No. 08-CI-856, Final Judgment, at 4-5 (Franklin Cir. Ct. Jan. 21, 2009) (Pls. Br. Ex. E). There, a party contended that the court should not declare legislation unconstitutional because of the "parade of horribles regarding the impact of this ruling on other unrelated legislation ..." *Id.* at 4. This Court rejected those arguments, "declin[ing] to base its ruling on the effect it may have in cases that are not before it." *Id.* The Court quoted the Supreme Court of New Mexico, holding:

> There is not the slightest doubt that the legislators are duty bound to comply with this constitutional directive. Their frequent failure to do so breeds disrespect for our law and our institutions. Ignoring this constitutional mandate reflects no credit upon the legislative branch of government for having indulged in such a course, or upon the judicial branch for having condoned it.

Id. at 10 (quoting *Dillon v. King*, 529 P.2d 745, 751 (N.M. 1974)).

The General Assembly's unconstitutional practice has already inflicted harm on the public in the form of rushed, ill-considered legislation without the input of the public and other stakeholders — precisely the harm that the constitutional provisions at issue were intended to prevent. Defendants' arguments about knock-on effects of a decision by this Court to uphold the Constitution are nothing more than an attempt to shift blame for problems of their own making.

Accordingly, this Court should enforce the unambiguous mandates of the Constitution, and hold SB 151 is void.

II. SB 151 Is Invalid Because It Was Not Read At Length Three Times.

In their Merits Brief, Plaintiffs outlined how the passage of SB 151 violated the three-readings requirement of Section 46 of the Kentucky Constitution. (Pls. Br. 12-19.) Plaintiffs first explained that Section 46 mandates that every bill "***shall*** be read at length on three different days

in each House…." (*Id.* at 12; KY. CONST. § 46 (emphasis added)).[2] Plaintiffs then pointed to the uncontroverted fact that SB 151, in its completely substituted "pension" form, received no readings in the Senate, and only one reading in the House. (Pls. Br. 12-13.)

Instead, over the course of six hours, the subject of SB 151 was changed from sewers to pensions, every word of the bill as it had been read in the Senate and House was deleted, 291 new pages of law was added, and it was rushed through both chambers without giving legislators an opportunity to read the bill, and depriving the public of its right to comment on it. (*Id.* at 14-16.) Plaintiffs provided numerous decisions showing even the most lenient courts have declared this practice unconstitutional, *i.e.*, where an original bill is replaced by a completely unrelated or "non-germane" bill, it must be given three new readings in each chamber or it is void. (*Id.* at 16-17.) As such, Plaintiffs requested that this Court declare SB 151 unconstitutional.

In response, Defendants admit that, in committee, they "removed the original wastewater provisions" from SB 151 and completely replaced and/or "substituted with a pension reform bill." (Gov. Br. 68; Leg. Defs. Br. 37.) Faced with this wholesale, non-germane change, Defendants claim that that the three-readings requirement of Section 46 is merely "directory," that it does not require re-reading of a substitute bill, and that this court must simply accept the Legislative Journals. (Leg Defs. Br. 30-37.) Defendants' arguments lack merit.

A. Section 46 of the Kentucky Constitution is Mandatory.

Defendants first claim that the readings requirement of Sections 46 is merely "directory." (Leg. Defs. Br. 30-35.) They are wrong. Controlling precedent clearly holds that Section 46's requirement that "the reading of the bills shall be on different days is mandatory." *Kavanaugh v.*

[2] Section 46 further provides 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." The undisputed facts show that there was no such vote here, nor do Defendants claim a vote occurred. (*See* Leg. Defs. Br. 10-15; Gov. Br. 82-83.)

Chandler, 72 S.W.2d 1003, 1004 (Ky. 1934).[3] More than a century of case law concurs, holding that every provision of the Kentucky Constitution is ***mandatory***.

Kentucky's highest court first rejected Defendants' argument in 1888, when it considered a similar argument that a provision of the constitution setting the exact time of elections was directory, not mandatory. *Varney v. Justice*, 6 S.W. 457, 459 (Ky. 1888). The court held that the Constitution is never directory:

> By the term "directory" it is meant that the statute gives directions which ought to be followed; but the power given is not so limited by the directions that it cannot be exercised without following the directions given. In other words, if the directions given by the statute to accomplish a given end are violated, but the given end is in fact accomplished, without affecting the real merits of the case, then the statute is to be regarded as directory merely. Should this rule of construction be applied to the constitution of the state? We think not.

Instead, the Court held that when the Constitution sets a requirement, it is mandatory:

> Wherever the language gives a direction as to the manner of exercising a power, it was intended that the power should be exercised in the manner directed and in no other manner. It is an instrument of words granting powers, restraining powers, and reserving rights. These words are fundamental words, meaning the thing itself; they breathe no spirit except the spirit to be found in them. To say that these words are directory merely, is to license a violation of the instrument every day and every hour. To preserve the instrument inviolate we must regard its words, except when expressly permissive, as mandatory, as breathing the spirit of command. The section under consideration uses the word "shall." It is mandatory . . . .

Id.[4]

In the ensuing 130 years, Kentucky courts have repeatedly reaffirmed this principle. *See, e.g.*, *Arnett v. Sullivan*, 132 S.W.2d 76, 78 (Ky. 1939) (holding that "with few exceptions, and

[3] *Kavanaugh* is cited as authority in both the Governor's and Legislative Defendants' Briefs. (Gov. Br. 79; Leg. Defs. Br. 68.)

[4] The Legislative Defendants' claim that the Framers were aware of and relied on a Missouri Supreme Court case from 1879 (Leg. Defs. Br. 31-32) is particularly bizarre in light of *Varney*—a Kentucky case from two years before the Constitutional Convention that expressly held that nothing in the constitution is directory. It was against the background of *Varney*—not a decade-old case from a neighboring state—that the Framers drafted Sections 46 and 56, confirming that they intended these provisions to be mandatory.

only where the provision under consideration was of such a nature as to scarcely present the question, the rule is declared that constitutional provisions are *mandatory* and never directory," and collecting cases reaching the same conclusion); *Fletcher*, 163 S.W.3d at 866 (same). For this reason, the doctrine of substantial compliance "has no relevancy upon the legal issue." *Arnett*, 132 S.W.2d at 80.

In fact, in *Kavanaugh*, the Court of Appeals addressed the very provision at issue here. It held that Section 46's requirement that "the reading of the bills shall be on different days is mandatory." 72 S.W.2d at 1004. That holding is dispositive.[5]

Kentucky law is clear – all sections of the Constitution are mandatory.[6]

B. Non-Germane Substitutes Must Receive Three Readings under Section 46.

In their Merits Brief, Plaintiffs showed how the purpose and intent of Section 46 would be violated if – after three readings in one chamber and two in another – a non-germane bill was substituted for the original. Plaintiffs provided six cases from as many states showing that even the most lenient courts require three new readings when a bill is "amended" by a non-germane substitute. Defendants counter, claiming the text and history of Section 46, along *Mason's Manual* provide that Section 46 does not require re-reading of "substitute" bills.

[5] Defendants rely almost solely on *Hamlett v. McCreary*, 156 S.W. 410 (Ky. 1913). *Hamlett* was decided nearly seventy years before the *D&W Auto Supply* case that overruled the enrolled bill doctrine. It was also prior to numerous cases, such as *Fletcher*, that have conclusively held that "constitutional provisions are mandatory and never directory." *See Fletcher*, 163 S.W.3d at 866 (quoting *Arnett v. Sullivan*, 132 S.W.2d 76, 78 (Ky. 1939)). To the extent *Hamlett* can be read to support Defendants' argument, it has been overruled numerous times in the 105 years since it was decided.

[6] Stunningly, the Legislative Defendants also argue that Sections 46 and 56 of the Constitution secure rights belonging *to the Legislature*, and that the *Legislature* can therefore waive those rights, just like a criminal defendant can waive his personal right to a jury trial. (Leg. Defs. Br. 35.) That argument is unfounded. The Constitution protects the rights of the people, not the Legislature. *See* KY. CONST. PREAMBLE ("We, the people of the Commonwealth of Kentucky… do ordain and establish this Constitution.") It may not be "waived" or otherwise ignored by ***any*** public official.

1. The history and text of Section 46 support Plaintiffs' claims.

In their Brief, Plaintiffs showed that the purpose of the three-readings requirement was to prevent the "evils" of undue haste, which can exclude the public and force legislators to vote on bills they have not read. (Pls. Br. 13-14, 32.) The passage of SB 151, as a newly substituted pension bill, in just over six hours violates this very intent. In his Response, the Governor argues that the "real concern" was not with haste, or with the time spent debating legislation." (Gov. Br. 71.) The Legislative Defendants similarly claim that Framers were merely concerned with the "roll call vote." (Leg. Defs. Br. 43.) The text of the Convention disagrees.

In the Convention, Delegate Buckner provided the specific basis for Section 46 , stating that the "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 3869 (1891) (Pls. Br. Ex. D.)). As an example, Delegate Buckner described a bill that had been passed and sent to the Governor in a single day. (*Id.*) He then explained that the purpose of Section 46 was "to throw guards around hasty legislation, and render it impossible for . . . bills to be railroaded through the Legislature . . . ." (*Id.*)[7]

Railroading is exactly what happened here. The hasty process by which SB 151 was passed embodied the very "evil" that the Framers sought to prevent. As a result of that haste, the procedure for passing SB 151 thwarted the legislators' and public's "access" and "abilities to know" the content of SB 151, as multiple legislators explained.[8]

[7] To "railroad" is "[t]o send (a measure) hastily through a legislature so that there is little time for consideration and debate." Black's Law Dictionary (10th ed. 2014).

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

Indeed, even *Mason's Manual* – an "authority" cited by the Legislative Defendants more than a dozen times – agrees that framers of state constitutions adopted the three readings requirement for the very purpose of prohibiting hastily passed legislation. It states that the "requirement that each bill be read on three separate days, prescribed by the constitution, legislative rules or statutes, is one of the many restrictions imposed upon the passage of bills to prevent hasty and ill-considered legislation, surprise or fraud, and to inform the legislators and the public of the contents of the bill." (*Mason's Manual*, § 720(2) (attached as Exhibit 1).)

Defendants also argue that the Framers did not intend to require the Legislature to follow their written mandate that "[e]very bill shall be read at length on three different days in each House," KY. CONST. § 46, because the "original intent" of the three-readings clause did not require the reading of amendments. (Leg. Defs. Br. 41-42.)

Defendants invoke the debate concerning an earlier draft of Section 46 that required printing of a bill and its amendments, which they contend shows that the Framers understood the three-readings requirement to apply only to the original bill. (*Id.*) In fact, the debates show that an argument *against* the printing requirement was that it was unnecessary precisely because Section 46 required the bill to be read before being voted on. (*See* Johnson, *Proceedings and Debates*, at 3859 (statement by Delegate Thomas Pettit, arguing against the printing requirement, that the bill "must be read three times, and a yea and nay vote taken")) (Attached as Exhibit 2.)

Even if Defendants were correct, however, the Debates conclusively show that the Framers believed that an amendment could not and should not completely transform a bill, because even at the Convention, substitutes that were not germane were repeatedly ruled out of order. (*See, e.g., id.* at 3121 ("The President. The substitute must be germane.")) (attached as

Government, Video 4.) Representative Jim Wayne observed, "I dare say no one in this chamber has read the bill." (Pls. Br. Ex. B., p. 8:13-14); (Pls. Br. Ex. C. at House Floor Debate, Video 3.)

Exhibit 3.) Thus, SB 151, as a pension bill, was not an "amendment" to SB 151 as the Framers used the term. Instead, the pension bill was a new bill, which required three readings.

Finally, Defendants claim that the text of Section 46 does not require re-reading. That interpretation would render Section 46 meaningless. Under their argument, the General Assembly could file bills with a single word, such as "the," read them three times in both chambers, and then amend it with hundreds of pages of law that impact the Commonwealth. This would result in bills becoming law that have not been read *at all.* This Court must prevent this "end-run" around Section 46, because "where the Constitution speaks in plain and unambiguous terms, it is our mandatory duty to give effect to its provisions, although the consequences are such as we would like to avoid if possible." *Booth v. Bd. of Educ. of City of Owensboro*, 17 S.W.2d 1013, 1014 (Ky. 1929).

2. *Mason's Manual* prohibits legislative amendments or substitutes that are not germane to the original.

In their attempt to justify turning an 11-page sewer bill into a 291-page pension bill, and passing it on the same day, Defendants provide "authority" they claim supports their position. First, they claim *Mason's Manual* – a treatise published by the National Conference of State Legislatures and adopted by both Houses of the General Assembly – supports their position. But *Mason's Manual* is explicit that "the requirement of reading the bill on different days is mandatory. Mandatory requirements must be complied with." § 720(3) (Ex. 1). Nevertheless, Defendants argue that it allows them to circumvent this mandate, claiming its text provides that "committee substitutes are treated merely as amendments," and therefore "even complete substitutes[] to a bill do not require three readings." (Leg. Defs. Br. 44.) They are wrong.

Under Kentucky law, *Mason's Manual* cannot supplant the textual mandates of the Constitution or controlling authority like *Kavanaugh*. *Mason's Manual* acknowledges this fact

on its first page. *See* Introduction at 1 ("Every deliberative body is bound to comply with all applicable rules laid down for it by the constitution,….) (Ex. 1.) And *Mason's Manual* agrees that when the Legislature "[f]ail[s] to conform" with Constitutional mandates, it "invalidates any action taken or decision made." *Id.*

Mason's Manual further prohibits exactly what occurred here – changing the topic and every word of a bill and claiming it is a mere "amendment." Section 415 of *Mason's Manual* – the section upon which the Legislative Defendants rely – states that "[s]ubstitution is only a form of amendment" that "may be used, ***as long as germane***, whenever amendments are in order." *Mason's Manual*, § 415(2) (Ex. 1) (emphasis added). In other words, "[t]he method of substituting an entirely new bill by amendment" is constitutional only "***when the changes by way of amendment are strictly germane to the original***." *Id.* (emphasis added).[9]

In Section 402, *Mason's Manual* further prohibits what Defendants did here. Entitled "Amendments ***Must*** Be Germane", it states that any amendment must "relate to the same subject," and "is relevant, appropriate, and in a natural and logical sequence to the subject matter of the original proposal." *Mason's Manual*, § 402(2)-(4) (Ex. 1). In other words, a substitute on a different topic with entirely different law is not allowed as an amendment.

3. Defendants' Foreign Case Law Also Requires Substitutes Be Germane.

Defendants' foreign case law likewise supports Plaintiffs' argument. For example, *State v. Ryan* mandates that any substitute must be "germane to the subject of the original bill and not an evident attempt to evade the Constitution, . . ." 139 N.W. 235, 238 (Neb. 1912). Likewise,

[9] Section 722 – also relied upon by the Legislative Defendants – confirms that ***"[w]here a substituted bill may be considered as an amendment***, the rule with reference to reading a bill on three separate days does not require bill to be read three times after substitution." *Mason's Manual*, § 722(3) (Ex. 1) (emphasis added). But a substitute is *not* an amendment when it is not "strictly germane to the original," as shown by *Mason's Manual* and the overwhelming weight of case law analyzing such constitutional provisions.

State v. Dillon relies on *State v. Hocker*, 18 So. 767 (Fla. 1895), for its holding. In *Hocker*, the Florida Supreme Court expressly limited its holding that amended bills did not require re-reading to situations where the "***amendments that it has adopted . . . are germane to [the original bill's] general subject***." 18 So. at 770 (emphasis added).

Defendants' attempts to distinguish the cases on which Plaintiffs rely fare no better. For instance, they claim that *Giebelhausen* is not persuasive because, in a more recent case, the Illinois Supreme Court refused to adjudicate whether the legislature had failed to comply with the three-readings requirement. (Leg. Defs. Br. 47 (citing *People v. Dunigan*, 650 N.E.2d 1026 (Ill. 1995).) But that holding depended on Illinois's new constitution, ratified after *Giebelhausen*, which expressly adopted the Enrolled Bill Doctrine. *Dunigan*, 650 N.E.2d at 253-54. That rule was expressly revoked in Kentucky in *D&W Auto Supply*, 602 S.W.2d at 425.

Defendants also claim that Ohio has "declined to extend" its holding in *Hoover v. Bd. of Cnty. Comm'rs, Franklin Cnty.*, 482 N.E.2d 575 (Ohio 1985), that the legislature violates the three-readings requirement when it replaces a bill with a wholly unrelated one without reading the new bill three times. (Leg. Defs. Br. 48.) But Ohio case law clearly shows its courts absolutely require a bill substitute to be "germane" to the original bill. *See State ex rel. Ohio AFL-CIO v. Voinovich*, 631 N.E.2d 582, 589 (Ohio 1994) ("Unlike the situation in *Hoover* where the entire contents of the original bill were removed and replaced by a totally unrelated subject, we are dealing here with a bill that has been heavily amended and yet retains its common purpose to modify the workers' compensation laws."); *Linndale v. State*, 19 N.E.3d 935, 944 (Ohio App. Dist. 10, 2014) (applying the *Hoover* test and holding than an "amendment did not vitally alter the bill" because both the amendment and original bill "shared a common relationship of regulating the organization and structure of Ohio's statutory courts").

Finally, Defendants dismiss judicial decisions from Pennsylvania, Alabama, and Michigan because they claim those states' constitutions have an "original purpose rule." It is clear from those cases, however, that violations of the original purpose and three-readings requirements are *distinct*, and that a bill like SB 151 would violate both. *Magee v. Boyd* illustrates this fact clearly. There, the Alabama Supreme Court reviewed case law interpreting the "original purpose rule," and held that the statute at issue complied. *Magee v. Boyd*, 175 So.3d 79, 107-12 (Ala. 2015). Then, the court separately analyzed cases applying the three-readings requirement, and required the subject of the substitute bill to be "germane to the original bill." *Id.* at 112-15. Other case law from these states confirms that Plaintiffs are correct on this point. For instance, in *In re Opinions of the Justices*, the Alabama Supreme Court held unconstitutional a proposed constitutional amendment solely because of the three-readings requirement. In that case, the original proposal was amended, and the "amendment was too drastic to come within the protection of the stated principle that proposed amendments may be amended during the course of the legislative procedure for the purpose of perfecting the same and to harmonize with the judgment of the requisite majority of the two bodies." 136 So. 585, 588 (Ala. 1931). Accordingly, the court held the proposal violated the constitutional three-readings requirement for constitutional amendments – all without reference to the "original purpose rule." *Id.* [10]

The overwhelming weight of authority – including the plain text of the Constitution, the case law of our sister states, the reasoning of the Framers, and the very legislative manual relied

[10] Importantly, all of these cases belie Defendants' claim that courts cannot and will not enforce constitutional provisions mandating legislative procedures. These cases also undermine Defendants' claims that requiring the legislature to abide by constitutionally mandated procedures will grind legislation to a halt. Instead, as demonstrated in these cases, courts have consistently applied a rule that preserves the constitutional requirements and protects the public without interfering with the Legislature's prerogatives, and Legislatures have conformed their conduct to that rule.

upon by the General Assembly – confirms that the Legislature violated the Constitution when it completely transformed SB 151 from an act pertaining to sewage to an act relating to retirements, and failed to complete the mandatory three readings.[11]

C. Overwhelming Evidence – including the Journals – Shows the Legislature Violated these Requirements.

Defendants also contend that this Court may not look to evidence other than the Legislative Journal, and that the Journal shows that SB 151 complied with the constitutional requirement of three readings. Defendants' argument is an attempt to resurrect the enrolled bill doctrine; which has been rejected as a matter of law. (Leg. Defs. Br. 48 (referring to the continued "viability of the enrolled bill doctrine in Kentucky")); *D & W Auto Supply*, 602 S.W.2d at 425. Accordingly, false statements in the Journals can be overcome by "clear and convincing evidence." *Id.*

Here, there is "clear and convincing" video evidence of every step of the process through which SB 151 was passed. The Legislative Defendants repeatedly cite this video as admissible evidence. (Leg. Defs. Br. 7, 9, 13, 16, 36, 64, 66, 73.) The video clearly shows that SB 151 received only one reading in the House and no readings in the Senate after its "sewer" subject was changed to pension reform, every original word was removed, and 291 new pages of law were added. (Pls. Br. 5-11 and Exs. B & C thereto.)

Moreover, all of the parties agree and admit the basic facts that require this Court to find a violation of Section 46, *i.e.*, that (1) SB 151 was amended in a manner that entirely changed its

[11] The Governor, unable to counter Plaintiffs' arguments on their merits, constructs a strawman. He claims that Plaintiffs' Merits Brief "essentially asks the Court to expound upon what the language of Section 46 means and to find that it requires all bills to be given three readings ***in their final form***." (Gov. Br. 69.) That claim is obviously false. Plaintiffs ask only that the Court enforce Section 46 as it was written, in a manner consistent with our sister states that have held that legislatures cannot evade constitutional requirements by substituting an unrelated bill that has not received the requisite three readings.

subject and every word of the original bill, and (2) that after this amendment it did not receive the necessary three readings in each chamber. (Leg. Defs. Br. 10-17; Gov. Br. 67-68.)

In any event, the Journals themselves prove Plaintiffs' case. Specifically, they show that SB 151 was read three times in the Senate and twice in the House as a sewage bill. The Journal shows this by recording the title – an act relating to the local provision of wastewater services – for the vote. The record then shows the substitute full title amendment changing the sewer bill to a non-germane pension bill. Then, the Journal shows only one new reading by the House under this new title, and none in the Senate. (Leg. Defs. Br. Exs. 5-10, 18, 20.)

III. Senate Bill 151 Did Not Comply With The Constitutional Mandate Of A Majority Vote For Appropriations.

In their Merits Brief, Plaintiffs described how SB 151 violated Section 46 of the Constitution because it did not receive the necessary number of votes. (Pls. Br. 19-22.) Plaintiffs explained that under Section 46, any "act or resolution for the appropriation of money" must, "on its final passage, receive the votes of a majority of all the members elected to each House." (*Id.* at 19 (quoting KY. CONST. § 46).) Plaintiffs provided controlling precedent wherein the Supreme Court ruled the statutes at issue in SB 151 are "self-executing appropriations," because they are "statutes specifically mandating that payments or contributions be made" to workers' retirement accounts. (Pls. Br. 19-20 (quoting *Fletcher v. Commonwealth*, 163 S.W.3d 852, 866 (Ky. 2005).) Finally, Plaintiffs provided uncontested evidence showing that SB 151 received only 49 votes in the House of Representatives – short of the constitutionally-required 51 votes for an appropriation. (Pls. Br. 19 (citing *D&W Auto Supply*, 602 S.W.2d at 424-25).)

In response, Defendants do not contest that appropriations bills require a majority vote. (Leg. Defs. Br. 51-52; Gov. Br. 61-62.) Nor do they contest that SB 151 failed to secure the

necessary votes to satisfy KY. CONST. § 46. (Leg. Defs. Br. 51-52; Gov. Br. 61-62.) Instead, they claim that SB 151 does not meet the definition of appropriation. (Leg. Defs. Br. 52; Gov. Br. 61-63.) They further contend that *Fletcher*'s holding is mere "dicta." (Leg. Defs. Br. 52; Gov. Br. 65.) Finally, they argue that if pension statutes are appropriations, SB 151 is merely a technical amendment to such an appropriation.[12] (Leg. Defs. Br. 54-55; Gov. Br. 66.) Defendants are incorrect on each argument.

A. SB 151 is an Act for the Appropriation of Money.

First, Defendants argue SB 151 is not an appropriation. *Fletcher* is dispositive on this point. *See* § III.B., *infra*. In *Fletcher*, the Court identified a specific statute at issue here – KRS 61.565(1) – as an appropriation under Kentucky's Constitution. *Fletcher*, 163 S.W.3d at 865. As such, SB 151 required 51 votes.

Nevertheless, Defendants claim, based on a 1923 case, that an appropriation is "the setting apart of a particular sum of money for a specific purpose." (Leg. Defs. Br. 52 (quoting *Davis v. Steward*, 248 S.W. 531, 532 (Ky. 1923).)[13] Defendants focus on the word "particular," claiming it requires a "specific" sum to be identified. If a bill does not include a "particular" sum, Defendants argue, it is not an appropriation.

[12] Significantly, the Legislative Defendants do not argue that the majority-vote requirement of KY. CONST. § 46 is merely directory, as they argued concerning the three-readings requirement. Indeed, they could make no such argument, because the Supreme Court clearly held that the majority-vote requirement is mandatory in *D&W Auto Supply*, 602 S.W.2d at 425. Yet there is no apparent reason from the text of the Constitution why one provision would be directory and the other would not: both arise in the same section of the Constitution, both concern legislative procedure, and both use the identical – and mandatory – term "shall."

[13] Defendants propose an alternate definition, set forth in KRS 48.010(3)(a), which is "an authorization by the General Assembly to expend a sum of money not in excess of the sum specified, for the purposes specified in the authorization and under the procedure prescribed in this chapter." Contrary to the Legislative Defendants' argument, it is irrelevant to the constitutional definition of the term "appropriation" how the term was defined by the General Assembly for purposes of KRS Chapter 48. But even the statute acknowledges that there may be "appropriation provisions" that do not meet that Chapter's definition of "appropriation." *See* KRS 48.010(3)(b) ("'Appropriation provision' means a section of any enactment by the General Assembly which is not provided for by this chapter and which authorizes the expenditure of funds other than by a general appropriation bill.").

The Kentucky Supreme Court disagrees, and does not include the terms "particular" or "specific" in its most recent definitions of appropriations. *See Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 369 (Ky. 2016), (an appropriation is "'an authorization by the General Assembly to expend a sum of money.'" (citation omitted). And in *Fletcher*, the Supreme Court defined numerous statutes as "appropriations" even though they did not include a "particular" sum. *See Fletcher*, 163 S.W.3d at 865 (quoting KRS 18A.015(2) ("Appropriations shall be made from the general expenditure fund to the cabinet to meet the estimated pro rata share of the cost of administering the provisions of this chapter ....") and KRS 44.100 ("All amounts necessary to pay awards and cost of operation assessed by the board [of claims] against all other cabinets or agencies of the Commonwealth shall be paid out of the general fund of the Commonwealth, upon warrants drawn by the secretary of the Finance and Administration Cabinet upon the State Treasurer.").).

Moreover, Defendants' argument – that a specific amount must be included – is tantamount to arguing that an appropriation must be in the form of a budget bill. Indeed, the Legislative Defendants argue "SB 151 bears no resemblance to a branch budget bill," and the Governor argues that – like a budget bill – any appropriation must "expire at the end of the biennium." (Leg. Defs. Br. 52; Gov. Br. 66.)

Kentucky law is clear that appropriations need not be in a budget bill. In *Bosworth v. State University*, 179 S.W. 403, 405 (Ky. 1915), the Court held the provision at issue was an "appropriation" pursuant to Sections 46 and 230 of the Constitution, even though it was placed in a bill other than a budget bill. *Bosworth*, 179 S.W. at 405.

Indeed, in the very case in which the Court struck down a law for lack of the necessary votes under Section 46, the law was not a budget bill and did not include any "specific" sum of

money. In *D&W Auto Supply*, the statute at issue placed an assessment on the gross proceeds from the sale of designated items, and then "directed the Department of Revenue to collect and disburse the monies from a fund 'within the state treasury' to implement the purposes of the Act." 602 S.W.2d at 422. Even though no specific sum of money was set aside, the Court held that the statute was an appropriation because, "[i]n the simplest of terms, an assessment of money is made and its expenditure is directed." *Id.*

SB 151 plainly directs an expenditure. It is therefore an appropriation.

B. *Fletcher* is Dispositive, Not Dicta.

Defendants next dismiss *Fletcher*'s description of self-executing appropriations as dicta. (Leg. Defs. Br. 62; Gov Br. 65.) They are incorrect. The question before the Court in *Fletcher* was critical, and went to the very heart of what the General Assembly had and had not "appropriated." *Fletcher*, 163 S.W.3d at 856. The *Fletcher* court specifically explained the rules of a government shutdown, and analyzed Section 230 of the Constitution in deciding under what authority "the Governor of the Commonwealth of Kentucky may order money drawn from the state treasury to fund the operations of the executive department of government…." *Id.* This analysis required the Supreme Court to analyze what was "appropriated" by the General Assembly and what was not. Under its analysis, the Court held that a statute at issue here, KRS 61.565, was a self-executing appropriation the General Assembly created, meaning the Governor could constitutionally fund the retirement plans in the absence of a budget. *Id.* at 873. Far from dicta, the Supreme Court's holding that the statutes at issue here are appropriations under the Constitution is dispositive.

Faced with controlling precedent, Defendants also argue that *Fletcher* held that the statutes at issue, as self-executing appropriations, are only "appropriations" for purposes of KRS

41.110. (Gov. Br. 64.) They are wrong. *Fletcher* held that KRS 61.565 was an appropriation under Section 230 of the Constitution. 63 S.W.3d at 856. And courts apply the same rule of construction to constitutions as they do statutes: "where words are repeated in them, they are presumed to have the same meaning throughout the statute, unless it appears by some language employed in the statutes that another meaning was intended." *Bd. of Councilmen of City of Frankfort v. Commonwealth*, 94 S.W. 648, 649 (Ky. 1906). Thus, an appropriation under KY. CONST. § 230 is also an appropriation under KY. CONST. § 46.

C. Senate Bill 151 Contains Appropriations, Not Just Technical Amendments.

Defendants next argue that SB 151 is not an appropriation because it merely makes technical amendments to self-executing appropriations like KRS 61.565(1). (Leg. Defs. Br. 54-55; Gov. Br. 66.) But SB 151 did not merely amend KRS 61.565(1) – it reenacted that statute, as required by the Constitution. *See* KY. CONST. § 51 ("[S]o much [of a statute] as is revised, amended, extended or conferred, shall be reenacted and published at length."). The uncontested evidence in this case confirms that the manner in which SB 151 "amended" the pensions statutes enacted those statutes into law all over again. Indeed, the language of SB 151 includes *all* of the statutory sections on KRS 61.565 and the other pension statutes. It was not an errata sheet. Instead, the full language of the statute, with some changes, came before the House for a vote. As only 49 members voted "yea," SB 151 cannot satisfy KY. CONST. § 46.

Kentucky's highest court has further rejected the argument that less than a majority may vote to amend an appropriation almost immediately after the passage of Section 46 and the current Constitution. In *Norman*, the Court of Appeals held that an amended *bill* must receive a majority vote to be constitutional, even if it had already received a majority vote in its previous

form. 20 S.W. at 905 (Bennett, J., concurring). Justice Bennett explained why Section 46 requires a majority vote on the bill its final form, and not just in prior versions:

> Such a construction would restore, in full panoply, the evils that existed under the old constitution, instead of suppressing them forever; for not less than 51 members of the house could vote away $50 of the people's money; but the senate, by amendment, could raise that sum to $50,000, and the house, by a mere majority of a quorum, could concur in the amendment, thus defeating and nullifying the provision supra.

Id. The same is true here: a constitutional majority voted to approve a self-executing appropriation that provided guaranteed retirement benefits to Kentucky's public workers. An insufficient minority cannot increase, eliminate, or reduce that appropriation without nullifying the requirement altogether.

Finally, the text of SB 151 shows that it does not merely amend and reenact KRS 61.565(1) – it materially changes that statute and other laws, ***as even the Legislative Defendants admit***. Those Defendants claim that SB 151 includes "additional funding," represents a "commitment to invest hundreds of millions of additional dollars to the pension plans," and changes the "standard for paying the unfunded liabilities of the pension plans." (Leg. Defs. Br. 76.) In fact, SB 151 alters the very calculation of the employer contributions that are authorized under KRS 61.565(1). (*See* Pls. Br. at 20 (quoting SB 151, § 18).) That is the exact appropriation referred to in *Fletcher* and is much more than a "technical" change. *See Fletcher*, 163 S.W.3d at 865 (describing the requirement that employers "shall contribute annually to the respective retirement system" as an appropriation).

Section 12 of SB 151 also creates a new statutory section that, like KRS 61.565, mandates contributions by 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). That statutory mandate is the mirror image of the language in KRS 61.565(1) that the Supreme Court identified as a self-executing appropriation in *Fletcher*.[14]

For the foregoing reasons, SB 151 is an act containing appropriations. Therefore, it is subject to the mandate of KY. CONST. § 46 that it pass both houses by a vote of a majority of the members of each house. Because SB 151 received only 49 votes – two votes shy of the constitutional requirement – the legislature did not pass it in accordance with Section 46 and the Court should declare it void. *See D&W Auto Supply*, 602 S.W.2d at 425.

IV. SB 151 Was Never Read At Length, In Violation Of Sections 46 And 56.

In their Brief, Plaintiffs explain how Sections 46 and 56 of Kentucky's Constitution mandate that bills we read "at length" before passage. Plaintiffs further showed that, by using the term "at length," the Framers intended that bills be read not by their title but – as the plain language suggests – *at length*. (Pls. Br. 22-24.) Indeed, the Framers noted that reading bills at length would slow the legislative process, but was necessary to prevent "errors," as well as "fraud or corruption." (*Id.* at 22.)

In response, Defendants argue first that reading bills solely by their title is sufficient because it represents the General Assembly's longstanding practice, and the Court should defer to the General Assembly's interpretation of the requirement. As Plaintiffs have shown herein, every part of Kentucky's Constitution is mandatory, and the court must enforce even its procedural requirements on the General Assembly. See § II.A., *supra*; *D&W Auto Supply*, 602 S.W.2d at 425; *Fletcher*, 163 S.W.3d at 866. Under this law, an unconstitutional practice does not become constitutional through repeated violations.

[14] For this reason, Defendants' claim that SB 151 contains only unfunded statutes is wrong. "[S]tatutes specifically mandating that payments or contributions be made can be interpreted as self-executing appropriations." *Fletcher*, 163 S.W.3d at 866. Self-executing appropriations like KRS 61.565(1) and its mirror-image sections in SB 151 are, by definition, *not* unfunded statutes. *See id.*

Furthermore, as Plaintiffs have shown, the weight of authority holds that reading by title does not satisfy the requirement of reading "at length." (Pls. Br. 23-24.) Even *Mason's Manual* – a source repeatedly cited by Defendants – confirms that where a constitution, like Kentucky's requires reading "at length," it is unconstitutional to read the bill solely by title. *See* § 721(4) ("A reading of a bill by title is considered a reading of the bill, unless it is specifically required by the constitution that the bill be read at length or in full.") (Ex. 1).

In response, Defendants contend that the reading at length requirement can be delegated to the clerk, who can "spread [the bill] 'at length' upon the Journal." (Leg. Defs. Br. 57; Gov. Br. 70.) Defendants later claim that such a reading does not conflict with the Framers' intent, which they support by latching onto a statement by Delegate Spalding that bills should be "set out in full." (Gov. Br. 81-82.)

These arguments have no merit. The Debates are unambiguous as to how to satisfy the reading requirements: the Framers intended the bills to be read *at length*, and out loud. Nothing in Delegate Spalding's comments, or in the comments from other Framers, suggests that the reading requirements are satisfied as long as a bill is "set out in full," or "spread" in the Journal. As Delegate J.C.W. Beckham stated, Section 46 requires that the bill "shall be read once ***before the whole House***" before it is passed. (Johnson, *Proceedings and Debates*, at 3867) (attached as Exhibit 4) (emphasis added). Additionally, Delegate Spalding – on whom the Governor rests his argument – states, unequivocally, that Section 56 requires that after a bill is passed, "it shall be again ***read to the House*** before it is signed by the Speaker." *Id.* (emphasis added).

The video evidence is abundantly clear that the General Assembly did not read SB 151 at length or out loud before or after it was passed. Nothing in the Journal reflects that SB 151 was read at length, as required by Sections 46 of the Constitution. And, the Legislative Defendants

admit that it is the practice of the Legislature to read bills solely by title. (Leg. Defs. Br. 61 n.30.) Thus, this Court may rely on the video, the Journal, or a party admission, all of which clearly establishes that SB 151 was not read at length, as required by Sections 46 or 56.

V. SB 151 Is Void Because Its Passage Violated KRS 6.350 And KRS 6.955.

In their Brief, Plaintiffs demonstrated that the General Assembly passed SB 151 in violation of KRS 6.350 and 6.955, which required it to obtain an actuarial analysis and a local impact fiscal note, respectively, before passing SB 151 out of committee. Because the General Assembly violated these statutory mandates, SB 151 is void.

In response, Defendants' argue that, under *Board of Trustees of the Judicial Form Retirement System v. Attorney General*, 132 S.W.3d 770, 777 (Ky. 2003) ("*Board of Trustees*"), this Court may never examine the General Assembly's compliance with statutory procedural requirements for the passage of laws. (Leg. Defs. Br. 62-63; Gov. Br. 83-86.) They also argue that the General Assembly validly suspended both statutes by ignoring them. They finally argue that the General Assembly substantially complied with KRS 6.350, though they cannot claim the same with regard to KRS 6.955. (Leg. Defs. Br. 65-66.)

A. *Board of Trustees* Does Not Permit The General Assembly to Violate Statutes.

In their initial filing, Plaintiffs demonstrated the Supreme Court decided *Board of Trustees* on the grounds that the General Assembly had "substantially complied" with KRS 6.350, and that to the extent its dicta suggested that the General Assembly could ignore validly enacted statutes, it was wrongly decided. (Pls. Br. 25-26.) Defendants counter that *Board of Trustees* renders this Court unable to enforce "procedural" statutes such as KRS 6.350 and KRS 6.955. (Leg. Defs. Br. 62-63; Gov. Br. 83-86.) Defendants' entire argument – and the legal foundation of *Board of Trustees* - treat procedural statutes the same as procedural rules. *Board*

of Trustees, 132 S.W.3d at 777-78. They are different. Procedural rules are adopted by one house, and may be waived by that house. They do not require the extensive legislative process where they are sent through committees, receive public input, must pass both chambers, and are subject to veto. They are also not subject to the Constitutional requirements and safeguards applicable to statutes, such as Section 46.

Board of Trustees was clear that the judiciary had the authority to enforce "procedural statutes" if there was a violation of a "constitutional mandate." *Id.* at 777. Here the mandate of Section 15 – covering suspension of statutes – has been violated. *Board of Trustees* never addressed this challenge.

It is uncontested that the General Assembly chose to make KRS 6.350 and 6.955 statutes, and not merely rules. It is further uncontested that, as recently as last year, the General Assembly passed amendments to KRS 6.350 to ensure its requirements were mandatory. In passing these statutes and amendments, they endured the full legislative process of committees, readings, and voting of both chambers, and were subject to veto. Once through this process KRS 6.350 and 6.955 became more than rules, they became statutes.

As statutes, KRS 6.350 and 6.955 are protected by the Constitution. They cannot be ignored. Section 15 of the Constitution prevents such an action, holding that KRS 6.350 and 6.955 are valid, as they can only be suspended through the passage of a separate statute or portion of a statute that expressly notwithstands or suspends a law. The General Assembly complies with Section 15 by either explicitly repealing a statute or "notwithstanding" it in a new statute. The General Assembly has followed this process with previous pension bills. *See* 2004 (1st Extra. Sess.) Ky. Acts Ch. 1, sec. 19.

KRS 6.350 and 6.955 were therefore binding and precluded passage of SB 151 out of its House committee before an actuarial analysis and fiscal note were obtained. Yet a single representative, the Chair of the State Government Committee unilaterally chose to ignore the rules. A single individual does not have the authority to suspend a statute. *See* KY. CONST. § 15; *Fletcher*, 163 S.W.3d at 871-72. Thus, both KRS 6.350 and 6.955 were violated.

B. The General Assembly Did Not Comply with KRS 6.350 or KRS 6.955.

Defendants also claim they complied or substantially complied with KRS 6.350. (Leg. Defs. Br. 65-66; Gov. Br. 88-90.) However, they do not and cannot claim the same for KRS 6.955. (*Id.*) It is uncontested that there was simply no fiscal note analyzing the impact on local governments. The Court must enforce KRS 6.955 and declare SB 151 void, because failing to do so would allow a single member of the General Assembly to suspend statutes in violation of KY. CONST. § 15.

With regard to KRS 6.350, this Court cannot find substantial compliance because the General Assembly made no attempt to comply with KRS 6.350, ***at all***. "[W]here an official makes no effort to comply with the statute, that failure is fatal and the doctrine of substantial compliance cannot be utilized." *Chumley v. Williams*, 639 S.W.2d 557, 560 (Ky. App. 1982). Courts find substantial compliance with a statute only where a body or official has taken action that fulfills the purpose of the statute, even if that action is technically deficient. *See Knox Cnty. v. Hammons*, 129 S.W.3d 839, 843-44 (Ky. 2004) (holding that the fiscal court's publication by summary of a proposed ordinance substantially complied with KRS 67.077(2), even though it did not state the statutorily required details of the ordinance); *Webster Cnty. v. Vaughn*, 365 S.W.2d 109, 111 (Ky. 1962) ("It seems to us that it is too stringent an interpretation of the statute

to invalidate the act of the fiscal court because it came one day later than the Act specifically provided. . . .").

This is not such a case. KRS 6.350 requires there be an actuarial analysis ***before*** a bill is voted out of committee. Here, there is no disputed fact that there was no attempt to secure an analysis before such a vote. As noted in the Plaintiffs' Brief, Chairman Miller, the substitute sponsor Rep. Carney, and House Majority Floor Leader Rep. Shell all testified during the Committee that there was no actuarial analysis whatsoever. (Pls. Br. 28.) Each said there had not been time, and it simply had not been done. (*Id.*)

The Answer of the KTRS Defendant further proves the General Assembly did not even attempt to secure the actuarial analysis until after the committee meeting. In paragraph 10, KTRS admits it was only provided a copy of SB 151 at 3:40 p.m. via e-mail on the day the bill was passed – more than thirty minutes ***after*** the bill was voted out of Committee. (Answer on Behalf of Defendant Teachers' Retirement System of the State of Kentucky, ¶ 10, attached as Exhibit 5.)[15] Given that the undisputed facts show the General Assembly made no attempt at compliance before the committee vote, there cannot be substantial compliance as a matter of law. *Chumley*, 639 S.W.2d at 560.

The General Assembly's failure to even attempt to comply with the actuarial analysis requirement further distinguishes this case from *Board of Trustees*, where "the circuit court found substantial compliance with KRS 6.350 because the General Assembly had made an unsuccessful attempt to obtain an actuarial analysis from the executive director of the" Judicial Form Retirement System. *Board of Trustees*, 132 S.W.3d at 775-76. And, as noted above, the General Assembly changed the law after *Board of Trustees* to ensure it was bound by KRS

[15] KTRS then sought an analysis from its actuary, which it did not receive until April 13, 2018 – two weeks *after* the General Assembly passed SB 151 and three days *after* the Governor signed it into law. (*Id.* ¶ 17.)

6.350. In *Board of Trustees*, the General Assembly had a letter – and not an analysis – stating the impact "would be 'negligible.'" *Id.* Yet, in 2017, the General Assembly amended KRS 6.350 to expressly state that such a letter did not satisfy the statute's requirements.

Finally, there can be no compliance because SB 151 was substantially different from SB 1. As Representative Carney, the sponsor of the committee substitute that completely transformed SB 151 from a sewage bill to the pension bill, stated when asked whether SB 151 was the same as SB 1: "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...." (Pls. Br. Ex. B., 40:8-9; 40:25-41:1); (Pls. Br. Ex. C. at House Committee on State Gov't, Video 6.) Among other things, those changes included the elimination of SB 1's plan to reduce or eliminate Cost of Living Adjustments for teachers, rendering any prior actuarial analysis on SB 1 irrelevant to SB 151 as passed. Thus, even if the General Assembly had attempted to comply with KRS 6.350 – which it did not – the prior bill's actuarial analysis does not satisfy the statutory requirement whatsoever.

C. The General Assembly Did Not Implicitly Repeal KRS 6.350 or KRS 6.955.

Defendants finally claim that the General Assembly "implicitly" repealed KRS 6.350 and 6.955 when it chose to ignore them while passing SB 151. In support, they invoke cases that rely on the doctrine of "implicit repeal." Implicit repeal is based on the "rule of statutory interpretation that whenever, in the statutes on any particular subject, there are apparent conflicts which cannot be reconciled, the *later* statute controls." *Beshear v. Haydon Bridge*, 304 S.W.3d 682, 703 (Ky. 2010). However, the implicit repeal doctrine is applied sparingly, as "[c]ourts will also presume that where the Legislature intended a subsequent act to repeal a former one, it will so express itself as to leave no doubt as to its purpose." *Galloway v. Fletcher*, 241 S.W.3d 819, 823 (Ky. App. 2007). Regardless, the doctrine does not apply here.

SB 151 and KRS 6.350 and 6.955 do not share the "particular subject" and are not in conflict. In no way does the text of SB 151 attempt to alter the required statutory process through which legislation covered by KRS 6.350 and 6.955 must be passed. Thus, there is nothing for the later statute to control. Nor do KRS 6.350 and 6.955 provide for how retirement benefits must be paid, and which benefits fall within the inviolable contract. The fact that the General Assembly chose to ignore KRS 6.350 and 6.955 does not and cannot invoke the implicit repeal doctrine. The General Assembly could have complied with KRS 6.350 and 6.955, and also passed SB 151 exactly as it is written, but it chose not to.

In sum, the General Assembly chose to violate these statutes, even as its members protested those violations. Therefore, the Court should hold that SB 151 is void.

V. The Passage Of SB 151 Violated Section 56 Of The Constitution.

In their Merits Brief, Plaintiffs explained that Section 56 of the Kentucky Constitution provides that "no bill shall become law" unless it is signed by the "presiding officer" of each house. (Pls. Br. 31.) They further described how controlling precedent holds that this mandate "is express, sweeping, and mandatory," and "[i]f the legislature fails in discharging this mandatory duty, the legislation is invalid by operation of Section 56." (Pls. Br at 31 (citing *Hamlett v. McCreary*, 156 S.W. 410, 411 (Ky. 1913); *Williams v. Grayson, et al.*, Case No. 08-CI-856, Order at 4-5 (Franklin Cir. Ct., July 31, 2008).) Under this precedent, SB 151 is invalid because the "presiding officer" of the House of Representatives – the Speaker of the House – did not sign SB 151 and the Speaker Pro Tempore was not authorized to do so in his absence.

Defendants do not and cannot argue that the Speaker signed SB 151.) Instead, they claim that Representative Osborne was authorized to assume the authority of the Speaker of the House to sign bills as "presiding officer" when that office became vacant. Defendants claim the

Speaker is not the "presiding officer" of the House of Representatives for purposes of Section 56, and alternatively that *Kavanaugh v. Chandler* allows the House Speaker Pro Tempore to sign bills under Section 56 of the Kentucky Constitution. (Gov. Br. 77-78; Leg. Defs. Br. 66-68.)

Representative Osborne's signature does not and cannot satisfy Section 56.

A. The Speaker of the House is the "Presiding Officer" of the Kentucky House of Representatives.

It is indisputable that the "presiding officer" of the Kentucky House of Representatives is the Speaker of the House. The text of the Constitution, the Debates from the Constitutional Convention, case law from Kentucky's highest court, and the General Assembly's own pronouncements provide that the Speaker of the House – not the Speaker Pro Tempore – is the "presiding officer" of the House of Representatives for purposes of Section 56 of the Kentucky Constitution.[16] *See* KY. CONST. § 34; Johnson, *Proceedings and Debates,* at 3869 ("When the bill is to be signed, it shall be done by the Speaker, in the presence of the House…") (Pls. Br. Ex. D); *Kirchendorfer v. Tincher*, 264 S.W. 766 (Ky. 1924) (holding "…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…"); *see also Flint v. Kentucky Legislative Ethics Commission*, No. 2014-CA-745, 2015 WL 2152871 (Ky. App. 2015) (stating that "Speaker Stumbo is the presiding Officer of the House.") (attached as Exhibit 6); *Stumbo v. Bevin, et. al*., Case No. 16-CI-522, Order at 4-5 (Franklin Cir. Ct., February 1, 2017) (attached as Exhibit 7); *Citizens Guide to the Kentucky Constitution*, Legislative Research Commission,

[16] At least one of the Defendants admits this unquestionable point of law. *See* KTRS Answer, ¶ 1 (admitting the allegations in Paragraphs 44 and 109 of Plaintiffs' Complaint, which state "[u]nder Kentucky law, the Speaker of the House is the presiding officer of the House of Representatives.").

Research Report No. 137, p. 21 (Revised June 2013).[17] Accordingly, the Speaker of the House is required – as presiding officer – to sign bills under Section 56 of the Kentucky Constitution.

It is undisputed that after Speaker Jeff Hoover resigned his office in January 2018, the office was left vacant and Representative Osborne was never elected Speaker As such, Representative Osborne was not the "presiding officer," and his signature cannot satisfy Section 56 of the Kentucky Constitution.

B. *Kavanaugh v. Chandler* is Inapplicable because the Kentucky Constitution Does Not Expressly Authorize the House Speaker Pro Tempore to "Preside" and Sign Bills.

In the alternative, Defendants imply that the House Speaker Pro Tempore has the same constitutional authority to sign bills as the Speaker of the House. Yet Defendants can cite no authority holding or even mentioning the House Speaker Pro Tempore as the "presiding officer" of the House. Instead, Defendants rely on *Kavanaugh*, which does not apply here. In *Kavanaugh*, the Court held that the Senate President Pro Tempore – a named constitutional officer under Section 85 of the Kentucky Constitution at the time of the ruling – had the constitutional authority to "preside" over the Senate. Unlike the Senate President Pro Tempore, the House Speaker Pro Tempore never appears in the Constitution, and is not an expressly named constitutional officer that is required to be elected by the membership of the body.

The *Kavanaugh* court makes clear that its holding is based on this important distinction, *i.e.*, that the Senate President Pro Tempore may sign bills as the presiding officer by virtue of Section 85. Section 85, as interpreted in *Kavanaugh*, provided in relevant part:

[17] Other States, too, recognize the Speaker of the House as the officer constitutionally required to sign bills under their respective constitutions . *See, e.g.*, *Lynch v. Hutchinson*, 76 N.E. 370 (Ill. 1905); *State ex rel. Hammond v. Lynch*, 151 N.W. 81 (Iowa 1915); *State ex rel. Scarborough v. Robinson*, 81 N.C. 409 (1879); *State ex rel. Hagood*, 13 S.C. 46 (S.C. 1879); *Holman v. Pabst*, 27 S.W.2d 340 (Texas 1930).

> A President Pro Tempore of the Senate shall be elected by each Senate as soon after its organization as possible, the Lieutenant Governor vacating his seat as president of the Senate until such election shall be made; and as often as there is a vacancy in office of President Pro Tempore, another President Pro Tempore of the Senate shall be elected by the Senate, if in session…

The Court in *Kavanaugh* held only that the ***Senate*** President Pro Tempore – a named, elected constitutional officer under Section 85 of the Kentucky Constitution prior to 1992 – has the authority to sign bills as the presiding officer. 72 S.W. 2d 1003 (Ky. 1934). The question in *Kavanaugh* was "…whether or not the signature of the presiding officer of the ***Senate*** is essential to the enactment of a legislative bill into a law." 72 S.W. 2d at 1003. The Court found that "[t]he immediate remedy would seem to lie in the body over which the officer is presiding. He is but its agent. Section 83 of the Constitution makes the Lieutenant Governor, by virtue of his office, the president of the Senate ***and section 85 provides for the election of a president pro tempore. He may sign bills as the presiding officer***." *Id*. at 1005.

The House Speaker Pro Tempore has never been named constitutional officer under any section of any of the four Kentucky constitutions, including the current Constitution. Accordingly, the *Kavanaugh* court's holding that the Senate President Pro Tempore may sign bills as the presiding officer of the Senate is inapplicable here.

C. Representative Osborne was Not Authorized to Assume or Exercise the Authority of the Speaker of the House.

Alternatively, if the House Speaker Pro Tempore can sign bills under Section 56, it must be through direct authorization of a sitting Speaker. Defendants admit as much, arguing that a Speaker Pro Tempore can sign bills when (1) when the Speaker is absent, and (2) when the Speaker delegates his or her authority to the Speaker Pro Tempore. (Gov. Br. 79.) Here, there could be no delegation and no absence because the Speaker's position. As such, Representative Osborne's signature fails to satisfy Section 56.

Under House Rules, the Speaker Pro Tempore is only authorized to exercise the authority of the Speaker in two circumstances: 1) when the Speaker designated the Speaker Pro Tempore to exercise that authority, and/or 2) when the Speaker was absent from the House. *See* 2018 HR 2, Section 2, and as amended, 2018 HR 56. Neither circumstance is present here.

On January 8, 2018, Representative Hoover had resigned the post as Speaker. This created a vacancy as a matter of law. *Robertson v. State***,** 30 So. 494, 496 (Ala. 1901). It is therefore uncontested that, when SB 151 was passed, there was no constitutionally elected Speaker. As such, there was no Speaker either to sign the bill or to delegate that authority. Any prior delegation by Speaker Hoover was extinguished upon the resignation of the Speaker in January. *See* Restatement (Third) of Agency § 3.06(2) (2006) ("An agent's actual authority may be terminated by . . . the principal's death, cessation of existence, or suspension of powers as stated in § 3.07(2) and (4)."). If there is no Speaker, there can be no delegation.

Nor was the Speaker "absent" when SB 151 was passed. Because the position was vacant, there was no constitutionally elected Speaker of the House who could have been absent. *See Robertson*, 30 So. at 496 (Ala. 1901). A vacancy necessarily implies an empty office that needs filling.[18] An "absence" implies an occupied office, whose occupant is not physically present, but who may – at some point – become present and resume the duties of his or her post as Speaker. *See e.g.*, *Watkins v. Mooney*, 71 S.W. 622, 624 (Ky. 1903) (stating that absence "probably mean[s] an absence from the place of meeting.") It is undisputed that the Speakership was vacant on the day SB 151 was passed.[19]

[18] KY. CONST. § 85 is illustrative of this point. Among other things, it provides, "A President of the Senate shall be elected by each Senate ***as soon after its organization as possible and as often as there is a vacancy*** in the office of President, another President of the Senate shall be elected by the Senate, if in session." (emphasis added).

[19] The Alabama Supreme Court has addressed similar circumstances in *Robertson v. State*, a case on which the Legislative Defendants rely. (Leg. Defs. Br. 68.) There, the Alabama Supreme Court held that when a vacancy

Here, the office of speaker was vacant. As such, there could be no delegation, nor absence. Thus, Representative Osborne's signature on SB 151 is ineffective and the bill is constitutionally invalid.

VI. SB 151 Breaches The Inviolable Contract And Violates The Contracts Clause.

Plaintiffs demonstrate in their Merits Brief the irrefutable statutory language of KRS 61.692, KRS 78.852, and KRS 161.714. Those statutes codify the inviolable contracts under which, in exchange for their decades of public service, the General Assembly promised Kentucky's teachers, police officers, firefighters, social workers, and other public servants a secure retirement. (Pls. Br. 12-19.) Not only did the General Assembly pass these promises into law, it made them "inviolable" under that law. Each statutory provision codifying the inviolable contracts is clear that the contract is mandatory and may not be reduced or impaired: "in consideration of the contributions by the members and in further consideration of benefits received by the [state] [county] from the member's employment," the specified range of statutes "shall constitute … an inviolable contract of the Commonwealth, and the benefits provided [therein] [herein] shall … not be subject to reduction or impairment by alteration, amendment, or repeal." KRS 61.692(1); KRS 78.852(1); KRS 161.714.

Plaintiffs illustrate in their Brief how SB 151 reduces or impairs the benefits provided in the inviolable contracts by alteration and amendment. Thus, Plaintiffs show how SB 151

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occurs in the officer of speaker, it is necessary to elect a member from the body to temporarily perform duties of the office – including signing bills as the presiding officer. 30 So. 494 (Ala. 1901) (interpreting the 1875 Alabama Constitution). The Court held that when the Speaker became "sick and absent, and unable to discharge any of the duties of the office," the house had the right to elect a temporary speaker, "…and that such speaker so elected had all the rights and authority, and was under all the duties incident to the office of speaker." *Id*. The *Robertson* court further noted that when – as here – a Speaker resigns, a vacancy occurs in the office of speaker. *Id*. The court therefore held that after Speaker resigns or retires the house is to elect one of its members to "discharge the duties of the office of speaker for a time commensurate with the necessity and such temporary speaker is 'the presiding officer' of the house, who is authorized, by section 27, art. 4, of the constitution to sign bill." 30 So. 494 at 496.

substantially impairs the rights and benefits of public employees under the plain meaning of each statute upon which employees have calculated and relied upon during their careers. (Pls. Br. 12-19.) Further, Plaintiffs make clear that none of the reductions or impairments in SB 151 causes are reasonable or necessary, and Defendants have failed to show how the reductions or impairments are reasonable or necessary.

A. The Contracts Promising Retirement Benefits to Public Employees are Inviolable.

The Governor first argues that the inviolable contract is not "inviolable," claiming it is "obviously capable of being violated." (Gov. Br. 1.) He claims that the General Assembly can either eliminate any promised benefits to active public employees who have not retired, or eliminate any promised benefits for active public employees on a going forward basis. (*Id.*, at 18, 27-28.) But Kentucky law is clear, and requires judgment for the Plaintiffs.

In *Jones v. Board of Trustees of Ky. Retirement Sys.*, the Kentucky Supreme Court definitively held that "the retirement savings system has created an inviolable contract between [employees and retirees] and the Commonwealth, and … the General Assembly can take no action to reduce the benefits promised to participants." 910 S.W.2d 710, 713 (Ky. 1995). As the Court provided, "At the simplest level, [public employees and retirees] have the right to the pension benefits they were promised as a result of their employment, at the level promised by the Commonwealth." *Id.* at 715. *See also Baker v. Commonwealth*, No. 2005-CA-001588-MR, 2007 WL 3037718, at *18, *31 (Ky. App. Oct. 19, 2007) (citing *Jones* and KRS 61.692, and stating pension rights of a retired public employee were established by the General Assembly and "are contractual and inviolable" and identifying "an irrefutable fact" that the plaintiff, a retiree, was the beneficiary of "an inviolable right to have his insurance premium paid in full"); *Kentucky Employees Retirement Sys. v. Seven Counties, Inc.*, 550 B.R. 741 (W.D. Ky. 2016),

appeal argued, Nos. 16-5569/16-5644 (6th Cir. Nov. 30, 2017) (recognizing that the General Assembly made Kentucky Retirement Systems an "inviolable contract," "That is, the laws governing Kentucky's pension system recognize an agreement between members of KERS and the state. That agreement prevents the General Assembly from reducing or impairing 'by altercation [sic], amendment, or appeal [sic],' the benefits the pensioners earn over the terms of their employment.").

Jones is dispositive. Kentucky employees are entitled to the retirement benefits "they were promised" under the law "as a result of their employment," *i.e.*, when they started. *Jones* is also clear that the "level promised by the Commonwealth" are the benefits promised at the time of employment. Put simply, the "offer" under the inviolable contract are the benefits provided under Kentucky law. The "acceptance" is agreeing to employment. At that point the contract is formed and "the General Assembly can take no action to reduce the benefits promised to participants." *See Jones*, 910 S.W.2d at 713.

The General Assembly's past legislation further evidences that a public employee is entitled to the benefits available under the inviolable contract when she accepts her employment. In 2013, the General Assembly passed a statute providing that, for members of KERS, SPRS and CERS employed *after* January 1, 2014, the legislature reserved "the right to amend, suspend, or reduce the benefits and rights" provided under the range of statutes establishing the inviolable contract, "except that the amount of benefits the member has accrued at the time of amendment, suspension, or reduction shall not be affected." KRS 61.692(2)(a), KRS 78.852(2)(a). If the General Assembly already had the power to reduce or impair current employees, it would have been unnecessary to pass a statute explicitly authorizing such changes for new employees. The

reason for the legislation is clear: Current employees had already accepted their contract when they began their employment.[20]

B. SB 151 Permanently and Substantially Impairs Public Employees' Benefits.

Defendants next argue that SB 151 does not substantially impair the benefits promised to public employees. (Gov. Br. 41-52; Leg. Defs. Br. 80-88.) In their Merits Brief, Plaintiffs demonstrated the numerous ways SB 151 substantially impairs the benefits promise to public employees and how SB 151 is neither reasonable nor necessary. (Pls. Br. 38-46.)

The plain language of each of the statutory provisions creating the inviolable contracts provides the following language: "… in consideration of the contributions by the members and in further consideration of benefits received by the [state] [county] from the member's employment," the specified range of statutes "shall constitute … an inviolable contract of the Commonwealth, and the benefits provided [therein] [herein] shall … not be subject to reduction or impairment by alteration, amendment, or repeal." KRS 61.692(1); KRS 78.852(1); KRS 161.714. The General Assembly statutorily mandated that any reduction or impairment bv alteration, amendment, or repeal of the benefits provided within the specified range of statutes is a substantial impairment.

The Court recognized such in *Jones*, stating that the General Assembly "can take ***no action*** to reduce the benefits promised to participants… ." *Jones*, 910 S.W.2d at 713 (emphasis added). The Court noted that "Any reduction or demonstrable threat to those promised benefits might well run afoul of Section 19 of the Kentucky Constitution… ." *Id.* As Plaintiffs established in their Merits Brief, SB 151 reduces benefits promised under the inviolable contracts. Defendants do not dispute that SB 151 changes those benefits, but that the changes did not

[20] The changes to the statutes applied to new employees who began their employment after the specified date.

substantially impair the benefits. Plaintiffs' showed otherwise in their Brief and that SB 151 therefore violates the Contracts Clause of KY. CONST. § 19.

Under KY. CONST. § 19, "[n]o ex post facto law, nor any law impairing the obligation of contracts, shall be enacted… ." 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). In *Jones*, the Court found that "Only upon a determination that the contract between KERS members and the state is substantially impaired by legislative action do we need decide whether the legislation impairing the contract is reasonable and necessary to serve a legitimate and important public purpose, necessitating a temporary impairment." 910 S.W.2d at 716 (citing *Maryland State Teachers Ass'n v. Hughes,* 594 F. Supp. 1353, 1361 (D. Md. 1984)).

First, SB 151 does not provide a temporary impairment. Instead, the reductions and impairments of benefits provided under the inviolable contracts are permanent. Defendants do not assert otherwise. Moreover, the reductions and impairments are substantial as a matter of law, as case law and statute establish that any impairment is substantial. The reductions and impairments are also substantial in fact because, as Plaintiffs' Complaint and Merits Brief shows, SB 151 alters or amends at least 15 statutory provisions that fall within the inviolable contracts. The changes in each of these provisions certainly exceed the reduction or impairment of an inviolable contract right the Court in *Baker v. Commonwealth* held was wrongful – a reduction of the promised monthly state contribution obligation of $175.50 to $105.08 to go toward the retiree's health insurance. 2007 WL 3037718, at *31, *40.

As an example of how SB 151 substantially impairs the benefits under the inviolable contracts, Section 16 of the bill prohibits Tier I KERS, SPRS and CERS employees from using sick leave service credit for the purpose of determining retirement eligibility if they retire on or after July 1, 2023. The General Assembly promised those Tier I employees they could use sick leave service credit for that very purpose. KRS 16.645; KRS 61.546; KRS 78.616. As the Legislative Defendants explain, under Section 16 of SB 151, KERS, SPRS and CERS Tier I and Tier II members who retire on or after July 1, 2023 will be barred from using unused sick leave they have accumulated in their careers to date as well as between now and July 1, 2023 to determine their retirement eligibility. (Leg. Defs. Br. 81-82.) This reduction and impairment of benefits substantially impairs the inviolable contract for Tier I members.

As Plaintiffs' stated in their Brief, the elimination of the use of sick leave has clear and material costs. (Pls. Br. 42.) 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. (*Id.*)[21] That amounts to more than half a year's salary, which is substantial. (*Id.*)

As another example, SB 151 substantially impairs the contracts of KERS and CERS members by eliminating uniform and equipment allowances from creditable compensation. This is a significant impairment, as Plaintiffs showed in their Brief. (Pls. Br. 43.) Under the current collective bargaining agreement between FOP Lodge 614 and Louisville Metro Government,

[21] The Governor attempts to discredit the newsletter in his Brief, claiming it is inadmissible and "is an article written by an unknown author with unknown credentials who cites unverified facts… ." (Gov. Br. 44.) The Governor ignores or is unaware from the face of the newsletter that it was published by the Kentucky Retirement Systems, a Defendant in this action, and was authored by the then-General Manager of KRS in his official capacity, for the benefit of members of KRS in calculating their retirement and benefits promised to them under the inviolable contracts. It is therefore a party admission. KRE 801A(b).

LMPD officers with uniform assignments 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. (*Id.*) 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. (*Id.*) Applied to the average annual benefit payment for such members, that reduction amounts to $1,494.59 per year. (*Id.*)

In addition, Section 74 of SB 151 amends KRS 161.623 to cap the amount of accrued sick leave members of KTRS may convert toward retirement to the amount accrued as of December 31, 2018. (Pls. Br. 39.) Currently, KRS 161.623 allows teachers who started before July 1, 2008 to convert their accrued sick leave toward retirement, and allows teachers who started after July 1, 2008 to convert up to 300 days of accrued sick leave toward retirement. (*Id.*) Legislative Defendants state in their Brief that this amendment will affect approximately four percent (4%) of KTRS members. (Leg. Defs. Br. 78-79.) Senate Bill 151 also forecloses the option of public school districts or employers of KTRS members to participate in the sick leave program as currently provided by KRS 161.623. (*Id.* at 78.)

These and the other changes to the inviolable contracts in SB 151 that the Plaintiffs describe in their Complaint and Merits Brief are reductions or impairments to benefits promised to Kentucky's public employees. They are permanent and substantial impairments – more than a demonstrable threat to the promised benefits contemplated in *Jones*, and far exceeding the reduction or impairment the Kentucky Court of Appeals held wrongful in *Baker v. Commonwealth*. As such, SB 151 violates the inviolable contracts.

C. The Substantial Impairments were Not Reasonable or Necessary.

Again, Plaintiffs have illustrated that SB 151 reduces and impairs, through alteration or amendment, benefits promised to Kentucky's public employees under the inviolable contracts. These reductions and impairments of benefits are substantial. As their Briefs show, Defendants have not met their burden of showing that SB 151 is reasonable or necessary.

Defendants argue that SB 151 is reasonable and necessary to fully fund and "rescue" the retirement systems. However, they fail to demonstrate that funding the retirement systems could not be accomplished through alternative means that do not reduce or impair benefits promised under the statutory provisions constituting the inviolable contracts. Indeed, Defendants admit that none of the changes under SB 151 will have an immediate impact on the solvency of funds for the systems. (Gov. Br. 47.) In addition, Defendants have not shown that alternative funding streams were 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).

Furthermore, as Plaintiffs have shown, SB 151 does not save money for the Kentucky Retirement System, but will add billions of dollars of debt to the state and local retirement systems. (*See* Affidavit of Jason Bailey, attached to Pls. Verified Complaint as Ex. A) As the Affidavit of Jason Bailey further indicates, SB 151 adds these costs by resetting the 30-year period used to pay off liabilities to start in 2019, instead of 2013, and ability to reset the 30-year period "shows that an urgency to pay off the unfunded liabilities and repeated claims of imminent insolvency in the plans were unfounded." (*Id.*)

In *Toledo Area AFL-CIO Council v. Pizza*, the Sixth Circuit found that the destruction of a benefit expressly given to public workers is a substantial impairment, and that the stated purposes for the impairment were not reasonable and necessary. 1547 F.3d 307, 323-327 (6th Cir. 1998). The Court stated that when the state itself is a contracting party, as here, the court will look to determine whether the state's self-interest makes deference to the state's judgment inappropriate." *Id.* at 323. The Court in *Pizza* found: "The state may indeed have been motivated by one of the justifications it now asserts. However, even if all of these alternative motivations are imputed to the state, we cannot defer to the state's judgment that to effectuate these goals the substantial impairment of existing contracts was necessary and reasonable." *Id.* at 325. The Court noted that even if it imputed the state's claim that the substantial impairment was necessary and reasonable to serve a significant and legitimate public purpose, it was "neither reasonable nor necessary for the state to renege on its contract" to achieve the goal.

Here, it was neither reasonable nor necessary for Defendants to repudiate their obligations under the inviolable contracts and substantially impair the benefits guaranteed to public employees to achieve the stated purpose of rescuing the retirement systems from insolvency. Rather, Plaintiffs have shown the alleged immediate insolvency did not exist. Defendants fail to meet their burden. Senate Bill 151 reduces or impairs benefits the General Assembly promised to Kentucky's public employees under the inviolable contracts, the impairments are permanent and substantial, and Defendants cannot show they were reasonable or necessary. Thus, SB 151 violates the Contracts Clause Section 19 of the Kentucky Constitution.

VII. SB 151 Violates The Taking Clause Of Section 13 Of The Kentucky Constitution.

Plaintiffs set out how SB 151 takes public employee's property rights in the benefits guaranteed under the inviolable contract without just compensation, a violation of Section 13 of

the Kentucky Constitution. (Pls. Br. 47-51.) This section states 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."

The Kentucky Supreme Court has held "[p]roperty rights are created and defined by state law." *Weiand v. Bd. of Trustees 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)). Further, the Court has endorsed the view that contractual rights are property. *Folger v. Com.*, 330 S.W.2d 106, 108 (Ky. 1959).

Defendants now attempt to explain away the unseemly and illegal means by which SB 151 takes the rights and benefits relied upon by over 200,000 thousand public employees. To counter Plaintiffs' precedent and the plain language of Section 13, Defendants merely proffer that "SB 151 does not take any already-existing property from the Plaintiffs." (Gov. Br 54.) But SB 151 indisputably removes does rights and benefits that they can no longer avail themselves, and offers no just compensation in return.

Defendants make a feeble argument that *Weiand v. Bd. of Trustees of the Kentucky Ret. Sys.*, 25 S.W.3d 88, 93 (Ky. 2000), as cited by Plaintiffs, actually supports their proposition that a public *employee*'s property rights in his or her pension are incorporeal. But at issue in *Weiand*, is a divorced spouse of a public employee seeking to establish a right to the pension of the deceased ex-husband. The court denied the claim based upon a statute explicitly barring spouse beneficiary who is divorced from the public employee at the time of his or her death. The court acknowledged that had the claimant been married at the time of the public employee's death, her rights to the pension benefits were enumerated within the statutory scheme of KRS.[22]

[22] The court affirmed the trial court holding, that "Whatever property rights Darleen may have are created and defined by the statutory scheme which governs the Kentucky Employees Retirement System. KRS 61.542(2)(b) is

As in *Weiand*, the property rights of the employees themselves are also enumerated within the statutory scheme of the inviolable contract, und thus removing these rights and benefits is a taking for which there has been no just compensation.

VIII. SB 151 Violated Section 2 Of The Kentucky Constitution.

Plaintiffs detail the documented manner in which the General Assembly passed SB 151 by converting a sewage bill into sweeping pension reform in a rushed process, and in so doing violated the Kentucky Constitution and state statute, further deprived the people of the opportunity to review or comment on the legislation. This exercise of absolute and arbitrary power is in contravention Section 2 of the Constitution. (Pls. Br. 32-37.)

Defendants contend that *City of Lebanon v. Goodin*, 436 S.W.3d 505, a case on municipal annexation, justifies their exercise of absolute and arbitrary power as applied to thousands of public employees. However *City of Lebanon* relied on the fact that the "political actions" at issue there do not "conflict with constitutional principles," and thus were not arbitrary. (Gov. Br. 58; Leg. Defs. Br. 74-76.) As proven in this lawsuit, the enactment of SB 151 conflicted with and violated multiple sections of the Kentucky Constitution. As such, it was arbitrary under *City of Lebanon* and Section 2.[23]

As part of the Kentucky Bill of Rights, KY. CONST. § 2 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." Kentucky's highest court has held, "whatever is essentially unjust

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part of this statutory scheme, and that statute clearly states that Darleen has no rights to Steven's benefits *after* the divorce. (emphasis added.)

[23] Even more unpersuasive is the Governor's citation to *Buford v. Commonwealth*, 942 S.W.2d. 909 (Ky. App. 1997), a criminal drug case in which the only argument made was that the statute in question was "unconstitutional." *Id.* at 911. The court performed no analysis under Section 2 of the Kentucky Constitution, nor was it asked to make a determination on this issue.

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).

Eschewing constitutionally mandated processes and covertly transforming a bill that otherwise would not garner wide public interest, in order to reduce and evade meaningful participation by the public, epitomizes a violation of Section 2. The General Assembly exercised absolute and arbitrary authority over the lives of public servants, their property rights, and the freedom they had to exercise first amendment free speech and assembly regarding the bill. This constitutional deprivation should not be allowed to stand.

CONCLUSION

Defendants violated the constitutional rights of over 200,000 teachers, police officers, firefighters, social workers and other public servants. They violated the Kentucky Constitution by turning an 11-page sewer bill into a 291-page pension bill and passing it in roughly six hours. They further violated the guaranteed retirement benefits of public employees that are protected under the Contracts Clause of the Kentucky Constitution. This Court has a duty to address these constitutional violations and void SB 151.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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INTRODUCTION

Principles of Parliamentary Law

An understanding of parliamentary principles will simplify the learning and application of parliamentary rules. Parliamentary procedure is based primarily on a group of principles that underlie the scheme of parliamentary rules. Some of these principles are set out below. Thought of in terms of principles instead of rigid, detailed technical rules, parliamentary law is essentially logical and simple.

Parliamentary Rules

Every deliberative body is bound to comply with all applicable rules laid down for it by the constitution, judicial decisions thereon and basic legal principles. These rules and principles govern whether adopted by the body or not, and they apply whenever group decisions are being made. Failure to conform to them invalidates any action taken or decision made.

Unless restricted by the constitution or other superior authority, a legislature can adopt its own rules of parliamentary procedure by a majority vote. Also by a majority vote, it can change, suspend or repeal the rules at any time it chooses. Failure to comply with its own adopted rules does not invalidate actions of the legislature.

Every member of a legislature is presumed to be the equal of each other member, and each has rights that must be respected. The rights of the minority and the majority both must be protected.

the presiding officer should entertain the amendment, subject to the right of a member to raise a point of order, or the presiding officer should submit to the house the question of whether the amendment is in order.

See also Sec. 242, Limitations on Use of Points of Order.

Sec. 402. Amendments Must Be Germane

1. Every amendment proposed must be germane to the subject of the proposition or to the section or paragraph to be amended.

2. To determine whether an amendment is germane, the question to be answered is whether the amendment is relevant, appropriate, and in a natural and logical sequence to the subject matter of the original proposal.

3. To be germane, the amendment is required only to relate to the same subject. It may entirely change the effect of or be in conflict with the spirit of the original motion or measure and still be germane to the subject.

4. An entirely new proposal may be substituted by amendment as long as it is germane to the main purpose of the original proposal.

Sec. 402, Par. 1: Sturgis, p. 44; Hughes, Sec. 380; N.Y. Manual, p. 405; Reed, Sec. 160.

Sec. 402, Par. 2: Hughes, Sec. 411; Robert's, pp. 109, 113.

Sec. 402, Par. 3: Jefferson, Sec. XXXV; Cushing's Legislative Assemblies, Secs. 1302, 1317, 1363; Jones v. Bd. of Ethics for Elected Officials (La., 1992).

Sec. 402, Par. 4: Nebraska *ex rel.* Davis v. Cox (Neb., 1920); Hood v. City of Wheeling (W.Va., 1920).

5. An amendment to an amendment must be germane to the subject of the amendment as well as to the main question.

Sec. 403. Withdrawing Amendments and Accepting Modifications

See also Ch. 27, Secs. 272-276, Withdrawal of Motions.

1. Amendments may be withdrawn prior to formal introduction by request of the member offering the amendment. After formal introduction, amendments may be withdrawn only with the consent of the body.

2. A member has the right to modify a motion or resolution that that member submitted at any time before it is stated by the presiding officer, but after it is stated, it is in the possession of the body, and can be modified only with the consent of the body.

3. After formal introduction, an amendment is in control of the body.

4. A request for leave to withdraw amendments is treated the same as a motion to grant the leave, except that the request must be made by the member who proposed the amendments while the motion to grant the leave to withdraw may be made by any member.

Sec. 402, Par. 5: Hughes, Sec. 361.

Sec. 403, Par. 1: Sturgis, p. 47; Reed, Sec. 150; Cushing, Secs. 92, 93.

Sec. 403, Par. 2: Sturgis, pp. 47, 48; Reed, Sec. 150.

Sec. 403, Par. 3: Sturgis, p. 47; Cushing, Secs. 92, 93.

Sec. 403, Par. 4: Sturgis, pp. 47, 90.

no amendment is in order that presents a question substantially identical with one already decided.

Sec. 415. Consolidation and Substitution of Measures

See also Sec. 722, Three Readings of Amended Bills; and Sec. 617, Substitute Bills.

1. When the matter contained in two propositions might be better put into one, the proper procedure is to reject one and to incorporate its provisions into the other by amendment. When the provisions would be better distributed into propositions, any part of the bill may be struck out by amendment and put into a new proposition.

2. Substitution is only a form of amendment and may be used, as long as germane, whenever amendments are in order. When a measure is being considered by sections, a substitute for the entire measure cannot be moved until the sections have all been considered and the presiding officer has announced that the proposition is open to amendment. Even though an entire measure is substituted for another, it is necessary afterwards to vote on adopting the measure.

3. An amendment, striking out the entire bill following the enacting clause and substituting a new bill, does not violate a constitutional provision that amendments

Sec. 414: Jefferson, Sec. XXXV; Cushing, Sec. 115; Reed, Sec. 145; Robert's, p. 129.

Sec. 415, Par. 1: Cushing's Legislative Assemblies, Sec. 1358; Sturgis, pp. 46, 47; Jefferson, Sec. XXXV; Cushing, Sec. 88; Reed, Sec. 155; N.Y. Manual, p. 408.

Sec. 415, Par. 2: Cushing's Legislative Assemblies, Sec. 1311; Reed, Sec. 156; Robert's, pp. 129, 151-154, 506-507; Sturgis, pp. 48, 51-52.

may not change the original purpose of an act, unless the substitution changes the original purpose of the act.

4. The method of substituting an entirely new bill by amendment, when the changes by way of amendment are strictly germane to the original, is not unconstitutional, is in accord with universal legislative procedure, and it is not necessary that such a bill, which has been read a first and second time before amendment, be again given first and second readings before passage.

Sec. 416. Alternative Propositions—Filling Blanks

See also Sec. 396, What Motions May Be Amended, particularly Par. 1(o).

Procedure on Filling Blanks

1. The method adopted in filling blanks has sometimes a great advantage over ordinary amendment. In amending, the last proposition made is the first one voted on; whereas, in filling blanks, the first proposition made, or name proposed, is voted on first, except where, from the nature of the case, another order is preferable, and then that order may be adopted.

2. When alternative propositions are submitted, they are treated not as separate amendments, but as independent propositions, to be voted on successively.

Sec. 415, Par. 3: Brake v. Callison (S.D. Fla., 1903); Reitzammer v. Desha Road Improvement Dist. No. 2 (Ark., 1919); Nebraska *ex rel.* Davis v. Cox (Neb., 1920); Nelson v. Haywood County (Tenn., 1892).

Sec. 415, Par. 4: Nebraska *ex rel.* Davis v. Cox (Neb., 1920); Hood v. City of Wheeling (W.Va., 1920).

CHAPTER 67

REQUIRED READING OF BILLS

Sec. 720. Bills Must Be Read on Three Separate Days

1. Ancient parliamentary practice and most state constitutions require that bills be read three separate times on three separate days in each house of a legislature before final passage.

2. The requirement that each bill be read on three separate days, prescribed by the constitution, legislative rules or statutes, is one of the many restrictions imposed upon the passage of bills to prevent hasty and ill-considered legislation, surprise or fraud, and to inform the legislators and the public of the contents of the bill.

3. A substantial compliance with the constitutional requirement as to the reading of bills is generally sufficient, although it has been held that the requirement of reading the bill on different days is mandatory. Mandatory requirements must be complied with.

Sec. 720, Par. 1: Jefferson, Sec. XL; Cushing's Legislative Assemblies, Secs. 2123, 2124; State Constitutions: Ala. IV, 63; Alaska II, 14; Ariz. IV, Part II, 12; Ark. V, 22; Calif. IV, 8(b); Colo. V, 22; Fla. III, 7; Ga. III, Sec. V, 7; Hawaii III, 15; Idaho III, 15; Ill. IV, 8; Ind. IV, 18; Kan. II, 15; Ky. 46; La. III, 15; Md. III, 27; Mich. IV, 26; Minn. IV, 19; Miss. IV, 59; Mo. IV, 21; Neb. III, 14; Nev. IV, 18, 23; N.J. IV, Sec. IV, 6; N.M. IV, 15; N.Y. III, 14; N.C. II, 22; N.D. IV, 13; Ohio II, 15; Okla. V, 34; Ore. IV, 19; Pa. III, 4; S.C. III, 18; S.D. III, 17; Tenn. II, 18; Texas III, 32; Utah VI, 22; Va. IV, 11; W.Va. VI, 29.

Sec. 720, Par. 2: Alabama *ex rel.* Attorney General v. Buckley (Ala., 1875); Florida *ex rel.* Buford v. Carley (Fla., 1925).

Sec. 720, Par. 3: Arkansas v. Crawford (Ark., 1879); Tarr v. Western Loan & Savings Co. (Idaho, 1909); Minnesota *ex*

4. A reading of a bill by title is considered a reading of the bill, unless it is specifically required by the constitution that the bill be read at length or in full.

5. The requirement that bills be read on different days in each house does not prevent the reading of a bill the first time in one house on the same date that it was given third reading and passed in the other.

6. The official reading of bills is not invalid or ineffective because it takes place on Sunday.

Sec. 721. Suspension of Requirement of Three Readings

1. Many state constitutions provide that the requirement of reading a bill on three separate days may be suspended by a two-thirds vote in case of emergency. It has been held that the legislative body is the exclusive judge as to when a case of emergency arises or exists.

See also Sec. 723, Journal Record of Readings, particularly Par. 8.

rel. Kohlman v. Wagner (Minn., 1915); Nelson v. City of South Omaha (Neb., 1909); City of Charlotte v. Shepard (N.C., 1898); Smathers v. Comm'rs of Madison County (N.C., 1899); Wagstaff v. Central Highway Comm'n (N.C., 1917); ComTech Systems, Inc. v. Limbach (Ohio, 1991); Pennsylvania Ass'n of Rental Dealers v. Commonwealth of Pennsylvania (Pa., 1989); Smith v. Mitchell (W.Va., 1911).

Sec. 720, Par. 4: Florida v. Kaufman (Fla., 1983); Saunders v. Bd. of Liquidation (La., 1903); People *ex rel.* Hart v. McElroy (Mich., 1888); McClellan v. Stein (Mich., 1924).

Sec. 720, Par. 5: Smithee v. Garth (Ark., 1878); Chicot County v. Davies (Ark., 1882); Skipper v. Street Improvement Dist. No. 1 (Ark., 1920); Tennessee *ex rel.* Estes v. Persica (Tenn., 1914); Smith v. Mitchell (W.Va., 1911).

Sec. 720, Par. 6: Ex parte Seward (Mo., 1923).

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Sec. 720, Par. 6: Ex parte Seward (Mo., 1923).

2. In suspending the requirement for reading bills on three separate days, when suspension is permitted by the constitution, the suspension may be effected by naming the bill and approved by the prescribed vote without any other formality. It is not material that bills other than the one in question are included in suspending the provision.

Sec. 722. Three Readings of Amended Bills

See also Sec. 415, Consolidation and Substitution of Measures; and Sec. 723, Journal Record of Readings, particularly Par. 6.

1. The constitutional requirement that bills be read three times is not generally interpreted to apply to amendments, so that bills are required to be read the specified number of times after amendment, although in some jurisdictions material amendments are excluded from this rule. When amended bills are required to be read, this requirement can be suspended the same as for other readings.

Sec. 721, Par. 1: People *ex rel.* Scearce v. Glenn County (Calif., 1893); McCulloch v. Indiana (Ind., 1858); Weyand v. Stover (Kan., 1886); Hull v. Miller (Neb., 1876).

Sec. 721, Par. 2: People *ex rel.* Scearce v. Glenn County (Calif., 1893); Minnesota *ex rel.* Kohlman v. Wagner (Minn., 1915).

Sec. 722, Par. 1: Cantini v. Tillman (D.C. S.C., 1893); Sch. Dist. No. 11, Dakota County v. Chapman (8th Cir., Neb., 1907); People *ex rel.* Leverson v. Thompson (Calif., 1885); Florida v. Dillon (Fla., 1900); People *ex rel.* Brady v. LaSalle St. Trust & Savings Bank (Ill., 1915); Allopathic St. Board v. Fowler (La., 1898); Missouri *ex rel.* Aull v. Field (Mo., 1894); Nebraska *ex rel.* Martin v. Ryan (Neb., 1912); People *ex rel.* Scott v. Supervisors of Chenango (N.Y., 1853); Miller v. Ohio (Ohio, 1854); Evanhoff v. State Indus. Accident Comm'n (Ore., 1915); South Carolina v. Brown (S.C., 1890); Nelson v. Haywood County (Tenn., 1892); Capito v. Topping (W.Va., 1909). Regarding suspension of readings of amended bills, see Tarr v. Western Loan & Savings (Idaho, 1909).

2. When a bill that has been passed by one house has been materially amended in the other, and there passed as amended, it has been held that the constitutional provision with reference to reading three times does not require the bill as amended to be read three times in the house of origin before concurring in the amendments of the other house. The same rule applies when a bill has been recalled and reconsidered and again passed.

3. Where a substituted bill may be considered as an amendment, the rule with reference to reading a bill on three separate days does not require the bill to be read three times after substitution. One house may substitute an identical bill of its own for the bill of the other house without the rereading of the substitute bill being required.

4. A bill already read one or two times is not required to be reread because of a change in the title.

5. A bill that is amended or redrafted by a conference committee is not a new bill in the sense that it requires three readings thereafter.

Sec. 722, Par. 2: Arkansas v. Crawford (Ark., 1879); Florida v. Dillon (Fla., 1900); Brake v. Callison (S.D. Fla., 1903); Nebraska *ex rel.* 1st Nat'l Bank of Atkinson v. Cronin (Neb., 1904).

Sec. 722, Par. 3: Alabama *ex rel.* Attorney General v. Buckley (Ala., 1875); People *ex rel.* Brady v. LaSalle St. Trust & Savings Bank (Ill., 1915); Nebraska *ex rel.* Davis v. Cox (Neb., 1920); Brown v. Road Comm'rs (N.C., 1917); Edwards v. Nash County Bd. of Comm'rs (N.C., 1922); Tennessee *ex rel.* Estes v. Persica (Tenn., 1914); Tennessee Coal, Iron & R.R. Co. v. Hooper (Tenn., 1915); Smith v. Mitchell (W.Va., 1911); Hood v. City of Wheeling (W.Va., 1920).

Sec. 722, Par. 4: Missouri *ex rel.* Aull v. Field (Mo., 1894); Nebraska *ex rel.* 1st Nat'l Bank of Atkinson v. Cronin (Neb., 1904).

Sec. 722, Par. 5: Nelson v. Haywood County (Tenn., 1892).

in the Union, which has made any effort to secure legislative reform, that is, the reform in the manner and mode of legislation, has a section like this, or something substantially like it, and for that reason the Committee present that question.

Mr. FARMER. I withdraw my amendment, as there is another one following it, which is better.

The CLERK. The next amendment in order is that offered by the Delegate from Daveiss (Mr. Pettit), which is to strike out all after the word "Committee" down to and including the word "House," in line five.

Mr. PETTIT. The effect of that amendment is to cut out of the Committee's report the provision for the printing of all bills and amendments to bills. These minor matters should be left to the Legislature itself. I do not see how it is possible for us to legislate for future years upon small matters like these. It is well known that in this matter of printing you not only delay legislation to a great extent, but the expense attached to this printing is unnecessary, and will amount to thousands of dollars each Legislature, much of it useless. If my amendment is adopted, these words will be stricken out: "and with the amendments thereto be printed for the use of the members; but the printing of any or all of the amendments may be dispensed with by a vote of two-thirds of the House."

Mr. MCDERMOTT. I hope that that amendment will not be carried, because there is nothing so important as publicity in the consideration of legislative bills. The cost of printing, if local legislation be dispensed with, will not be very great. We found in this Committee a great divergence of opinion on the question how often these bills should be read at length. It takes a great deal of costly time to read them. Instead of having them read so much, it would be better to have them printed, so that the members could take them home and study them. You cannot take in the full meaning of a bill from a reading by the Clerk. You have to read it over carefully for yourself. I do not think there should be so much objection to dispensing with the printing of amendments, because you cannot tell how quickly an amendment will be offered, and to require the printing of each amendment might unduly delay the proceedings, and yet even this precaution may be wise.

Mr. PETTIT. Let me ask my friend from Louisville one question. He has been in the Legislature, and knows the practical workings of these matters. In the fiftieth section approved by the Committee, it proposes the method of obtaining special legislation——

Mr. MCDERMOTT. In special legislation, the printing is at the expense of the man who wants the legislation.

Mr. PETTIT. But let me call your attention to this fact: no matter how you hedge about your clause against private and special legislation, private and special legislation will be had under the guise of general laws. Two-thirds of the bills passed will be general laws, but will have only private application. I have known our Legislature, at the beginning of a session, to resolve solemnly that they would discard all private legislation, but an entering wedge is made here by some favored member, and it is a pretext to throw down all barriers and admit, without limit, special legislation.

Mr. SPALDING. I do not like to interrupt the gentleman.

Mr. PETTIT. I am through.

Mr. MCDERMOTT. As to that question of special legislation, we will discuss it when we come to it. We are discussing now the simple question of printing. Whenever a man wants to pass any thing that is wrong, he tries to keep it from being printed; he tries to keep its contents unknown.

Mr. PETTIT. It must be read three times, and a yea and nay vote taken.

Mr. PUGH. I ask that that be put on its passage.

The PRESIDENT. Do you offer that as an amendment to the other resolution?

Mr. PUGH. Yes sir.

The PRESIDENT. I doubt that—

Mr. PUGH. I offer that as a substitute.

The PRESIDENT. The substitute must be germane. It is in the nature of a rule of instruction for the Committee of the Whole, and the substitute is not in order in the way of a substitute.

Mr. PUGH. Then I withdraw the original resolution which I offered.

Mr STRAUS. I object to the withdrawal.

The PRESIDENT. The resolution has been amended, and, therefore, it cannot be withdrawn. It is the property of the House.

Mr. PUGH. I desire to strike out so much as directs that it be reported back; and I ask that a vote be taken to ascertain the sense of this Convention as to which Court system shall be adopted.

The PRESIDENT. That is not in order. The original resolution is in the nature of instructions, and the amendment must be germane to the subject-matter. The subject-matter is the resolution with instructions to the Committee of the Whole. The amendment must be germane to the general sphere and scope of the original resolution. The gentleman can attain his purpose by voting the resolution down, and offering his as a substitute.

Mr. PUGH. I hope it will be voted down. If jewel be a consistency. (Laughter.) I beg pardon; if consistency be a jewel, some of the gentlemen on this floor are not very wealthy.

Mr. JONSON. I suggest to the Delegate that the jewels were all reaped in the discussion on the Bill of Rights.

A vote being taken, and a division called,

Mr. BRONSTON. I call the yeas and nays on that.

Mr. PUGH. I second it.

Mr. APPLEGATE. Is that proposition of the Delegate from Lewis susceptible of division?

The PRESIDENT. As a matter of course instructions are divisible from the motion to go into the Committee of the Whole.

Mr. APPLEGATE. I want to divide the instructions taking the test vote.

The PRESIDENT. At what point does the gentleman wish the resolution divided?

The resolution, as amended, was again read.

Mr. APPLEGATE. That part which provides that the Committee report back to the Convention for the purpose of taking a test vote, I ask if that is susceptible of division from the rest of the resolution?

The PRESIDENT. The Chair thinks so. The gentleman can move to strike that out.

Mr. APPLEGATE. I move to strike it out.

Mr. BIRKHEAD. I second it.

A vote being taken, the motion of the Delegate from Pendleton was rejected.

The PRESIDENT. The question now recurs on the passage of the resolution.

Mr. JONSON. I make the point of order that there is no quorum.

Mr. PUGH. I ask that my resolution be put on its passage.

The resolution of the Delegate from Lewis was read.

Mr. CARROLL. I call the yeas and nays on that.

Mr. BRONSTON. I second it.

Mr. ZACK PHELPS. I offer a substitute to that.

Mr. W. SCOTT SMITH. I move the previous question on the resolution and all amendments.

A vote being taken, the main question was ordered.

The substitute offered by the Delegate

Mr. BECKHAM. Of course I am aware the present Constitution requires four-fifths to dispense, but I understand that provision to dispense with any reading at all; but this amendment requires that it shall be read once before the whole House.

Mr. SPALDING. I would state, in response to the inquiry of the Delegate from Boyd, that there is another provision here, which I hope will be adopted, requiring not only that a bill shall be read, as provided in this section, but when it has passed both Houses, and is enrolled and presented to the Speaker for his signature, it shall be again read to the House before it is signed by the Speaker, so it will necessarily be read twice.

Mr. L. T. MOORE. What good will that do after it has become a law?

Mr. SPALDING. If there is any objection to it, it can then be made. It is not a law before it is signed.

A vote being taken, the amendment of the Delegate from Bourbon was rejected.

The CLERK. The next is the amendment offered by the same Delegate:

Strike out in line seven all after the word "passage," down to and including the word "House," in line eight.

A vote being taken, the amendment was rejected.

The CLERK. The next amendment is that of the Delegate from Henry.

Mr. CARROLL. I wish to withdraw that.

The CLERK. The next amendment is that of the Delegate from Oldham:

Amend by inserting after the word "Committee," in the second line, these words: "and printed for the use of the members."

Mr. DEHAVEN. By the amendment of the Delegate from Daveiss, all after the word "Committee" was stricken out, and the only object that I had in offering the amendment that I offered was to still require, by the adoption of this section, the printing of the bill. At the suggestion of a gentleman, I shall withdraw the amendment.

The CLERK. The next amendment is that proposed by the Delegate from Shelby.

The amendment was read again.

Mr. DEHAVEN. I think there ought to be an amendment to that. I do not think that any reading of a bill ought to be dispensed with, unless it is done by four-fifths of those present.

Mr. MACKOY. Under the old Constitution, you could dispense with all the readings This amendment simply dispenses with two readings. Therefore, it seems to me that it is not proper that there should be four-fifths required——

Mr. BECKHAM. With the consent of the Committee, I will change it, and say "a majority of those elected to each House."

The CHAIRMAN. Without objection, the amendment will be so changed.

Mr. L. T. MOORE. It seems to me that it would be easier to strike out that which requires the second and third readings altogether, because it will never be done if that amendment is adopted.

Mr. PETTIT. I call for a division of the question.

Mr. STRAUS. I make the point it is all one question. It is so worded you cannot separate it.

Mr. PETTIT. The amendment proposed by the gentleman from Shelby sets at naught what has already been done by the Convention. I do not believe that his amendment, so far as the printing of *all* bills, should be adopted. What does he propose? He proposes that *every* bill shall be printed. Why impose this duty upon the Legislature? Let the Legislature itself say what bills shall be printed. It will have the interest of the people at heart. Let us look at this as legislators. Let us take it as practical men. What do we say: "no bill shall be considered for final pas-

04/30/18

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

COMMOMWEALTH OF KENTUCKY, etc. et al. PLAINTIFFS

v. **ANSWER ON BEHALF OF DEFENDANT TEACHERS' RETIREMENT SYSTEM OF THE STATE OF KENTUCKY**

MATTHEW G. BEVIN, etc. et al. DEFENDANTS

* * * * * * * * * * *

Comes now the Defendant, Board of Trustees of the Teachers' Retirement System of the State of Kentucky [hereinafter referred to as "TRS"], by counsel, and for its Answer in the above-styled action states:

Without waiving any defenses in law and in response to the averments contained in the Complaint, TRS answers as follows:

1. The allegations contained in numerical paragraphs 5, 6, 7, 9, 10, 11, 12, 16 through 25, 27, 35, 36, 42, 44, 52, 53, 54, 57 and 109 are admitted.

2. The allegations contained in numerical paragraphs 1, 3 of the Complaint assert conclusions of law to which no response is required.

3. The allegation contained in numerical paragraph 2 of the Complaint that recites the language of KRS 418.040 requires no response. The allegation in numerical paragraph 2 which

asserts an "actual and justiciable controversy regarding violations of the Kentucky Constitution and state law clearly exists in this action," is a matter of law for the Court to decide.

4. TRS is without sufficient knowledge to admit or deny the allegations contained in numerical paragraphs 4 of the Complaint and therefore denies same.

5. The allegations contained in numerical paragraph 8 regarding the status of Matthew Griswold Bevin as Governor of the Commonwealth of Kentucky and the powers of that office are admitted. TRS is without sufficient knowledge to admit or deny the allegations regarding Governor Bevin and the KRS Board of Trustees and therefore denies same.

6. The allegations contained in paragraphs 13, 14 and 15 of the Complaint regarding jurisdiction and venue assert conclusions of law to which no response is required.

7. The allegations contained in numerical paragraph 26 are admitted to the extent that on March 29, 2018, the House of Representatives recessed so that the House Committee on State Government could meet, at which time SB 151, that then was an 11-page bill relating to sewer services was called. TRS is without sufficient knowledge to admit or deny that the public was excluded from the meeting and therefore denies same.

8. The allegations contained in numerical paragraph 28 are admitted to the extent that SB 151 as amended made changes to TRS. The allegation that SB 151 as amended unconstitutionally breached the inviolable contract is a matter of law for the Court to decide.

9. TRS is without sufficient information to admit or deny the allegations in numerical paragraphs 29 through 34 and 37, and therefore denies same.

10. The allegations contained in numerical paragraph 38 are admitted to the extent that SB 151 was amended in a way that changed the original subject matter. TRS affirmatively states that it became aware sometime after the House State Government Committee met that it had been provided a copy of House Committee Substitute to SB 151 by email at approximately 3:40 p.m. on March 29, 2018. TRS also admits the allegation that SB 151 was reported out of the House State Government Committee and approved by the House and Senate. TRS is without sufficient knowledge to admit or deny that any other stakeholders were not given an opportunity to read the bill and therefore denies same.

11. The allegation contained in numerical paragraph 39 recites the language of Section 46 of the Kentucky Constitution and requires no response.

12. TRS is without sufficient information to admit or deny the allegations contained in numerical paragraphs 40 and 41 and therefore denies same.

13. The allegation contained in numerical paragraph 43 recites the language of Section 56 of the Kentucky Constitution and requires no response.

14. The allegation in numerical paragraph 45 asserts a conclusion of law which requires no response.

15. The allegation contained in numerical paragraph 46 is admitted to the extent that an actuarial analysis from TRS on SB 151 was not available at the time SB 151 was reported out of the House State Government Committee.

16. The allegation contained in numerical paragraph 47 recites the language of KRS 6.350 and requires no response.

17. TRS denies the allegation contained in numerical paragraph 48, in as much as it relates to TRS, that no actuarial analysis to date has been performed on SB 151. TRS affirmatively asserts that an actuarial analysis was performed on SB 151 as it relates to TRS and that said analysis was submitted to the Legislative Research Commission by TRS, on the same day TRS received the analysis, by letter dated April 13, 2018. TRS is without sufficient information to admit or deny the remaining allegations contained in numerical paragraph 48 and therefore denies same.

18. TRS is without sufficient information to admit or deny the allegations contained in numerical paragraph 49 regarding an actuarial analysis performed by Kentucky Retirement Systems and therefore denies same.

19. TRS is without sufficient knowledge to admit or deny the allegations contained in numerical paragraph 50 and therefore denies same.

20. The allegations contained in numerical paragraph 51 recite the language of KRS 6.955 and require no response.

21. TRS admits the allegations contained in numerical paragraph 55 to the extent that SB 151 makes changes to the benefits to be provided to current members of TRS. TRS is without knowledge to admit or deny the remaining allegations contained in numerical paragraph 55 and therefore denies same.

22. The allegation contained in numerical paragraph 56 states a conclusion of law for the Court to decide.

23. TRS admits the allegation contained numerical paragraph 58 to the extent that KRS 161.623 is within the range of statutes covered by the language of set forth in KRS 161.714. The

allegation that the capping of sick leave under SB 1 unlawfully and materially reduces, alters, or impairs pension benefits is moot as that bill did not become law.

24. TRS admits the allegation contained in numerical paragraph 59 to the extent that the language of KRS 161.623 does not cap the amount of sick leave that can be applied as service credit for retirement calculation purposes. The allegation that the inviolable contract does not permit a cap on sick leave is a matter of law for the Court to decide.

25. TRS admits the allegation contained in numerical paragraph 60 to the extent that the language of KRS 161.623 caps the amount of sick leave that can be applied as service credit for retirement calculation purposes at 300 days for individuals who become members on or after July 1, 2008. The allegation that the inviolable contract currently caps sick leave as service credit at 300 days is a matter of law for the Court to decide.

26. TRS admits the allegation contained in numerical paragraph 61 to the extent that Section 74 of SB 151 caps the amount of sick leave that can be applied as service credit for retirement calculation purposes to the amount accrued as of December 31, 2018. The allegation that this limitation materially alters and impairs the rights and benefits due employees, and violates the inviolable contact, is a matter of law for the Court to decide.

27. The allegations contained in numerical paragraphs 62 through 81 are directed at Kentucky Employees Retirement System, Kentucky State Police Retirement System, and County Employees Retirement System, and do not require a response from TRS.

28. TRS is without sufficient knowledge to admit or deny the allegations contained in numerical paragraphs 82 through 84 regarding a letter sent by the Attorney General to all members of the General Assembly and the public and therefore denies same.

29. TRS admits the allegations contained in numerical paragraph 85 to the extent that SB 151 was passed by the General Assembly and signed into law by the Governor. The allegation that SB 151 contains 15 violations of the inviolable contract is a matter of law for the Court to decide.

30. TRS is without sufficient knowledge to admit or deny the allegations contained in numerical paragraph 86 and therefore denies same.

31. The allegations contained in numerical paragraphs 87 and 88 assert conclusions which are a matter of law for the Court to decide.

32. The allegations contained in numerical paragraph 89 regarding the impact on all state retirement systems cumulatively are based upon an attached affidavit that speaks for itself. TRS is without sufficient information to admit or deny the allegations to otherwise contained in numerical paragraph 89 and therefore denies same.

33. TRS is without sufficient information to admit or deny the allegations contained in numerical paragraphs 90 and 91 and therefore denies same.

34. TRS admits the allegation contained in numerical paragraph 92 in regard to the timeframe identified in the footnoted article.

35. TRS is without sufficient knowledge to admit or deny the allegations in numerical paragraph 93 regarding retirement patterns in the other state retirement systems and therefore denies same. The allegations regarding future retirement patterns in TRS are based upon an affidavit that speaks for itself. TRS admits that, should members retire earlier than assumed, there is a negative actuarial consequence.

36. TRS is without sufficient information to admit or deny the allegations contained in numerical paragraphs 94 and 95 and therefore denies same.

37. The allegations contained in numerical paragraph 96 contain conclusions that are matters of law for the Court to decide.

38. TRS answers that numerical paragraph 97 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

39. The allegation contained in numerical paragraph 98 recites Section 19 of the Kentucky Constitution and does not require a response.

40. The allegations contained in numerical paragraphs 99 and 100 contain conclusions that are matters of law for the Court to decide.

41. TRS answers that numerical paragraph 101 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

42. The allegation contained in numerical paragraph 102 recites Section 46 of the Kentucky Constitution and does not require a response.

43. TRS is without sufficient information to admit or deny the allegations contained in numerical paragraphs 103 through 105 and therefore denies same.

44. The allegation contained in numerical paragraph 106 is a conclusion which is a matter of law for the Court to decide.

45. TRS answers that numerical paragraph 107 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

46. The allegation contained in numerical paragraph 108 recites Section 56 of the Kentucky Constitution and does not require a response.

47. The allegations contained in numerical paragraphs 110 and 111 are conclusions which are matters of law for the Court to decide.

48. TRS answers that numerical paragraph 112 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

49. The allegation contained in numerical paragraph 113 recites Section 13 of the Kentucky Constitution and does not require a response.

50. The allegations contained in numerical paragraphs 114 through 117 are conclusions which are a matter of law for the Court to decide.

51. TRS answers that numerical paragraph 118 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

52. The allegation contained in numerical paragraph 119 recites KRS 6.350 and does not require a response.

53. The allegations contained in numerical paragraph 120 are admitted to the extent that SB 151 will decrease benefits for some members in TRS. TRS is without knowledge to admit or deny the allegations regarding the other state retirement systems and therefore denies same.

54. TRS admits the allegation in numerical paragraph 121 to the extent that an actuarial analysis of the impact of SB 151 on TRS was not available at the time the House Committee on State Government reported the bill to the floor. TRS is without sufficient knowledge to admit or deny that an actuarial analysis on the impact of SB 151 on KERS, SPRS and CERS was not Available and therefore denies same.

55. The allegation contained in numerical paragraph 122 is a conclusion which is a matter of law for the Court to decide.

56. TRS answers that numerical paragraph 123 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

57. The allegation contained in numerical paragraph 124 recites KRS 6.955 and does not require a response.

58. TRS is without sufficient knowledge to admit or deny the allegations contained in numerical paragraphs 125 and 126 and therefore denies same.

59. The allegation contained in numerical paragraph 127 is a conclusion which is a matter of law for the Court to decide.

60. TRS answers that numerical paragraph 128 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

61. The allegation contained in numerical paragraph 129 recites Section 2 of the Kentucky Constitution and does not require a response.

62. The allegations contained in numerical paragraphs 130 and 131 are conclusions that are a matter of law for the Court to decide.

63. TRS answers that numerical paragraph 132 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

64. The allegations contained in numerical paragraphs 133 through 138 are conclusions which are a matter of law for the Court to decide.

65. TRS is without sufficient information to admit or deny the allegations contained in numerical paragraph 139 and therefore denies same.

66. TRS answers that numerical paragraph 140 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

67. The allegations contained in numerical paragraphs 141 through 146 are conclusions that are a matter of law for the Court to decide.

68. TRS is without sufficient information to admit or deny the allegations contained in numerical paragraph 147 and therefore denies same.

69. TRS answers that numerical paragraph 148 incorporates by reference each and every allegation previously set forth in the Complaint, and TRS would answer each of those allegations in the same manner it has in the foregoing paragraphs of this Answer.

70. The allegations contained in numerical paragraphs 149 through 154 are conclusions that are a matter of law for the Court to decide.

71. TRS does not have sufficient information to admit or deny the allegation contained in numerical paragraph 155 and therefore denies same.

72. The allegation contained in numerical paragraph 156 is a conclusion which is a matter of law for the Court to decide.

WHEREFORE, TRS prays for relief as follows:

1. Pursuant to KRS 161.250(1), the TRS Board of Trustees is charged with the general administration and management of the retirement system, is responsible for its proper operation and for making effective the provisions of KRS 161.155 and 161.220 to 161.714. As such, the TRS Board of Trustees is obligated to implement KRS 161.155 and 161.220 to 161.714 as amended by SB 151 as, under Kentucky law, it is well established that duly adopted legislation is entitled to a presumption of validity. Hayes v. State Property and Buildings Commission, Ky. 731 S.W. 2d 797, 731 (1987). TRS will implement the afore-cited statues as amended by SB 151, unless it is directed by the Court to do otherwise. Accordingly, TRS awaits the Court's decision in this matter.

2. TRS requests that no costs be assessed against it.

3. TRS requests any other relief to which it may be entitled.

DATE: April 30, 2018

Respectfully submitted,

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By: _____

ATTORNEY FOR THE DEFENDANT
TEACHERS' RETIREMENT SYSTEM
OF THE STATE OF KENTUCKY

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Answer was served via U.S. Mail, postage prepaid, on this the 30th day of April, 2018 to the following:

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2015 WL 2152871
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Edward H. Flint, Appellant

v.

Kentucky Legislative Ethics Commission, Appellee

NO. 2014–CA–000745–MR

|

MAY 8, 2015; 10:00 A.M.

|

Discretionary Review Denied by
Supreme Court August 17, 2016

APPEAL FROM FRANKLIN CIRCUIT COURT, HONORABLE PHILLIP J. SHEPHERD, JUDGE, ACTION NO. 14–CI–00267

Attorneys and Law Firms

BRIEFS FOR APPELLANT: Edward H. Flint, Pro se, Louisville, Kentucky

BRIEF FOR APPELLEE: H. John Schaaf, Frankfort, Kentucky

BEFORE: DIXON, KRAMER AND THOMPSON, JUDGES.

OPINION

THOMPSON, JUDGE:

***1** Edward H. Flint, *pro se,* appeals from an order of the Franklin Circuit Court dismissing his action seeking an order compelling the Kentucky Legislative Ethics Commission (KLEC) to conduct an adjudicatory hearing on his ethics complaint against Speaker of the House of Representatives, Greg Stumbo. The circuit court ruled that Flint failed to state a claim upon which relief can be granted under Kentucky Rules of Civil Procedure (CR) 12.02(f) and dismissed his complaint. We affirm.

Flint sought to initiate impeachment proceedings against the Governor of Kentucky, five Kentucky Supreme Court Justices, five Kentucky Court of Appeals Judges, five Jefferson Circuit Court Judges, and one Jefferson District Court Judge. Under Section 66 of the Kentucky Constitution, the power of impeachment is vested in the House of Representatives and the procedure to be followed set forth in Kentucky Revised Statutes (KRS) 63.030. Speaker Stumbo is the presiding officer of the House.

After filing the various impeachment petitions, Flint filed a complaint with the KLEC alleging Speaker Stumbo engaged in unethical conduct when dealing with his impeachment petitions. He alleged Speaker Stumbo or someone at his direction, pressured or blackmailed the Louisville Courier Journal, the Lexington Herald, and the Associated Press so that the news entities would not report on Flint's impeachment petitions.

Speaker Stumbo filed an answer denying any violation of the Code of Legislative Ethics by himself, his staff, or any member of the House leadership. Additionally, Speaker Stumbo stated the impeachment documents filed by Flint did not conform to KRS 63.030 in that the documents were not accompanied by executed affidavits. He further stated that the documents were not received during a regular legislative session during which the House could review or act upon the alleged violations.

A preliminary inquiry hearing was scheduled for January 8, 2014. Prior to that date, Flint amended his complaint with the KLEC to allege that Speaker Stumbo violated the Code of Legislative Ethics when he did not promptly notify him of the deficiencies in his impeachment petitions.

At the preliminary inquiry, Flint testified regarding the lack of news coverage regarding his impeachment petitions and his concern that he was not earlier notified of the deficiencies in his petitions. Following the inquiry, the KLEC issued an order dismissing Flint's complaint. It found Flint did not "furnish any substantive evidence beyond his personal speculation, showing contact by the Speaker or someone at his direction, with any of the news media concerning Mr. Flint's impeachment efforts." Likewise, investigation by the KLEC uncovered no evidence of contact, "let alone 'blackmail." ' Addressing the allegation in the amended complaint, the KLEC found there was nothing in the Code of Legislative Ethics

that required Speaker Stumbo to return Flint's deficient impeachment petitions or notify him of the deficiencies. In light of its findings, an adjudicatory hearing was not held.

***2** Flint filed this action in the Franklin Circuit Court. He requested that the Court order the KLEC to conduct an adjudicatory hearing on his ethics complaint and permit discovery. The Franklin Circuit Court granted the KLEC's motion to dismiss for failure to state a claim upon which relief can be granted. CR 12.02(f).

Our standard of review for dismissals pursuant to CR 12.02(f) is as follows:

> The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determinations; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

*James v. Wilson,*95 S.W.3d 875, 883–84 (Ky.App.2002) (internal quotations and footnote omitted). Under this stated standard, the truth or falsity of Flint's claims against Speaker Stumbo is not at issue. The question is whether Flint is entitled to seek judicial relief from the KLEC's dismissal of his complaint alleging ethical violations against Speaker Stumbo.

"Kentucky's public scandal involving the indictment and conviction of legislators, former legislators, and lobbyists for criminal misconduct prompted/hastened the enactment of Senate Bill 7 during the first extraordinary session of 1993." *Associated Industries of Kentucky v. Commonwealth,* 912 S.W.2d 947, 950 (Ky.1995). The legislation included changes to KRS Chapter 6 referred to as the "Kentucky Code of Legislative Ethics." *Id.*

KRS 6.651 provides for the establishment of the ethics commission as an independent authority and agency of the legislative branch. The commission's authority includes the authority to receive complaints regarding violation of the Legislative Ethical Code, investigate, and conduct preliminary inquiries. Upon a finding of probable cause, the commission is further empowered to conduct adjudicatory proceedings. KRS 6.686. KRS 6.691(8) provides for an appeal to the Franklin Circuit Court after an adjudicatory hearing by "*[a]ny person found by the commission to have committed a violation of [the ethical] code* [.]" (Emphasis added).

The KLEC precisely followed the statutory procedures upon receipt of Flint's complaint against Speaker Stumbo. It conducted a preliminary inquiry and investigation and found no probable cause that Speaker Stumbo committed an ethical violation to warrant an adjudicatory hearing.

There is no statutory authority for Flint to appeal the KLEC's dismissal of the complaint against Speaker Stumbo. The only person who may appeal to the Franklin Circuit Court is one who has been found to have committed a violation. As noted by the Franklin Circuit Court, there is no statutory authority for Flint's complaint and he did not allege any constitutional violation that would confer jurisdiction on that court.

In his amended complaint filed with the KLEC, Flint alleged Speaker Stumbo violated the ethics code because he did not promptly notify Flint that his impeachment petitions against the Governor and various justices and judges were not properly verified as required for impeachment petitions. See KRS 63.030. According to Flint's allegations, the first in his series of impeachment petitions was filed in June 2013. However, he was not notified of the deficiency in his petitions until December 4, 2013, when he was sent a letter by the Chief Clerk of the House. Flint then refiled the petitions with the Clerk.

***3** We agree with the KLEC that there is no provision in the Code of Legislative Ethics which would require Speaker Stumbo to notify Flint that the impeachment petitions were deficient. Additionally, this issue is moot in light of Flint's acknowledgment that he refiled the petitions for impeachment.

The Franklin Circuit Court also interpreted Flint's *pro se* complaint to request that the court order the House of Representatives to act on his impeachment petitions. It properly noted that the power of impeachment is within the exclusive power of the House of Representatives under Section 66 of the Kentucky Constitution and the power to establish its rules of procedure for that process conferred

to it by Section 39 of the Kentucky Constitution. Under the separation of powers doctrine contained in Sections 27 and 28 of the Kentucky Constitution, one branch of government cannot interfere with the authority of another coequal branch of government. See *Legislative Research Com'n By and Through Prather v. Brown,* 664 S.W.2d 907 (Ky.1984).

The order of the Franklin Circuit Court dismissing Flint's complaint is affirmed.

ALL CONCUR.

All Citations

Not Reported in S.W.3d, 2015 WL 2152871

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 16-CI-522

GREGORY STUMBO, *in his official capacity as Speaker of the House of Representatives of the Commonwealth of Kentucky* **PETITIONER**

V. **ORDER**

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

This action is before the Court on Petitioner's and Respondents' Motion and Cross-Motion for Summary Judgment. A hearing was held on August 8, 2016. Petitioner, Speaker Gregory Stumbo, was represented by Matthew Stephens. Respondents, Secretary of State Allison Lundergan Grimes and Governor Matthew G. Bevin, were represented by Lindsay Hughes Thurston, and M. Stephen Pitt and S. Chad Meredith, respectively. The Court having reviewed the record and arguments of counsel, and being sufficiently advised, **IT IS ORDERED** that the Petitioner's Motion be **DENIED**, and that the Respondents' Supplemental Motion to Dismiss for Lack of Standing be **GRANTED** and this case be **DISMISSED** for reasons more fully set forth below.

BACKGROUND

The Speaker's Petition arises from a number of actions taken by Governor Bevin that are alleged by the Speaker to have been in violation of Sections 15, 56, 81, 88, and 230 of the Kentucky Constitution. Among these actions are: (1) an alleged violation of Sections 56 and 81 of the Kentucky Constitution through the Governor's signing of Senate Bill 296, as it was "a fatally defective or invalid bill" which was presented "to the Kentucky Secretary of State to be spread

upon the Executive Journal as properly enacted legislation;" (2) alleged violations of Section 88 of the Kentucky Constitution through "erroneous delivery of the veto messages," facially incorrect signature and dating, improper line-item vetoing, and improper messaging for the vetoes of, or objections to, House Bills 10, 129, 150, 303, 304, and 626; (3) alleged violations of Section 15 of the Kentucky Constitution through the use of vetoes of house bills in order to suspend laws in KRS Chapter 48; and (4) an alleged violation of Section 230 of the Kentucky Constitution through the Governor's veto of House Bill 626, making money drawn from the State Treasury no longer in pursuance of appropriations made by law.

Speaker Stumbo filed his petition styled in "his official capacity as Speaker of the House of Representatives of the Commonwealth of Kentucky and the duly elected 95th District Representative." As such, the Speaker bases his standing to bring this suit on his "unique status" and constitutional authority as the presiding officer of the House of Representatives. In the Speaker's brief, he argues that, while the Supreme Court of Kentucky decided in *Beshear v. Bevin*, 498 S.W.3d 355 (Ky. 2016), that the *individual* legislators in that case did not have standing to bring suit, his position as Speaker vests him with standing in order to protect the constitutional role of the House of Representatives and its Speaker in the enactment of legislation.[1] Alternatively, the Speaker asserts that Kentucky courts have long held that Kentucky taxpayers have standing to bring suit challenging the validity of a veto and whether a particular expenditure is constitutional.

Respondents, Governor Bevin and Secretary Landrum, filed a Supplemental Motion for Summary Judgment arguing that *Beshear v. Bevin* stands for the proposition that "[i]ndividual legislators simply do not have a sufficient personal stake in a dispute over the execution or constitutionality of a statute, even when the claim is that another branch of government is violating

[1] It should be noted that the Attorney General, who would apparently have standing under the decision in *Beshear v. Bevin, Id.,* was not named as a party here, nor has he moved to intervene.

the separation of powers." *Id.* at 368. Further, Respondents argue that the Speaker has no more of a valid claim to standing than any other legislator, and therefore must be found to lack standing to bring the present action. Finally, Respondents refute the Speaker's assertion that he may fall back on taxpayer standing, as the Petition was specifically styled as an action by the Speaker of the House in his official capacity and not being brought by an individual taxpayer.

JUDICIAL NOTICE

In addition to the facts set forth above, the Court finds it prudent to take judicial notice that the Plaintiff, Speaker Gregory D. Stumbo, failed to retain his seat in the Kentucky House of Representatives in the November 8, 2016 general election. The House of Representatives has now replaced Speaker Stumbo, who no longer holds the constitutional position of Speaker of the Kentucky House of Representatives. Counsel for the newly elected Speaker, Hon. Jeff Hoover, has filed an entry of appearance as counsel of record for the Speaker of the House in his official capacity, but the Court notes that Speaker Hoover has not sought to continue this action or to be substituted as plaintiff under CR 25.04. Since the events giving rise to this dispute arose while Speaker Stumbo was in office, the Court will address the issue of whether this action should be adjudicated in light of the change in status in the Plaintiff's official position during the pendency of this lawsuit.

DISCUSSION

The Petition filed in this case involves multiple challenges to the constitutionality of several actions taken by the Governor with regard to his veto power, along with more procedural issues concerning the delivery, signing, and dating of bills. However, like any petition before the Court, the individual asserting the claims involved must have standing to bring the petition. Here, the Speaker's standing has been called into question by Respondents, specifically on the basis

previously asserted and denied in *Beshear v. Bevin*. In *Beshear v. Bevin*, three individual members of the legislature joined the Attorney General in challenging an order by Governor Bevin to reduce the budget across-the-board for the fourth quarter of the 2015-2016 fiscal year, including for several universities in the Commonwealth. The Supreme Court of Kentucky concluded that, while the Attorney General had standing to bring suit, the three individual legislators did not. Nevertheless, the Supreme Court left the door open for future consideration of whether a legislator's leadership position, thereby acting in a representative capacity, could allow him to bring suit as being "representative of the entire body of the General Assembly."[2]

First, the Court finds Respondents' contention that the Speaker cannot rely upon taxpayer standing as a basis to continue to bring this Petition to be persuasive. As stated by the Respondents, the Speaker filed his Petition specifically in his official capacity as Speaker of the House of Representatives of the Commonwealth of Kentucky. Therefore, any standing that the Speaker has should be based on his capacity as Speaker. Because Speaker Stumbo's standing as presiding officer of the House is no longer applicable, he cannot maintain an action such as this to challenge actions of the Governor in any official capacity.

Courts have been presented with similar issues and have erred on the side of exercising the court's remedial discretion to withhold equitable and declaratory relief in light of separation-of-powers concerns. When the exercise of the Court's jurisdiction has the potential to infringe on the powers of it coequal branches of government, the Court has the equitable discretion to decline to exercise its jurisdiction.[3] Speaker Stumbo has made arguments that *Beshear v. Bevin* is distinguishable from the case at bar because his constitutional position as Speaker vests him with

2. *Id.* at 368 (citing *Raines v. Byrd*, 521 U.S. 811, 830 (1997)).
3. *See, e.g.*, *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

standing in a manner that differs from that of an individual member of the House by virtue of his constitutional role as presiding officer. The Court, however, need not decide at this time whether a Speaker, by virtue of his position as Speaker of the House, may assert claims against the Governor for violations of various constitutional provisions related to issuing and delivering vetoes. Instead, in light of the separation-of-powers concerns presented in this case, and because a transition of power has taken place removing the Speaker Stumbo's standing as the presiding officer of the House, the Court finds it improvident to adjudicate this matter further. Thus, while the Court may have jurisdiction to adjudicate such disputes between the Speaker of the House and the Governor, the Court finds that it is more appropriate, in light of the unique circumstances presented here, to exercise its equitable discretion to decline to exercise jurisdiction. *See e.g., Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983). Former Speaker Stumbo no longer has standing to pursue this challenge by virtue of his replacement in office by Speaker Hoover, and accordingly, it would be improvident for the Court to adjudicate the merits of the claims raised in this action.

CONCLUSION

Therefore, for the reasons stated above, the Court **DENIES** the Petitioner's Motion, **GRANTS** the Respondents' Supplemental Motion for Summary Judgment, and hereby **ORDERS** this case be **DISMISSED** for the reasons stated above. This is a final and appealable judgment and there is no just cause for delay.

IT IS SO ORDERED this 1st day of February, 2017.

PHILLIP J. SHEPHERD, JUDGE
FRANKLIN CIRCUIT COURT

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