COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 18-CI-379
ELECTRONICALLY FILED

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

GOVERNOR BEVIN'S SUR-REPLY IN SUPPORT OF COMBINED MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs' Reply Brief is reminiscent of a quote from the late Yogi Berra: "If you ask me anything I don't know, I'm not going to answer." The Plaintiffs adhere to this philosophy assiduously in their Reply Brief as they completely fail to rebut the Governor's arguments on the two most important points in this case. First, the Plaintiffs obviously cannot provide any reasoned explanation as to why their interpretation of the term "inviolable contract" is correct, so rather than attempt to rebut Governor Bevin's interpretation, they simply ignore the issue altogether. Their silence on this issue—*the* salient issue in this case—is the most remarkable aspect of their argument. And it is all the more remarkable given that they did not discuss the issue in their opening Brief on the Merits either. The Plaintiffs' utter failure to rebut Governor Bevin's interpretation of the inviolable contract can only lead to one

conclusion: the Prevailing Rule, rather than the California Rule, is the correct way to interpret the contract. The Plaintiffs have nothing to say on this point precisely because there is nothing they can say. The Prevailing Rule is the only interpretation that is sensible, fiscally responsible, and legally justified.

The Plaintiffs' silence on this point is truly astonishing. Nowhere, in nearly 100 pages of briefing, have the Plaintiffs offered any rationale or analysis to guide the Court in determining what rights are granted by the so-called "inviolable contract." Instead, the Plaintiffs simply assume—without any real analysis or argument—that the term "inviolable contract" must be interpreted according to the California Rule—*i.e.*, that a public employee's ability to accrue pension benefits is locked in at the moment the employee is hired, and the employee must be allowed to continue earning those exact same benefits at the exact same rates as long as the employee remains employed. The Plaintiffs' entire argument on this point is based on the logical fallacy of begging the question. That is, the Plaintiffs' argument is premised on the assumption that their ultimate conclusion is true, but does not actually prove the truth of that conclusion. *See, e.g., Wilburn v. Commonwealth*, 312 S.W.3d 321, 334 (Ky. 2010) (Noble, J., dissenting). Even the most novice of logic students could spot this logical fallacy.

The second key point on which the Plaintiffs fail to offer any rebuttal to the Governor's arguments is with regard to their claim under the Contracts Clause of the Kentucky Constitution. As an initial matter, the Court should not even reach this claim because SB 151 does not impair any contract rights to begin with.

Nevertheless, even if the Court were to reach this claim, it is now abundantly clear that the Plaintiffs cannot prevail since they have failed to produce any competent and admissible evidence to prove their claim. To prevail, they would have to prove that the purported impairments of contract rights are *substantial* and either *unreasonable* or *unnecessary*. These questions ultimately involve factual issues that require evidentiary proof. And the Plaintiffs have offered no competent and admissible evidence—none whatsoever.

The Plaintiffs' Reply not only fails to rebut the Governor's arguments on these points, but it also does not contest many key facts pointed out in the Governor's opening brief. In particular, the following points are undisputed by virtue of the Plaintiffs' failure to contest them:

1. Every single change to the various inviolable contracts is *prospective only* and does not affect any accrued benefits;

2. SB 151 does not affect the inviolable contract rights of a *single public school teacher* in Kentucky;

3. SB 151 makes no changes for current retirees;

4. The change in the guaranteed return from 4% to 0% for those who opted into the hybrid cash balance plan *does not affect a single individual* because no one has ever actually been given the option to opt in;

5. Health insurance is not a benefit covered by the inviolable contract;

6. The General Assembly has increased employees' pension contribution rates multiple times over the years;

7. The General Assembly has changed the benefits contained in the various inviolable contracts many times over the years, and, in some instances, certain benefits have been terminated outright;

8. Kentucky has the worst funded public pension systems in the country, with an unfunded liability of between $33 *billion* and $84 *billion*;

9. Only 15% of the unfunded liability is attributable to inadequate funding from the General Assembly, meaning that additional revenue and funding alone cannot save the pension systems, and, therefore, the structural changes in SB 151 are necessary;

10. Without reforms, the Kentucky Employees Retirement System ("KERS") will likely be insolvent by 2022, and the Kentucky Teachers' Retirement System ("KTRS") will likely be insolvent by 2036;

11. The new hybrid cash balance plan for teachers will likely provide them with a better retirement benefit than the old plan;

12. The Plaintiffs' process-based arguments—if accepted—would invalidate nearly every bill passed by the General Assembly in the last century;

13. The Plaintiffs' presiding-officer argument—if accepted—would invalidate *every single bill* passed in the 2018 Regular Session of the General Assembly; and

14. Credit rating agencies view SB 151 as a credit-positive development that helps to stabilize the Commonwealth's fiscal situation.

These uncontested facts show that SB 151 does not impair any rights under the inviolable contract and that the bill is vitally important to the future of both the pension systems and the Commonwealth as a whole.

Ultimately, the Plaintiffs' Reply is more notable for what it does not say than for what it does say. In offering no actual rebuttal to the Governor's argument that the "inviolable contract" should be interpreted according to the Prevailing Rule instead of the California Rule, the Plaintiffs have essentially conceded the point. And well they should. The available authority overwhelmingly demonstrates that the Prevailing Rule is the correct interpretation. Likewise, by failing to provide any competent and admissible evidentiary support for their claim under the Contracts

Clause, the Plaintiffs have obviously failed to satisfy their burden on that issue. And the Plaintiffs' Reply also fails to set forth any grounds on which they could prevail on their other substantive claims. Accordingly, the Court must reject the Plaintiffs' claims and enter judgment upholding the validity of SB 151.

Of course, the Plaintiffs also make a number of process-based arguments directed at the manner in which the bill was passed. Those arguments are a mere sideshow. Most of them are not even remotely justiciable, and, in any event, they are not meritorious. For the Court to strike down SB 151 based on the Plaintiffs' process-based arguments would be an unthinkable declaration of judicial supremacy that would do lasting damage to the Commonwealth's separation of powers, not to mention the havoc that such a ruling would bring to the statutes passed by the General Assembly over the last century.

ARGUMENT

I. The Plaintiffs' Reply Brief fails to rebut that the Prevailing Rule is the correct way to interpret the inviolable contract.

There are two ways to determine what rights are protected by the inviolable contract: the Prevailing Rule and the California Rule. The Prevailing Rule says that public employees' already-accrued pension benefits cannot be reduced, but the employees have no right to any future, unaccrued benefits. *See, e.g., Scott v. Williams*, 107 So. 3d 379, 388-89 (Fla. 2013). The California Rule, in contrast, says that public employees not only have a right to the pension benefits they have already accrued, but also have a right to continue accruing the same benefits at the same rates in the future. *See Legislature v. Eu*, 816 P.2d 1309, 1332-33 (Cal. 1991) (in

bank). Without saying so, the Plaintiffs are advocating for the California Rule. But they give the Court no reason to adopt that rule. And, perhaps more importantly, they do not rebut the overwhelming abundance of reasons that the Governor provided for adopting the Prevailing Rule.

Instead of attempting to rebut the reasons why the Prevailing Rule is the correct interpretation of the inviolable contract, the Plaintiffs simply assert that public employees have a contract that cannot be impaired, and since SB 151 makes changes to future accruals of benefits, it therefore impairs the contract. [*See* Pls.' Reply Br. at 39-40]. *But that argument assumes the ultimate conclusion*. It amounts to nothing more than the logical fallacy of begging the question. In fact, it begs a number of questions: What are terms of the contract? What actions would constitute an impairment of the contract? *Why* does SB 151 impair the contract? The Plaintiffs never address any of these points. Why not? Because doing so would be fatal to their argument.

As explained in Governor Bevin's opening brief, the Prevailing Rule is the only interpretation of the inviolable contract that makes sense. The Supreme Courts of Florida, Wisconsin, Oregon, and Michigan have all compellingly explained in recent opinions why the Prevailing Rule is the correct way to view public employees' rights to pension benefits. The Plaintiffs' Reply Brief does not even mention these decisions, much less try to rebut their sound reasoning.

The Plaintiffs also do not deny that the Prevailing Rule is more consistent with Kentucky law than the California Rule is. The Plaintiffs have no answer whatsoever

to *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky. 1973)—indeed, they fail to say even a single word about the case—nor do they have any answer to the Governor's analysis of *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995). Instead, they simply regurgitate some quotes from *Jones* and assert—without any analysis—that those quotes support their position. *Jones*, however, does not support the Plaintiffs. The Governor's opening brief—which contains a careful analysis of *Jones* rather than mere conclusory statements like the Plaintiffs' briefs—demonstrates that *Jones* supports the application of the Prevailing Rule.

The Plaintiffs make no serious attempt to rebut the overwhelming reasons supporting the application of the Prevailing Rule. Presumably, they realize that any such attempt would be futile and would only further reveal the soundness of that rule. Rather than address the Prevailing Rule head on, the Plaintiffs merely attempt to make a glancing blow at it by pointing to the 2013 legislation that created a new retirement plan for employees hired after January 1, 2014. This legislation provided that accrued benefits under the new plan would be protected, but that the General Assembly could make prospective changes to future benefits. *See* KRS 61.692(2)(a); 2013 Ky. Acts ch. 120, § 70. Based on this provision, the Plaintiffs argue that the Prevailing Rule cannot be the correct interpretation of the inviolable contract because "[i]f the General Assembly already had the power to reduce or impair current employees [*sic*], it would have been unnecessary to pass a statute explicitly authorizing such changes for new employees." [Pls.' Reply Br. at 40]. But the Plaintiffs conveniently fail to mention that the 2013 legislation also provides that

"[t]he provisions of this subsection shall not be construed to limit the General Assembly's authority to change any other benefit or right specified by KRS 61.510 to 61.705 [*i.e.*, the inviolable contract] . . . ." KRS 61.692(2)(c); 2013 Ky. Acts ch. 120, § 70. In other words, the statute itself contradicts the Plaintiffs' arguments. The General Assembly specifically provided that the provision allowing prospective changes for the new pension plan cannot be taken as an implication that the General Assembly lacks that same power with respect to the existing plans.

Why would the General Assembly allow for prospective changes to one plan while saying that such a provision does not imply that such authority is lacking for other plans? Because those provisions are belt-and-suspenders measures. The General Assembly believed that it had the authority—consistent with the Prevailing Rule—to make changes to any pension plan on a prospective basis, but it could not be sure how the courts would view the matter. Thus, when creating the new plan, the only logical and safe thing to do was to provide that it could be changed on a prospective basis, and to simultaneously state that such provision did not imply that the General Assembly lacked the authority to make prospective changes to the existing plans. This is exactly what the General Assembly did, and, when viewed in full context, it does not in any way undermine the conclusion that the Prevailing Rule is the correct interpretation of the inviolable contract.

The Plaintiffs also cite an unpublished Kentucky Court of Appeals opinion, *Baker v. Commonwealth*, No. 2005-CA-001588-MR, 2007 WL 3037718 (Ky. App. Oct. 19, 2007), although it is not clear why they believe this case supports their position

that the inviolable contract should be interpreted according to the California Rule. *Baker* involved a reduction in benefits to an individual who was already retired. *See id.* at *1. In other words, *Baker* involved a reduction in already-accrued benefits. This is impermissible even under the Prevailing Rule. Thus, the fact that the Court of Appeals found the reduction in accrued benefits to be unlawful does not support the Plaintiffs' advocacy for the California Rule.

The Prevailing Rule is the only interpretation of the inviolable contract that is sensible, fiscally responsible, consistent with existing Kentucky case law, and consistent with the manner in which other states' courts are interpreting public employees' pension rights. The superiority of the Prevailing Rule is wholly unrefuted by the Plaintiffs' Reply Brief. Also unrefuted is the fact that the Prevailing Rule is ultimately more advantageous for public employees. For these reasons, the Court should follow the Prevailing Rule. And, since all of the benefit changes in SB 151 are merely prospective, the application of the Prevailing Rule can only lead to the conclusion that SB 151 does not impair any rights guaranteed by the inviolable contract. Accordingly, the Defendants are entitled to judgment as a matter of law on this point.

II. The Plaintiffs' claim under the Contracts Clause fails because they cannot show that SB 151 creates a substantial impairment that was unreasonable and unnecessary.

The primary point in this case is that SB 151 does not impair any rights guaranteed by the inviolable contract. As explained above, the Plaintiffs' Reply utterly fails to rebut this point. But, even if one were to assume for the sake of

argument that SB 151 does somehow impair such rights, the bill would still be valid because the impairments do not run afoul of the Contracts Clause of the Kentucky Constitution.

Under the Contracts Clause, the state can impair contractual obligations as long as the impairments are either insubstantial or reasonable and necessary to serve a legitimate and important public purpose. *See Jones*, 910 S.W.2d at 717. The Plaintiffs bear the burden of proof here,[1] *see United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuno*, 633 F.3d 37, 41-42 (1st Cir. 2011), and they have not met—and cannot meet—it. They have produced not one iota of competent and admissible evidence to show that the impairment is both substantial *and* unreasonable or unnecessary. Their failure to produce the evidence necessary to sustain their Contracts Clause claim means that they cannot possibly prevail.

As an initial matter, it is remarkable that the Plaintiffs do not ever address the difference between an impairment to a contract and a *substantial* impairment. Instead, they double down on the idea that any violation of a contract is *per se* substantial—ignoring entirely the substantial body of law differentiating between impairments and substantial impairments. [Pls.' Reply Br. at 41-42]. Under their theory, the word "substantial" is superfluous because any change to a public employee's benefits meets that threshold. But this is contrary to every case applying

[1] This comports with the general rule that statutes are presumed to be constitutional and that it is the plaintiff's burden to prove otherwise. *See, e.g., Star v. Commonwealth*, 313 S.W.3d 30, 37 (Ky. 2010) (citing *Cornelison v. Commonwealth*, 52 S.W.3d 570, 572-73 (Ky. 2001)).

the Contracts Clause, and the Plaintiffs make no effort to explain why the Court should abandon the applicable standard.

Just as problematic, the Plaintiffs' Reply demonstrates that they are incapable of providing this Court with any competent evidence to support their claims. This is not surprising, given that the Plaintiffs successfully persuaded the Court to prevent the parties from engaging in discovery, claiming there are no factual disputes at issue in their motion for summary judgment. Yet their original brief on the merits was full of unsubstantiated, incompetent evidence that could never be admitted during a trial and cannot provide the basis for summary judgment. Rather than produce any competent evidence, the Plaintiffs simply repeat the same unsubstantiated allegations as before.

The Plaintiffs' sole response on this point is telling. The Governor argued that the Plaintiffs cannot rely on a clipping from a newsletter that is almost twenty years old to "prove" that the average public employee will lose $16,500 over a lifetime of benefits from SB 151. The reason is that such evidence is plainly incompetent: the newsletter was written by an individual with unknown credentials, and he relies on back-of-the-envelope math using numbers that have no foundation. *See* KRE 403, 601, 602. If this is proffered as expert-witness evidence, the Plaintiffs have done nothing to establish the individual's expertise or the reliability of the methodology used for his newsletter math. *See* KRE 702; *see also Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). If this is proffered as lay-witness evidence, the Plaintiffs have done nothing to establish this individual's personal knowledge and

ability to attest to the "facts" he asserts. *See* KRE 701. Nor have the Plaintiffs established that this evidence is not based on scientific, technical, or other specialized knowledge. *See id.* Under no standard of evidence is this newsletter admissible in any form—and that is true without even discussing that the article was written *seventeen years* before SB 151 passed and therefore has little to no relevance to the issues today.

In response, the Plaintiffs counter that the newsletter is not hearsay. The Plaintiffs' argument on this point is wrong, but more importantly, it is irrelevant. Although the newsletter is in fact inadmissible hearsay, the evidence also is inadmissible because it is incompetent. The Plaintiffs' defense of their "evidence" in this case is a complete *non sequitur*. In short, they have introduced no evidence whatsoever to satisfy their burden of proving that any contractual impairment caused by SB 151 is substantial. And the burden is plainly theirs. *See, e.g., Wojcik v. City of Romulus*, 257 F.3d 600, 612 (6th Cir. 2001) (holding that the Contracts Clause analysis requires the court to determine "whether a plaintiff has shown 'a substantial impairment' of a contractual relationship" (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983))); *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1364 (D. Md. 1984) (denying claim of substantial impairment because the plaintiffs could not produce affidavits rebutting the defendants' evidence in the record); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978) (establishing the severity of impairment is a necessary precondition before analyzing the purpose and reasonableness of the statute at issue);

see also Robertson v. Com., 82 S.W.3d 832, 837-38 (Ky. 2002) (explaining that substantiality is a question of fact).

It should go without saying that this is a lawsuit, not a campaign speech or a political debate. Parties are not permitted to simply assert facts in their briefs and have the Court enter judgment in their favor. *Evidence* is necessary to resolve factual disputes. But the Plaintiffs have introduced no competent evidence to support their Contracts Clause claim, relying instead on incompetent evidence and unsubstantiated and inadmissible factual assertions.[2] This is not how the judicial system works, and the Court must reject it outright. The bottom line is that the Plaintiffs have produced no competent and admissible evidence proving that any purported of contract rights is a *substantial* impairment. In the absence of such evidence, the Plaintiffs' Contracts Clause claim necessarily fails.

Alternatively, the claim also fails because the Plaintiffs have not demonstrated that any purported impairments were unreasonable or unnecessary. Essentially the Plaintiffs' only rejoinder to the Governor's argument on this point is that the

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[2] The audacity of the Plaintiffs in relying on unsubstantiated factual assertions to prevail on summary judgment despite objecting to discovery is not limited to their reference to a 20-year-old newsletter article. The Plaintiffs make factual allegations regarding the average value of equipment allowances [Pls.' Reply Br. at 44] that have never been examined through discovery. They also argue that the General Assembly "rejected multiple bills that would provide dedicated funding to the retirement systems," [*id.* at 45], without providing any factual bases or analyses to support this claim. And, after claiming that there were no factual issues that needed to be resolved, the Plaintiffs *expressly rely on affidavits* to support their claims. [*See, e.g.,* Pls.' Reply Br. at 45]. This is inappropriate and should not be permitted.

Even where the Plaintiffs attempt to defend their use of incompetent evidence in their brief, they do so by asserting facts that have no support in the record whatsoever. [*Id.* at 43, n.21]. Their entire defense of the 20-year-old newsletter relies on unsubstantiated claims about the identity of the author, which the Plaintiffs simply assert in their brief. Whether willfully or not, the Plaintiffs just ignore the ordinary rules governing civil litigation.

purported impairments in SB 151 are not reasonable and necessary because the Plaintiffs would have preferred the General Assembly to have adopted different policies. Laid bare, the Plaintiffs' argument on this point essentially is that the Court should declare the Plaintiffs' policy preferences to be the only reasonable and necessary policies and that the Court should set aside the General Assembly's considered wisdom in adopting different policies. This plainly is not a proper role for the Court. In any event, the Plaintiffs have failed to introduce any competent and admissible evidence showing that any purported impairment is not reasonable and necessary, just as they have also failed to introduce evidence showing that any purported impairment is substantial. The lack of evidence is fatal to their claim.

III. The Plaintiffs' Reply fails to rebut the significant body of case law showing that they have no claim under the Takings Clause.[3]

The Plaintiffs' Reply does not—at any point—address the difference between contractual rights to which an individual has a present entitlement and those that are contingent upon future circumstances. This is curious because *all of the cases they cite* make this distinction, and several of them deny takings claims when the plaintiffs cannot demonstrate a present entitlement to the benefits allegedly seized. [Gov. Br. at 54-55]. The Kentucky Supreme Court recognized this point in *Weiand*, when it explained that the ex-spouse of a retiree had no property rights in benefits *even while they were married* because the benefits were contingent on her husband

[3] In any event, the Governor contends that the Contracts Clause, not the Takings Clause, provides the appropriate mechanism for analyzing the constitutionality of SB 151. [*See* Gov. Br. at 53].

pre-deceasing her. *Weiand v. Bd. of Trustees of Ky. Retirement Sys.*, 25 S.W.3d 88, 93 (Ky. 2000). Because there was no guarantee that this event would occur, the Kentucky Supreme Court explained that there were no property rights at stake. Similarly, the Plaintiffs have not identified any benefits to which they are *presently entitled* that SB 151 confiscates. It is undisputed that all of the challenged provisions in SB 151 make *prospective* changes to the pension plans. Therefore, the Plaintiffs cannot demonstrate that any of their already-accrued benefits are being confiscated. This is a critical point that the Plaintiffs do not confront at all. Instead, they simply repeat their arguments and ignore that the case law they rely on does not support their own claims.

IV. The Plaintiffs' Reply fails to rehabilitate their Section 2 claim.

The Plaintiffs' attempt at defending their Section 2 claim is bizarre. They continue to argue that SB 151 violated Section 2 of the Kentucky Constitution solely because it violates *other* provisions of the Constitution. The argument, in other words, is that Section 2 has no meaning of its own and simply mirrors other sections of the Constitution. This interpretation renders Section 2 superfluous, and the Plaintiffs make this argument because any actual analysis as to whether SB 151 was an arbitrary exercise of power leads to only one conclusion: it is not. Prospectively reforming the state's ailing pension system is, without question, supported by a rational basis and therefore is not arbitrary under Section 2. *See City of Lebanon v. Goodin*, 436 S.W.3d 505, 519 (Ky. 2014). As with most of the arguments raised in the Governor's brief, the Plaintiffs do not even address this point—which is the central

question under Section 2. Instead, the Plaintiffs point to the rest of their arguments and—as if by magic—declare a constitutional violation must have occurred. The Court must reject this nonsense and dismiss the Plaintiffs' Section 2 claim.

V. The Plaintiffs' process-based claims remain just as frivolous after their Reply Brief as they were before.

The Governor's opening brief demonstrates a multitude of ways in which the Plaintiffs process-based claims fail. The Plaintiffs' Reply Brief does nothing to rebut this. Instead, the Plaintiffs go to great lengths in their Reply to merely rehash the exact arguments they made in their initial brief regarding the manner in which SB 151 was passed. Since that is not the purpose of a reply brief, the Governor will refrain from doing the same. Instead, the Governor specifically responds to several of the Plaintiffs' illogical contentions below, demonstrating why all of the Plaintiffs' far-reaching process-based claims fail. First, the Plaintiffs still have not demonstrated that all of their process-based claims are justiciable. In reality, those claims—with one exception—are not. Second, putting aside the issue of justiciability for the sake of argument, the Plaintiffs' process-based claims have no merit.

A. Most of the Plaintiffs' process-based arguments simply are not justiciable.

With the exception of the argument that SB 151 did not receive enough votes in the House of Representatives, none of the Plaintiffs' process-based arguments are justiciable. The Plaintiffs seem to believe that there are no limits to the questions that can be resolved by courts and that every provision in the Constitution gives rise to a justiciable cause of action. They are wrong on both counts.

The Plaintiffs appear perplexed by the idea that anyone but a court would have the final say on whether a constitutional provision has been complied with. But this is not a controversial proposition, nor is it a new one. It has been understood from the earliest days of the American republic that some constitutional questions are simply beyond the reach of courts. For example, in *Marbury v. Madison*, 5 U.S. 137 (1803), the United States Supreme Court held:

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. . . . [B]eing entrusted to the executive, the decision of the executive is conclusive. Questions, in their nature political, or which are by the constitution and laws, submitted to the executive can never be made in this court.

Id. at 165-66.

More recently, in *Philpot v. Haviland*, 880 S.W.2d 550 (Ky. 1994), the Kentucky Supreme Court refused to consider whether the Kentucky Senate was violating Section 46 of the Kentucky Constitution. In relevant part, Section 46 provides that if "a Committee refuses or fails to report a bill submitted to it in a reasonable time, the same may be called up by any member, and be considered in the same manner it would have been considered if it had been reported." A group of senators claimed that Senate Rule 48 violated this provision. Senate Rule 48 provided that if a member petitioned to call a bill out of committee pursuant to Section 46 because it was being held for an unreasonable time, the bill would be considered as if it had been reported by committee *only if a majority* of senators agreed it had been held in committee for an unreasonable time. *See Philpot*, 880

S.W.2d at 552. Applying the political question doctrine, the Kentucky Supreme Court refused to consider whether Senate Rule 48 was inconsistent with Section 46 of the Constitution. It held that "the determination of what is a 'reasonable time' in this context, is a matter for the legislature to determine . . . ." *Id.* at 553. The Kentucky Supreme Court further held that "[f]or [the courts] to presume to define a 'reasonable time' would result in the judiciary usurping the power of the Senate to determine for itself through its own rules when a committee has failed to report a bill within a reasonable time." *Id.*

This rule should be applied here as well. With the exception of the argument that SB 151 did not receive enough votes in the House of Representatives, the Court should hold that the Plaintiffs' process-based arguments are not justiciable. To do otherwise would do serious and lasting harm to the Commonwealth's robust separation-of-powers doctrine. As Kentucky's Supreme Court has noted on multiple occasions, Kentucky's separation of powers is "among the most powerful in the country." *Appalachian Racing, LLC v. Commonwealth*, 504 S.W.3d 1, 4 (Ky. 2016) (citing *L.R.C. v. Brown*, 664 S.W.2d 907, 911-12 (Ky. 1984)). "The essential purpose of separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." *Id.* at 4-5 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 760-61 (1982)). For the courts to consider the Plaintiffs' process-based arguments—other than the 51-vote argument—would obliterate this

principle by allowing the courts to supervise and control the functioning of the legislature.

As the Kentucky Supreme Court has clearly held, our government is one of three separate and *coequal* branches. It is *not* a government with three unequal branches, two of which are subordinated to the judiciary. The courts are not the overlords of the other two branches. Under our system of checks and balances, there are undoubtedly many instances in which the courts get the final word on whether legislation or government action complies with the Constitution. And rightly so. But that is not true in all instances. For example, no reasonable person could argue that the Governor's duty under Section 81 of Constitution to "take care that the laws be faithfully executed" could give rise to any justiciable questions. In fact, the United States Supreme Court has held that it would be "an absurd and excessive extravagance" for the courts to attempt to determine whether the President has complied with his identical duty to see that the laws are faithfully executed. *Mississippi v. Johnson*, 71 U.S. 475, 499 (1866). To hold such questions justiciable would elevate the courts to a position of supremacy over another branch by allowing them to supervise and control the functioning of that branch.

The same is true of the Plaintiffs' process-based claims in this case, with the exception of the 51-vote issue. What makes that issue different? Aside from the fact that the Kentucky Supreme Court specifically adjudicated this issue in *D&W Auto Supply v. Department of Revenue*, 602 S.W.2d 420 (Ky. 1980), it makes sense that this particular question would be justiciable. First, the question of whether a bill received

a sufficient number of votes is objectively verifiable and judicially administrable—*i.e.*, everyone agrees on what constitutes a vote for or against legislation, and the final vote tally can be simply and indisputably determined. Moreover, the question does not require the courts to second-guess any judgment calls or discretionary decisions made by the legislature. Thus, determining whether a bill has received a sufficient number of votes does not entail a showing of disrespect to the judgment of a coequal branch of government. And, perhaps more importantly, the question of whether a bill has received an adequate number of votes to become law is a question that goes to the heart of what it means to be a republic. For example, it would be anathema to the very concept of a republic for a bill to become law after receiving only a single vote in the legislature. In such an instance, a single legislator would be usurping the sovereignty of the state, and the courts could undoubtedly step in to prevent such a constitutional violation. After all, when a court determines that a bill has not received enough votes to become law, the court is not evaluating the action of the legislature, but of a subset of the legislature that is not authorized to act for the whole.

But no such issue is at stake with respect to the Plaintiffs' other process-based arguments. To the contrary, if the Court were to consider those arguments, the Court would be the one usurping power that does not belong to it. The Court would be second-guessing the General Assembly on matters that are solely within the General Assembly's province. In short, the Court would be elevating itself to a position of supremacy over the General Assembly by usurping the authority to supervise and

control the internal functioning of the General Assembly. Unlike the Supreme Court's decision in *D&W Auto Supply*, this would be inconsistent with the appropriate role of the judiciary in a republican form of government with three separate and *coequal* branches. For these reasons, the Court should find the Plaintiffs' process-based arguments to be nonjusticiable with the exception of the 51-vote issue, which ultimately fails on its merits in any event.

As explained below, however, even if the Court were to find all of the process-based arguments to be justiciable—which it should not do—each of those arguments would still fail.

B. The Plaintiffs cannot constitutionalize their nonjusticiable claim regarding KRS 6.350 and KRS 6.955 by relying on Section 15 of the Kentucky Constitution.

The Plaintiffs concede that the Court does not have jurisdiction to decide whether the General Assembly violated KRS 6.350 or KRS 6.955 because the question is nonjusticiable. [*See* Pls.' Reply Br. at 28 (acknowledging that "the legal foundation of *Board of Trustees*" requires treating "procedural statutes the same as procedural rules")]. Nonetheless, the Plaintiffs continue with their argument and pivot their focus to Section 15 of the Constitution, claiming the General Assembly unlawfully suspended these statutes by passing SB 151. This argument is nonsensical and relies on a version of Section 15 that simply does not exist.

The General Assembly substantially complied with KRS 6.350 and KRS 6.955 when it passed SB 151—a question that is not justiciable anyway—but even if it did not, there is no reasonable basis for claiming that these statutes were

unconstitutionally suspended. Section 15 of the Kentucky Constitution grants *the General Assembly* the exclusive authority to suspend statutes, stating that "[n]o power to suspend laws shall be exercised unless by the General Assembly or its authority." Ky. Const. § 15. The power to suspend statutes, in other words, is vested in the General Assembly—the same body that passed SB 151. If KRS 6.350 and KRS 6.955 were suspended, they were suspended by the body with the constitutional right to do so.

Yet, the Plaintiffs contend there is an extraconstitutional requirement that any suspension of a statute be expressly done through separate legislation. This requirement is not found in the text of Section 15, and the Plaintiffs provide no authority for it. [Pls.' Reply Br. at 29]. They do not cite case law; they do not cite treatises; they do not cite historical documents—they cite nothing at all. [*Id.*]. Their theory appears to be made up out of whole cloth in a desperate attempt to have SB 151 ruled unconstitutional.[4] But the text of Section 15 not only precludes this theory, it actually points toward the opposite conclusion. Section 15 does not require the General Assembly to go through the ordinary legislative process to suspend a statute, and, in fact, it broadly grants this power to "the General Assembly *or its authority*." Ky. Const. § 15 (emphasis added). Thus, the language suggests that the General

[4] The Governor rejects outright that SB 151 suspended KRS 6.350 or KRS 6.955, as the General Assembly complied with both. But even if the Court disagrees, it would have to find that the General Assembly implicitly repealed the statutes as applied to SB 151—as the Supreme Court did in *Board of Trustees* when declaring this issue nonjusticiable. *See* 132 S.W.3d at 778 ("[T]he failure to follow such procedural rules amounts to an implied *ad hoc* repeal of such rules.") (quoting *State ex rel. La Follette v. Stitt*, 338 N.W.2d 684, 687 (Wis. 1983)).

Assembly has significant discretion to determine the manner in which it suspends statutes. Even if the Court finds that SB 151 suspended the procedural statutes, there is no grounds for finding the General Assembly suspended the statutes unconstitutionally.

C. SB 151 received the requisite three readings under Section 46.

The Plaintiffs quote *ad nauseum* from *Kavanaugh v. Chandler*, 72 S.W.2d 1003 (Ky. 1934), stating that the three-readings requirement of Section 46 is "mandatory." The Governor does not dispute this proposition; to the contrary, the Governor's entire point is that the passage of SB 151 *did* comply with Section 46's requirements. The General Assembly's interpretation of what it means for a bill to be read at length three times under Section 46 is simply different than the Plaintiffs' interpretation, and the General Assembly's interpretation controls. [*See* Part V.A., *supra* (explaining why the Plaintiffs' process-based arguments are nonjusticiable)].

Notably, the Plaintiffs fail to even acknowledge that the Rules of Procedure for the Kentucky House of Representatives contemplate and allow a committee substitute, which "upon its adoption, shall be considered as the original bill." *See* House Rule 60.[5] Instead of addressing this undisputed fact and offering some explanation as to why that Rule and Section 39 of the Kentucky Constitution do not apply, the Plaintiffs rely instead on out-of-state case law and an irrelevant excerpt

[5] As the Plaintiffs themselves acknowledge, *Mason's Manual* does not replace the text of the Kentucky Constitution, [*see* Pls.' Reply Br. at 15-16], which explicitly gives the House the authority to establish its own rules of procedure. *See* Ky. Const. § 39.

from the constitutional debates. The Plaintiffs' attempt to cite the debates is not persuasive. [*See* Pls.' Reply Br. at 14-15 (citing *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3121)]. The portion of the debates that the Plaintiffs rely upon was not discussing the General Assembly's manner of handling amendments to legislation, but was instead addressing the Constitutional Convention's rules for amending proposed provisions in the Constitution that the Convention was drafting. That the Constitutional Convention's rules of procedure for amending such proposals required a particular substitute to be germane says nothing about how the General Assembly must operate when it passes legislation through the House of Representatives or Senate. And, simply put, none of the out-of-state cases the Plaintiffs cite represent the law of Kentucky.

To the extent the Plaintiffs claim that the legislators had no "access" to or "abilities to know" the contents of SB 151 as a result of the General Assembly's standard procedures, [*see* Pls.' Reply Br. at 13 n.8], that is a question of fact that would necessitate denying the Plaintiffs' motion for summary judgment. *See, e.g.*, *Green v. Bourbon Cnty. Joint Planning Comm'n,* 637 S.W.2d 626, 630 (Ky. 1982) ("It is not necessary that there must be many genuine issues of fact; it is sufficient to deny the granting of a summary judgment even though the genuine issue of a material fact may be small.").

D. SB 151 is not an appropriations bill and, therefore, did not require 51 votes in the House of Representatives.[6]

The Plaintiffs wholly misunderstand both the case law that they cite and the Governor's argument about what constitutes an act "for the appropriation of money." *See* Ky. Const. § 46. Rather than acknowledging binding precedent and attempting to address SB 151 within that framework, the Plaintiffs argue only that a different definition of appropriation controls. The Plaintiffs do not respond to the Governor's arguments but instead claim the definition of appropriation set forth in *Davis v. Steward*, 248 S.W. 531, 532 (Ky. 1923), is incorrect because it is outdated, and they insist that *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005), is dispositive of the Court's *sua sponte* Section 46 question. They are wrong.

The binding precedent on this issue comes from *Davis v. Stewart* and *D&W Auto Supply v. Department of Revenue*, the two cases wherein Kentucky's highest court analyzed the meaning of an act "for the appropriation of money" under Section 46. Under these cases, the definition of an appropriations bill is "the setting apart of a particular sum of money for a specific purpose." *See Davis*, 248 S.W. at 532; *D&W Auto Supply*, 602 S.W.2d at 422-25 (relying on the definition set forth in *Davis*). Rather than argue that SB 151 satisfies this definition, the Plaintiffs spend their entire Reply Brief alleging that this definition does not apply, resting their argument instead on cases that define appropriation in different contexts and never mention Section 46. *See Fletcher*, 163 S.W.3d at 863-68 (analyzing the definition of

[6] This issue is not pled anywhere in the Plaintiffs' Complaint and therefore is not properly before the Court.

appropriation only under Kentucky Constitution Section 230 and KRS 41.110); *Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 369 (Ky. 2016) (mentioning appropriations in the Kentucky Constitution Section 230 and KRS Chapter 48 contexts only). The Plaintiffs' cases are neither controlling nor relevant, and the Defendants' arguments prevail.[7]

Furthermore, the Plaintiffs fail to even acknowledge, much less dispute, the evidence presented by the Governor from the Department of the Treasury and the Office of State Budget Director. Both of those offices routinely and intimately deal with appropriations legislation, and, tellingly, neither office considers SB 151 to be an appropriations bill. [*See* Gov.'s Br. at Ex. 10, Cardwell Aff. & Ex. 11, Paiva Aff.]. In the face of binding precedent and uncontested proof, the Court must find that SB 151 is not an appropriations bill under Section 46 and, therefore, that SB 151 received the requisite number of votes to pass the Kentucky House.

E. SB 151 was appropriately read "at length" under both Sections 46 and 56 of the Kentucky Constitution.

With respect to their claims that Sections 46 and 56 of the Constitution required SB 151 to be read "at length," the Plaintiffs wholly fail to explain, among other things, (1) why or how the General Assembly's standard procedures do not fulfill the "at length" requirement and the purposes behind it, and (2) what part of the

[7] The Plaintiffs seem to accept that definitions of the term "appropriation" outside of the Section 46 context are less relevant to the Court's inquiry than the Section 46 definition itself. [*See* Pls.' Reply Br. at 21 n.13 (criticizing the Legislative Defendants for citing the definitions set forth in KRS 48.010)]. Puzzlingly, though, the Plaintiffs themselves go on to champion cases that discuss appropriations without any reference to Section 46. This is logically inconsistent.

Constitution actually mandates that a bill be read "out loud," as the Plaintiffs claim is required. *See* Ky. Const. §§ 46, 56 (stating only that bills be read "at length," not aloud). The Plaintiffs' shallow arguments are riddled with baseless assumptions about what the Constitution says and means.

The Constitution contains no language stating that bills must be read out loud and word-for-word, and the Constitution does not prohibit the practice of reading a bill at length by setting out the full text of the bill at length in the Journal. Instead, the Constitution gives the General Assembly the authority to establish its own procedural rules, and that is the end of the inquiry. *See* Ky. Const. § 39. The General Assembly—not the Court, and not the Plaintiffs—is empowered to define what constitutes a reading "at length" under both Sections 46 and 56, and nothing the Plaintiffs have argued suggests otherwise.

F. The Plaintiffs' argument that Speaker Pro Tempore Osborne could not sign bills as the "presiding officer" under Section 56 is the height of absurdity.

The Plaintiffs dedicate pages of their Reply Brief to torturing case law from Kentucky and other states in an attempt to claim that the Speaker Pro Tempore of the Kentucky House of Representatives cannot act as the presiding officer and sign bills for purposes of Section 56. It is difficult to imagine a more unprincipled and frivolous position. Why else would the office of Speaker Pro Tempore exist if not for the purpose of presiding over the House, and signing legislation on behalf of the House, when the Speaker, for whatever reason, cannot do so? What Osborne did

during the 2018 legislative session is precisely what Speakers Pro Tempore do nationwide, and to claim otherwise is nonsensical.

Rather than admit that their claim is baseless, however, the Plaintiffs refuse to engage the Governor's logical arguments. For instance, the Plaintiffs entirely fail to acknowledge the plain language of Kentucky Constitution Section 56, which provides for the "presiding officer" of each chamber, not a particular individual, to sign legislation. *See* Ky. Const. § 56. The Plaintiffs also ignore the clear text of the House Rules of Procedure and *Mason's Manual*, which authorize the Speaker Pro Tempore to take on the role of "presiding officer" when the Speaker is unavailable. *See* House Rule 26; House Rule 74; *Mason's Manual of Legislative Procedure* §§ 575, 579 (Nat'l Conf. of State Legislators, 2010 ed.). Neither legal authority nor common sense supports the Plaintiffs' position, and the Court should not allow any of the Plaintiffs, much less the Commonwealth's chief law officer, to persist in such a frivolous claim.

G. The General Assembly's standard procedures do not violate the Constitution, and a finding in favor of the Plaintiffs would void thousands of Kentucky laws and resolutions passed throughout the last century.

Finally, it is important to take note of the startling consequences of ruling for the Plaintiffs on their process-based arguments. The Plaintiffs insist the General Assembly violated Sections 46 and 56 of the Kentucky Constitution when it passed SB 151, but, as the Defendants have shown, the General Assembly followed the exact same procedures that it does for all bills and resolutions. The Plaintiffs therefore are asking this Court to declare the General Assembly's standard practice for complying

with Sections 46 and 56 unconstitutional—a declaration that would void thousands of laws passed throughout Kentucky history. This request, not the argument set forth in the Governor's brief, is what is "stunning" in scope. [*See* Pls.' Reply Br. at 8].

The Governor does not point out the historical procedures of the General Assembly to suggest that longstanding practices must always be adopted wholesale, or to further a "this is the way we have always done it" agenda. If the Governor were of that mindset, he would never have insisted on pension reform as part of his platform in the first place, and the Commonwealth's retirement systems would continue down the catastrophic trajectory set for them by decades of previous Kentucky lawmakers and governors. No, the Governor points out the historical procedures of the General Assembly to impress upon the Court the novelty and frivolity of the Plaintiffs' arguments, which call into question innumerable laws on Kentucky's books, including the "inviolable contract" itself.

Tellingly, no Kentucky court has ever found that the General Assembly's standard procedures for reading bills three times, or for reading bills at length under Sections 46 and 56, are unconstitutional. Further, the Attorney General himself has not raised any of his sweeping process-based claims until now. When the Attorney General has disagreed with something proposed by the General Assembly in the past, he has written to the legislators to inform them of his interpretation of the Kentucky Constitution.[8] Surely if the Commonwealth's chief law officer perceived the standard

[8] *See, e.g.*, Andy Beshear, March 6, 2018 Letter to Kentucky Legislators, *available at* https://ag.ky.gov/pdf_news/20180228_KY-Legislators.pdf; Andy Beshear, Feb. 28, 2018 Letter to Kentucky Legislators, *available at* https://ag.ky.gov/pdf_news/20180228_KY-Legislators.pdf.

procedures of the General Assembly to be unconstitutional, he would bring his concerns to the General Assembly's attention immediately rather than sit back and let hundreds of laws pass according to those procedures before speaking up. But, since the start of his tenure in January 2016, the Attorney General has never once challenged the General Assembly's longstanding practice of setting out the full text of bills at length in the Journal, or the longstanding practice of using committee substitutes. Nor did the Attorney General express any concern during the most recent legislative session that Speaker Pro Tempore Osborne was signing all of the bills and resolutions on behalf of the House.

This, of course, is because there have been no procedural violations of the Constitution. The Attorney General has plainly invented novel theories to make an unprincipled challenge to a single law that he does not like. This is an inappropriate waste of time and resources, and the Court should not disturb the time-tested, constitutional procedures of its sister branch of government now.

VI. The KEA and FOP still have not demonstrated that they have standing in this action.

The KEA and FOP have made half-hearted, but unavailing, efforts to demonstrate that they have standing here. The KEA has not identified a single one of its members whose rights are purportedly affected by SB 151, and both organizations are actually litigating *against* their members' best interests by fighting to invalidate a bill that guarantees their members' pension funds will remain solvent. Moreover, the new hybrid cash balance plan provided for teachers under SB 151 is *better* than their current plan. Even the Jefferson County Teachers Association says

so. [*See* JCTA Analysis of SB 151, Ex. 5 to Gov.'s Br.]. For these reasons, the KEA and FOP lack standing and should be dismissed as parties.

CONCLUSION

The Prevailing Rule is the correct way to interpret the inviolable contract, and under that interpretation, SB 151 obviously does not impair any contract rights. This is the most critical point in this case, and the Plaintiffs' Reply Brief does not even discuss, much less refute, it. Instead, the Plaintiffs' Reply Brief largely regurgitates the arguments and statements in the Plaintiffs' opening Brief on the Merits, and it devotes most of its attention to red herring issues that are—for the most part—not even justiciable. In the entire 49 pages of argument in their Reply Brief, the Plaintiffs spend a grand total of three pages on the most important issue: whether SB 151 impairs any rights guaranteed by the inviolable contract. Their desperate attempt to avoid discussing this issue is telling. They say little about it because they know that there is little they can say. SB 151 does not impair any contractual rights, and the Plaintiffs have essentially conceded this point by failing to engage in any serious analysis of the issue. Because SB 151 does not impair any contractual rights, and because the Plaintiffs' other arguments are also unavailing, the Defendants are entitled to judgment as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served via email this 4th day of June, 2018, to Andy Beshear, J. Michael Brown, La Tasha Buckner, S. Travis Mayo, Marc G. Farris, Samuel Flynn, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601, Jeffrey Walther, Walther, Gay & Mack, 163 E. Main St., Suite 200, Lexington, KY 40588, David Leightty, Priddy, Cutler, Naake, Meade, 2303 River Road, Suite 300, Louisville, KY 40206, David Fleenor, Capitol Annex, Room 236, Frankfort, KY 40601, Eric Lycan, Office of the Speaker, Capitol Annex, Room 332, Frankfort, KY 40601, Mark Blackwell, 1260 Louisville Road, Frankfort, KY 40601, and Bill Johnson, Johnson Bearse, LLP, 326 West Main St., Frankfort, KY 40601.

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