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

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

LEGISLATIVE DEFENDANTS' SURREPLY

Come the Defendants, Bertram Robert Stivers, II, in his official capacity as President of the Kentucky Senate, and David W. Osborne, in his official capacity as Speaker Pro Tempore of the Kentucky House of Representatives, ("Legislative Defendants"), by Counsel, pursuant to the Court's April 20, 2018 scheduling order, tender the following Surreply and do hereby state as follows:

I. The Plaintiffs continue to ignore the Constitutional provisions concerning separation of powers and the deference required with respect to the General Assembly's interpretation of its own rules.

In their reply brief the Plaintiffs completely misconstrue the arguments made by the legislative Defendants with respect to the myriad procedural issues raised by the Plaintiffs. Defendants are not, as is characterized by the Plaintiffs, arguing that the procedures utilized in enacting SB 151 should be allowed merely because that is the way the General Assembly has consistently done this for at least the last sixty years (and more likely the last 100 years). Defendants' argument is that the procedures utilized are the procedures mandated by the Constitution.

The world of 2018 would have been completely unrecognizable in 1891. The legislator of 1891 did not have a computer terminal on his desk, did not have high speed photo copying readily available, and did not have a highly trained staff with expertise in the areas of law with which the General Assembly dealt. Moreover, the legislator in 1891 was not faced with the nearly impossible task of reviewing hundreds of bills, dealing with increasingly complex interfaces between state and federal law, and enacting a biennial budget of nearly sixty-six billion dollars.

As an initial matter, the Plaintiffs made a great leap of logic in defining "at length" as meaning "out loud." Reading a bill out loud may have in fact made some sense in the 1890's. The Acts of the General Assembly for 1897 provide an example. The entirety of the Acts consist of 47 pages of text. The General Assembly passed 27 Acts and 5 resolutions. No bill was more than a few pages long. Most were a single page long. The actual bill at issue in this case is 291 pages long. It would take roughly nine hours and twenty minutes to read out loud. The budget and revenue bills are of similar length and complexity. Reading a 300 page bill out loud to what would undoubtedly be an empty chamber would accomplish absolutely nothing with respect to educating legislators as to the content of a bill. Taking the Mississippi approach of having a digital reader set at a speed so fast as to be unintelligible likewise accomplishes nothing.

Compare the process Plaintiffs are demanding to the process the General Assembly actually uses. The first reading "at length" is delegated to a Committee with expertise in the subject matter of the bill. Each member of the Committee has a copy of the bill in front of him or her. The sponsor of the bill appears at a "hearing" where he or she may be questioned at length. Input from interested parties affected by the bill is discussed. When the bill is reported out by the Committee, it is considered as having its first reading and is spread upon the journal of the chamber in its

entirety or "at length." The subsequent readings are accomplished by reading the bills by title only, a procedure that legislators could object to. No such objection was made here.

The General Assembly takes these Constitutional requirements very seriously. For that reason in 1954 the General Assembly commissioned an exhaustive study of these very procedures including a comparison with other states. That study concluded that the modern approach, consistently applied since that date, satisfies the Constitutional mandates. In the intervening 64 years no one, including this Attorney General, has taken issue with this approach.

Similarly, the Plaintiffs' demand that the General Assembly read bills three times in each chamber "in their final form," including after a committees substitute, is a requirement that is not found anywhere in the Kentucky Constitution. In this regard, the Plaintiffs paint the process by which the House Committee on State Government adopted a committee substitute to SB 151, and by which the General Assembly passed the bill, as "'evil' . . . undue haste" that was improper because the substitute was a "wholesale, non-germane change." However, as noted in the Legislative Defendants' Brief, SB 151 was the result of nearly a year of study by the General Assembly, and the final form of the legislation reflected changes requested by the very stakeholders that are now Plaintiffs in this action. Additionally, the public "input" was practically unprecedented – a fact that was readily apparent to anyone present at the Capitol during March, 2018, which featured protests by retirees, teachers, and public employees in numbers not seen in at least twenty (20) years.

Further, it is basic parliamentary procedure that committee ***substitutes***, by their very nature, are wholesale changes to bills – they substitute a new version of the bill for the original bill. And there is nothing in the Kentucky Constitution that prohibits the General Assembly from adopting a non-germane committee substitute – regardless of how much inflammatory language the

Plaintiffs use to describe it. As noted by the Legislative Defendants in their Brief, Kentucky did not adopt an "original purpose" rule, and contrary to the Plaintiffs' arguments, that is the only circumstance where a constitution requires a new round of readings. *See, e.g., Washington v. Dep't of Pub. Welfare*, 71 A.3d 1070, 1083 (Pa. Commw. Ct. 2013) (citing *Stilp v. Comm.*, 905 A.2d 918 (Pa. 2006) and stating "a violation of Article III, Section 1 [original purpose] or 3 [single subject] must first be established before three readings of an amendment will be required to satisfy Article III, Section 4."). Kentucky's Constitution requires that all "bills" be read three times on three separate days in each chamber. SB 151 met this requirement, and there is no basis under Kentucky's Constitution for the argument that it had to be re-read in either chamber.[1]

The General Assembly is a separate co-equal branch of government. Sections 27 and 28 of the Kentucky Constitution make that abundantly clear. The doctrine of separation powers requires a level of deference to the General Assembly with respect to the interpretation of procedural rules which is uniquely positioned to interpret. This Court should defer to those interpretations both on the grounds of justiciability and upon the grounds that the General Assembly's interpretation of the Constitutional requirements is correct.

II. The General Assembly May Establish Rules Governing Its Own Proceedings And KRS 6.350 and KRS 6.955 Are Procedural Rules That Can Be Waived.

In *Board of Trustees of the Judicial Form Retirement v. Attorney General*, 132 S.W.3d 770 (Ky.2003), the Kentucky Supreme Court succinctly held the following as it began its analysis of the question of whether the legislature had failed to comply with KRS 6.350:

[1] The Plaintiffs' citation to *Mason's Manual* for the proposition that amendments must be germane and re-read is also not applicable. While *Mason's Manual* is adopted by each chamber in Rule 74, it is only "in the absence of a specific rule of the [Senate or House] . . . ." Each chamber provides in the rule relating to amendments that "[a] committee substitute, upon its adoption, shall be considered as the original bill for the purposes relating to the permissible degree of further amendment of the bill." Rule 60. In other words, a committee substitute is considered by the body in the same manner (i.e. procedure) as an amendment, but once adopted, the committee substitute is treated like the original bill – with germaneness of amendments considered in reference only to the substitute.

> [KRS 6.350] is procedural in nature and has no constitutional implications. Section 39 of our Constitution authorizes the General Assembly to establish rules governing its own proceedings. So long as those rules do not violate some other provision of the Constitution, it is not within our prerogative to approve, disapprove, or enforce them.

Id. at 777.

Plaintiffs inexplicably characterize this holding as "dicta," and argue that the last sentence in Section III of *Board of Trustees*, which noted that the General Assembly had substantially complied with KRS 6.350, as the true holding of the case. The reverse is true. The Kentucky Supreme Court devoted almost all of its analysis regarding this issue in support of the notion that "a statute enacted in contravention of a legislative procedural rule is not invalid *per se*," and cited five separate holdings in foreign jurisdictions for that principle. *Id*. Plaintiffs cannot effectively distinguish *Board of Trustees* from the facts of the instant case, and to argue that the holding in *Board of Trustees* is "dicta," and the true dicta about substantial compliance was the actual holding, is patently incorrect.

Moreover the holding in *Board of Trustees* is consistent with Section 15 of the Kentucky Constitution ("No power to suspend laws shall be exercised unless by the General Assembly or its authority"). This authority of the General Assembly may be exercised explicitly or implicitly, as stated in *Board of Trustees*: "[T]he legislature has complete control and discretion whether it shall observe, enforce, waiver, suspend, or disregard its own rules of procedure, and violations of such rules are not grounds for the voiding of legislation." *Id*. (Citation omitted). [2]

[2] This is of course the only logical conclusion because one General Assembly cannot add to the requirements of the Constitution for passing legislation and thereby bind future General Assemblies. As stated by Kentucky's highest court: "In business so important as state legislation, one Legislature cannot put any limitation in the matter of ordinary legislation upon its successor, control its conduct, or prescribe its method of procedure in the enactment of laws. If legislation could thus be controlled, the power, independence, and freedom of legislative bodies would gradually become so limited as that each succeeding Legislature would have less liberty than its predecessor, and ultimately the legislative branch of the government would become a useless appendage on the body politic." *City of Mt. Sterling v. King*, 104 S.W. 322, 322-23 (Ky. App. 1907).

Plaintiffs' Reply Brief on the Merits also repeats the false claim in its Motion for Summary Judgment that the General Assembly amended KRS 6.350 in 2017 to "ensure it was bound by KRS 6.350." This ignores the clear evidence set forth on pages 63-64 of the Legislative Defendants' Brief on the Merits from the 2017 Regular Session Senate debate on SB 2 that the purpose of the changes forbidding a statement that the cost is "negligible or indeterminable" was to require the reporting agencies to give more specific information, and to not offer indefinite statements that provided no useful information to the General Assembly. The changes to KRS 6.350 that were part of SB 2 placed more rigorous demands upon the reporting agencies in the information provided to the legislature, and cannot be interpreted instead as an additional demand upon the General Assembly that would somehow change the interpretation of the law set forth in *Board of Trustees*.

Finally, since the fiscal note requirement of KRS 6.955 is a procedural rule of the General Assembly in the same manner as KRS 6.350, the holding in *Board of Trustees* is controlling regarding the waiver of the rule by the General Assembly, as well.

III. The General Assembly Substantially Complied With the Requirements of KRS 6.350 and KRS 6.955

Apart from the clear authority set forth in *Board of Trustees* for the General Assembly to waive a procedural rule, the General Assembly did in fact substantially comply with the requirements of KRS 6.350 and KRS 6.955. Plaintiffs argue that the affidavit of TRS Executive Director Gary Harbin noting that TRS was provided a copy of SB 151 after the bill was voted out of Committee is conclusive proof that the legislature did not substantially comply with KRS 6.350. The information provided in the existing actuarial analysis for SB 1 SCS 1, however, was sufficient for evaluating SB 151, as the actuarial information for SB 1 SCS 1 was broken down into segmented components with the result that the information was useful for analyzing SB 151. This

is true because SB 151 was essentially a condensed version of SB 1, with several controversial provisions removed.

KRS 6.955 requires that a fiscal note be prepared "for any bill introduced before the General Assembly which relates to any aspect of local government or any service provided thereby." "Fiscal note" is defined in KRS 6.950(1) as "a realistic statement of the estimated effect on expenditures or revenue of local government in implementing or complying with any proposed act of the General Assembly[.]" The only other specific statutory requirement for the content of the fiscal note is for it to state "whether the bill or order is determined to be a state mandate." KRS 6.965(1).

The requirements of SB 151 contains specific mandates for local governments, and these mandates were, directly or indirectly, identified in the actuarial analysis. Fiscal notes are more frequently prepared during General Assembly sessions than actuarial analyses, as there are more bills introduced relating to the general operations of local government than bills related to the pension systems, but there is significant overlap in the purposes of actuarial analyses and fiscal notes. In this instance, actuarial analyses that were prepared for SB 1 SCS 1 and SB 151 substantially complied with the requirements for a fiscal note as enumerated in KRS 6.950 and 6.965.

IV. SB 151 Does Not Violate or Substantially Impair the Inviolable Contract Provisions

In *Jones v. Board of Trustees of Ky. Retirement Sys.*, 910 S.W.2d 710 (Ky. 1995), the Kentucky Supreme Court stated that the analysis would consist of whether the contract is "substantially impaired," citing to *Maryland State Teachers Ass'n v. Hughes*, 594 F.Supp. 1353, 1361 (D.Md.1984), which in turn follows the precedent of *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

a. Plaintiffs Misrepresent the Impacts to Current Employees Involved in the Amendments to KRS 61.546 and 78.616. (Sections 16 and 17 of SB 151)

As noted in the Legislature's Brief on the Merits (p.81), the changes in Sections 16 and 17 of SB 151 simply ends, for Tier I employees who retire on or after July 1, 2023, the use of sick leave to determine eligibility for an unreduced retirement. No value of the employee's sick leave will be lost when the employee reaches an unreduced retirement with actual service time – accumulated sick leave will still be applied to the retiree's total service calculation for purposes of his or her retirement formula. Clearly, the purpose of this change was to require Tier I employees retiring on or after July 1, 2023, to use actual service time to reach an unreduced retirement, and Sections 16 and 17 do not put at risk the accumulated value of sick leave accrued by public employees. The practical effect of this change will be that some Tier I employees will have to work longer to achieve an unreduced retirement, but those employees will not have lost any service credit or sick leave credit in the process. As such, the contract rights are not substantially impaired.

Again, a current Tier I employee retiring on or after July 1, 2023, who reaches an unreduced retirement with actual service time is unaffected by these provisions in SB 151. For a current employee retiring on or after July 1, 2023, with less than the service necessary for an unreduced retirement, the accumulated sick leave will still be credited to the employee. The retirement allowance will be reduced, however, by 6.5%[3] for each year that the employee's actual service credit falls short of the service necessary for an unreduced retirement. So, after July 1, 2023, if a non-hazardous, Tier I employee retired with 26 years of actual service and one year of sick leave, that individual would have their retirement calculated based upon 27 years of service, with a 6.5% actuarial reduction.

[3] https://kyret.ky.gov/Publications/Books/Tier%201%20Guide.pdf, p.7.

Tier II employees are not affected by the changes in Sections 16 and 17 of SB 151, as they are already prohibited by KRS 61.546(3)(c) and KRS 78.616(3)(d)3. from using sick leave credit to become eligible for an unreduced retirement. Changes to KRS 61.546(3)(c) and KRS 78.616(3)(d)3. in SB 151 are only conforming amendments.

b. Plaintiffs Incorrectly Continue to Argue that Uniform and Equipment Allowances as Creditable Compensation Are Part of Current Employees' Contract Rights.

There are no statutory provisions in the inviolable contract range of statutes that protect the practice of including expense allowances in creditable compensation. This fact remains unrefuted by the Plaintiffs' Reply Brief on the Merits (p.43-44). Expense allowances were not included in the definition of "creditable compensation" prior to changes found in Sections 14 and 15 of SB 151, therefore the Plaintiffs' argument fails.

c. Changes to KRS 161.623 in SB 151 Do Not Violate or Substantially Impair the Inviolable Contract of TRS Members.

KRS 161.155(10) authorizes local school districts to provide salary credit for sick leave. KRS 161.623 authorizes local school districts or other employer-members of TRS to provide service credit for sick leave. KRS 161.155(10), authorizing the use of sick leave for salary credit, is not part of the inviolable contract range of statutes, and KRS 161.623, authorizing the use of sick leave for service credit, is. Despite possessing the option to join, no public school districts in Kentucky participate in KRS 161.623.

Notably, prior to the changes instituted by SB 151, there was no prohibition upon a public school district choosing to move from the sick leave for service credit plan to the sick leave for salary credit plan, or vice versa. This undermines the Plaintiffs' claim that the rights of employees under KRS 161.623 are inviolable.

Finally, the cap on sick leave as of December 31, 2018, for service credit for the 4% of TRS members under the service credit plan does not rise to the level of a "substantial impairment" of the members' contract rights.

V. Plaintiffs' "Reasonable and Necessary" Arguments Fail as Counter to Both the Law and the Facts of the Case.

Under Contracts Clause analysis, the question of whether the government took action that is "reasonable and necessary" is not relevant to the instant case, as SB 151 has not substantially impaired the contract rights of current employees or retirees. (See Contracts Clause analysis in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 323 (6th Cir. 1998)).

The more significant error of the Plaintiffs on pages 45-46 is to conflate the issue of the contract rights of employees, which is subject to a Contracts Clause analysis, with the issue of pension funding streams and funding sources, which is not subject to Contracts Clause scrutiny. ("Defendants . . . specifically rejected multiple bills that would provide dedicated funding to the retirement systems" "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." Plaintiff's Reply Brief at p.45).

Through the level-dollar funding plan in SB 151, the General Assembly has changed the statutory funding structure of KRS and TRS to add hundreds of millions of additional dollars of annual funding in order to maintain the solvency of the retirement plans. These are provisions that, obviously, inure to the benefit of the members of the Plaintiff organizations, and buttress, rather than compromise, their contract rights. These funding decisions are fully within the purview of the General Assembly, and are in no wise subject to a Contracts Clause analysis, as contract rights of employees are not invoked.

VI. SB 151 Does Not Violate the Takings Clause.

Plaintiffs fail to rebut the clear holding in *B & B Trucking, Inc. v. U.S. Postal Service*, 406 F.3d 766, 769 (6th Cir. 2005) that a Takings Clause claim cannot be asserted against a governmental entity ancillary to a Contracts Clause claim. Restating the holding in *St. Christopher Associates, LP v. U.S.*, 511 F.3d 1376, 1385 (Fed Cir.2008):

> [T]he concept of a taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim. (Citation omitted).

There is no Takings Clause claim available to Plaintiffs when a matter of contract is asserted in their complaint. Thus, the Plaintiffs' Takings Clause claim fails.

VII. SB 151 Does Not Violate Section 2 of the Kentucky Constitution.

Plaintiffs admit in their Reply Brief on the Merits that their Section 2 claim is completely derivative of their other claims. (". . . 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." Plaintiffs' Reply Brief at p.48.). Consequently, there is little to no legal argument of substance to be had about this individual claim, since it rests only upon the assumption that other constitutional counts in the Plaintiffs' Complaint will be successful.

It is worth noting that the Plaintiffs cannot distinguish the essential holding in *City of Lebanon v. Goodin*, 436 S.W.3d 505 (Ky. 2014). The deference to the legislative branch is emphasized in *Goodin*, as the Kentucky Supreme Court states that "only in extreme cases will courts declare ordinances passed pursuant to legislative authority invalid on the ground that they are unreasonable, arbitrary, or oppressive." *Id.* at 519. (Inner quotation marks omitted). As clearly permitted in *Goodin*, the General Assembly made a series of policy choices in SB 151 which are rationally related to the objective of rescuing KRS and TRS from eventual insolvency. Plaintiffs' Section 2 claim must fail.

CONCLUSION

For all of the foregoing reasons, the Legislative Defendants respectfully request the Court enter summary judgment declaring that passage of SB 151 complied with all requirements in the Kentucky Constitution and that the provisions of Acts, ch. 107 do not violate any contractual rights of any of the Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Surreply has been served on the following parties or their counsels of record on this, the 4th day of June, 2018.

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LEGISLATIVE DEFENDANTS' REPLY TO THE PLAINTIFFS' RESPONSE TO THE MOTION TO DISMISS

Come the Defendants, Bertram Robert Stivers, II, in his official capacity as President of the Kentucky Senate ("President Stivers"), and David W. Osborne, in his official capacity as Speaker Pro Tempore of the Kentucky House of Representatives ("Speaker Pro Tem Osborne"), (collectively "Legislative Defendants"), by Counsel, and submit the following reply to the Plaintiffs' Response to their Motion to Dismiss.

I. The Motion To Dismiss Was Not Untimely

As an initial matter, the Plaintiffs begin by stating the Legislative Defendants' Motion to Dismiss was untimely filed. First, the Legislative Defendants attempted, pursuant to direction from this Court, to negotiate with the Plaintiffs in good faith to address legislative immunity by an agreed order of dismissal. As shown in the exhibits to the Motion to Dismiss, the Plaintiffs did not negotiate in good faith, and instead held the draft agreed order for two (2) weeks without any

response to the Legislative Defendants whatsoever. The Plaintiffs have unclean hands in this regard, and their objection as to timeliness of the motion should be rejected accordingly.

Additionally, neither Legislative Defendant has been served, and therefore, the time for a responsive pleading had not even begun to run when the Motion to Dismiss was filed. This is because "Kentucky has long followed a strict adherence to the rule of 'in-hand Service of Process.'" *R.F. Burton & Burton Tower Co. v. Dowell Division of Dow Chemical Co.*, 471 S.W.2d 708, 710 (Ky. 1971). In *Burton*, Kentucky's highest court held that attempted service by leaving process with a wife or significant other of a defendant does not constitute valid service. *Id*. (citing *Newsome v. Hall*, 161 S.W.2d, 629 (Ky. 1942)). In the present case, the Plaintiffs cannot show service on either President Stivers or Speaker Pro Tem Osborne, and at best can only show service on other legislative employees, which according to *Burton* does not constitute valid service.

Further, at the initial hearing, counsel for the Legislative Defendants noted that service on one or both defendants had not been properly effectuated, and that neither of them were waiving any objection as to service by counsel's appearance. The Plaintiff, Attorney General Andy Beshear, specifically stated to counsel for the Legislative Defendants that "we will work with you on that" – thereby acknowledging the deficiency in service and that additional steps would be required to bring the Legislative Defendants before the court. Therefore, if the Legislative Defendants are not dismissed on immunity grounds, and if that denial is affirmed on appeal,[1] the Plaintiffs will first have to properly serve the Legislative Defendants, allow them the twenty (20) day period to answer as a party, and then this case may proceed against them.

II. The Law Is Clear That The Legislative Defendants Are Immune From Suit

[1] As the Kentucky Supreme Court has repeatedly held, "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009) (cited and reaffirmed in *Baker v. Fields*, 543 S.W.3d 575, 577-78 (Ky. 2018)).

In opposition to the Legislative Defendants' Motion to Dismiss, the Plaintiffs incorrectly argue that: (a) *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) remains the law in Kentucky as to legislative immunity; (b) legislative immunity does not apply in cases for declaratory judgments; and (c) the plain language of KRS 418.075(4) does not mean what it says. None of these arguments have merit, and each will be discussed in turn.

A. *Rose* Is Not The Law On Legislative Immunity Because It Was Not Raised In The Case And It Was Not Part Of The Court's Opinion

The Plaintiffs' entire argument that legislative immunity does not apply in this case is based on *Rose* and cases citing to *Rose*. However, the word "immunity" does not appear anywhere in the entire *Rose* opinion, and certainly there is no mention of legislative immunity. That is because legislative immunity was not considered by the Kentucky Supreme Court in *Rose* at all, which the Court later noted in *Baker v. Fletcher* was because "neither the President of the Senate nor the Speaker of the House moved the Court to dismiss based on legislative immunity." 204 S.W.3d 589, 595 fn. 23 (Ky. 2006). Indeed, the President Pro Tempore and Speaker defended "vigorously" "the constitutionality of an act" on behalf of the General Assembly in *Rose*, and as to those officers the Court only held, in response to an insufficient service of process defense, that service upon them alone "is sufficient to acquire jurisdiction over the General Assembly in this action." *Rose*, 790 S.W.2d at 204-05. This holding as to the members was not based on legislative immunity, and therefore, *Rose* cannot possibly be the law in Kentucky on legislative immunity.[2]

[2] The Plaintiffs also make the bizarre statement that "[n]owhere in the [*Rose*] decision did the Court mention, much less base its holding on, the legislators not filing a motion to dismiss on immunity grounds in the trial court." Plaintiffs' Response at 4. There was absolutely no reason for the Court to mention an issue that was not raised – except as the Court did in the later *Baker* opinion to clarify that legislative immunity was not an issue in *Rose*.

B. The Law Is Clear That Legislative Immunity Is An Absolute Bar To Litigation Challenging Legislative Activity – For Declaratory Relief Or Otherwise – Against The Members Of The General Assembly

The applicability of legislative immunity to declaratory judgment actions is actually very clear in the Commonwealth. *See Wiggins v. Stuart*, 671 S.W.2d 262 (Ky. Ct. App. 1984) (holding members of the Kentucky legislature are immune from a declaratory judgment suit, which is brought against them in their official capacity). In *Wiggins*, as in the present case, a declaratory judgment action was filed against members of the 1982 General Assembly to have various bills passed in 1980 and 1982 declared unconstitutional. *Id*. at 263. The Franklin Circuit Court, this Court, dismissed the claims "on the basis that the complaint was filed against the individual members of the General Assembly in their capacity as members of the Senate and House of Representatives [and] [a]s such, they were immune from this action." *Id*. at 264. The Court of Appeals affirmed the dismissal, holding that "[w]hen legislators are sued in their official capacity on the basis of legislation which they acted upon, they are being 'questioned in another place' for their legislative actions" – which is prohibited under § 43 of the Kentucky Constitution. *Id*. The Court of Appeals specifically rejected the argument that the members were necessary parties in a declaratory judgment action. *Id*.

Wiggins is the law in the Commonwealth on legislative immunity. It was cited with approval by the Kentucky Supreme Court in *Baker*, in *Kraus v. Kentucky State Senate*, 872 S.W.2d 433 (Ky. 1993), and in *Yanero v. Davis*, 65 S.W.3d 510, 518 (Ky. 2001).[3] *Wiggins* predates *Rose*, as well as all of the other cases cited by the Plaintiffs in their response, and none of those cases overruled, abrogated, or otherwise limited the holding in *Wiggins*. Indeed, *Wiggins* is the only

[3] *Wiggins* has also been repeatedly cited with approval by the Court of Appeals in recent unpublished decisions finding absolute legislative privilege applicable to various claims. *See, e.g., Jackel v. Green*, 2013 WL 2394855 (Ky. Ct. App. May 31, 2013) (last accessed June 1, 2018).

case specifically considering the question as to whether legislative immunity applies in declaratory judgment actions, and the opinion is clear that immunity applies.[4]

Finding no support for their argument in *Rose* itself, and ignoring the clear holding in *Wiggins*, the Plaintiffs instead primarily rely on *Jones v. Bd. of Trustees of Ky. Judicial Retirement Sys*., 910 S.W.2d 710 (Ky. 1995), and the broad brush statements in that opinion about the holding in *Rose* and other cases. However, as the Court stated in *Com. v. Kentucky Retirement Systems*, "[t]he appellants in *Jones*, the governor and other state officials, filed a motion to dismiss the Board's petition for a declaration of rights ***on the grounds of sovereign immunity***." 396 S.W.3d 833, 840 (Ky. 2013) (emphasis added). *See also Jewish Hosp. Healthcare Services, Inc. v. Louisvillle/Jefferson County Metro Government*, 270 S.W.3d 904, 908 (Ky. Ct. App. 2008) (citing *Rose* and *Jones* as examples where the Kentucky Supreme Court has held governmental bodies and their officials do not enjoy ***sovereign immunity*** from declaratory judgment actions). Sovereign immunity is derived from the Eleventh Amendment to the United States Constitution, as to claims in federal court, and is embodied in Section 231 of the Kentucky Constitution, as to state claims against the Commonwealth. *Withers v. University of Kentucky*, 939 S.W.2d 340, 342-43 (Ky. 1997). Sovereign immunity concerns immunity for the Commonwealth and its subdivisions and is not the same as legislative immunity, which derives from Section 43 of the

[4] *Wiggins* reaches the same conclusion as numerous other jurisdictions, including the United States Supreme Court. *See, e.g., Doe v. McMillan*, 412 U.S. 306, 312 (1973) (holding Speech or Debate Clause barred suit seeking damages and declaratory relief against Congressmen-Committee members); *Cathy's Tap, Inc. v. Village of Mapleton*, 65 F.Supp.2d 874, 895 (C.D. Ill. 1999) ("It is also clear from Supreme Court precedent that the absolute immunity afforded legislators includes immunity for damages, declaratory, and injunctive relief."); *Stamler v. Willis*, 287 F.Supp. 734, 738 (N.D. Ill. 1968) (holding Speech or Debate Clause applies in an action seeking only equitable relief and a declaratory judgment and stating "[t]he doctrine of immunity should protect the legislator not only from the consequences of the results of the litigation, but also from the burden of defending himself."); and *Rivera v. Saris*, 130 F.Supp.3d 397, 402 (D.D.C. 2015) (holding claims for declaratory relief against Sentencing Commission and individual commissioners were barred by Speech or Debate Clause when they were acting in quasi-legislative capacity).

Kentucky Constitution and protects members of the General Assembly from being questioned regarding their legislative activity. This is apparent in the Kentucky Supreme Court's repeated references to "the state" in holding that sovereign immunity cannot be asserted to block all judicial review of state action. *See Com. v. Kentucky Retirement Sys.*, 396 S.W.3d at 840 ("[t]o hold that ***the state*** has immunity" "***the state*** is inevitably affected in some manner" and "***[t]he state*** is not above its own constitution and laws") (emphasis added). And, this is an important distinction, because the Legislative Defendants do not argue that sovereign immunity applies in this case – rather they argue legislative immunity applies to bar the Plaintiffs' claims against them.

The confusion of sovereign immunity versus legislative immunity continues throughout the Plaintiffs' Response. The Plaintiffs also argue that the Court in *Jones* cited to *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992), in support of the contention that legislative immunity does not bar declaratory judgment actions against legislators. However, the holding in *Philpot* was actually that the case was moot, and the Court only stated in *dicta* that it disagreed with the trial court that the controversy was nonjusticiable. *Id*. at 493. The *Philpot* Court then went on to provide a broad brush statement that the Court in *Rose* held "that the General Assembly is not immune from suit in a declaratory judgment action to decide whether the General Assembly has failed to carry out a constitutional mandate and that members of the General Assembly are not immune from declaratory relief of this nature simply because they are acting in their official capacity." *Id*. at 494. However, the Kentucky Supreme Court has more recently characterized *Philpot* and *Rose* as standing for the proposition that "the Commonwealth" is not immune from lawsuits seeking a declaration that the General Assembly has acted or failed to act in a constitutional manner. *See Beshear v. Haydon Bridge Co., Inc.*, 416 S.W.3d 280, 287 (Ky. 2013).

In other words, viewed in the light of the Kentucky Supreme Court's statement in *Baker* that legislative immunity was not raised in *Rose*; the Supreme Court's statement in *Kentucky Retirement Systems* that *Jones* was a challenge based on sovereign immunity; the Court of Appeals statement in *Jewish Hospital* that both *Rose* and *Jones* were based on sovereign immunity; and the Supreme Court's statement in *Haydon Bridge* that *Philpot* and *Rose* applied to "the Commonwealth" generally, this "holding" of *Rose*, as stated in *Philpot*, is best understood to be that a general challenge to the constitutionality of an act by the General Assembly is not barred by sovereign immunity, but instead is reviewable by the courts of the Commonwealth – in other words, that such a challenge is generally justiciable.[5]

Finally, the Plaintiffs point to the *Jones* Court's citation to *Kraus v. Kentucky State Senate*, 872 S.W.2d 433 (Ky. 1993) as another case that re-states the "holding" of *Rose*. However, the Kentucky Supreme Court specifically noted in *Kraus* that the plaintiff presented ***a justiciable controversy,*** and then cited to *Philpot* and *Rose* generally to support the contention that non-specific "immunity" of the General Assembly will not make a controversy nonjusticiable. *Id*. at 439. Additionally, as noted previously, *Kraus* actually held "that this action may not be maintained against the Senate because the legislature is immune from suit for damages under Section 43 of the Kentucky Constitution and Federal case law." *Id*. at 440. As to declaratory relief and legislative immunity, the opinion is completely silent.

[5] This is not to concede that the general authority of judicial review as to acts extends to make the General Assembly's procedures, rules, or interpretation of constitutional directives also justiciable. Those are matters reserved to the Legislature by the Kentucky Constitution, *see, e.g.*, KY. CONST. §§ 27, 28, 29, and 39, as argued in the Legislative Defendants' Brief on the Merits, and are not justiciable.

Contrary to the Plaintiffs' arguments, *Wiggins* is the law in the Commonwealth, not *Rose*, and *Wiggins* conclusively establishes that legislative immunity applies to suits of all manner against the members of the General Assembly acting in their legislative capacity.

C. KRS 418.075(4) Is Plain – No Member Of The General Assembly May Be Named In Any Action Challenging The Constitutionality Or Validity Of Any Statute

As stated in the Motion to Dismiss, the Legislative Defendants are also not proper parties to this action by operation of KRS 418.075(4). Although the subsection was set out in the Motion to Dismiss, the Plaintiffs' argument on this point requires that it be set out again herein. Specifically, KRS 418.075(4) reads:

> Pursuant to Sections 43 and 231 of the Constitution of Kentucky, members of the General Assembly, organizations within the legislative branch of state government, or officers or employees of the legislative branch ***shall not be made parties to any action challenging the constitutionality or validity of any statute*** or regulation, without the consent of the member, organization, or officer or employee.

KRS 418.075(4) (emphasis added).

Although this subsection is clear, unambiguous language the General Assembly does not waive legislative immunity in actions brought under the declaratory judgment act, and that members of the General Assembly "shall not be made parties to ***any action***" the Plaintiffs nonetheless engage in linguistic gymnastics to claim "[t]he plain language . . . reflects the intent of the legislature that its members not be named as defendants in ***every*** constitutional challenge." Plaintiffs' Response at 7 (emphasis added). This argument is nonsensical, and the Plaintiffs' citation to *Kentucky Retirement Systems* for the proposition that immunity would "leave citizens with no redress for the unconstitutional exercise of legislative power" does not make it any less so, as the Plaintiffs concede that the opinion concerned only sovereign immunity, not legislative immunity, *see* Plaintiffs' Response at 5-6, and because the Plaintiffs clearly have other avenues of redress in the form of the named defendants, the Governor, the Kentucky Retirement Systems, and

the Kentucky Teachers' Retirement Systems, who have not asserted any form of immunity in this case.

The law is clear that legislative immunity applies and the Legislative Defendants are not proper parties to this action. Therefore, the Legislative Defendants are entitled to be dismissed from this action as parties as a matter of law.

CONCLUSION

For all of the foregoing reasons, the Legislative Defendants respectfully request that the Plaintiffs' Complaint be dismissed, with prejudice, as to the Legislative Defendants, and that this Court grant them leave to file their Brief on the Merits as *Amicus Curiae*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply has been served on the following parties or their counsels of record on this, the 4th day of June, 2018.

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