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

NOTICE OF FILING OF AFFIDAVIT REQUESTING APPOINTMENT OF SPECIAL JUDGE

Governor Bevin files this notice of his filing of an affidavit under KRS 26A.020 requesting that the Chief Justice of the Kentucky Supreme Court appoint a special judge in this matter. Blake Brickman's affidavit is attached as Exhibit 3, and a full explanation of this request is attached as Exhibit A. Governor Bevin requests that the Clerk immediately certify the facts to the Chief Justice.

While the Chief Justice considers this issue, this Court must stay its consideration of this case. *See Jackson v. Commonwealth*, 806 S.W.2d 643, 645 (Ky. 1991); *Diaz v. Barker*, 254 S.W.3d 835, 838 (Ky. App. 2008) (VanMeter, J.). By operation of this mandatory rule, the oral argument on the merits, scheduled for June 7, 2018, must be remanded. However, undersigned counsel is continuing to prepare for the oral argument, in the event that the Court insists on holding it.

To correct the Attorney General's public statements about the recusal issue, Governor Bevin's request for your Honor's recusal is not intended to delay this matter, but to ensure beyond a shadow of a doubt that Senate Bill 151 receives a full and fair hearing. Although the Plaintiffs challenge numerous aspects of Senate Bill 151 as violative of the "inviolable contract," only Section 19 of Senate Bill 151 will take effect on July 14, 2018. *See* S.B. 151 § 19; OAG 18-007. And it is undisputed that, at present, Section 19 affects no one because the opt-in program that is the subject of Section 19 has never been approved by the Internal Revenue Service and, as a result, no state employee has ever opted into the program. [*See* Governor's Opening Merits Br. at 40]. Thus, any delay caused by Governor Bevin's request for the Chief Justice's intervention will affect ***no one*** because the remaining contested sections of Senate Bill 151 are not scheduled to take effect until, at the earliest, January 1, 2019.

Respectfully submitted,

/s/ M. Stephen Pitt
M. Stephen Pitt
S. Chad Meredith
Matthew F. Kuhn
Office of the Governor
700 Capital Avenue, Suite 101
Frankfort, Kentucky 40601
(502) 564-2611
Steve.Pitt@ky.gov
Chad.Meredith@ky.gov
Matt.Kuhn@ky.gov

Brett R. Nolan
Finance and Administration Cabinet
Office of the General Counsel
Room 392, Capital Annex
Frankfort, Kentucky 40601
(502) 564-6660

Brett.Nolan@ky.gov

Katharine E. Grabau
Public Protection Cabinet
Office of Legal Services
656 Chamberlin Avenue, Suite B
Frankfort, Kentucky 40601
(502) 564-7760
Katie.Grabau@ky.gov

Counsel for Governor Bevin

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were served via email this 5th 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, KY 40601; Jeffrey Walther, Victoria Dickson, Walther, Gay & Mack, 163 E. Main St., Suite 200, Lexington, KY 40588; David Leightty, Alison Messex, Priddy, Cutler, Naake, Meade, 2303 River Road, Suite 300, Louisville, KY 40206; David Fleenor, Vaughn Murphy, Capitol Annex, Room 236, Frankfort, KY 40601; Eric Lycan, Office of the Speaker, Capitol Annex, Room 332, Frankfort, KY 40601; Mark Blackwell, Katherine Rupinen, Joseph Bowman, Kentucky Retirement Systems, 1260 Louisville Road, Frankfort, KY 40601; Robert B. Barnes, Teachers' Retirement System, 479 Versailles Road, Frankfort, KY 40601; Bill Johnson, Johnson Bearse, LLP, 326 West Main Street, Frankfort, KY 40601.

/s/ Matthew F. Kuhn
Counsel for Governor Bevin

EXHIBIT A

COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

MATTHEW G. BEVIN
GOVERNOR

700 CAPITOL AVENUE
SUITE 100
FRANKFORT, KY 40601
(502) 564-2611
FAX: (502) 564-2517

June 5, 2018

The Honorable John D. Minton Jr.
Chief Justice
Kentucky Supreme Court
700 Capitol Avenue, Room 231
Frankfort, Kentucky 40601

Re: *Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney General, et al. v. Matthew G. Bevin, et al.*, 18-CI-379 (Franklin Cir. Ct.)

Dear Chief Justice Minton:

We write pursuant to KRS 26A.020, which allows you to select a special judge if a circuit judge will not "afford [a party] a fair and impartial trial." In the above-referenced matter, which is the challenge to Senate Bill 151, Kentucky's pension-reform bill, we wrote to Judge Shepherd on May 30, 2018, asking him to consider whether he ought to recuse due to his membership in a state pension plan that is governed by an "inviolable contract," the meaning of which is directly at issue in this case. [*See* Exhibit 1]. We did not file a formal motion. The following day, without briefing or a hearing, Judge Shepherd, on his own motion, issued an order refusing to recuse. [*See* Exhibit 2]. We have filed the required affidavit with the Franklin Circuit Clerk, [*see* Exhibit 3], and respectfully ask that your Honor appoint a special judge in Judge Shepherd's place.

We do not take this step lightly and do so reluctantly. As I told Judge Shepherd, this is only the second request for recusal that I remember making since I began practicing law in 1971. But this case is too important to the Commonwealth and its citizens for there to be any appearance of partiality. If the Attorney General succeeds in invalidating Senate Bill 151, Kentucky's public pensions will continue to be the worst funded in the nation, legislation that credit agencies view as credit-positive for the Commonwealth will be no more, and—worst of all—the Commonwealth's employees will keep working without knowing whether they can actually retire with the benefit of a pension. It is now undisputed in the record before Judge Shepherd that, without pension reform, the Kentucky Employees Retirement System will likely

be insolvent by 2022 and the Kentucky Teachers' Retirement System will likely be insolvent by 2036. For a case with these stakes, Kentuckians must have absolute confidence that any judge who passes judgment on Senate Bill 151 does so impartially.[1]

The first count of the Plaintiffs' verified complaint asserts that Senate Bill 151 violates the "inviolable contract" established by Kentucky statutes. As Governor Bevin explained in his merits brief in circuit court, the inviolable-contract issue boils down to whether Kentucky applies the California Rule or the Prevailing Rule. The California Rule provides that a public employee's unaccrued pension benefits are locked in from the moment he or she begins working, meaning that the employee has a right to continue accruing the exact same benefits at the exact same rates for the duration of his or her employment. The Prevailing Rule, by contrast, protects a public employee's already-accrued benefits, but allows changes to future, unaccrued benefits. [*See* Exhibit 4 at 18-40]. Consequently, if he is not recused, Judge Shepherd will decide whether the General Assembly can ever change a public employee's pension benefits going forward. If Judge Shepherd adopts the California Rule, public employees' unaccrued pension benefits will be set in stone from the moment they begin working. If he adopts the Prevailing Rule, he permits leeway for the General Assembly to act in the future, but without in any way changing already-accrued benefits.

The problem with Judge Shepherd deciding the terms and scope of public employees' inviolable contracts is that his pension is likewise protected by an inviolable contract. More specifically, the Judicial Retirement Plan creates an inviolable contract for judges who assumed the bench before January 1, 2014, as Judge Shepherd did. *See* KRS 21.480(1). In fact, in raising their inviolable-contract challenge, the Plaintiffs' verified complaint (paragraphs 53 and 99) and their merits brief (pages 12, 38, and 48) specifically cite the inviolable contract that relates to the Judicial Retirement Plan. [*See* Exhibits 5 & 6 (citing KRS 21.480)]. The Plaintiffs thus concede that this case will affect judges' inviolable contracts, including Judge Shepherd's. Our concern is this: If Judge Shepherd adopts the California Rule, he will forever shield his own personal pension from reform. In sum, a win for the Plaintiffs on the inviolable contract is a win for Judge Shepherd on his own inviolable contract. This appearance of a conflict of interest is manifest. Any reasonable person who knows that Judge Shepherd, like other state employees, has an inviolable contract

[1] We note that your Honor has time to reach a considered judgment about the necessity of Judge Shepherd's recusal, even though this matter is stayed while the issue is decided. *See Jackson v. Commonwealth*, 806 S.W.2d 643, 645 (Ky. 1991). Only one of the provisions of Senate Bill 151 that the Plaintiffs challenge as a violation of the inviolable contract takes effect in July 2018. *See* S.B. 151 § 19; OAG 18-007. And that aspect of Senate Bill 151 currently affects no one. [Exhibit 4 at 40 (discussing the change in Section 19 of Senate Bill 151)].

would immediately question whether he can impartially decide the scope and terms of public employees' inviolable contracts.

Judge Shepherd's reasons for refusing to recuse demonstrate just how necessary his recusal is. Without the benefit of briefing or a hearing, Judge Shepherd found that any change to the Judicial Retirement Plan *per se* violates Section 120 of the Constitution, which states that "[t]he compensation of a justice or judge shall not be reduced during his term." (Put aside the substantial, unsettled legal questions of whether a change to a judge's unaccrued pension benefits is a reduction in "compensation" during the judge's "term" as opposed to after that "term" has been completed.) Judge Shepherd's reasoning, it seems, is that his ruling in this case could never affect his pension because it is independently protected by Section 120 of the Constitution. How can Judge Shepherd impartially adjudicate the constitutional protections of his own pension? He cannot. He has a palpable conflict of interest on that issue. Perhaps better than anything else, this *sua sponte* ruling on a constitutional issue of first impression—a ruling that conveniently protects Judge Shepherd's own pension for all time—demonstrates the necessity of his recusal. The problem is obvious: Judge Shepherd determined that he has no conflict of interest by resolving a constitutional issue about which he has an undeniable conflict of interest.

Judge Shepherd also refused to recuse because, in his view, "*no* changes to the Judicial Retirement System . . . are at issue in this case." That could not be more wrong. The Plaintiffs have asked that Senate Bill 151 be invalidated in its entirety [Exhibit 6 at 1], and Senate Bill 151 makes several changes to the Judicial Retirement Plan. Senate Bill 151, for example, prohibits certain members of the Judicial Retirement Plan from retiring and then earning additional benefits in the Legislators' Retirement Plan or the Judicial Retirement Plan. S.B. 151 § 8. Senate Bill 151 also gives participants in the Judicial Retirement Plan the option to participate "as a nonhazardous employee for any future service as a legislator, judge, or justice" and receive a 401(a) money purchase plan. S.B. 151 § 7. In allowing judges to participate in a 401(a) money purchase plan, the legislature specifically removed the ability of judges to elect to participate in a hybrid cash balance plan. *Id.* Senate Bill 151 also amends the judicial inviolable contract as to provisions that become effective on or after July 1, 2018. S.B. 151 § 11; *see also* S.B. 151 § 5. Because the Plaintiffs have asked Judge Shepherd to void Senate Bill 151 in its entirety, it follows that these changes to the Judicial Retirement Plan are in fact before Judge Shepherd. Indeed, Judge Shepherd apparently has now invalidated these portions of Senate Bill 151 through his ruling on Section 120 of the Constitution.

Judge Shepherd's further rationale for refusing to recuse is that legislation affecting the Judicial Retirement Plan has not "been drafted, introduced, considered in any legislative committee, voted on in any legislative chamber, or passed by either chamber of the General Assembly." Respectfully, this is also incorrect. Throughout the fall of 2017, serious consideration was given to what changes to make to the

Judicial Retirement Plan. So serious was this consideration that the "Keeping the Promise" plan unveiled by Governor Bevin, President Stivers, and then-Speaker Hoover in October 2017 would have made changes to the Judicial Retirement Plan. (This proposal can be viewed at https://pensions.ky.gov.) It is our understanding that several members of the Supreme Court met with legislative leaders about pension reform around this same time. And Justice VanMeter, in his capacity as Trustee of the Judicial Form Retirement System, met with the Governor's Office and wrote a letter to Governor Bevin and legislative leaders, dated October 12, 2017, asking that no changes be made to the Judicial Retirement Plan. [*See* Exhibit 7]. Justice VanMeter went so far as to opine that the contemplated legislation "would seem[] to implicate" Section 28 of the Constitution, and he voiced "strong reservations" about the legislation violating the judicial inviolable contract and Section 120 of the Constitution. Thus, contrary to Judge Shepherd's holding, changes to the Judicial Retirement Plan were in fact seriously considered.

The circumstances of this case, in our view, plainly create a conflict of interest requiring recusal. Kentucky law requires recusal where a judge's "impartiality *might* reasonably be questioned." KRS 26A.015(2)(e) (emphasis added); SCR 4.300, Kentucky Code of Judicial Conduct, Rule 2.11(A). It also requires recusal where a judge "has an interest that *could* be substantially affected by the outcome of the proceeding." KRS 26A.015(d)(3) (emphasis added); SCR 4.300, Kentucky Code of Judicial Conduct, Rule 2.11(A)(2)(c) (requiring more than a *de minimis* interest). Kentucky law also necessitates recusal if a judge "has a pecuniary or proprietary interest in the subject matter in controversy . . . ." KRS 26A.015(2)(c); SCR 4.300, Kentucky Code of Judicial Conduct, Rule 2.11(A)(3) (discussing recusal based upon an "economic" interest).

In addition, the federal Due Process Clause guarantees litigants an impartial judiciary. In *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), the United States Supreme Court ordered the recusal of a state supreme court justice who had received significant campaign contributions from a litigant. *Id.* at 872. In so holding, the Supreme Court concluded that the Constitution compels recusal where the circumstances "would offer a *possible* temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Id.* at 885 (emphasis added) (citation omitted). *Caperton* also reaffirmed the rule from *Tumey v. Ohio*, 273 U.S. 510 (1927), and *Ward v. Monroeville*, 409 U.S. 57 (1972), that financial interests in the outcome of a matter do in fact implicate the Due Process Clause. *Caperton*, 556 U.S. at 877-79. *Caperton* also reestablished that financial interests necessitating recusal need not be direct. *See id.* at 878-79 (discussing *Ward*).

In light of this authority requiring recusal, it comes as no surprise that judges routinely recuse when the case before them could affect their personal finances. In fact, in 1941, all members of Kentucky's highest court recused from a matter implicating their pensions. *See Talbott v. Thomas*, 151 S.W.2d 1, 6 (Ky. 1941). This

should be expected in legal challenges to pension reform. Case in point: Less than two years ago, four out of the five justices of the Arizona Supreme Court recused from a matter challenging pension reform. *See Hall v. Elected Officials' Retirement Plan*, 383 P.3d 1107, 1110 n.* (Ariz. 2016). Arizona's pension bill, much like Senate Bill 151, was challenged as a violation of the Arizona Constitution's "Pension Clause," which states, similar to Kentucky's inviolable-contract language, that "public system retirement benefits shall not be diminished or impaired." *Id.* at 1110. Thus, it has long been the rule in Kentucky and elsewhere that a judge with a public pension cannot sit in judgment of legislation that could affect that pension.

Because Judge Shepherd's pension is unquestionably affected by Senate Bill 151, and because the Plaintiffs have asked him to invalidate those changes, he must recuse. It is no answer to say that the changes to the Judicial Retirement Plan are not extensive. They in fact are. In any event, surely a judge cannot avoid recusal by concluding that Senate Bill 151 does not affect his or her pension substantially enough. For obvious reasons, a judge's impartiality in reaching such a self-serving result might reasonably be questioned. The only possible rule, and the bright-line one followed in *Talbott* and the Arizona case, is that whenever a judge's pension is or could be affected by pension reform, recusal is required.

In addition, Judge Shepherd's ruling in this matter will be the gatekeeper for future pension reform, unless his judgment is reversed. If Judge Shepherd adopts the California Rule and that ruling is affirmed, any meaningful future reforms are off the table, absent constitutional amendment. And there is good reason to believe that future reforms are, by necessity, on the horizon. Because this case is almost certainly going to be the paradigmatic Kentucky case on public employees' inviolable-contract rights and the yardstick by which future pension reform is measured, Judge Shepherd's own inviolable-contract rights require him to step aside.

We think the recusal inquiry can end here. There, however, are other aspects of this case that weigh decidedly in favor of recusal. While we are hesitant at this stage to get into Judge Shepherd's general handling of this case, as opposed to raising these issues in the inevitable appeal, we feel compelled to offer some additional information given the trajectory and importance of this case. *See* KRS 26A.015(2)(a) (requiring recusal where a judge "has a personal bias or prejudice concerning a party . . . or has expressed an opinion concerning the merits of the proceeding").

At the initial hearing for this case on April 19, 2018, Judge Shepherd took the extraordinary step of suggesting to the parties a constitutional basis for invalidating Senate Bill 151 that the Plaintiffs had not thought of—namely, whether Senate Bill 151 is an appropriation requiring 51 votes to pass the House. [4/9/18 Hearing, at 10:36:45-10:40:45]. Not only that, but Judge Shepherd identified what he thought was an applicable case on this topic and instructed the parties to brief the issue. [*Id.*]. This raises serious concerns about Judge Shepherd's impartiality. At the very least,

he is coming dangerously close to prosecuting the Plaintiffs' case for them, rather than deciding the issues that they choose to raise. *See Delhanty v. Commonwealth*, ___ S.W.3d ___, 2018 WL 2372794, at *8 n.16 (Ky. App. May 25, 2018)[2] ("The premise of our adversarial system is that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." (citation omitted)). The Plaintiffs unsurprisingly have taken Judge Shepherd's constitutional "theory" to heart and have asked that Senate Bill 151 be voided in its entirety on the basis raised by Judge Shepherd even though it appears nowhere in their verified complaint. [Exhibit 6 at 19-22; *see generally* Exhibit 5].

Judge Shepherd also has rejected Governor Bevin's reasonable request for modest discovery, even though the Plaintiffs' 156-allegation verified complaint contains factual allegation after factual allegation, all of them predictably one-sided, that Governor Bevin reasonably disputes. [*See* Exhibit 8]. After securing protective orders prohibiting discovery, the Plaintiffs—in what can only be described as a bait and switch—are now relying on affidavits to seek summary judgment. [*See* Exhibit 9 at 45; Exhibit 10 at 2]. Obviously, that is not how the civil rules work. *See Roberson v. Lampton*, 516 S.W.2d 838, 840 (Ky. 1974) (holding that summary judgment "is not a trick device for the premature termination of litigation" (citation omitted)).

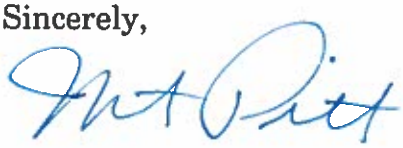
Finally, Judge Shepherd's recusal order demonstrates that he has prejudged this case. As discussed above, Judge Shepherd determined that "it is clear [from Section 120] that the legislature lacks the power to enact legislation altering the Judicial Retirement System in a manner that the Governor asserts could give rise to a conflict for those judges interpreting the meaning of 'inviolable contract' for executive branch employees." [Exhibit 2 at 2]. This conclusion necessarily means that all of Senate Bill 151's changes to the Judicial Retirement Plan, most of which are summarized above, are unconstitutional. Judge Shepherd reached this conclusion on his own, without briefing on the recusal issue and, more troubling, without any party raising Section 120. Still worse, Judge Shepherd reached this conclusion before merits briefing had closed and before oral argument was held. *Cf. Delhanty*, 2018 WL 2372794, at *7 (criticizing a judge who engaged in "wholesale, unprompted judicial review" of the constitutionality of a statute).

One final point: The specific conflict of interest that Judge Shepherd possesses is not shared by all judges in the Commonwealth. Only judges who took the bench prior to January 1, 2014 or who were previously a member of another state retirement plan have an inviolable contract. *See, e.g.*, KRS 21.480. Thus, Judge Shepherd's conflict of interest can be cured by appointing one of the many able members of the Kentucky judiciary who do not share Judge Shepherd's specific conflict.

[2] We note that this recent decision has not yet reached finality. *See* CR 76.30.

We appreciate your careful consideration of this important issue in what may be one of the most important cases in the history of our Commonwealth.

Sincerely,



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

Enclosures (Exhibits 1-10)

Cc:

Hon. Phillip J. Shepherd
Attorney General Andy Beshear
J. Michael Brown, Esq.
La Tasha Buckner, Esq.
S. Travis Mayo, Esq.
Marc G. Farris, Esq.
Samuel Flynn, Esq.
Jeffrey Walther, Esq.
Victoria Dickinson, Esq.
David Leightty, Esq.
Alison Messex, Esq.
David Fleenor, Esq.
Vaughn Murphy, Esq.
Greg Woosley, Esq.
Eric Lycan, Esq.
Mark Blackwell, Esq.
Katherine Rupinen, Esq.
Joseph Bowman, Esq.
Robert B. Barnes, Esq.
Bill Johnson, Esq.

EXHIBIT 1

COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

MATTHEW G. BEVIN
GOVERNOR

700 CAPITOL AVENUE
SUITE 100
FRANKFORT, KY 40601
(502) 564-2611
FAX: (502) 564-2517

May 30, 2018

VIA HAND-DELIVERY

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

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

Dear Judge Shepherd:

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

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

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

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

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

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

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

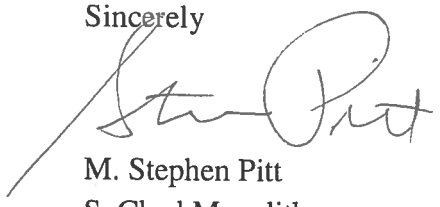
Commonwealth and its thousands of employees, including our public school teachers, that the decision in this case be free of any question of actual or perceived bias or lack of impartiality on the part of the Court. Otherwise, as demonstrated in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868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

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

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

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

Sincerely



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

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

EXHIBIT 2

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

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

v. **ORDER**

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

This action is before the Court on the Court's own motion to address issues raised in a letter (dated May 30, 2018, copy attached) to the Court from counsel for the Governor. In the letter, Counsel for the Governor requests that this Court recuse from presiding over this action. The basis for the request is the assertion that all judges are members of the Judicial Retirement System, and that the statute governing judicial retirement provides that judicial retirement benefits for judges who became part of the system prior to changes enacted effective January 1, 2014 are beneficiaries of an "inviolable contract" under KRS 21.480(1). The Governor's counsel reasons that such membership in the Judicial Retirement System disqualifies any judge whose service pre-dates January 1, 2014 from interpreting the legality of any changes that effect the "inviolable contract." Such a ruling, the Governor's counsel argues, could have an impact on the judge's own retirement benefits in the event that a legislature might enact changes for the judicial system in the future similar to those in Senate Bill 151. The Governor's counsel notes that the case could be assigned to another judge who was elected or appointed after January 1, 2014 because the changes in the Judicial Retirement System effective on that date deleted the "inviolable contract" from the judicial retirement statute for judges whose service began after that date. *See* 2013 Ky. Acts ch. 120, sec.

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31. The Governor's counsel asserts that recusal is required under KRS 26A.015(2)(d) because "the Court has more than a *de minimis* personal interest that could be substantially affected by the proceedings. *See* SCR 4.300, Rule 2.11(A)(2)(c)." The Court, being sufficiently advised, hereby **DENIES** the request for recusal, for the reason set forth below.

DISCUSSION

First, the Court notes that there are *no* changes to the Judicial Retirement System that are at issue in this case. It would stretch the concept of conflict of interest beyond any reasonable recognition to hold that a Court cannot preside over a case involving interpretation of any legal rule that could at some unknown future date be applied by the legislature to members of the judiciary. No such legislation has been drafted, introduced, considered in any legislative committee, voted on in any legislative chamber, or passed by either chamber of the General Assembly. It is beyond speculative to posit that the possibility of such legislation being enacted at some unspecified future date could create a conflict of interest for a judge considering Senate Bill 151.

Moreover, even if such speculation had any factual basis, the framers of the Judicial Article in 1975 anticipated the potential problem with legislation that would diminish the compensation of sitting judges. Section 120 of the Kentucky Constitution provides that "[t]he compensation of a justice or judge shall not be reduced during his term." Accordingly, it is clear that the legislature lacks the power to enact legislation altering the Judicial Retirement System in a manner that the Governor asserts could give rise to a conflict for those judges interpreting the meaning of the "inviolable contract" for executive branch employees. Thus, the conflict asserted by the Governor is not only remote and speculative, it is eliminated, for all practical purposes, by Section 120 of

the Kentucky Constitution, which prohibits legislation that would diminish the compensation of sitting judges.

This Court has no vested interest in any particular interpretation of the "inviolable contract" and no concerns about future legislative action regarding judicial pensions because Section 120 of the Kentucky Constitution protects judicial compensation from diminution by the General Assembly. Regardless of whether the "California Rule" or the "Prevailing Rule" is adopted in this case, any future changes to the Judicial Retirement System will be governed by the plain mandate of Section 120 of the Kentucky Constitution, a provision of law not at issue in this case. Judicial pensions are protected (or, as the letter from the Governor's counsel puts it, "locked in") by Section 120 of the Kentucky Constitution, not by any common law or statutory interpretation that will be adjudicated in this case.

The Court has carefully reviewed the statute and rules governing recusal, including KRS 26A.015 and Canon 3 of the Code of Judicial Conduct. The Court is mindful of the requirement to recuse when personal bias, prejudice, or the appearance of bias could give rise to a lack of public confidence in the fairness of the Court's ruling. By the same token, the Court has an equally compelling duty to hear and decide all assigned cases. As Rule 2.7 of the Model Code of Judicial Conduct provides, "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law." The commentary to Rule 2.7 notes that "[u]nwarranted disqualification may bring public disfavor to the court and to the judge personally." As noted by the Court in *Hinman v. Rogers*, 831 F.2d 937 (10th Cir. 1987), "there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Id.* at 939 (citations omitted). This Court has a duty to decide cases and finds that there is no reason that would justify recusal in this case.

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Finally, the Court is compelled to take judicial notice that the theory of recusal advanced by the Governor in this case, if accepted, would compel the recusal of every member of the Kentucky Supreme Court in this case. All seven justices of the Kentucky Supreme Court are members of the Judicial Retirement System, whose services pre-date January 1, 2014. Under the Governor's theory, all seven justices would be required to recuse. When two or more members of the Kentucky Supreme Court recuse, Section 110(4) of the Kentucky Constitution provides that "the Chief Justice shall certify that fact to the Governor, who shall appoint to try the particular cause a sufficient number of Justices to constitute a full court for the trial of that case." The potential for the appearance of conflict asserted by the Governor here is remote and speculative, but there is a certainty that the credibility of the judicial system would be severely damaged if the Governor would be empowered to appoint the entire membership of the Kentucky Supreme Court that would hear and decide this case in which the Governor is a litigant.

As Justice John Roach noted in *Dean v. Bondurant*, 193 S.W.3d 744, 752 (Ky. 2006), quoting the Florida Supreme Court, in analyzing a recusal motion based on campaign contributions,

> [W]e cannot operate a judicial system, or indeed a society, on the basis of the factually unsubstantiated perceptions of the cynical and distrustful. There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g. friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers. However, such allegations have been found legally insufficient when asserted in a motion for disqualification. The same is true of the ground for disqualification assert at bar.

Id. at 752 (quoting *MacKenzie v. Super Kids Bargain Stores, Inc.*, 565 So. 2d 1332, 1335 (Fla. 1990)). Only "the most cynical and distrustful" observer would believe that the Governor's alleged grounds for recusal in this case have merit. The Court finds no legal or factual basis to support the request for recusal.

CONCLUSION

For the reasons stated above, the Governor's request for this Court to recuse is **DENIED.**

SO ORDERED this 31st day of May, 2018.

/s HON. PHILLIP J. SHEPHERD
electronically signed
5/31/2018 4:22:06 PM

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

DISTRIBUTION:

Hon. Andy Beshear
Hon. J. Michael Brown
Hon. La Tasha Buckner
Hon. S. Travis Mayo
Hon. Marc G. Farris
Hon. Samuel Flynn
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

Hon. Jeffrey S. Walther
Walther, Gay & Mack, PLC
163 East Main Street, Suite 200
Lexington, KY 40588

Hon. David Leightty
Priddy, Cutler, Naake & Meade PLLC
2303 River Road, Suite 300
Louisville, KY 40206

Hon. M. Stephen Pitt
Hon. S. Chad Meredith
Hon. Matthew F. Kuhn
Office of the Governor
700 Capitol Avenue, Suite 101
Frankfort, KY 40601

Hon. Brett R. Nolan
General Counsel
Finance and Administration Cabinet
702 Capitol Avenue, Room 392
Frankfort, KY 40601

Hon. David Fleenor
Capitol Annex, Room 236
Frankfort, KY 40601

Hon. Eric Lycan
Office of the Speaker
Capitol Annex, Room 332
Frankfort, KY 40601

Hon. Brent Woosley
General Counsel
Legislative Research Commission
Room 300, Capitol Building
Frankfort, KY 40601

Hon. Mark Blackwell
Hon. Joseph Bowman
Kentucky Retirement Systems
1260 Louisville Road
Frankfort, KY 40601

Hon. Robert B. Barnes
Kentucky Teachers' Retirement System
479 Versailles Road
Frankfort, KY 40601

EXHIBIT 3

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE 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

AFFIDAVIT OF JAMES "BLAKE" BRICKMAN

Comes the affiant, James "Blake" Brickman, first being duly sworn, and states as follows:

1. I am over the age of 18 and of sound mind.
2. I am a resident of Fayette County, Kentucky.
3. I have personal knowledge of the facts in this Affidavit.
4. I am the Chief of Staff to Governor Matthew G. Bevin. I am a graduate of the University of Kentucky College of Law and Vanderbilt University. I am a member of the Kentucky Bar.
5. I am familiar with the litigation regarding Senate Bill 151 (the "Pension Lawsuit"), which is styled *Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney General, et al. v. Matthew G. Bevin, in his official capacity as Governor of the Commonwealth of Kentucky, et al.*, Franklin Circuit Court, Division I, Case No. 18-CI-379.

6. This Affidavit is made pursuant to KRS 26A.020, which allows the Chief Justice of the Kentucky Supreme Court to appoint a special judge under certain circumstances.

7. Based upon my knowledge and review of the Pension Lawsuit, it is my belief that Judge Phillip J. Shepherd of the Franklin Circuit Court is unable to conduct and afford a fair and impartial trial in the Pension Lawsuit. I believe that the only adequate remedy is the appointment of a special judge who does not suffer from the same conflict of interest as Judge Shepherd.

8. The Plaintiffs in the Pension Lawsuit have challenged whether Senate Bill 151 is a violation of the "inviolable contract" established by Kentucky law for certain classes of state employees. Thus, Judge Shepherd has been called on to decide the terms and scope of public employees' inviolable contracts.

9. Judge Shepherd is a member of the Judicial Retirement Plan who assumed the bench prior to January 1, 2014. Thus, pursuant to KRS 21.480(1), Judge Shepherd's own personal pension is protected by an "inviolable contract." It is my belief that Judge Shepherd cannot conduct and afford a fair and impartial trial in the Pension Lawsuit because, like many other state employees, he has a pension that is protected by an "inviolable contract."

10. If Judge Shepherd rules that Senate Bill 151 violates the "inviolable contract," Judge Shepherd will, in effect, rule that his own pension can never be modified in any way, even as to unaccrued future pension benefits.

11. In refusing to recuse, Judge Shepherd determined that "there are *no* changes to the Judicial Retirement System that are at issue in this case." However, the Plaintiffs

in the Pension Lawsuit have asked Judge Shepherd to invalidate Senate Bill 151 in its entirety, and Senate Bill 151 does in fact make changes to the Judicial Retirement Plan, of which Judge Shepherd is a member.

12. Section 7 of Senate Bill 151 allows certain members in the Judicial Retirement Plan, from July 1, 2019 until December 31, 2020, to opt into a 401(a) money purchase plan and eliminates the ability of certain members of the Judicial Retirement Plan to opt into a hybrid cash balance plan.

13. Section 8 of Senate Bill 151 directs that members in the Judicial Retirement Plan who retire on or after January 1, 2019 cannot then earn additional benefits from the Legislators' Retirement Plan or the Judicial Retirement Plan.

14. Section 11 of Senate Bill 151 amends the judicial inviolable contract provision in KRS 21.480. A related amendment is contained in Section 5 of Senate Bill 151.

15. In refusing to recuse, Judge Shepherd also ruled that legislation affecting the Judicial Retirement Plan has not "been drafted, introduced, considered in any legislative committee, voted on in any legislative chamber, or passed by either chamber of the General Assembly."

16. However, in the fall of 2017, leaders in the General Assembly and Governor Bevin discussed making changes to the Judicial Retirement Plan. This is demonstrated by, among other things, the "Keeping the Promise" plan unveiled in October 2017, which proposed changes to the Judicial Retirement Plan; Justice VanMeter's October 12, 2017 letter to Governor Bevin and legislative leaders asking that the Judicial Retirement Plan not be modified; and Justice VanMeter's meeting with me

on or about October 20, 2017 to discuss pension reform as it relates to the Judicial Retirement Plan.

17. In refusing to recuse, Judge Shepherd also ruled, without formal briefing or a hearing, that legislative revisions to his pension would be unconstitutional under Section 120 of the Kentucky Constitution. It is my belief that Judge Shepherd is unable to impartially decide whether or not his own pension can be amended in accordance with Section 120 of the Kentucky Constitution.

18. In addition, it is my belief that Judge Shepherd has prejudged the constitutionality of Senate Bill 151. On April 19, 2018, Judge Shepherd suggested to the parties a constitutional basis for invalidating Senate Bill 151 that the Plaintiffs had not thought of. Judge Shepherd even identified an applicable case for this point. On May 8, 2018, Judge Shepherd refused to allow any discovery even though the Plaintiffs had filed a verified complaint and had introduced affidavits into the record. And on May 31, 2018, Judge Shepherd, without formal briefing or a hearing, declared that changes to the Judicial Retirement Plan are unconstitutional under Section 120. Judge Shepherd reached this conclusion before merits briefing in the Pension Lawsuit had closed.

19. Under the circumstances of this case, it is my belief that Judge Shepherd's impartiality might reasonably be questioned.

20. Under the circumstances of this case, it is my belief that Judge Shepherd possesses more than a *de minimis* interest that could be substantially affected by the Pension Lawsuit.

21. Under the circumstances of this case, it is my belief that Judge Shepherd possesses an economic, pecuniary, or proprietary interest in the subject matter of the Pension Lawsuit.

22. Under the circumstances of this case, it is my belief that Judge Shepherd has a possible temptation to judge the Pension Lawsuit on something other than its merits.

23. Under the circumstances of this case, it is my belief that Judge Shepherd has a personal bias or prejudice concerning the parties and has expressed an opinion concerning the merits of the proceeding without the benefit of formal briefing or a hearing.

24. Further affiant sayeth naught.

James "Blake" Brickman

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF FRANKLIN)

Subscribed and sworn to before me this 5 day of June, 2018, by James "Blake" Brickman.

Deanna Cope Brandstetter
Notary Public

My commission expires on the _____ day of _____.

DEANNA COPE BRANDSTETTER
Notary Public
Kentucky - State at Large
My Commission Expires Apr 21, 2020

EXHIBIT 4

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

COMBINED MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Does the recently enacted Senate Bill 151 violate the inviolable contract? That is the ultimate issue here, and while it is simple to phrase, it is exceedingly complex to understand. To some extent, the complexity comes from the very term itself. After all, an "inviolable" contract appears at first glance to be an oxymoron, much like an unsinkable ship or an uncrashable airplane. And even greater complexity arises from the fact that there is very little legal authority addressing what exactly it means to be an *inviolable* contract. It cannot literally be inviolable, or else the Plaintiffs would not see a need to bring this case. In other words, despite its name, the inviolable contract is obviously capable of being violated. Thus, the real question is whether SB 151 violates the so-called inviolable contract. Simply put, it does not.

There are two potential ways to analyze this issue, but only one of them is correct. One way—which is the analysis urged by the Plaintiffs—is to say 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—at the very least—to continue earning those exact same benefits at the exact same rates as long as the employee remains employed. In other words, any change to an employee's ability to accrue benefits in the future is a violation of the contract. This is commonly known as the California Rule. It has proven to be an unmitigated disaster in its namesake state, as well as other states that have experimented with it. Thus, the California Rule has been overwhelmingly rejected across the country. In fact, even the *California* courts are walking away from it. And yet, the Plaintiffs argue that this is the rule Kentucky should follow. Tellingly, their brief simply assumes that this is the correct rule without undertaking any analysis or explanation as to *why* it is the correct rule. Were the Plaintiffs to attempt such an explanation, they would have to confront the realities of the California Rule—*i.e.*, that it is nonsensical, fiscally irresponsible, and legally unjustifiable.

The alternative analysis—which the Plaintiffs do not even acknowledge—says that a public employee's right to already-accrued pension benefits must be protected, but the employee does not have to be permitted to continue accruing pension benefits in the future. In other words, a public employee has an inviolable right to pension benefits that he or she has already accrued, but has no right to future accruals. This is analogous to salaries and wages—*i.e.*, an employee has a contractual right to be

paid for work that he or she has already performed, but, in the absence of a written contract for a set term, does not have a right to continue earning money in the future. This is the prevailing view (hereinafter, the "Prevailing Rule") across the country with regard to public pensions, and it is *the only* analysis applied with respect to private pensions. In contrast to the California Rule, the Prevailing Rule is sensible, fiscally responsible, and legally justified. To say it is obvious that the Court should follow the Prevailing Rule instead of the California Rule is an understatement. And, assuming that the Court does so, it can only conclude that SB 151 does not violate the inviolable contract since SB 151 only alters prospective, unaccrued benefits.[1]

Finally, the Plaintiffs also raise a number of complaints about the process used to enact SB 151. This is nothing more than a sideshow. Most of the process-based issues raised by the Plaintiffs are not even justiciable. In any event, those issues are all unavailing. As a result, the Defendants are entitled to summary judgment.

One final point: the Kentucky Education Association ("KEA") and the Fraternal Order of Police ("FOP") also lack standing, and therefore should be dismissed as Plaintiffs on that ground.

For these reasons, and as explained below, the Defendants are entitled to summary judgment.[2]

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[1] While the inviolable contract cannot literally be inviolable, this brief will nevertheless refer to the contract throughout as the "inviolable contract" for the purposes of convenience and consistency with the statutory language.

[2] The Defendants are seeking summary judgment under protest because the Court ordered them to file a brief on the merits without the benefit of discovery. The Defendants continue to believe that discovery is necessary on many issues in this case, and the Defendants do not waive any objections by asking the Court for summary judgment. [*See* Ex. 1, Brinkman Aff.].

FACTS

Creation and History of the Kentucky Retirement Systems

Public employees in Kentucky have long been provided pension benefits. But, for much of the twentieth century, those benefits were viewed by the courts as a mere gratuity that could be completely taken away from an employee at any moment prior to retirement. *See, e.g., City of Louisville v. Bd. of Educ. of Louisville*, 163 S.W.2d 23, 25 (Ky. 1942).

In 1972, the Kentucky General Assembly set out to change this. In order to provide greater security for public employees' pensions, it enacted KRS 61.692(1), which, at the time, provided that:

> in consideration of the contributions by the members and in further consideration of the benefits received by the state from the member's employment, KRS 61.510 to KRS 61.700 shall constitute an inviolable contract of the Commonwealth, and the benefits provided therein shall not be subject to reduction or impairment by alteration, amendment, or repeal.[3]

The basic pension benefit available to state and county retirees under this system is relatively straightforward: when they retire at full retirement age, they are eligible to receive an annual retirement allowance equal to their years of service,

[3] 1972 Ky. Acts ch. 116, § 60. KRS 61.692 applies to most state employees. Identical inviolable contract provisions were also enacted for county employees and the State Police in 1972. *See* KRS 16.652(1) (state police); KRS 78.852(1) (county employees). The statutory provisions governing the County Employees Retirement System (CERS), State Police Retirement System (SPRS), and Kentucky Employees Retirement System (KERS) are essentially identical, so those three retirement systems and the provisions governing them will generally be treated and discussed in this brief as if they are one system, even though they are technically three systems united under the same Board of Trustees. Teachers are members of a separate system, the Kentucky Teachers' Retirement System (KTRS), which is discussed separately below. Legislators and judges also are in a different pension system, but the Plaintiffs have not raised any claims pertaining to that system.

multiplied by the average of their five highest years of salary—three highest for hazardous-duty employees—and then multiplied by a specific benefit factor, commonly referred to as a multiplier. *See* KRS 61.510(14); KRS 61.595.

From the beginning, it was clear that the so-called inviolable contract was not set in stone. Instead, its provisions have ebbed and flowed many times over the years. For instance, in 1976, the General Assembly modified the covered provisions within the inviolable contract, reducing the range of statutes included within it to KRS 61.510 to KRS 61.692. 1976 Ky. Acts ch. 321, § 40. In 1988, the covered provisions were extended to the present range of KRS 61.510 to KRS 61.705. 1988 Ky. Acts ch. 349, § 29.

Over time, many provisions have also been added to *and* taken away from the inviolable contract. *See, e.g.,* KRS 61.585 (repealed by 1976 Ky. Acts ch. 321, § 41); KRS 61.620 (repealed by 1976 Ky. Acts ch. 321, § 41). One significant benefit added to the inviolable contract after its creation was hospital and medical insurance for retirees. *See* KRS 61.702. This benefit was added in 1978. 1978 Ky. Acts ch. 311, § 9.

But the General Assembly's tinkering with the inviolable contract has not been limited solely to measures that increase benefits. In 1986, the General Assembly raised the percentage of income that employees were required to contribute to the pension system. When the inviolable contract was created in 1972, employees were required to contribute 4% of their income to the pension system. 1966 Ky. Acts ch.

35, § 5. In 1986, however, the General Assembly raised the required contribution to 5%. 1986 Ky. Acts ch. 293, § 4.

Two years later, the General Assembly amended the inviolable contract to create a 10% service credit bonus for employees. *See* KRS 61.596 (repealed by 2000 Ky. Acts ch. 385, § 42). That amendment, however, also contained a sunset clause that prohibited retirement system members from taking advantage of the bonus if they did not retire by a certain date. *See* 1988 Ky. Acts ch. 336, § 1. Thus, KRS 61.596 created a benefit within the inviolable contract, but that benefit terminated before it could be taken advantage of by all of the members of the retirement systems.

In 1993—in response to the Boptrot prosecutions—the General Assembly amended the inviolable contract to provide that legislators convicted of a felony relating to their duties as a legislator would forfeit their pension rights and benefits, "except for the return of [the legislator's] accumulated contributions and interest credited on those contributions." *See* KRS 6.696; 1993 (1st Extra. Sess.) Ky. Acts ch. 4, § 78 (amending the inviolable contract to apply "except as provided in KRS 6.696"). In other words, the General Assembly terminated the inviolable contract rights of legislators in those circumstances.

In 2000, the General Assembly repealed KRS 61.554, which had allowed LRC employees to purchase service credit after working six legislative bienniums. 1990 Ky. Acts ch. 480, § 6 (repealed by 2000 Ky. Acts ch. 385, § 42).

Similarly, in 2003, the General Assembly removed hospital and medical insurance benefits from the inviolable contract for employees hired on or after July 1, 2003. KRS 61.702(8)(e) (added by 2003 Ky. Acts ch. 155, § 1).

In 2008, the General Assembly made perhaps the most significant changes yet to the Kentucky Retirement Systems, creating what is now referred to as Tier II benefits for employees hired on or after September 1, 2008. *See generally* 2008 (1st Extra. Sess.) Ky. Acts ch. 1. Employees who were already in the system prior to those reforms are said to have Tier I benefits. The major distinctions between Tier I and Tier II benefits are: Tier II employees are required to contribute 1% of their income for future medical and hospital insurance benefits, while Tier I employees are not required to contribute anything, KRS 61.702(2)(b); Tier II employees have generally lower multipliers, KRS 61.595(1); the "high five" and "high three" calculations for Tier II employees must be based on full years of employment whereas the "high five" calculation for Tier I employees can be based on as little as 48 months of employment and the "high three" calculation can be based on as little as 24 months of employment, KRS 61.510(14); Tier I non-hazardous employees can retire unreduced benefits at any age after 27 years of service, but Tier II non-hazardous employees can only retire with unreduced benefits if they are at least 57 years old and their age plus years of service equals at least 87, KRS 61.595(2); and Tier I employees generally receive full medical and hospital insurance benefits at 20 years of service, whereas Tier II employees simply receive a cash stipend—based on their months of service—to defray the cost of purchasing insurance.

In 2013, the General Assembly made still more changes to the Kentucky Retirement Systems, this time creating what is referred to as Tier III benefits. *See generally* 2013 Ky. Acts ch. 120. Tier III benefits are different in nature than the Tier I and Tier II benefits. Whereas the earlier tiers are pure defined benefit plans, Tier III is a hybrid cash balance plan. KRS 61.595(3); KRS 61.597. It is known as a "hybrid" plan because it has characteristics of both a defined benefit plan and a defined contribution plan. Under Tier III, a member has a cash balance in an account designated for the member, and that balance increases based on required contributions from the member and the member's employer, as well as a certain level of guaranteed investment returns. KRS 61.597(2). Upon retirement, a Tier III employee can either receive a distribution of their contributions plus their employer's contributions plus the investment returns, or they can opt for an annuity calculated according to actuarial assumptions and based on their accumulated account balance. KRS 61.597(7). Like Tier II employees, Tier III employees also receive a stipend for medical and hospital insurance based on their months of service. Tier III employees are not expressly covered by the inviolable contract, but their contributions—and only their contributions—are protected. KRS 61.692(2).

Creation and History of the Kentucky Teacher Retirement System

In 1978, six years after the creation of the inviolable contract for members of the Kentucky Retirement Systems, the General Assembly extended the inviolable contract to the Commonwealth's teachers. *See* 1978 Ky. Acts ch. 152, § 20 (codified at KRS 161.714). The teachers' inviolable contract, which is essentially identical to

the inviolable contract provisions that apply to state employees, county employees, and the State Police, initially provided that:

> in consideration of the contributions by members and in further consideration of benefits received by the state from the member's employment, KRS 161.220 to KRS 161.710 shall constitute an inviolable contract of the Commonwealth, and the benefits provided therein shall not be subject to reduction or impairment by alteration, amendment, or [repeal].[4]

Like the pension benefit available to state and county employees, the benefit available to members of the Kentucky Teachers Retirement System ("KTRS") under the inviolable contract provisions is calculated by multiplying a member's years of service by their final average salary—calculated according to their highest five or highest three years of salary—and then multiplied by a benefit factor, commonly referred to as a multiplier. KRS 161.220(9); KRS 161.620. Unlike the other pension systems, the KTRS does not have multiple tiers of pension benefits. All KTRS members are generally able to retire with unreduced benefits after 27 years of service, or the age of 60, whichever comes first. KRS 161.600.

Like the inviolable contract for state and county employees, the details within the KTRS inviolable contract have seen significant change over the years. First, the rate at which teachers are required to contribute to their pension system has increased several times since 1978. When the inviolable contract was created, members of the Kentucky Teachers Retirement System ("KTRS") were required to

[4] The original language actually stated that the benefits "shall not be subject to reduction or impairment by alteration, amendment, or *appeal*." This appears to have been a scriveners error and was officially corrected in 1992. 1992 Ky. Acts ch. 192, § 17.

contribute 7.7% of their salaries. 1978 Ky. Acts ch. 152, § 8. This increased to 7.84% in 1979; to 9.32% on January 1, 1984; to 9.6% on July 1, 1984; and to 9.855% in 1988. 1978 Ky. Acts ch. 152, § 8; 1982 Ky. Acts ch. 326, § 7; 1984 Ky. Acts ch. 253, § 15; 1988 Ky. Acts ch. 240, § 3.

In addition, benefits covered by the inviolable contract have been reduced, and even eliminated, since 1978. In 1992, for instance, the General Assembly repealed KRS 161.705. 1992 Ky. Acts ch. 192, § 18. That statute had allowed a KTRS member, or the member's employer, or both, to make voluntary contributions of up to 4% of the member's salary, which would be invested by KTRS for the member's benefit. 1990 Ky. Acts ch. 476, Pt. V, § 542.

Changes in 1995 further reduced KTRS members' benefits. Prior to 1995, KRS 161.700 provided that pension payments were exempt from state and municipal taxes. 1990 Ky. Acts ch. 476, Pt. V, § 541. In 1995, however, the statute was amended to provide that retirement benefits would be subject to the state income tax after January 1, 1998. 1995 (2d Extra. Sess.) Ky. Acts ch. 1, § 6; KRS 161.700.

Unfunded Liabilities and the Arrival of the Pension Crisis

Any pension system that allows employees to work for 27 years and then collect a defined benefit retirement allowance for the rest of their lives—which could be 40 or 50 years—is bound to run into funding problems. And so it is with all of Kentucky's public pension systems.

Standard & Poor's recently ranked Kentucky's pension systems as the worst funded among the 50 states. [*See* Ex. 2, Standard & Poor's, U.S. State Pensions:

Weak Market Returns Will Contribute to Rise in Expense, Sept. 12, 2016 (hereinafter, "S&P 2016 Report")]. And a recent study conducted for the benefit of the Commonwealth revealed that the total unfunded liability for Kentucky's public pension systems lies somewhere between $33 *billion* in the best case scenario and $84 *billion*, depending on the assumptions used to calculate it. [PFM Interim Report #2, Historical & Current Assessment at 1 (hereinafter, "PFM Report #2"), attached as Ex. A to Chilton Aff, Ex. 3]. The average public pension fund in the United States is funded at 73.2%, but the KERS Non-hazardous plan is funded at a mere *16%*. [*Id.* at 24-25]. The KERS Hazardous, CERS Non-hazardous and Hazardous, SPRS, and KTRS plans are better funded—with the best being the CERS Non-hazardous plan at 59%—but they are still far below the national average. [*Id.* at 25].

This ever-present sword of Damocles threatens every aspect of the Commonwealth's fiscal well-being. Pension spending in Kentucky has obviously not kept pace with the level of spending necessary to keep the pension systems adequately funded, and yet, pension spending has increased nearly five times as fast as General Fund revenue over the last decade. [*Id.* at 26-27]. This means that pension spending is crowding out the Commonwealth's spending on other priorities like education and public protection. If the unfunded liability continues to grow, the Commonwealth will be forced to devote more and more of its financial resources to the pension plans all the while falling further and further behind. This will only result in more crowding out of spending on other budget items.

Importantly, the unfunded liability is not just a problem of underfunding. Indeed, structural issues with the pension funds—like actuarial back-loading, actuarial assumption changes, and cost-of-living adjustments—account for more than half of the problem. [*Id.* at 5]. A mere 15% of the unfunded liability is attributable to underfunding. [*Id.*]. This is demonstrated most clearly by the experience of CERS. While the Commonwealth has often failed to pay the full amount of its full actuarially required contribution to KERS, local governments have typically paid the full requirement. [*Id.* at 13]. If simply funding the pensions were enough, one would expect CERS to be nearly 100% funded. But it is not. Instead, it is only 59% funded. [*Id.* at 25]. In short, the issue is not simply that the pension systems are underfunded; the issue is that they are structurally unsound.

Given the structural problems, it is not surprising that the pension systems have had abysmal cash flows over the last decade. The KERS non-hazardous fund has had negative cash flows to the tune of hundreds of millions of dollars per year for the last decade. [*Id.* at 5-6]. As a result, it is now in such poor shape that estimates show it could be insolvent as early as 2022 if it stays on the same path. [*Id.* at 47]. The other funds have had similar experiences over the past decade. This is not sustainable.

Governor Bevin and the General Assembly try to Save the Pension Systems

In light of the obvious problems with Kentucky's pension systems, Governor Bevin and the General Assembly did what any good leaders would do: they confronted the problems head-on and resolved to stop kicking the can down the road.

To that end, they held discussions about pension reform amongst themselves and with citizen groups—including the KEA and FOP—throughout 2017. [*See* Ex. 4, Tom Latek, *Work still being done in preparation for special session on pension crisis*, Kentucky Today (Sept. 15, 2017)]. These conscientious and diligent efforts to save the pension systems from insolvency ultimately led to the passage of SB 151.

SB 151 makes a number of much-needed reforms to Kentucky's public pension systems. *See* 2018 Ky. Acts ch. 107. Among its more important provisions are the following, divided according to the affected pension systems:

Reforms to KERS, CERS, and SPRS

- There are no changes for current retirees.
- For Tier I members who retire after July 1, 2023, service credit obtained for unused sick leave cannot be added to the member's service credit to determine whether the member is eligible to receive a retirement allowance or to reduce applicable actuarial penalties for early retirement. *Id.* at §§ 16-17.
- Tier I members hired on or after July 1, 2003 must contribute 1% of their creditable compensation to a fund for retiree health insurance. *Id.* at § 30.
- Level-dollar funding (analogous to a mortgage payment) over a 30-year amortization period is established to pay down the unfunded liabilities. Level-dollar funding is a more direct and fiscally-responsible method of paying down the unfunded liabilities than the current level-percent-of-payroll, which back-loads the payments on the assumption that state and county payrolls will increase over time. *Id.* § 18.

Reforms to KERS and CERS

- For Tier I non-hazardous members who retire after July 1, 2023, lump-sum payments for compensatory time upon termination of employment cannot be used to increase their average final compensation for the purpose of computing their retirement allowance. In other words,

members will not be able to spike their pensions with payments for compensatory time. *Id.* at §§ 14-15.

- Tier I members cannot use uniform, equipment, or any other expense allowances paid on or after January 1, 2019 to increase their average final compensation for the purpose of computing their retirement allowance. In other words, members will not be able to spike their pensions with the amounts paid to them for payments for uniform, equipment, or any other expense allowances. *Id.* at §§ 14-15.

- For Tier I non-hazardous members retiring on or after January 1, 2019, the determination of their highest five years of compensation must be based on five *complete* fiscal years. Likewise for Tier I hazardous members retiring after January 1, 2019, the determination of their highest three years of compensation must be based on three *complete* fiscal years. *Id.* at §§ 14-15.

Reforms to KTRS

- There are no changes for current retirees.

- All members hired on or after January 1, 2019 will have a hybrid cash balance plan, like Tier III members of KERS, CERS, and SPRS. *Id.* at § 43.

- For existing members, payment for unused sick days accrued as of December 31, 2018 can be used to increase their average final compensation for the purpose of computing their retirement allowance, but unused sick days accrued after that date cannot be so used. *Id.* at § 44.

- For existing members, only sick leave accrued as of December 31, 2018 can be converted into service credit. *Id.* at §74.

- Level-dollar funding (analogous to a mortgage payment) over a 30-year amortization period starting in 2021 is established to pay down the unfunded liabilities. As explained above, level-dollar funding is a more direct and fiscally-responsible method of paying down the unfunded liabilities than the current level-percent-of-payroll. *Id.* at § 63.

- A mandatory actuarially-required contribution is established for KTRS for the first time, thereby helping to ensure that adequate amounts will be appropriated to KTRS in future budgets. *Id.* at § 63.

Reforms to Legislators' Retirement Plan

- SB 151 removes salary reciprocity for non-legislative compensation earned on or after January 1, 2019. Thus, it ends the practice of legislators spiking their pensions by taking a higher paying job in another branch of government. *Id.* at § 4.

- The multiplier to be used in the retirement allowance formula is reduced from 2.75% to 1.97% for service accrued on or after January 1, 2019. *Id.* at § 3.

These reforms are significant accomplishments. By adopting level-dollar funding and moving all new KTRS members into a hybrid cash balance system, the reforms essentially ensure that Kentucky will stop digging its pension hole deeper and will actually start filling it in. Moreover, the new hybrid cash balance plan for KTRS members promises to provide them with better benefits than they would have received under the old pension plan. In fact, the Jefferson County Teachers Association ("JCTA") has publicly stated that the new hybrid cash balance plan has the potential to provide greater benefits than the old defined benefit plan. [Ex. 5, JCTA Analysis of SB 151]. In addition, the JCTA has also noted that mandating an actuarially required contribution to KTRS is a positive development, and that level-dollar funding will eliminate the unfunded liability faster than other funding methods. [*Id.*; *see also* Ex. 6, JCTA Facebook Post, April 15, 2018].

While the Jefferson County Teachers Association appears to be largely pleased with SB 151, at least one observer fears that the bill did not go far enough. Standard & Poor's recently downgraded the Commonwealth's bond rating from A+ to A due in large part to the Commonwealth's significant unfunded pension liability. [Standard & Poor's, Kentucky RatingsDirect Report, May 18, 2018, at 2 (hereinafter, "S&P

Report"), attached as Ex. A to Barrow Aff., Ex. 7]. While observing that the Commonwealth's 2018 pension reform gives it a stable outlook for the time being, the ratings agency expressed concern that these reforms did not go far enough to put the Commonwealth on solid financial ground. [*Id.* at 12]. It also expressed concerns about the effect of potential lawsuits—like this one—regarding the pension reform bill. [*Id.*].

Regardless, it is clear that Standard & Poor's views SB 151 as a positive development for the Commonwealth. [*See* Ex. 7, Barrow Aff.]. Its most recent ratings report refers to the reforms in SB 151 as "welcome" changes, and it notes that the Commonwealth's "stable outlook reflects Kentucky's enacted pension reform." [S&P Report at 6, 12]. Similarly, Moody's, another credit rating agency, recently reported that Kentucky's "credit benefits from recently enacted pension reforms . . . ." [Moody's Investors Service, Commonwealth of Kentucky Credit Opinion, May 1, 2018 at 1 (hereinafter, "Moody's Report"), attached as Ex. B to Barrow Aff., Ex. 7]. Moody's also observed that "Kentucky's recently enacted credit-positive pension reforms will reduce its exposure to investment performance and longevity risk across key funds." [*Id.* at 4]. But Moody's also expressed concern about this lawsuit, noting that "[t]he changes are being challenged by the state's attorney general, however, and may be overturned." [*Id.*].

This lawsuit does indeed threaten to halt the Commonwealth's forward momentum. SB 151 essentially saves the pension systems by ensuring that they will remain solvent, and it also provides teachers with benefits that are potentially more

generous than they would have obtained under the old plan. These are positive developments. And yet, the Attorney General, the KEA, and the FOP want to stop them for some reason. Their crusade against fiscal responsibility and improved retirement benefits is as mind-boggling as it is perilous. The Governor and the General Assembly are trying to *save* the pension systems, and the Plaintiffs—if they succeed here—will inexplicably be hastening the pension systems to their graves.

ARGUMENT

The Plaintiffs make two general kinds of arguments against SB 151: substantive arguments—*i.e.*, arguments that the law is invalid because it violates some substantive right guaranteed by the Constitution or a statute—and process-based arguments—*i.e.*, arguments that the law is invalid not because there is anything wrong with the law itself, but because the process used to pass it was wrong. The primary substantive argument is that SB 151 violates the so-called inviolable contract. This issue ultimately comes down to whether the Court follows the California Rule or the Prevailing Rule. As explained below, in Part I, the latter is the correct rule. And under that rule, SB 151 does not violate any rights under the inviolable contract.

The other substantive arguments raised against SB 151 are that it violates the Contracts Clause and Takings Clause of the Kentucky Constitution, as well as the constitutional prohibition against exercising arbitrary power. These arguments, addressed below in Parts II, III, and IV, are also unavailing.

Part V addresses the multitude of process-based arguments raised by the Plaintiffs. These arguments—most of which are not even justiciable—are just desperate attempts to get the courts to strike down a statute that the Plaintiffs simply do not like. This is not an appropriate role for the courts. Moreover, if the Court goes down this path, it will open a Pandora's Box of problems that could lead to the invalidation of nearly every law passed in Kentucky in the last century. Such absurdity should not be even be considered.

Finally, Part VI explains that the KEA and FOP have no standing and therefore should be dismissed as Plaintiffs.

I. SB 151 does not violate any contractual rights.

It is indisputable that SB 151 only affects public employees' ability to accrue certain pension benefits *in the future*. It *does not* take away or reduce any benefits they have already accrued. Accordingly, this Court must determine whether public employees have a right to future accruals of benefits, or whether they only have a right to benefits they have already accrued. There are two possible approaches to this issue, and they lead to opposite outcomes. If the Court goes against the great weight of authority and follows the California Rule—as urged by the Plaintiffs—then it will likely find that SB 151 violates contractual rights. Conversely, if the Court follows the Prevailing Rule, then it must find that SB 151 *does not* violate any contractual rights. Only one of these options is sensible, fiscally responsible, and legally justified. And it is not the California Rule.

A. The Court should not follow the California Rule.

California is not known for its sound public policy. The California Rule regarding pension rights is especially problematic—so much so that even California courts are starting to walk away from it. This Rule, which was created out of whole cloth by the California courts primarily during the second half of the twentieth century, provides that public employees have "a right to earn future [pension] benefits through continued service." *Legislature v. Eu*, 816 P.2d 1309, 1332 (Cal. 1991) (in bank). And not only do they have the *right* to continue accruing benefits in the future, but they also have the *right* to continue accruing benefits at no less than the rate at which they were permitted to accrue benefits when they were first hired. *See id.* at 1333. In other words, under the California Rule, when a public employee is hired, that employee has a locked-in right to continue accruing future pension benefits forever at no less than the accrual rate that was available to them on their first day of employment. Simply put, the California Rule denies public employers any flexibility when it comes to current employees' future pension accruals—they must be afforded the opportunity to accrue any and all benefits that were capable of being accrued when they were hired.

The California Rule has only been cited with approval by courts in a handful of states, and several of them subsequently repudiated the rule. *See* Amy B. Monahan, "Statutes as Contracts? The 'California Rule' and its Impact on Public Pension Reform," 97 Iowa L. Rev. 1029, 1071-73 (2012). Why? Because it is nonsensical, fiscally irresponsible, and legally unjustifiable.

It makes no sense to say that public employees have a right to future pension accruals. Taken to its logical extent, such a rule would mean that public employers could never terminate their employees or reduce their compensation. No reasonable person can dispute that terminating an employee completely ends the employee's ability to continue accruing pension benefits, nor can anyone reasonably dispute that reducing an employee's compensation reduces the rate at which the employee accrues pension benefits. Therefore, anyone who is being intellectually honest would have to admit that the California Rule—carried to its logical conclusion—would affect the ability to terminate employees or reduce their compensation. But, of course, no one takes issue with the ability to terminate public employees or reduce their compensation. This destroys any rationale for holding that there is a right to future accruals. "After all, if your employment can be terminated and your salary lowered prospectively, what is the basis for finding a right to future accruals?" *Id.* at 1077. There is none. And, tellingly, the California courts have never even attempted to provide one. Instead, "[t]hey simply treat it as a given." *Id.* Logic, however, says that it is anything but.

Moreover, a pension is a form of deferred compensation. *See, e.g., Brosick v. Brosick*, 974 S.W.2d 498, 504 (Ky. App. 1998). Thus, it is analogous to salary or wages, and should be treated the same way.[5] Indeed, as the Oregon Supreme Court has held, pension benefits are simply "another form of compensation." *Moro v. State of Oregon*, 351 P.3d 1, 20 (Or. 2015). "Whereas, for example, salary is compensation

[5] If pensions were not a form of compensation, they would likely constitute an emolument, and therefore be unconstitutional. *See* Ky. Const. § 3.

paid to the employee every two weeks or at the end of each month, a pension is compensation paid to the employee at retirement." *Id.* Therefore, since salary and wages can be reduced prospectively—meaning that there is no right to continue accruing them at the same rate in the future—it makes no sense to say that pension benefits cannot similarly be reduced on a prospective basis. In other words, since there is no right to continue accruing future salary or wages at the same rate, there is no logical—or legal—basis upon which to conclude that employees should have a right to continue accruing pension benefits at the same rate.

Guaranteeing a right to future accruals is also inefficient and irresponsible. It is absurd to suggest that a state legislature would provide employees with a specific set of unalterable pension benefits from the day they are hired. Doing so would encumber the state with obligations running as long as 70 or 80 years without any flexibility to take measures to protect the state from run-away costs. No state that cares about its future fiscal condition would put itself on the hook for such obligations; it would expose the state to far too much vulnerability and uncertainty.

In addition, it is not in the best interest of employees to guarantee a right to future accruals. This might seem counterintuitive at first glance, but it is true. If public employers cannot alter pensions on a prospective basis in order to preserve solvency, then they may have to accomplish that by terminating employees, reducing salaries and wages, or reducing fringe benefits like health insurance—or all three. *See* Monahan, 97 Iowa L. Rev. at 1079. These obviously are not desirable outcomes, and many employees may prefer to accept reduced future pension accruals in

exchange for preserving their jobs, or preserving their wage rate, or preserving affordable health insurance. The California Rule, however, would not allow such flexibility. *See id.*

The California Rule was initially influential and was adopted by several states, but it appears that only a handful of states still follow it. Why? Because nearly everyone recognizes that it is a disastrous rule. This is nowhere more evident than in California itself. California is experiencing crushing financial pressures stemming from its out-of-control public pensions. From 2002-03 to 2017-18, public employers' pension contributions in California increased by 400% on average. *See* Joe Nation, *Pension Math: Public Pension Spending and Service Crowd Out in California, 2003-2030*, Stanford Institute for Economic Policy Research at x (Oct. 2, 2017), available at https://siepr.stanford.edu/research/publications/pension-math-public-pension-spending-and-service-crowd-out-california-2003 (last visited May 23, 2018). For California public employers, "pension contributions now consume on average 11.4% of all operating expenditures, more than three times their 3.9% share in 2002-03." *Id.* And pension contributions are projected to increase by an additional 73% to 113% by 2029-30. *Id.* As a result, state and local governmental entities in California "have reduced social, welfare and educational services, as well as 'softer' services, including libraries, recreation, and community services. In some cases, governments have reduced total salaries paid . . . ." *Id.* xi. The bottom line is that "rising pension costs are making it harder to provide services traditionally considered part of government's core mission." *Id.* at 1.

These results are so disastrous that even the California courts are walking away from the California Rule. This is most clearly demonstrated in *Marin Association of Public Employees v. Marin County Employees' Retirement Association*, 206 Cal. Rptr. 3d 365 (Cal. App. 2016), where the court retreated significantly from the traditional California Rule in an apparent attempt to unwind some of the damage caused by the rule. *Marin Association* involved a challenge to the provision of the California Public Employees' Pension Reform Act of 2013, which attempted to eliminate pension spiking by prohibiting things like payments for unused sick leave from being counted as part of an employee's compensation when calculating the employee's pension benefit. The plaintiffs alleged that they had a contractual right to spike their pensions with such payments. *See id.* at 381. Thus, in the plaintiffs' view—and consistent with the holding in *Eu*—the state could not change pension spiking at all with regard to existing employees. *See id.*

In evaluating this claim, the court began by noting that "a pension is treated as a form of deferred salary that the employee earns prior to it being paid following retirement." *Id.* The court then noted that "pension rights are not immutable." *Id.* at 382. It further noted that "the government entity providing the pension may make reasonable modifications and changes in the pension system. This flexibility is necessary 'to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy.'" *Id.* (quoting *Miller v. State of California*, 557 P.2d 970 (Cal. 1977)). And the court then observed that while the legislature cannot destroy pension rights, it can modify them

because "[t]he right to modify inheres in the inalienable rights of government." *Id.* at 383.

Throughout the opinion, the court further found the ability to modify pension benefits to be a broad one, concluding that "there are acceptable changes aplenty that fall short of 'destroying' an employee's anticipated pension. 'Reasonable' modifications can encompass reductions in promised benefits. Or changes in the number of years [of] service required. Or a reasonable increase in the employee's contributions." *Id.* at 387-88 (citations omitted). Thus, the court concluded that a public employee "does not have a right to any fixed or definite benefits but only to a substantial or *reasonable* pension," and that "*reasonable* modifications and changes" may be made "before the pension becomes payable." *Id.* at 388. Applying this rule, the court found that the anti-spiking provisions in the law were valid because they were "quite modest" and "purely prospective." *Id.* at 390, 393.

The *Marin Association* holding is a far cry from the traditional California Rule—which guarantees public employees a right to future pension accruals at no less than the rate that was available to them when they were hired—and it demonstrates that even the California courts no longer believe in the soundness of the California Rule. If even California does not believe in the California Rule, why should Kentucky? Simply put, it should not. Rather, the Commonwealth should follow the rule that is presently prevailing among state and federal courts, referred to herein as the Prevailing Rule—*i.e.*, the rule that protects accrued pension benefits, but permits prospective changes.

B. The Court should follow the Prevailing Rule instead.

Given the disastrous results of the California Rule, it is no surprise that courts are rejecting it from coast to coast. Indeed, some states that had previously adopted it have now abandoned it. Significantly, it has been rejected in many states that have statutory protections for pension benefits that are similar to Kentucky's inviolable contract. And, perhaps even more significantly, the Prevailing Rule is more consistent with the manner in which Kentucky's statutory "inviolable contract" language has been treated throughout the years.

1. The Prevailing Rule is more consistent with Kentucky's past treatment of the inviolable contract.

There is little authority in Kentucky on how the term "inviolable contract" ought to be interpreted. But there is not a complete absence of authority, and the authority that exists supports the application of the Prevailing Rule instead of the California Rule.

In 1973, Kentucky's highest court addressed municipal employees' inviolable contract rights in *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky. 1973). At issue in that case was the plan to create the Lexington-Fayette Urban County Government and abolish the City of Lexington as a legal entity. One aspect of the plan was the creation of a combined retirement system that would include employees of both Fayette County and the old City of Lexington. A group of employees and retirees of the City of Lexington argued that the plan would impair their inviolable contract rights, which were provided by KRS 90.400. *See id.* at 478. Specifically, they contended that the creation of the new pension system would impair or dilute the value of contributions

they had made to their previous pension system. The court pointed out that there is never a guarantee that cities will remain in existence, and that once a city ceases to exist, employees have no right to continued employment. *See id.* at 479. By implication, this means that employees also have no right to future accrual of pension benefits once a city ceases to exist. The court then made it clear that the required protection for the city employees' pension rights was backward-looking protection focused on their accrued benefits, not forward-looking protection for future accruals. The court held:

> As concerns pension rights, it is of course true that the termination of the existence of the City of Lexington will not extinguish the assets of the pension funds, and those active or retired members of the pension systems by and for whom contributions were made will have vested rights in those assets. **But the continued existence of the pension system in its previous form and strictly in accordance with the previous statutes governing city pension systems is not essential to the protection of those vested rights.**

Id. (emphasis added). Thus, the court held that protection provided by the inviolable contract was the protection of already-accrued benefits, not future accruals.[6] This is plainly an application of the Prevailing Rule.

The Kentucky courts next had occasion to address inviolable contract rights in *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995). In *Jones*, the Board of Trustees of the Kentucky Retirement Systems sued the governor and several other officials because the 1992 budget bill did not fund the

[6] *Holsclaw* was later disapproved of on other grounds, pertaining solely to taxation, in *Jacobs v. Lexington-Fayette Urban County Government*, 560 S.W.2d 10, 14 (Ky. 1977). But *Holsclaw*'s holding on pensions has not been disapproved of or reversed.

state pensions at the level recommended by the Board. *See id.* at 712. In rejecting the Board's claims, the Kentucky Supreme Court made several observations that indicate the Prevailing Rule, rather than the California Rule, is the correct method of interpreting the inviolable contract. First, the court found that "[t]he contract between the Commonwealth and its employees is for retirement funding. It is not a contract which denies the General Assembly the ability to fashion its ways or means in providing pension funds." *Id.* at 713-14. Thus, the court acknowledged that changes to the pension systems are not prohibited by the inviolable contract. It reiterated this point in the very next sentence by adding, "[t]he appellees' argument that the retirement statutes forever removed legislative power to amend those statutes runs afoul of our holding in *Legislative Research Commission v. Brown*, 664 S.W.2d 907 (1984)." *Id.* at 714. Finally, the court held that "[a]t the simplest level, appellees have the right to the pension benefits they were promised as a result of their employment, at the level promised by the Commonwealth." *Id.* 715. This is perhaps the clearest indication that the Kentucky Supreme Court views pension rights through the lens of the Prevailing Rule rather than the California Rule. After all, the court did not hold that state employees are entitled to the pension benefits they were promised as a result of their employment *plus the pension benefits they expected to accrue as a result of their future employment*. The reference to employment, but not future employment, is significant. Moreover, it is striking that the court used the past tense in referring to promised benefits. Specifically, the court found that employees have a right to "the pension benefits they were promised," not

to the benefits that *are or will be promised if their employment continues in the future*. The Court's use of the past tense indicates that the inviolable contract is a backward-looking provision, protecting what has already been accrued—*i.e.*, what was promised—but not protecting future accruals.

The General Assembly's historical treatment of the inviolable contract also demonstrates that the Prevailing Rule is the correct rule. The General Assembly has made many changes to the public pension systems over the years, many of which have reduced plan members' benefits on a prospective basis. For example, KERS members were required to contribute 4% of their salaries to the pension system when the inviolable contract was created in 1974, *see* 1966 Ky. Acts ch. 35, § 5, but in 1986, the required contribution rate was raised to 5% going forward, *see* 1986 Ky. Acts ch. 293, § 4. Likewise, the General Assembly has increased the required contribution rate for KTRS members several times, raising it from 7.7% to 7.84% in 1979, then to 9.32% in 1984, and then 9.6% later that same year, and, finally, to 9.855% in 1988. *See* 1978 Ky. Acts ch. 152, § 8; 1982 Ky. Acts ch. 326, § 7; 1984 Ky. Acts ch. 253, § 15; 1988 Ky. Acts ch. 240, § 3. Requiring employees to pay more for their pension benefits undoubtedly affects the value of those benefits, but the General Assembly obviously did not see a problem with that.

In addition, on multiple occasions, the General Assembly has *completely repealed* a benefit that was available to KERS members under the inviolable contract. In 1988, the General Assembly offered a 10% service credit bonus to certain employees, but placed a sunset provision on that benefit. *See* KRS 61.596 (repealed

by 2000 Ky. Acts ch. 385, § 42). In other words, they made a benefit available for a limited time, and then made it completely unavailable from that point forward. The General Assembly clearly did not believe that once a benefit had been offered, it had to continue being offered so that employees could accrue it in the future.

Similarly, in 2000, the General Assembly repealed KRS 61.554, which had allowed LRC employees to purchase service credit after working six legislative bienniums. *See* 1990 Ky. Acts ch. 480, § 6 (repealed by 2000 Ky. Acts ch. 385, § 42). Eliminating this benefit would be a violation of the inviolable contract under the California Rule. The fact that it was repealed clearly indicates that the General Assembly does not intend the inviolable contract to be interpreted according to such a rule.

Finally, the Prevailing Rule is the only one that is consistent with the age old rule that one legislature cannot bind another. As the Kentucky Supreme Court held in *Jones*, the "argument that the retirement statutes forever removed legislative power to amend those statute runs afoul of our holding in *Legislative Research Commission v. Brown*, Ky., 664 S.W.2d 907 (1984)."

2. The Prevailing Rule is also in line with recent trends from other states, and is the only rule accepted under federal law.

Kentucky's pension crisis is the worst in the nation, but Kentucky is not the only state dealing with this issue. In response to crushing pension debt, state and municipal governments from coast to coast have undertaken pension reform efforts. In many instances, these efforts have led to litigation, just as SB 151 has here. And

the overriding theme coming out of those cases is that employees' accrued benefits cannot be reduced, but unaccrued benefits can be reduced prospectively because employees do not have a right to future accruals. That is, states are generally adopting the Prevailing Rule. As one commentator has observed, "[a] common theme can be seen emerging from the case law, no matter what the putative holding: employees have a right to pension benefits that they have already accrued, but not necessarily to the accrual of future benefits." Stuart Buck, "The Legal Ramifications of Public Pension Reform," 17 Tex. Rev. L. & Pol. 25, 57 (2012). Recent decisions in Florida, Wisconsin, Oregon, and Michigan all demonstrate the soundness of the Prevailing Rule, and Kentucky should follow these states' reasoning.

To begin, Florida's experience is illustrative. In response to rising budgetary pressures, the Florida legislature enacted pension reforms in 2011. In particular, the legislature "converted the Florida Retirement System (FRS) from noncontributory by employees to contributory, required all current FRS members to contribute 3% of their salaries to the retirement system, and eliminated the retirement cost-of-living adjustment for creditable service after the effective date of the act." *Scott v. Williams*, 107 So. 3d 379, 381 (Fla. 2013). FRS members sued, arguing that those reforms violated their contractual rights.

Florida law has a preservation of rights statute, which—much like Kentucky's statutory inviolable contract—provides that "the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable

as valid contract rights and shall not be abridged in any way." *Id.* at 383 (quoting Fla. Stat. § 121.011(3)(d)). The Florida Supreme Court rejected the plaintiffs' argument that the reforms violated this provision. In doing so, it clearly rejected the California Rule and followed the Prevailing Rule.

The plaintiffs argued that the reforms should be evaluated under the California Rule:

> It is contended, without dispute, that even though the actual changes in the plan occur at a future date, the changes diminish the total expected retirement benefits that could have accrued over the entire projected life of a member's employment who continue their employment after the amendments. Thus, the challengers contend, the rights to a noncontributory plan and to a continuing COLA were part of the contract established under section 121.011, Florida Statutes (1974), as it has been continually enacted, and are rights to be honored over the life of their employment with the State.

Id. at 386. The Florida Supreme Court gave this argument short shrift. It concluded "that the preservation of rights statute was enacted to give contractual protection to those retirement benefits already earned as of the date of any amendments to the plan." *Id.* at 388. The court further stated that "the preservation of rights statute was not intended to bind future legislatures from prospectively altering benefits for future service performed by all members of the FRS," and that the reforms at issue were valid because they were "prospective changes within the authority of the Legislature to make." *Id.* at 389. The court arrived at this holding based on the following key observations:

> [T]he rights provision was not intended to bind future legislatures from prospectively altering benefits which accrue for future state service. To hold otherwise would

> mean that no future legislature could in any way alter future benefits of active employees for future services, except in a manner favorable to the employee. *This view would, in effect, impose on the state the permanent responsibility for maintaining a retirement plan which could never be amended or repealed irrespective of the fiscal condition of this state*. Such a decision could lead to fiscal irresponsibility. It would also impose on state employees an inflexible plan which would prohibit the legislature from modifying the plan in a way that would be beneficial to a majority of employees, but would not be beneficial to a minority.

Id. at 388 (quoting *Florida Sheriffs Ass'n v. Dept. of Admin.*, 408 So. 2d 1033, 1037 (Fla. 1981)). Thus, Florida has unequivocally rejected the California Rule and adopted the Prevailing Rule allowing prospective changes to pensions while protecting already-accrued benefits.

The Wisconsin Supreme Court applied the same reasoning and reached the same result in *Stoker v. Milwaukee County*, 857 N.W.2d 102 (Wis. 2014). In Wisconsin, counties with a population of 500,000 or more are required by state statute to provide pension plans for their employees. *See id.* at 104 (Wis. 2014) (citing Ch. 201, Wis. Laws of 1937). Wisconsin law provides—much like Kentucky's inviolable contract—that those pension benefits "shall not be diminished or impaired by subsequent legislation or by any other means without [members'] consent." *Id.* at 105 (quoting Ch. 138, Wis. Laws of 1945). Under another statute, counties can make changes to their pension systems when necessary, but "no such change shall operate to diminish or impair the annuities, benefits or other rights of any person who is a members of [the pension system] prior to the effective date of any such change." *Id.* at 106 (quoting § 1, ch. 405, Wis. Laws of 1965). Acting pursuant to these laws,

Milwaukee County created a pension system for its employees. Its pension system "calculates pension payments for its retired employees by multiplying a retiree's final average salary by a certain percentage known as a multiplier, and the resulting number is then multiplied by the retiree's total years of county service." *Id.* at 103.[7] In 2000, Milwaukee County raised its "multiplier from 1.5% to 2% for service rendered on and after January 1, 2001." *Id.* (citing Milwaukee Cnty., Wis. Gen. Ordinance § 201.24(5.15)(1)(a) (2000)). Subsequently, Milwaukee County "reduced the multiplier from 2% to 1.6% for all county service performed on and after January 1, 2012." *Id.* at 104 (citing Milwaukee Cnty., Wis. Gen. Ordinance § 201.24(5.1)(2)(f) (2011). The 2% multiplier continued to apply to service rendered from 2001 through 2011. Nevertheless, employees sued on the ground that their rights had been impaired because they had a right to continue accruing future benefits with a 2% multiplier. *See id.* The Wisconsin Supreme Court rejected this argument, firmly adopting the Prevailing Rule.

The plaintiffs in *Stoker* essentially argued that Wisconsin should follow the California Rule, *see id.* at 109, but the Wisconsin Supreme Court firmly rejected that argument. Indeed, it found that adopting a rule that prohibits prospective changes to pensions would lead to "absurd results." *Id.* The court concluded that "[b]ecause the multiplier is 'a form of deferred compensation that is earned as the work is performed,' it 'can be changed, but only as it is related to work not yet performed.'" *Id.* at 113 (quoting *Champine v. Milwaukee Cnty.*, 696 N.W.2d 245 (Wis. App. 2005)).

[7] This is essentially the same formula used to calculate pension payments in Kentucky's pension systems. *See* KRS 61.595.

The court also noted that its "conclusion that Milwaukee County may prospectively modify benefits before they vest is consistent with the anti-cutback rule of the Employee Retirement Income Security Act ("ERISA") of 1974. The anti-cutback rule allows employers subject to ERISA to modify benefits with respect to future service because those benefits have not yet accrued." *Id.* (citing *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 747 (2004)). Thus, in light of these considerations, the court held that reducing the multiplier "did not breach [the plaintiffs'] contractual right to retirement system benefits earned and vested because it had prospective-only application to future service credits not yet earned." *Id.* at 116.

Also instructive is the Oregon Supreme Court's decision in *Moro v. State of Oregon*, 351 P.3d 1 (Or. 2015). Oregon had previously adopted the California Rule in *Oregon State Police Officers' Association v. State of Oregon*, 918 P.2d 765, 773 (Or. 1996), where the court held that public employees' pension benefits "vest on acceptance of employment or after a probationary period, with vesting encompassing not only work performed but also work that has not yet begun." But the Oregon Supreme Court abrogated this holding in *Moro*, abandoning the California Rule in favor of the Prevailing Rule. *See Moro*, 351 P.3d at 37.

At issue in *Moro* was a pension reform bill that reduced the cost-of-living adjustment applied to benefits received under the Oregon Public Employee Retirement System. *See id.* at 7. The ultimate issue, as in the cases discussed above, was whether the state was required to allow employees to continue accruing the COLA benefit in the future at the pre-reform rate, or whether it could reduce that

benefit prospectively. *See id.* at 33-34. The court concluded that employees had "a contractual right to receive the pre-amendment COLA for benefits that they earned *before* the effective dates of the amendments—that is, benefits that are generally attributable to work performed before the amendments went into effect," *id.* at 8, but that employees had "no contractual right to receive the pre-amendment COLA for benefits that they earned *on or after* the effective dates of the amendments—that is, benefits that are generally attributable to work performed after the amendments went into effect," *id.* The court acknowledged its previous holding in *Oregon State Police Officers' Association*, *id.* at 34-35, but abrogated it, rejecting the position that pension benefits "cannot be changed prospectively," *id.* at 35. The court found that "[t]he PERS contract binds a participating employer to compensate a member for only the work that the member has rendered and based on only the terms offered at the time the work was rendered . . . ." *Id.* at 23. Accordingly, the court held that the legislature cannot change benefits "that have already accrued," but is well within its rights to change "benefits that might accrue in the future." *Id.* at 37.

Finally, Michigan is also among the recent deluge of states adopting the Prevailing Rule rather than the California Rule. In 2010, the Michigan legislature modified pension benefits for current public school employees in response to a budget shortfall in the state public school system. *AFT Mich. v. State of Michigan*, 866 N.W.2d 782, 786 (Mich. 2015). Among other things, the pension reform legislation "required all current public school employees to contribute 3% of their salaries to the MPSERS [Michigan Public School Employees' Retirement System] to assist in

funding retiree healthcare benefits for current and future public school retirees." *Id.* Prior to the 2010 reforms "public school employees had never been required to pay for these benefits." *Id.* A group of labor unions representing public school employees sued, arguing—among other things—that the legislation violated their members' contractual rights to pension benefits.

While the litigation over the 2010 reforms was pending, the legislature passed another pension reform bill in 2012. The 2012 bill made changes to the 2010 retiree healthcare provisions—such as allowing employees to avoid paying the 3% contribution if they wanted to opt out of retiree healthcare benefits—and also increased the amount that employees were required to contribute to the pension system. *See id.* at 787-88. The unions challenged the 2012 reforms as well, but the Michigan Supreme Court upheld those reforms. Although the unions argued that the reforms violated their members' contract rights with respect to their pension benefits, the Michigan Supreme Court rejected this argument on the ground that public employees had no contractual rights to future pension benefits. *See id.* at 806. Articulating the Prevailing Rule, the court stated that "[a]lthough public school employees have no contractual right to accrue future pension benefits, they do possess a contractual right to receive the pension benefits they have already earned." *Id.* at 808 n.26.

Federal courts also apply the Prevailing Rule instead of the California Rule. For example, in *Van Houten v. City of Fort Worth*, 827 F.3d 530 (5th Cir. 2016), the Fifth Circuit considered whether changes to Fort Worth's pension plan violated Texas

law. Prior to the changes, Fort Worth provided retirees with a pension equal to the average of their three highest annual salaries multiplied by their years of service and then subjected to a 3% multiplier. *See id.* at 533. The changes reduced the multiplier to 2.5%, changed the "high three" factor to a "high five" factor, and changed the cost-of-living adjustment. Employees challenged the reforms, but the Fifth Circuit turned away their challenge. It concluded that "[i]f the changes to the pension plan impact only benefits that have not yet accrued, amendment is permissible. *Id.* at 538. And since the reforms at issue were prospective only, they did not violate the employees' rights. *See id.* at 538-39.

The trend established by all these cases is clear: courts across the country recognize that the appropriate rule for evaluating changes to public pension plans is not the California Rule, but the Prevailing Rule—*i.e.*, the rule that says accrued benefits must be protected, but unaccrued future benefits can be changed or reduced. This rule is legally correct, sensible, fiscally responsible, and consistent with Kentucky law. Therefore, this court should join the overwhelming chorus of states that are following it.

C. Under the Prevailing Rule, none of the challenged provisions of SB 151 are invalid since they all apply to prospective, unaccrued benefits.

All of the challenged provisions in SB 151 are purely prospective in their effect on pension benefits. Not one of those changes affects inviolable contract benefits that members of the pension systems have already accrued. Instead, the changes only affect unaccrued future benefits. The Plaintiffs have not even attempted to

demonstrate otherwise, and, in fact, they are incapable of doing so. There is simply no credible argument that SB 151 reduces any accrued benefits that are protected by the inviolable contract. As a result, under the Prevailing Rule, the Court must find that the challenged portions of SB 151 are valid and not in violation of the inviolable contract.

The Plaintiffs have challenged seven particular benefit changes made by SB 151. The following briefly recaps each challenge and explains why each one is prospective, and therefore permissible under the Prevailing Rule:

1. The challenge to § 74 of the bill, which amends KRS 161.623 to limit the number of sick days that KTRS members can accrue after December 31, 2018 for the purpose of enhancing their service credit –

    - Section 74 of the bill does nothing more than limit the ability of KTRS members to accrue sick days *in the future* that can be exchanged for service credit when they retire. Without the amendment, the benefit would not even accrue until the occurrence of two future contingencies: (1) the employee retires, and (2) the employee has unused sick days at that point. The change in § 74 does not, in any way, affect current accrued benefits.

2. The challenge to the portions of § 14 and § 15 of the bill that amend KRS 61.510 and 78.510 to exclude lump-sum payments of compensatory time from the calculation of creditable compensation for employees retiring after July 1, 2023 –

    - Sections 14 and 15 eliminate the ability to use unused compensatory time to increase an employee's creditable compensation at retirement. As with the exchange of sick days for service credit, an employee does not accrue this benefit until: (1) the employee retires, and (2) the employee has unused compensatory time at the point of retirement. Accordingly, these changes only affect benefits that might accrue in the future, if at all. *Cf. Cinotto v. Delta Airlines, Inc.*, 674 F.3d 1285, 1296-97 (11th Cir. 2012) (holding that defendant was not required to allow employee to take advantage of increased retirement benefit for employees who continued working past the age of 52 when that benefit was terminated prospectively before the plaintiff reached that age).

3. The challenge to the portions of § 14 and § 15 of the bill that amend KRS 61.510 and 78.510 to exclude uniform and equipment allowances paid after January 1, 2019 from the calculation of creditable compensation –

    - This change only affects how money received *in the future* will be counted in determining employees' retirement allowances when they retire *in the future*. To say that this is a purely prospective change is to state the obvious.

4. The challenge to § 16 and § 17 of the bill, which amend KRS 61.546, KRS 78.616, and KRS 16.645 to prohibit the use of sick leave credit to determine retirement eligibility for Tier I KERS, CERS, and SPRS members retiring after July 1, 2023 –

    - This change, like the other changes to sick leave and compensatory time, only affects benefits that might accrue *in the future*. The right to use unused sick leave to determine retirement eligibility cannot accrue until an employee who is not otherwise eligible for retirement accumulates enough unused sick leave to then become eligible for retirement. These are contingent *future events*. If an employee has presently accrued this right and wants to enforce it, the employee can do so. If an employee has not presently accrued this right, then eliminating the ability to accrue it in the future is obviously not an impairment of an accrued benefit.

5. The challenge to § 30 of the bill, which amends KRS 61.702(2)(b), KRS 78.545, and KRS 16.645 to require a 1% deduction of the creditable compensation for Tier I KERS, CERS, and SPRS members hired after July 1, 2003 for the purpose of funding providing retiree health insurance –

    - The obvious answer to this challenge is that retiree health benefits are expressly excluded from the terms of the inviolable contract for employees hired after July 1, 2003. *See* KRS 61.702(8)(e). In addition, § 30 simply raises the employee contribution rate, which the General Assembly has done many times throughout the history of the public pension systems.

6. The challenge to the portions of § 14 and § 15 of the bill that amend KRS 61.510 and 78.510 to make clear that, for retirements occurring after January 1, 2019, the calculation of Tier I members' "high three" and "high five" must be based on three and five complete fiscal years, respectively –

    - As an initial matter, it is important to note that the Plaintiffs are making a facial challenge to SB 151. Thus, they must establish that there are no circumstances under which the bill can be valid. They clearly have not done so here. Even if one were to assume for the

sake of argument that it might reduce some employees' benefits to change "high three" and "high five" to mean three and five complete fiscal years—and there actually is no evidence that would permit such an assumption—one could not assume that it would necessarily reduce employees' benefits in *all instances*. There may be employees who retire on January 2, 2019 using a "high five" made up of five complete fiscal years who would have received exactly the same retirement allowance if it had been calculated using a "high five" made up of the previous 49 months. The Plaintiffs have offered no evidence on this point even though it is their burden to prove invalidity. Regardless, the amendment at issue does not impair employees' accrued contractual rights. The changes to "high three" and "high five" only take effect *in the future*—that is, for retirements after January 1, 2019. Anyone who has already accrued the right to retire with the old "high three" and "high five" calculation is free to do so until January 1, 2019. Anyone who has accrued that right but does not desire to use it prior to that date obviously has no grounds on which to complain. More to the point, if such individuals ultimately retire and receive a retirement allowance that is at least as large as what they would have received had they retired before January 1, 2019, then their pension benefits obviously have not been reduced by the new "high three" and "high five" calculation. *See, e.g., Cinotto*, 674 F.3d at 1296-97.

7. The challenge to § 19 of the bill, which amends KRS 61.597 and KRS 78.545 to reduce the guaranteed interest credit for any KERS or CERS Tier I and Tier II members who opted into the hybrid cash balance plan in 2014 –

    - The obvious problem with this challenge is that there is not a single Tier I or Tier II member who opted into the hybrid cash balance plan. [*See* Ex. 8, Surratt Aff.]. Indeed, the opportunity to opt into the plan was never even offered to Tier I and Tier II members because the statute provided that opting into the plan was contingent on the retirement systems' receipt of a private letter ruling from the IRS, and such a private letter ruling was never even sought. *See* KRS 61.5955(6). Given that no Tier I or Tier II members ever opted into the hybrid cash balance plan, it is clear that no Tier I or Tier II members' rights are affected by the reduction in the guaranteed return for that plan. Moreover, the statute provided that if any Tier I or Tier II members ever opted into the hybrid cash balance plan, they would do so "in lieu of the benefits he or she is currently eligible to receive from the systems." KRS 61.5955(1). Thus, even if there were opt-ins—which there are not—they would have waived their inviolable contract rights upon opting in.

II. SB 151 does not impair any contractual rights, but even if it did, it would not violate the Contracts Clause of the Kentucky Constitution.

The Plaintiffs contend that SB 151 violates public employees' contractual rights, and therefore also violates the Contracts Clause of Section 19 of the Kentucky Constitution. First, as explained above, SB 151 does not violate any contractual rights. Second, even if it did violate contractual rights, it would not be in violation of the Contracts Clause, and therefore would still be valid.

Section 19 of the Kentucky Constitution provides that the General Assembly may not enact any law "impairing the obligation of contracts." Ky Const. § 19. This provision, which mirrors its federal counterpart, "is not an absolute bar to subsequent modification of a State's own financial obligations." *See U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25 (1977). A legislature "cannot bargain away the police power of a State," and "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *Id.* at 23. For this reason, courts universally hold that a state runs afoul of the Contracts Clause only if it *substantially* impairs the contract at issue. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 ("[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."); *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353 (D. Md. 1984). And even then, "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust Co.*, 431 U.S. at 25.

SB 151 does not breach the inviolable contract, but even if it did, the changes do not constitute a "substantial impairment." More importantly, the changes in SB

151—along with other legislation passed by the General Assembly—were reasonable and necessary to allow the Commonwealth to begin to undo decades of structural deficiencies and underfunding that have put the state retirement systems into jeopardy.

A. None of the changes created by SB 151 constitute a "substantial impairment" of the inviolable contract.

When applying the Contracts Clause, "the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.*, 438 U.S. at 244. The Plaintiffs skip right past this step. They contend that *any* impairment is a substantial impairment, rendering the analysis a completely perfunctory exercise. [Pls.' Br. at 38-44]. But this threshold question is critical because "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." *Id.* at 245. "Minimal alteration of contractual obligations may end the inquiry at its first state." *Id.* It is insufficient, in other words, to demonstrate only that the state impaired a contract. *Substantial* impairment is required.

The Plaintiffs challenge seven changes made to Kentucky's retirement systems in SB 151. In short, the Plaintiffs contend that these changes constitute substantial impairments of the inviolable contract:

- Amending KRS 161.623 to limit the number of sick days that KTRS members can use to enhance the service credit calculation to days accumulated up through December 31, 2018.
- Amending KRS 61.510 and 78.510 to exclude lump-sum payments of compensatory time from the calculation of creditable compensation for employees retiring after July 1, 2023.

- Amending KRS 61.510 and 78.510 to exclude uniform and equipment allowances paid after January 1, 2019 from the calculation of creditable compensation.

- Amending KRS 61.546, KRS 78.616, KRS and 16.645 to prohibit the use of sick leave credit to determine retirement eligibility for Tier I KERS, CERS, and SPRS members retiring after July 1, 2023.

- Amending KRS 61.702(2)(b), KRS 78.545, and KRS 16.645 to require a 1% deduction of the creditable compensation for Tier I KERS, CERS, and SPRS members hired after July 1, 2003 for the purpose of funding providing retiree health insurance.

- Amending KRS 61.510 and 78.510 to make clear that the calculation of Tier I members' "high three" and "high five" must be based on three and five complete fiscal years, respectively.

- Amending KRS 61.597 and KRS 78.545 to alter the guaranteed interest credit for any KERS or CERS Tier I and Tier II members that opted into the hybrid cash balance plan in 2014.

None of these marginal changes are substantial, and the Plaintiffs' motion fails to prove otherwise.

The substantial impairments that the Plaintiffs allege have no factual basis whatsoever. For example, the Plaintiffs contend that SB 151 violates the inviolable contract by limiting the use of accrued sick days to calculate service credit under KRS 161.623 for KTRS members after December 31, 2018. What the Plaintiffs' brief fails to mention is that this change has no practical effect on any public school teacher or local school board employee in Kentucky. There are not any public school employees who are even eligible for service credit under KRS 161.623. [Ex. 9, Harbin Aff.]. The right to receive service credit for sick days under KRS 161.623 is not granted to individual employees. Instead, participating school districts must choose to offer the benefit to their employees. *See* KRS 161.623(2). But members receiving service credit

for sick days cannot also receive compensation under the salary-spiking provision of KRS 161.155(10), which often provides more lucrative benefits. Every public school district has therefore chosen not to offer service credit under KRS 161.623. The Plaintiffs, in other words, contend that the limit on sick leave accrual for service credit is a substantial impairment of the inviolable contract *even though no current public school teachers are eligible for this benefit anyway*. Whatever the definition of substantial is, it certainly is not this. Furthermore, the fact that KRS 161.623 gives local school districts the *option* of allowing their teachers to use unused sick days for service credit underscores that teachers have *no contractual right* to such service credit. How can teachers have a contractual right in something that their school district employers can decide to give, or not give, them? Simply put, they cannot.

The remaining alleged substantial impairments that the Plaintiffs identify similarly suffer from a lack of factual support. In fact, the Plaintiffs make almost no effort to provide any real evidence about the effect of the changes in SB 151.[8] Instead, their brief contains one unsupported allegation after another. When discussing the changes to sick leave, for example, the Plaintiffs' cite an article from a newsletter written in 2001 to support their claim that the change "has clear and material costs."

[8] The only "evidence" the Plaintiffs rely on to prove many of their factual assertions regarding the effect of SB 151 on state workers is an article from a newsletter that was written in 2001—almost twenty years ago. The article is written by an unknown author with unknown credentials who cites to unverified facts to conclude that state workers could accumulate $16,500 worth of sick leave over a lifetime of employment. The assertions made in the article are not even within the realm of admissible or competent evidence, and for this reason should be excluded from consideration by the Court. *See Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992) (rejecting a party's attempt to rely wholly on inadmissible evidence "to support a motion for summary judgment"); *James v. Wilson*, 95 S.W.3d 875, 898 (Ky. App. 2002) ("'Evidence' necessarily implies evidence that would be admissible at trial."); CR 56.01 & 56.05.

But the article itself contains only back-of-the-envelope calculations about the value of sick leave. There is no data about the number of employees eligible to use this benefit after 2023; no data on the total value of the benefit for actual employees eligible to use it. There is no actual evidence supporting the claim that the change "has clear and material costs"—nor could there be, given that the Plaintiffs successfully persuaded this Court to stay discovery before it ever began.

Likewise, the Plaintiffs object to the change in interest credits for Tier I and Tier II members who opted into the hybrid cash balance plan in 2014. But, again, if the Court had allowed discovery on this issue, the Plaintiffs might know that there is not one Tier I or Tier II member who opted into the hybrid cash balance plan. [Ex. 8, Surratt Aff.]. Just as with the change to KRS 161.623, this change does not affect any of the people the Plaintiffs claim to represent. It cannot be a substantial impairment—it impairs no one's rights.

The lack of seriousness underpining the Plaintiffs' allegations continues as they discuss other changes in SB 151. The Plaintiffs throw out allegations about "average life expectancy" with no factual support. [Pls.' Br. at 42]. They contend that a recession "could cost the member [of a hybrid cash balance plan] their entire retirement," but rely only on a general citation to the KRS Comprehensive Annual Financial Report that in no way supports their claim.[9] [*Id.* at 43]. The record does not support any of the Plaintiffs' claims about the effects of SB 151 on public

[9] Nor could it because the hybrid cash balance plans under SB 151 still protect any participating members from market losses.

employees' benefits, yet they insist that this Court must find that each and every change amounts to a substantial impairment.

Even when the Plaintiffs do provide financial information for the Court (which, again, no party could probe or test through the ordinary discovery process), the largest number they can come up with is a reduction of 5.5% for some members' creditable compensation.[10] They contend that the limitation on expense allowances for uniform and equipment could amount to 5.5% reduction in creditable compensation for some employees. These numbers purportedly are based on an average salary (that the Plaintiffs provide with no supporting documents), along with a one-page excerpt from a collective bargaining agreement. Assuming that the numbers are accurate, which the Defendants have no way to verify without discovery, the worst case scenario is a 5.5% reduction in creditable compensation. In other words, this is not a case in which the General Assembly is cutting benefits in half or suspending payments altogether—actions that might certainly be substantial. While a 5.5% reduction in benefits would make anyone uncomfortable, these changes are not retroactively reducing the retirement benefits of employees or already-retired members. The changes are *prospective* and only affect employees who have not yet left the workforce. If a 5.5% reduction in prospective benefits that have not even accrued is considered "substantial," this Court might as well throw out the requirement of "substantiality" altogether because no change will ever survive that standard. The Plaintiffs cannot demonstrate a substantial impairment—not even

[10] This is the highest number the Plaintiffs could come up with. Some members might only have a 1% deduction to pay for their health insurance, while most will see no change at all.

with their many unsubstantiated factual allegations—and their claim must be dismissed.

B. The changes in SB 151 are reasonable and necessary to save Kentucky's ailing pension system and make it solvent for current and future retirees.

Finally, if the Court were to find that SB 151 did substantially impair the inviolable contract, the impairments are nonetheless justified because they are reasonable and necessary to serve an important public purpose: ensuring the solvency of Kentucky's retirement systems and guaranteeing the state's current and future retirees will receive retirement benefits through their lifetime. It is difficult to imagine a greater public purpose than the preservation of the state's retirement system, and the changes in SB 151 along with related legislation from the 2018 Regular Session ensure just that.

Kentucky's pension fund is the most underfunded in the nation. [*See* PFM Report #2 at 2; *see also* S&P 2016 Report]. The structural problems built into the system have caused an unfunded liability of somewhere between $33 billion and $84 billion. [*See* PFM Report #2]. And these problems were not primarily caused by chronic underfunding. One recent report indicated that underfunding by the General Assembly over the last decade caused only 15% of the total deficit, and that structural problems contributed to the remaining 85%. [*Id.* at 5]. The system, in other words, is broken. KERS non-hazardous has had a negative cash flow every year since at least 2002, and "[o]ver the longer-term, such negative cash flows can ultimately threaten the insolvency of the plan." [*Id.* at 6]. Legislators in the past wrote checks

that we simply cannot continue to cash today, but the 2018 General Assembly recognized the dire situation our public employees face.

A substantial impairment remains constitutional if it "is reasonable and necessary to serve a legitimate and important public purpose." *Jones*, 910 S.W.2d at 717. "[A] State is not free to impose a drastic impairment" to solve a public crisis, but minimal impairments to resolve serious problems will survive scrutiny under the Contracts Clause. *See Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1370–71 (D. Md. 1984) (quoting *United States Trust Co.*, 431 U.S. at 31). And while "complete deference to a legislative assessment of reasonableness and necessity is not appropriate" with respect to a financial obligation of the state, "pension reform, unlike the area of municipal bonds," is not "purely financial" because of the many layers of issues at play. *Id.* (quoting *U.S. Trust Co.*, 431 U.S. at 25–26). For this reason, "once the facts are brought to light the court should not act as a super legislature and attempt to second guess which legislative act would have better solved the perceived problem." *Id.* at 1371. "The legislature has the responsibility and the discretion to act on the facts and information at its disposal." *Id.*

The Plaintiffs' sole basis for denying that the changes in SB 151 are reasonable and necessary is their contention that the General Assembly "openly refused to consider any additional revenue measures to address pension obligations." [Pls. Br. at 45]. The Attorney General, KEA, and FOP strongly favor a big tax increase. They cite several bills they contend would have provided the revenue necessary to solve a sixty-billion-dollar problem. But of course, they provide no actuarial analysis, no

expert report, *no facts whatsoever* to show that the General Assembly had a viable option to fund the pension problem and chose to ignore it. Like with their other claims, the Plaintiffs ask the Court to just take their word for it and declare the pension-reform bill unconstitutional on its face.

The Plaintiffs' lack of supporting evidence alone means that summary judgment is inappropriate. The Court ordered a stay of discovery after the Governor sought to conduct reasonable, limited depositions related to the material facts asserted in the Plaintiffs' Verified Complaint. The Court held there are "no disputed issues of material fact" that are "materially relevant to the constitutionality of the challenged legislation." [May 8, 2018 Order]. Yet the Plaintiffs are seeking summary judgment based on unsubstantiated factual claims, such as their contention that "SB 151 fails because funding the retirement systems in full is possible, and will eliminate any shortfall." *There is not a single document in the record even purporting to support this claim*, and the Court refused the Governor's reasonable request for discovery on these issues.

But even in the face of the Plaintiffs' many, unsupported factual claims, there is no disputing that SB 151 survives the challenge under the Contracts Clause because it is reasonable and necessary step to protect the public interest. This case bears a strong resemblance to *Hughes*, the landmark case from Maryland upholding the legislature's reasonable modifications to its failing pension system in the early 1980s. As here, many publicly available reports showed the dire situation for Maryland's retirement system. *Hughes*, 594 F. Supp. at 1368–1369; [PFM Report

#2]. The Court reviewed the evidence in the record and found the marginal changes to the state's pension system, such as limiting the employees' cost-of-living adjustments, were reasonable and necessary to address the problem:

> The 1984 Act was a reasonable response to an important public concern. It addressed the perceived cause of the problem, the unlimited COLA, and did so with little or no impairment to State employees or teachers. "The extent of impairment is certainly a relevant factor in determining reasonableness." This court has found the impairment to be minimal at worst.

Hughes, 594 F. Supp. At 1370 (citing *U.S. Trust Co.*, 431 U.S. at 27); *see also Buffalo Teachers Federation v. Tobe*, 464 F.3d 362 (2d Cir. 2012) (finding a wage freeze reasonable because it was "relatively minimal" and only operated prospectively); *Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO v. Mayor and City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1999). The Contracts Clause is not a straightjacket, preventing reasonable action while the ship sinks. Maryland acted reasonably, and so has Kentucky. For this reason, SB 151 must be upheld.

Just as in Maryland, public reports released in Kentucky showed that a lack of funding alone was not the cause of the unfunded pension liability and that 85% of the problem was created by structural deficiencies with the system. [PFM Report at 5]. This means that, contrary to the Plaintiffs unsubstantiated assertions otherwise, funding alone cannot solve the problem. The General Assembly understood this, which is why it implemented small structural changes in addition to providing record-level funding in the 2018–2020 biennium budget.

The Plaintiffs are simply wrong in arguing that SB 151 was unreasonable because the General Assembly did not pass one of the handfuls of bills that the Plaintiffs believe would provide additional revenue. [Pla's Mot at 46]. "[I]t is always the case that to meet a fiscal emergency taxes conceivably could be raised." *Buffalo Teachers Federation*, 464 F.3d at 372 ("[W]e find no need to second-guess the wisdom of picking the wage freeze over other policy alternatives, especially those that appear more Draconian, such as further layoffs or elimination of essential services."); *Baltimore Teachers Union*, 6 F.3d at 1020 (finding it insufficient to argue that the city "*could have* raised taxes" because "these courses are always open, no matter how unwise they may be"). Not only do the Plaintiffs fail to provide any actuarial analysis of those bills, they ignore that the General Assembly passed SB 151 along with unprecedented increases in funding for the pensions. The General Assembly did not simply cut benefits with SB 151; it mandated full contributions and funded the pensions at levels much higher than any legislature ever had before. The Plaintiffs obviously would have preferred difference policy decisions, and they want this Court to overrule the General Assembly and implement the Plaintiffs' preferred policies—or at least prevent their disfavored policies from taking effect. But that is not an appropriate role for a Court.

The Plaintiffs also ignore that the General Assembly passed SB 151 *to rescue* the pension system from insolvency. SB 151 protects the pensions of the public employees the Plaintiffs claim to represent. In *U.S. Trust Co.*, the United States Supreme Court explained that a state's impairment of a contract is reasonable when

doing so is necessary to save the underlying obligation. *U.S. Trust Co.*, 431 U.S. at 25, 29-31. The issue in *U.S. Trust Co.* was whether New York and New Jersey could repudiate their contracts with a group of bondholders for the public purpose of promoting mass transportation, energy conservation, and environmental protection. *Id*. at 28-29. The Supreme Court acknowledged that such goals are "important and of legitimate public concern," but still found that they were insufficient to justify impairing the states' contracts. To reach this holding, the Supreme Court distinguished it from a prior case that upheld an impairment of bond contracts. *Id.* at 28 (citing *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942)). That case, the Supreme Court explained, was different because the contractual impairments were necessary to save the underlying obligation. *Id*. Or as the Supreme Court stated, "as a practical matter the city could not raise its taxes enough to pay off its creditors under the old contract terms. The composition plan enabled the city to meet its financial obligations more effectively." *Id.* The effect was that, although the city's actions technically impaired its contracts, it did so "with the purpose and effect of protecting the creditors." *Id.*

The same is true here. The General Assembly passed SB 151 to protect the benefits for current and retired public employees. The law makes marginal changes to the system to save the vast majority of the benefits promised. Such changes are axiomatically reasonable and necessary for the public good, and this Court should find as much and uphold the validity of SB 151.

III. SB 151 also does not violate the Takings Clause of the Kentucky Constitution.

The Plaintiffs contend that SB 151 violates the Takings Clause in Section 13 of the Kentucky Constitution because "it deprives Kentucky's public employees of their contractual property rights in their retirement benefits without just compensation."[11] [Pls. Br. at 47]. Essentially, the Plaintiffs argue that they have a property right in benefits that have not yet accrued—benefits that do not exist and might never exist—and that any modification of these unaccrued benefits constitutes an unconstitutional taking. This argument finds no support in the law.

To the extent there is a dispute over whether SB 151 unlawfully deprives state employees of their retirement benefits, the "proper recourse would be a breach-of-contract claim, not a takings claim." *See B & B Trucking, Inc. v. U.S. Postal Service*, 406 F.3d 766, 769 (6th Cir. 2005) (citing *Hughes Communications Galaxy, Inc. v. United States*, 271 F.3d 1060, 1070 (Fed. Cir. 2001)). The Kentucky Constitution addresses the impairment of contractual rights in a separate provision. *See* Ky. Const. § 19(1). The Contracts Clause, not the Takings Clause, is the appropriate vehicle to pursue the Plaintiffs' claims. *See B & B Trucking, Inc.*, 406 F.3d at 769. If, as the Plaintiffs argue, every contractual right falls within the scope of the Takings Clause, as the Plaintiffs argue, the Contracts Clause would be wholly subsumed and entirely superfluous. This is not the law in Kentucky, nor should it be. *See MPM*

[11] As explained in Part I., C., *supra*, the changes made in SB 151 apply only prospectively and do not fall within the inviolable contract. For this reason, the Plaintiffs have no contractual right to the benefits at issue and therefore no property rights at stake, even under the Plaintiffs' theory of the Takings Clause.

Financial Group, Inc. v. Morton, 289 S.W.3d 193, 199 (Ky. 2009) (explaining courts must be reluctant to interpret laws so as to render other provisions superfluous).

To be clear, this is not a case where the Commonwealth is attempting to confiscate benefits already earmarked for the Plaintiffs in an existing fund. SB 151 does not take any already-existing property from the Plaintiffs, nor does it require the Plaintiffs to contribute back pay or additional contributions for benefits already earned. This is a critical point here because the Plaintiffs point to several (mostly out-of-state) cases they contend support their Takings Clause argument, but all of these cases distinguish circumstances where the government confiscates benefits already accrued from cases in which the existence of a benefit is a prospective, contingent right.

In *Spina v. Consolidated Police and Fireman's Pension Fund*, 197 A.2d 169 (N.J. 1964), for example, the New Jersey Supreme Court actually denied the plaintiff's takings claim because the law at issue did not confiscate benefits from "an existing fund." *Id.* at 175. Similarly, in *Miller v. Retirement Board of Policemen's Annuity*, 771 N.E.2d 431 (Ill. App. 2001), the Court did not address whether prospective benefits could be modified as with SB 151, but instead analyzed whether the state could retroactively reduce an already-retired employee's monthly benefits and *require him to pay back benefits he already received*. *Id.* at 435. And in *Katzman v. Los Angeles County Metropolitan Transportation*, 72 F. Supp. 3d 1091 (N.D. Cal. 2014), the court rested its holding on the fact that the defendant municipality admitted that it owed an immediate obligation to the plaintiff due to the plaintiff's

retirement. This fact distinguished *Katzman* from prior cases in which the plaintiffs "lacked a 'present entitlement' to the claimed property." *Id.* at 1101. All of the cases the Plaintiffs rely on to support their Takings Clause claim turn on whether the contractual rights entitled the claimant to immediate and already-accrued benefits.

Perhaps the best example of this point is found in *Weiand v. Board of Trustees of Kentucky Retirement Systems*, 25 S.W.3d 88, 93 (Ky. 2000), a case the Plaintiffs cite as support for their argument that contractual rights are protected by the Takings Clause, which, in fact, contradicts their claim. [Pls. Br. at 48]. In *Weiand*, the Kentucky Supreme Court rejected the plaintiff's property-rights argument because it found that the contractual right at issue was merely contingent, and there was no guarantee it would ever come to fruition. *Id.* The plaintiff was an ex-spouse of a public employee, and she was listed as the beneficiary of the employee's survivorship benefits. KERS, however, denied her claim for benefits after her ex-husband's death due to the divorce. The plaintiff sued on the grounds that the denial amounted to an unconstitutional taking of her property. *Id.* at 90-91. But contrary to the insinuation in the Plaintiffs' brief, the Kentucky Supreme Court rejected her claim.

The Supreme Court denied the property-rights claim because the benefits at issue were contingent on a future event that may not ever occur. Specifically, the plaintiff lacked a present entitlement to her benefits because there was always a possibility that she might pre-decease her husband: "even if [the couple] did not divorce, *she might never receive any of his pension benefits, as there is a possibility*

that she could predecease [her ex-husband]." *Id.* at 93 (emphasis added). The plaintiff, in other words, had no property right in the benefits because she did not have—and never had—an actual entitlement to receive them. Similarly, the benefits at stake in this case are prospective in nature only. An employee, for example, only has the right to receive service credit for future sick days if they continue in their employment and continue to save them *and retire with unused sick days*. But there is no guarantee that either of these events will occur: public employees affected by SB 151 could leave their employment before retirement or end up using sick days they thought they could save. In either case, the employees would never actually obtain the right to receive the benefits, yet they now claim they already have a property interest protected by the Takings Clause. This is directly contrary to the holding in *Weiand*, the case the Plaintiffs contend establishes their property rights in these benefits.[12]

The only case in Kentucky the Plaintiffs have found where the court appears to subject contractual rights to the Takings Clause is *Folger v. Commonwealth*, 330 S.W.2d 106 (Ky. 1959)—a sixty-year-old case that has never been cited for this proposition. Separating the wheat from the chaff, however, reveals that *Folger* is far from groundbreaking. The "contractual right" at issue is simply a restrictive covenant contained within a deed of conveyance. *See* 330 S.W.2d at 106–07 ("All of this is recited in the deed."). The contract, in other words, is a classic property right

[12] It is worth contrasting *Weiand* with *Katzman*, another case cited by the Plaintiffs. In *Katzman*, the plaintiff had already retired and the defendant municipality admitted that the retirement triggered an immediate obligation to pay. *Katzman*, 72 F. Supp. 3d at 1101. But in cases such as *Weiand* and the instant matter where no such obligation exists, there can be no taking of the Plaintiffs' property.

attached to the sale of real property. Moreover, the taking in *Folger* was also typical: the Commonwealth destroyed the value of the restrictive covenant when it condemned private property in order to construct a highway. *Id.* at 107. *Folger* stands only for the narrow proposition that the Takings Clause protects parties' real property interests, which include the contractual covenants included in a conveyance.

SB 151 does not seize funds belonging to the Plaintiffs. It does not require that the Plaintiffs repay benefits they have already received, and it does not confiscate benefits already earmarked in an existing fund, nor does it halt payments to a retiree already eligible to receive them. Instead, SB 151 prospectively modifies certain benefits that public employees might be eligible to receive *if* they continue employment through retirement—benefits that have neither vested nor accrued at this time, and which might never accrue regardless of the outcome of this case.[13] For this reason, the Takings Clause simply does not apply, and the "proper recourse would be a breach-of-contract claim." *See B & B Trucking, Inc.*, 406 F.3d at 769.

IV. SB 151 does not violate Section 2 of the Kentucky Constitution.

As a last-ditch effort, the Plaintiffs contend that SB 151 violates Section 2 of the Kentucky Constitution because it was "rushed" through the legislature without providing an opportunity to review and comment. [Pls. Br. at 36]. This argument is simply a rehash of the Plaintiffs' other arguments: they object to the legislative process behind the bill, and they object to what they believe are constitutional infirmities with its substance. All of this, according to the Plaintiffs, amounts to an

[13] See Part I. C., *supra.*

arbitrary exercise of power. But for the reasons explained elsewhere, the process and contents behind SB 151 are perfectly lawful. The Plaintiffs cannot create a constitutional violation by simply bundling up their list of grievances.

"It is important to bear in mind that '[s]ection two of our Constitution does not rule out policy choices which must be made by government.'" *City of Lebanon v. Goodin*, 436 S.W.3d 505, 519 (Ky. 2014) (quoting *White v. Danville*, 465 S.W.2d 67, 69–70 (Ky. 1971)). When the government performs a "strictly legislative act" the courts should "not disturb a municipality's action if the 'existence of such rational connection is fairly debatable.'" *Id.* (quoting *City of Louisville v. McDonald*, 470 S.W.2d 173, 178 (Ky. 1971)). To this end, a statute "will be determined to be constitutionally valid if a reasonable, legitimate public purpose for it exists, whether or not [the court] agrees with its 'wisdom or expedience.'" *Buford v. Com*, 942 S.W.2d 909, 911 (Ky. App. 1997) (quoting *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968)).

Here, there is no disputing that SB 151 represents a reasonable policy choice by the General Assembly in response to a serious problem with Kentucky's retirement systems. While the Plaintiffs mistakenly contend that the General Assembly could fix the ailing pensions solely by increasing revenue, the Court cannot deem legislative policy choices arbitrary based simply on their "wisdom or expedience." *Buford*, 942 S.W.2d at 911 (quoting *Walters*, 435 S.W.2d at 467). Kentucky faces the worst unfunded pension liability in the nation, and SB 151 contains reasonable policy choices to address those problems.

The only case remotely bearing on this issue that the Plaintiffs cite is *Commonwealth, Transportation Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. App. 2004)a case in which the Kentucky Court of Appeals analyzed whether an executive agency's decision was arbitrary or capricious. The Plaintiffs cite this case for the proposition that the failure of a "[body]" to follow its own rules or regulations amounts to *per se* arbitrary and capricious conduct. [Pls.' Br. at 37]. But that is not what *Weinberg* says. Rather, the Court of Appeals held that "it is axiomatic that failure of an ***administrative agency*** to follow its own rule or regulation generally is *per se* arbitrary and capricious." *Weinberg*, 150 S.W.3d at 77 (emphasis added). This is a critical distinction because the Kentucky Supreme Court has made clear that the judiciary is precluded from adjudicating disputes over whether the General Assembly followed its own internal rules. *See Board of Trustees*, 132 S.W.3d at 777; *see also* Ky. Const. § 39. Courts cannot resolve disputes over how the General Assembly conducts its business, even if that request is couched as a Section 2 violation.

Section 2 is not a residual clause of the Kentucky Constitution that the Plaintiffs can use to salvage their otherwise meritless claims. To prevail, the Plaintiffs must demonstrate that SB 151 is the product of arbitrary and unreasonable conduct. It plainly is not, and this claim must be rejected.

V. The Plaintiffs' various process-based arguments are unavailing.

In addition to their substantive arguments against SB 151, the Plaintiffs also make numerous process-based argument—*i.e.*, arguments not about the bill itself, but about the manner in which it was enacted. Specifically, the Plaintiffs argue that

SB 151 is invalid because: (A) it violated Section 46 of the Kentucky Constitution because it did not receive three readings prior to its passage and is really an appropriation bill and therefore needed to receive 51 votes in the House rather than the 49 that it actually received; (B) it violated Section 56 of the Kentucky Constitution because it was not read prior to being signed by the presiding officers of each legislative chamber and was not actually signed by the presiding officer of the House of Representatives since it was signed by the Speaker Pro Tempore rather than the Speaker; and (C) it did not have an actuarial analysis or a fiscal note as required by KRS 6.350 and KRS 6.955 respectively. These arguments are unavailing, and, in fact, most of them are not even justiciable.

A. The General Assembly did not violate Section 46 of the Kentucky Constitution when it passed SB 151.

The Plaintiffs launch a variety of procedural challenges against SB 151 based on Section 46 of the Kentucky Constitution and, in addition, the Court *sua sponte* requested briefing on a Section 46 issue that the Plaintiffs did not raise in their Complaint. As a matter of first importance, the Court is limited in its review of these procedural challenges by separation of powers principles and the political question doctrine. "It is well settled law in the state of Kentucky that one branch of Kentucky's tripartite government may not encroach upon the inherent powers granted to any other branch." *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 422 (Ky. 2005) (quoting *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984)). Because the Plaintiffs' allegations require the Court to usurp the General Assembly's authority to

establish its own procedural rules, *see* Ky. Const. § 39, the allegations are not justiciable.

Nevertheless, because the Court specifically requested briefing on these issues, [*see* April 20, 2018 Order at 2], a complete explanation of why SB 151's passage did not violate Section 46 is set forth below. For the reasons that follow, SB 151 passed by a sufficient number of votes. Further, it received a sufficient number of readings, and the readings occurred in a constitutional manner.

1. SB 151 received a constitutionally sufficient number of votes in the House of Representatives.

SB 151 passed the House of Representatives by a simple majority of forty-nine votes, and this simple majority is all that Section 46 requires. In almost every circumstance, a bill in Kentucky needs only a simple majority—half of all votes cast, plus one—to pass. *See* Ky. Const. § 46 ("No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each House, and a majority of the members voting."). Exceptions to this rule apply only in limited circumstances. For example, a constitutional majority—half of all the members of a chamber plus one—is required to override a Governor's veto, *see* Ky. Const. § 88, to make an appropriation of money, *see* Ky. Const. § 46, or to create a debt, *id.* None of these exceptions apply to SB 151.

Although the Plaintiffs did not raise this issue in their complaint, the Court nevertheless *sua sponte* directed the parties to address whether Section 46 requires

SB 151 to be passed by a constitutional majority.[14] Because Section 46 requires fifty-one votes only where legislation is "for the appropriation of money or the creation of debt," *see* Ky. Const. § 46—and because SB 151 is neither—the bill's forty-nine votes were constitutionally sufficient. The Plaintiffs argue that SB 151 is an appropriation bill, but do not argue that it creates a debt. However, as set forth below, and as explained by both the Department of the Treasury and the Office of State Budget Director, SB 151 is most certainly not an appropriation bill. [*See* Ex. 10, Cardwell Aff.; Ex. 11, Paiva Aff.].

Section 46 prevents legislation from passing by simple majority if the legislation is an act "for the appropriation of money." *Id.*; *see also D&W Auto Supply v. Dept. of Revenue*, 602 S.W.2d 420, 422-25 (Ky. 1980) (striking down an appropriations bill passed by less than fifty-one votes). For purposes of Section 46, the term "appropriation" means "the setting apart of a particular sum of money for a specific purpose." *Davis v. Steward*, 248 S.W. 531, 532 (Ky. 1923); *see also D&W Auto Supply*, 602 S.W.2d at 422-25 (applying this definition in Section 46 context). SB 151 does not designate any set sums of money for a specific purpose, nor does it authorize the expenditure of government funds in the first instance.[15] That is what budget bills do. *See, e.g.,* HB 200 (appropriating funds for the operations, maintenance, and support of the Executive Branch and its agencies, boards, and commissions); HB 201

[14] *Compare* 04/11/18 Plaintiffs' Verified Complaint *and* 04/11/18 Plaintiffs' Memorandum in Support of Motion for Temporary Injunction *with* 04/20/18 Court Order at 2.

[15] As explained by the Director of Accounting and Disbursements in the Commonwealth's Department of the Treasury, no public money may be withdrawn from the Treasury based on SB 151 alone. [*See* Ex. 11, Paiva Aff.].

(appropriating funds, likewise, for the Transportation Cabinet); HB 203 (same, for the Judicial Branch); HB 204 (same, for the Legislative Branch); [*see also* Ex. 10, Cardwell Aff]. Indeed, instead of designating state funds or authorizing expenditures, SB 151 merely amends certain provisions of the Commonwealth's existing public retirement systems—systems created years ago, into which public employers are already required to pay.

Comparing SB 151 with actual appropriations bills proves that SB 151 did not need fifty-one votes to pass. For instance, in *D&W Auto Supply v. Dept. of Revenue*, the Kentucky Supreme Court struck down the Litter Control Act for being an appropriations bill in disguise where the act placed a three cent per one hundred dollar assessment on certain proceeds and directed the Department of Revenue to collect and disburse monies from the state treasury to implement the act. *D&W Auto Supply*, 602 S.W.2d at 422-25. The court decided the Litter Control Act was an appropriation because "[i]n the simplest of terms, an assessment of money [was] made and its expenditure [was] directed." *Id.* SB 151 could not be more different. The bill makes no such assessments and directs no such expenditures. Instead, it changes some of the terms of the Commonwealth's existing public retirement systems, and it amends ***how*** public employees will be paid benefits under those systems. It does not make any appropriations for employees' benefits in the first instance. [*See* Ex. 10, Cardwell Aff; Ex. 11, Paiva Aff.].

Ignoring the differences between SB 151 and *D&W Auto Supply*, the Plaintiffs rely on *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005), to contend that SB

151 must be an appropriations bill. In the *Fletcher* case, the Kentucky Supreme Court considered whether the Governor could appropriate money from the state treasury when the General Assembly failed to pass budget legislation, ultimately concluding the Governor does not possess such authority. The *Fletcher* court never addressed Section 46 but instead considered KRS 41.110, a statute regarding restrictions on withdrawing money from the state treasury. *Id.* at 865. For purposes of that statute, the court noted that "[w]here the General Assembly has mandated that specific expenditures be made on a continuing basis, or has authorized a bonded indebtedness which must be paid, such is, in fact, an appropriation." *Id.* The court went on to offer examples of "statutes that mandate appropriations even in the absence of a budget bill," referencing one retirement statute, KRS 61.565(1), as part of that list.[16] *Id.*

The Plaintiffs contend that because *Fletcher* described KRS 61.565 as a "statute[] that mandates appropriations even in the absence of a budget bill," and because SB 151 partially amends KRS 61.565, SB 151 itself must be an appropriations bill. This is logically flawed. First, *Fletcher* defined "appropriation" under KRS 41.110, not Section 46. The definition of appropriation under Section 46 is not what the Plaintiffs claim, but rather "the setting apart of a particular sum of money for a specific purpose." *Davis*, 248 S.W. at 532; *D&W Auto Supply*, 602 S.W.2d at 422. SB 151 sets apart no sums of money for a specific purpose. In fact, no dollar amounts are even articulated in the bill.

[16] At the time *Fletcher* was issued, the relevant provision of KRS 61.565 stated that "Each employer participating in the State Police Retirement System . . . and each employer participating in the Kentucky Employees Retirement System . . . shall contribute annually to the respective retirement system . . . ." *See Fletcher*, 163 S.W.3d at 865.

Second, *Fletcher* does not actually state that KRS 61.565 is an appropriations bill; the Plaintiffs erroneously make that assumption. In reality, the *Fletcher* court said, in dicta, that KRS 61.565 "mandates" appropriations, not "is" an appropriation. *See Fletcher*, 163 S.W.3d at 865. Many bills require that appropriations be made without themselves being an appropriation. For better or worse, many of the Commonwealth's laws are effectively unfunded mandates. Without the authorization of a certain dollar amount from one of the various budget bills, those statutes cannot be properly implemented, and such is the case with SB 151. While SB 151 may have an impact on future budget bills, it is not itself a budget bill, and without a separate appropriation by the General Assembly, its implementation would be wholly frustrated.

Third, even if the Court were to deem KRS 61.565 an appropriations bill because of the *Fletcher* dicta, it does not follow that SB 151 is an appropriations bill just because it amends that statute. To the extent KRS 61.565 was an appropriation (which the Governor does not concede), the only reason it could be viewed as such is because it required, for the first time, that public employers contribute an unspecified amount of funds to their employees' respective retirement systems. The original creation of that contribution requirement could conceivably be an appropriation under *Fletcher*'s logic, because public employers were previously not required to use their funding for that purpose. Importantly, though, that logic would not extend to SB 151. SB 151, however, does not require any new contributions from public employers that are not already contemplated—for instance, by establishing a new

retirement system for a group of public employees and requiring the employer for the first time to begin contributing to that system. Thus, even if the Court is persuaded that KRS 61.565 was an appropriations bill when passed, SB 151 still did not require fifty-one votes.

To be sure, SB 151 lacks the hallmark features of an appropriations bill. Appropriations bills are typically titled as such by the Legislative Research Commission, are designated to an appropriations committee as part of the legislative process, are tied to the biennium, and are subject to the Governor's line-item veto authority. [*See* Ex. 10, Cardwell Aff.]. Tellingly, the Legislative Research Commission did not consider either SB 151 or the original SB 1 to be an appropriations bill. Unlike the actual appropriations legislation passed this session, the Legislative Research Commission titled both SB 1 and SB 151 "an act relating to retirement." *See, e.g.,* HB 200 (titled "an act relating to appropriations measures" and proceeding through both the House and Senate Appropriations and Revenue Committees). Further, SB 151 amends a compilation of retirement statutes that endure in perpetuity, whereas actual appropriations legislation must be passed every two years. If SB 151 were truly an appropriations bill, it would expire at the end of the biennium. Finally, appropriations bills are subject to the Governor's line-item veto power. *See* Ky. Const. § 88 ("The Governor shall have the power to disapprove any part or parts of appropriation bills embracing distinct items, and the part or parts disapproved shall not become a law unless reconsidered and passed, as in case of a bill."). Surely no one would contend that SB 151, or any past pension legislation, is

subject to the line-item veto. This is a good indication that SB 151 is not an appropriations bill.

In the end, the Plaintiffs attempt to seize on an argument they did not even raise, but it is clear that SB 151 is not an act "for the appropriation of money." Ky. Const. § 46. The relevant appropriations bills for purposes of Kentucky's public retirement systems are the Commonwealth's various budget bills, not SB 151. Those bills specifically include line items to fund the retirement systems, and without these, there would be no money for public employers to contribute to their employees' pension funds in the first place. Even if SB 151 requires that appropriations be made at some point, the bill does not actually authorize those appropriations such that money from the state treasury can be designated for the relevant retirement systems. Accordingly, SB 151 required only a simple majority of votes to constitutionally pass.

2. SB 151 did not violate the "three-readings" requirement of Section 46.

Kentucky Constitution Section 46 also provides that "[e]very bill shall be read at length on three different days in each House . . . ." Beyond this succinct statement, neither the Constitution nor subsequent case law sets out any requirements regarding the form or contents of a bill when it receives those three readings. Pursuant to Kentucky Constitution Section 39, "[e]ach House of the General Assembly may determine the rules of its proceedings." The House of Representatives, both through its Rules of Procedure and custom, has determined that a committee substitute, when passed, becomes the original bill, and that a bill need only receive the three readings at some point during the legislative process. There is simply no

requirement under Kentucky law that a bill "as passed" receive three readings in each chamber. [*See* Pls.' Verified Compl. at ¶¶ 103, 105 (claiming "SB 151, as passed" failed to receive the appropriate number of readings)].

It is undisputed that SB 151, in some form, received three readings in both legislative chambers. [*See* Pls.' Br. at 15-16 (acknowledging SB 151 was read by title twice in the House and three times in the Senate before the committee substitute)]. The legislative record indicates that SB 151 received its first Senate reading on March 12, 2018; its second Senate reading on March 13; and its third reading on March 16. SB 151 then received its first reading in the House on March 20 and its second reading on March 21. Subsequently, both a committee substitute and a title amendment were passed with respect to the bill, which removed the original wastewater provisions and inserted the retirement system amendments. After these amendments were voted upon, the bill received its third House reading, and after this third reading, SB 151 passed the House and, as amended, also passed the Senate.[17] This procedural history makes clear that SB 151 was voted upon three times in each chamber. The only remaining question, then, is whether SB 151 was required to have three ***additional*** readings in both chambers after the House passed the committee substitute and title amendment.

This is not a question for the Court to decide. "Such a determination is a political question, which traditionally courts have declined to address in the exercise

[17] The procedural history of SB 151 is detailed in the 2018 Legislative Record, available from the Legislative Research Commission at http://www.lrc.ky.gov/record/18RS/record(14-4-2018).pdf (last accessed May 15, 2018).

of proper restraint, and have left to the appropriate branch of government." *Philpot v. Haviland*, 880 S.W.2d 550, 554 (Ky. 1994). The Kentucky Supreme Court has previously made clear that not all issues under Section 46—if any—are justiciable. In *Philpot v. Haviland*, the court considered the portion of Section 46 which states "[b]ut whenever 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 . . . ." *Id.* (quoting Ky. Const. § 46). When asked to interpret the meaning of a "reasonable time" under the Constitution, the court acknowledged that to do so would violate fundamental separation of powers principles and the political question doctrine set forth in *Baker v. Carr*, 369 U.S. 186 (1962):

> We are of the opinion, however, that the determination of what is a 'reasonable time' in this context is a matter for the legislature to determine, under Section 39 of the Kentucky Constitution. For us 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. at 553.

The Plaintiffs' three-readings argument essentially asks the Court to expound upon what the language of Section 46 means and to find that it requires all bills to be given three readings ***in their final form***. This is simply not for the judiciary to decide. *See, e.g.*, *id.*; *Manning v. Sims*, 213 S.W.2d 577, 580 (Ky. 1948) ("It is essential that the sharp separation of the powers of government be preserved carefully by the courts. Those which are judicial must not be permitted to encroach upon those which are legislative.") The General Assembly has determined for itself that bills need not

receive three readings as finally passed, and this Court should not usurp its authority to so determine.

But even if the Court could appropriately pass on the question, the Plaintiffs have yet another hurdle: there is no reason to believe that the reading requirement cannot be satisfied by reading a bill into the Journal, which the practice of the General Assembly. Contrary to the Plaintiffs' suggestions, there is nothing in the Constitution that requires bills to be read out loud. Accomplishing the reading requirement by reading the title of a bill out loud and then reading the bill at length into the Journal is consistent with the text of Section 46, as well as the purposes behind Section 46 and the General Assembly's historical practices and interpretation of Section 46.

The General Assembly's practice squares with the purposes behind Section 46 as articulated in the constitutional debates: ensuring that all legislators had access to proposed bills, and that the legislators intended to cast their votes the way they did. As the Plaintiffs point out, the Framers were indeed troubled by various "abuses"; however, a more thorough reading of the debates demonstrates that the real rub for the Framers was not merely the legislature's choice to pass a bill with haste but with the passing of a bill before the members even had an opportunity to know that they were voting, much less what they were voting on:

> We all know that many abuses exist in legislative bodies in the passage of acts. There are now on the statute books of Kentucky not less than two hundred railroad charters granting the most extraordinary privileges. ***Not one of those has been passed upon a call of the yeas and nays***, and yet they involve the interest of the people in

> every section of the State. There was, in the opinion of the Committee, a very serious abuse of the legislation in the haste with which bills are passed. . . . On one occasion, during the last Legislature, a bill involving large interests, the interests of the people of two large and populous counties, passed through both bodies of the Legislature in thirty-five minutes, and was laid before the Executive in a short time after that.
>
> The tenor of that legislation was unknown entirely to almost every person in those two counties, although it involved their interests very materially. It is probable that not more than ten men in the Legislature knew what they were voting on; ***yet, if their attention had been called it to by a yea and nay vote the bill would not have been passed.***

Simon Bolivar Buckner, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3868 (1891) (emphasis added). The severity of the problem at the time is summarized by Delegate Buckner's following statement: "I say that because, on its return to the Legislature, the veto was sustained with unanimity." *Id.* at 3869.

This excerpt makes clear that, prior to 1891, the General Assembly was truly passing bills without legislators knowing what they were voting on—so much so that when the Governor would veto a bill and state his objections, the General Assembly would unanimously sustain that veto, deriving the contents of the bill for the first time from the Governor's objections. *Id.* This is plainly not a problem faced by the 2018 General Assembly, which voted to override multiple gubernatorial vetoes. *See, e.g.,* HB 200; HB 366. Undoubtedly, the Framers' real concern was not with haste, or with the time spent debating legislation, but rather with ***access*** and with the legislators' abilities to know the subject matter of a bill. Thanks to computer

technology and the General Assembly's practice of incorporating the full text of every bill into the Journal, which is available to all legislators at the touch of a computer key, there is simply no access problem in the twenty-first century.

More specifically, there was no access problem with SB 151. Just like with all other pieces of legislation, the full text of the committee substitute was available to all members of the House and Senate for their review. And while not all of the legislators may have foreseen the exact terms of the committee substitute, all were familiar with SB 1.[18] Indeed, no subject was more heavily debated during the 2018 legislative session than pension reform. All of the legislators in both chambers clearly recognized that casting a vote for SB 151 on March 29, 2018, was a vote in favor of pension reform, and to the extent any individual members did not feel as if they had sufficient time to review the committee substitute's contents, [*see* Pls.' Br. at 10 (quoting Representatives Greer and Wayne)], those members could choose for themselves whether to vote for or against the bill.

In reality, the General Assembly frequently passes bills the same way SB 151 was passed, and for good reason. Crucial work is accomplished during the final week of the legislative session, and requiring the General Assembly to start the three-readings process over again after every committee substitute or title amendment is passed would hamstring time-sensitive legislative activity. Even the most cursory review of the legislative record for past sessions reveals the flurry of amendments

[18] The Plaintiffs are quick to quote Representatives Carney and Miller who both emphasized that SB 151 was distinct from SB 1. [*See* Pls.' Br. at 5 (quoting Miller as stating "[t]his is not Senate Bill 1")]. The Plaintiffs ignore the fact that the reason SB 151 was "not Senate Bill 1" is that SB 151 removed numerous provisions of the original legislation ***at the Plaintiffs' request***.

that pass during a session's final days on the Commonwealth's most critical pieces of legislation. The Kentucky Education Reform Act ("KERA")—the most comprehensive overhaul of public education in the nation—was significantly amended over the course of the 1990 legislative session but was never re-read three times in the House and Senate after those amendments. To the contrary, after KERA received its first two readings in the House, thirteen floor amendments were passed, and the bill then proceeded to the Senate where it received two readings before ten additional amendments were passed—not to mention the committee amendments incorporated in both chambers throughout the process.[19] A ruling in favor of the Plaintiffs calls the validity of KERA, the most pivotal education legislation enacted in Kentucky's recent history, into serious question. Yet that would be the mere tip of the iceberg.

To the extent the Plaintiffs would differentiate the KERA amendments from the committee substitute and title amendment passed with respect to SB 151, that reasoning fails. The out-of-state case law relied upon by the Plaintiffs is simply not the law of Kentucky. Nowhere in the Constitution, Kentucky case law, or House and Senate Rules of Procedure does it state that the General Assembly must start the three-readings process anew when an amendment that is not "germane" to the original bill passes. [*See* Pls.' Br. at 4, 17 (claiming the committee substitute subject matter was "in no way germane" to SB 151's original subject matter)]. Instead, the House Rules of Procedure contemplate both committee substitutes and title

[19] The procedural history of KERA, House Bill 940 of the 1990 regular session of the General Assembly, is available from the Legislative Research Commission at http://www.lrc.ky.gov/lrcsearch (last accessed May 16, 2018).

amendments, and key laws have been passed after receiving both with support from each side of the aisle. *See* House Rule 60 (contemplating a committee substitute, which "upon its adoption, shall be considered as the original bill" and a title amendment, which "shall be presented to the body immediately after adoption of the bill").[20]

For example, in 2017, the General Assembly passed a committee substitute and title amendment to Senate Bill 12, initially styled "an act relating to responsible real property ownership", and thereby converted the bill to "an act relating to public postsecondary education governance and declaring an emergency."[21] The Plaintiffs may not like the fact that the General Assembly "turn[ed] a dog biting bill into higher education law," [*see* Pls.' Br. at 18], but this was a legitimate tactic used by the legislature to help ensure the University of Louisville's continued accreditation. The same tactic was used in 2015 for Senate Bill 192, the bipartisan anti-heroin bill ceremonially signed into law by former-Governor Steve Beshear less than twelve hours after it passed the General Assembly.[22]

[20] The Rules of Procedure for the 2018 Regular Session of the House of Representatives are publicly available from the Legislative Research Commission at http://www.lrc.ky.gov/house/HouseRules2018.pdf.

[21] *See* SB 12, 2017 Legislative Record, available at http://www.lrc.ky.gov/record/17RS/record(30-3-2017).pdf (last accessed May 16, 2018).

[22] *See* SB 192, 2015 Legislative Record, available at http://www.lrc.ky.gov/record/15rs/rec_docs.htm (last accessed May 16, 2018); Kerri Richardson & Terry Sebastian, "Gov. Beshear Signs Landmark Anti-Heroin Bill" (March 25, 2015), http://kentucky.gov/Pages/Activity-Stream.aspx?viewMode=ViewDetailInNewPage&eventID=%7B3B6958E7-F44D-4293-A774-F3670DF3DF24%7D&activityType=PressRelease.

In sum, no violation of Section 46's three-readings requirement occurred. For the Court to find otherwise would be to impose a never-before-seen proscription on the General Assembly: one that infringes on the General Assembly's right to determine the rules of its own proceedings, that violates the Commonwealth's commitment to tripartite government, and that inserts concepts into the Constitution that do not exist. The Plaintiffs' misguided argument must be wholly disregarded.

3. SB 151 was not required to be read out loud in its entirety.

The Plaintiffs contend SB 151 was procedurally unconstitutional because it was read by title only, arguing the "at length" language in Section 46 requires a bill to be read "in its entirety" before passage. [*See* Pls.' Br. at 22-23]. The Plaintiffs would be hard pressed, however, to present the Court with an example of ***any*** Kentucky bill that was read on a chamber floor "in its entirety" at any point in the last century. This is obviously not how the General Assembly operates, and the Court should ignore the Plaintiffs' formulaic, unrealistic claim.

In actual practice, and pursuant to longstanding custom, bills passed by the General Assembly are rarely—if ever—read out loud according to the Plaintiffs' interpretation of the Constitution. Instead, all bills are read by title only regardless of whether the Journal indicates the bills were "read at length" to comply with constitutional requirements. Over sixty years ago, the Legislative Research Commission investigated the practices and procedures of the Kentucky General Assembly, and even then it was clear that no bills were read in their entirety as part of the legislative process. According to the Legislative Research Commission's

December 1955 report, although many state constitutions contain similar requirements about reading bills in full, a number of states "like Kentucky, simply do not follow the requirement." Legislative Research Commission, *The Legislative Process in Kentucky* 135-36 (No. 43, 1955). Indeed, reading bills by title only, just as SB 151 was read, is regular practice, and accomplishes the purposes intended by the Framers as set forth in the Constitutional Convention debates. *See* Buckner, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3868-69 (1891) (emphasizing the need for legislators to know what bills were being passed).

Technology has advanced in indescribable ways since 1891. In its 1955 report, the Legislative Research Commission acknowledged that modern information-sharing had alleviated the problems that drove the drafting of Section 46:

> These provisions were written into constitutions at a time when prompt printing of bills was impossible. They have been retained, even in recent constitutions, to identify the bill being considered and to assure that no bill may be passed without adequate notice. ***The desirability of the requirement that one reading be in full, however, is debatable. It is not complied with and would consume an unwarranted amount of time if it were.*** As many as thirty-six bills were given first readings in a single day in the 1954 House of Representatives; reading them in full would have precluded transacting any other business. ***With present bill printing practices, this provision seems anachronistic.***

The Legislative Process in Kentucky at 136 (emphasis added).

Moreover, and as previously stated, it is not for the Court to question the processes adopted by the General Assembly. Just as the Kentucky Supreme Court

has determined it cannot define a "reasonable time" under Section 46, the meaning of "at length" and what it means to "read" a bill are nonjusticiable political questions. *See Philpot*, 880 S.W.2d at 553-54. It is for the General Assembly to determine its own procedures, *see* Ky. Const. § 39, and, here, it has done so in a contemporary way that still accomplishes the goals intended by the Framers. If the General Assembly publishes its bills in the Journal such that they are available in full to all legislators, that is the General Assembly's prerogative.

Finally, and significantly, the Governor notes that SB 151 was read in the same way that every Kentucky bill is read and has been read for decades. If SB 151 is invalid on this ground, not only are all the laws passed this legislative session void, but an unfathomable number of laws passed throughout the Commonwealth's history are void, including the very pension systems and "inviolable contracts" that the Plaintiffs are now so loathe to see amended.[23] The Plaintiffs' argument fails to account for the realities of modernity and must be summarily dismissed.

B. SB 151 also did not violate Section 56 of the Kentucky Constitution.

Desperate for a reason to invalidate legislation they simply do not like, the Plaintiffs also contend SB 151's passage violated two provisions of Section 56 of the Kentucky Constitution. As set forth below, these arguments are also frivolous. In fact, they are so frivolous that the Plaintiffs ought to be embarrassed to make them. No reasonable person can argue that Speaker Pro Tempore David W. Osborne was

[23] For example, the Commonwealth's Executive Budget, HB 200, would be invalid, along with HB 185, which provides financial benefits to the survivors of the state's first-line defenders.

not the presiding officer when he signed SB 151 on behalf of the Kentucky House of Representatives. And, again, there is no credible argument that SB 151 was required to be read aloud in its entirety prior to its signing.

1. SB 151 was signed by the presiding officer of the House of Representatives.

The Plaintiffs' contention that SB 151 is invalid because it was not signed by the Speaker of the House is laughable. Kentucky Constitution Section 56 does not state that the Speaker of the House must sign all bills; instead, it states that "[n]o bill shall become a law until the same shall have been signed by the ***presiding officer*** of each of the two Houses in open session." (Emphasis added.) The Plaintiffs' position that the Speaker of the House is the only individual who can ever serve as the "presiding officer" is bizarre. Like with so many of the Plaintiffs' other arguments, this one would mean that countless laws passed throughout Kentucky's history—and every law passed this legislative session—would necessarily be void.

The Kentucky Constitution does not define "presiding officer," and it does not explicitly refer to the Speaker as the "presiding officer." Instead, it simply provides that "[t]he House of Representatives shall choose its Speaker and other officers." *See* Ky. Const. § 34. Subsequent case law, the Rules of Procedure of the House of Representatives, historical practice, and common sense all make clear that an individual other than the Speaker of the House can serve as the presiding officer of the House and can thus sign bills under Section 56.

In a case favorably cited by the Plaintiffs elsewhere in their brief but conveniently ignored for this proposition, Kentucky's highest court expressly

recognized that the President Pro Tempore of the Senate may sign bills as the presiding officer of that chamber. *See Kavanaugh v. Chandler*, 72 S.W.2d 1003, 1005 (Ky. 1934).[24] In so finding, the *Kavanuagh* court referenced an Alabama Supreme Court case that clearly articulates why the Plaintiffs' position is so untenable. *See Robertson v. State*, 30 So. 494 (Ala. 1901). At times, the Speaker of the House or the President of the Senate will inevitably be called away from his legislative duties because of illness, family emergency, travel complications, or other reasons. To forbid any other legislators from presiding over the House or Senate chambers would hamstring the legislature and prevent crucial work from being accomplished. *See id.* at 496. This is precisely why offices such as the Speaker Pro Tempore and President Pro Tempore were conceived in the first place.[25]

Unsurprisingly, the Rules of Procedure of the Kentucky House of Representatives, as well as *Mason's Manual of Legislative Procedure*, explicitly allow individuals other than the Speaker of the House to serve as presiding officers.[26] Rule 26, which articulates the duties of the Speaker of the House, states that "[a]ny

[24] [*See also* Pls.' Br. at 12, 14 (relying on other provisions of *Kavanaugh*)].

[25] The phrase "pro tempore" literally translates from Latin to "for the time (being)". *See* Pro Tempore, *Online Etymology Dictionary*, http://www.dictionary.com/browse/pro-tempore (last accessed May 16, 2018). An officer pro tempore is, by his very nature, a temporary presiding officer, authorized to perform the duties of the chair in the chair's absence. This is true not only in the Commonwealth but also at the federal level. *See, e.g.*, President Pro Tempore, United States Senate, https://www.senate.gov/artandhistory/history/common/briefing/President_Pro_Tempore.htm (last accessed May 16, 2018).

[26] Rule 74 provides that, in the absence of a specific House Rule, the most recent edition of *Mason's Manual of Legislative Procedure* shall govern the proceedings. *Mason's Manual* is a parliamentary procedure manual adopted by the National Conference of State Legislatures and used as the parliamentary authority for the Kentucky General Assembly. *See Mason's Manual of Legislative Procedure* (Nat'l Conf. of State Legislators, 2000 ed.)

reference made to the Speaker in these rules shall refer to the Speaker of the House or, in the proper context, any member, including the Speaker Pro Tempore, who is acting as the presiding officer."

While the House Rules do not elaborate on what it means to act as "presiding officer," *Mason's Manual* does. According to *Mason's*, the duties of a "presiding officer" include opening the session each day and calling the chamber to order; announcing business; recognizing the members entitled to the floor; preserving order and decorum; guiding and directing the proceedings of the body; signing all acts; and generally supervising the legislative chamber. *Mason's Manual of Legislative Procedure* § 575 at 416-17. *Mason's* also provides that "[w]hen it is necessary for the presiding officer to vacate the chair, the president pro tempore, the speaker pro tempore or the vice chair should take the chair, and in the absence of the pro tempore or vice chair, the presiding officer next in order, if there be one." *Id.*, § 579 at 422.

Clearly, the power to sign bills is not vested in the Speaker of the House alone, but in whoever is acting as "presiding officer" at the time the bill is signed. For the majority of the 2018 legislative session, David W. Osborne, the duly elected Speaker Pro Tempore of the House of Representatives, acted as the "presiding officer" of the House, opening the session, announcing business, preserving order, directing the proceedings of the chamber, and performing the other duties of the "presiding officer" set forth in *Mason's Manual*. And at the time Osborne signed SB 151, he was the "presiding officer" of the House. The terms of Section 56 were undeniably satisfied.

To find otherwise would declare void every law passed this legislative session, such as House Bill 185, which increased death benefits for families of law enforcement officers killed in the line of duty. House Bill 185 was lauded by the Fraternal Order of the Police throughout the legislative session, yet it was signed by Osborne just as SB 151 was.[27] If SB 151 is invalid per Section 56, then House Bill 185, every bill passed this session—including HB 200, the Executive Branch Budget bill, and HB 203, the Judicial Branch Budget bill—and innumerable other laws on the Commonwealth's books are necessarily invalid too.

2. SB 151 was not required to be read in its entirety under Section 56.

Similar to their argument with respect to Kentucky Constitution Section 46, the Plaintiffs allege SB 151 is invalid because it was not read out loud, word-for-word before it was signed. Section 56 states that a bill "shall then be read at length and compared" before the presiding officer of the House affixes his signature to it, *see* Ky. Const. § 56, and the Plaintiffs insist "at length" means "in its entirety, and not simply by title," [Pls.' Br. at 35]. Despite the Plaintiffs' misleading citations, no case defines "at length" for purposes of Section 56. And as set forth in the Legislative Research Commission's report, the General Assembly has not read bills aloud in their entirety for decades. *The Legislative Process in Kentucky* at 135-36. Instead, the General Assembly carries out the "at length" requirement of Section 56 by reading each bill by title only and then incorporating the full bill in the Journal. *See id.*

[27] *See* HB 185, *available at* http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2018-Reg-HB-0185-2514.pdf (showing Osborne's signature on behalf of the House of Representatives).

The General Assembly's standard procedure does not conflict with the Framers' intent, expressed by Delegate Spalding as follows:

> The members of the General Assembly did not know what they were voting for half the time, and this section . . . provides when an act is amended . . . ***shall be set out in full***, so every man will understand what it is when voting on it, and the people will know what change has been made when they see it.

Spalding, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3792 (1891) (emphasis added); *see also Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 445 (Ky. 1986). The full text of SB 151 was plainly "set out in full" for all legislators to see and understand via the legislature's typical practice. Thus, Section 56 was never violated.

In any event, just as with the Plaintiffs' other procedural claims, the issue is not justiciable in this Court. Section 39 of the Constitution, case law precedent, and separation of powers principles entrust the General Assembly, not the judicial bench, with the power to determine the rules of its proceedings. What constitutes a "reasonable time" under Section 46 is a nonjusticiable political question. *See Philpot*, 880 S.W.2d at 553-54. In the same way, this Court may not expound on the meaning of "at length" or opine on what it means to "read" a bill. Those are questions for the General Assembly and the General Assembly alone. *Id.*; *Elk Horn Coal Corp.*, 163 S.W.3d at 422 (noting the separation of powers doctrine in the Commonwealth is to be "strictly construed").

In conclusion, the Governor again points out that the Plaintiffs' position with respect to the "at length" language in Section 56 would invalidate every bill passed

this session and thousands throughout Kentucky history, such that the Commonwealth could no longer properly function. Bills are simply not read—nor must they be—according to the Plaintiffs' contrived reading of the Constitution. For the Plaintiffs to advance a position totally divorced from legislative realities is to irresponsibly waste the taxpayers' resources as well as the Court's time, and the Court should reject the Plaintiffs' Section 56 allegations in whole.

C. SB 151 is not invalid under KRS 6.355 and KRS 6.955.

The final facet of the Plaintiffs' process-based arguments is their contention that SB 151 is invalid because the General Assembly failed to follow the procedural rules established by KRS 6.355 and KRS 6.955. This argument is erroneous for two reasons. First, whether the General Assembly complies with its own procedural rules—even those codified in statute—is a nonjusticiable political question that this Court lacks jurisdiction to determine. Second, even if this question were justiciable, the General Assembly substantially complied with the requirements by obtaining an actuarial report for SB 1 and confirming the same report applied to the provisions in SB 151.

1. Whether the General Assembly complied with its statutory rules of procedure is a nonjusticiable political question that this Court cannot resolve.

It is black-letter law that courts cannot interfere with how the General Assembly conducts its business. *See Board of Trustees of the Judicial Form Retirement System v. Attorney General of the Commonwealth*, 132 S.W.3d 770, 777 (Ky. 2003); Ky. Const. § 39. Section 39 of the Kentucky Constitution provides that

"[e]ach House of the General Assembly may determine the rules of its proceedings." Ky. Const. § 39. This provision is essential to Kentucky's doctrine of separation of powers, and it prohibits courts from adjudicating disputes over the manner in which the General Assembly operates. *Board of Trustees*, 132 S.W.3d at 777; *Philpot v. Haviland*, 880 S.W.2d 550 (Ky. 1994). Courts cannot "approve, disapprove, or enforce" the procedural rules governing the legislative process. *Bd. of Trustees*, 132 S.W.3d at 777. And, critically for this case, "[t]he result is the same even when the procedural is, as here, codified in a statute." *Id.*

The ruling in *Board of Trustees* controls the outcome of this case. In fact, the case is almost indistinguishable from the facts here, which is why the Plaintiffs resort to labeling the holding "dicta" to avoid its implications. [Pls.' Br. at 25–26]. In *Board of Trustees*, the General Assembly proposed a bill affecting one of the state's retirement plans, and when that bill did not pass, the language was added to a different bill through an amendment. The General Assembly obtained an actuarial analysis for the first bill, but did not reconstruct the effort for the second. *Id.* at 774–75. Eventually, the new bill passed both chambers and was signed into law, and opponents of the bill filed suit claiming the law was invalid because it did not have the actuarial analysis required under KRS 6.350. But the Kentucky Supreme Court rejected the argument outright, holding that it was not within the purview of the courts to determine whether the General Assembly follows its procedural rules. *Id.* at 777. The Supreme Court explained that "review of the legislature's adherence to its own procedural rules constitutes a nonjusticiable political question solely within

the legislature's province," and "[t]he result is the same even when the procedural rule is, as here, codified in a statute." *Id.* (citing *Abood v. League of Women Voters*, 743 P.2d 333, 336–37 (Alaska 1987) & *Moffitt v. Willis*, 456 So.2d 1018, 1021–22 (Fla. 1984)).

The application of *Board of Trustees* to the instant matter is so apparent that the Plaintiffs' argument borders on frivolous. The Plaintiffs contend that the holding regarding justiciability is dicta "because the Supreme Court's decision primarily relied on the finding that the General Assembly had 'substantial[ly] compli[ed]' with the actuarial analysis requirement." [Pls.' Br. at 26]. This is a gross distortion of the Court's opinion. The Supreme Court engaged in a nearly seven-hundred word analysis of whether the issue was justiciable—discussing numerous out-of-state cases addressing a similar question—and concluded that the courts have no authority to adjudicate these kinds of disputes. *Board of Trustees*, 132 S.W.3d at 777–78. At the end of its discussion, the Supreme Court included *one additional sentence* indicating that the General Assembly might have substantially complied with the requirements of the statute by obtaining an actuarial analysis on the first bill, and this single sentence is what the Plaintiffs submit is the primary holding of the Court's opinion.

A cursory reading of *Board of Trustees* reveals that the Supreme Court grounded its opinion on justiciability, but even if that were not the case, the Court's statement regarding substantial compliance cannot be dicta as a matter of law. This Court has jurisdiction "over only 'justiciable causes.'" *Berger Family Real Estate, LLC v. City of Covington*, 464 S.W.3d 160, 166 (Ky. App. 2015) (quoting Ky. Const.

§ 112(5)). A justiciable cause is one in which there is "an actual controversy" that the Court can decide. *Id.* (citing *Interactive Gaming Council v. Commonwealth ex re. Brown*, 425 S.W.3d 107, 112 (Ky. App. 2014)). If a case is not justiciable, the court lacks the power to resolve the issue. *Id.* Justiciability, in other words, is not merely an alternative means of resolving a case—it is a threshold jurisdictional inquiry that *ends the case* if the court determines that it lacks the authority to weigh in. In *Board of Trustees*, once the Supreme Court determined that the issue was not justiciable, it lacked jurisdiction to adjudicate the merits of the issue—including whether or not the previously used actuarial analysis substantially complied with the statute. Any further discussion was, as a matter of law, dicta. *See H.R. ex rel. Taylor v. Revlett*, 998 S.W.2d 778 (Ky. App. 1999) ("As such, the 1996 opinion turned on a lack of jurisdiction both by the trial court and this Court on appeal. Any additional findings on appeal are superfluous and cannot be binding due to the lack of jurisdiction.").

The Plaintiffs' remaining arguments to avoid the impact of *Board of Trustees* are similarly deficient. The Plaintiffs attempt to distinguish KRS 6.350 from procedural rules because "both houses of the legislature passed it and the Governor signed it into law." [Pls. Br. at 26]. Of course, that was true when the Supreme Court analyzed the issue in *Board of Trustees*, and the Plaintiffs do not cite any authority for treating a codified rule of procedure any differently than another procedural rule. This is likely because the only case addressing this in Kentucky held exactly the opposite. *See Board of Trustees*, 132 S.W.3d at 777–78.

In an attempt to shoehorn the statutory argument into a constitutional issue, the Plaintiffs argue that SB 151 is invalid because "[t]he power to ignore or suspend such a binding statute does not rest in a single individual, such as Speaker Pro Tempore Osborne or Chairman [Jerry] Miller." They point to Section 15 of the Kentucky Constitution for support, which provides that laws can only be suspended "by the General Assembly." But even if KRS 6.350 was suspended by the passage of SB 151, *it was suspended by the General Assembly*. SB 151 passed both the Senate and the House of Representatives, and it was signed into law by the Governor. If the Plaintiffs believe that the legislature suspended KRS 6.350 by enacting SB 151, it was the General Assembly—not a single individual—that effected the suspension.[28]

This also explains why the Plaintiffs are wrong in arguing that SB 151 does not amount to an implicit repeal of KRS 6.350. It is "an elementary rule of statutory interpretation that whenever in the statutes on any particular subject there are apparent conflicts which cannot be reconciled, the *later* statute controls." *Beshear v. Haydon Bridge Co., Inc.*, 304 S.W.3d 682 (Ky. 2010) (quoting *Butcher v. Adams*, 220 S.W.2d 398, 400 (1949)). The Plaintiffs argue that one law—SB 151—is in conflict with a prior law—KRS 6.350. In such a circumstance, the most recently enacted statute prevails. Or as the Kentucky Supreme Court explained, "the failure to follow such procedural rules amounts to an implied *ad hoc* repeal of such rules." *Board of Trustees*, 132 S.W.3d at 778 (quoting *State ex rel. La Follette v. Stitt*, 338 N.W.2d 684,

[28] The Plaintiffs appear to suggest that the General Assembly must suspend a statute *expressly* in order for it to be effective. [Pls. Br. at 27]. The Plaintiffs provide no support for this argument—no statutes, no case law—and instead rely only on the fact that the General Assembly has, at some time in the past, expressly suspended a statute. This is a bizarre argument with no legal basis whatsoever.

687 (Wisc. 1983)). If SB 151 did in fact conflict with KRS 6.355, as the Plaintiffs argue, the effect is not a nullification of SB 151 but an implicit repeal of the prior statute.

KRS 6.350 is not a super-statute, and Kentucky law does not allow for any such thing. There is nothing that the General Assembly can do by an ordinary statute that it cannot undo through the same process. Whether it is called an implicit repeal or not, the fact is that the General Assembly passed SB 151 through the process required by the Kentucky Constitution—and this Court lacks the authority to inquire any further.

The same arguments apply with equal force to KRS 6.955. KRS 6.955 creates a procedural rule for the General Assembly to follow, requiring a fiscal note be attached to certain bills touching on local government. The bill is not rooted in any constitutional mandate, and the Court, therefore, cannot "approve, disapprove, or enforce" it. *See Board of Trustees*, 132 S.W.3d at 777.

2. The General Assembly substantially complied with the provisions of KRS 6.350 and KRS 6.955.

Even if this Court could review the General Assembly's compliance with KRS 6.350 or KRS 6.955, the facts in the record indicate that the General Assembly substantially complied with both statutes.[29] The provisions of SB 151 were first introduced in SB 1. At that time, the General Assembly obtained an actuarial report

[29] The Court's April 20, 2018 scheduling order requested that the parties brief whether the actuarial analysis for SB 151 satisfied the standard set forth in *Board of Trustees*. Of course, as explained above, the Court lacks jurisdiction to resolve this issue because it is not justiciable. Regardless, the Court subsequently ordered a stay of discovery ten days later, making it difficult—if not impossible—to properly resolve this issue.

analyzing the provisions of SB 1 and its committee substitute. This actuarial report was provided to the legislators and made public weeks before the legislature eventually voted on SB 151. Subsequently, on March 29, 2018, the day the committee substitute amended SB 151 to add the provisions of SB 1,the General Assembly received an amended actuarial analysis for SB 151 from GRS Retirement Consulting. The new report indicated that the previously provided actuarial analysis of SB 1 applied to the new bill.

Again, this is almost identical to the fact pattern the Supreme Court analyzed in *Board of Trustees*. In that case, the legislature obtained an actuarial analysis for the first version of the legislation but did not obtain an updated analysis when the second bill was amended by to include the relevant provisions. The Supreme Court noted that during the debate on the new bill that ultimately passed, the bill's sponsor stated from the floor: "Section 4 was added . . . and I have a report here . . . from the retirement system . . . that says . . . '*I am unable to determine the fiscal impact, if any, of Section 4*.'" 132 S.W.3d at 775 (emphasis added). The General Assembly, in other words, actually requested an actuarial analysis from the retirement system for the amended bill and received a response stating that it could not make a determination. Nonetheless, the Supreme Court found that the General Assembly substantially complied with the statute by obtaining an actuarial report on the *prior* bill that never passed. *Id.* at 778. Similarly, here it would have been sufficient for the General Assembly to rely on the prior actuarial report alone without requesting a new analysis. But the General Assembly actually went a step further: it asked for and

received an updated report the same day SB 151 passed, and that actuarial report was made publicly available for every legislator to access. This is more than what the Supreme Court deemed "substantial compliance" in *Board of Trustees*, and the Plaintiffs' contention otherwise must be rejected.

Similarly, the actuarial analysis obtained for SB 1 and SB 151 substantially complies with the requirement of a fiscal note in KRS 6.955. The requirements for a fiscal note are broadly worded and vaguely defined. It requires only that the Legislative Research Commission provide an estimate of the effect the law will have on expenditures or revenues of local government. *See* KRS 6.965(1). How or in what detail the fiscal note accomplishes this is left unsaid. The actuarial analysis assessing the financial impact of SB 1 and SB 151 is more than sufficient to substantially comply with this statute.

VI. The Kentucky Education Association and Kentucky State Lodge Fraternal Order of Police do not have associational standing.

Two of the three Plaintiffs are associations purporting to litigate this matter on behalf of their entire memberships. Because those two Plaintiffs do not have appropriate associational standing, they should be dismissed before this lawsuit is allowed to proceed.

"Standing is a legal term defined as a 'sufficient legal interest in an otherwise justiciable controversy to obtain some judicial decision in the controversy.'" *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 112 (Ky. 2014) (quoting *Kraus v. Ky. State Senate*, 872 S.W.2d 433, 439 (Ky. 1993)). In general, an association only has standing to sue as a third party on behalf of its

members if (1) its members would otherwise have standing to sue in their own right; (2) the interests the association seeks to protect are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Commonwealth ex rel. Brown v. Interactive Media Entm't & Gaming Ass'n, Inc.*, 306 S.W.3d 32, 38 (Ky. 2010) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)). While Kentucky has never officially adopted this entire three-prong test first articulated by the United States Supreme Court, "at a minimum, to establish associational standing at least one member of the association must individually have standing to sue in his or her own right." *Bailey v. Preserve Rural Roads of Madison Cnty., Inc.*, 394 S.W.3d 350, 356 (Ky. 2011).

The KEA and FOP fail to satisfy the prerequisites of associational standing for at least two reasons. First, the two associations fail to specifically identify even a single one of their members. An association's blanket assertion that it is litigating a matter on behalf of a group of individuals with their own standing fails to satisfy the binding precedent of the Kentucky Supreme Court. *See Commonwealth ex rel. Brown*, 306 S.W.3d at 38-39. In a 2010 case where two associations purported to represent a number of relevant entities but failed to specifically identify at least some of those entities, the Kentucky Supreme Court found the action improper for lack of standing and explained that "[w]ithout even revealing any of the [individuals] they purport to represent, the associations cannot hope to achieve associational standing." *Id.* at 38.

Here, the KEA and FOP have done the exact same thing as the associations in *Commonwealth ex rel. Brown*—they have broadly asserted that their underlying members have standing, but they have failed to provide even the slightest proof to back up their claims. Just as in *Commonwealth ex rel. Brown*, "this Court cannot simply take their words for it." *Id.* The Court should refuse to let the two associations proceed in this litigation on the bare assertions set forth in the complaint. *See* Verified Complaint at ¶¶ 6-7 (failing to specifically identify a single member of either association).

Additionally, inherent in the concept of associational standing is the notion that the association is acting in the best interest of its members. *See Commonwealth ex rel. Brown*, 306 S.W.3d at 40 ("[B]efore a favorable judgment can be attained, the association's general allegations of injury must clarify into 'concrete' proof that 'one or more of its members' has been injured."). The KEA and FOP do not have standing to contest the validity of SB 151 because neither they, nor any of their purported members, have actually been harmed by the bill. Put another way, no one has suffered a requisite injury in fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To the contrary, SB 151 works to the two associations' benefit by steering the Commonwealth's failed retirement systems back on a path towards sustainability, thereby increasing the likelihood that public employees such as teachers and police officers will recover any pension benefits at all when they retire. Moreover, the new hybrid cash balance plan for teachers likely gives them a better

benefit than they would have had under the old plan. Even the Jefferson County Teachers Association says so.

Where there are "genuine conflicts" between a litigant's interests and those of an absent third party, courts have "strongly counsel[ed] against third party standing." *See Amato v. Wilentz*, 952 F.2d 742, 750 (3d Cir. 1991); *see also Clifton Terrace Assocs., Ltd. v. United Tech. Corp.*, 929 F.2d 714, 722 (D.C. Cir. 1991) (denying third-party standing where the litigant's "interests in the subject of this suit to some extent conflict with those of the [third parties] whose rights [the litigant] purports to advance"). Because the purported members of the Plaintiffs' associations are better off under the terms of SB 151, which the General Assembly passed to address the retirement systems' current multi-billion dollar deficits, there is no injury, and the Plaintiffs are not advocating in their members' best interests by litigating this matter. The Court should dismiss both the KEA and the FOP from this action.

CONCLUSION

The ultimate question for this Court is whether it wants to move the Commonwealth backward, in the direction of fiscal irresponsibility and insolvent pension systems, by following the California Rule, or whether it wants to join the recent trend of marching toward prosperity and solvent pension systems by following the Prevailing Rule. The answer is an easy one. Even the California courts are walking away from the California Rule. Why? Because the Prevailing Rule is the only one that is sensible, fiscally responsible, and legally justifiable. Nevertheless,

the Attorney General wants Kentucky to be like California—a fiscally irresponsible state with high taxes and no flexibility to reform public pensions to ensure they will remain solvent. The Defendants implore this Court to reject that approach and follow the Prevailing Rule. It is the only way, in the long run, to ensure that the pension systems will remain solvent and will remain capable of providing retirement benefits to the Commonwealth's public employees and retirees. Those individuals have worked hard and deserve no less. The Court should not turn its back on them by adopting a rule that will only hasten the decline of the pension systems. Instead, the Court should follow the Prevailing Rule and should grant summary judgment in favor of the Defendants.

Respectfully submitted,

/s/ M. Stephen Pitt
M. Stephen Pitt
S. Chad Meredith
Matthew F. Kuhn
Office of the Governor
700 Capital Avenue, Suite 101
Frankfort, Kentucky 40601
(502) 564-2611
Steve.Pitt@ky.gov
Chad.Meredith@ky.gov
Matt.Kuhn@ky.gov

Brett R. Nolan
Finance and Administration Cabinet
Office of the General Counsel
702 Capital Avenue, Rm. 392
Frankfort, Kentucky 40601
(502) 564-6660
Brett.Nolan@ky.gov

Counsel for Governor Bevin

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served via email this 23rd day of May, 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.

/s/ S. Chad Meredith
Counsel for Governor Bevin

EXHIBIT 5

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION ___
CIVIL ACTION NO. 18-CI-_____

COMMONWEALTH OF KENTUCKY
ex rel. ANDY BESHEAR, ATTORNEY GENERAL

and

KENTUCKY EDUCATION ASSOCIATION

and

KENTUCKY STATE LODGE FRATERNAL ORDER OF POLICE PLAINTIFFS

v. **VERIFIED COMPLAINT FOR A DECLARATION OF RIGHTS, A TEMPORARY INJUNCTION, AND A PERMANENT INJUNCTION**

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

SERVE: Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

and

BERTRAM ROBERT STIVERS, II, in his official capacity
as President of the Kentucky Senate

SERVE: 702 Capitol Avenue
Annex Room 236
Frankfort, Kentucky 40601

David Byerman, Director
Legislative Research Commission
700 Capitol Avenue, Room 300
Frankfort, Kentucky 40601-3449

and

DAVID W. OSBORNE, in his official capacity as
Speaker Pro Tempore of the Kentucky House of Representatives

SERVE: 702 Capitol Avenue
Annex Room 332C
Frankfort, Kentucky 40601

David Byerman, Director
Legislative Research Commission
700 Capitol Avenue, Room 300
Frankfort, Kentucky 40601-3449

and

BOARD OF TRUSTEES OF THE TEACHERS'
RETIREMENT SYSTEM OF THE STATE OF KENTUCKY

SERVE: Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

and

BOARD OF TRUSTEES OF THE KENTUCKY RETIREMENT SYSTEMS DEFENDANTS

SERVE: Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

**** **** **** ****

Come now the Plaintiffs, Commonwealth of Kentucky, *ex rel.* Andy Beshear, Attorney General, Kentucky Education Association ("KEA"), and the Kentucky State Lodge Fraternal Order of Police ("Kentucky State FOP Lodge"), by and through counsel, and bring this action for a declaration of rights, a temporary injunction, and a permanent injunction against the Defendants, Matthew Griswold Bevin, in his official capacity as Governor of the Commonwealth of Kentucky ("Governor Bevin"), Bertram Robert Stivers, II, in his official capacity as President of the Kentucky Senate ("Senator Stivers"), David W. Osborne, in his official capacity as Speaker Pro Tempore of the Kentucky House of Representatives ("Representative Osborne"), the Board of

Trustees of the Kentucky Teachers Retirement System ("KTRS"), and the Board of Trustees of the Kentucky Retirement Systems ("KRS").

INTRODUCTION

March 29, 2018 was the 57th day of the 2018 Kentucky Legislative Session. By this time, a "pension reform" bill – Senate Bill 1 – had been introduced in the Senate, but had failed to secure the necessary votes to pass that single chamber and lay dormant after being returned to committee. Strong public opposition led the sponsor of SB 1 to declare the bill was "on life support," and the President of the Senate stated that there was "little hope" the bill would pass.

Then, just after 2:00 p.m. on March 29, the Kentucky House of Representatives called for a recess, so that its Committee on State Government could meet. The unannounced meeting was not held in the legislative hearing rooms, but instead in a small conference room. Claiming the space was too small, the public – including the hundreds of teachers rallying outside – was excluded. At that time, the Committee called Senate Bill 151 ("SB 151"), an 11-page bill relating to sewer services.

The Committee immediately amended SB 151, stripping all language about sewers. The bill suddenly became a massive 291-page overhaul of Kentucky's public pension systems. The Chair, Representative Jerry T. Miller, announced the Committee would vote on the bill during the meeting, even though most committee members had not seen, much less read, the 291-page "surprise" bill. Nor had any actuarial analysis been prepared, as required by KRS 6.350, which is necessary to determine if the bill will work, *i.e.*, would the bill save money or cost the Commonwealth the additional $3 plus billion that has since been reported. The Committee allowed no public testimony, excluding any say for the public employees whose pensions were

being cut. And the Committee did not make a single copy of the bill available to the public during the meeting to allow Kentucky citizens to know what their "public servants" were doing.

Just minutes after the bill passed the committee on a purely partisan vote, it was called on the floor of the full House, where the new SB 151 received its first public reading. Once again, state representatives were forced to vote on the bill without reading it, without public testimony, and without an actuarial analysis. The vote also occurred in violation of Section 46 of the Kentucky Constitution, which required the "new" bill – and not some prior sewer version – to receive three readings on three different days.

Only 49 of the 100 state representatives voted for the bill, with 46 voting against and 5 not voting. The Speaker Pro Tempore of the House signed the bill, instead of the Speaker himself as required by Section 56 of the Kentucky Constitution. SB 151 then moved to the Senate, which likewise rushed it through passage late into the night, avoiding the same hearings and public participation that had defeated its own attempts at cutting pensions for public employees. Governor Bevin signed the bill into law on April 10, 2018.

As passed, the new SB 151 substantially alters and ultimately reduces the retirement benefits of the over 200,000 active members of the pension systems, including teachers, police officers, and firefighters. In doing so, it breaks the "inviolable" contract that the Commonwealth made with its public employees under KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714. Under those laws, the legislature promised Kentucky's public employees that, in exchange for their decades of public service, they would be guaranteed certain retirement benefits. By enacting SB 151, Governor Bevin and the General Assembly have substantially impaired and broken that contract, in violation of the Kentucky Constitution and state statute.

The process under which SB 151 was passed also violates numerous provisions of both the Kentucky Constitution and state statute. These laws were designed to prevent the exact trickery and exclusion of the public that the General Assembly exhibited on March 29. Each of these violations – including violations of Sections 2, 46, and 56 of the Kentucky Constitution and KRS 6.350 and 6.955 – invalidate SB 151.

Kentucky's employees and the people they serve will suffer irreparable injury if SB 151 is allowed to take effect. Already, the Governor's threats to strip retirement benefits from public employees have led to record retirements of teachers, state troopers, and other public servants. If SB 151 is allowed to take effect, hundreds – and perhaps thousands – of additional public employees will retire, leading to both an education and public safety crisis. Indeed, the mere passage of SB 151 resulted in the closure of 27 school districts the very next day and the following Monday because teachers have begun to take their sick days as a direct consequence of SB 151's elimination of their ability to use such days to calculate their retirement eligibility.

Plaintiffs therefore respectfully request that the Court enter an order declaring SB 151 unconstitutional and enjoining Governor Bevin, the Board of Trustees of KTRS, and the Board of Trustees of KRS from enforcing it.

NATURE OF ACTION

1. This Verified Complaint for a Declaration of Rights, a Temporary Injunction, and a Permanent Injunction is governed by the Kentucky Declaratory Judgment Act, KRS 418.010, *et seq.*, and Kentucky Rules of Civil Procedure ("CR") 57 and 65.

2. KRS 418.040 provides this Court with authority to "make a binding declaration of rights, whether or not consequential relief is or could be asked" when a controversy exists. An

actual and justiciable controversy regarding violations of the Kentucky Constitution and state laws clearly exists in this action.

3. CR 65 permits this Court to issue a preliminary injunction and, in a final judgment, a permanent injunction, which may restrict or mandatorily direct the doing of an act.

4. The Attorney General requests an expedited review pursuant to KRS 418.050 and CR 57. SB 151 unconstitutionally eliminates benefits promised to public employees, causing them immediate harm. Moreover, hundreds of public employees have already announced their intention to retire – a significant increase over the historical average – in response to the introduction of pension "reform." Absent immediate relief, SB 151 will force more teachers, law enforcement officers, firefighters, and other crucial public employees to choose between continued employment or the reduction or loss of benefits that were guaranteed to them by state law and the Kentucky Constitution. For these reasons, this justiciable controversy presents an immediate concern that the Court should promptly resolve.

PARTIES

5. Plaintiff, Andy Beshear, is the duly elected Attorney General of the Commonwealth of Kentucky, a constitutional office pursuant to Sections 91, 92, and 93 of the Kentucky Constitution. Pursuant to KRS 15.020, Attorney General Beshear is the chief law officer of the Commonwealth and all of its departments, commissions, agencies, and political subdivisions. Attorney General Beshear is duly authorized by the Kentucky Constitution, statutes and the common law, including his *parens patriae* authority, to enforce Kentucky law. As Attorney General, he has the authority to bring actions for injunctive and other relief to enforce the Kentucky Constitution and the Commonwealth's statutes and regulations, including the

authority to bring an action against the Governor and other state agencies for injunctive relief. *See* KY. CONST. § 91; KRS 15.020.

6. Plaintiff, KEA, is a not-for-profit corporation organized under the laws of Kentucky. KEA is a voluntary membership association comprised of student, active and retired teachers and active and retired education support professionals. KEA advocates for the professional welfare of its members. All active and retired members of KEA participate in or are annuitants of KTRS or CERS.

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

8. Defendant, Matthew Griswold Bevin, is the duly elected Governor of the Commonwealth of Kentucky, a constitutional office. The Governor is the Chief Magistrate of the Commonwealth, pursuant to Section 69 of the Kentucky Constitution, and he is charged by Section 81 of the Constitution with taking care that the laws of the Commonwealth be "faithfully executed." Moreover, Governor Bevin controls the Board of Trustees of KRS through his power to appoint ten of its members, as well as the Secretary of the Personnel Cabinet. KRS 61.645(1)(a), (e). Governor Bevin also exercises influence over the Board of Trustees of KTRS through his power to appoint two of its members and the chief state school officer. KRS

161.250(1)(b)(3). Further, Governor Bevin has stated that he believes he has "absolute authority" to reorganize any state board pursuant to KRS 12.028.[1]

9. Defendant, Bertram Robert Stivers, II, is the President of the Kentucky Senate, a constitutional office. At all relevant times, Senator Stivers was the presiding officer of the Kentucky Senate.

10. Defendant, David W. Osborne, is the Speaker Pro Tempore of the Kentucky House of Representatives.

11. Defendant, Board of Trustees of the Teachers' Retirement System of the State of Kentucky, is responsible for the general administration and management of KTRS. KRS 161.250(1)(a). KTRS is an independent agency and instrumentality of the Commonwealth with the powers and privileges of a corporation and the purpose of providing retirement allowances for teachers and their beneficiaries and survivors. KRS 161.230. The Board's membership consists of the chief state school officer and the State Treasurer as ex officio members, two trustees appointed by the Governor, four elected teacher trustees, two elected lay trustees, and an elected retired teacher trustee. KRS 161.250(1)(b).

12. Defendant, Board of Trustees of the Kentucky Retirement Systems, is responsible for the general administration and management of the Kentucky Employees Retirement System ("KERS"), the County Employees Retirement System ("CERS"), and the Kentucky State Police Retirement System ("SPRS"). KRS 61.645. The Board of Trustees of KRS consists of seventeen members: the Secretary of the Personnel Cabinet, three trustees elected by the members of CERS, one trustee elected by members of SPRS, two trustees elected by members of

[1] Jack Brammer, *Bevin Says He Has "Absolute Authority" to Disband Any State Board*, Lexington Herald-Leader, June 21, 2016 (available at http://www.kentucky.com/news/politics-government/article85085272.html) (last visited Apr. 2, 2018).

KERS, and ten trustees appointed by the Governor. KRS 61.645(1). The Board of Trustees of KRS has the powers and privileges of a corporation, which it exercises to oversee KERS, CERS, and SPRS.

JURISDICTION AND VENUE

13. An actual, justiciable controversy exists, and this Court has subject matter jurisdiction over this action pursuant to KRS 418.040, KRS 23A.010, CR 57, and CR 65.

14. Venue is appropriate in this Court pursuant to KRS 452.405, because the primary offices of the Attorney General and the Defendants are located in Frankfort, Franklin County, Kentucky. Furthermore, this action generally relates to violations of Kentucky law, which were either determined or accomplished in Frankfort, Franklin County, Kentucky. Additionally, this action generally relates to violations of the Kentucky Constitution that occurred in Frankfort, Franklin County, Kentucky.

15. Pursuant to KRS 418.040, *et seq.*, this Court may properly exercise *in personam* jurisdiction over the Defendants. Because Senator Stivers and Representative Osborne are named as defendants in their official capacities, the Court may exercise *in personam* jurisdiction over the General Assembly.

FACTUAL BACKGROUND

The General Assembly Attaches Pension Reform to a Sewage Bill

16. On February 15, 2018, SB 151 was introduced in the Senate as "an act relating to the local provision of wastewater services." The nine-page bill was referred to the Senate Committee on Natural Resources & Energy Committee the next day.

17. On March 12, 2018, SB 151 was taken from that committee, given its first constitutionally mandated reading on the floor of the Senate, and returned to that committee. For this reading, the content of SB 151 dealt only with sewer services.

18. On March 13, 2018, SB 151 was again taken from the Senate Committee on Natural Resources & Energy, given its second constitutionally mandated reading, and then returned to the committee. For this second reading, the content of SB 151 dealt only with sewer services.

19. On March 14, 2018, the Senate Committee on Natural Resources & Energy reported SB 151 favorably, with a Committee Substitute. Again, the hearing and vote dealt with SB 151 as an 11-page bill dealing with sewer services.

20. On March 16, 2018, SB 151 received another reading on the floor of the Senate, and passed 36-0. The vote was in favor of the content of the bill, which dealt exclusively with sewer services.

21. Thus, during its first, second, and third readings on the floor of the Senate, SB 151 was "an act relating to the local provision of wastewater services." It did not contain any provisions relating to the state pension system.

22. On March 19, 2018, SB 151 was received in the House of Representatives and sent to the House Committee on Committees.

23. On March 20, 2018, SB 151, as it then existed exclusively as a sewer bill, was taken from the Committee on Committees, given its constitutionally mandated first reading on the House floor, and returned to the Committee on Committees, which posted SB 151 to the House Committee on State Government.

24. On March 21, 2018, SB 151 was taken from the House Committee on State Government, given its constitutionally mandated second reading on the House floor – again, exclusively as a sewer bill – and returned to the same committee.

25. At the time of both its first and second readings in the House of Representatives, SB 151 was "an act relating to the local provision of wastewater services." It did not contain any provisions relating to the state pension system.

26. Just after 2:00 p.m. on March 29, 2018, the House of Representatives recessed so that the House Committee on State Government could meet. The previously unannounced meeting was held in a small conference room and the public was excluded. At that time, the Committee called SB 151, which was still an 11-page bill relating to sewer services.

27. House Committee Substitute 1 to SB 151 was then introduced. The Substitute stripped all provisions of the wastewater treatment bill and replaced it with pension reform provisions.

28. The new SB 151 completely overhauled the public pension system and, as set forth more fully below, it unconstitutionally breached the inviolable contract that the Commonwealth made with its public employees, including its teachers and police officers.

29. The House Committee on State Government refused to hear testimony from the public concerning SB 151.

30. During the Committee meeting, Representative Jim Wayne objected to holding a vote on SB 151 because no actuarial analysis was provided to the members of the Committee or attached to the bill, in violation of KRS 6.350.

31. The Chair of the House Committee on State Government, Representative Jerry T. Miller, overruled Representative Wayne's objection, and called for a vote on SB 151 shortly

after it was distributed to Committee members, thereby ensuring that the Committee members did not have time to read SB 151 in its entirety.

32. The Committee on State Government then reported the bill favorably to the House. Only then was the title amended by a vote of the Committee, changing it from "an act relating to the local provision of wastewater services" to "an act relating to retirement."

33. The new SB 151 was immediately reported to the House of Representatives, all on the evening of March 29, 2018. It then received its first reading on the floor of the House of Representatives in its new form, as "an act relating to retirement."

34. Again, Representative Wayne objected to the passage of SB 151 without an actuarial analysis. The Speaker Pro Tempore of the House, Representative Osborne, ruled that it was legal to pass SB 151 without such an analysis. Representative Rocky Adkins appealed this ruling of the Chair, but the ruling was upheld by a vote of 58-33.

35. The House of Representatives then passed SB 151 by a vote of 49-46. Representative Osborne, who is the Speaker Pro Tempore of the House of Representatives, then signed the bill on the line labeled "Speaker-House of Representatives."

36. Also during the evening of March 29, 2018, SB 151 was received in the Senate. The Senate then voted to concur in the House Committee Substitute and the amendment to the title. The Senate then passed the bill by a vote of 22-15.

37. SB 151 never received a reading in the Senate after the title and contents of the bill were completely changed, eliminating the provisions relating to wastewater treatment and replacing them wholesale with provisions relating to public pensions.

38. Thus, in a matter of mere hours, SB 151 was completely transformed from its original subject matter, reported out of the House State Government Committee, approved by the

House of Representatives, and approved by the Senate in the dark of night – all before any stakeholders had the opportunity even to read the 291-page bill, much less comment on it.

39. Section 46 of the Kentucky Constitution provides, in relevant part, that "[e]very bill shall be read at length on three different days in each House, but the second and third readings may be dispensed with by a majority of all the members elected to the House in which the bill is pending."

40. No vote was taken in either the House of Representatives or the Senate with regard to SB 151 to suspend the constitutional requirement that a bill receive three separate readings on three separate days in each House prior to passage.

41. SB 151 never received a reading in the Senate in the form in which it was passed – that is, as an act relating to retirement, as opposed to an act relating to wastewater treatment.

42. Moreover, Representative Osborne signed SB 151 on the line for the signature of the "Speaker-House of Representatives."

43. Section 56 of the Kentucky Constitution provides, in pertinent part, that "[n]o bill shall become a law until the same shall have been signed by the presiding officer of each of the two Houses in open session."

44. Under Kentucky law, the Speaker of the House is the presiding officer of the House of Representatives.

45. Representative Osborne is not the Speaker of the House of Representatives, as that position is vacant until filled pursuant to Section 34 of the Kentucky Constitution.

46. In addition, SB 151 was reported out of the House State Government Committee without an actuarial analysis.

47. KRS 6.350, a duly enacted statute, provides that no bill affecting pensions may be reported out of Committee unless accompanied by an actuarial analysis.

48. To date, no actuarial analysis has been performed on SB 151. Instead, a purported actuarial analysis was later added to the bill on the Legislative Research Commission ("LRC") website as an obvious attempt to paper over the fact that SB 151 was passed in violation of the law, because the actuarial analysis was never provided to members of the House Committee on State Government.

49. Specifically, the purported actuarial analysis came too late because it was added to the LRC website after the House Committee on State Government had already reported SB 151. Moreover, the purported actuarial analysis failed to account for the provisions of SB 151 as amended, claiming that it was the same as SB 1 even though numerous provisions between the two bills differed that affected the financial impact of SB 151. In addition, the purported actuarial analysis was provided only by auditors for KRS, and did not contain any analysis of the effects of SB 151 on KTRS.

50. SB 151 was also voted on by both the House of Representatives and the Senate even though it was not accompanied by a fiscal note, and even though neither of those bodies voted by a two-thirds majority to waive the fiscal note requirement.

51. KRS 6.955 specifically prohibits both chambers of the General Assembly from voting on a bill that "relates to any aspect of local government or any service provided thereby" unless the bill is accompanied by a fiscal note, the contents of which are described in KRS 6.965, or unless the chamber of the General Assembly votes, by a two-thirds majority, to waive the fiscal note requirement.

52. Governor Bevin signed SB 151 into law on April 10, 2018.[2]

SB 151 Breaks the Commonwealth's Inviolable Contract

53. The General Assembly promised Kentucky's public employees that, in exchange for their public service, they would be guaranteed certain retirement benefits. This promise was made in the form of a contract, which was passed into law. *See* KRS 21.480; KRS 61.692; KRS 78.852; KRS 161.714. The statutes the General Assembly passed declared this contract to be "inviolable," meaning the General Assembly could not later break it.

54. Kentucky's public employees have upheld their end of the bargain by rendering services for the benefit of the people of the Commonwealth.

55. The new SB 151 made substantial and material changes to the benefits that had been promised to participants in the KTRS, KERS, SPRS, and CERS public pension systems.

56. By enacting and enforcing SB 151, Defendants have materially breached and substantially impaired the inviolable contracts between the Commonwealth and public employees, as set forth below.

Kentucky Teachers Retirement System

57. The General Assembly created an inviolable contract with public educators under KRS Chapter 161. The contract protects benefits provided between KRS 161.220 and KRS 161.710. *See* KRS 161.714.

58. SB 1 amends KRS 161.623, which is within the inviolable contract. In doing so, it unlawfully and materially reduces, alters, or impairs pension benefits due to KTRS members.

[2] The signed SB 151 is available at http://apps.sos.ky.gov/Executive/Journal/execjournalimages/2018-Reg-SB-0151-2470.pdf.

59. Specifically, the inviolable contract does not cap the amount of accrued sick leave that teachers who started before July 1, 2008, may convert to additional service credit for purposes of their retirement. *See* KRS 161.623.

60. Moreover, the inviolable contract currently caps the amount of accrued sick leave that teachers who started on or after July 1, 2008, may convert to additional service credit for purposes of their retirement at 300 days. *See* KRS 161.623(8).

61. Section 74 of SB 151 caps the amount of accrued sick leave that members may convert to the amount accrued as of December 31, 2018. This limitation materially alters and impairs the rights and benefits due to employees, and therefore violates the inviolable contract.

Kentucky Employees Retirement System

62. The KERS pension rights and benefits are located at KRS Chapter 61, with the inviolable contract found in KRS 61.510-61.705. *See* KRS 61.692.

63. SB 1 amends or repeals these very statutes, thereby unlawfully and materially reducing, altering, or impairing pension benefits due to KERS members, as set forth more fully below.

64. The inviolable contract allows lump-sum payments for compensatory time to be included in the creditable compensation of Tier I nonhazardous employees. *See* KRS 61.510. Section 14 of SB 151 expressly excludes lump-sum payments from creditable compensation for non-hazardous, Tier I employees, retiring after July 1, 2023. This exclusion materially alters and impairs the ultimate calculation of KERS members' retirement allowances, and therefore violates the inviolable contract.

65. Under the inviolable contract, uniform and equipment allowances may be included in KERS members' creditable compensation. *See* KRS 61.510. Section 14 of SB 151

expressly excludes such allowances as well as undefined "other expense allowances," paid on or after January 1, 2019, from creditable compensation. This exclusion materially alters and impairs the ultimate calculation of KERS members' retirement allowances, and therefore violates the inviolable contract.

66. The inviolable contract guarantees KERS Tier I members may use accumulated, unused sick leave to determine retirement eligibility. *See* KRS 61.546. Section 16 of SB 151 prohibits KERS Tier I employees from using sick leave service credit for retirement eligibility, if they retire on or after January 1, 2023. Because this prohibition materially impairs the rights and benefits due to members, it violates the inviolable contract.

67. The inviolable contract does not require deductions in any amount from KERS Tier I members' creditable compensation for hospital and medical insurance. *See* KRS 61.702(2)(b). Section 30 of SB 151 requires an employer of a KERS Tier I member employed after July 1, 2003 to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical insurance under the plan. Because this provision alters and impairs the ultimate calculation of KERS members' retirement allowances, it violates the inviolable contract.

68. The inviolable contract requires Tier I hazardous employees' final compensation be calculated using the creditable compensation from the three (3) fiscal years the employee was paid the highest average monthly rate. It requires the highest five (5) fiscal years for Tier I nonhazardous employees. *See* KRS 61.510. In either case, the inviolable contract does not require that the fiscal years used for calculation be complete fiscal years. *Id.* Section 14 of SB 151 requires, after January 1, 2019, that Tier I hazardous employees' final compensation be calculated using the creditable compensation from their highest three (3) *complete* fiscal years, and that the highest five (5) *complete* fiscal years be used to calculate for Tier I nonhazardous

employees' final compensation. Because SB 151 alters and impairs the final compensation calculation guaranteed to hazardous and nonhazardous Tier I employees, it violates the inviolable contract.

69. KERS Tier I and Tier II employees who opted into the current hybrid cash balance plan are guaranteed an annual interest credit of at least 4%. *See* KRS 61.597. Section 19 of SB 151 removes this guarantee, and instead guarantees a return of 0%. Because this change materially impairs the rights of these employees, it violates the inviolable contract.

Kentucky State Police Retirement System

70. The SPRS pension rights and benefits are located at KRS Chapter 16, with the inviolable contract found in KRS 16.510-16.645. *See* KRS 16.652.

71. SB 151 amends or repeals these very statutes, thereby unlawfully and materially reducing, altering, or impairing pension benefits due to SPRS members.

72. The inviolable contract guarantees SPRS Tier I members may use accumulated, unused sick leave to determine retirement eligibility. *See* KRS 16.645; KRS 61.546. Section 16 of SB 151 prohibits SPRS Tier I employees from using sick leave service credit for retirement eligibility, if they retire on or after January 1, 2019. This prohibition materially impairs rights and benefits due to members, and therefore violates the inviolable contract.

73. The inviolable contract does not include deductions in any amount from SPRS Tier I members' creditable compensation for hospital and medical insurance. *See* KRS 16.645; KRS 61.702(2)(b). Section 30 of SB 151 requires an employer of a SPRS Tier I member, employed after July 1, 2003, to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical insurance under the plan. Because this provision alters and

impairs the ultimate calculation of SPRS members' retirement allowances, it violates the inviolable contract.

County Employees Retirement System

74. The CERS pension rights and benefits are located at KRS Chapter 78, with the inviolable contract found in KRS 78.510-78.852. *See* KRS 78.852.

75. SB 151 amends or repeals these very statutes, thereby unlawfully and materially reducing, altering, or impairing pension benefits due to CERS members.

76. The inviolable contract allows lump-sum payments for compensatory time to be included in the creditable compensation of Tier I nonhazardous employees. *See* KRS 78.510. Section 15 of SB 151 expressly excludes lump-sum payments from creditable compensation for non-hazardous, Tier I employees, retiring after July 1, 2023. This exclusion materially alters and impairs the ultimate calculation of CERS members' retirement allowances and therefore violates the inviolable contract.

77. Under prior law, uniform and equipment allowances may be included in CERS members' creditable compensation. *See* KRS 78.510. Section 15 of SB 151 expressly excludes uniform and equipment allowances as well as undefined "other expense allowances," paid on or after January 1, 2019, from creditable compensation. This exclusion materially alters and impairs the ultimate calculation of CERS members' retirement allowances, and therefore violates the inviolable contract.

78. The inviolable contract guarantees CERS members may use accumulated, unused sick leave to determine retirement eligibility. *See* KRS 78.616. Section 17 of SB 151 prohibits CERS employees from using sick leave service credit for retirement eligibility, if they retire on

or after January 1, 2023. This prohibition materially impairs rights and benefits guaranteed to CERS members, and therefore violates the inviolable contract.

79. The inviolable contract does not include deductions, in any amount, from CERS Tier I members' creditable compensation for hospital and medical insurance. *See* KRS 78.545; KRS 61.702(2)(b). Section 30 of SB 151 requires an employer of a CERS Tier I member, employed after July 1, 2003, to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical insurance under the plan. As this provision alters and impairs the ultimate calculation of CERS members' retirement allowances, it violates the inviolable contract.

80. The inviolable contract requires CERS Tier I hazardous employees' final compensation to be calculated using the creditable compensation from the three (3) fiscal years the employee was paid the highest average monthly rate. It requires the highest five (5) years for CERS Tier I nonhazardous employees. *See* KRS 78.510. In either case, the inviolable contract does not require that the fiscal years used for calculation be complete fiscal years. *Id.* Section 15 of SB 151 requires, after January 1, 2019, that CERS Tier I hazardous employees' final compensation be calculated using the creditable compensation from their highest three (3) *complete* fiscal years, and that the highest five (5) *complete* fiscal years be used to calculate CERS Tier I nonhazardous employees' final compensation. Because this provision alters and impairs the ultimate calculation of CERS members' retirement allowances, it violates the inviolable contract.

81. CERS Tier I and Tier II employees who opted into the current hybrid cash balance plan are guaranteed an annual interest credit of at least 4%. *See* KRS 61.597; KRS 78.545. Section 19 of SB 151 removes this guarantee, and instead guarantees a return of

0%. Because this change materially impairs the rights of these employees, it violates the inviolable contract.

SB 151 Violates the Kentucky Constitution

82. By letters dated February 28, 2018 and March 6, 2018, the Attorney General notified all members of the General Assembly and the public that the pension bills it was considering – then SB 1 and its Committee Substitute – violated the inviolable contract in 21 ways.

83. Those letters therefore put the General Assembly and the public on notice that SB 1, if passed, would breach the inviolable contract and therefore violate the Kentucky Constitution.

84. Specifically, the letters explained that a substantial impairment of the contract would violated Section 19 of the Kentucky Constitution, which prohibits the enactment of "any law impairing the obligation of contracts."

85. SB 151 contains 15 of the violations of the inviolable contract identified in the Attorney General's letters. Nevertheless, the General Assembly passed SB 151 and Governor Bevin signed it into law.

86. Moreover, the General Assembly declined to enact or even consider measures that would provide revenue dedicated to funding the retirement systems.

87. SB 151 is therefore not reasonable or necessary to serve an important public purpose.

88. Because SB 151 substantially impairs the contractual benefits guaranteed to Kentucky's public employees, and because Defendants cannot show that SB 151 is reasonable

and necessary to serve an important public purpose, SB 151 violates Section 19 of the Kentucky Constitution.

89. Moreover, SB 151 obligates the Commonwealth to pay *more* toward the state pension systems than under current law, rather than create a savings. Specifically, SB 151 will cost $3.3 billion in debt for state pension systems and $1.7 billion in debt for local pension systems over the next 35 years. *See* Affidavit of Jason Bailey, ¶ 22, attached as Exhibit A.

The Public Has Suffered and Will Suffer Irreparable Injury Absent a Permanent Injunction

90. As a direct result of Defendants' efforts to abrogate public employees' rights to the promised retirement benefits, record numbers of public employees have retired rather than be subjected to an unlawful reduction in benefits.

91. For instance, in September 2017, after Governor Bevin introduced his plan to dismantle the public pension systems, the number of state and local government employees who retired surged 37% over the same month in the previous year.[3]

92. KTRS saw an even greater increase in the number of teacher retirees—a jump of 64% following Governor Bevin's pension proposal.[4]

93. The unprecedented wave of retirements has continued to the present, and it will only accelerate now that SB 151 has been signed into law. Defendants' actions have left public employees who are eligible to retire with an impossible choice: retire now, or lose the pension

[3] John Cheves, *September Retirements Surge as Kentucky Lawmakers Consider Pension Overhaul*, Lexington Herald-Leader, Sept. 6, 2017 (available at http://www.kentucky.com/news/politics-government/article171567482.html) (last visited Apr. 3, 2018).

[4] Tom Loftus, *Kentucky Pension Crisis: More Public Employees Are Retiring As Governor Bevin Works on Reform*, Courier-Journal, Oct. 10, 2017 (available at https://www.courier-journal.com/story/news/politics/2017/10/10/kentucky-pension-crisis-retirements-surge-bevin-works-reform/749214001/) (last visited Apr. 3, 2018).

benefits you were promised. The Commonwealth is harmed by the early retirement of thousands of capable teachers and other public servants who would prefer to remain working, but must retire to protect the pension benefits on which they and their families depend. Moreover, the retirement systems themselves are hurt by these early retirements, which cause each annuitant to be paid benefits longer than actuarially projected and cut short the anticipated employer and employee contributions to the system. *See* Affidavit of Stephanie Winkler, ¶ 12, attached hereto as Exhibit B. The enactment of SB 151 makes this harm imminent.

94. Moreover, because SB 151 removes teachers' ability to use sick days for retirement eligibility after the end of the current year, teachers have begun to use their sick days now.

95. The result of teachers using sick days has already become apparent. Already, on March 30, 2018, 27 school districts were forced to cancel school because teachers called in sick, to the detriment of the schoolchildren and their parents.

96. In light of the foregoing, Defendants' actions to impair the inviolable contracts between public employees and the Commonwealth violate Section 19 of the Kentucky Constitution.

CLAIMS

Count I
Declaratory Judgment
Violation of Section 19 of the Kentucky Constitution

97. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

98. Section 19 of the Kentucky Constitution similarly provides that "[n]o ex post facto law, nor any law impairing the obligation of contracts, shall be enacted."

99. SB 151 substantially impairs the inviolable contract between the Commonwealth and its public employees established in KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714 by reducing the benefits provided to those employees.

100. SB 151 therefore violates Section 19 of the Kentucky Constitution.

Count II
Declaratory Judgment
Violation of Section 46 of the Kentucky Constitution

101. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

102. Section 46 of the Kentucky Constitution provides, in relevant part, that "[e]very bill shall be read at length on three different days in each House, but the second and third readings may be dispensed with by a majority of all the members elected to the House in which the bill is pending."

103. SB 151, as passed, received only one reading in the House of Representatives.

104. The House of Representatives did not vote, "by a majority of all the members elected to the House in which the bill is pending," to dispense with the second and third readings of SB 151, as passed.

105. SB 151, as passed, did not receive any readings in the Senate.

106. SB 151 therefore violates Section 46 of the Kentucky Constitution.

Count III
Declaratory Judgment
Violation of Section 56 of the Kentucky Constitution

107. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

108. Section 56 of the Kentucky Constitution provides, in pertinent part, that "[n]o bill shall become a law until the same shall have been signed by the presiding officer of each of the two Houses in open session."

109. Under Kentucky law, the Speaker of the House is the presiding officer of the House of Representatives.

110. SB 151 was signed by Representative Osborne, who is not the Speaker of the House.

111. SB 151 therefore was not properly signed by the presiding officer of the House of Representatives, in violation of Section 56 of the Kentucky Constitution.

Count IV
Declaratory Judgment
Violation of Section 13 of the Kentucky Constitution

112. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

113. Section 13 of the Kentucky Constitution provides, in relevant part, that "[n]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

114. SB 151 deprives public employees of their contractual rights to certain retirement benefits, as set forth above.

115. SB 151 does not provide public employees with any compensation in exchange for depriving them of their contractual rights.

116. The contractual rights deprived by SB 151 are the property of the public employees.

117. SB 151 therefore violates Section 13 of the Kentucky Constitution.

Count V
Declaratory Judgment
Violation of KRS 6.350

118. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

119. KRS 6.350 provides, in relevant part: "A bill which would increase or decrease the benefits or increase or decrease participation in the benefits or change the actuarial accrued liability of any state-administered retirement system shall not be reported from a legislative committee of either house of the General Assembly for consideration by the full membership of that house unless the bill is accompanied by an actuarial analysis." KRS 6.350(1).

120. As introduced to the House Committee on State Government on March 29, 2018, SB 151 will decrease the benefits provided to the participants of KTRS, KERS, SPRS, and CERS, each of which is a state-administered retirement system.

121. The House Committee on State Government reported SB 151 to the floor of the House of Representatives without an actuarial analysis.

122. SB 151 was therefore passed in violation of KRS 6.350(1).

Count VI
Declaratory Judgment
Violation of KRS 6.955

123. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

124. KRS 6.955 provides, in relevant part: "No bill or resolution which relates to any aspect of local government or any service provided thereby shall be voted on by either chamber of the General Assembly unless a fiscal note has been prepared and attached to the bill pursuant to KRS 6.960, except that, if in the chamber in which the bill is being considered, two-thirds

(2/3) of the members elected vote to waive the fiscal note requirement, no note shall be required. The fiscal note waiver shall be certified by the clerk of the chamber in which the bill is being considered, and such certification shall be attached to the bill. Although waived in one chamber, a fiscal note shall be required when the bill goes to the other chamber unless a majority of the members elected to such chamber vote to waive the fiscal note requirement." KRS 6.955(1).

125. SB 151 affects local government because it creates, alters, or amends provisions of law requiring local governments to contribute to the pensions of their employees.

126. Both the House of Representatives and the Senate passed SB 151 without including a fiscal note, and without a vote by two-thirds (2/3) of the members of either chamber to waive the fiscal note requirement.

127. SB 151 was therefore passed in violation of KRS 6.955.

Count VII
Declaratory Judgment
Violation of Section 2 of the Kentucky Constitution

128. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

129. Section 2 of the Kentucky Constitution provides, "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

130. SB 151 was passed in a procedure that violated constitutional and statutory requirements, and it deprives public employees of their constitutional and statutory rights.

131. The passage of SB 151 therefore violates the rights of the people of the Commonwealth to be free from the exercise of arbitrary power over their lives, liberty, and property, in violation of Section 2 of the Kentucky Constitution.

Count VIII
Injunctive Relief Against Governor Bevin
(All Plaintiffs)

132. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

133. Plaintiffs are entitled to relief in the form of injunctive relief, both temporary and permanent, restraining and enjoining Governor Bevin and his agents, attorneys, and any other person in active concert or participation with him, from enforcing or complying with SB 151, or in any way unconstitutionally reducing or eliminating the retirement benefits provided to public employees under the inviolable contracts.

134. By reducing retirement benefits beginning July 1, 2018, SB 151 forces public employees to choose between retiring immediately or losing retirement benefits they had previously been promised in an inviolable contract.

135. Moreover, by causing public employees to retire, SB 151 inflicts harm on the Commonwealth, which will be deprived of the services provided by essential, experienced public employees.

136. SB 151 therefore threatens imminent harm to the public and public employees by violating the Kentucky Constitution's prohibition on the impairment of contracts.

137. By reason of the actions and violations described above, KTRS, KERS, SPRS, and CERS participants, as well as the citizens of the Commonwealth, suffered immediate and irreparable injury and will continue to so suffer unless Governor Bevin is immediately restrained and permanently enjoined from enforcing SB 151, or in any way unconstitutionally reducing or eliminating the retirement benefits provided to public employees under the inviolable contracts.

138. Plaintiffs have no adequate remedy at law or otherwise to address this injury, save in a court of equity.

139. No court has refused a previous application for a restraining order or injunction in this matter.

Count IX
Injunctive Relief Against Board of Trustees of KTRS
(Commonwealth and KEA)

140. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

141. Plaintiffs are entitled to relief in the form of injunctive relief, both temporary and permanent, restraining and enjoining the Board of Trustees of KTRS and its agents, attorneys, and any other person in active concert or participation with it, from enforcing or complying with SB 151, or in any way unconstitutionally reducing or eliminating the retirement benefits provided to public school employees under the inviolable contracts.

142. By reducing retirement benefits beginning July 1, 2018, SB 151 forces public employees to choose between retiring immediately or losing retirement benefits they had previously been promised in an inviolable contract.

143. Moreover, by causing public employees to retire, SB 151 inflicts harm on the public, who will be deprived of the services provided by essential public employees.

144. SB 151 therefore threatens imminent harm to the public and public employees by violating Kentucky's prohibition on the impairment of contracts.

145. By reason of the actions and violations described above, KTRS participants, as well as the citizens of the Commonwealth, suffered immediate and irreparable injury and will continue to so suffer unless the Board of Trustees of KTRS is immediately restrained and

permanently enjoined from enforcing or complying with SB 151, or in any way unconstitutionally reducing or eliminating the retirement benefits provided to public employees under the inviolable contracts.

146. Plaintiffs have no adequate remedy at law or otherwise to address this injury, save in a court of equity.

147. No court has refused a previous application for a restraining order or injunction in this matter.

Count X
Injunctive Relief Against Board of Trustees of KRS
(Commonwealth and Kentucky State FOP Lodge)

148. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

149. Plaintiffs are entitled to relief in the form of injunctive relief, both temporary and permanent, restraining and enjoining the Board of Trustees of KRS and its agents, attorneys, and any other person in active concert or participation with him, from enforcing or complying with SB 151, or in any way unconstitutionally reducing or eliminating the retirement benefits provided to public employees under the inviolable contracts.

150. By reducing retirement benefits beginning July 1, 2018, SB 151 forces public employees to choose between retiring immediately or losing retirement benefits they had previously been promised in an inviolable contract.

151. Moreover, by causing public employees to retire, SB 151 inflicts harm on the public, who will be deprived of the services provided by essential, experienced public employees.

152. SB 151 therefore threatens imminent harm to the public and public employees by violating the Kentucky Constitution's prohibition on the impairment of contracts.

153. By reason of the actions and violations described above, KERS, SPRS, and CERS participants, as well as the citizens of the Commonwealth, suffered immediate and irreparable injury and will continue to so suffer unless the Board of Trustees of KRS is immediately restrained and permanently enjoined from enforcing or complying with SB 151, or in any way unconstitutionally reducing or eliminating the retirement benefits provided to public employees under the inviolable contracts.

154. Plaintiffs have no adequate remedy at law or otherwise to address this injury, save in a court of equity.

155. No court has refused a previous application for a restraining order or injunction in this matter.

156. Plaintiffs are entitled to further relief as may be shown by the evidence and legal authority that may be presented in this proceeding. Plaintiffs reserve the right to amend this Complaint, as necessary, to request any further relief to which they are entitled.

WHEREFORE, Plaintiffs demand judgment against Defendants as set forth in the prayer for relief, below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand as follows:

I. That this Court issue a declaration and order that:

A. SB 151 breaches the inviolable contract between the Commonwealth and its public employees.

B. SB 151 violates Section 2 of the Kentucky Constitution.

C. SB 151 violates Section 13 of the Kentucky Constitution.

D. SB 151 violates Section 19 of the Kentucky Constitution.

E. SB 151 was passed in violation of Section 46 of the Kentucky Constitution.

F. SB 151 was passed in violation of Section 56 of the Kentucky Constitution.

G. SB 151 was passed in violation of KRS 6.350.

H. SB 151 was passed in violation of KRS 6.955.

II. That the Court issue a restraining order, temporary injunction, and permanent injunction, restraining and enjoining Governor Bevin and all his agents, attorneys, representatives, and any other persons in active concert or participation with him from enforcing SB 151 or in any way reducing or eliminating the retirement benefits provided to public employees under the inviolable contracts.

III. That the Court issue a restraining order, temporary injunction, and permanent injunction, restraining and enjoining the Board of Trustees of KTRS and all its agents, attorneys, representatives, and any other persons in active concert or participation with it from enforcing SB 151 or in any way reducing or eliminating the retirement benefits provided to public employees under the inviolable contract.

IV. That the Court issue a restraining order, temporary injunction, and permanent injunction, restraining and enjoining the Board of Trustees of KRS and all its agents, attorneys, representatives, and any other persons in active concert or participation with it from enforcing SB 151 or in any way reducing or eliminating the retirement benefits provided to public employees under the inviolable contract.

V. That Plaintiffs be awarded any and all other relief to which they are is entitled, including attorneys' fees and costs.

DATE: April 11, 2018

Respectfully Submitted,

ANDY BESHEAR
ATTORNEY GENERAL

By: */s/ Andy Beshear*

J. Michael Brown (jmichael.brown@ky.gov)
Deputy Attorney General
La Tasha Buckner (latasha.buckner@ky.gov)
Assistant Deputy Attorney General
S. Travis Mayo (travis.mayo@ky.gov)
Executive Director,
Office of Civil and Environmental Law
Marc G. Farris (marc.farris@ky.gov)
Samuel Flynn (samuel.flynn@ky.gov)
Assistant Attorneys General
Office of the Attorney General
700 Capitol Avenue
Capitol Building, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
(502) 564-8310 FAX

Counsel for Plaintiff Commonwealth of Kentucky, ex rel. *Andy Beshear, Attorney General*

/s/ *Jeffrey S. Walther*, by permission

Jeffrey S. Walther (jwalther@wgmfirm.com)
Walther, Gay & Mack, PLC
163 East Main Street, Suite 200
Lexington, Kentucky 40588
(859) 225-4714

Counsel for Plaintiff Kentucky Education Association

/s/ *David Leightty*, by permission

David Leightty (dleightty@earthlink.net)
Priddy, Cutler, Naake & Meade PLLC
2303 River Road, Suite 300
Louisville, Kentucky 40206
(502) 632-5292

Counsel for Plaintiff Kentucky FOP Lodge

VERIFICATION

I, J. MICHAEL BROWN, Deputy Attorney General, upon being duly sworn, do hereby swear that I have read the foregoing Verified Complaint for a Declaration of Rights, a Temporary Injunction, and a Permanent Injunction and the factual allegations set out therein are true and correct to the best of my knowledge and belief.

J. Michael Brown

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF FRANKLIN)

Subscribed, sworn to and acknowledged before me by this 11 day of April, 2018, by J. Michael Brown.

Notary Public

ABIGAIL R. HARTGE
NOTARY PUBLIC
State At Large, Kentucky
My Commission Expires March 24, 2021

Printed Name: Abigail R. Hartge

My Commission Expires: March 24, 2021

VERIFICATION

I, STEPHANIE WINKLER, President of the Kentucky Education Association, upon being duly sworn, do hereby swear that I have read the foregoing Verified Complaint for a Declaration of Rights, a Temporary Injunction, and a Permanent Injunction and the factual allegations set out therein are true and correct to the best of my knowledge and belief.

Stephanie Winkler

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF FRANKLIN)

Subscribed, sworn to and acknowledged before me by Stephanie Winkler this 9th day of April, 2018.

Notary Public #517584

Printed Name: MARY W. RUBLE

My Commission Expires: Aug. 18, 2018

VERIFICATION ON BEHALF OF STATE FOP

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

Berl Perdue, Jr.

Subscribed and sworn to before me by Berl Perdue, Jr., this 11th day of April, 2018.

Notary Public, State at Large, Kentucky

My commission expires: 8-4-2018
556555

EXHIBIT 6

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

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

v.

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

PLAINTIFFS' BRIEF ON THE MERITS

The Plaintiffs, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, the Kentucky Education Association ("KEA"), and the Kentucky State Lodge Fraternal Order of the Police ("FOP"), pursuant to the Court's April 20, 2018 scheduling order, tender the following Brief on the Merits.

INTRODUCTION

The Plaintiffs are entitled to judgment as a matter of law. In passing Senate Bill 151 ("SB 151"), the Defendants violated critical provisions of Kentucky's Constitution, Bill of Rights, and state statutes. These provisions are mandatory, and their violation voids SB 151 in its entirety. Accordingly, this Court should grant judgment for the Plaintiffs as a matter of law.

On March 29, 2018, the House recessed just after 2:00 p.m., to hold a previously unannounced meeting of the House Committee on State Government. The meeting was held in a small conference room from which the public was excluded. When they arrived, legislators learned that the agenda (also unannounced) contained just one bill: SB 151. SB 151 – an 11-page

sewer bill – was called, and then immediately amended, stripping out all of its original sewer language and substituting 291 pages of new legislation purporting to overhaul Kentucky's public employee retirement systems. SB 151 was then voted out of Committee without public hearings, without an actuarial analysis or fiscal note, and before most legislators could even read the bill. SB 151 then directly proceeded to the House Floor. The House then "passed" the bill, but did so without the constitutionally-required 50 votes, without the constitutionally-required three separate readings on three separate days, and without the constitutionally-required signature of the presiding officer. SB 151 was then sent to the Senate, which likewise hastily and improperly "passed" the bill. Governor Bevin signed the bill on April 10, 2018.

The process by which SB 151 was passed is government at its worst, intended to exclude both the public and large portions of the General Assembly itself. It was further unconstitutional and unlawful, violating Sections 2, 46, and 56 of the Kentucky Constitution as well as KRS 6.350 and KRS 6.955. Even if it had been passed in a constitutional and transparent manner, SB 151 would still be unconstitutional, because it violates and substantially impairs the retirement rights and benefits of Kentucky's public employees, amounting to violations of Sections 13 and 19 of the Kentucky Bill of Rights.

Specifically, SB 151 violates the Kentucky Constitution and Kentucky law in the following ways:

(1) Section 46 requires every bill receive three readings on three separate days in each chamber. SB 151 did not receive the required readings;

(2) Section 46 requires every bill containing an appropriation to receive a 51-member majority vote in the House of Representatives. SB 151 contains self-executing appropriations, but only received 49 votes in favor of passage;

(3) Section 46 requires every bill be read "at length." SB 151 was never read at length in either chamber of the Kentucky General Assembly;

(4) KRS 6.350 requires bills affecting public retirement systems to have an actuarial analysis, and KRS 6.955 requires bills affecting counties to have a fiscal impact note before they are considered by either house of the General Assembly. No actuarial analysis or fiscal note was attached to SB 151;

(5) Section 56 requires the presiding officer of the House to sign each bill. SB 151 was not signed by the Speaker or anyone appropriately exercising the authority of Speaker;

(6) Section 56 requires each bill to be "read at length" before it is signed by the presiding officer of each House. SB 151 was not "read at length" before it was signed;

(7) Section 2 prohibits the General Assembly from exercising absolute and arbitrary power in contravention of law. The General Assembly passed SB 151 in direct contravention of express Kentucky law;

(8) The Contracts Clause of Section 19 prohibits any law impairing contracts. SB 151 contains provisions that violate the inviolable contract by substantially impairing the retirement rights and benefits of Kentucky's public employees; and

(9) The Takings Clause of Section 13 prohibits the taking of private property without just compensation. SB 151 deprives Kentucky public employees of their property rights in the benefits guaranteed under the inviolable contract.

The General Assembly broke its word and the law when it passed SB 151. This Court should grant judgment for the Plaintiffs as a matter of law and declare SB 151 void.

STATEMENT OF FACTS

The facts in this case are uncontroverted. March 29, 2018 was the 57th day of the 2018 Kentucky Legislative Session. By this time, a "pension reform" bill – Senate Bill 1 – had been introduced in the Senate,[1] but had failed to secure the necessary votes to pass that chamber.

[1] Senate Bill 1 was introduced in the Senate on February 20, 2018. *See* Legislative Record For Senate Bill 1, available at http://www.lrc.ky.gov/record/18RS/SB1.htm (last visited May 1, 2018). SB 1 was reported favorably to the Rules Committee with a Committee Substitute on March 7, 2018. *Id*. On March 8, 2018, SB 1 was posted for passage in the Regular Orders of the Day for March 9, 2018. *Id*. On March 9, 2018, the Senate Majority Caucus met for several hours, thereafter, the Senate referred SB 1 back to committee. *Id*.

Strong public opposition led the sponsor of SB 1 to declare the bill was "on life support,"[2] and the President of the Senate stated that there was "little hope" the bill would pass.[3] The Attorney General twice informed the legislature of the numerous ways it violated the inviolable contract for each public retirement system. (*See* Attorney General's Letters to the General Assembly) (Attached as Ex. A.) Nevertheless, just after 2:00 p.m. on March 29th, the Kentucky House of Representatives called for a recess so that its Committee on State Government could meet.

I. The House State Government Committee Hearing On SB 151.

This meeting was a surprise. It had not been previously scheduled or announced to the public, nor was it listed on the legislative calendar. And it was not held in the legislative hearing rooms in the Capitol Annex, but was instead held in a small conference room in the Capitol. The public – including hundreds of teachers rallying outside of both the House chamber and the small conference room – was excluded. Representative Jerry T. Miller, Chairman of the House Committee on State Government, opened the meeting and called SB 151, an 11-page sewer bill that had passed the Senate with little opposition.

Representative John "Bam" Carney immediately introduced a substitute to SB 151, which was adopted on a voice vote. The substitute stripped SB 151's language in its entirety, including all language concerning sewers. The bill instead became a massive 291-page overhaul of Kentucky's public pension systems. Unquestionably, the entire subject of SB 151 changed, with the new topic (pensions) being in no way germane to the original one (sewers). Despite the fact

[2] *Herald Leader: Pension Bill Still on 'Life Support,' Sponsor Says*, available at https://www.lanereport.com/88547/2018/03/herald-leader-kentucky-pension-bill-still-on-life-support-says-sponsor/ (last visited Apr. 30, 2018).

[3] Tom Loftus, *I Don't See A Lot of Hope For It, Kentucky's Pension Reform Bill Is Unlikely To Pass*, available at https://www.courier-journal.com/story/news/politics/2018/03/14/stivers-dont-see-lot-hope-pension-bill/424601002/ (last visited Apr. 30, 2018).

that the majority of the Committee had never seen, much less had time to read the substitute, Chairman Miller stated that the Committee would vote on the new SB 151 during the meeting. (Transcript of Legislative Proceedings at 30 (March 29, 2018)) (Attached as Ex. B); (House Committee on State Government, Video 1) (Attached as Ex. C.)

In the Committee, Representative Carney testified at length about how SB 151 was different from SB 1. He stated that SB 151 made fewer "substantial change[s]" for current teachers, such as "the freezing of the sick days." (Ex. B., p. 32:5-6); (Ex. C., at House State Government, Video 2.) He further stated that, unlike SB 1, SB 151 was "basically try[ing] to put this on future hires." (Ex. B., p. 32:15-16); (Ex. C., at House State Government, Video 2.) In sum, Representative Carney's testimony was that there were substantial differences between SB 151 and SB 1. (Ex. B., p. 39:21); (Ex. C. at House Committee on State Government, Video 6.)

Chairman Miller likewise stated "[t]his is not Senate Bill 1." (Ex. B., p. 31:13-14); (Ex. C. at House Committee on State Government, Video 2.) To ensure absolute certainty, Representative Will Coursey further questioned Representative Carney as to whether SB 151 was the same as SB 1. (Ex. B. p. 39:25-40:10); (Ex. C. at House Committee on State Government, Video 6.) Representative Carney stated, "I would, I would argue that it's not; otherwise, I wouldn't be here … For current employees it's a very significant, different piece of language ..." (Ex. B., p. 40:8-9; p. 40:25-41:1); (Ex. C. at House Committee on State Government, Video 6.)

Few of the legislators – particularly those from the minority party – had an opportunity to read the substitute prior to the Committee meeting. Representative Rick Rand stated that the new SB 151 was a "291-page document that I just saw 10 minutes ago." (Ex. B., p. 33:3-4); (Ex. C. at

House Committee on State Government, Video 3.) Representative Derrick Graham later stated, "[t]his is a bill we have been given today, which we don't really know what's in the bill." (Ex. B., p. 34:18-19); (Ex. C. at House Committee on State Government, Video 4.)

In addition, the Committee's consideration of SB 151 raised several legal concerns. Representative Jim Wayne raised a point of order, asking if the new SB 151 had an actuarial analysis. In response, House Majority Leader Jonathan Shell acknowledged that there was no actuarial analysis for SB 151, stating "[w]e ***do not have an actuarial analysis*** on the full plan before you." (Ex. B. p. 29:2-4); (Ex. C. at House Committee on State Government, Video 1.) Nevertheless, Representative Shell stated the Committee should "move forward without an actuarial analysis." (Ex. B., p. 29:10); (Ex. C. at House Committee on State Government, Video 1.)

Representative Wayne then stated that SB 151 could not be voted out of the Committee without the actuarial analysis under KRS 6.350. (Ex. B., p. 30:5-7); (Ex. C. at House Committee on State Government, Video 1.) Chairman Miller stated that it "…will be dealt with on the floor," and ruled that the Committee would consider SB 151 despite the lack of actuarial analysis. (Ex. B., p. 30:3-4); (House Committee on State Government, Video 1.) Representative Wayne objected, stating that the text of KRS 6.350 prohibited the Committee from voting on SB 151 without the analysis. (Ex. B., p. 31:4-6); (Ex. C. at House Committee on State Government, Video 1.)

There was also no fiscal note analyzing the impact of the bill on local governments as required by KRS 6.955. In the Committee, Representative Wayne inquired whether SB 151 had a fiscal note attached. (Ex. B., p. 38:18-20); (Ex. C. at House Committee on State Government, Video 5.) Chairman Miller acknowledged there was none. (Ex. B., p. 38:21-22); (House

Committee on State Government, Video 5.) Voicing additional concerns, Representative Wayne asked whether SB 151 had a local government impact study attached. (Ex. B., p. 36:20-21); (Ex. C. at House Committee on State Government, Video 5.) Representative Carney responded, "[s]taff is telling there is not one." (Ex. B., p. 37:1-2); (Ex. C. at House Committee on State Government, Video 5.)

The Committee allowed no public testimony. Nor did it make a single copy of the bill available to the public during the meeting. Several legislators, including Representative Graham, argued that it was inappropriate to consider the bill when stakeholders and the public were excluded from the Committee hearing. (Ex. B., p. 34:4-25-35:1-5); (Ex. C. at House Committee on State Government, Video 4.) Representative Wayne specifically asked whether a Kentucky teacher would be permitted to speak on the bill. (Ex. B., p. 35:14-24); (Ex. C. House Committee on State Government, Video 5.) Chairman Miller refused. (Ex. B., p. 35:25- 36:1-2); (Ex. C. at House Committee on State Government, Video 5.) Representative Rand objected to the process, noting when the General Assembly passed pension reform in 2013, it had conducted open public meetings across the state. (Ex. B., p. 33:5-8); (Ex. C. at House Committee on State Government, Video 3.)[4]

Just an hour after SB 151 was entirely stripped of its 11-pages of sewer legislation and 291 pages of pension reform were substituted, Representative Miller called for a vote. He did so despite most Committee members stating they had not seen, much less read the 291-page amendment. Just after 3:00 p.m. the Committee voted SB 151 out of Committee, reporting it

[4] SB 151 stands in stark contrast to the open and deliberative process that marked the 2013 pension reform package. *See* 2013 SB 2; 2013 HB 440. Unlike with SB 151, which was passed in just over eight hours without hearings, an actuarial analysis, or fiscal note, in 2012 the legislature created a bipartisan task force dedicated to addressing growing public-sector pension fund liabilities. *See* 2012 HCR 162. After a year of public meetings and suggestions from a range of stakeholders, the task force made agreed recommendations to the General Assembly. Those recommendations included benefit modifications for future hires and revenue increases to help fund the pension plan. In 2013, the General Assembly passed these reforms with wide bipartisan support.

favorably to the House floor. The circumstances were such that the Committee voted to report SB 151 before it even amended its original title: "An Act relating to the local provision of wastewater services." (Ex. B., p. 41:5-18); (Ex. C. at House Committee on State Government, Video 7.) Only after the Committee vote was the title amended to reflect that the new SB 151 was "An Act relating to retirement."

II. House Floor Proceedings And Vote On SB 151.

SB 151 was then immediately called on the floor of the full House. While SB 151 had received two readings as a sewer bill, its subject and every word of its content had entirely changed. As such, it received its first reading as a pension bill only after it was called on the House Floor, and it was read only by title, not "at length." Despite the constitutional requirement of three readings on three separate days, state representatives were forced to vote on the bill that very day, without reading it, without public testimony, without an actuarial analysis, and without any fiscal note.

On the House floor, several legislators again voiced serious concerns about the manner in which SB 151 was proceeding. House Minority Leader Rocky Adkins questioned whether SB 151 contained an actuarial analysis as required under KRS 6.350. (Ex. B., p. 3:18-22); (Ex. C. at House Floor Debate, Video 1.) Representative Shell responded only that "it is not the responsibility or purview of the Court to establish and interpret the rules by which the legislature conducts business." (Ex. B., p. 4:7-9); (Ex. C. at House Floor Debate, Video 1.) Speaker Pro Tempore David Osborne then ruled from the chair that the requirements of KRS 6.350 were "waived" because "the statute is treated as a rule, that the House does not have the ability to waive that rule." (Ex. B., p. 4:14-16); (Ex. C. at House Floor Debate, Video 1.) Representative Adkins appealed the ruling of the chair. (Ex. B., p. 4:23-25–5:1-3); (Ex. C. at House Floor

Debate Video 1.) The appeal was overruled on a 58-33 roll call vote. Representative Wayne then addressed SB 151's lack of an actuarial analysis, fiscal note, and local government impact study and moved to table the bill. That motion failed. (Ex. B., p. 6:11–8:14); (Ex. C. at House Floor Debate, Video 3.)

Representative Carney then explained SB 151 to the House Floor. (Ex. B., p. 5:6-25–6:12); (Ex. C. at House Floor Debate Video 2.) Only an hour prior to this explanation, SB 151 had been an 11-page sewer bill. In its new form, there had been no public hearings, no public posting of the bill, no actuarial analysis, no fiscal note, and no local government impact study. Nevertheless, Representative Carney stated "[Stakeholders] have been heard" on SB 151. (Ex. B., p. 5:11-12); (Ex. C. at House Floor Debate, Video 2.) As the sponsor, Representative Carney again clarified that SB 151 and SB 1 were substantially different. (Ex. B., p. 13:9-10); (Ex. C. at House Floor Debate, Video 7.)

Representative Jeffery Donohue questioned Representative Carney about why an actuarial analysis had not been provided for SB 151. (Ex. B., p. 10:5-8); (Ex. C. at House Floor Debate, Video 5.) Representative Carney responded that there was no actuarial analysis because "[w]hen I got the [committee] sub[stitute] ready, ***they have not had time to do that***." (Ex. B., p. 10:21-22); (House Floor Debate, Video 5.) (emphasis added). Representative Donohue responded "[t]hat's not a good answer… it's our job to do things right…so that we can make an informed decision." (Ex. B., p.11:3-9); (Ex. C. at House Floor Debate, Video 5.) Twenty minutes later, Representative Carney, again acknowledged the lack of an actuarial analysis stating, "on the specific sub, it's not been done yet because of time." (Ex. B., p. 13:18-19); (Ex. C. at House Floor Debate, Video 7.) Representative Graham stated "[n]o actuary analysis is on hand, and yet the majority party is asking us to pass this bill with no materials for us to help us to make a

proper and sound decision on this important issue." (Ex. B., p. 16:1-4); (Ex. C. at House Floor Debate, Video 9.)

Once again, several legislators voiced concerns that they had not had an opportunity to read the bill. Representative Jeff Greer stated "…we've had a very limited time to read this bill." (Ex. B., p. 18:1-2); (Ex. C. at House Floor Debate, Video 11.) And Representative Jim Wayne observed, "I dare say no one in this chamber has read the bill." (Ex. B., p. 8:13-14); (Ex. C. at House Floor Debate, Video 3.) Notably, the House itself only read the bill once the same day, by title only, not "at length."

Ultimately, Representative Carney moved for the House's final passage of the bill. Only 49 of the 100 state representatives voted for the bill, with 46 voting against and 5 not voting. *See* Vote History of SB 151.[5] The Speaker Pro Tempore of the House nevertheless declared the bill had passed, and signed the bill as the "Speaker-House of Representatives." SB 151 was then immediately sent to the Senate.

III. Senate Floor Proceedings And Vote On SB 151.

The Senate likewise rushed SB 151 through passage, avoiding any hearings or public participation. The Senate Rules Committee met and posted SB 151 in the Orders of the Day. Senate Majority Floor Leader Damon Thayer moved that the House Committee Substitute to SB 151, which was then reported as a wastewater bill, be adopted.

Senate Minority Leader Ray Jones, II, informed the Senate that no "actuarial analysis" was attached to SB 151, that he had not seen one, and that the bill should be reviewed. (Ex. B., p. 18:11-12); (Ex. C. at Senate Floor Debate, Video 3.) He then moved to table the bill. The motion to table the bill failed. (*Id.*)

[5] Available at http://www.lrc.ky.gov/record/18RS/SB151/vote_history.pdf (last visited May 1, 2018).

Shortly thereafter, Senator Joe Bowen, the sponsor of SB 1 and the original wastewater version of SB 151, was called upon to explain the bill. In direct contradiction to Representative Carney (the sponsor of the House Committee Substitute), Senator Bowen claimed that SB 1 and SB 151 were essentially the same. (Ex. B., p. 19:1-9); (Ex. C. at Senate Floor Debate, Video 2.) He therefore argued that the actuarial analysis for SB 1 worked for SB 151 as well. (Ex. B., p. 19:7-8); (Ex. C. at Senate Floor Debate, Video 2.) Responding to questions about whether an actuarial analysis accompanied SB 151, Senator Bowen argued that the actuarial analysis provided for SB 1 "[I]s available" for SB 151. (Ex. B., p. 19:9); (Ex. C. at Senate Floor Debate, Video 2.) Despite constitutional mandates, the Senate did not conduct ***any*** readings of SB 151 in its new 291-page form. Instead, Senator Bowen moved for final passage of the bill, the roll was called, and the bill passed on a 22-15 vote.

On April 10, 2018, Governor Bevin signed the bill. The next day, the Attorney General, KEA, and FOP filed this lawsuit.

STANDARD OF REVIEW

Under CR 56.03, summary judgment should be granted "forthwith" if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." As stated in *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." The Kentucky Supreme Court has acknowledged that the word "impossible" is "'used in a practical sense, not in an absolute sense.'" *O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006) (quoting *Perkins v.*

Hausladen, 828 S.W.2d 652, 654 (Ky. 1992)). Because this dispute is purely a matter of law, summary judgment is appropriate for the reasons below.

ARGUMENT

SB 151 substantially alters and reduces the retirement benefits of the over 200,000 active members of the pension systems, including teachers, police officers, and firefighters. In doing so, it breaks the "inviolable" contract that the Commonwealth made with its public employees under KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714. Under those laws, the legislature promised public employees that, in exchange for their decades of public service, they would be guaranteed certain retirement benefits.

The manner in which the General Assembly passed SB 151 violated Sections 2, 13, 46, and 56 of the Kentucky Constitution, as well as KRS 6.350 and KRS 6.955. Moreover, by enacting SB 151, Governor Bevin and the General Assembly have broken that contract and substantially impaired those benefits in violation of the Kentucky Constitution and state statute.

I. SB 151 Violates The Constitution Because It Did Not Receive Three Readings.

"Section 46 of the Kentucky Constitution sets out certain procedures that the legislature ***must*** follow before a bill can be considered for final passage." *D & W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 422 (Ky. 1980) Any law that fails to follow these procedures is void under Section 26 of the Kentucky Constitution. *Id.* at 424. Courts have a duty to recognize unconstitutionally passed laws "and to declare [them] void." *Id.*

Section 46 provides: "Every bill shall be read at length on three different days in each House . . . ." KY. CONST. § 46. As a part of the Constitution, the "requirement that the reading of the bills shall be on different days is ***mandatory***." *Kavanaugh v. Chandler*, 72 S.W.2d 1003, 1004 (Ky. 1934) (emphasis added).While Section 46 allows that "the second and third readings

may be dispensed with by a majority of all the members elected to the House in which the bill is pending," there is no dispute that, here, there was no vote in either house to dispense with the second and third readings.

The three-readings mandate was created by the Framers of our Constitution to stop "abuses" by the General Assembly. The specific "abuse" they sought to address is exactly what happened here – a secret deal by legislative leadership, followed by a reckless "haste" to pass a bill, all without adequate reflection or time to read the bill by the Legislature, and without any input from the people affected by the law.

In debating Section 46 of the Constitution, Delegate Simon B. Buckner described this exact scenario, stating the three-readings requirement was necessary to protect both the people and the legislature itself:

> We all know that many abuses exist in legislative bodies in the passage of acts. . . . There was, in the opinion of the Committee, a very serious abuse of the legislation in the haste with which bills are passed. . . . On one occasion, during the last Legislature, a bill involving large interests, the interests of the people of two large and populous counties, passed through both bodies of the Legislature in thirty-five minutes, and was laid before the Executive in a short time after that. . . . It is probable that not ten men in the Legislature knew what they were voting on . . . . The people are too apt to criticise legislative bodies, and say, because of hasty legislation like this, the body is corrupt. This hasty mode of legislation ought to be checked, not only in the interest of the people, but in the interest of the legislative body itself.

(*See* E. Polk Johnson, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3868-69 (1891) (attached as Ex. D.)

Thus, Section 46 of the Constitution was specifically designed to prevent "hasty" legislation and to prohibit any bill from being passed in a single day. It was further devised to ensure that all members of the Legislature had time to read and fully understand what they voted on. It was calculated to protect "the interests of the people," so that bills could not be rushed

through without public knowledge and participation. As Delegate Buckner stated, a system that did not satisfy these concerns would be viewed as "corrupt."

The requirements of Section 46 prevent such corruption and address these concerns in two ways: (1) by requiring the printing of the bill, and (2) by mandating it be read at length on three separate days. Again, as stated by Delegate Buckner:

> We have sought, in recommending this to your consideration, to remedy, in great part, the evil, by requiring that, before consideration by the House before which the bill comes, it shall be printed, so that every member shall have an opportunity at least of knowing what he has voted on. Then it shall be read. The report provides three subsequent days….[6]

(*Id.* at 3869.) (emphasis added).

Because it is part of the Kentucky Constitution, the three-readings requirement is mandatory. *Kavanaugh*, 72 S.W.2d at 1004; *see also Bosworth v. State Univ.*, 179 S.W. 403, 407 (Ky. 1915) ("[A]ll the provisions of a Constitution are mandatory.") (citation omitted). When, as here, the General Assembly has passed a law in violation of the procedures prescribed by the Constitution, the courts must strike it down. *See D & W Auto Supply*, 602 S.W.2d at 424 ("The proper exercise of judicial authority requires us to recognize any law which is unconstitutional and to declare it void. . . ."). The judiciary is "sworn to see that violations of the constitution by any person, corporation, state agency or branch of government are brought to light and corrected." *Id. See also Bosworth*, 179 S.W. at 406.

Here, the evidence is uncontested that neither house of the General Assembly met the three-readings requirement of Section 46 after SB 151 was entirely stripped of its original sewer

[6] Delegate Buckner further observed that "the amendment of the Delegate from Shelby, which I believe meets with the approbation of most of the members of the Committee, modifies that by enabling the Legislature itself to dispense with the two subsequent readings." *Id.* As previously noted, there was no such vote to dispense with the second and third readings in this case.

language, its very subject was changed, and 291 pages of new and different text were added. In this new form, it received only one reading, by title, in the House. That reading was on the same day it was passed, only hours after it was revealed to legislators for the first time, and before the public could participate. As such, the process contained the same "abuses" outlined by Delegate Buckner: (1) the haste of passing a bill in one day, (2) whereby Legislators did not have time to read or understand it, and (3) where the "public interest" was excluded, having no chance to testify or otherwise comment on the bill.

The Committee and floor speeches confirm these abuses. Representative Graham raised the haste abuse in that SB 151 was moving so fast that he and others did not have the necessary materials to make an informed vote. (Ex. B., p. 16:1-4); (Ex. C. at House Floor Debate, Video 9.) He stated: "[n]o actuary analysis is on hand, and yet the majority party is asking us to pass this bill with no materials for us to help us to make a proper and sound decision on this important issue." (*Id.*) Representative Wayne raised the abuse of legislators not having read the bill, stating, "I dare say no one in this chamber has read the bill." (Ex. B., p. 8:13-14); (Ex. C. at House Floor Debate, Video 3.) He also noted that the public interest was being excluded, requesting that a Kentucky teacher be permitted to speak on the bill. (Ex. B. p. 35:14-19); (Ex. C. at House Committee on State Government, Video 5.) Chairman Miller denied that request.

The result was exactly as Delegate Buckner predicted. The public has since expressed distrust in the legislative process, including one teacher who described it as "absolutely corrupt government."[7] Indeed, more than 12,000 Kentuckians marched on the State Capitol in Frankfort to protest the passage of SB 151 just days later.

[7] Sarah Jones, *Kentucky Teachers Walk Out*, The New Republic, Apr. 2, 2018, available at https://newrepublic.com/article/147724/kentucky-teachers-walk (last visited Apr. 24, 2018).

The handling of the new SB 151 in the Senate was even more troubling. Despite the Section 46 mandate, the Senate did not conduct ***any*** readings of SB 151 in its new 291-page form. Like the House, the Senate acted as though the previous readings of SB 151 by its prior title – as "An Act relating to the local provision of wastewater services" – satisfied the constitutional requirement. The Senate then passed the new SB 151 without performing any reading of it in its new form, as "An Act relating to retirement."

Importantly, the fact that SB 151 was read by title twice in the House and three times in the Senate *as a sewage bill* cannot and does not satisfy the three readings requirement. Virtually every state that enforces a similar constitutional mandate – and does not follow the enrolled bill rule – has held that if amendments "vital[ly] alter[]" or "wholly change[]" the bill, the amended bill must receive three new readings on three separate days. *Hoover v. Bd. of Cnty. Comm'rs, Franklin Cnty.*, 482 N.E.2d 575, 579 (Ohio 1985). Indeed, even states that provide significant latitude to the Legislature still hold that previous readings only count when the subject of the substituted or amended bill "has a common purpose" with and "is germane to the original bill." *Magee v. Boyd*, 175 So. 3d 79, 114 (Ala. 2015.) *See also Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006) (holding that "a bill does not have to be considered on three separate days, . . . if the amendments to the bill added during the legislative process are germane to and do not change the general subject of the bill."); *People v. Clopton*, 324 N.W.2d 128, 130 (Mich. App. 1982) ("When an original bill has met the procedural constitutional requirements for passage, an amended version or substitute bill need not also meet those requirements in its later form so long as the amended version or substitute serves the same purpose as the original bill, is in harmony with the objects and purposes of the original bill, and is germane thereto."); *Frazier v. Bd. of*

Comm'rs of Guilford Cnty., 138 S.E. 433, 437 (N.C. 1927) (rereading of a bill is necessary only when the bill is amended "in a material matter.").

In *Giebelhausen v. Daley*, 95 N.E.2d 84 (Ill. 1950), the Illinois Supreme Court struck down a bill passed in violation of the three-readings requirement on facts nearly identical to this case. There, the original bill appropriated money for refunds to taxpayers pursuant to that state's Motor Fuel Tax Act. *Id.* at 94. The bill was read three times in the Senate and then adopted. *Id.* In the House, however, "every word of the original bill was stricken," and then "new language, which provided for the salaries and expenses to be paid by the Revenue Department in the Property Division" was substituted. *Id.* at 95. The Court held the law was void, finding "there was a complete substitution of a new bill under the original number, dealing with a subject which was not akin or closely allied to the original bill, and which was not read three times in each House, after it has been so altered, in clear violation of [the Constitution]." *Id.* The court stated that to hold otherwise would render the three readings "clause of the constitution nugatory by construction, and invite disregard of its salutary provisions." *Id.*

So, too, is the case here. Like in *Giebelhausen*, the original SB 151 passed the Senate. Then, in the House, every word was stripped, and the subject was changed from a sewage bill to a pension bill. The new SB 151 was "a complete substitution of a new bill under the original number." *Id.* Therefore, the readings of the old SB 151 – "An Act relating to the local provision of wastewater services" do not satisfy the three-readings requirement. To hold otherwise would render the three readings requirement of Section 46 meaningless.

A decision ruling SB 151 unconstitutional under the three-day reading requirement is further necessary to stop the General Assembly's consistent abuse and violation of Section 46. In the last two sessions alone, the General Assembly violated the three readings requirement in

turning a dog biting bill into higher education law, 2017 SB 12,[8] and attempting to turn a well digger bill into tax law. *See* 2018 SB 197.[9] In both instances, full substitutes were introduced at the last minute, and were then rushed through passage (of one or both chambers) in a single day.

The abuse of constitutionally mandated procedure extends well beyond these two sessions, and raised concerns for this Court in *Williams v. Grayson*. There, the General Assembly turned a House Bill concerning "the operation of taxicabs and limousines" into an entirely new bill "relating to road projects and declaring an emergency." *Williams v. Grayson*, Case No. 08-CI-856, Final Judgment, at 7 (Franklin Cir. Ct. Jan. 21, 2009) (Attached as Ex. E.) In doing so, the original bill was "gutted, amended, and completely re-written in the Senate on the last day of the legislative session to encompass an entirely foreign subject matter controlling hundreds of millions of dollars of highway expenditures with less than *one day's consideration* in both legislative bodies combined." *Id.*

In sum, the Framers adopted the three-readings requirement after substantial debate to ensure that the public and legislature were protected from the passage of a bill in secret, with too much haste, and without due consideration. The General Assembly willfully evaded this three-readings requirement by transforming a sewage bill into a pension bill, and then reading the completely different bill only once, by title, in the House. The General Assembly violated this

[8] The Senate conducted two readings of the 2017 SB 12, a bill relating to dog biting, prior to adopting a committee substitute that completely stripped the bill of its dog biting language and transformed the bill by adding language relating to the membership of the University of Louisville Board of Trustees. Thereafter, the new 2017 SB 12 received only one reading in the Senate prior to passage, being now completely divorced from dog biting, available at http://www.lrc.ky.gov/record/17RS/SB12.htm (last visited May 2, 2018).

[9] Because of the errors caused by the hasty and careless drafting of the House Floor Amendment to SB 197, the House of Representatives unintentionally passed a bill that would have taxed the full amount of retirees' pensions. *See* Joseph Gerth, *Frankfort is so screwed up, it almost taxed all of your Granny's pension*, The Courier-Journal, Apr. 11, 2018, available at https://www.courier-journal.com/story/news/local/joseph-gerth/2018/04/11/kentucky-house-representatives-income-tax-pensions-joseph-gerth/506425002/ (last visited Apr. 30, 2018).

thoughtfully considered clause of Section 46. Therefore, the Court should hold SB 151 is unconstitutional and void.

II. SB 151 Violates The Constitution Because A Majority Of The Members Of the House of Representatives Did Not Vote For It.

To comply with Section 46 of the Constitution, SB 151 also required a vote of a majority of all members elected to each House for passage. But it received only 49 votes in the House of Representatives. SB 151 therefore did not comply with Section 46, and must be declared void. *See D & W Auto Supply*, 602 S.W.2d at 424. Section 46 of the Constitution provides, in relevant part:

> No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each House, and a majority of the members voting, the vote to be taken by yeas and nays and entered in the journal: Provided, ***Any act or resolution for the appropriation of money*** or the creation of debt ***shall, on its final passage, receive the votes of a majority of all the members elected to each House***.

(Emphasis added).

Any bill that provides for an appropriation therefore requires at least 51 votes in the House and 20 votes in the Senate. *See D & W Auto Supply*, 602 S.W.2d at 422 (holding bill containing appropriations void, because it "received less than 51 votes in the House").

The Supreme Court has explained that "[w]here the General Assembly has mandated that specific expenditures be made on a continuing basis, or has authorized a bonded indebtedness which must be paid, such is, in fact, an appropriation." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 865 (Ky. 2005). The Court further explained that "appropriations" can be made outside a budget bill, stating that legislation may "mandate appropriations even in the absence of a budget bill." *Id.*

As an example of such an appropriation, *Fletcher* cited to pension legislation in the form of KRS 61.565(1) ("Each employer participating in the State Police Retirement System . . . and

each employer participating in the Kentucky Employees Retirement System . . . shall contribute annually to the respective retirement system . . . ."). *Id.* That very law is changed, altered, and amended by SB 151. Section 18 of SB 151 provides that KRS 61.565(1)(a) is amended as follows:

> Each employer participating in the State Police Retirement System as provided for in KRS 16.505 to 16.652, ~~[each employer participating in]~~the County Employees Retirement System as provided for in KRS 78.510 to 78.852, and ~~[each employer participating in]~~the Kentucky Employees Retirement System as provided for in KRS 61.510 to 61.705 shall contribute annually to the respective retirement system an amount ***determined by the actuarial valuation completed in accordance with KRS 61.670 and as specified by this section. Employer contributions for each respective retirement system shall be*** equal to the ***sum of***~~[percent, as computed under subsection (2) of this section, of the creditable compensation of its employees to be known as]~~ the "normal ***cost contribution***~~[contributions,]~~" and ~~[an additional amount to be known as]~~ the "actuarially accrued liability contribution**.**"

SB 151, § 18. Section 18 goes on to provide the method of calculating these contributions. *See id.* (amending KRS 61.565(b)-(e)). Because it amends KRS 61.565(1), which the Supreme Court has identified as an "appropriation" under the Constitution, SB 151 required 51 votes for passage.

SB 151 contains numerous other self-executing appropriations nearly identical to KRS 61.565. Like KRS 61.565, SB 151 requires employers – *i.e.*, state agencies – that participate in KERS or CERS to contribute annually to retirement plans. Specifically, Section 12 of SB 151 mandates contributions by these public employers to hybrid cash balance plans of state employees. It requires the state to provide a "contribution of four percent (4%) of the creditable compensation earned by the employee for each month the employee is contributing" to their plan. SB 151, § 12(2)(b). *See also* SB 151, § 14(45). Put simply, these sections of the bill require a contribution – defined in *Fletcher* as an appropriation under law – by public employers based on a set calculation. These annual contributions are the definition of a self-executing appropriation.

Here, as in *Fletcher*, there is a state law requiring public employers to contribute annually to retirement accounts. *Fletcher* definitively ruled that such payments were self-executing appropriations under the state Constitution, namely Section 230. *Id.* at 868 (holding that, "absent a statutory … mandate," such as the statutes establishing self-executing appropriations, "Section 230 precludes the withdrawal of funds from the state treasury except pursuant to a specific appropriation by the General Assembly"). If such payments are "appropriations" for purposes of Section 230 of the Constitution, they must also be appropriations for purposes of Section 46. Thus, SB 151 required 51 votes in the House. KY. CONST. § 46.

In similar circumstances, the Supreme Court held that "logic suggests that the decision of this Court is obvious, viz., since the Act makes an appropriation and since it received less than 51 votes in the House, it is violative of the Kentucky Constitution." *D & W Auto Supply*, 602 S.W.2d at 422. In that case, the Supreme Court overruled the so-called "enrolled bill doctrine" that held that courts could not review whether a bill was passed in accordance with constitutional procedure. *Id.* at 423-24. The Court held that the rule was "not appropriate in today's modern and developing judicial philosophy," particularly in light of technological advances that improved legislative record-keeping. *Id.* at 424. The Court observed that it was "sworn to see that violations of the constitution by any person, corporation, state agency or branch of government are brought to light and corrected. To countenance an artificial rule of law that silences our voices when confronted with violations of our constitution is not acceptable to this court." *Id.* Like SB 151, the bill at issue in *D&W Auto Supply* – the Litter Control Act – appropriated funds, despite not being a budget bill. *Id.* at 425. Also like SB 151, it received a vote of fewer than 51 members of the House of Representatives. *Id.* at 424. Accordingly, the Supreme Court declared the bill unconstitutional, and therefore void. *Id.* at 424-25.

This Court should reach the same conclusion here. According to binding Supreme Court precedent, SB 151 contains appropriations, yet it did not receive the vote of a majority of all members elected to the House of Representatives. It must, therefore, be declared void.

III. SB 151 Violates The Constitution Because It Was Never Read "At Length."

In addition to the majority-vote and three-readings requirements, Section 46 also requires that bills be read "at length." KY. CONST. § 46. SB 151, as passed, was never read at length in either House, in violation of this clear constitutional mandate. Instead, its sole reading – as passed in the House – was by title only.

The debates of the Constitutional Convention demonstrate that, by using the term "at length," the Framers understood that bills would be read in full and not by title. For instance, Delegate Edward J. McDermott noted that the three readings and "at length" requirements in Sections 46 and 56 would slow legislative business, which he believed would beneficially prevent the Legislature from taking up so-called "local" or "special" legislation:

> The time that is wasted in considering these private bills is astonishing; but not only are time and money lost. These private bills bring the lobby here, and the lobby controls and injures legislation to a very great extent. It is unfair and unjust that some persons active in securing special favors should get their favors at the State's expense, and without notice to the public. We have limited the session to sixty days. We have required that all bills shall be read three several times; that before they are signed by the Speaker, they shall be again read at length. If you require all this time in the case of local and special bills, you cannot properly get through with your work. . . . ***If all bills are to be read at length (many of them a hundred pages long), it will necessarily follow that general legislation will be stopped***, and the business of the State can not go on. ***We are, therefore, compelled, by the limitations which we have put in this Constitution, to rid ourselves of this evil of local or special legislation.***

(Polk, *Proceedings and Debates*, at 3991) (Ex. D.) (emphasis added).

Another delegate objected to the requirement of reading at length, noting that reading one bill "may take two hours." (*Id.* at 4321.) Yet the requirement was ultimately adopted by the Framers "to protect that body from its own errors, and from any fraud or corruption." (*Id.* at

4322.) One delegate lauded the reading requirement, observing, "[t]here is no wiser provision in this report than this section." (*Id.*) Thus, the Framers plainly intended that bills be read in full, as demonstrated by their debates and their use of the term "at length," and not by title only.

Kentucky's highest court has confirmed that the term "at length" means in its entirety and not simply by title only. *See generally, Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 445 (Ky. 1986) ("When any person, lawyer or layman, takes up an act of the Legislature, to read and understand what changes have been made in an old law, he ought to have before him in the act that he is reading the whole of the law as it appears when amended or revised by the new act . . . .") (quoting *Bd. of Penitentiary Comm'rs v. Spencer*, 166 S.W. 1017, 1024 (Ky. 1914)). Indeed, Section 51 of the Constitution provides by its own terms that "at length" means *not* simply by title. *See* KY. CONST. § 51 ("No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and ***no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only***, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published ***at length***.") (emphasis added).

The sole reading of SB 151, as amended, received on the floor of the House of Representatives reflected only the title, and it was never read "at length" on the floor of the Senate. Such a reading simply does not satisfy the constitutional mandate. *See* 82 C.J.S. *Statutes* § 34 (noting that reading by title qualifies as reading of the bill "[u]nless the constitution requires that a bill be read at length or in full"); *U.S. Gypsum Co. v. State Dep't of Revenue*, 110 N.W.2d 698, 699 (Mich. 1961) (holding, where the Constitution requires only that the bill "be read 3 times in each house" – *i.e.*, it does not expressly require reading "at length" – that the

requirement is satisfied when the bill is read once "in full," with the second and third readings by title). Therefore, SB 151 is unconstitutional, and this Court should declare it void.

IV. SB 151 Violates State Statute Because The General Assembly Passed It Without An Actuarial Analysis Or A Fiscal Note.

The General Assembly not only violated the Constitution when it rushed through SB 151, it also violated Kentucky statutes. These statutes, like Section 46 of the Constitution, were intended to prevent the passage of bills without due consideration of their impact. Specifically, the General Assembly violated KRS 6.350, which requires an actuarial analysis before public pension bills can be voted out of Committee, and KRS 6.955, which requires a fiscal note before passage. The General Assembly "passed" SB 151 without meeting either statutory mandate.

A. The General Assembly Passed SB 151 in Violation of KRS 6.350.

1. KRS 6.350 required an actuarial analysis.

In relevant part, KRS 6.350(1) provides that "[a] bill which would increase or decrease the benefits or increase or decrease participation in the benefits or change the actuarial accrued liability of any state-administered retirement system shall not be reported from a legislative committee of either house of the General Assembly for consideration by the full membership of that house unless the bill is accompanied by an actuarial analysis." The statute further sets out the requirements of such an actuarial analysis, which must demonstrate, among other things, "the economic effect of the bill on the state-administered retirement system over a twenty (20) year period." KRS 6.350(2). There can be no dispute that KRS 6.350 required an actuarial analysis for SB 151 before it was introduced on the floor of the House, as it unquestionably decreases the benefits provided to state employees, and will decrease participation in the benefits it does provide.

The General Assembly first passed KRS 6.350 into law in 1980. It was passed by majorities of both chambers and signed into law by the Governor. *See* 1980 Ky. Acts, Ch. 246, § 1. At that point, KRS 6.350 became more than a legislative rule, it became a law.

Since its passage, KRS 6.350 has been repeatedly amended to strengthen its requirements. The most recent amendment to strengthen the actuarial analysis requirement occurred in 2017, meaning that *the same* General Assembly that passed SB 151 also voted – by majority – to be bound by a stronger KRS 6.350. The 2017 amendment added subsection (c) to KRS 6.350, which states:

> (c) A statement that the cost is negligible or indeterminable shall not be considered in compliance with this section. If a cost cannot be determined by the actuary in accordance with paragraph (a) of this subsection, then the systems shall certify in writing:
>
> 1. The estimated number of individuals affected;
> 2. The estimated change in benefit payments;
> 3. The estimated change to employer costs; and
> 4. The estimated change to administrative expenses.

The 2017 amendment passed both houses of the legislature *unanimously*, and was signed into law by Governor Bevin on March 10, 2017.[10] This shows the General Assembly's intent to ensure there would always be an actuarial analysis before a pension bill reached a legislative chamber, and that a mere "statement" was insufficient. Moreover, by passing the amendment and enhancing the actuarial analysis requirements, this legislature plainly demonstrated its intent to be bound by KRS 6.350.

The Supreme Court previously addressed judicial review of the General Assembly's compliance with KRS 6.350, in *Board of Trustees. of Judicial Form Ret. Sys. v. Attorney Gen. of Commonwealth*, 132 S.W.3d 770, 777 (Ky. 2003). To the extent *Board of Trustees* can be read to

[10] *See* http://www.lrc.ky.gov/record/17RS/SB2.htm (last visited Apr. 30, 2018).

state that a challenge to a law for violating KRS 6.350 is nonjusticiable, that language is dicta, because the Supreme Court's decision primarily relied on the finding that the General Assembly had "substantial[ly] compli[ed]" with the actuarial analysis requirement. *Id.* at 778. As explained more fully below, there was no compliance in this case.

Moreover, *Board of Trustees* relied on an incorrect reading of a Florida case for the proposition that courts will not review a legislature's procedure rule "even when the procedural rule is, as here, codified in statute." *Id.* at 777 (citing *Moffitt v. Willis*, 459 So.2d 1018, 1021-22 (Fla. 1984)). In *Moffitt*, the statute at issue simply provided that each legislative committee "shall abide by the general rules and regulations adopted by its respective house to govern the conduct of meetings by such committee." *Moffitt*, 459 So.2d at 1021. The *Moffitt* court declined to adjudicate a claim that the statute had been violated because to do so would necessarily require the court to determine whether a legislative committee had followed legislative *rules*. *Id.* at 1022 ("It is a legislative prerogative to make, interpret and enforce its own procedural rules . . . . [W]e may not invade the legislature's province of internal procedural rulemaking."). Thus, *Moffitt* addressed only whether the court would interpret procedural rules made by the legislative body – *not* statutes, like KRS 6.350.

A statute like KRS 6.350 is mandatory and legally distinct from a voluntary legislative procedural rule, in that both houses of the legislature passed it and the Governor signed it into law. Therefore, it became a binding statute.

The power to ignore or suspend such a binding statute does not rest in a single individual, such as Speaker Pro Tempore Osborne or Chairman Miller. Instead, Section 15 of Kentucky's Constitution, which is entitled "laws to be suspended only by the General Assembly," expressly provides that "no power to suspend laws shall be exercised unless by the General Assembly or its

authority." KY. CONST. § 15. The General Assembly exercises this power through the passage of a separate statute or portion of a statute that expressly notwithstands or suspends a law. In fact, the General Assembly has followed this legal process and suspended KRS 6.350 at times, including in the 2004 special session. *See* 2004 (1st Extra. Sess.) Ky. Acts Ch. 1, sec. 19. But to do so, it passed laws – through votes of the majorities of both chambers – specifically stating that the new law "shall be effective, KRS 6.350 to the contrary notwithstanding." *See id.* Here, the General Assembly did not suspend KRS 6.350 in the text of SB 151. It did not pass any separate statute suspending KRS 6.350. Instead, Chairman Miller (and later Speaker Pro Tem Osborne) unilaterally "ruled" that KRS 6.350 did not apply. Such an action cannot suspend a duly enacted statute, and the General Assembly was required to receive an actuarial analysis before considering SB 151.

Nor can there be an argument that passage of SB 151 implicitly repealed KRS 6.350. "It is a well-settled rule of statutory construction that the repeal of an existing law by implication is not favored by the court." *Kentucky Off-Track Betting, Inc. v. McBurney*, 993 S.W.2d 946, 949 (Ky. 1999). Instead, courts understand that "where the legislature intended a subsequent act to repeal a former one, it will so express itself so as to leave no doubt as to its purpose." *Id.* Nothing in SB 151 suggests that the General Assembly intended to repeal KRS 6.350.

Finally, this case does not present the question, as suggested by the dicta in *Board of Trustees*, as to whether one legislature can bind another. As stated above, in 2017 this legislature with very similar leadership confirmed that an actuarial analysis is required for pension legislation by passing SB 2 (2017). Accordingly, the General Assembly was required to comply with KRS 6.350.

2. SB 151 did not comply with KRS 6.350.

In *Board of Trustees*, the Supreme Court held that the General Assembly had "substantial[ly] compli[ed]" with the actuarial analysis requirement. *Id.* at 778. Here, there can be no such finding because the House State Government Committee admitted it had ***no*** actuarial analysis. It therefore failed to comply *at all*, much less substantially, with the actuarial analysis requirement.

It is uncontested that no actuarial analysis was performed on SB 151 before it left the House State Government Committee. In Committee, House Majority Leader Shell admitted "[w]e ***do not have an actuarial analysis*** on the full plan that is before you today," (Ex. B., p. 29:24); (Ex. C. at House Committee on State Government, Video 1.) The sponsor of the committee substitute – Representative Bam Carney – stated: "When I got the [committee] sub[stitute] ready, ***they have not had time to do that***." (Ex. B., p. 10:21-22); (Ex. C. at House Floor Debate, Video 5.) When SB 151 reached the House Floor, even the Speaker Pro Tempore acknowledged there was no analysis. (Ex. B., p. 4); (Ex. C. at House Floor Debate, Video1.) Instead, acting as Chair, he ruled that no such analysis was needed. (*Id*.) "Substantial compliance" was therefore impossible for the House, which admitted it did not have and was not considering an actuarial analysis under KRS 6.350.

When SB 151 proceeded to the Senate, Senator Bowen claimed that the actuarial analysis for SB 1 satisfied the requirement for SB 151. But the bills were substantially different. Indeed, Representative Carney's entire presentation before the House emphasized that SB 151 was not SB 1. (Ex. B., p. 5-6, 12-13); (Ex. C. at House Floor Debate, Video 2 and 7.) Presiding over the Committee, Chairman Miller agreed, stating "[t]his is not Senate Bill 1." (Ex. B., p. 31:13-14); (Ex. C. at House Committee on State Government, Video 2.) As evidence of their differences, Representative Carney pointed to SB 151 not cutting teacher's cost of living adjustments

("COLAs"). (Ex. B., p. 13:1-5) (Ex. C. at House Floor Debate, Video 7.) This exclusion would alone create an approximately $3 billion difference from the actuarial analysis performed on SB1. Based on the House testimony that SB 1[11] and SB 151 were different, and the fact that $3 billion creates a substantial difference, there is no "substantial compliance."

Moreover, the fact that the General Assembly later posted a hastily compiled "actuarial analysis" to the Legislative Research Commission website after the bill was passed does not help its cause. Rather, it merely emphasizes that it was aware of KRS 6.350 and its failure to comply with that statute.

This so-called "actuarial analysis" consists solely of a cover letter attached to the analysis of SB 1. Such a cover letter is the exact type of mere "statement" that the 2017 amendment to KRS 6.350 prohibits, stating it "shall not be in compliance." Not only is such a cover letter insufficient in itself, but the attached analysis for SB 151 only analyzes the KRS-administered systems. (*See* KRS Actuarial Cover Letter (Mar. 29, 2018)) (Attached as Ex. F.) As of the date of this filing, there is still *no* actuarial analysis for KTRS attached to SB 151. As such, the General Assembly did not and could not substantially comply with KRS 6.350 because it directly affected retirement systems (KTRS) for which – even as of today – no actuarial analysis has been performed.

In passing KRS 6.350 without an actuarial analysis, this General Assembly violated the law that the legislature enacted and that this very legislature strengthened in the previous legislative session. In this case, the untimely and incomplete "actuarial analysis" that posted to LRC's website *after* passage of SB 151 failed to include a statement of the costs associated with

[11] The actuarial analysis for SB 1 is available at http://www.lrc.ky.gov/recorddocuments/note/18RS/SB1/AA.pdf (last visited May 1, 2018).

the changes in SB 151. Because the General Assembly failed to comply with KRS 6.350, this Court should declare SB 151 void.

B. The General Assembly Passed SB 151 in Violation of KRS 6.955.

The General Assembly also failed to comply with KRS 6.955 when passing SB 151. That statute provides, in pertinent part:

> No bill or resolution which relates to any aspect of local government or any service provided thereby shall be voted on by either chamber of the General Assembly unless a fiscal note has been prepared and attached to the bill pursuant to KRS 6.960, except that, if in the chamber in which the bill is being considered, two-thirds (2/3) of the members elected vote to waive the fiscal note requirement, no note shall be required. The fiscal note waiver shall be certified by the clerk of the chamber in which the bill is being considered, and such certification shall be attached to the bill. Although waived in one chamber, a fiscal note shall be required when the bill goes to the other chamber unless a majority of the members elected to such chamber vote to waive the fiscal note requirement.

KRS 6.955(1).

SB 151 certainly "relates to" "any aspect of local government." First, it directly impacts the state-administered retirement programs – KTRS and CERS – in which local government employees participate. Second, it requires local governments, as "employers," to make contributions to these retirement plans. *See, e.g.*, SB 151, Section 12(2)(b) (requiring employer contributions). By altering the retirement benefits of local governments' public employees, SB 151 further impacts all the "service[s]" provided by local government. For this reason, prior legislation altering pension plans has included fiscal notes, including the 2013 pension reform. (*See* Local Mandate Fiscal Impact Estimate, Bill No. SB 2 GA) (attached as Ex. G.) That note provided a detailed explanation as to how local government participants in CERS could expect a decrease in contribution rates for employees. *Id.*

Here, it is uncontested that neither the House nor the Senate attached a fiscal note. Nor did either chamber vote to waive the express fiscal note requirement. Thus, the General

Assembly violated KRS 6.955 when it passed SB 151. For this statutory violation and the statutory violation of KRS 6.350, the Court should find SB 151 invalid.

V. SB 151 Is Invalid By Operation Of Section 56 Of The Kentucky Constitution.

SB 151 is further void because the General Assembly failed to meet the requirements of Section 56 of the Kentucky Constitution. Specifically, (1) the presiding officer of the House of Representatives – the Speaker of the House – failed to affix his signature to the bill, and (2) the bill was not read "at length." *See Hamlett v. McCreary*, 156 S.W. 410, 411 (Ky. 1913).

Section 56 provides:

> No bill shall become a law until the same shall have been signed by the presiding officer of each of the two Houses in open session; and before such officer shall have affixed his signature to any bill, he shall suspend all other business, declare that such bill will now be read, and that he will sign the same to the end that it may become a law. The bill shall then be read at length and compared; and, if correctly enrolled, he shall, in the presence of the House in open session, and before any other business is entertained, affix his signature, which fact shall be noted in the journal, and the bill immediately sent to the other House. When it reaches the other House, the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceeding shall thereupon be observed in every respect as in the House in which it was first signed. And thereupon the Clerk of the latter House shall immediately present the same to the Governor for his signature and approval.

Interpreting Section 56, Kentucky's highest court has held "[t]he language is express, sweeping, and mandatory." *Hamlett*, 156 S.W. at 411. Section 56 "prohibits a bill from becoming a law until it shall have been signed by the presiding officer of each house." This Court has expressly held that Section 56 mandates three specific actions be taken before any bill can become law, stating:

> [t]he mandates of Section 56 are extremely specific…[it] requires that before a bill become a law it must be: a) signed in open session by the presiding officer of each House; b) correctly enrolled after being read at length and compared; and c) all bills that have been passed by both House, enrolled must be 'immediately' presented 'to the Governor for his signature and approval.

See Williams v. Grayson, No. 08-CI-856, Order, at 4-5 (Franklin Cir. Ct., July 31, 2008 (Attached as Ex. H.) "The failure to comply with any mandatory requirement of Section 56, under controlling case law, renders the bill invalid." (*Id*. at 5.) "If the legislature fails in discharging this mandatory duty, the legislation is invalid by operation of Section 56 of the Constitution." (*Id*. at 5-6) (Internal citation omitted).

The Framers of the Kentucky Constitution stressed the importance and mandatory nature of these requirements. Upon giving the Report of the Committee on the Legislative Department to the Committee of the Whole Constitutional Convention, Delegate Ignatius A. Spalding stated, the following:

> [Section 56] is about how bills are signed. We think this is a ***very important and salutary change*** also. I will state, generally, from recollection, the nature of the change. You have the report before you. Enrolled bills are to be read in each House, and ***the Speaker*** is to suspend all other business and call attention of the members to the bill before him, thus giving an opportunity to everybody to inquire into the matter, whether the bill is enrolled correctly, or whether any thing wrong has gotten into it by any means. He shall sign it in the presence of the House, and it shall be reported to the other House, where the same process is gone through…***There has been some carelessness in the past sessions of the General Assembly on this subject***…***Bills have been signed when they were perhaps not correctly enrolled***. It has been the custom for the Enrolling Clerk to bring a batch of bills to the Speaker's desk, and the Speaker would have no time to read them, but just simply sign them as a matter of form, not knowing what they were. Sometimes duplicate bills have been signed in that way, and this is to prevent those evils, and to secure the proper enrollment and the proper consideration of all bills by the Speaker and by the House at the time they are signed. This would consume a great deal of time if we were to continue the practice of local legislation; but when that is cut off, and nothing but general laws are enacted, there will be plenty of time to attend to it. It will be very little interruption to the business of the House, and will result, doubtless, in a better system of legislation than we have had in that respect.

(E. Polk Johnson, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3793-3794 (Feb. 17, 1891)) (Ex. D.) (emphasis added).

SB 151 is invalid because the General Assembly failed to meet two of these three constitutional requirements. First, the presiding officer of the House of Representatives – the Speaker of the House – failed to affix his or her name upon the bill. Second, SB 151 was not "read at length and compared" immediately prior to signing. Therefore, "under the strong language of section 56 of our Constitution, no such bill is permitted to become a law." *Hamlett*, 156 S.W. at 413.

A. SB 151 is Invalid Because the Presiding Officer of the Kentucky House of Representatives – the Speaker of the House – Did Not Sign the Bill.

Section 56 of the Kentucky Constitution requires that the presiding officer of each of the two Houses must affix his or her signature to the bill in open session before it can become law. The highest Court in Kentucky held in *Hamlett* that this requirement "is express, sweeping, and mandatory." *Id*. at 411. There, a bill that lacked signature of the President of the Senate was declared constitutionally invalid. *Id.*

Under Kentucky law, the Speaker is the House of Representatives' presiding officer. In *Kirchendorfer*, Kentucky's highest court expressly held:

> "…***the presiding officer over the House is its speaker, which is provided for by section 34 of the Constitution, and he is to be elected from the membership of the body over which he presides***. The presiding officer of the Senate is the Lieutenant Governor, as is prescribed for by section 83 of the Constitution."

264 S.W. at 768-69. (Emphasis added). Lower courts – including Franklin Circuit Court – have agreed as recently as last year. *See Stumbo v. Bevin*, No. 16-CI-522, Order at 4-5 (Franklin Cir. Ct., Feb. 1, 2017) (attached as Ex. I.) In *Stumbo v. Bevin*, this Court held that former Speaker Greg Stumbo lacked standing to bring claims in his official capacity as the "presiding officer" of the House because he was no longer Speaker. (*Id*.) Specifically, this

Court stated "[b]ecause Speaker Stumbo's standing as ***presiding officer of the House*** is no longer applicable, he cannot maintain an action such as this… ." *Id*. (emphasis added).

The General Assembly also informs Kentucky citizens that the Speaker of the House is the presiding officer over the House of Representatives. In its *Citizen's Guide to the Kentucky Constitution*, it states "[t]he presiding officer of the House of Representatives, the Speaker of the House, is a Representative selected by the members of the House."[12]

Finally, the Framers of the Constitution clearly recognized the Speaker of the House was the presiding officer who must affix his signature to the bill. Delegate Simon Buckner, discussing Section 56, stated: "***When the bill is to be signed, it shall be done by the Speaker, in the presence of the House,*** business being suspended, and that fact being announced." (E. Polk Johnson, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3869 (Feb. 19, 1891)) (Ex. D.) (emphasis added).

It is beyond dispute that the "presiding officer" over the Kentucky House of Representatives is the constitutionally elected Speaker of the House referenced in Section 34 of the Kentucky Constitution. Because the Speaker is the presiding officer over the House of Representatives, only the Speaker's signature can meet the mandates of Section 56 of the Kentucky Constitution. *See Hamlett*, 156 S.W. at 411.

It is uncontested that the Speaker did not sign SB 151. The most recent Speaker was Representative Jeff Hoover, who was elected Speaker pursuant to Section 34 of the Kentucky Constitution in January 2017. Based on ethics issues, Representative Hoover resigned as Speaker on January 8, 2018. However, the House did not conduct any election to replace Representative Hoover or elect a new Speaker pursuant to the requirements of Section 34.

[12] *See* Legislative Research Commission, Research Report No. 137, p. 21 (Rev. June 2013), available at http://www.lrc.ky.gov/lrcpubs/rr137.pdf (last visited Apr. 30, 2018).

Instead, they proceeded with the Speaker Pro Tem, Representative Osborne, serving as what they termed "acting Speaker," a concept and title that does not appear in the Constitution or law.[13]

On March 29, 2018, the date the General Assembly purported to pass SB 151, the constitutional office of Speaker of the House was vacant, and remains vacant. (*See* LRC House of Representatives' Leadership webpage) (Attached as Ex. J.)[14] Because there was no Speaker to affix his or her signature to SB 151, as constitutionally required under Section 56 of the Kentucky Constitution, the bill is invalid.

B. SB 151 is Invalid Because it was Not Read at Length Before Signing.

Like Section 45, Section 56 also requires that – before a bill can become law – it must be read at length. Section 56 specifically requires the bill be "read at length" prior to the presiding officer affixing his or her signature to the bill. This directive "is express, sweeping, and mandatory." *Hamlett*, 156 S.W. at 411. Section 56 provides, in pertinent part:

> …before such officer shall have affixed his signature to any bill, he shall suspend all other business, declare that such bill will now be read, and that he will sign the same to the end that it may become a law. ***The bill shall then be read at length and compared***; and, if correctly enrolled, he shall, in the presence of the House in open session, and before any other business is entertained, affix his signature…

(Emphasis added)

As with Section 46, discussed above, none of the readings of SB 151 complied with the requirement in Section 56 that all bills be read "at length." "[A]t length" means in its entirety, and not simply by title. *See Commonwealth ex rel. Armstrong*, 709 S.W.2d at 445 (internal

[13] On Wednesday, December 6, 2017, the Republican House Leadership announced Representative Osborne would be "acting Speaker," without a vote. Jaqueline Pitts, *David Osborne to serve as Acting House Speaker during 2018 session*, available at https://www.lanereport.com/84463/2017/12/david-osborne-to-serve-as-acting-house-speaker-during-2018-session/ (last visited Apr. 24, 2018) ("After a caucus meeting Wednesday, House Republican leadership announced Rep. David Osborne of Prospect will remain as Acting Speaker of the House during the 2018 legislative session.")

[14] Available at http://www.lrc.ky.gov/House.htm (last visited Apr. 18, 2018).

citation omitted). *See also*, 82 C.J.S. *Statutes* § 34 (noting that reading by title qualifies as reading of the bill "[u]nless the constitution requires that a bill be read at length or in full"); *U.S. Gypsum Co. v. State Dep't of Revenue*, 110 N.W.2d 698, 699 (Mich. 1961) (holding, where the Constitution requires only that the bill "be read 3 times in each house" – *i.e.*, it does not expressly require reading "at length" – that the requirement is satisfied when the bill is read once "in full," with the second and third readings by title). SB 151 was not "read at length" immediately prior to either the Senate President or Representative Osborne affixing their signatures to the bill, as constitutionally required. Accordingly, SB 151 is invalid under Section 56 of the Kentucky Constitution.

VI. SB 151 Represents The Arbitrary Exercise Of Power, In Violation Of The Constitution

Section 2 of the Kentucky Constitution – part of the Kentucky Bill of Rights – provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." By (1) converting a sewage bill into a pension bill, and then (2) passing that bill in a rushed process that violated the Kentucky Constitution and state statute, (3) all in a manner that deprived the people of the opportunity to review or comment on the legislation, the General Assembly subjected the people affected by SB 151 to the exercise of arbitrary power. Kentucky's highest court has held, "whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary." *Sanitation Dist. No. 1 v. City of Louisville*, 213 S.W.2d 995, 1000 (Ky. 1948).

Here, the General Assembly did not follow the carefully weighed and thoughtfully enacted procedural requirements for the passage of SB 151, including the constitutional requirements of three readings and a majority vote, and the statutory requirements of an actuarial analysis and a fiscal note detailing the bill's impact on local governments. As set forth more

fully above, these procedures exist to ensure the transparency and accuracy of the legislative process, and to protect the people by making certain that the laws enacted by the General Assembly are the result of deliberation and public input. By failing to follow those procedures, the General Assembly arbitrarily exercised its power in depriving Kentucky's public servants of their contractual and property rights. *See Commonwealth, Transp. Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. App. 2004) (citation omitted) ("[I]t is axiomatic that failure of a [body] to follow its own rule or regulation generally is per se arbitrary and capricious.").

Accordingly, SB 151 violated Section 2 of the Kentucky Constitution, and the Court should declare that it is void.

VII. The Substance of SB 151 Violates The Contracts Clause.

Under Section 19 of the Constitution provides "[n]o ex post facto law, nor any law impairing the obligation of contracts, shall be enacted… ." KY. CONST. § 19. A law violates Section 19 where, as here, (1) there is a contract; (2) the statute at issue substantially impairs that contract; and (3) the impairment of the contract is not "reasonable and necessary to serve an important public purpose." *See generally, U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17, 30 (1977); *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1360 (D. Md. 1984).

A. An Inviolable Contract Exists Between the Commonwealth and its Public Employees.

The Kentucky Supreme Court has definitively ruled that "the retirement savings system has created an inviolable contract between [employees and retirees] and the Commonwealth…." *Jones*, 910 S.W.2d at 713. Pursuant to that contract, the General Assembly promised Kentucky's public employees that, in exchange for decades of public service, they would be guaranteed

certain retirement benefits. The General Assembly specifically made that contract "inviolable"[15] – meaning it could never be broken – and wrote it into our law as KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714. *See also Jones v. Bd. of Trs. of Kentucky Ret. Sys.*, 910 S.W.2d 710, 713 (Ky.1995) (describing pension benefits as contractual); *Baker v. Commonwealth*, No. 2005-CA-001588-MR, 2007 WL 3037718, at *31 (Ky. App. Oct. 19, 2007) (pension rights of a retired public employee "are contractual and inviolable").

The plain language of these statues establish that benefits falling within the inviolable contract – such as sick days, guaranteed returns, or uniform allowance – were reduced by the General Assembly under SB 151.

B. SB 151 Substantially Impairs the Inviolable Contract

When it enacted the inviolable contracts into law, the General Assembly included what would constitute "substantial impairment" of those contracts. In each statute, the General Assembly stated that the "rights and benefits provided" in the contract shall "not be subject to reduction or impairment by alteration, amendment or repeal." *See* KRS 16.652; 61.692; 78.852; 161.714. Thus, the General Assembly – through law – mandated that a reduction of rights or benefits would constitute substantial impairment of the inviolable contracts. The Kentucky Supreme Court recognized as much, stating the General Assembly "can take no action to reduce the benefits promised to participants…." *Jones*, 910 S.W.2d at 713. Indeed, the Court noted that, in the context of pension benefits, even a "threat" of a reduction may qualify as "substantial impairment." *See Jones*, 910 S.W.2d at 713.

SB 151 reduces promised benefits and rights under the inviolable contract—and it does so substantially. It therefore violates the contracts clause. *See Hughes*, 594 F. Supp. at 1360

[15] *Inviolable*, Black's Law Dictionary (10th ed. 2014) *adj*.: Safe from violation; incapable of being violated. *Inviolable*, The American Heritage Dictionary (2d ed. 1985) *adj*.: Secure from violation or profanation.

(citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)). SB 151 violates this inviolable contract in the following ways:

Kentucky Teachers

The inviolable contract in KRS 161.714 protects benefits provided between KRS 161.22 through KRS 161.710. SB 151 violates that inviolable contract as follows:

- KRS 161.623 allows teachers who started before July 1, 2008, to convert accrued sick leave toward retirement, and allows teachers hired after July 1, 2008 to convert up to three hundred days of accrued sick leave toward retirement. Section 74 of SB 151 caps the amount of accrued sick leave members may convert toward retirement to the amount accrued as of December 31, 2018, materially altering and impairing the rights and benefits due under the inviolable contract.

Kentucky Employees

The inviolable contract in KRS 61.692 protects benefits provided to members of the Kentucky Employees Retirement System ("KERS") between KRS 61.510 through 61.705. SB 151 violates that inviolable contract as follows:

- KRS 61.510 allows non-hazardous, Tier I employees to include lump-sum payments in creditable compensation. Section 14 of SB 151 violates the inviolable contract because it expressly excludes lump-sum payments from creditable compensation for non-hazardous, Tier I employees, retiring after July 1, 2023.

- KRS 61.510 allows uniform and equipment allowances to be included in members' creditable compensation. Section 14 of SB 151 violates the inviolable contract because it expressly excludes uniform and equipment allowances as well as undefined "other expense allowances," paid on or after January 1, 2019, from creditable compensation.

- KRS 61.546 allows KERS Tier I employees to use sick leave service credit for retirement eligibility. Section 16 of SB 151 violates the inviolable contract because it prohibits KERS Tier I employees from using sick leave service credit for retirement eligibility, if they retire on or after July 1, 2023.

- Prior to passage of SB 151, KRS 61.702(2)(b) did not require employers of KERS Tier I members, employed after July 1, 2003, to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical

insurance under the plan. Section 30 of SB 151 imposes this new requirement, altering and impairing the ultimate calculation of KERS members' retirements and violating the inviolable contract.

- KRS 61.510 requires Tier I hazardous employees' final compensation be calculated using the creditable compensation from three (3) fiscal years the employee was paid the highest average monthly rate. It requires the highest five (5) years for Tier I nonhazardous employees. In either case, the compensation need not be calculated using complete fiscal years. Section 14 of SB 151 requires, after January 1, 2019, that Tier I hazardous employees' final compensation be calculated using the creditable compensation from their highest three (3) *complete* fiscal years, and that the highest five (5) *complete* fiscal years be used to calculate for Tier I nonhazardous employees' final compensation. This change, altering and impairing the final compensation calculation guaranteed to Tier I employees, is in violation of KRS 61.510.

- KRS 61.597 guaranteed annual interest credit of at least 4% to KERS Tier I and Tier II employees who opted into the hybrid cash balance plan. Section 19 of SB 151 violates the inviolable contract because it removes the guaranteed annual interest credit of at least 4%, reducing it to 0%.

Kentucky State Police

The inviolable contract in KRS 16.652 protects benefits provided to members of the State Police Retirement Systems ("SPRS") between KRS 16.510 through 16.645. SB 151 violates that inviolable contract as follows:

- KRS 16.645 and KRS 61.546 allow SPRS Tier I employees to use sick leave service credit for retirement eligibility. Section 16 of SB 151 violates the inviolable contract by prohibiting SPRS Tier I employees from doing so if they retire on or after July 1, 2023.

- KRS 16.645 and KRS 61.702(b) did not require employers of SPRS Tier I members, employed after July 1, 2003, to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical insurance under the plan. Section 30 of SB 151 imposes this new requirement, altering and impairing the ultimate calculation of SPRS members' retirements and violating the inviolable contract.

County Employees

The inviolable contract in KRS 78.852 protects benefits provided to members of the County Employees Retirement System ("CERS") between KRS 78.510 through KRS 78.852. SB 151 violates that inviolable contract as follows:

- KRS 78.510 allows non-hazardous, Tier I employees to include lump-sum payments in creditable compensation. Section 15 of SB 151 violates the inviolable contract because it expressly excludes lump-sum payments from creditable compensation for non-hazardous, Tier I employees, retiring after July 1, 2023, altering and impairing the ultimate calculation of CERS members' retirements.

- KRS 78.510 allows uniform and equipment allowances to be included in members' creditable compensation. Section 15 of SB 151 violates the inviolable contract because it expressly excludes uniform and equipment allowances as well as undefined "other expense allowances," paid on or after January 1, 2019, from creditable compensation – altering and impairing the ultimate calculation of CERS members' retirements.

- KRS 78.616 allows CERS Tier I employees to use sick leave service credit for retirement eligibility. Section 17 of SB 151 violates the inviolable contract because it prohibits CERS Tier I employees from using sick leave service credit for retirement eligibility, if they retire on or after July 1, 2023.

- Prior to passage of SB 151, KRS 78.545 and KRS 61.702(2)(b) did not require employers of CERS Tier I members, employed after July 1, 2003, to deduct up to 1% of the member's creditable compensation for purposes of hospital and medical insurance under the plan. Section 30 of SB 151 makes this new requirement, altering and impairing the ultimate calculation of CERS members' retirements and violating the inviolable contract.

- KRS 78.510 requires CERS Tier I hazardous employees' final compensation be calculated using the creditable compensation from three (3) fiscal years the employee was paid the highest average monthly rate. It requires the highest five (5) years for Tier I nonhazardous employees. In either case, the compensation need not be calculated using complete fiscal years. Section 15 of SB 151 requires, after January 1, 2019, that Tier I hazardous employees' final compensation be calculated using the creditable compensation from their highest three (3) *complete* fiscal years, and that the highest five (5) *complete* fiscal years be used to calculate for Tier I nonhazardous employees' final compensation. This change violates KRS 78.510 by altering and impairing the final compensation calculation guaranteed to Tier I employees.

- KRS 61.597 and 78.545 guaranteed annual interest credit of at least 4% to CERS Tier I and Tier II employees who opted into the hybrid cash balance plan. Section 19 of SB 151 violates the inviolable contract because it removes the guaranteed annual interest credit of at least 4%, reducing it to 0%.

In this case, the impairments are numerous and substantial. And there is no question that promised benefits and/or rights have been reduced. For instance, the elimination of the use of sick leave has clear and material costs. A newsletter to state employees from 2001, in which KRS encouraged employees to save sick leave for retirement, noted that, for someone retiring at a final salary of $30,000, and who lived for another 25 years, just twelve months' sick leave credit would be worth over $16,500 in retirement benefits. (William P. Hanes, General Manager, Kentucky Retirement Systems, *Maximize Your Sick Leave For Retirement*, 2-3 (Jan. 2001)) (Attached as Ex. K.) (Stating "How can you maximize sick leave credit for retirement purposes? Obviously by hoarding your sick leave and not using it as soon as it accrues."). That amounts to more than half a year's salary, something any Kentucky family would view as substantial.

SB 151 also reduces the creditable compensation by 1% for Tier 1 KERS members hired after July 1, 2003. The average KERS non-hazardous retiree receives an annual pension payment of $21,699,[16] so the 1% reduction is equal to about $217 per year. For a retiree with the average 25-year life expectancy after retirement, (*See* Ex. K.), the total effect of that reduction is $5,425—again, a substantial sum for a retiree on a fixed income.

SB 151 also eliminates the guaranteed return for Tier I and Tier II members in the existing hybrid cash balance plan, from a guaranteed 4% to nothing, (0%). This has the potential

[16] *See* Kentucky Retirement Systems Comprehensive Annual Financial Report, at p. 15, Dec. 7, 2017, available at https://kyret.ky.gov/Publications/Books/CAFR_2017%20(Comprehensive%20Annual%20Financial%20Report).pdf (last visited May 1, 2018).

to cost participants hundreds if not thousands of dollars per year in returns on their retirement plan, and in the case of a recession could cost the member their entire retirement.[17]

SB 151 also substantially impairs the contracts of KERS and CERS participants by eliminating uniform and equipment allowances from creditable compensation. The cost of that change is significant. For instance, under the current collective bargaining agreement between FOP Lodge 614 and Louisville Metro Government, LMPD officers with uniform assignments (as opposed to plainclothes work) are paid allowances of $1,500 for clothing and $900 for equipment, plus $720 in negotiated increases to those allowances, for a total of $3,120 per year. (*See* Excerpt of Collective Bargaining Agreement) (Attached as Ex. L.) The average CERS hazardous active member is currently paid a total of $57,044 per year, so that a $3,120 reduction is equivalent to a 5.5% reduction in creditable compensation. Applied to the average annual benefit payment for such members, that reduction amounts to $1,494.59 per year.

SB 151 also caps the use of sick leave for calculating retirement eligibility by teachers to the amount accrued as of December 31, 2018. For a teacher who may earn ten days of sick leave per year, the elimination of the existing 300-day cap means that teachers may be required to work an additional year or more before he or she can retire. Such a change plainly alters the terms of the contract between the Commonwealth and teachers in a significant way.

Because SB 151 unquestionably reduces benefits, it substantially impairs rights and benefits under the inviolable contract as a matter of law. In *Baker v. Commonwealth*, the Kentucky Court of Appeals found a reduction of little over a hundred dollars per month, amounting to a total reduction of $524.40 of retirement benefits for one public servant, was a substantial impairment of the inviolable contract. 2007 WL 3037718, at *31, 39-40 (KRS policy

[17] *See generally* Kentucky Retirement Systems Comprehensive Annual Financial Report, at p. 39-40, Dec. 7, 2017 (setting forth contribution rates for Tier III members).

of withholding $105.00 of its $175.50 monthly state contribution obligation for one individual public servant's health insurance was an impermissible impairment of the inviolable contract.) In its holding, the Court of Appeals noted "no lesser institution than the General Assembly of the Commonwealth of Kentucky guaranteed those rights by statute in the form of an inviolable contract, never to be reduced or impaired."

Under the express language of the statutes creating the inviolable contract and the Kentucky Supreme Court's decision in *Jones*, "the General Assembly can take no action to reduce the benefits promised to participants…" 910 S.W.2d at 713. SB 151's provisions undoubtedly reduce the retirement rights and benefits of hundreds of thousands of current public employees, which could amount to losses of hundreds – if not thousands – of dollars for each affected public servant. Such reductions substantially impair the inviolable contract. *Baker*, 2007 WL 3037718, at *31, 39-40.

C. SB 151 is Neither Reasonable nor Necessary.

A law that substantially impairs a state's contract "may nevertheless be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust Co.*, 431 U.S. at 25. As the United States Supreme Court held, however, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." *Id.* at 26. Thus, "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* Moreover, courts are even less deferential "when a state's legislation is self-serving and impairs the obligations of its *own* contracts." *See Donohue v. Paterson*, 715 F. Supp. 2d 306, 321 (N.D.N.Y. 2010) (internal citation omitted).

Here, Defendants cannot show that SB 151's impairment of contractual rights is reasonable and necessary to accomplish an important public purpose. It is not enough to claim that the Commonwealth needs money because the "need for money is no excuse for repudiating contractual obligations." *Id.* at 26 n. 25 (citing *Lynch v. United States*, 292 U.S. 571, 580 (1934)). Moreover, if the state policy can be achieved through "alternative means," which could "serve its purposes equally well," the state must follow that course rather than impair the contract. *Id.* at 30. To this end, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *Id.* at 30-31

Defendants bear the burden of making such a showing. They cannot do so here because SB 151 merely sought to cut costs, i.e. reduce benefits, and openly refused to consider any additional revenue measures to address pension obligations. Such a position fails to qualify as "reasonable and necessary" under the law. *See, e.g., Moro v. State*, 351 P.3d 1, 39 (Ore. 2015) (holding respondents had failed to establish that they were entitled to such a defense, because "even if respondents had identified specific public service deficiencies resulting from the current level of funding, they have not demonstrated that those deficiencies could not be remedied through funding from other sources"); *United Firefighters of Los Angeles City*, 259 Cal. Rptr. 65, 73 (Cal. App. 1989) (Holding that "a desire to reduce costs or limit public spending does not justify the abrogation or impairment of a public entity's contractual obligations notwithstanding the legitimacy of such a public purpose").

In *Donohue*, the court found that that the State of New York failed to demonstrate that emergency appropriation "extender bills," impairing state contracts, were "reasonable and necessary." 715 F.Supp.2d at 322-323 (noting, "the Court must see that the impairments were reasonable and necessary, as established by real and demonstrable consideration of needs and

alternatives.") In that case the court held that the State did not demonstrate that certain furlough and wage provisions were reasonable and necessary when the State failed to demonstrate "any legislative consideration of policy alternatives to the challenged terms of the bill," instead choosing to "artificially limit[] the scope of alternatives for addressing the fiscal crisis to retrieving a certain amount of savings from unionized state employees." *Id*. Moreover, the court found that the State imposed "a drastic impairment when an evident and more moderate course was available," and did "not satisfactorily explain why a particular level of savings must be obtained from state personnel, aside from general reference to the fiscal crisis." *Id*.

In this case, SB 151 fails because funding the retirement systems in full is possible, and will eliminate any shortfall. Like *Donohue*, in passing SB 151 the Kentucky General Assembly improperly saddled the under-funding and unfunded liability of the retirement systems on the backs – and retirements – of current public employees. Further, the General Assembly cannot show that alternative funding streams are unavailable because it specifically rejected multiple bills that would provide dedicated funding to the retirement systems. *See* 2018 HB 41, 2018 HB 229, 2018 HB 536, 2018 SB 22, and 2018 SB 241 (each providing dedicated revenue streams directed, at least in part, to funding state retirement systems). Accordingly, Defendants will not be able to show that the impairment of the contractual rights promised to teachers is reasonable and necessary.

For the foregoing reasons, the Court should hold that SB 151 violates Kentucky's Contracts Clause set forth in Section 19 of the Constitution, and grant judgment for the Plaintiffs as a matter of law.

VIII. SB 151 Violates Section 13 Of The Kentucky Bill Of Rights As An Unconstitutional Taking.

The General Assembly made an inviolable contract with the Commonwealth's public employees, guaranteeing them certain contractual rights and benefits in exchange for their public service. Those contractual rights and benefits are the property of Kentucky's public employees. SB 151 violates Section 13 of the Kentucky Constitution because it deprives Kentucky's public employees of their contractual property rights in their retirement benefits without just compensation. Accordingly, this Court should grant judgment for the Plaintiffs as a matter of law.

Section 13 of the Kentucky Constitution provides, in relevant part:

> "[n]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

Kentucky's highest court has held "[t]he obvious meaning of section[] 13…is not only that persons whose property is taken for public use…shall receive just compensation therefor, but that this compensation must be received by them or tendered them before the property is taken." *Bushart v. Fulton Cnty.*, 209 S.W. 499, 503 (Ky. 1919). Since that time, numerous Kentucky courts have recognized. "…This declaration of an "inherent and inalienable" right has been a part of all four Constitutions of Kentucky, and there is no exception in favor of the state or its subdivisions. *See Stathers v. Garrad Cnty. Bd. of Educ.*, 405 S.W.3d 473, 483 (Ky. App. 2012) (quoting *Kentucky State Park Comm'n v. Wilder*, 84 S.W.2d 38 (Ky. 1935)) (citing *Carrico v. Colvin*, 17 S.W. 854 (Ky. 1891)). SB 151 violates the inherent and inalienable rights of the Commonwealth's public employees by depriving them of their inviolable contractual retirement rights and benefits, without just compensation.

Contractual rights and benefits create property interests. The Kentucky Supreme Court has held "[p]roperty rights are created and defined by state law." *See Weiand v. Bd. of Trs. of the Kentucky Ret. Sys.*, 25 S.W.3d 88, 93 (Ky. 2000) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, (1985)). Courts in other jurisdictions have held that contracts *can* create a constitutionally protected property interest. *See e.g.*, *San Bernardino Physicians' Servs. Med. Grp., Inc. v. Cnty. of San Bernardino*, 825 F.2d 1404, 1407–08 (9th Cir.1987). The Kentucky Supreme Court has endorsed the view that contractual rights are property. *Folger v. Com.*, 330 S.W.2d 106, 108 (Ky. 1959).

The guaranteed contractual rights and benefits under the inviolable contracts are the property of the Kentucky's public employees. *See Weiand*, 25 S.W.3d at 93; *Folger*, 330 S.W. at 108. Kentucky law provides – that in exchange for their public service – public employees are guaranteed certain retirement rights and benefits. *See* KRS Chapters 21, 61, 78, and 161. The General Assembly went further, making those retirement rights and benefits part of an "inviolable" contract under KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714. For example, Kentucky teachers' inviolable contract provides:

> It is hereby declared that in consideration of the contributions by members and in further consideration of benefits received by the state from the member's employment, KRS 161.220 to 161.710 shall constitute, except as provided in KRS 6.696, an inviolable contract of the Commonwealth, and the benefits provided herein shall, except as provided in KRS 6.696, not be subject to reduction or impairment by alteration, amendment, or repeal.

KRS 161.714.

The Kentucky Supreme Court has held the "[e]ssence of contractual right of state employees is receipt of promised pension benefits at promised levels…" *Jones*, 910 S.W.2d at 715. The Kentucky Court of Appeals has implicitly recognized such contractual rights and benefits are property stating, "[p]ublic school employees are entitled to retirement benefits

pursuant to KRS Chapter 161." *See Smith v. Teachers' Ret. Sys. of Kentucky*, 515 S.W.3d 672, 674 (Ky. App. 2017). Other courts have also held that both current and retired public employees have property interests in their pension benefits. *See e.gs., Miller v. Ret. Bd. of Policeman's Annuity*, 771 N.E.2d 431, 437 (Ill. App. 2001) (a person's interest in a pension benefit is a property interest); *Katzman v. Los Angeles Cnty. Metro. Transp. Auth.* 72 F.Supp. 3d 1091, 1100-01 (N.D. Cal. 2014) (retiree had property interest in his pension); *Spina v. Consolidated Police and Firemen's Pension Fund Comm'n*, 197 A.2d 169, 174 (N.J. 1964) (employee had a property interest in an existing State pension fund); *NEA v. Ret. Bd. of Rhode Island Employees' Ret. Sys.*, 172 F.3d 22, 29 (D.R.I. 2003).

SB 151 deprives the Commonwealth's public employees of these contractual rights and benefits – thus depriving these public servants of their property. In the instant case, SB 151 deprives public employees of – among other things – their right to use sick leave toward their retirement and retirement eligibility, the right to include certain lump sum payments and uniform allowances toward creditable compensation, reduces the guaranteed annual interest for certain employees that opted into the hybrid cash plan, and ultimately, the agreed-upon formula by which their retirement allowances are calculated. It also requires employers to deduct up to 1% from public employees' creditable compensation for other purposes. As a result, SB 151 substantially impairs public employees' contractual rights and benefits, thus depriving employees of their property rights.

SB 151 deprived the Commonwealth's public employees of their property rights without any just compensation. The Kentucky Supreme Court has held "[w]hen contract rights are taken for the public use, there is a constitutional right to compensation in the same manner as when other property rights are taken." *Folger*, 330 S.W.2d at 108. (citation omitted). It is undisputed

that the General Assembly did not compensate public employees before depriving them of their property rights. Because SB 151 does not provide these employees with any compensation in exchange for depriving them of their property rights, SB 151 violates Section 13 of the Kentucky Constitution.

CONCLUSION

SB 151 is government at its worst. The process by which SB 151 was passed violated Sections 2, 46, and 56 of the Kentucky Constitution as well as KRS 6.350 and KRS 6.955. The content of the bill violates Sections 13 and 19 of the Kentucky Constitution by breaching the inviolable contract the General Assembly made with the Commonwealth's public servants and depriving them of their property without just compensation. This Court must declare SB 151 void and grant judgment for the Plaintiffs as a matter of law.

Respectfully Submitted,

ANDY BESHEAR
ATTORNEY GENERAL

By: */s/ Andy Beshear*

J. Michael Brown (jmichael.brown@ky.gov)
Deputy Attorney General
La Tasha Buckner(latasha.buckner@ky.gov)
Assistant Deputy Attorney General
S. Travis Mayo (travis.mayo@ky.gov)
Executive Director,
Office of Civil and Environmental Law
Marc G. Farris (marc.farris@ky.gov)
Samuel Flynn (samuel.flynn@ky.gov)
Assistant Attorneys General
Office of the Attorney General
700 Capitol Avenue
Capitol Building, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
(502) 564-8310 FAX

Counsel for Plaintiff Commonwealth of Kentucky, ex rel. *Andy Beshear, Attorney General*

/s/ *Jeffrey S. Walther*, by permission

Jeffrey S. Walther(jwalther@wgmfirm.com)
Victoria Dickson(vdickson@wgmfirm.com)
Walther, Gay & Mack, PLC
163 East Main Street, Suite 200
Lexington, Kentucky 40588
(859) 225-4714

Counsel for Plaintiff
Kentucky Education Association

/s/ *David Leightty*, by permission
David Leightty (dleightty@earthlink.net)
Alison Messex (amessex@pcnmlaw.com)
Priddy, Cutler, Naake & Meade PLLC
2303 River Road, Suite 300
Louisville, Kentucky 40206
(502) 632-5292

Counsel for Plaintiff
Kentucky FOP Lodge

CERTIFICATE OF SERVICE

I hereby certify that, on May 2nd 2018, I electronically filed the foregoing Plaintiffs' Brief on the Merits via the Court's electronic filing system, and that on same date I served true and accurate copies of the foregoing electronically and via-email to the following: M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn, Office of the Governor, The Capitol, Suite 100, 700 Capitol Avenue, Frankfort, Kentucky 40601; Brett R. Nolan, Finance and Administration Cabinet, Office of the General Counsel, Room 329, Capitol Annex, Frankfort, Kentucky, 40601; Katherine E. Grabau, Public Protection Cabinet, Office of Legal Services, 655 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40601. I certify that I served true and accurate copies of the foregoing Plaintiffs' Brief on the Merits on the individuals whose names appear on the following Service List via U.S. mail and/or hand delivery on May 2nd 2018.

/s/Andy Beshear
Andy Beshear
Attorney General

SERVICE LIST

Robert B. Barnes
Teachers' Retirement System of the State of Kentucky
479 Versailles Road
Frankfort, Kentucky 40601

Mark Blackwell
Katherine Rupinen
Joseph Bowman
Kentucky Retirement System
Perimeter Park West
1260 Louisville Road
Frankfort, Kentucky 40601

Eric Lycan
Office of the Speaker
Capitol Annex, Room 332
Frankfort, Kentucky 40601

David Fleenor
Vaughn Murphy
Capitol Annex, Room 236
Frankfort, Kentucky 40601

EXHIBIT 7

KENTUCKY JUDICIAL FORM RETIREMENT SYSTEM
JUDICIAL RETIREMENT PLAN
LEGISLATORS RETIREMENT PLAN

Donna Stockton-Early
Executive Director

Whitaker Bank Building, Suite 302
305 Ann Street
Frankfort, Kentucky 40601

Phone (502) 564-5310
Fax (502) 564-2560
E-Mail DonnaS.Early@ky.gov

October 12, 2017

Hon. Matt Bevin
Governor
State Capitol
700 Capitol Ave., Ste. 100
Frankfort, KY 40601

Hon. Robert Stivers, II
President of the Senate
Capitol Annex
702 Capitol Ave., Ste. 236
Frankfort, KY 40601

Hon. Jeff Hoover
Speaker of the House
State Capitol
700 Capitol Ave.
Frankfort, KY 40601

Re: Judicial Form Retirement System
Anticipated Special Session

Dear Governor Bevin, President Stivers and Speaker Hoover:

I write today in my capacity as a Trustee of the Judicial Form Retirement System (JFRS), including Chairman of the Investment Committee of the Judicial Retirement Plan (JRP). Like most Kentuckians, I have followed the public debate on the pension crisis over the last decade. In fact, I have participated in the discussion in my role with the JFRS through the Public Pension Oversight Board's monthly meetings.

A. **JRP and Its Performance/Soundness.** The JRP has 226 members in its defined benefit plan; 24 members in its hybrid cash plan; and 350 retirees. As of September 30, 2017, the JRP had assets totaling approximately $381,000,000. These assets are managed by Hilliard Lyons Trust Company pursuant to an investment policy statement (ISP) established by the JRP's Investment Committee. The ISP provides that the fund be comprised of 70% equities and 30% fixed income/cash equivalents, but the investment manager has the discretion to vary these percentages by 10%, so that the range for equities is 60-80%, and the range for fixed income/cash equivalents is 20-40%. As of September 30, 2017, equities comprised approximately 77.6% of the portfolio, and fixed income/cash equivalents were 22.4%. The ISP further sets forth parameters for the types of investments within the equity and fixed income holdings. At present, the equities are comprised of common stock in 27 publicly traded companies, all included in the S&P 500. The fixed income holdings are similarly diversified in corporate and government issues. None of the assets are invested in hedge funds, private equity, real estate, or commodities.

As to investment return, the IPS sets a blended benchmark equal to 70% of the return of the S&P 500 for equities and 30% of the return of the Barclays US Intermediate Government/Credit Bond Index. Over the last 20 years, the policy benchmarks have been met or exceeded in virtually every time period, as follows (as of September 30, 2017): 1 yr: 13.76%; 3 yrs: 9.40%; 5 yrs: 11.92; 10 yrs: 8.03%; and 20 yrs: 8.40%. JRP has achieved, what I believe are, the best returns of any of the Commonwealth's retirement systems with one investment advisor at a very modest fee: 8 basis points per year. Eight basis points.

In terms of actuarial soundness, the plan's actuaries this week delivered the JRP's Actuarial Valuation and Report for the fiscal year ended June 30, 2017. The report indicates the plan's funded/unfunded status at 85% funded. This is an increase from 72% as of July 1, 2015, and 60% as of July 1, 2013. A number of factors contributed to the decline in the plan's funded percentage prior to July 1, 2013, but relative investment performance was not one of those reasons. Although, and to be clear, everyone's portfolio went down in 2007-08. My thought and expectation are that those factors have been corrected, and the plan's actuarial soundness has improved demonstrably over the last seven years.

As to the JRP's Annual Required Contribution (ARC), I anticipate that amount will be approximately $9,200,000 for fiscal 2018-19, and $9,800,000 for fiscal 2019-20. These amounts compare to ARC for the past four fiscal years as follows: $13,000,000 for each fiscal 2017-18 and 2016-17, and $16,000,000 for each fiscal 2015-16 and 2014-15. In other words, because of JRP's performance and funded status, the cost to the taxpayers of the Commonwealth has decreased by almost 41% from the levels of four years ago.

I note that these numbers, for the funded/unfunded status and anticipated ARC reflect the discount rate and assumed rate of return of 6.5%, which the JRP board lowered from 7.0% at its most recent July 2017 meeting.

B. Anticipated Special Session Concerns. I have heard, among other things, that the special session may affect the JRP and its members primarily in two ways. 1. Merging or transferring JFRS to a unified retirement system in the executive branch. 2. Freezing years of service for existing judges, *i.e.*, those who participate in the defined benefit plan, at 27 years or at age 65, such that any additional accruals would, perhaps, be paid into a 401(k) type account.

With respect to merging JFRS into a unified retirement system operated in the executive branch, this would seem to entail transferring a system which has been well-run to one which has historically been very poorly run. As to the cost involved, such a transfer would seem to generate substantial cost to the Commonwealth, since I understand KERS is requesting an ARC from various state agencies of 84% of payroll for the coming fiscal year. This compares to JRP's 31%. To put a dollar figure on such an increase, the resulting ARC for JRP would approximate $25,000,000 in each fiscal year, as opposed to JRP's anticipated ARC numbers for these fiscal years as noted above.

A question also is raised as to whether such a transfer would be valid or permissible under sections 27 and 28 of the Kentucky Constitution. Since the inception of the first pension plans for judges, the Special Circuit Judges' Fund, 1954 Ky. Acts ch. 83, and then the JRP, 1960 Ky. Acts ch. 84, these plans have been operated as part and parcel of the judicial branch. Even now, JRP's ARC is calculated and submitted to the General Assembly as a part of the judicial branch's budget. While the General Assembly unquestionably has the power to create a retirement system in the executive branch for judges and judicial branch employees, the JRP having been created in the judicial branch cannot now be transferred and operated from the executive branch. Doing so would seems to implicate section 28.

As to any possible freeze of existing judges' retirement benefit, at least those who began participating in the JRP's defined benefit plan prior to January 1, 2014, I have strong reservations that doing so violates the inviolable contract explicitly set forth in KRS 21.480(1), and may very well constitute a reduction of judicial compensation during a term in office in violation of Kentucky Constitution § 120.

While my focus in this letter is the JRP, many of these points also apply to the Legislators Retirement Plan, which is operated similarly to the JRP.

C. **Request.** For the fiscal/economic and legal reasons set forth above, I request that the Judicial Form Retirement System be omitted from the anticipated call for the special session. Since its inception, the trustees of JFRS have been prudent and faithful stewards of the trust imposed on them by the General Assembly, and have operated the JRP very well for the benefit of its members, retirees, AND the taxpayers of the Commonwealth of Kentucky. I request that it be permitted to continue to do so.

Please contact me with any questions or comments. Any members of the JFRS Board, Donna Early or I will be glad to meet with you at any time in the coming weeks if a meeting would be beneficial. Thank you for your attention to this letter.

Very truly yours,

Laurance B. VanMeter
Trustee, Judicial Form Retirement System
email: lbv@kycourts.net
(o) 859-246-2053
(c) 859-227-2754

EXHIBIT 8

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. **ORDER**

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

The matter is before the Court on the Motions for Protective Order filed by the Attorney General, the Fraternal Order of Police ("FOP"), and the Kentucky Education Association ("KEA"). The parties appeared before the Court to argue the matter on May 7, 2018. Travis S. Mayo, La Tasha Buckner, and J. Michael Brown appeared on behalf of the Attorney General; David Leightty appeared on behalf of FOP; Victoria F. Dickson appeared on behalf of KEA; and M. Stephen Pitt appeared on behalf of Governor Bevin.

The Court notes that all parties have agreed to an expedited briefing schedule on the legal issues presented in this case. Until those threshold legal issues have been decided, it is impossible to identify or define the proper scope of any factual discovery. In the event that any disputed issues of material fact are identified in the initial briefing on the summary judgment motions, the Court will deny summary judgment and allow full discovery under CR 26–34. However, at this point, no disputed issues of material fact have been identified by any party. When asked to identify areas of factual dispute that would justify discovery prior to a ruling on the threshold legal issues, counsel for the Governor recited several of Plaintiffs' factual allegations, but none that are materially relevant to the constitutionality of the challenged legislation. So while the parties may vigorously dispute the factual background and policy reasons for and against the enactment of

Senate Bill 151, the Court's consideration is limited to whether the legislation complies with all statutory and constitutional requirements.

In sum, if any party, including the Governor, identifies an area of disputed material facts, the Court will allow depositions and discovery to make a full record on any such issues. At this point, no such area of factual dispute has been identified. Accordingly, the Court declines the invitation to put the cart (of depositions and discovery) before the horse (of defining the legal issues).

In addition, the Court is aware that all parties to this case have extremely divergent views on the political, economic, and social policies that shape the public debate on the legislation at issue here. The First Amendment guarantees to all the right to vigorously engage in such public debate. However, the political, economic, and social policy disputes between the parties are not relevant to the adjudication of the constitutionality of Senate Bill 151. The debate in this Court must be limited to the legal issues presented, and at this point there has been no showing that there are any factual disputes that are relevant and material to the analysis and resolution of those strictly legal issues.

The Court, having considered the arguments of counsel and being otherwise sufficiently advised, hereby **GRANTS** each Motion for Protective Order under CR 26.03 and **STAYS** all factual discovery pending resolution of the Cross-Motions for Summary Judgment, with the exception of the previously scheduled and unopposed deposition of the Kentucky Teachers' Retirement Systems. If counsel for the Governor asserts a good faith basis to allege that the FOP or the KEA has no members with real and substantial interests in the outcome of the litigation, he may file a motion for relief from this stay to conduct limited discovery on the issue of standing. *See Bailey v. Preserve Rural Roads of Madison County, Inc.*, 394 S.W.3d 350 (Ky. 2011);

Commonwealth ex rel. Brown v. Interactive Media Entertainment and Gaming Ass'n, Inc., 306 S.W.3d 32 (Ky. 2010); *City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667 (Ky. 1994). However, the Kentucky Supreme Court has unequivocally ruled that the Attorney General has standing to challenge the constitutionality of legislation and executive action implementing legislation. *Commonwealth ex rel. Beshear v. Bevin*, 498 S.W.3d 355, 361–66 (Ky. 2016); *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 172 (Ky. 2008). Accordingly, the Attorney General has standing to challenge the enactment of Senate Bill 151, and the question of whether the KEA or FOP have standing to join as additional plaintiffs in this action is therefore not central to the resolution of this case.

SO ORDERED this ___ day of May, 2018.

/s/ HON. PHILLIP J. SHEPHERD
electronically signed
5/8/2018 1:28:04 PM

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

DISTRIBUTION:

Hon. Andy Beshear
Hon. J. Michael Brown
Hon. La Tasha Buckner
Hon. S. Travis Mayo
Hon. Marc G. Farris
Hon. Samuel Flynn
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, KY 40601

Hon. Jeffrey S. Walther
Walther, Gay & Mack, PLC
163 East Main Street, Suite 200
Lexington, KY 40588

Hon. David Leightty
Priddy, Cutler, Naake & Meade PLLC
2303 River Road, Suite 300
Louisville, KY 40206

Hon. M. Stephen Pitt
Hon. S. Chad Meredith
Hon. Matthew F. Kuhn
Office of the Governor
700 Capitol Avenue, Suite 101
Frankfort, KY 40601

Hon. Brett R. Nolan
General Counsel
Finance and Administration Cabinet
702 Capitol Avenue, Room 392
Frankfort, KY 40601

Hon. David Fleenor
Capitol Annex, Room 236
Frankfort, KY 40601

Hon. Eric Lycan
Office of the Speaker
Capitol Annex, Room 332
Frankfort, KY 40601

Hon. Brent Woosley
General Counsel
Legislative Research Commission
Room 300, Capitol Building
Frankfort, KY 40601

Hon. Mark Blackwell
Hon. Joseph Bowman
Kentucky Retirement Systems
1260 Louisville Road
Frankfort, KY 40601

Hon. Robert B. Barnes
Kentucky Teachers' Retirement System
479 Versailles Road
Frankfort, KY 40601

EXHIBIT 9

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

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

v.

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

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

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

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

UNCONTESTED FACTS

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

I. The Process By Which SB 151 Was Passed.

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

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

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

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

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

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

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

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

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

II. The Contents Of SB 151.

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

Kentucky Teacher Retirement System

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

Kentucky Employee Retirement System

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

State Police Retirement System

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

County Employee Retirement System

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

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

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

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

ARGUMENT

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

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

A. This Case Is Justiciable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Section 46 of the Kentucky Constitution is Mandatory.

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

[2] Section 46 further provides that "the second and third readings may be dispensed with by a majority of all the members elected to the House in which the bill is pending." The undisputed facts show that there was no such vote here, nor do Defendants claim a vote occurred. (*See* Leg. Defs. Br. 10-15; Gov. Br. 82-83.)

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

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

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

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

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

Id.[4]

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

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

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

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

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

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

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

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

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

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

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

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

In the Convention, Delegate Buckner provided the specific basis for Section 46 , stating that the "hasty mode of legislation ought to be checked, not only in the interest of the people, but in the interest of the legislative body itself." (*See* E. Polk Johnson, *Official Report of the Proceedings and Debates of the Convention of the Constitution of the State of Kentucky*, Vol. 3, at 3869 (1891) (Pls. Br. Ex. D.)). As an example, Delegate Buckner described a bill that had been passed and sent to the Governor in a single day. (*Id.*) He then explained that the purpose of Section 46 was "to throw guards around hasty legislation, and render it impossible for . . . bills to be railroaded through the Legislature . . . ." (*Id.*)[7]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Fletcher* is Dispositive, Not Dicta.

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

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

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

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

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

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

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

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

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

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

Section 12 of SB 151 also creates a new statutory section that, like KRS 61.565, mandates contributions by public employers to hybrid cash balance plans of state employees. It requires the state to provide a "contribution of four percent (4%) of the creditable compensation earned by the employee for each month the employee is contributing" to their plan. SB 151, §

12(2)(b). That statutory mandate is the mirror image of the language in KRS 61.565(1) that the Supreme Court identified as a self-executing appropriation in *Fletcher*.[14]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Under KY. CONST. § 19, "[n]o ex post facto law, nor any law impairing the obligation of contracts, shall be enacted… ." A law violates Section 19 where, as here, (1) there is a contract; (2) the statute at issue substantially impairs that contract; and (3) the impairment of the contract is not "reasonable and necessary to serve an important public purpose." *See generally, U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17, 30 (1977); *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1360 (D. Md. 1984). In *Jones*, the Court found that "Only upon a determination that the contract between KERS members and the state is substantially impaired by legislative action do we need decide whether the legislation impairing the contract is reasonable and necessary to serve a legitimate and important public purpose, necessitating a temporary impairment." 910 S.W.2d at 716 (citing *Maryland State Teachers Ass'n v. Hughes,* 594 F. Supp. 1353, 1361 (D. Md. 1984)).

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

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

As Plaintiffs' stated in their Brief, the elimination of the use of sick leave has clear and material costs. (Pls. Br. 42.) A newsletter to state employees from 2001, in which KRS encouraged employees to save sick leave for retirement, noted that, for someone retiring at a final salary of $30,000, and who lived for another 25 years, just twelve months' sick leave credit would be worth over $16,500 in retirement benefits. (*Id.*)[21] That amounts to more than half a year's salary, which is substantial. (*Id.*)

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

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

LMPD officers with uniform assignments are paid allowances of $1,500 for clothing and $900 for equipment, plus $720 in negotiated increases to those allowances, for a total of $3,120 per year. (*Id.*) The average CERS hazardous active member is currently paid a total of $57,044 per year, so that a $3,120 reduction is equivalent to a 5.5% reduction in creditable compensation. (*Id.*) Applied to the average annual benefit payment for such members, that reduction amounts to $1,494.59 per year. (*Id.*)

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

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

C. The Substantial Impairments were Not Reasonable or Necessary.

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

Defendants argue that SB 151 is reasonable and necessary to fully fund and "rescue" the retirement systems. However, they fail to demonstrate that funding the retirement systems could not be accomplished through alternative means that do not reduce or impair benefits promised under the statutory provisions constituting the inviolable contracts. Indeed, Defendants admit that none of the changes under SB 151 will have an immediate impact on the solvency of funds for the systems. (Gov. Br. 47.) In addition, Defendants have not shown that alternative funding streams were unavailable because it specifically rejected multiple bills that would provide dedicated funding to the retirement systems. *See* 2018 HB 41, 2018 HB 229, 2018 HB 536, 2018 SB 22, and 2018 SB 241 (each providing dedicated revenue streams directed, at least in part, to funding state retirement systems).

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

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

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

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

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

the Kentucky Constitution. (Pls. Br. 47-51.) This section states in relevant part: "[n]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

The Kentucky Supreme Court has held "[p]roperty rights are created and defined by state law." *Weiand v. Bd. of Trustees of the Kentucky Ret. Sys.*, 25 S.W.3d 88, 93 (Ky. 2000) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, (1985)). Further, the Court has endorsed the view that contractual rights are property. *Folger v. Com.*, 330 S.W.2d 106, 108 (Ky. 1959).

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

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

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

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

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

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

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

As part of the Kentucky Bill of Rights, KY. CONST. § 2 provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Kentucky's highest court has held, "whatever is essentially unjust

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

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

and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary." *Sanitation Dist. No. 1 v. City of Louisville*, 213 S.W.2d 995, 1000 (Ky. 1948).

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

CONCLUSION

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

Respectfully Submitted,

ANDY BESHEAR
ATTORNEY GENERAL

By: */s/ Andy Beshear*

J. Michael Brown (jmichael.brown@ky.gov)
Deputy Attorney General
La Tasha Buckner(latasha.buckner@ky.gov)
Assistant Deputy Attorney General
S. Travis Mayo (travis.mayo@ky.gov)
Executive Director,
Office of Civil and Environmental Law
Marc G. Farris (marc.farris@ky.gov)
Samuel Flynn (samuel.flynn@ky.gov)
Assistant Attorneys General
Office of the Attorney General
700 Capitol Avenue
Capitol Building, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
(502) 564-8310 FAX

Counsel for Plaintiff Commonwealth of Kentucky, ex rel. *Andy Beshear, Attorney General*

/s/ *Jeffrey S. Walther*, by permission

Jeffrey S. Walther(jwalther@wgmfirm.com)
Victoria Dickson(vdickson@wgmfirm.com)
Walther, Gay & Mack, PLC
163 East Main Street, Suite 200
Lexington, Kentucky 40588
(859) 225-4714

Counsel for Plaintiff Kentucky Education Association

/s/ *David Leightty*, by permission
David Leightty (dleightty@earthlink.net)
Alison Messex (amessex@pcnmlaw.com)
Priddy, Cutler, Naake & Meade PLLC
2303 River Road, Suite 300
Louisville, Kentucky 40206
(502) 632-5292

Counsel for Plaintiff
Kentucky FOP Lodge

CERTIFICATE OF SERVICE

I hereby certify that, on May, 30, 2018, I electronically filed the foregoing Plaintiffs' Reply Brief on the Merits via the Court's electronic filing system, and that on same date I served true and accurate copies of the foregoing electronically and via-email to the following: M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn, Office of the Governor, The Capitol, Suite 100, 700 Capitol Avenue, Frankfort, Kentucky 40601; Brett R. Nolan, Finance and Administration Cabinet, Office of the General Counsel, Room 329, Capitol Annex, Frankfort, Kentucky, 40601; Katherine E. Grabau, Public Protection Cabinet, Office of Legal Services, 655 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40601. I certify that I served true and accurate copies of the foregoing Plaintiffs' Reply Brief on the Merits on the individuals whose names appear on the following Service List via U.S. mail and/or hand delivery on May 30, 2018.

/s/ Andy Beshear
Andy Beshear
Attorney General

SERVICE LIST

Robert B. Barnes
Teachers' Retirement System of the State of Kentucky
479 Versailles Road
Frankfort, Kentucky 40601

Mark Blackwell
Katherine Rupinen
Joseph Bowman
Kentucky Retirement System
Perimeter Park West
1260 Louisville Road
Frankfort, Kentucky 40601

Eric Lycan
Office of the Speaker
Capitol Annex, Room 332
Frankfort, Kentucky 40601

David Fleenor
Vaughn Murphy
Capitol Annex, Room 236
Frankfort, Kentucky 40601

EXHIBIT 10

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT

DIVISION I

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

Electronically filed

COMMONWEALTH OF KENTUCKY etc. et al. PLAINTIFFS

v.

MATTHEW G. BEVIN, etc. et al. DEFENDANTS

* * * * * * *

REPLY BRIEF OF KY. LODGE STATE FOP REGARDING STANDING

INTRODUCTION

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

ARGUMENT

B. Personal Identification of Individual Members Is Not Required

3. The Applicable Case Law Supports Standing

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

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

888 S.W.2d at 668.

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

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

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

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

Each of those three elements is satisfied here:

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

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

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

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

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

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

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

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

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

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

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

[1] The full citation to the case is ***Lujan v. Defs. of Wildlife***, 504 U.S. 555 (1992)

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

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

CONCLUSION

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

RESPECTFULLY SUBMITTED,

s/David Leightty
DAVID LEIGHTTY
PRIDDY, CUTLER, NAAKE & MEADE, PLLC
2303 River Road, Suite 300
Louisville, KY 40206
Tel.: (502) 632-5292
Fax: (502) 632-5293
dleightty@earthlink.net
COUNSEL FOR PLAINTIFF
KENTUCKY STATE LODGE FRATERNAL
ORDER OF POLICE

CERTIFICATE

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

J. Michael Brown (jmichael.brown@ky.gov)
Deputy Attorney General
La Tasha Buckner (latasha.buckner@ky.gov)
Assistant Deputy Attorney General
S. Travis Mayo (travis.mayo@ky.gov)
Executive Director, Office of Civil and Environmental Law
Marc G. Farris (marc.farris@ky.gov)
Samuel Flynn (samuel.flynn@ky.gov)
Assistant Attorneys General
Office of the Attorney General
700 Capitol Avenue
Capitol Building, Suite 118
Frankfort, KY 40601

Jeffrey S. Walther (jwalther@wgmfirm.com)
Victoria F. Dickson (vdickson@wgmfirm.com)
Walther, Gay & Mack, PLC
163 East Main Street, Suite 200
Lexington, KY 40588

Matthew F. Kuhn (Matt.Kuhn@ky.gov)
M. Stephen Pitt (Steve.Pitt@ky.gov)
S. Chad Meredith (Chad.Meredith@ky.gov
Matthew F. Kuhn
Office of the Governor
700 Capital Avenue, Suite 101
Frankfort, Kentucky 40601

Brett R. Nolan (Brett.Nolan@ky.gov)
General Counsel
Finance and Administration Cabinet
702 Capitol Avenue, Suite 101
Frankfort, KY 40601

Katharine E. Grabau (Katie.Grabau@ky.gov)
Public Protection Cabinet
Office of Legal Services
656 Chamberlin Avenue, Suite B
Frankfort, Kentucky 40601

Mark Blackwell,(KRS) <mark.blackwell@kyret.ky.gov>
Katherine Rupinen, katherine.rupinen@kyret.ky.gov
Joseph Bowman, (KRS) <joseph.bowman@kyret.ky.gov>
Kentucky Retirement System
Perimeter Park West
1260 Louisville Road
Frankfort, Kentucky 40601

Robert B. Barnes
Teachers' Retirement System of the State of Kentucky
479 Versailles Road
Frankfort, KY 40601

Brent Woosley
Teachers Retirement System of Kentucky
479 Versailles Rd.
Frankfort, KY 40601

Eric Lycan
Office of the Speaker
Capitol Annex, Rm. 332
Frankfort, KY 40601

David Fleenor
Vaughn Murphy
Capitol Annex, Rm. 236
Frankfort, KY 40601

s/David Leightty