

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 2018-CI-00414**

**COMMONWEALTH OF KENTUCKY, ex rel.
MATTHEW G. BEVIN, in his official capacity as
Governor of the Commonwealth of Kentucky**

PETITIONER

v.

**ANDY BESHEAR, in his official capacity as
Attorney General of the Commonwealth of Kentucky**

RESPONDENT

MOTION TO STRIKE THE AMENDED PETITION

Comes the Plaintiff/Respondent, Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, by and through counsel, and moves this Court to strike the Amended Petition for a Declaratory Judgment filed by Defendant/Petitioner, Governor Matthew G. Bevin, on June 13, 2018. On June 13, 2018, without leave of Court or the consent of the Attorney General, and nearly a week after the submission of these consolidated actions, the Governor filed an Amended Petition in No. 2018-CI-00414. The Governor's Amended Petition is inappropriate and should be stricken pursuant to Kentucky Rules of Civil Procedure ("CR") 12.06 and 15.01 for the following reasons: (1) it was untimely and improper; (2) it was filed in bad faith; (3) it is intended to cause to delay; (4) it unfairly prejudices the Attorney General; and (5) amendment is futile. Accordingly, this Court should strike the Governor's Amended Petition.

NOTICE

The Attorney General's foregoing Motion to Strike does not require a hearing.

Respectfully Submitted,

ANDY BESHEAR
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion to Strike, attached Memorandum in Support of Motion to Strike, and Proposed Order using the Court's electronic filing system on June 14, 2018, 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; Jeffrey Walther, Walther, Gay & Mack, 163 E. Main St., Suite 200, Lexington, KY 40588; David Leighty, Priddy, Cutler, Naake, Meade, 2303 River Road, Suite 300, Louisville, KY 40206; David Fleenor, Capitol Annex, Room 236, Frankfort, KY 40601, Eric Lycan, Office of the Speaker, Capitol Annex, Room 332, Frankfort, KY 40601, Mark Blackwell, 1260 Louisville Road, Frankfort, KY 40601, and Bill Johnson, Johnson Bearnse, LLP, 326 West Main St., Frankfort, KY 40601. I certify that I served true and accurate copies of the foregoing Motion to Strike, attached Memorandum in Support of Motion to Strike, and Proposed Order on the individuals whose names appear on the following Service List via U.S. mail and/or hand delivery on June 14, 2018.

/s/ La Tasha Buckner
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RESPONDENT

MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

On June 13, 2018, nearly a week after this action was fully submitted to the Court, the Governor filed an Amended Petition. The Amended Petition follows numerous attempts to delay a final ruling that is eagerly anticipated by 200,000 public servants including teachers, police officers, firefighters, social workers and other state, city, county and school workers. The Governor has resorted to motions to disqualify and recuse, notices to take unnecessary discovery, and even an affidavit to the Supreme Court, all in effort to delay and preclude a ruling. The Amended Petition must be struck. It was improperly and untimely filed because it falls outside the time allotted for filing an amendment as of right under CR 15.01, and the Governor has not sought leave of Court or the Attorney General.

Moreover, even if the Court were to treat the Governor's Amended Petition as a motion "for leave to amend," the Court should deny that motion under CR 15.01 because the Amended Petition was filed in bad faith, was intended to cause delay, unfairly prejudices the Attorney General, and is futile. The Governor has been aware of the alleged issues raised in his Amended Petition since April 11, 2018, the date the Attorney General filed his initial complaint. Yet the

Governor has failed raise these new issues during briefing or oral argument despite numerous opportunities to do so. As a result, the Court should strike the Governor’s Amended Petition.

FACTUAL BACKGROUND

The General Assembly passed SB 151 – the subject of these consolidated actions – in about six hours on March 29, 2018. The Governor signed the bill into law on April 10, 2018. On April 11, 2018, the Attorney General, Kentucky Education Association (“KEA”), and the Kentucky State Lodge of the Fraternal Order of the Police (“FOP”) filed a Verified Complaint challenging SB 151 on seven constitutional grounds and two statutory grounds. *See Commonwealth of Kentucky, ex rel. Andy Beshear, et al. v. Matthew G. Bevin, et al.*, Civil Action No., 18-CI-00379, Complaint (Franklin Cir. Ct. April 11, 2018). One such constitutional ground challenged the sufficiency of the Speaker Pro Tempore’s signature on SB 151 Section 56 of the Kentucky Constitution. *Id.*

On April 18, 2018 the Governor filed a Petition for a Declaration of Rights to commence this action to “confirm the constitutionality under Section 56 of the Kentucky Constitution of the signing of every bill, joint, resolution, and concurrent resolution passed during the 2018 General Assembly.” *Commonwealth of Kentucky, ex rel. Matthew G. Bevin v. Andy Beshear*, Civil Action No. 18-CI-00414, Petition (Franklin Cir. Ct. April 17, 2018).

On April 20, 2018, this Court entered an Order consolidating the actions. The Court’s Order also established a briefing schedule, and mandated that “the parties *shall comply* with” that schedule. All parties moved for summary judgment in 18-CI-00379, and the Attorney General also moved to dismiss this action while the Governor moved for summary judgment. Pursuant to the Court’s Order, the parties completed all briefing on June 4, 2018.

On June 7, 2018, this Court held oral argument on the merits in the consolidated actions. During oral argument, counsel for the Governor argued that the Speaker Pro Tempore’s signature was constitutionally sufficient. The Court indicated its agreement. Based on the Court’s position, **the Attorney General withdrew the Section 56 argument** in 18-CI-00379 – the sole basis for the Governor’s Petition in 18-CI-00414 – rendering the Governor’s Petition moot.

On June 13, 2018 – more than two months after the Attorney General filed suit challenging the constitutionality of SB 151 and a week after the case was fully submitted – the Governor filed the Amended Petition, asking the Court to review the constitutionality of every bill passed in prior legislative sessions. The Governor did not seek leave of this Court to file his Amended Petition, and he did not request or obtain consent from the Attorney General. The Court should strike the Amended Petition.

STANDARD OF REVIEW

A motion to strike is properly brought pursuant to CR 12.06, which provides that a court “... may order stricken from any pleading any insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter.” The Court’s discretionary authority to strike materials “...is the power to remove the material from the record.” *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724, 734 (Ky. 2002).

ARGUMENT

I. The Governor’s Amended Petition Is Untimely And Improper.

The Amended Petition is improper under CR 15.01, which provides, in pertinent part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires....

As this Court is aware, the Attorney General filed his responsive pleading in this case on May 2, 2018 – 43 days ago – and the parties had fully briefed this action on June 4, 2018, as ordered by the Court, and argued the actions on June 7, 2018. Accordingly, CR 15.01 required the Governor to seek leave of this Court or obtain the written consent of the Attorney General to file his Amended Petition. The Governor neither sought nor obtained either. The Court should therefore strike the Amended Petition. *See Simmons v. Taylor*, 451 S.W.2d 385, 388 (Ky. 1970) (affirming order striking amended complaint filed without leave).

II. The Governor Should Not Be Permitted to Amend His Petition.

Even if the Governor had not flouted the procedural requirements of CR 15.01 and the Court’s scheduling order, he cannot meet the standard to amend his Petition. “It is within the trial court’s discretion to grant or deny a motion to amend a pleading, and on appellate review, its decision should not be disturbed unless the trial court abused that discretion.” *Nichols v. Zurich Am. Ins. Co.*, 423 S.W.3d 698, 707 (Ky. 2014). The Amended Petition is unduly delayed, would unduly prejudice the Attorney General, is not offered in good faith, would result in injustice, and would be futile. *See Stout v. City of Martin*, 395S.W.2d 591, 593 (noting that a court may deny a motion for leave to amend if the amendment will result in undue prejudice to the adverse party, is unduly delayed, is not offered in good faith, or the party has had sufficient opportunity to state a claim); *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869 (Ky. App. 2007).

The Amended Petition is inexcusably late. Nothing that occurred during oral argument on June 7 was new to this action or 18-CI-00379. Indeed, the Governor has known about the constitutional shortcomings of SB 151 – which form the basis of this Amended Petition – since at least April 11, 2018, when the Plaintiffs filed the Verified Complaint in 18-CI-00379. Yet the Governor chose to raise only the issue of the Section 56 signature requirement in his initial

Petition. Now, after summary judgment has been fully briefed and the case has been submitted to the Court, he seeks to expand the litigation to address the procedure of every bill passed in the prior legislative session.

Further, permitting the Governor to file the Amended Petition would unduly prejudice the Attorney General and the people of the Commonwealth because it would delay the proceedings. Indeed, it is apparent that is why the Governor filed the Amended Petition, six days after the oral argument, without once raising the possibility of amendment to the Court or the Attorney General. Allowing the Governor to amend the Petition after submission on the merits deprives the Attorney General, or any other party, the opportunity to adequately respond. Even if the Court were to allow such a response, briefing the procedural issues of *every* bill passed this session would undoubtedly delay the resolution of this case, which is now ripe for summary judgment. Such a delay would unnecessarily prejudice the Attorney General, as well as the 200,000 public employees on behalf of whom the Attorney General brought suit, who are anxiously awaiting a resolution of the merits of this case.¹ The Court should therefore strike the Amended Petition. *See Johnson v. Cypress Hill*, 641 F.3d 867, 872-73 (7th Cir. 2011) (applying analogous federal rule and holding amendment of complaint after summary judgment was briefed would delay resolution of the case, prejudicing the defendant).

The Governor, by contrast, is not prejudiced by the striking of his improper Amended Petition. Both the Governor and the Legislative Defendants addressed the constitutional arguments in their responsive briefs, in their surreplies, and at oral argument. Yet the Governor did not seek leave of the Court to amend his Petition at any time prior to submission of the action

¹ Indeed, the mere passage of SB 151 has spiked the retirement rates of the Commonwealth's public employees by eighteen percent (18%). *See* John Cheves, *Kentucky's public workers hit the exits. Retirements surge by 18 percent this year.* Herald-Leader (June 8, 2016) available at <http://www.kentucky.com/news/politics-government/article212802384.html>. (last visited June 14, 2018).

to the Court for a decision on the merits, including during the briefing of the Attorney General's motion to dismiss the Petition.

Finally, the Court should strike the Governor's Amended Petition because it is futile. The Amended Petition is meritless, because the Attorney General has challenged only one law – SB 151. The Amended Petition is merely a “parade of horrors,” claiming if this Court enforces the Kentucky Constitution, it will invalidate other laws. However, the Attorney General has never argued for such an invalidation, and there is no complaint filed challenging the constitutionality of any other bill. Acting in bad faith, the Governor asserts otherwise in his Amended Petition, falsely stating that the Attorney General claims “every law passed by a session of the General Assembly is invalid.” (*See* Amended Petition, at 2.)

Moreover, the Kentucky Supreme Court rejected the Governor's “parade of horrors” argument as a matter of law in *D & W Auto Supply*. In overruling the Enrolled Bill Doctrine, the Court conceivably called into question hundreds of bills then and into the future, but ruled it had a duty to enforce the Constitution and its provisions. *See D & W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 424 (Ky. 1980). As this Court acknowledged during oral argument on June 7, it 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). There, a party contended that this Court should not declare legislation unconstitutional because of the “parade of horrors regarding the impact of this ruling on other unrelated legislation ...” *Id.* at 4. This Court overruled 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 Court should again reject the Governor's baseless arguments about knock-on effects of a decision by this Court to uphold the Constitution. SB 151 is the only bill at issue in the consolidated actions, because it is the only bill the Attorney General asks this Court to review for its constitutional compliance.

Finally, the Attorney General expressly withdrew his claim related to the presiding officer under Kentucky Constitution Section 56 on the record in Court on June 7, rendering this action moot. The Court should strike the Amended Petition.²

CONCLUSION

The Governor's Amended Petition was untimely and improper under CR 15.01 because it was filed without leave of the Court or the Attorney General. With his Amended Petition, the Governor seeks to delay the resolution of this action, which will prejudice the public. Finally, the Amended Petition is futile because it suffers the same defects as the Petition. Accordingly, the Attorney General respectfully requests that the Court grant this Motion and strike the Amended Petition.

² In the alternative, if the Court were to deny this Motion to Strike, the Attorney General hereby renews his Motion to Dismiss dated May 2, 2018. For the reasons stated therein and in this Motion, the Amended Petition should be dismissed.

Respectfully Submitted,

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ORDER

The Plaintiff/Respondent, the Commonwealth of Kentucky *ex rel.* Andy Beshear, in his official capacity as Attorney General of the Commonwealth of Kentucky, through counsel, having made a Motion to Strike the Amended Petition of the Defendant/Respondent Governor Matthew G. Bevin, and the Court being otherwise sufficiently advised: **IT IS HEREBY ORDERED** that the Attorney General's Motion to Strike be **GRANTED**.

Wherefore, **IT IS ORDERED AND ADJUDGED** that, pursuant to CR 15.01, the Petitioner Matthew G. Bevin, in his official capacity as Governor of the Commonwealth of Kentucky's Amended Petition against Respondent is hereby **STRICKEN** from the record

SO ORDERED, this the _____ day of _____, 2018.

Judge Phillip J. Shepherd
Franklin Circuit Court, Division I

Tendered by:

/s/ La Tasha Buckner

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DISTRIBUTION

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