

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 18-CI-379
CONSOLIDATED WITH 18-CI-414
ELECTRONICALLY FILED

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

PLAINTIFFS

v.

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

DEFENDANTS

GOVERNOR BEVIN'S MOTION TO ALTER, AMEND, OR VACATE

NOTICE

Please take notice that undersigned counsel will appear in the courtroom of the above-referenced Court and present the following Motion on July 11, 2018 at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

MOTION

Defendant Governor Bevin moves to alter, amend, or vacate the Court's June 20, 2018 Opinion and Order under CR 59.05. A memorandum of law and proposed order are attached.

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

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 and U.S. mail this 29th 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 Lyan, 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; Barbara B. Edelman, Mindy G. Barfield, Dinsmore & Shohl LLP, 250 West Main Street, Suite 1400, Lexington, Kentucky 40507.

/s/ Matthew F. Kuhn

Counsel for Governor Bevin

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 18-CI-379
CONSOLIDATED WITH 18-CI-414
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

MEMORANDUM IN SUPPORT OF THE GOVERNOR'S
MOTION TO ALTER, AMEND, OR VACATE

Before an appeal is taken, the Court should amend its June 20, 2018 Opinion and Order in two respects. First, the Court should amend its decision to resolve whether Senate Bill 151 violates the “inviolable contract” and the Contracts Clause of the Kentucky Constitution. This will allow the Kentucky Supreme Court to fully address these vitally important issues without delay in the event it reverses this Court on the two legislative-process issues. Second, the Court should amend its decision to determine whether the provisions of Senate Bill 151 that the Court invalidated under the 51-vote requirement of Section 46 of the Constitution are severable from the larger bill, such that other aspects of Senate Bill 151 that are capable of standing alone can be upheld in the event the Court’s “three readings” holding is reversed. Although these issues were argued, the Court decided not to rule on them.

By resolving these issues now, the Court will ensure that the Kentucky Supreme Court can settle the constitutionality of Senate Bill 151 *once and for all*. Kentuckians need and deserve resolution through a single appeal to the Kentucky Supreme Court. At the first hearing in this case, on April 19, 2018, the Court agreed, describing it as “very important to have a full record for our Supreme Court to review when it gets . . . up there.” [4/19/18 Hearing, at 10:37:38-10:37:45]. The Governor agrees. Surely, the Attorney General cannot now disagree, given his repeated rhetoric about the need for a quick resolution of this matter. In short, no party can oppose a full, rather than a piecemeal, ruling by this Court.

ARGUMENT

CR 59.05 empowers the Court to alter, amend, or vacate its June 20, 2018 decision. CR 59.05 grants this Court “broad discretion to ‘alter or amend a judgment,’ so as to correct manifest errors . . . or otherwise to prevent manifest injustice.” *Rumpel v. Rumpel*, 438 S.W.3d 354, 365–66 (Ky. 2014). All parties, including this Court, have agreed that this case should arrive at the Supreme Court fully ready for an expedited up-or-down ruling. Governor Bevin therefore asks the Court to fix two things in its June 20, 2018 decision to hasten Kentuckians getting a final answer on the constitutionality of Senate Bill 151.

First, the Court should revise its decision to resolve the “inviolable contract” and Contracts Clause issues. In other words, the Court should not leave the merits of Senate Bill 151 for another day. Both parties sought summary judgment on these issues. [*E.g.*, AG’s Op. SJ Memo. at 37–46; Gov.’s Op. SJ Mem. at 18–52]. And these

issues were argued during the June 7, 2018 oral argument. [*E.g.*, 6/7/18 Transcript at 22–28, 35–55]. Yet, the Court refrained from resolving them, explaining:

The Court notes that these issues were thoroughly briefed and both sides presented strong arguments for their positions. However, in light of the Court’s conclusion that the legislation violates Section 46 of the Kentucky Constitution, and was therefore not validly enacted, the Court declines to address the merits of whether it violates the “inviolable contract” or the constitutional prohibitions against impairing the obligations of contracts.

[6/20/18 Opinion & Order at 32]. The Court should revise this portion of its decision.

The Court’s decision not to reach the merits of Senate Bill 151 cannot be supported on the ground that the Court need only invalidate Senate Bill 151 on one basis to resolve this case. If that were the Court’s position, why invalidate Senate Bill 151 on two separate grounds—“three readings” and the failure to get 51 votes? In addition, the two grounds on which the Court invalidated Senate Bill 151 can be readily fixed by the General Assembly in a special session or in the 2019 session. If the General Assembly decides to remedy any alleged procedural defect in the near term, it deserves guidance about the merits of Senate Bill 151.

Second, the Court should amend its June 20, 2018 decision to decide whether the portions of Senate Bill 151 that, in the Court’s view, violate the 51-vote requirement can be severed from the larger bill. As counsel for the Governor explained at oral argument, “[t]here is, of course, a severability clause at the end of Senate Bill 151 [in Section 89]. There’s a general Kentucky severability statute that your Honor is aware [of in KRS 446.090], that if a bill can stand on its own legs without the severed provision then it would remain if possible.” [6-7-18 Transcript at

70]. For example, it is undisputed that certain provisions of Senate Bill 151 are outside of the “inviolable contract” and do not violate the 51-vote requirement—for example, the hybrid cash balance plan for new members of the Kentucky Teachers’ Retirement System that will become effective on January 1, 2019. Consequently, the Court should decide whether the aspects of Senate Bill 151 collected on pages 25–27 of its decision are severable from the larger bill in the event that the Supreme Court reverses on the “three readings” ground on which the Court invalidated the entire bill. *See Ky. Municipal League v. Dep’t of Labor*, 530 S.W.2d 198, 200 (Ky. 1975) (“It is a well-established rule that portions of a statute which are constitutional ma[y] be upheld while other portions are eliminated as unconstitutional.”).

CONCLUSION

The Court has correctly acknowledged that it is “very important to have a full record for our Supreme Court to review when it gets . . . up there.” [4/19/18 Hearing, at 10:37:38-10:37:45]. Those were the Court’s words. The Court should adhere to them and grant the Governor’s Motion. The people of Kentucky deserve to have this case decided as a whole and as quickly as possible, rather than piece by piece.

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

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 and U.S. mail this 29th 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 Bearnse, LLP, 326 West Main Street, Frankfort, KY 40601; Barbara B. Edelman, Mindy G. Barfield, Dinsmore & Shohl LLP, 250 West Main Street, Suite 1400, Lexington, Kentucky 40507.

/s/ Matthew F. Kuhn
Counsel for Governor Bevin

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 18-CI-379
CONSOLIDATED WITH 18-CI-414
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

ORDER

This matter is before the Court on a motion to alter, amend, or vacate filed by Defendant Governor Bevin, in his official capacity as Governor of the Commonwealth of Kentucky. The Court, having been sufficiently advised, **ORDERS** that the motion to alter, amend, or vacate is **GRANTED**. The Court will forthwith issue a revised Opinion and Order that addresses whether Senate Bill 151 violates the “inviolable contract” and the Contracts Clause of the Kentucky Constitution and determines whether portions of Senate Bill 151 are severable from those that the Court has determined violate the 51-vote requirement of the Kentucky Constitution.

Dated this ____ day of July, 2018.

CIRCUIT JUDGE

Distribute to:

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

Katharine E. Grabau
Public Protection Cabinet
Office of Legal Services
656 Chamberlin Avenue, Suite B
Frankfort, Kentucky 40601

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

Jeffrey Walther
Victoria Dickson
Walther, Gay & Mack
163 East Main Street, Suite 200
Lexington, Kentucky 40588

David Leightty
Alison Messex
Priddy, Cutler, Naake, Meade
2303 River Road, Suite 300
Louisville, Kentucky 40206

David Fleenor
Vaughn Murphy
Capitol Annex, Room 236
Frankfort, Kentucky 40601

Eric Lycan
Office of the Speaker

Capitol Annex, Room 332
Frankfort, Kentucky 40601

Mark Blackwell
Katherine Rupinen
Joseph Bowman
Kentucky Retirement Systems
1260 Louisville Road
Frankfort, Kentucky 40601

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

Bill Johnson
Johnson Barse, LLP
326 West Main Street
Frankfort, Kentucky 40601

Barbara B. Edelman
Mindy G. Barfield
Dinsmore & Shohl LLP
250 West Main Street, Suite 1400
Lexington, Kentucky 40507