COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NOS. 2018-SC-000419-TG and 2018-SC-000421-TG

MATTHEW G. BEVIN, in his official capacity as GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, et al. APPELLANTS

APPEAL FROM COURT OF APPEALS
CASE NO. 2018-CA-001200
AND
FRANKLIN CIRCUIT COURT
CASE NOS. 2018-CI-000379 and 2018-CI-000414

v.

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

MOTON FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Kentucky Chamber of Commerce (the "Kentucky Chamber"), the Northern Kentucky Chamber of Commerce, Greater Louisville, Inc., and Commerce Lexington, Inc. (collectively, the "Chambers"), by counsel, respectfully move for leave to file an *Amicus Curiae* Brief in this case.

This Motion is timely filed pursuant to the Court's expedited scheduling order and is not interposed for delay. The Chambers have a strong interest in the issues to be decided herein and the outcome of this appeal. Because the Franklin Circuit Court's Opinion And Order (the "Opinion") has serious ramifications for Kentucky's economy, many Kentucky businesses will be directly impacted by, and have an interest in, the outcome of this case. *See Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 202 (Ky. 1989) (recognizing that associations have standing to represent the legal interests of their members).

As the largest business organization in the Commonwealth, the Kentucky Chamber has more than 2,700 member businesses, which collectively employ more than

half of Kentucky's private workforce. An additional 12,000 business professionals have joined as affiliate members. The mission of the Kentucky Chamber is to provide leadership and serve as a consensus-builder and advocate for the advancement of Kentucky.[1] The Northern Kentucky Chamber of Commerce is the largest volunteer business organization in northern Kentucky, representing nearly 2,000 businesses with thousands of employees.[2] Greater Louisville Inc., the Metro Chamber of Commerce, advocates for a pro-business environment and facilitates businesses engagement on issues that impact regional competitiveness.[3] Commerce Lexington, Inc. works to create the environment and opportunity for economic prosperity and quality living in Central Kentucky.[4]

As *amici curiae*, the Chambers are vitally concerned with the pension crisis dragging Kentucky's economy into an untenable future. Confronting the crisis by implementing common-sense solutions – such as those found in SB 151 – is vital to Kentucky's economic prosperity.

WHEREFORE, the Chambers respectfully ask this Court to grant leave to file, on their own behalf and on behalf of their members, the attached *Amicus* Brief.

---

[1] For a description of the Kentucky Chamber's membership and mission, see http://www.kychamber.com.

[2] For a description of the Northern Kentucky Chamber's membership and mission, see https://www.nkychamber.com.

[3] For a description of Greater Louisville, Inc.'s membership and mission, see https://www.greaterlouisville.com.

[4] For a description of Commerce Lexington, Inc.'s membership and mission, see https://www.commercelexington.com.

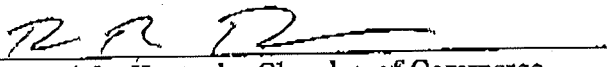
Respectfully submitted,

Brent R. Baughman
Janet P. Jakubowicz
Kyle W. Miller
BINGHAM GREENEBAUM DOLL LLP
3500 PNC Tower
101 S. Fifth Street
Louisville, Kentucky 40202-3197
(502) 587-3559

COUNSEL FOR MOVANT,
KENTUCKY CHAMBER OF COMMERCE
NORTHERN KENTUCKY CHAMBER OF
COMMERCE GREATER LOUISVILLE, INC.
COMMERCE LEXINGTON, INC.

CERTIFICATE OF SERVICE

It is hereby certified that pursuant to CR 76.12(5) that a true copy of this Motion for Leave to File *Amicus Curiae* Brief was served by First Class U.S. Mail, postage prepaid this 27th day of August, 2018, to: Hon. Andy Beshear, J. Michael Brown, La Tasha Buckner, S. Travis Mayo, Marc G. Farris, and Samuel Flynn, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601 (and by hand-delivery and electronic mail); Jeffrey Walther and Victoria Dickson, Walther, Gay & Mack, 163 E. Main St., Suite 200, Lexington, KY 40588; David Leightty and Alison Messex, Priddy, Cutler, Naake, Meade, 2303 River Road, Suite 300, Louisville, KY 40206; David Fleenor and 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, and 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; and Barbara B. Edelman and Mindy G. Barfield, Dinsmore & Shohl LLP, 250 West Main Street, Suite 1400, Lexington, KY 40507.



Counsel for Kentucky Chamber of Commerce
Northern Kentucky Chamber of Commerce
Greater Louisville, Inc.
Commerce Lexington, Inc.

19565924.1

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

CERTIFICATE OF SERVICE

I certify that a true copy of this Brief for Amici Curiae was served by First Class U.S. Mail, this 27th day of August, 2018, to: Hon. Andy Beshear, J. Michael Brown, La Tasha Buckner, S. Travis Mayo, Mary G. Harris, Samuel Flynn, Office of the Attorney General, 700 Capitol Ave., Ste. 118, Frankfort, KY 40601; M. Stephen Pitt, Chad Meredith, Matthew Kuhn, Office of the Governor, 700 Capitol Ave., Ste. 100, Frankfort, KY 40601; Jeffrey Walther, Walther, Gay & Mack, 163 E. Main St., Ste. 200, Lexington, KY 40588; David Leighty, Priddy, Cutler, Naake, Meade, 2303 River Rd., Ste. 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 Rd., Frankfort, KY 40601; Robert B. Harney, Teachers' Retirement System, 479 Versailles Rd., Frankfort, KY 40601; Amy Feldman, Franklin Cir. Ct. Clerk, Franklin Cty. Courthouse, 222 St. Clair St., Frankfort, KY 40601; Sam Givens, Ky. Ct. of Appeals Clerk, 360 Democrat Drive, Frankfort, KY 40601.

COUNSEL FOR AMICI CURIAE

TABLE OF POINTS AND AUTHORITIES

INTRODUCTION/INTEREST OF AMICI CURIAE 1

Sissel v. U.S. Dep't of Health & Human Servs, 760 F.3d 1 (D.C. Cir. 2014) 3

ARGUMENT 3

A. The Court Should Afford Great Deference To The Legislature's Pension Reform As A Matter Of Public Policy 3

Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989) 3

Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408 (Ky. 2005) 3

Smothers v. Lewis, 672 S.W.2d 62 (Ky. 1984) 3

Bd. of Trustees of the Judicial Form Ret. Sys. v. Attorney General, 132 S.W.3d 770 (Ky. 2003) 4

Bloemer v. Turner, 281 Ky. 832, 137 S.W.2d 387 (Ky. 1939) 4

Legislative Research Com. by Prather v. Brown, 664 S.W.2d 907 (Ky. 1984) 4

Sibert v. Barrett, 197 Ky. 17, 246 S.W. 455 (Ky. 1922) 4

TECO Mech. Contractor, Inc. v. Commonwealth, 366 S.W.3d 386 (Ky. 2012) 4

B. Pension Reform Is Necessary For A Prosperous Kentucky 4

1. An Unsustainable System 5

2. Pension Reform 7

3. Economic Effects 8

C. The Substantive Challenges To SB 151 Are Not Sufficient To Invalidate Good Law 10

Jones v. Bd. Of Trs., 910 S.W.2d 710 (Ky. 1995) 11

2013 Ky. Acts ch. 120 11

KRS 61.595(3) 11

Maryland State Teachers Ass'n Inc. v. Hughes, 594 F. Supp. 1353 (D. Md. 1984) 12

Sveen v. Melin, 138 S. Ct. 1815 (2018) 12

Strathers v. Garrard Cty. Bd. of Educ., 405 S.W.3d 473 (Ky. App. 2012) 12

Martin v. Commonwealth, 199 S.W.3d 195 (Ky. App. 2006) 12

CONCLUSION 13

INTRODUCTION / INTEREST OF AMICI CURIAE

The Kentucky Chamber of Commerce (the "Kentucky Chamber"), the Northern Kentucky Chamber of Commerce, Greater Louisville, Inc., and Commerce Lexington, Inc. (collectively, the "Chambers") have a strong interest in the issues to be decided herein and the outcome of this appeal, concerning the fate of the SB 151 pension reform legislation. The Commonwealth's financial stability is an important issue for all Kentuckians, including Kentucky's business community, compelling the Chambers' involvement as *amici curiae*.

The Kentucky Chamber has consistently advocated for measures advancing the Commonwealth's economic prosperity.[1] The other Chambers likewise promote policy initiatives that support the economic vitality of the Commonwealth's three largest population centers.[2] Collectively they agree that only if the Commonwealth has a viable and successful business climate will it have the tax base sufficient to sustain critical governmental obligations. And that necessarily includes a strong public school system: primary, secondary, and post-secondary. The Chambers have long recognized that a strong public school system – at all levels – is an essential factor in economic

---

[1] The Kentucky Chamber "supports a prosperous business climate in the Commonwealth of Kentucky and works to advance Kentucky through advocacy, information, program management and customer service in order to promote business retention and recruitment." *Mission*, Kentucky Chamber of Commerce at https://www.kychamber.com/about-us/about-us/our-mission-values.

[2] The Northern Kentucky Chamber's "mission is to promote and support the development of strong businesses and a vibrant economy in the Northern Kentucky region, through leadership and advocacy, resulting in a better quality of life for all." *Mission Statement*, Northern Kentucky Chamber of Commerce at https://www.nkychamber.com/about/about-nky-chamber/. Greater Louisville, Inc. "is committed to transforming our community by improving the region's quality of life, advocating for a pro-business environment and developing a talented workforce." *What is the Chamber of Commerce?*, Greater Louisville, Inc. at https://www.greaterlouisville.com/faq/. Commerce Lexington, Inc.'s mission is "[t]o represent our members, creating the environment and opportunity for economic prosperity and quality living in Central Kentucky." *Mission*, Commerce Lexington, Inc. at https://www.commercelexington.com/about.html.

development, ensuring a workforce which can meet the needs of today's increasingly knowledge intensive economy.

But the Commonwealth's budget does not exist in a vacuum. There are many competing budget priorities, and the share of the state General Fund consumed by Medicaid, corrections and public employee benefits (pensions and health insurance) is taking an ever larger slice of the Commonwealth's budgetary pie. These spending categories are increasing faster than the budget as a whole, crowding out spending for important priorities like education. Pension costs alone have grown from 5.4% of the General Fund in 2008 to 14.3% in 2020 in the current budget.[3] Earlier this decade, the Kentucky Chamber explained how this "leaky bucket" of state spending had shifted spending priorities away from critical investments in education. The consequences were enormous at the beginning of the decade; they are even more dire now, at the decade's end.

The Court is well aware of the pension crisis facing the Commonwealth's public pension funds, now the most underfunded in the nation. The consequences of failing to address this problem are nothing short of disastrous. Not only does pension spending compromise the state's ability to fully fund educational priorities, it adversely affects the Commonwealth's bond rating, leading to a fiscal vicious cycle, with the higher interest on that debt further reducing the legislature's ability to spend on education and other priorities.

---

[3] State Budget Director Presentation to House and Senate Appropriations and Revenue Committees, Jan. 23, 2018, p.13. https://osbd.ky.gov/Publications/Documents/Presentations/2018-20%20House%20and%20Senate%20AR%20presentation%2001%2023%2018%20FINAL.pdf (last visited Aug. 24, 2018).

At this late stage, casting blame is counter-productive; no doubt there is plenty of that to go around. But recent legislative efforts to reform an unsustainable defined-benefits system – public policy measures only the General Assembly may take – should be granted deference. SB 151 is a positive step to help the Commonwealth create a prosperous economy, in which the state is able to make essential investments in education and infrastructure.

The Chambers are aware that the challenge below was both procedural and substantive. The parties ably argued the procedural issues,[4] and will certainly do so before this Court. In this brief, the Chambers wish to concentrate on the substantive challenges to SB 151, and the public policy ramifications of pension reform.

ARGUMENT

A. The Court Should Afford Great Deference To The Legislature's Pension Reform As A Matter Of Public Policy.

"The General Assembly is the representative of the people and is the proper branch of government to determine public policy." *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 222 (Ky. 1989). "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)).

---

[4] The Chamber notes that the procedural challenge in this case mirrors litigation contesting legislative maneuvers Congress employed in the passage of the Patient Portability and Affordable Care Act ("ACA"). The D.C. Circuit ultimately rejected that challenge. *See, Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014), reh. en banc denied, 799 F.3d 1035 (D.C. Cir. 2015), cert. denied, 136 S.Ct. 925 (U.S. 2016) (holding that the ACA did not violate the U.S. Constitution's Origination Clause even though it originated in the House of Representatives as the "Service Members Home Ownership Tax Act of 2009").

In his Opinion, Judge Shepherd noted that the legislature's policy-making is afforded "great deference." Opinion & Order at p. 17.

Under the separation of powers doctrine expressly stated in Sections 27, 28, 29, and 60 of the Kentucky Constitution, legislative power is exclusively confined to the "General Assembly of the Commonwealth of Kentucky" and the power to make laws cannot be delegated to any other body. *See Bd. of Trustees of the Judicial Form Ret. Sys. v. Attorney General*, 132 S.W.3d 770, 782 (Ky. 2003); *Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387, 390 (Ky. 1939). Indeed:

> Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution, which history tells us came from the pen of the great declaimer of American independence, Thomas Jefferson. We conceive it to be the duty of the courts to adopt the construction most conducive to prevent the destruction of the edifice as contemplated.

Legislative Research Com. by Prather v. Brown, 664 S.W.2d 907, 913 (Ky. 1984) (quoting *Sibert v. Garrett*, 197 Ky. 17, 246 S.W. 455, 457 (Ky. 1922) (internal punctuation omitted)).

Moreover, "[t]his Court adheres to the 'long-established principle that a strong presumption exists in favor of a statute's constitutionality.'" *TECO Mech. Contractor, Inc. v. Commonwealth*, 366 S.W.3d 386, 392-93 (Ky. 2012) (internal citations omitted). Consistent with these venerable principles, this Court should not lightly strike the legislature's chosen public policy evidenced in SB 151.

B. Pension Reform Is Necessary For A Prosperous Kentucky.

Kentucky needs to invest in education, healthcare, infrastructure, and other areas which will provide the foundation for healthy and happy lives of its citizens.

Unfortunately, funds which would otherwise be used to support these endeavors are being diverted to prop up an increasingly unsustainable pension system. The unfunded liabilities within that system are, in turn, decreasing the Commonwealth's measured creditworthiness, making debt more expensive. The more expensive the debt, the more expensive capital projects are to support education, healthcare, corrections, infrastructure, *etc.* The ripples from the pension crisis are felt across the state.

1. An Unsustainable System

A series of policy decisions, questionable management practices, and poor investment returns has put the Commonwealth's retirement systems in an unsustainable financial position. Our pension systems have become underfunded for several major reasons, including: continually enhancing retirement benefits, underfunding of the employer pension contribution, failure to meet actuarial assumptions, and poor investment returns. *See* PFM Interim Report #2 ("PFM Report #2"), at 58-64, attached to Defendant's (Governor Bevin) Response on the Merits as Exhibit 3. The net effect is to put the Commonwealth on a path toward brutal economic consequences as it confronts righting its financial ship, including properly funding its pension obligations.

As an example of questionable assumptions, KTRS encourages employees to work for 27 years and then collect a defined benefit retirement allowance for the rest of their lives. On its face, one wonders how that system could possibly be properly funded. Indeed, Standard & Poor's recently ranked Kentucky's pension systems as the worst funded among the 50 states. *See* Standard & Poor's, U.S. State Pensions Weak Market Returns Will Contribute to Rise in Expense, Sept. 12, 2016, attached to Defendant's (Governor Bevin) Response on the Merits as Exhibit 2 (the "S&P 2016 Report"). The total unfunded liability for Kentucky's public pension systems is estimated to be between

$33 billion and $84 billion. *See* PFM Report #2 at 1-2. The 2010 census recorded 1,719,965 households in the state of Kentucky.[5] This means the unfunded liability equals $19,186 per household on the low-end, or $48,838 on the high-end. Given Kentucky's median household income of $44,811, even confiscating every household's yearly income would not be enough to fix this problem.[6] Though the average public pension fund in the United States is funded at 73.2%, Kentucky's relevant public pensions are funded between 16% and 59%. *See* PFM Report #2 at 24-25.

In 2015, Governor Steve Beshear issued Executive Order 2015-385, establishing the Kentucky Teacher Retirement System Funding Work Group (the "Working Group"). The Kentucky Chamber's President and CEO served on the Working Group. In its final report, the Working Group set forth its "guiding principles," the first of which was that: "The status quo is unsustainable. While the projected date of insolvency may vary based upon the assumptions made and accounting models used, doing nothing leaves the Kentucky Teachers' Retirement System on a pathway to insolvency."[7] Earlier that year, a

---

[5] American FactFinder, *Households and Families: 2010: Kentucky*, https://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_SF1/QTP11/0400000US21 (last visited Aug. 24, 2018).

[6] American FactFinder, *Community Facts – Kentucky*, https://factfinder.census.gov/bkmk/cf/1.0/en/state/Kentucky/INCOME (last visited Aug. 24, 2018).

[7] Kentucky Teachers' Retirement System Funding Working Group, *Final Report*, p. 7, https://trs.ky.gov/wp-content/uploads/2015/12/Funding-Work-Group-Final-Report.12.7.2015.pdf (Dec. 4, 2015) (last visited Aug. 24, 2018).

Working Group presentation stated that, without changes, the KTRS would be insolvent by 2036.[8]

2. Pension Reform

The Chambers wish for all Kentuckians, especially those committing their lives to service of the state, to enjoy a stable retirement. Absent the SB 151 reforms, the system would not only drag down the state economy, failure to act would eventually not permit the proposed benefits to be paid at all. The Kentucky Chamber has produced a number of reports and has provided legislative testimony highlighting the negative impact of rising benefit costs on other important areas of state spending, especially education, and has advocated for changes to make the Commonwealth's retirement systems more sustainable. The Kentucky Chamber organized a coalition of organizations to support the successful 2013 legislation, which required payment of the full employer contribution and placed new state and local government employees in a hybrid cash balance plan. In 2015, the Kentucky Chamber organized a pension task force, made up primarily of employers and financial executives, as part of its ongoing efforts to focus state policy makers' attention on the pension issue.

Public retirement benefits should mirror those available in the private sector as much as possible. Of course, there are legal and ethical guidelines that must be followed regarding public retirement benefits. The Chambers believe it is important to offer competitive retirement benefits that help Kentucky recruit and retain quality teachers and other government employees. The Commonwealth's interests are best served by devoting

---

[8] Kentucky Teachers' Retirement System Funding Working Group, *Introductory Issues*, p.8, https://trs.ky.gov/wp-content/uploads/2015/12/20150731_PTA.pdf (July 31, 2015) (last visited Aug. 24, 2018).

time and resources to pension reforms that can win legislative approval and withstand a costly and time-consuming legal challenge that would, at best, delay needed reforms and could ultimately undo needed changes. The Chambers advised the legislature and the state that the best way to develop a clear and certain path forward is through a combination of additional financial investments in the retirement system and legally sustainable benefit changes.[9]

3. Economic Effects

The pension crisis is more than large numbers on state balance sheets. As a quote famously attributed to former Illinois Senator Everett Dirksen goes: "a billion here, a billion there, pretty soon, you're talking real money." Well, whether it's $33 or $84 billion, it's certainly real money that the state will eventually have to pay, burdening future generations with an unwelcome legacy of debt. While kicking the can to our children is morally reprehensible, the effects are presently playing out in our state.

Pension underfunding has prompted national agencies to downgrade Kentucky's credit rating, meaning it costs taxpayers more to build the Commonwealth's public works, including essential school and road projects. This lower credit rating increases the interest rate on bonds issued to finance those projects, making them more expensive. All things being equal, a more expensive project certainly means fewer projects. The pension crisis is, therefore, compromising the state's ability to fund new schools, infrastructure improvements, and combat public health crises.

---

[9] Kentucky's pension woes can be likened to a family suffering huge credit-card debt. Of course, the family can increase its monthly payments, which will help reduce existing debt. But that alone won't solve the problem, as maintaining existing excessive spending practices will result in a never ending cycle of debt. Only by both reducing spending and increasing payments can the problem truly be solved.

A vivid illustration of this unintended shifting in state budget priorities is the fact that in the past six fiscal years (FY2011 to FY2017), general fund spending on traditional education expenditures has been relatively flat. This is due to revenue declines stemming from the Great Recession, leading to intense spending pressures on the other major state government obligations noted above. Overall budgetary numbers for education are misleading; only by including sharp increases in KTRS pension funding in consecutive legislative sessions did total education spending increase in any significant way. Otherwise, funding for tradition education was flat. The reality is that the condition of our teachers' pension (KTRS) system – not including the even more dire condition of the KRS system for state and local government employees – is preventing normal investments by the state in teacher salaries, textbooks, computers, school buildings, teacher training programs, *etc.* The Chambers see these trends continuing for the foreseeable future and would only be exacerbated if SB 151 were overturned.

SB 151 is a positive step to improve Kentucky's assessment by bond rating agencies. See Moody's Investors Service, Commonwealth of Kentucky Credit Opinion, May 1, 2018 attached to Defendant's (Governor Bevin) Response on the Merits as Exhibit 7 (calling SB 151 "credit-positive"). Actions designed to decrease unfunded liabilities will correspondingly increase Kentucky's creditworthiness. Likewise, actions which increase the unfunded liabilities will damage Kentucky's creditworthiness, increasing the cost of bonds to finance public works projects. Even the outcome of this litigation could drive up the cost of critical improvements in this state. See S&P 2016 Report at 6-7 ("Although Oregon had previously ranked among the top 5 states with the highest funded ratios, it fell out of the ranking after the Oregon Supreme Court

overturned a significant feature of the state's 2013 pension reform legislation which consequently increased estimated plan liabilities."). Unlike Kentucky's system, Oregon's system was well-funded at the time. One can only imagine the effect that delaying, or failing to make, necessary pension reforms could have here.

Kentucky has few options when it comes to solving the pension crisis. It could solely increase taxes, though the amount necessary to solve the crisis would be extraordinarily burdensome, imposing a draconian burden on the state's taxpayers. It could solely reduce benefits, but that would likewise unfairly force teachers to shoulder the entire burden of reforms. Or, consistent with the Chambers' best efforts in driving this public policy debate, it could adopt the kind of "shared responsibility" approach underlying the 2013 pension reform legislation, the very principles actuating the pension reform found in SB 151. What it cannot do, what we as Kentuckians cannot afford to do, is ignore the problem any longer. To do so is tantamount to Nero fiddling while Rome burns.

C. The Substantive Challenges To SB 151 Are Not Sufficient To Invalidate Good Law.

Appellees assert that SB 151 violates the Inviolable Contract (Complaint p. 15), the Kentucky Constitution's Takings Clause (Complaint p.25), and the Kentucky Constitution's Contracts Clause (Complaint p. 23). Judge Shepherd did not reach the merits of these arguments in his Opinion, but the Chamber believes they are too important to the Commonwealth's financial stability to ignore.

The Chamber has long-argued that the state's current teachers have a right to any benefit already accrued under the inviolable contract. To attempt to remove a vested benefit would be both illegal and immoral. But, the legislature must be able to make

incremental changes not implicating those vested benefits in response to changing economic realities. It would be just as immoral to let a past legislature tie the hands of present representatives regarding critical policy decisions. And changes of the sort made through SB 151 are no more invasive that the inevitable yearly health plan changes each family experiences, whether changes in co-pays for prescription drugs or doctor visits, or revisions to drug formularies or physician networks. Certainly, no one can credibly contend that the inviolable contract forever freezes each and every aspect of employee benefit packages for all time, thereby precluding any legislative action. *See, Jones v. Bd. Of Trs.*, 910 S.W.2d 710, 713 (Ky. 1995) (this Court rejected an inviolable contract challenge, taking a practical approach which required a "substantive contractual infringement" to support such a challenge).

Indeed, the Chamber was a vocal supporter of the 2013 pension reforms which created hybrid benefit and contribution plans for certain members in the Kentucky Retirement Systems ("KRS"). *See generally* 2013 Ky. Acts ch. 120. These changes only affected members in the KRS – state and county employees – who began "participating in the system on or after January 1, 2014." KRS 61.595(3). At the time, the reform was celebrated for providing much-needed stability to an otherwise shaky system, yet Appellees now claim that sort of change is illegal.

We encourage the Court to use a similar analysis for the inviolable contract and contracts clause issues. Surely our Constitution does not prevent the legislature from setting the terms of its retirement system *moving forward*, in a way that does not alter any vested interest. Courts require a "substantial impairment" to be proven before invoking the contracts clause to invalidate a law, and have not found such an impairment on

similar facts. *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1363 (D. Md. 1984) ("The glaring fact emerging from the welter of documents and affidavits in the record here is that the challenged legislation does *not* operate to deny vested or merely earned pension rights retroactively.") (emphasis in original).

In a footnote to his Opinion, Judge Shepherd noted a recent United States Supreme Court Opinion which dealt with a U.S. Constitution Contracts Clause challenge to a Minnesota law. *Sveen v. Melin*, 138 S. Ct. 1815 (2018). Judge Shepherd states that the Governor's stance on the Contracts Clause mirrors the seven-member majority, holding that a statute must "substantially impair pre-existing contractual arrangements" to be a violation. *Id* at 1822. The Attorney General's argument, on the other hand, follows Justice Gorsuch's lone dissent, arguing that the Contracts Clause categorically forbids any law impairing the obligation of contracts. *Id* at 1827. The Chamber encourages Kentucky's Justices to join that overwhelming judicial majority.

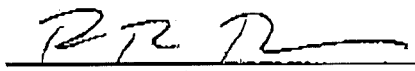
The Chamber supports private property rights, and stands against any governmental taking in violation of the takings clauses of the United States or Kentucky Constitutions. However, it is difficult to imagine how SB 151, designed to save the state pension system from insolvency, constitutes a taking. Kentucky courts often define a "taking" as "the entering upon private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment." *Stathers v. Garrard Cty. Bd. of Educ.*, 405 S.W.3d 473, 485 (Ky. App. 2012) (quoting *Martin v. Commonwealth*, 199 S.W.3d 195, 199 (Ky. App. 2006). SB 151 does not deprive anyone of a private property right, it merely changes prospective benefits for certain state employees, changes which are necessary for the system to continue at all.

These substantive arguments are not only relevant to the current challenge to SB 151, but present legal obstacles to any future attempt at pension reform. The Chambers urge this Court to find that these substantive challenges – the inviolable contract, the Contracts Clause, and the Takings Clause – do not, individually or collectively, provide a basis to invalidate SB 151.

CONCLUSION

Affirming the decision below will cause serious repercussions for the Commonwealth's economy. The Chamber respectfully requests that this Court reverse the Circuit Court's Opinion and definitively uphold SB 151.

Respectfully submitted,



Brent R. Baughman
Janet P. Jakubowicz
Kyle W. Miller
BINGHAM GREENEBAUM DOLL LLP
3500 National City Tower
101 South Fifth Street
Louisville, KY 40202-3197
Phone (502) 587-3559
Facsimile (502) 540-2157

COUNSEL FOR AMICI CURIAE, KENTUCKY CHAMBER OF COMMERCE, NORTHERN KENTUCKY CHAMBER OF COMMERCE, GREATER LOUISVILLE, INC., and COMMERCE LEXINGTON, INC.

19565920.4