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. **OPINION & 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 Cross Motions for Summary Judgment filed by Plaintiffs and Governor Matthew G. Bevin, as well as a joint Motion to Dismiss filed by Defendants Bertram Robert Stivers, II, as President of the Kentucky Senate, and David W. Osborne, as Speaker Pro Tempore of the Kentucky House of Representatives ("Legislative Defendants"). These pending motions have been fully briefed, and the parties presented their arguments to the Court on June 7, 2018. At that time, Attorney General Andy Beshear, J. Michael Brown, and La Tasha Buckner appeared on behalf of the Commonwealth; Jeffrey Walther appeared on behalf of the Kentucky Education Association ("KEA"); David Leightty appeared on behalf of the Kentucky State Lodge Fraternal Order of Police ("FOP"); Steve Pitt, Chad Meredith, Matthew Kuhn, Brett R. Nolan, and Katharine E. Grabau appeared on behalf of Governor Matthew G. Bevin; Robert Barnes appeared on behalf of the Board of Trustees of the Teachers' Retirement System; Joseph Bowman appeared on behalf of the Board of Trustees of the Kentucky Retirement Systems ("KRS"); and David Fleenor, Vaughn Murphy, Eric Lycon, and Greg Woosley appeared on behalf of the Legislative Defendants. William E. Johnson also appeared for the Kentucky Association of Transportation Engineers and Kentucky Transportation Employees Association, non-parties that submitted

amicus curiae briefs in this matter. Having fully considered the pleadings and arguments of counsel and being sufficiently advised, the Court hereby **GRANTS** the Legislative Defendants' Motion to Dismiss; **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion for Summary Judgment; and **GRANTS IN PART** and **DENIES IN PART** Governor Bevin's Motion for Summary Judgment, for the reasons set forth below.

BACKGROUND[1]

Senate Bill ("SB") 1 was introduced in the Senate on February 20, 2018.[2] *See* Pls.' Br. 3 n.1. This bill, titled as "AN ACT relating to retirement," proposed various changes to the Kentucky Employees Retirement Systems ("KERS"), County Employees Retirement Systems ("CERS"), State Police Retirement System ("SPRS"), and Kentucky Teachers' Retirement Systems ("KTRS"). More specifically, SB 1 proposed to cut annual cost of living adjustments ("COLAs"), move new hires into a hybrid cash balance plan, and cap the amount of sick leave that could be used in the calculation of benefits, among other things. In protest of these proposed changes, thousands of teachers, public employees, and concerned citizens from around the Commonwealth gathered at the State Capitol Building in late February and early March to voice their concerns. Ultimately, on March 9, 2018, the Senate declined to vote on SB 1 and referred the bill back to

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[1] The factual background set forth in this Opinion is based on the public record, much of which is set forth in detail in the Plaintiffs' briefs and pleadings. Defendants did not contest these facts regarding the legislative process (i.e., the sequence and timing of committee meetings, floor debates and votes, etc.), and those factual details are corroborated by the legislative records of SB 1 and SB 151 located on the Legislative Research Commission's website, as well as the archived floor debates of SB 151 located on KET's website, which can be accessed at https://www.ket.org/legislature/?archive&program=WGAOS&epoch=2018&nola=WGAOS+019276.

[2] The terms and legislative record of SB 1 can be located on the Legislative Research Commission's website: http://www.lrc.ky.gov/record/18RS/sb1.htm.

committee. *See* Pl.'s Br. 3 n.1. The bill apparently lacked the necessary votes to pass the Senate and it ultimately died in committee.

Later, in the afternoon of March 29, 2018 (the fifty-seventh day of the sixty-day legislative session), the Kentucky House of Representatives called a recess to allow its Committee on State Government to meet. *Id.* at 3, 4. The Committee meeting had not been previously scheduled and docketed on any legislative calendar, nor was it announced to the public. *Id.* at 4. Rather, the Committee held this meeting in a small conference room within the Capitol Building, to the exclusion of the public. *Id.*

The Chairman of the Committee, Representative Jerry T. Miller, opened the meeting and called SB 151. *Id.* This bill was titled "AN ACT relating to the local provision of wastewater services."[3] It consisted of eleven pages and, according to its title, related to contractual agreements for the acquisition of wastewater facilities. *Id.* Prior to the Committee's meeting, this "sewage bill" had received three readings before the Kentucky Senate and two readings before the Kentucky House of Representatives. *Id.*

Shortly after Representative Miller called SB 151, Representative John "Bam" Carney introduced a committee substitute to the bill. *Id.* The committee substitute removed every word of the bill related to wastewater facilities and added 291 pages of legislation which made changes to dozens of statutes governing the retirement plans of hundreds of thousands of current and future public employees. Some of these changes closely mirrored the proposals contained in SB 1, and the Governor concedes that "[t]he provisions of SB 151 were first introduced in SB 1." Gov.'s Combined Mem. 88. For example, both bills compelled newly hired teachers to join a hybrid cash

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[3] The terms and legislative record of SB 151 can also be located on the Legislative Research Commission's website: http://www.lrc.ky.gov/record/18rs/SB151.htm.

balance plan, and both bills contained a cap on the number of sick days that can be used to calculate retirement benefits. However, some of SB 1's changes affecting current employees were eliminated from SB 151.

Throughout the State Government Committee meeting, several legislators raised questions regarding the procedure by which the committee substitute was being considered. Pls.' Br. 5–7. These legislators were primarily concerned with the lack of an actuarial analysis, fiscal note, or local government impact study, the lack of public testimony and input, and the inability to review the lengthy substitute prior to voting. *Id.* Some legislators also expressed concern that the Committee excluded the public from the meeting and failed to provide a copy of the substituted bill to the public. *Id.* at 7. However, approximately one hour after the introduction of the 291-page committee substitute, Chairman Miller called for a vote. *Id.* SB 151 was voted out of the Committee and reported favorably to the House floor, where it was immediately called. *Id.* at 7–8.

SB 151—now a pension reform bill—received only one reading in its new form before the Kentucky House of Representatives on March 29, 2018, at which time it was read only by its original title: "AN ACT relating to the local provision of wastewater services."[4] *Id.* at 8. Several legislators again raised concerns about the lack of actuarial analysis or fiscal note, the lack of public hearings and input, and the limited time available to review the bill. *Id.* at 8–10. At least one legislator expressed concern that "the majority party is asking us to pass this bill with no

[4] Even after the House committee substitute for SB 151 was adopted in Committee and reported to the floor of the House, the bill continued to be titled "AN ACT relating to the local provision of wastewater services." *See* Unofficial Copy of SB 151, LEGISLATIVE RESEARCH COMMISSION www.lrc.gov/recorddocuments/bill/18RS/SB151/HCS1.pdf (last visited June 19, 2018). It was not until *after* SB 151 was reported on the floor of the House, then "read for the third time by title only" and passed by a 49-46 vote, that the title amendment changing the title to "AN ACT relating to retirement" was adopted. Thus, SB 151 in its changed form as "AN ACT relating to retirement" received zero readings, even by title only, in either chamber.

materials for us to help us to make a proper and sound decision on this important issue." Pls.' Compl., Exs. B, C. Regardless, the committee substitute for SB 151 then passed the House in a 49–46 vote. Pls.' Br. 10.[5] Because the subject matter of the new bill was entirely different from the old bill, the House also adopted a title amendment changing the bill's title to "AN ACT relating to retirement," in order to comply with Section 51 of the Kentucky Constitution. Defendant Osborne, as Speaker Pro Tempore of the House, then signed the bill and referred it to the Senate, where it passed in a 22–15 vote, only a few hours after it was first unveiled in the House. *Id.* SB 151 was then signed by Defendant Stivers, as President of the Kentucky Senate. On April 10, 2018, Governor Bevin signed the bill into law. *Id.* Certain provisions, namely Section 19's changes for current cash balance plan members, become effective July 14, 2018. The remaining portions become effective January 1, 2019.

This case presents important questions both procedural and substantive in nature. First, was the law validly enacted? If so, does the law impermissibly infringe on the contract rights of public employees under the "inviolable contract" provisions of KRS Chapter 61 and the Contracts Clause of the Kentucky Constitution? Because the Court finds that the law was not enacted in compliance with the requirements of the Kentucky Constitution, the Court will not reach the question of whether the statute violates the "inviolable contract" or Kentucky's Contracts Clause.

ANALYSIS

This case presents two primary issues under Section 46 of the Kentucky Constitution, which sets forth explicit requirements for the enactment of legislation. First, Section 46 requires that each bill must be printed and "read at length on three different days in each House." Thus,

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[5] *See also* Vote History of SB 151, www.lrc.ky.gov/record/18RS/SB151/votehistory.pdf (last visited June 19, 2018).

this case presents the question of whether legislation can be expedited through the General Assembly through the method of completely deleting one piece of legislation that has been through the process and received its required readings, eliminating every word of the original bill and substituting an entirely new bill on a different subject as a "committee substitute," then bringing the new bill to a vote without the three readings, which would otherwise be required under Section 46 of the Kentucky Constitution if the new bill had been proposed on its own merits. The principle is well established that "the General Assembly cannot do by indirection what it cannot do directly because of constitutional restrictions." *Commonwealth v. O'Harrah*, 262 S.W.2d 385, 389 (Ky. 1953) (citations omitted). Here, could the legislature do indirectly what Section 46 of the Constitution forbids it from doing directly?

Section 46 also provides that "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 the members elected to each House." This legislation received only forty-nine votes in the House of Representatives, two votes short of the constitutional majority required by Section 46 of the Constitution if the bill is construed to provide for "the appropriation of money or the creation of debt." Thus, this case also presents the issue of whether a broad revision of state pension statutes—making specific allocations of state dollars to pension funds and redefining the state's obligations for payment of the long term "unfunded liability" of the existing pensions programs—should be considered an act "for the appropriation of money or the creation of debt." If so, could SB 151 have been properly enacted without having received a constitutional majority of the House?

I. Legislative Defendants' Motion to Dismiss

As a threshold matter, there is an initial procedural issue that requires resolution. Plaintiffs' Complaint names Sen. Stivers in his official capacity as President of the Senate and similarly

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names Rep. Osborne in his official capacity as Speaker Pro Tempore of the House. These Legislative Defendants argue for their dismissal on grounds of legislative immunity. Their argument is well-supported by Kentucky law, which holds that elected legislators enjoy immunity from suit for actions related to their legislative duties. This legislative immunity stems from Section 43 of the Kentucky Constitution, which prohibits the questioning of members of the General Assembly "in any other place" for "any speech or debate in either House." Similarly, Article 1, Section 6, Clause 1 of the United States Constitution provides that members of Congress "shall not be questioned in any other place" for any speech or debate in either House. Noting these similarities, the Kentucky Supreme Court has explained that "[t]he constitutional privileges granted to members of the Kentucky General Assembly mirror word-for-word the privileges granted to members of the Congress of the United States in the Speech [or] Debate Clause." *Baker v. Fletcher*, 204 S.W.3d 589, 593 (Ky. 2006).

Thus, this Court looks to case law interpreting Section 43, as well as federal case law interpreting the U.S. Constitution's Speech or Debate Clause. For example, federal courts read this clause "broadly to effectuate its purposes," which includes ensuring "that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501–02 (citations omitted). With this broad purpose in mind, the Supreme Court of the United States has held that the Clause provides protection against both civil and criminal actions, whether brought by private individuals or the state. *Id.* at 502–03.

Thus, so long as "it is determined that [legislators] are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference." *Id.* at 503 (citing *Doe v. McMillan*, 412 U.S. 306, 314 (1973)). The legislative sphere includes "things generally

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done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880). More specifically, the legislative sphere includes activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." *Gravel v. United States*, 408 U.S. 606, 625 (1972). The Kentucky Supreme Court has similarly explained that Section 43 "applies not only to speech and debate, but also to voting, reporting and every official act in the execution of legislative duties while in session." *Kraus v. Kentucky State Senate*, 872 S.W.2d 433, 440 (Ky. 1993) (citation omitted).

However, Plaintiffs point to various Kentucky Supreme Court cases to argue that legislative immunity does not apply to declaratory judgment actions. For example, Plaintiffs cite *Kraus v. Kentucky State Senate*, 872 S.W.2d 433 (Ky. 1993), in which the Court stated,

> The decision of this Court in *Rose v. Council for Better Education*, [790 S.W.2d 186 (Ky. 1989)], held that the General Assembly is not immune from suit in a declaratory judgment action to decide whether the General Assembly has failed to carry out a constitutional mandate and that members of the General Assembly are not immune from declaratory judgment relief simply because they are acting in their official capacities.

Id. at 339. Similarly, in *Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992), the Court cited to *Rose* for the proposition that "members of the General Assembly are not immune from declaratory relief . . . simply because they are acting in their official capacity." *Id.* at 493–94.

Yet in the *Rose* case, an individual legislator's immunity was not at issue. Instead, that Court considered only whether *service* on the Senate President and Speaker Pro Tempore of the House conveyed jurisdiction over the *entire* General Assembly. Thus, the *Rose* Court did not address the immunity of individual legislators; instead, it considered whether the trial court obtained proper jurisdiction over the General Assembly, as a whole. *See Jones v. Board of*

Trustees of Kentucky Retirement Systems, 910 S.W.2d 710, 713 (Ky. 1995) (discussing holding of *Rose*). Ultimately, the Court held that the General Assembly lacks immunity in a declaratory judgment action to decide whether its method of operation violates a constitutional requirement. The *Kraus* and *Philpot* cases therefore appear to extend *Rose* beyond its original holding, perhaps based on a misreading of that holding. *See Philpot*, 837 S.W.2d at 495 (Wintersheimer, J., dissenting) ("It is difficult, if not impossible, to reconcile the reasoning of the majority opinion with [*Rose*].").

In the present suit, both Stivers and Osborne have been named as defendants in their official capacity as legislators, for actions related to their legislative duties, namely voting on and signing SB 151. These actions fall clearly within the scope of the "legitimate legislative sphere." *See Bogan v. Scott-Harris*, 523 U.S. 44, 45 (1998) (noting that voting on legislation is "quintessentially legislative"). Relying on the more recent authority of the Kentucky Supreme Court in *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006), the Court concludes that the absolute legislative immunity of Section 43 shields these individual legislators from suit for such actions. *See id.* at 594 (explaining that "absolute legislative immunity" is "essential" to the separation of powers doctrine).

The Court notes, however, that this lawsuit raises important questions of legislative practice and procedure under Sections 46 and 56 of the Kentucky Constitution. The Court therefore believes this case is distinguishable from *Commonwealth ex rel. Beshear v. Commonwealth, Office of the Governor ex rel. Bevin*, 498 S.W.3d 355 (Ky. 2016), which held that legislators are not proper parties to litigation involving challenges to acts of the General Assembly. As the presiding officers of the Senate and House, President Stivers and Speaker Pro Tem Osborne retain unique interests in the proper interpretation and application of these constitutional

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requirements. However, the legislative leaders assert legislative immunity and seek leave to express their legal arguments as amicus curiae. The Court defers to their request and will grant both their Motion to Dismiss and their request for leave to participate in the litigation as amicus curiae.

II. Cross-Motions for Summary Judgment

Plaintiffs present two primary sets of arguments in their Motion for Summary Judgment. First, Plaintiffs argue that the legislature failed to abide by certain procedural requirements contained within the Kentucky Constitution and the Kentucky Revised Statutes ("KRS"), and these procedural deficiencies render SB 151 null and void. Specifically, Plaintiffs point to Section 46 of the Kentucky Constitution (requiring each bill to be read at length on three different days and bills for the appropriation of money or debt to receive a majority vote of all members), Section 56 (requiring the signature of the presiding officer of each House), KRS 6.350 (requiring an actuarial analysis), and KRS 6.955 (requiring a fiscal note).[6] Plaintiffs also assert that the legislature acted arbitrarily in disregarding these procedural requirements, thereby violating Section 2 of the Kentucky Constitution.

In addition to these procedural arguments, Plaintiffs challenge the substance of the bill. For example, Plaintiffs contend that SB 151 substantially impairs the "inviolable contract" between the Commonwealth and its public employees, thereby violating the Contracts Clause contained within Section 19 of the Kentucky Constitution. Plaintiffs also argue that SB 151 violates Section 13, the Takings Clause, which prohibits the taking of any person's property without the consent of his representatives and without just compensation.

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[6] At the June 7, 2018 hearing, Attorney General Beshear orally withdrew his claim that the passage of SB 151 violated Section 56 of the Kentucky Constitution.

For the reasons set forth below, the Court finds that SB 151 is procedurally deficient and therefore null and void. Accordingly, the Court need not decide whether the legislature acted arbitrarily in violation of Section 2 of the Kentucky Constitution or whether the substance of the bill violates the "inviolable contract" of KRS Chapter 61, nor will the Court address the Contracts Clause or Takings Clause of the Kentucky Constitution.

A. Under Kentucky Precedent, SB 151 Did Not Violate KRS 6.350 and KRS 6.955.

Before addressing the constitutional challenges presented to SB 151, the Court is obligated to resolve the statutory challenge, as that might avoid any need for constitutional adjudication. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (Brandeis, J., concurring) (citing *Blair v. United States*, 250 U.S. 273, 279 (1919)). Thus, the Court begins with Plaintiffs' argument that the passage of SB 151 violates certain statutory provisions, namely, KRS 6.350 and KRS 6.955.

KRS 6.350(1) states,

> 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 actuarial analysis must "show the economic effect of the bill on the state-administered retirement system over a twenty (20) year period." KRS 6.350(2). Similarly, under KRS 6.955, a fiscal note must be prepared for and attached to bills or resolutions "which relate[] to any aspect of local government or any service provided thereby." The fiscal note provides "a realistic statement of the estimated effect on expenditures or revenue of local government in implementing or complying with any proposed act of the General Assembly." KRS 6.950.

The Governor's argument on the applicability of these statutes is twofold: First, the Governor argues that this is a nonjusticiable political question. The statutory provisions, he argues, are codified rules of the General Assembly's internal procedures, and their interpretation and enforcement are therefore left to the legislature. Even if the Court may consider this issue, the Governor argues that the legislature substantially complied with these statutes. Specifically, the Governor points to the actuarial report developed for SB 1, which was made available to the public. *See* Gov.'s Combined Mem. 88–89. On March 29, 2018, the General Assembly received an amended actuarial report for SB 151. *See id.* at 89. This amended report indicated that the SB 1 actuarial analysis applied to the revised version of SB 151. *Id.* The Governor argues that this substantially complies with KRS 6.350.

In making these arguments, Defendants rely primarily, if not exclusively, on *Board of Trustees of Judicial Form Retirement Systems v. Attorney General of Commonwealth*, 132 S.W.3d 770 (Ky. 2003). In that case, the Court held that the failure to obtain an actuarial analysis did not render the act in question invalid under KRS 6.350. To begin with, the Court explained, the statute is procedural in nature, with "no constitutional implications." *Id.* at 777. "*So long as those rules do not violate some other provision of the Constitution*, it is not within our prerogative to approve, disapprove, or enforce them." *Id.* (emphasis added). Instead, the legislature's decision to disregard KRS 6.350 amounted to "an implied *ad hoc* repeal of such rules." *Id.* at 778 (quoting *State ex. Rel. La Follette v. Stitt*, 338 N.W.2d 684 (Wis. 1983)). In other words, the General Assembly, by failing to attach an actuarial analysis, impliedly waived or suspended the requirements of KRS 6.350.

The Supreme Court's broad holding in *Board of Trustees* compels this Court to reject the Attorney General's arguments under KRS 6.350 and KRS 6.955. However, the circumstances of

this case may present compelling reasons for the Supreme Court to revisit its ruling on the ability of the General Assembly to "waive" the statutory requirement of an actuarial study. For example, the parties in *Board of Trustees* apparently did not raise—nor did that Court decide—the applicability of Section 15 of the Kentucky Constitution to a legislative waiver of a statutory requirement. That provision states, "No power to suspend laws shall be exercised unless by the General Assembly or its authority." Stated another way, statutory requirements may be suspended, but only upon action of the legislature. Under *Legislative Research Commission v. Brown*, 664 S.W.2d 907 (Ky. 1984), a legislature is authorized only to act through passage of legislation. *Id.* at 913 (citation omitted). Thus, while the legislature can suspend the requirements of KRS 6.350 and KRS 6.955 under Section 15, it arguably should be required to enact legislation to do so.

Here, it is uncontested that the legislature did not affirmatively enact any legislation to suspend KRS 6.350 or KRS 6.955, nor did it include a "notwithstanding" clause in SB 151 that suspended those requirements. While the legislature may suspend its own *rules* without enacting a law, Section 15 of the Kentucky Constitution appears to prevent the legislature from suspending a *statute* without enacting legislation. Furthermore, when Section 15 is drawn into the analysis, the issue does become one of constitutional interpretation and should be justiciable. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005); *Philpot*, 837 S.W.2d at 494.

The *Board of Trustees* decision appears to be controlling law and binding on this Court; however, for the reasons stated above, the Court declines to find SB 151 void because it violated KRS 6.350 and KRS 6.955. The Court thus proceeds to the Plaintiffs' argument that SB 151 is void *ab initio* for failure to comply with Section 46 of the Kentucky Constitution.

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B. The Constitutional Procedural Issues Raised in This Case Present a Justiciable Controversy.

Before addressing the merits of the Attorney General's argument that SB 151 was enacted in violation of the Kentucky Constitution, this Court must address the Governor's argument that the Court lacks jurisdiction to consider Plaintiffs' procedural claims. The Governor argues that the "three-readings requirement" of Section 46 raises a political question, "which traditionally courts have declined to address in the exercise of proper restraint, and have left to the appropriate branch of government." Gov.'s Combined Mem. 68–69 (quoting *Philpot v. Haviland*, 880 S.W.2d 550, 554 (Ky. 1994)) (internal quotation marks omitted). In support of this argument, the Governor cites to *D&W Auto Supply v. Department of Revenue*, 602 S.W.2d 420 (Ky. 1980). There, the Kentucky Supreme Court found that the Litter Control Act qualified as a bill for the appropriation of money, and it was therefore unconstitutional under Section 46 due to its failure to receive a majority vote of all elected members of the House of Representatives. Thus, the Governor cannot and does not argue that Section 46's "majority-vote requirement" raises a nonjusticiable political question.

He explains, however, that "the question of whether a bill received a sufficient number of votes is objectively verifiable and judicially administrable—*i.e.*, everyone agrees on what constitutes a vote for or against legislation, and the final vote tally can be simply and indisputably determined." Gov.'s Sur-reply 19–20. On the other hand, the Governor argues, an interpretation of the three-readings requirement of Section 46 requires a subjective analysis, and the Court must therefore defer to the legislature's interpretations of that provision. According to the Governor, "The General Assembly has determined for itself that bills not receive three readings [under Section 46 of the Kentucky Constitution] as finally passed, and this court should not usurp its

authority to so determine." Gov.'s Combined Mem. 69–70. The Governor thus contends that the role of interpretation of Section 46 lies with the legislative branch, not the judiciary.

First, the Court agrees that the majority-vote requirement is an objective standard that affects the legitimacy of the democratic process. The Court concludes, however, that if the question of whether a particular bill received an adequate number of votes is objective, then the question of whether a bill received an adequate number of readings is also objective. On this point, the Court disagrees with the Governor's interpretation of and reliance on *Philpot v. Haviland*, 880 S.W.2d 550 (Ky. 1994), which rejected a challenge by Senator Tim Philpot to Senate Rule 48. That rule allows an individual senator to call a bill held by a committee for a vote on the floor upon a finding that the bill has been held in committee for an "unreasonable time" in violation of Section 46 of the Kentucky Constitution, but only upon first receiving a majority vote to do so. That Court upheld the legislature's interpretation and application of Rule 48. However, while the issue in that case (whether a committee had held a bill an "unreasonable time" without acting) involved a subjective judgment, the requirement of Section 46 for three readings on three separate days contains an objective standard that is enforceable by the courts. While the judiciary may defer to the legislature on the mode of reading (whether it is delegated to staff, committee, or other means), the requirement of three readings "on three different days" is objective and enforceable.

In addition, the *Philpot* Court relied heavily on the Constitutional Debates, which in the present case support a strict interpretation of the requirement for three readings on three separate days. Though the Court upheld the Senate Rule in *Philpot*, it did so only after finding that it was a reasonable method of implementing that portion of Section 46 that allows an individual senator to by-pass the committee system if a bill is held "an unreasonable time." The Court noted that "once the Senate adopted a procedure such as Rule 48 provides, this Court has no authority to edit

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or rewrite on the ground that it could be improved upon." *Id.* at 552. In other words, even though the Senate Rule might not be perfect, it was still consistent with the constitutional requirements of Section 46. It simply stated that every senator has the right to call any bill, but he must have the support of a majority to bring it to a vote on the floor. It is hard to argue that such a legislative rule, which merely requires a majority vote, is anti-democratic or in violation of the protections of the democratic process found in Section 46; accordingly, that Court deferred to the legislature's interpretations of its own procedural rules and declined to consider the issue. By contrast, the three-readings requirement at issue here is a constitutional mandate, enacted by the framers to ensure that legislators and the public know the substance and the content of the bills they vote on. It is a constitutional mandate—not an internal procedural rule of the General Assembly.

The Governor, however, contends that the question of SB 151's constitutional sufficiency rests in the hands of the legislature, the very branch accused of violating those constitutional provisions. On the contrary, both state and federal law clearly vest the judiciary with the role and the duty to interpret the Constitution. As stated by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803), "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . This is of the very essence of judicial duty." *Id.* at 177. In other words, the final authority on interpretation of the Constitution is vested in the judicial branch of government. With this duty in mind, the Supreme Court of Kentucky held that the issue of whether the Governor had the constitutional authority to make certain budget decisions was a constitutional question, and therefore, a justiciable one. *See Fletcher*, 163 S.W.3d at 860. That Court found support in *Baker v. Carr*, 369 U.S. 186 (1962), in which the United States Supreme Court stated,

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds

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> whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Id. at 211.

These statements make clear that it is the duty of the judiciary to interpret the Constitution and to ensure that the legislative and executive branches do not exceed the authority allotted to them by its terms. *See also Stephenson v. Woodward*, 182 S.W.3d 162, 174 (Ky. 2005) ("[J]ust as this court will not infringe upon the independence of the legislature, we will not cast a blind eye to our own duty to interpret the Constitution and declare the law."); *Philpot*, 837 S.W.2d at 494 (explaining that it is the judiciary's "constitutional responsibility" to determine whether the legislature's system and rules "complies with or violates a constitutional mandate"); *Rose*, 790 S.W.2d at 209 (explaining that "[t]o allow the General Assembly to decide whether its actions are constitutional is literally unthinkable").

Indeed, this case is simply the latest in a long line of disputes between the branches of government over the proper role of the judicial system in interpreting and enforcing the provisions of the Kentucky Constitution, which contains numerous and very specific restrictions on the exercise of power by the legislative and executive branches of government. While it is the province of the legislative and executive branch to make policy, and their policy determinations are entitled to great deference, the Kentucky Supreme Court has repeatedly made clear that it is the historic and fundamental role of the judiciary to enforce the letter and the spirit of these constitutional restrictions. *See Commonwealth ex rel. Beshear*, 498 S.W.3d at 374–77 (holding that Governor cannot unilaterally reduce appropriation made under Section 230 without legislative approval in the absence of budget shortfall); *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 673–79 (Ky. 2010) (applying prohibition against public funding for sectarian schools

set forth in Section 189); *Fletcher*, 163 S.W.3d at 865–68 (discussing necessity of legislative appropriations to spend money under Section 230), *Stephenson*, 182 S.W.2d at 167–69 (considering application of Section 38 on qualifications of members of the General Assembly when there is an election challenge); *Rose*, 790 S.W.2d at 205–213 (discussing right to an "efficient system of common schools" under Section 183); *Gillis v. Yount,* 748 S.W.2d 357, 361–63 (Ky. 1988) (discussing uniformity of taxation under Section 171); *Brown,* 664 S.W.2d at 911–14 (discussing separation of powers under Sections 27 and 28).

Lastly, the Governor acknowledges that that whether the bill received the required number of votes for passage is justiciable. The Governor stated in his brief that "[t]he question of whether a bill has received an adequate number of votes to become law is a question that goes to the heart of what it means to be a republic." Gov.'s Sur-reply at 20. Such a rule, he reasons, prevents a bill from passing with only a handful of votes. Thus, when a court considers the sufficiency of the number of votes, "the court is not evaluating the action of the legislature, but of a subset of the legislature that is not authorized to act for the whole." *Id.* In other words, the Court evaluates whether an unauthorized faction has taken control to pass legislation in contravention of the majority's wishes. By contrast, the Governor impliedly argues that the question of whether a bill has received an adequate number of *readings* is not vital to the democratic legitimacy of the legislation. This Court, however, finds that *both* the majority-vote requirement and the three-readings requirement "go[] to the heart of what it means to be a republic," and the three-readings requirement is equally essential to the legitimacy of the legislative process.

As explained above, the three-readings requirement is designed to provide public notice of the contents of the legislation, the most fundamental requirement of any legislative process based on the consent of the governed. The reason for it was explained by Delegate McDermott at the

1891 Constitutional Convention: "Whenever a man wants to pass any thing that is wrong, he tries to keep it from being printed; he tries to keep its contents unknown." See 3 DEBATES OF CONSTITUTIONAL CONVENTION 3859 (1891). Another delegate explained:

> Sometimes it has happened in the history of our State, as of other states, that very important measures, affecting the interest of the whole people, especially revenue matters, have been introduced, without referring them to any Committee, frequently at the end of a session, without printing, and pushed through to the great loss and detriment of the State. . . . We thought they ought to give each general measure that degree of consideration which would secure accuracy, and we put this into secure that consideration. Now under our old Constitution, the reading of a bill for three consecutive days was evaded.

Id. at 3858. Thus, this requirement is a fundamental safeguard for the right of all legislators to know what they are voting on and the right of the public to voice support or opposition to legislation before it is called for a vote, rights which are essential to democratic government. Stated another way, the three-readings requirement was enacted in conjunction with the requirement that each bill be printed, to ensure that legislators, and the public, knew what was being voted on. This requirement of informed judgment is at the heart of the democratic process.

Accordingly, having determined that the constitutional procedural claims in this case fall within the Court's jurisdiction, the Court now turns to those issues.

C. SB 151 Violates Section 46 of the Kentucky Constitution Because It Did Not Receive Three Readings on Three Separate Days.

Section 46 states, in part, "Every 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." In the present suit, there is no dispute that the House committee substitute for Senate Bill 151 could not have complied with this provision if it had been introduced as a new bill on the fifty-seventh day of the legislative session. It simply could not be read three separate times on three separate days in each House (assuming the General

Assembly wanted to leave itself two days at the end of the session to review any action by the Governor). In fact, the changed version of SB 151 received only one reading (by its title, "AN ACT relating to the local provision of wastewater services") in the House and no readings in the Senate. No party asserts that its second and third readings were waived by majority vote; rather, the question is simply whether the initial readings of the eleven-page SB 151 can be counted toward the three-readings requirement even after the original sewage bill was completely discarded and a totally different pension bill was substituted in its place, with the bill number being the only thing the original bill and the committee substitute had in common.

The Governor argues that "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."[7] Gov.'s Combined Mem. 67. As a result, the Governor argues, the readings that SB 151 received as a sewage bill should count toward its total number of readings received as a pension reform bill. The implications of this argument are obvious: a fairly noncontroversial bill can receive the required number of readings and otherwise comply with all procedural mandates, but a completely different bill can be substituted in its place just prior to voting.[8]

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[7] The Governor also argues that SB 151 did not need to be read "at length." However, as the new bill (as adopted by committee substitute) received only one reading, as explained herein, it violates Section 46, regardless of whether it was read at length.

[8] Interestingly, the Governor argues that Senate Bill 151 is merely a scaled down version of Senate Bill 1, "AN ACT relating to retirement," which apparently lacked enough votes for passage on March 9, 2018. On the fifty-seventh day of the legislative session, if there had been sufficient support by a majority of legislators, SB 1 could have been amended (or a committee substitute could have been adopted) and reported from Senate Committee, voted on by the full Senate, then sent to the House for its first reading. The House could have suspended its rules to allow the consideration of a Senate Bill at that late date, and referred it to committee, which could have reported it back for its second reading on the fifty-eighth legislative day, and the Rules Committee could have placed it in the Orders of the Day for its third reading and final passage on the fifty-ninth legislative day. Such a delay of two or three days would have allowed legislators to vote knowing the full content and fiscal impact of the bill, and citizens who were interested in this legislation would have had an opportunity to review the bill, contact their legislators, and make their voices heard in the democratic process.

However, as the proceedings of the Constitutional convention make clear, this argument disregards the purposes of Section 46. The drafters of this provision were greatly concerned with "the fraudulent substitution of bills" that had so frequently occurred in the past and hoped to prevent similar abuses in the future. *See* 3 DEBATES OF CONSTITUTIONAL CONVENTION at 4318–19. For example, Delegate Spalding stated that bills had been brought to the Speaker for signature "in batches of twenty, thirty, forty or fifty, and the Speaker would sign them without knowing what he was signing." *Id.*[9] At other times, bills had passed both Houses and had been delivered to the Governor for signature within a single day. *Id.* at 3869. The drafters believed that 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." *Id.* As a result, the drafters enacted Section 46 "to throw guards around hasty legislation, and render it impossible for . . . bills to be railroaded through the Legislature." *Id.* Thus, the readings requirement of Section 46, when duly observed, invites "caution and deliberation in each house" during an open legislative process, ensuring that members of the legislature remain well-informed and know what they are voting for. *See Kavanaugh v. Chandler*, 72 S.W.2d 1003, 1004 (Ky. 1934) ("The purpose [of the three-readings requirement] is to secure caution and deliberation in each house.").[10]

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[9] In response to concerns by Delegate Pettit that the three-readings requirement would create an impediment to passing bills, making legislation more expensive and more difficult, Mr. Spalding stated,

> Mr. President, this was suggested by abuses (I call them) that have grown up in the matter of signing bills. It has been the custom of the Enrolling Committee to have bills enrolled by some young man or some young woman around town here, and nobody knows who compared them. They were brought to the Speaker in batches of twenty, thirty, forty or fifty, and the Speaker would sign them without knowing what he was signing. Sometimes they would be carried to his room and signed there, or elsewhere in the town, wherever they could catch him on the fly.

3 DEBATES OF CONSTITUTIONAL CONVENTION at 4318–19.

[10] Though 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," it is important to note that Section 46 requires at least one reading. The drafters added this compulsory reading to the current constitution "in response to complaints that the post-Civil War

The wholesale changes in SB 151 rendered the first three readings in the Senate and two readings before the House meaningless. Reliance on those previous readings would have led the legislators to believe that they voted on a bill for the acquisition of wastewater services. However, instead of an eleven-page bill related to the acquisition of wastewater services, the General Assembly actually enacted a 291-page bill that altered the retirement plans of over 200,000 current employees and future hires, and did so in such a way that legislative leaders recognized that the title of the bill had to be rewritten.

It is significant that the Governor fails to cite a single case from any jurisdiction that upholds this legislative sleight-of-hand when there is a constitutional requirement for three readings on three separate days. Case law from states with similar constitutional provisions strongly support the requirement for separate readings after wholesale changes require a title amendment. While not binding on this Court, these authorities from other states are persuasive. *See, e.g.*, *Hoover v. Bd. of Cnty. Comm'rs, Franklin Cnty.*, 482 N.E.2d 575, 579 (Ohio 1985) (explaining that "amendments which do not vitally alter the substance of a bill do not trigger a requirement for three considerations anew of such amended bill," while amendments that wholly change the subject of bill do); *State v. Ryan*, 139 N.W. 235, 238 (Neb. 1912) (allowing amendments to be introduced after the legislative session ends so long as "the amendment is germane to the subject of the original bill and not an evident attempt to evade the Constitution"); *State v. Hocker*, 18 So. 767, 770 (Fla. 1895) (explaining that three re-readings are unnecessary

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General Assembly routinely waived the reading of bills, even major ones, and rushed them to passage without adequate knowledge of their contents." ROBERT M. IRELAND, THE KENTUCKY STATE CONSTITUTION 72 (2d ed. 2012). In the present case, the General Assembly did not waive the second and third readings.

when the amendments in question are "made germane to [the bill's] general subject, either to the body of the bill or to its title").

Accordingly, this Court finds that, after the March 29, 2018 committee substitute, the revised version of SB 151 required three separate readings on "three different days" in each House. The Court holds that SB 151 violated Section 46's three-readings requirement and is therefore unconstitutional and void *ab initio*.[11]

D. SB 151 Also Violated Section 46 of the Kentucky Constitution Because It Was a Bill for the Appropriation of Money and Did Not Receive a Majority Vote of All Members of the House.

In addition to the three-readings requirement, Section 46 mandates that "[n]o 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," and additionally that "[a]ny 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." In the present case, SB 151 received only 49 votes in the House of Representatives, two votes short of the constitutional majority required by Section 46 of the Constitution if the bill is construed to provide for "the appropriation of money or the creation of debt." Thus, this case presents the issue of whether a

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[11] Because the enactment of SB 151 plainly violated the provisions of Section 46, the Court reserves for another day and declines to consider whether pre-amendment or pre-substitution readings count towards the three-readings requirement, nor will the Court consider under what circumstances amendments may be so minor that the previous readings may be deemed to sufficiently inform the legislature of the substance of the bill. At the June 7, 2018 hearing, for example, counsel for the Governor and the Legislative Defendants argued the impracticability of reading a bill three times after each amendment, explaining that this would cause extreme delay and, ultimately, legislative deadlock. Plaintiffs, on the other hand, suggested that three additional readings were required after any amendment or committee substitute changed the entire substance of the bill such that the amended version is no longer germane to the subject and purpose of the original version. The purpose of Section 46 is clear: to ensure that legislators and the public are fully informed about the content of bills before they are brought to a vote. In this case, there is no doubt that three post-substitution readings were required to satisfy this purpose.

wholesale revision of state pension statutes—making specific provisions for the allocation of state dollars to pension funds and redefining the state's obligations for payment of the long term "unfunded liability" of the existing pensions programs—should be considered an act "for the appropriation of money or the creation of debt."

In *Davis v. Steward*, 248 S.W. 531 (Ky. 1923), Kentucky's highest court defined "appropriation" as "the setting apart of a particular sum of money for a specific purpose." *Id.* at 532. That Court has also relied on the definition provided in KRS 4.010(2) (now repealed), which defined appropriation as "an authorization by the general assembly to a budget unit to expend, from public funds, 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." *See D&W Auto Supply*, 602 S.W.2d at 422. KRS 4.010(3) also defined "appropriation act" as "an act of the general assembly that authorizes the expenditure of public funds." *Id.*

The Governor contends that SB 151 cannot fit these definitions because it "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," arguing instead that "[t]hat is what budget bills do." Gov.'s Combined Mem. 62. However, the Court discussed this very issue in *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005). In that case, the Court considered whether the Governor could order money withdrawn from the treasury to fund the operations of the executive department, absent a specific appropriation from the legislature. In its analysis, the Court explained the nature of a "self-executing appropriation": "Where 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 . . . . These are statutes that mandate appropriations even in the absence of a budget bill." *Id.* at 865. This definition does not

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encompass every statute that requires funding to be implemented, however. *Id.* Instead, "[o]nly those statutes specifically mandating that payments or contributions be made can be interpreted as self-executing appropriations." *Id.* at 866.

The history and purpose of Section 46 supports this conclusion. For example, in 1849, one drafter encouraged the adoption of an amendment "prohibit[ing] the legislature from passing any bill, or resolution, for the appropriation of money, or creating *any* debt against the state, or for the payment of money *in any way whatever*" unless that bill or resolution receives a majority vote of all members. DEBATES OF CONSTITUTIONAL CONVENTION 219 (1849) (emphasis added). This broad application was said to serve a specific purpose: "It is to require deliberation and good reason to be given before you appropriate money, such reasons as will induce a majority of the members to vote for the measure." 2 DEBATES OF CONSTITUTIONAL CONVENTION 1655 (1891). This requirement of cautious deliberation, in turn, was intended to "protect the Treasury." *Id.*

To address any lingering question as to why the Treasury needs protection, the drafters explained, "We know that the legislature have frequently, on the eve of final adjournment, when there was scarcely a quorum present, passed bills making large appropriations by a minority." *Id.* at 1031. Yet, a "just" bill should have easily received a majority of votes, "and if not, it ought [not] to pass." *Id.* The majority-vote requirement was designed to prevent such abuses: "[I]t will prevent the representatives of the people from putting their hands into the treasury without proper authority and due reflection." *Id.*

In the current case, SB 151 plainly appears to be a bill "for the appropriation of money," as contemplated by Section 46. For example, Section 47 amends KRS 161.420, which in turn explains that the assets of the retirement system are to be used "for the exclusive purpose of providing benefits to members and annuitants and defraying reasonable expenses of administering

the system." Under this Section, the teachers' savings fund consists of members' contributions and regular interest and, for members of the hybrid cash balance plan, employer pay credit and regular interest. In addition, Section 12 explains the "401(a) money purchase plan," which is defined as "a mandatory defined contribution plan" under Section 12(c). According to Section 12(2)(b), this plan mandates an employer contribution at a set rate of "four percent (4%) of the creditable compensation earned by the employee for each month the employee is contributing" to the plan. Under Section 20(1)(c), the accounts of the 401(a) money purchase plan members are credited with these employer contributions, as well as investment returns. Thus, this statute "specifically mandate[s] that payments or contributions be made," and not only authorizes, but commands that these funds be used for a specific purpose.[12] It is therefore appropriately characterized as an act for the appropriation of money, thereby requiring a vote by "a majority of all the members elected to each House."

In addition, Section 46 mandates a majority vote for bills creating a debt. A debt is, in its simplest terms, a financial obligation or liability. *See Debt*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "debt" as "liability on a claim"). In fact, in the current case, the Governor has repeatedly referred to the pension program as an "unfunded liability." *See, e.g.*, Gov.'s Combined Mem. 10, 14, 50, 58. This characterization is certainly accurate; the Commonwealth remains

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[12] Other examples from the bill include the following: In Section 63, KRS 161.550 is amended to reflect an employer contribution to the KTRS equal to "[t]hirteen and one hundred five thousandths percent (13.105%) of the total annual compensation of nonuniversity members" and "[t]hirteen and sixty-five hundredths percent (13.65%) of the total annual compensation of university members of the retirement system it employees." Section 47(5) notes that the medical insurance fund, which provides benefits in accordance with KRS 161.675, consists of member contributions, employer contributions, state appropriations, and interest income. Under Section 57, KRS 161.540 is amended to reflect an increase in the amount of member contributions. Members' accounts are then credited with these various employer and employee contributions, as well as interest and investment returns, under Section 20(1)(a). Under Section 20(1)(b), the accounts of hybrid cash balance plan members are credited with employer pay credit and interest. These are only a few examples of appropriations under SB 151.

financially obligated to its public employees, despite the insolvency of the pension fund. SB 151 continues to impose that financial obligation, though under altered terms. Accordingly, SB 151 is a bill "for the creation of a debt" as contemplated by Section 46, and for that additional reason, it required a vote by "a majority of all the members elected to each House." Because it did not receive at least fifty-one votes, SB 151 was void *ab initio*.[13]

E. SB 151 Did Not Violate Section 56 of the Kentucky Constitution Despite Being Signed by the Speaker Pro Tempore.

The Court next addresses Plaintiffs' claim that SB 151 violates the signature requirements of Section 56 of the Kentucky Constitution, and the Governor's parallel request for a declaratory judgment that the Speaker Pro Tem had authority to sign all legislation as the presiding officer of the House. Section 56 states, in pertinent part, "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." In this suit, Defendant Osborne, the Speaker Pro Tempore of the House of Representatives, signed SB 151. Initially, Plaintiffs argued that this signature violated Section 56, as the Speaker is typically considered to be the presiding officer of the House. In response, Governor Bevin filed an independent action, Civil Action No. 18-CI-414, seeking a declaratory judgment that Defendant Osborne was the presiding officer of the Kentucky House of Representatives during the Regular Session of the 2018 General Assembly and therefore the proper signatory to the bills and resolutions passed during that session.[14] The Court consolidated Civil Action No. 18-CI-414 with the present suit in an Order dated April 20, 2018.

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[13] Because SB 151 violates specific provisions of the Kentucky Constitution, the Court need not consider whether the actions of the legislature also violate Section 2.

[14] On June 13, 2018, after the parties argued and submitted these pending motions for decision, the Governor attempted to file an Amended Petition for Declaration of Rights that questions the impact of the Plaintiffs' other arguments on numerous other pieces of legislation. In response, Plaintiffs filed a Motion to Strike, and noticed that

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At the June 7, 2018 hearing, Attorney General Beshear orally withdrew his claim that the passage of SB 151 violated Section 56 of the Kentucky Constitution. However, neither Plaintiffs nor Governor Bevin filed any motions for leave to withdraw any claim. Accordingly, the Court must still consider whether the signature of the Speaker of the House of Representatives was essential to the enactment of SB 151. Furthermore, the Court finds that the public interest supports adjudication of this claim to resolve any question about the validity of the signing procedure employed by the House of Representatives in 2018.

The Kentucky Court of Appeal's ruling in *Kavanaugh v. Chandler*, 72 S.W.2d 1003 (Ky. App. 1934) addresses this very issue. In that case, the President of the Senate, as presiding officer over that body, refused to sign a bill. The Court noted that, if it were to rule that only the President of the Senate or the Speaker of the House could sign under Section 56, those presiding officers could "thwart the will of the General Assembly by refusing arbitrarily or under an erroneous conception of duty, or by negligently omitting to sign a bill duly passed." *Id.* at 1005. Thus, while Section 56 requires the presiding officers' signatures, the President Pro Tempore "may sign bills as the presiding officer." *Id.* (citing *Robertson v. State*, 30 So. 494 (Ala. 1901)).

In reaching this conclusion, the Court of Appeals cited to an Alabama case, which provides some additional insight into why the Speaker or President Pro Tempore may sign. In that case, the Speaker became sick and unable to discharge his official duties; thus, the duly-elected Speaker Pro Tempore signed a bill as presiding officer. That Court held it "clear upon principle and authority that the house had the right to elect a temporary speaker under the circumstances

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Motion for June 27, 2018. On June 18, 2018, the Governor responded to the Motion to Strike. Accordingly, the Court will hear argument on said Motion on June 27, 2018 and thereafter render a decision by separate Order.

indicated, and that such speaker so elected had all the rights and authority, and was under all the duties, incident to the office of speaker." *Robertson*, 30 So. at 496.

In the present suit, the duly-elected Speaker of the Kentucky House of Representatives resigned from his position early in the legislative session, leaving the position vacant throughout the balance of the 2018 Regular Session. However, Rule 28 of the House provides that "[t]he Speaker Pro Tempore shall perform the duties of the Speaker in the absence of the Speaker or when empowered by the Speaker to perform the duties of the chair."[15] Thus, the Speaker Pro Tempore, a duly-elected official presiding over the House during the 2018 Legislative Session, signed the bill.

As *Kavanaugh* makes clear, such officers may sign bills as the presiding officer in satisfaction of Section 56 of the Kentucky Constitution. Accordingly, the Court finds that SB 151 does not violate Section 56, and that Speaker Pro Tempore Osborne was duly authorized to sign all legislation as the presiding officer of the House of Representatives.

F. The Court's Ruling Is Limited to SB 151 and the Issues in This Case.

The defendants also raised concerns about the effect of this case on bills already passed. The Governor, for example, asserts,

> If SB 151 is invalid [for failure to comply with Section 46], 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.

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15 The House Rules can be viewed at www.lrc.ky.gov//house/HouseRules2018.pdf.

Gov.'s Combined Mem. 77. The Court has not been asked to consider the constitutionality of any other bill or law in the currently pending motions.[16] The only legislative action presently before the Court is the passage of SB 151, and the Court's ruling is based only on the validity of that bill.

The Governor's argument on this point is essentially that the violation of the three readings requirement of Section 46 has become so commonplace that the courts are now required to acquiesce in it. These other statutes are not before the Court in the pending motions, and this Court must concern itself with the actual controversy presented. Still, the logic supporting the Governor's argument could just as readily be employed to support the Court's ruling here. If the explicit command of Section 46 is not enforced in this case, then that provision—or indeed any Constitutional restriction on legislative action—can never be reliably enforced. If the judiciary abdicates its responsibility to enforce such a clear constitutional mandate in this case, how will legislators (and citizens participating in the process) ever reliably gauge how to govern their actions? The answer cannot be that we should overlook a constitutional violation because it would make other legislation vulnerable to challenge; the answer must be that we should endeavor to make all governmental conduct conform to the commands of the Constitution. The wholesale violation of Section 46 is a threat to the integrity of the legislative process, and it undermines respect for the rule of law.

On this point, this case presents striking similarities to *Williams v. Grayson,* Civil Action No. 08-CI-856, in which this Court held that the legislature's attempt to pass a bill after midnight on the final day of the legislative session violated Section 42 of the Kentucky Constitution; that

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[16] The Governor's Amended Petition for Declaration of Rights, referenced above, attempts to raise these questions regarding numerous other laws that may raise issues under Section 46. As noted above, the Attorney General has filed a motion to strike that pleading, which is set for hearing at motion hour on June 27, 2018. Accordingly, the Court will not address those issues in this Opinion.

bill was declared null and void. *See* Civil Action No. 08-CI-856, Pet.'s Mem. in Supp. Mot. Summ. J. 809 n.6. In a Motion for Summary Judgment, Senator Williams argued that numerous other bills were signed and delivered to the Governor after the "clock had expired" and the sixtieth legislative day had concluded, and that striking down the road bill at issue there would invalidate much needed and important legislation that had the same defect. He specifically listed H.B. 309, 2008 Ky. Acts 785 (ch. 168), H.B. 204, 2008 Ky. Acts 717 (ch. 146), H.B. 170, 2008 Ky. Acts 709 (ch. 141), H.B. 2, 2008 Ky. Acts. 683 (ch. 139), H.B. 83, 2008 Ky. Acts 746 (ch. 158), S.B. 58, 2008 Ky. Acts 676 (ch. 136), and S.B. 188, 2008 Ky. Acts. 886 (ch. 187). *See id.* at 9.

The Court notes that the next session of that legislature corrected this problem without fanfare by properly re-enacting the legislation which had been illegally enacted after the expiration of the last legislative day. In other words, other bills similarly "passed" after the end of the last day of the legislative session were reintroduced and voted on again during the next session. Thus, though the defendants in that case expressed similar concerns regarding previously enacted laws, the legislature resolved those concerns simply by passing the bills in a constitutional manner. The same can be accomplished in this case. Moreover, if other legislation is challenged on these grounds, the Courts have many tools to fashion remedies that will guard against an injury to the public interest, including applying equitable principles of waiver, estoppel, laches, and fashioning prospective relief. Because Senate Bill 151 has yet to take effect, none of those issues apply to this case.

G. The Court Reserves Ruling on the Claims for Violation of the "Inviolable Contract" and the Contracts Clause of the Kentucky Constitution.

As noted above, in addition to raising the procedural issues outlined above, this case also presents the substantive question of whether SB 151 impermissibly infringes on the contract rights of public employees under the "inviolable contract" provisions of KRS Chapter 61 and the

Contracts Clause of the Kentucky Constitution, which prohibits laws impairing the obligations of contracts. 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 contacts.[17]

CONCLUSION

For the reasons set forth above, the Court **GRANTS** the Legislative Defendants' Motion to Dismiss. On the issue of whether SB 151 violates Section 46 of the Kentucky Constitution, the Court **GRANTS** Plaintiffs' Motion for Summary Judgment and **DENIES** Defendants' Motion for Summary Judgment. On the issue of whether SB 151 violates Section 56 of the Kentucky Constitution, the Court **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiffs' Motion for Summary Judgment. Accordingly, the Court hereby **GRANTS** Plaintiffs' request for declaratory and injunctive relief, and **IT IS ORDERED AND ADJUDGED** as follows:

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[17] The Court further notes that, after the present case was argued and submitted, the U.S. Supreme Court decided *Sveen v. Melin*, 2018 WL 2767640 (June 11, 2018), a case involving a Contracts Clause challenge to a Minnesota statute. That statute provided that, upon divorce, an ex-spouse would be automatically revoked as the beneficiary of the other's life insurance policy. The Supreme Court upheld the statute, describing it as a valid exercise of state regulatory power and holding that it does not violate the Contracts Clause. Here, the Governor strongly argues for the position adopted by the Court in a decision written by Justice Kagan. In that opinion, the Court explained that the Contracts Clause restricts the power of states to disrupt contractual obligations, but it does not prohibit all laws that impact pre-existing legal agreements. *Id.* at *5. On the other hand, the Attorney General argues for the position advocated by Justice Gorsuch in dissent. Justice Gorsuch explained that "treating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority." *Id.* at *10 (citation omitted). Justice Gorsuch thus endorsed the historical view "that any legislative deviation from a contract's obligations, 'however minute, or apparently immaterial' violates the Constitution." *Id.* at *11 (citation omitted).

1. The Court finds and declares pursuant to KRS 418.040 that SB 151 as enacted by the 2018 Regular Session of the General Assembly is unconstitutional and void because the General Assembly violated the Kentucky Constitution, specifically, the three-readings requirement of Section 46 and the majority-vote requirement of Section 46;

2. Defendants, and the employees, agents, and successors of Defendants, are hereby **PERMANENTLY ENJOINED** from enforcing SB 151 as enacted by the 2018 Regular Session of the General Assembly;

3. The Court further finds and declares pursuant to KRS 418.040 and CR 57 that the Speaker Pro Tem of the House was the duly designated presiding officer of the House of Representatives in the 2018 Regular Session following the resignation of Speaker Jeff Hoover, and, accordingly, Speaker Pro Tem David Osborne was authorized to sign legislation under Section 56 of the Kentucky Constitution;

4. This is a final and appealable order and there is no just cause for delay in the entry of this judgment.

SO ORDERED this 20th day of June, 2018.

/s/ HON. PHILLIP J. SHEPHERD
electronically signed
6/20/2018 1:23:10 PM

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

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DISTRIBUTION:

Hon. Andy Beshear
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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

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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 Governor's Motion to Alter, Amend, or Vacate this Court's June 20, 2018 Opinion & Order. The parties appeared before the Court on July 11, 2018 for oral argument in this matter. Attorney General Beshear argued on behalf of the Commonwealth and Hon. Steve Pitt argued on behalf of the Governor. Having heard the argument of counsel and being otherwise sufficiently advised, the Court hereby **DENIES** the Motion to Alter, Amend, or Vacate, for the reasons set forth below.

BACKGROUND

In this Court's June 20, 2018 Opinion & Order, the Court held that Senate Bill ("SB") 151, which proposed various changes to the state's retirement systems, violated both the three-readings requirement and majority-vote requirement of Section 46 of the Kentucky Constitution. Because the Court determined that the bill failed to comply with constitutional requirements for enactment, the Court declined to address whether the legislative procedure employed in passing SB 151 violated Section 2's prohibition against arbitrary action. The Court also declined to address the parties' substantive arguments, namely, that SB 151 violated the "inviolable contract" of KRS

Chapter 61 and Sections 13 (Takings Clause) and 19 (Contracts Clause) of the Kentucky Constitution.

The Governor now urges the Court to amend its ruling. Specifically, the Governor asks this Court to determine (1) whether SB 151 violates the inviolable contract between the Commonwealth and its employees and (2) whether the provisions of SB 151 that the Court invalidated under Section 46's majority-vote requirement are severable from the remaining portions of the bill. For the reasons set forth below, the Court declines to amend its June 20, 2018 Opinion & Order.

ANALYSIS

I. The Court Will Not Provide an Advisory Opinion on the Validity of the Bill's Substance.

This Court's June 20, 2018 judgment declined to address the merits of Plaintiffs' assertion that the bill violated the inviolable contract between the Commonwealth and its employees and the Contracts Clause of Section 19. The Governor now argues that the Court is duty-bound to address these issues and "decide the constitutionality of Senate Bill 151 ***once and for all***." Gov's Mem. 2. However, the Court held that SB 151 failed to comply with constitutional requirements for passage and is therefore void; as such, the substantive arguments no longer presented a live controversy for this Court to decide. *See Commonwealth v. Terrell*, 464 S.W.3d 495, 498 (Ky. 2015) (quoting *Commonwealth v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994)) (explaining that a case or issue may "become[] moot as a result of a change in circumstances which vitiates the underlying vitality of the action"); *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson Cnty. Metropolitan Sewer Dist.*, 72 S.W.3d 918, 921 (Ky. 2002) ("For 85 years, it has been the law in Kentucky that any statute passed in contravention of the Constitution is void *ab initio,* and any action taken thereunder is a

nullity."). Because the bill was never properly enacted, the legal issues regarding the inviolable contract are not ripe for review. Thus, the Governor essentially seeks an advisory opinion on the validity of the bill's substance before the bill has been validly enacted. To the extent the Governor seeks a ruling on whether SB 151 violates the inviolable contract, the controversy is moot. To the extent that he seeks guidance for future legislatures on the scope of the inviolable contract, the controversy is not ripe.

The Court is bound by this state's longstanding prohibition against issuing advisory opinions. For example, the Kentucky Supreme Court has repeatedly held that "[o]ur courts do not function to give advisory opinions, even on important public issues, unless there is an actual case or controversy." *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992); *see also In re Constitutionality of House Bill No. 222*, 90 S.W.2d 692, 693 (Ky. 1936) (noting that the power to render advisory opinions conflicts with the Kentucky Constitution). In the present case, the Court found SB 151 to be void *ab initio* due to its procedural deficiencies. When the Court determined that the bill was never validly enacted, the issues related to the bill's substance became moot. In other words, those issues no longer presented an actual case or controversy for the Court to decide.

Simply put, the Governor's motion is designed to obtain a ruling on the merits of a bill that was not validly enacted. As he explains, "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." Gov.'s Mem. 3. However, to the extent the Governor seeks guidance on the legal parameters of the inviolable contract, it would be sheer speculation for this Court to assume that the legislature would re-enact the provisions of SB 151. In that sense, the issue over whether SB 151 violates the inviolable contract of KRS Chapter 61 or the Contracts Clause of the Kentucky Constitution is not ripe for adjudication. As Judge Minton explained, writing for the Court of Appeals, "[q]uestions

that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005) (citations omitted). The contract-related claims in this complaint are not ripe for adjudication until the legislature has passed a bill that complies with all constitutional requirements for enactment under Section 46 of the Kentucky Constitution. That manifestly has not happened yet, and the Court declines the invitation to offer its legal opinion about the merits of a pension proposal that may—or may not—be enacted.

In addition, the Court notes that it also declined to decide whether SB 151 violates Sections 2 (prohibiting arbitrary action) and 13 (prohibiting taking of property without just compensation). Interestingly, the Governor makes no reference to these substantive issues and asks only that the Court consider the inviolable contract and Contracts Clause issues. Regardless, for the reasons set forth above, the Court will not provide an advisory opinion on the validity of the bill's substance.

II. The Unconstitutional Provisions of SB 151 Cannot Be Severed from the Remaining Portions of the Bill.

In its Opinion & Order, the Court cited to specific provisions of the bill that qualified as appropriations; in other words, these provisions "set[] apart . . . a particular sum of money for a specific purpose." *Davis v. Steward*, 248 S.W. 531, 532 (Ky. 1923) (defining appropriation). For example, on pages 25–27 of its Opinion and Order, the Court cited to Sections 12, 20, 47, 57, and 63. After reviewing these various provisions, the Court concluded that SB 151 "not only authorizes, but commands that these funds be used for a specific purpose." Opinion & Order 26. As a result, it was properly characterized as an appropriations bill and required a majority vote of all House members under Section 46.

The Governor now argues that "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."[1] In support of this argument, the Governor cites to KRS 446.090. That statute provides that "[i]t shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force." Thus, the Governor argues, it was the General Assembly's intent that any unconstitutional provisions of SB 151 be severed.

However, it is important to note that KRS 446.090 provides certain exceptions to severability. The statute states, in full,

> It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, *unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.*

KRS 446.090 (emphasis added). Thus, in seeking severance of the unconstitutional portions, the Governor is essentially asking that this Court determine whether the remaining parts of SB 151 are "essentially and inseparably connected with and dependent upon the unconstitutional part[s]" or whether they are "incomplete and incapable of being executed" without inclusion of the unconstitutional provisions.

The Kentucky Supreme Court applied KRS 446.090 in *Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Company*, 691 S.W.2d 893 (Ky. 1985) and found severance

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[1] When a statute is passed in an unconstitutional manner, it is void *ab initio*, and severability is therefore impossible. *See Spanish Cove Sanitation, Inc.*, 72 S.W.3d at 291. However, as the Governor explains in his supporting memorandum, his argument presupposes that the Supreme Court reverses the Court's ruling on the three-readings requirement of Section 46, which invalidates the bill as a whole, and upholds the Court's ruling on Section 46's majority-vote requirement, which the Governor argues applies only to the appropriations sections of the bill.

inappropriate. In that case, the Court found the Milk Marketing Act, which prohibited retailers from selling milk below cost, to be unconstitutional. When asked to sever those unconstitutional provisions, the Court declined, explaining that "[t]he entire Act, from its definition section to its penalty section, has the purpose of enforcing the provisions of KRS 260.705," which related to the selling of milk and milk products. *Id.* at 901. The Court therefore concluded "that all parts of the statute are essentially and inseparably connected, and not severable." *Id.*; *see also McGuffey v. Hall*, 557 S.W.2d 401, 416 (Ky. 1977) (declining to sever where invalid portions were "so essential to that section as a whole that the remainder of the section could not stand without them"); *but cf. Louisville/Jefferson Cnty. Metro Govt. v. Metro Louisville Hospitality Coalition, Inc.*, 297 S.W.3d 42, 47 (Ky. App. 2009) (severing unconstitutional exemption in Smoke Free Law because the dissected law would continue to serve the purpose of promoting the public's health).

The Court finds the reasoning of *Kentucky Milk Marketing* controlling in the present case. As noted by the Court in its opinion, the sections referenced on pages 25–27 represent only a sampling of the various appropriations made by SB 151. *See* Opinion & Order 26 n.12 ("These are only a few examples of appropriations under SB 151."). The bill includes numerous other similar provisions related to funding the state's retirement systems and how such benefits are distributed, including—but not limited to—the following:

- Section 9: amends KRS 21.402, which in turn expalins how to determine the amount of interest credit that will be added to a member's account if that member contributed to the hybrid cash balance plan.
- Section 14: amends KRS 61.510, which defines various terms under KRS Chapter 61, including "level dollar amortization method." This is "a method of determining the annual amortization payment on the unfunded actuarial accrued liability that is

set as an equal dollar amount over the remaining amortization period" or, in simpler terms, a method of paying down the state's unfunded liabilities by setting payments at a specific dollar amount (as opposed to the present method of calculating a *percentage*). Section 14 also defines "accumulated employer contribution" as "the employer contribution deposited to the members' account and any investment returns on such amounts."

- Section 15: amends KRS 78.510, which defines various terms under KRS Chapter 78. This section adds the term "accumulated employer contribution," the "employer contribution deposited to the member's account and any investment returns on such amounts."
- Section 16: amends KRS 61.546 to add that members that began participating in the Kentucky Employees Retirement System ("KERS") or the State Police Retirement System ("SPRS") prior to September 1, 2008 who retire on or after July 1, 2023 cannot use accumulated unused sick leave service credits to determine whether they are eligible to receive a retirement allowance.
- Section 17: amends KRS 78.616, which similarly limits the ability of County Employee Retirement Systems ("CERS") members to use accumulated unused sick leave service credits to calculate retirement allowances.
- Section 18: amends KRS 61.565, which mandates that employers participating in SPRS, CERS, or KERS contribute annually to the respective retirement system. They "shall contribute an amount determined by the actuarial valuation completed in accordance with KRS 61.670 and specified by this section." The amendment also adds, "Employer contributions for each respective retirement system shall be

equal to the sum of the 'normal cost contribution' and the 'actuarially accrued liability contribution.'"

- Section 19: amends KRS 61.597, which provides that certain members of KERS or CERS who hold nonhazardous positions "shall receive the retirement benefits provided by this section in lieu of the retirement benefits provided under KRS 61.559 and 61.595. The retirement benefit referred to in this section is the "hybrid cash balance plan."
- Section 43: adds a new section of KRS 161.220 to 161.716. These additions provide that members who begin participating in the Teachers' Retirement System ("TRS") on or after January 1, 2019 shall be placed into the hybrid cash balance plan. That section then explains how retirement benefits are calculated under this plan, including the member's contributions, the employer's pay credits, and regular interest. For example, the hybrid cash balance plan provides retirement benefits based on the member's accumulated account balance, which includes employer pay credits of either eight percent (8%) of the employee's compensation (for non-university employees) or 4% of the employee's compensation (for university employees).
- Section 45: amends KRS 161.220, which defines various terms for KRS 161.220 to 161.716 and 161.990. This section adds, among other terms, the phrase "accumulated employer credit," "the employer pay credit deposited to the member's account and regular interest credited on such amounts." This section also defines "accumulated account balance" for members who began participating in the system prior to January 1, 2019 as the member's accumulated contributions,

while the accumulated account balance for members who began participating after that date is "the combined sum of the members' accumulated contributions and the member's accumulated employer credit."

- Section 52: amends KRS 161.507 to explain that "[m]embers participating in the hybrid cash balance plan as provided by Section 43 of this Act who make the regular member contribution required by this paragraph, shall receive employer credits for the period of service purchased."
- Section 77: amends KRS 161.661 to explain that members of the hybrid cash balance plan "shall also be credited with employer credits and interest credits for each year of service earned."

The many provisions of SB 151 that directly specify the amount of state tax dollars that must be set aside to fund the retirement system, in the form of employer contributions, are central to the bill. So too with the bill's specific allocation of tax dollars to fund health insurance for retired employees. The major policy change in the bill—ending the defined benefit pension system for teachers and shifting newly hired teachers into a hybrid cash balance fund—could not operate or be implemented without a specific directive for the allocation of state tax dollars to fund the employer's share of the cash-hybrid retirement benefit. Likewise, the "level dollar funding" method of retiring the current unfunded liability in these funds would be meaningless without the bill's requirement for specific annual contributions to the retirement of this deficit. In other words, the entire bill is dependent upon the legislature's allocation of specific amounts of tax dollars to the specific purposes of funding these retirement systems, both the defined benefit system for current teachers and other public employees and the hybrid cash balance system for future hires.

Without those specific authorizations for allocations of tax dollars for these purposes, the bill could not be implemented.

Upon reviewing these provisions and the remaining portions of SB 151, the Court finds that the bill's purpose—as a whole—was to change the way in which our state's retirement systems are funded and the manner in which those funds were distributed to public employees. Accordingly, if the unconstitutionally-enacted appropriations provisions are severed, "the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part." KRS 446.090. In other words, the General Assembly intended to make these specific changes to the funding of the state's retirement systems. Without those provisions, "the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly." *Id.* Severance is therefore inappropriate in this case, and the Court declines the Governor's invitation to amend its June 20, 2018 Opinion & Order in that manner.

CONCLUSION

For the reasons set forth above, the Court hereby **DENIES** the Governor's Motion to Alter, Amend, or Vacate the Court's June 20, 2018 Opinion & Order.

IT IS SO ORDERED this 11th day of July, 2018.

/s/ HON. PHILLIP J. SHEPHERD
electronically signed
7/11/2018 3:15:12 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
250 West Main Street, Suite 1400
Lexington, KY 40507

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

Entered 18-CI-00379 07/11/2018 Amy Feldman, Franklin Circuit Clerk

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, *et al.* **DEFENDANTS**

This matter is before the Court on the Plaintiffs' Motion for Temporary Injunction. The matter is currently noticed for Motion Hour on Wednesday, April 18, 2018. However, finding it appropriate to hear the matter outside of Motion Hour, the Court hereby **ORDERS** that this matter be remanded from the April 18, 2018 Motion Hour docket and directs the parties to appear for a status conference on **Thursday, April 19, 2018 at 10:00 AM**, at which time the parties shall be prepared to discuss a briefing schedule on Plaintiffs' Motion.

SO ORDERED this 13th day of April, 2018.

Hon. Phillip J. Shepherd
/s/ HON. PHILLIP J. SHEPHERD
electronically signed
4/16/2018 8:18:30 AM

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

DISTRIBUTION:

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
Capitol Building, Suite 118
Frankfort, KY 40601

Hon. Jeffrey S. Walther
163 East Main Street, Suite 200
Lexington, KY 40588

Hon. David Leightty
2303 River Road, Suite 300
Louisville, KY 40206

Matthew G. Bevin, Governor
c/o Hon. M. Stephen Pitt
Office of the Governor
700 Capitol Avenue
Capitol Building, Suite 100
Frankfort, KY 40601

Board of Trustees, Teachers' Retirement System of the State of Kentucky
479 Versailles Road
Frankfort, KY 40601

Board of Trustees, Ky. Retirement System
Perimeter Park West
1260 Louisville Road
Frankfort, KY 40601

Representative David W. Osborne
Speaker Pro Tempore, Ky. House of Representatives
702 Capitol Avenue
Annex Room 332C
Frankfort, KY 40601

Senator Bertram Robert Stivers, II
President, Kentucky Senate
702 Capitol Avenue
Annex Room 236
Frankfort, KY 40601

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

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 matter is before the Court on Plaintiffs' Motion for Temporary Injunction. All parties were represented at a hearing held on April 19, 2018. Having heard the arguments of the parties, reviewed the record, and otherwise being sufficiently advised, the Court hereby

ORDERS:

1. Upon the Court's motion, pursuant to Local Rule 5 of the Franklin Circuit Court and Civil Rule 42.01, *Commonwealth of Kentucky, ex rel. Matthew G. Bevin v. Andy Beshear*, Civil Action No. 18-CI-414, shall be consolidated with *Commonwealth of Kentucky, ex rel. Andy Beshear, et al. v. Matthew G. Bevin et al.*, Civil Action No. 18-CI-379.
2. In briefing the merits of the case, the parties shall comply with the following briefing schedule: Plaintiffs' briefs on the merits shall be filed and served on or before May 2, 2018; Defendants' responses on the merits shall be filed and served on or before May 23, 2018; any replies by Plaintiffs shall be filed and served on or before May 30, 2018; and, a sur-reply by Defendants, addressing in particular the implications of Section 56 of the Kentucky Constitution in the present litigation, may be filed and served on or before June 4, 2018.

3. Oral argument will be held on June 7, 2018 at 9:00 a.m. in Courtroom H of the Franklin County Circuit Court.
4. The Court waives the page limit requirements set forth in Local Rule 4.02.
5. The Attorney General's response to Defendant Governor Bevin's Motion to Disqualify the Attorney General and the Office of the Attorney General shall be served and filed on or before April 23, 2018.
6. In addition to addressing any other legal issues, in briefing the merits of the case the parties shall provide the Court with guidance on the following issues: (a) whether the actuarial analysis for SB 151, required under KRS 6.350 and KRS 6.955(1), could be satisfied under the standard articulated in *Board of Trustees of the Judicial Form Retirement System v. Attorney General of the Commonwealth of Kentucky*, 132 S.W.3d 770, 776-778 (Ky. 2003) and whether the requirements of KRS 6.350 and KRS 6.99595(1) were properly suspended under Section 15 of the Kentucky Constitution; (b) the extent to which the requirement under Section 46 of the Kentucky Constitution that "[e]very bill shall be read at length on three different days in each House" was addressed in debates at the Kentucky Constitutional Convention in 1891, and whether that requirement of Section 46 was met regarding Senate Bill 151; (c) the extent to which the requirement of Section 46 of the Kentucky Constitution for each legislative chamber to vote "by the majority of its members" to create a debt or make an appropriation, may apply to Senate Bill 151 (*see, e.g., Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005)); and, (d) who is authorized to sign bills as a presiding officer of the House of Representatives under Section 56 of the Kentucky Constitution.
7. If the parties reach an agreement to allow the dismissal of the President of the Senate and Speaker of the House of Representatives to be dismissed as parties, the Senate President

and House Speaker shall be granted leave to participate in these actions as *amicus curiae*, and to file briefs in accordance with the briefing schedule set forth above. In the event the House Speaker and Senate President are not dismissed by Agreed Order, they may fully brief any claims or defenses that they may wish to present. The Court notes that it has dismissed the House Speaker and Senate President from prior litigation involving challenges to the constitutionality of legislation on the grounds that legislators have absolute immunity from suit. *See Kraus v. Kentucky State Senate*, 872 S.W.2d 433, 440 (Ky. 1993). *See also Eastland v. United States' Serviceman's Fund*, 421 U.S. 491, 507 (1975). If the parties reach agreement on this issue, they shall submit an Agreed Order for review and entry by the Court.

SO ORDERED, this 20th day of April, 2018.

Hon. Phillip J. Shepherd
/s/ HON PHILLIP J SHEPHERD
electronically signed
4/20/2018 2:29:05 PM

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

DISTRIBUTION:

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

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

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

Brett R. Nolan
General Counsel
Finance and Administration Cabinet
702 Capitol Avenue, Suite 101
Frankfort, KY 40601

David Fleenor
Capitol Annex, Room 236
Frankfort, KY 40601

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

Brent Woosley
General Counsel
Legislative Research Commission
Room 300, Capitol

Frankfort, KY 40601

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

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

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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 matter is before the Court on Defendant Governor Bevin's Motion to Disqualify the Attorney General and the Office of the Attorney General. The case was called during Motion Hour on April 25, 2018. Having heard the arguments of the parties, reviewed the record, and otherwise being sufficiently advised, the Court hereby **DENIES** the motion for reasons more fully stated below.

DISCUSSION

The Governor's motion to disqualify the Attorney General is based on two unsolicited letters from the Attorney General to members of the General Assembly during the 2018 Regular Session advising them of potential statutory and constitutional infirmities within Senate Bill 1 ("SB 1")[1] and a tweet from the "KY House Democrats" which includes a photograph of the Attorney General and certain legislators with a caption that references discussing "legal options."

The Governor argues that these communications constituted legal advice given in the context of an attorney-client relationship. To the extent this characterization is accurate, the Governor's argument continues, allowing the Attorney General to sue any of the Defendants in

[1] The Attorney General's first letter, dated February 28, 2018, advised the General Assembly on SB 1. His second letter, dated March 6, 2018, advised the General Assembly on the Proposed Senate Substitute for SB 1. The substance of SB 1 was eventually included in an amended version of Senate Bill 151 and passed by the General Assembly on March 29, 2018. The Governor signed SB 151 into law on April 2, 2018.

this action creates a conflict of interest under the Kentucky Rules of Professional Conduct and, as such, the Attorney General and his office should be disqualified from participating in the present case.

The Governor's argument misconstrues the law, specifically as it relates to the office of the Attorney General, and the nature of his constitutional and statutory duties. The long established controlling law on this point emphatically provides that the Attorney General's true clients, to whom he owes his legal and fiduciary duty of loyalty, are the citizens of Kentucky and not any officeholder, department or agency. Given this duty, the letters sent by the Attorney General to the General Assembly cannot operate to create a conflict of interest which would disqualify him from participating in this case. Further, there are no allegations that the Attorney General advised the Governor on the passage of the legislation at issue in this case. It is abundantly clear from the record in this case and others, that the Governor did not seek or accept the legal advice of the Attorney General, nor did he agree with or follow the advice the Attorney General offered to the legislature. For these reasons, the Attorney General could not possibly have a conflict of interest and the Court must **DENY** the Governor's motion to disqualify.

The Governor is correct that lawyers owe a duty of loyalty to their clients. The attorney-client relationship is built on trust, and a major component of this trust is a client's confidence that her lawyer will be loyal to her. It is for that reason that the Rules of Professional Conduct provide that a lawyer may not "represent a client if the representation involves a concurrent conflict of interest" or "represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client . . . ." SCR 3.130 (1.7) and (1.9). Accordingly, a lawyer who works against the interests of his current or former clients violates his duty of loyalty under the Rules of Professional Conduct.

The Governor argues that as the "the chief law officer" for the Commonwealth with a statutory obligation under KRS 15.020 to provide every state agency and officer with legal advice, the Attorney General's letters and other communications with the General Assembly around SB 1 constituted "legal advice." Under the Governor's theory, providing this "legal advice" created a duty of loyalty to the General Assembly which was breached, in violation of the Rules of Professional Conduct, when the Attorney General filed the present case. The Governor does not explain how this duty of loyalty extended to him since there are no allegations that the Attorney General provided "legal advice" to the Governor regarding SB 1.

While the Attorney General is the "chief law officer" of the Commonwealth, Governor Bevin, as the person who now occupies the office of Governor, is not the state. As Kentucky's highest court has aptly noted, the Governor is not a King: "under a democratic form of government now prevailing, the people are king, Ky. Const. sec. 4, so the Attorney General's duties are to that sovereign rather than to the machinery of government." *Commonwealth ex rel. Hancock v. Paxton.*, 516 S.W.2d 865, 867 (Ky. 1974). In our democracy, "the source of authority of the Attorney General is the people who establish the government, and his primary obligation is to the people." *Hancock v. Terry Elkhorn Mining Co., Inc.,* 503 S.W.2d 710, 715 (Ky. 1973).

Indeed, in that capacity, the Attorney General has not only an obligation, but a duty to bring suit "when he believes the public's legal or constitutional interests are under threat." *Beshear v. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). As such, the Attorney General's attorney-client relationship is with the citizens of Kentucky and it is to the public, not any office or officeholder, that the duty of loyalty is owed. The language of KRS 15.020 does not somehow transform this duty of loyalty into an obligation to serve as private legal counsel to the General

Assembly, the Governor or any other state official in "the machinery of government." Opining on this very issue, Kentucky Supreme Court held:

> While KRS 15.020 imposes on the Attorney General the duty to "attend to . . . any litigation or legal business that any state officer, department, commissioner, or agency may have in connection with, or growing out of, his or its official duties," we believe the statute, in stating at the outset that the Attorney General is "the chief law officer of the Commonwealth," intends that in case of a conflict of duties the Attorney General's primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions, or agencies.

Paxton, 516 S.W.2d at 868.

The Governor cites one case from the California Supreme Court, *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981), in support of his argument. However, that case is not helpful to the Governor because it is legally and factually distinguishable from the present case. Critically, the California Supreme Court "recognize[d] there are cases in other jurisdictions that permit their attorneys general to sue any state officer or agency, presumably without restriction" and, citing to *Paxton*, expressly identified Kentucky as an example of one such jurisdiction in which there were "peculiarities of the prevailing law" that were "not persuasive here." *Id.* at 1209. In addition, putting aside the differing legal standards, the facts in *Deukmajian* are distinguishable. There, the California Attorney General met with representatives of the State Personnel Board, which had been served with a summons in connection with a pending lawsuit, and "outlined the legal posture of the board and described four legal options available to it." *Id.* at 1207. These facts from *Deukmajian* clearly involve a relationship that bears a much closer resemblance to a private legal counsel relationship in which the agency relied on legal advice of the Attorney General. Here, the Governor has pointed only to two unsolicited letters and a tweet, none of which were relied upon by the Governor or the General Assembly.

There are no allegations that the Attorney General provided "legal advice" to the Governor himself. Significantly, the legislative defendants in this action have not asserted that the Attorney General acted as their counsel or breached any duty to them. The Attorney General's professional duty is owed to the Commonwealth and its citizens, not to any individual officeholders or any part of "the machinery of government."

The Court recognizes there are many important legal issues that can and should be contested in this action. The legitimacy of the Attorney General's right to challenge the legislation at issue, and to contest the Governor's legal position, is not one such legal issue. Case law is well established that the Attorney General has both the right and the duty to challenge statutes that he believes are unconstitutional. *Beshear*, 498 S.W.3d at 362. It would perversely twist the logic and purpose of the Rules of Professional Conduct to hold that the Attorney General is disqualified from challenging a statute because he rendered a legal opinion prior to adoption of the law that counseled against the actions adopted by the legislature.

CONCLUSION

Accordingly, the Court finds that the Attorney General breached no duty of loyalty to the General Assembly or the Governor and has no conflict of interest in participating in the present case. For those reasons, the Court **DENIES** the Governor's motion to disqualify the Attorney General.

SO ORDERED, this 30th day of April, 2018.

Hon. Phillip J. Shepherd
/s/ HON. PHILLIP J. SHEPHERD
electronically signed
5/1/2018 9:01:01 AM

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

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

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

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

Brett R. Nolan
General Counsel
Finance and Administration Cabinet
702 Capitol Avenue, Suite 101
Frankfort, KY 40601

David Fleenor
Capitol Annex, Room 236
Frankfort, KY 40601

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

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

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

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

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

Entered 18-CI-00379 05/08/2018 Amy Feldman, Franklin Circuit Clerk

Senate Bill 151, the Court's consideration is limited to whether the legislation complies with all statutory and constitutional requirements.

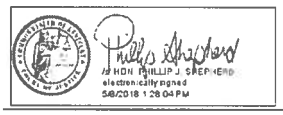
In sum, if any party, including the Governor, identifies an area of disputed material facts, the Court will allow depositions and discovery to make a full record on any such issues. At this point, no such area of factual dispute has been identified. Accordingly, the Court declines the invitation to put 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.



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

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Hon. Andy Beshear
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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
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Finance and Administration Cabinet
702 Capitol Avenue, Room 392
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Capitol Annex, Room 236
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Hon. Eric Lycan
Office of the Speaker
Capitol Annex, Room 332
Frankfort, KY 40601

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General Counsel
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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

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.

Entered 18-CI-00379 05/31/2018 Amy Feldman, Franklin Circuit Clerk

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.

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
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Hon. David Fleenor
Capitol Annex, Room 236
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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

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

Supreme Court of Kentucky

FROM THE 48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT, DIVISION 1
CASE NO. 18-CI-00379

COMMONWEALTH OF KENTUCKY
Ex re. 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 DENYING REQUEST FOR DISQUALIFICATION

This matter is before the Chief Justice upon the certification of the Clerk of the Franklin Circuit Court of the affidavit of Defendants, Matthew G. Bevin, et al., which seeks to disqualify the Honorable Phillip Shepherd, 48th Judicial Circuit, Division 1, from presiding in the above-styled action.

Upon review, it is ORDERED that Defendants have failed to demonstrate any disqualifying circumstance that would require the appointment of a special judge under Kentucky Revised Statutes (KRS) 26A.020.

As a point of clarification, the letter to the Chief Justice from the Governor's general counsel, M. Stephen Pitt, states "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," citing *Talbott v.*

Thomas,[1] a 1941 decision of the then-Kentucky Court of Appeals, and *Hall v. Elected Officials' Retirement Plan,*[2] as the sources of this "rule."

The *Talbott* case addressed the constitutionality of legislation specifically relating to the "retirement of Judges of the Courts of Appeals."[3] The case was brought by six of the seven members of the Court of Appeals, who were the parties before the high court. Similarly, *Hall* involved a class action challenge to statutory changes to Arizona's Elected Officials' Retirement Plan. In the order certifying the class action, the Superior Court of Arizona, Maricopa County, specifically defined the membership of the class to include "any member of the Elected Officials' Retirement Plan who was actively employed ... as a justice of the Arizona Supreme Court on July 20, 2011."[4]

As the Governor's counsel correctly notes, all members of the Court did recuse in *Talbott.* And four of the five justices of the Arizona Supreme Court recused in *Hall.* But the situations in *Talbott* and *Hall* are different than the case at hand. In *Talbott,* the parties to the underlying litigation were also the judges in the Court hearing the appeal, and they unquestionably had a direct financial interest in the outcome of the case, which addressed the constitutionality of legislation relating specifically to judges of the Court of Appeals. Similarly, the justices who recused in *Hall* were members of the class who brought the underlying lawsuit, and they had a financial interest in the

---

[1] 151 S.W.2d 1 (Ky. 1941)
[2] 383 P.3d 1107 (Ariz. 2016).
[3] *Talbott,* 151 S.W.2d at 2.
[4] *Hall v. Elected Officials' Retirement Plan,* No. CV2011-021234, 2015 WL 13297983 (Ariz. Super. Ct. Jan. 27, 2015).

outcome of the case, which challenged a change to the formula for calculating future benefit increases for retired members of the Elected Officials' Retirement Plan.

Neither of these potentially disqualifying circumstances applies to the present case. Accordingly, the Chief Justice rejects the argument that *Talbott* and *Hall* stand for the broad proposition that "a judge with a public pension cannot sit in judgment of legislation that could affect that pension."

The Defendants' request is denied without prejudice of any party to seek appellate review after entry of a final judgment.

The Clerk of the Franklin Circuit Court shall place a copy of this order in the record of this case and shall serve copies on parties or their counsel.

Entered this 6th day of June 2018.

CHIEF JUSTICE

Copies to: Jean C. Logue, Chief Regional Circuit Judge, Bluegrass Region
Phillip Shepherd, 48th Judicial Circuit, Division 1
Amy Feldman, Clerk, Franklin Circuit Court

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**

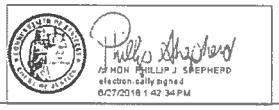
MATTHEW G. BEVIN, in his official capacity
as Governor of the Commonwealth of Kentucky, *et al.* **DEFENDANTS**

This action is before the Court on the Amended Petition for a Declaration of Rights filed by Governor Bevin and the Attorney General's Motion to Strike the Amended Petition. The Kentucky League of Cities has also filed a Motion to Intervene and Motion for Leave to File Outside Filing Deadline. The parties appeared before the Court to argue these matters during Motion Hour on June 27, 2018. Attorney General Andy Beshear appeared on behalf of the Commonwealth, Steve Pitt appeared on behalf of Governor Bevin, and Barbara Edelman appeared on behalf of the Kentucky League of Cities. At that time, counsel for Governor Bevin moved this Court to voluntarily dismiss the Amended Petition under CR 41, and no party objected. In addition, the parties agreed that dismissal of the Amended Petition rendered the remaining motions moot. Accordingly, being sufficiently advised, the Court herby **GRANTS** the Governor's Motion to Voluntarily Dismiss the Amended Petition and **DISMISSES** the Amended Petition without prejudice. Furthermore, the Court **DENIES** as moot the Attorney General's Motion to Strike and the Kentucky League of Cities' Motion to Intervene and Motion for Leave to File Outside Filing Deadline.

Entered 18-CI-00414 06/27/2018 Amy Feldman, Franklin Circuit Clerk

This is a final and appealable Order, and there is no just cause for delay in the entry of this judgment. Pursuant to CR 54.02(2), this Order and Judgment "shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of" herein.

IT IS SO ORDERED this 27th day of June, 2018.



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

DISTRIBUTION:

Hon. Andy Beshear
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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

Entered 18-CI-00414 06/27/2018 Amy Feldman, Franklin Circuit Clerk

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**

The Court being sufficiently advised,

IT IS HEREBY ORDERED that the above-captioned matter is scheduled for oral argument on the pending Motion to Alter, Amend, or Vacate on **Wednesday, July 11, 2018 at 2:00 PM** in Courtroom H.

IT IS SO ORDERED this 5th day of July, 2018.

/s/ HON PHILLIP J SHEPHERD
electronically signed
7/5/2018 1:15:01 PM

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

Entered 18-CI-00379 07/05/2018 Amy Feldman, Franklin Circuit Clerk

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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
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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
250 West Main Street, Suite 1400
Lexington, KY 40507

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

Entered 18-CI-00379 07/05/2018 Amy Feldman, Franklin Circuit Clerk