COMMONWEALTH OF KENTUCKY
SUPREME COURT

Case Nos. 2018-SC-000419-TG;
2018-SC-000421-TG (2018-CA-001200)

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

v.

On Appeal From Franklin Circuit Court
Nos. 2018-CI-00379 and 2018-CA-000414

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

BRIEF OF *AMICI CURIAE* ROBERT STIVERS, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE SENATE AND DAVID OSBORNE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE PRO TEMPORE, IN SUPPORT OF THE APPELLANT

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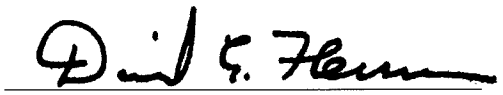

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INTRODUCTION

This appeal concerns the constitutionality of Senate Bill 151 from the 2018 Regular Session of the Kentucky General Assembly ("SB 151"). SB 151 as enrolled, is an Act relating to retirement. The Court below invalidated SB 151 in its entirety on two separate constitutional grounds. First, the Court held that SB 151 did not receive the constitutionally required number of readings in each chamber of the General Assembly. This holding came despite the fact the legislative record clearly reflects that SB 151 was read on three separate days in each Chamber. The Franklin Circuit Court chose to ignore any reading that occurred before the bill was amended by a House Committee Substitute. Second, the Court found held that SB 151 was an appropriation bill and that, as it received only 49 votes in the House, was deficient under Section 46 of the Kentucky Constitution. As with the other claimed constitutional deficiency, this holding is not supported by the facts. SB 151 appropriates no money. Any funds appropriated to the pension system were appropriated by the biennial budget.

This ruling, if it stands, will significantly hamper the General Assembly in the conduct its day to day business. The expansion of the concept of what constitutes an appropriation bill effectively "kicks the can down the road" on pension reform to 2020 at the earliest. The ruling of the Franklin Circuit Court must therefore be reversed.

STATEMENT OF POINTS AND AUTHORITIES

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INTERESTS OF THE LEGISLATIVE *AMICI*

The Senate President, Robert Stivers, and the Speaker *Pro Tem*, David Osborne, (collectively the "Legislative *Amici*") are currently the duly elected heads of their respective Chambers of the General Assembly. In the Court below, the Legislative *Amici* were named defendants in the complaint filed by the Appellees. The Court dismissed them on grounds of legislative immunity. This appeal centers on two issues that go to the heart of the legislative process. The decision of the Court below will necessarily impact the day to day operation of the General Assembly far beyond the boundaries of SB 151. Notwithstanding this dismissal, the Legislative *Amici* have both a significant body of knowledge that can aid this Court in rendering its decision and a significant stake in the outcome of this case.

ARGUMENT

I. BACKGROUND

The Court below analyzed the legal issues utilizing a misleading factual context. Particularly with respect to whether the Constitutional requirement that a "bill" be read on three separate days in each chamber of the General Assembly, the Court bought into Appellees' narrative that SB 151 as pension reform legislation started and ended with March 29, 2018, the date of its passage. That is simply not the case. The legislative process used was not for purpose of *avoiding* debate and public input; rather, the opposite is true – the process employed was precisely the *result* of legislators responding to that debate and public input.

The process of passing what ultimately became SB 151 began during the 2017 Interim. Through the summer and early fall, monthly meetings of the Public Pension Oversight Board ("PPOB") focused almost exclusively on the underfunded status of Kentucky's public employee pensions. Kentucky faces an aggregate funding shortfall across its pension systems of at least $33 billion. Standard & Poor's "calculated [Kentucky's unfunded liabilities] . . . as

the worst among the 50 states" and "also one of the largest [unfunded liabilities] in proportion to the revenues available to pay for the liabilities, draining resources from other critical needs. The Kentucky Employment Retirement Systems Non-Hazardous ("KERS-NH") plan will become insolvent as early as 2022 unless this issue is addressed.

Senate Bill 1 ("SB 1") was introduced on February 20, 2018, beginning the legislative process. The bill was assigned to the State and Local Government Committee where the chair of that committee, Senator Bowen, allowed a week to pass before placing SB 1 on the agenda for the committee meeting on February 28, 2018. A second committee hearing on SB 1 was held March 7, 2018. Chairman Bowen opened the floor for discussion, and after over thirty (30) minutes of discussion, questions, and debate by the committee members, SB 1, as amended by SCS 1, was reported favorably from committee by a vote of 7-4. SB 1 ultimately made its way to the Senate orders of the day, but after discussion it was recommitted to committee on March 9, 2018. General Assembly members continued to discuss pension reform legislation amongst themselves and with constituent groups. On the fifty-seventh (57th) legislative day, members reached consensus on a pension reform package.

On March 28, 2018, the Committee Assistant for the House State Government Committee prepared a meeting notice for a March 29, 2018, meeting. On the same day the Committee Assistant sent by electronic mail ("email") a copy of the agenda, which included SB 151, for the March 29, 2018, meeting to the members of the committee, as well as to a number of other agenda recipients within LRC. By operation of the LRC's automated Legislative Calendar system, the meeting time and date, and its agenda, were posted to the General Assembly's website on March 28, 2018, where it continued to be displayed through March 29, 2018. The Committee Assistant also sent by email a copy of the agenda to an agenda recipients' list comprising a number of individuals throughout state government as well as

members of the public at large who have requested to receive State Government Committee agendas. This recipient list included two (2) staff members of the Plaintiff / Appellee, Attorney General Andy Beshear. The March 29, 2018, meeting of the State Government Committee was held in Capitol Room 327. Additionally, the meeting was open to the public and no individual was denied access until the room capacity was reached. The meeting was heavily covered by news media, including KET, which broadcast the meeting to the world on its website.

Chairman Miller noted that while they were not considering SB 1, the House Committee Substitute 1 ("HCS 1") to SB 151 was very similar to SB 1, and that the sponsor had summarized the minor differences between the committee substitute and SB 1. He also noted that SB 1 had been public for weeks. To reiterate the point that the HCS 1 for SB 151 contained almost identical language which had been presented in SB 1, but with some minor changes, Representative Carney summarized a couple of differences between the two documents again and stated: "Basically, the only other substantial change is the freezing of the sick days at the end of this fiscal year . . . ."

After more than an hour and a half of floor debate, SB 151 passed the House by a vote of 49-46, and the Appellees concede it received three (3) readings in the House. After nearly two and a half hours (2.5 hours) of debate, the Senate concurred in the HCS 1 and HCA 1T by a vote of 22-15, and the Appellees likewise concede it received three (3) readings in the Senate. The trial court also acknowledged SB 151 received all of its required readings in each chamber. Franklin Circuit Court Order, June 20, 2018, at pgs. 6 and 20 ("Order"), R. at X.

SB 151 did not, as is stated by the Appellees in their filings below and as is inferred by the Court below in its opinion and order, "magically appear" on March 29, 2018. Every single substantive issue contained in Appellees' Complaint addresses a provision contained in SB 1.

Moreover, every single change made to SB 1 to create the HCS to SB 151, came as a result of specific requests for changes made by the Appellees via a letter sent by the Attorney General to all Legislators more than a month before SB 151 was passed.

II. APPELLEES' CHALLENGE TO THE GENERAL ASSEMBLY'S PASSAGE OF SB 151 PRESENTS A NON-JUSTICIABLE POLITICAL QUESTION.

In its June 20, 2018 Opinion and Order, the Circuit Court found 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*." (Court's Opinion at 23). According to the Circuit Court, "[t]he wholesale changes in SB 151 rendered the first three readings in the Senate and two readings before the House meaningless." (*Id.* at 22). In an accompanying footnote, the Circuit Court stated in part the following:

> 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 he legislature of the substance of the bill.**
>
> (*Id.* at 23, fn. 11)(Emphasis added).

The very failure of the Circuit Court to articulate a standard in its ruling for what constitutes a violation of the Three Readings Clause of Section 46 only underscores the fact that this issue is a non-justiciable political question under the Kentucky Constitution and prior Kentucky Supreme Court holdings – a political question reserved for the legislative branch of government.

As previously noted, the Appellees cannot contest the fact that Senate Bill 151 received the required three readings in both chambers. For the Circuit Court, however, depending on

the extent to which a bill is amended, there is an imagined continuum upon which an amended bill's readings is deemed either constitutionally acceptable or unacceptable. But the Circuit Court expressly avoided the discussion of how much change is too much. It is forced to do so because there is a lack of judicially discoverable and manageable standards for resolving it, requiring the Court to defer to the legislative branch.

In *Philpot v. Haviland*, 880 S.W.2d 550 (Ky.1994), the Kentucky Supreme Court considered a challenge to Senate Rule 48, requiring a majority of members to find that a committee has held a bill for an "unreasonable time," as a violation of Section 46, which states in pertinent part that "whenever a committee refuses or fails to report a bill submitted to it in a reasonable time, the same may be called up by any member, and be considered in the same manner it would have been considered if it had been reported." Appellants in *Philpot* argued that Section 46 was intended to permit individual members of the General Assembly to determine that a bill has been held in committee for an unreasonable length of time, and afforded them the ability to force a vote in the full chamber. *Id.* at 552.

The *Philpot* Court noted that the appellants were, by implication, asking the Court to "determine guidelines as to reasonableness and to require the Senate to set out such guidelines in its rules, 'within definite time frames.'" *Id.* at 553. The Kentucky Supreme Court rejected this role. The *Philpot* Court held:

> We are of the opinion... that the determination of what is a 'reasonable time' in this context, is a matter for the legislature to determine, under Section 39 of the Kentucky Constitution. For us to presume to define a 'reasonable time' would result in the judiciary usurping the power of the Senate to determine for itself through its own rules when a committee has failed to report a bill within a reasonable time.
>
> *Id.* at 553.

The court then noted the standard in the United States Supreme Court case of *Baker v. Carr*, 369 U.S. 186 (1962) for determining if a subject is a "political question" not subject to judicial review.[1] Applying that standard, the *Philpot* court stated:

> Just as the United States Supreme Court held that it was appropriate for the Congress to determine what constituted a "reasonable time" within which an amendment to the Constitution had to be ratified, this Court is of the opinion that it is most appropriate for the Kentucky State Senate to determine what constitutes a "reasonable time" for a committee to retain proposed legislation. Such a determination is 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. The Kentucky Senate has the "full knowledge and appreciation ascribed to the ... legislature of the political, social and economic conditions which have prevailed" since the legislation was introduced, and thus, the Senate is best able to determine when a committee has held a bill an unreasonable period of time.
>
> *Id.* at 554

In the instant case no "judicially discoverable and manageable standard" could be imposed that would not infringe upon the independence of the General Assembly in its day to day deliberations, in violation of the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution. These separation of powers constraints are especially important considering the manner in which legislation is, on an annual basis, substantively amended and concurred with by the two chambers, especially in the final days of a legislative session.

Following passage of any controversial legislation in upcoming legislative sessions, the Circuit Court's open-ended Opinion and Order fully invites future litigants to test the parameters of its ruling regarding SB 151. The Circuit Court would then again assess, under

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[1] "Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Philpot* at 553.

the particular facts of the future case, whether the degree of amendment to an underlying bill has triggered the necessity to reread the bills in the respective chambers. Holding a separate and equal branch of government hostage by the uncertainty of this type of case-by-case fact analysis is specifically what the strong separation of powers provisions of the Kentucky Constitution were meant to prevent. Consequently, the Circuit Court's ruling also violates *Philpot* and *Baker* as a non-justiciable political question because it reveals the "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government." *Philpot* at 553.

The Circuit Court attempts to distinguish *Philpot* by asserting that the "reasonable time" standard in Section 46 is "subjective," justifying deference to the legislative branch, while the three readings requirement in Section 46 is objective and "enforceable by the courts." (Court Opinion at 15). In reality, the Circuit Court's interpretation of Section 46 falls far short of applying a simple objective standard. The Circuit Court has already conceded the subjectivity of its interpretation by stating that it will not "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." (*Id.* at 23, fn. 11). The notion that a bill must be re-read once it has been amended in excess of a certain as yet to be determined judicially-required threshold is every bit as subjective as determining what is a "reasonable time" for a committee to consider a bill, and is contrary to the ruling in *Philpot.*

III. THE THREE READINGS CLAUSE IN SECTION 46 OF THE KENTUCKY CONSTITUTION IS DIRECTORY AND CAN BE INTERPRETED OR WAIVED BY THE GENERAL ASSEMBLY

The trial court's Order is also erroneous because the three readings clause of Section 46 is directory, and thus, capable of interpretation or waiver by the members of the General Assembly. This conclusion is inescapable when the plain language of this section is construed

in accordance with contemporaneous judicial and legislative constructions and in harmony with the legislature's rulemaking authority, provided for in Section 39 of the Kentucky Constitution, and with the separation of those powers as set forth in Sections 27 and 28.

In *Hamlett v. McCreary*, Kentucky's then highest court construed the first clause of Section 56, which utilizes the same introductory phrase "[n]o bill shall become a law," as appears in Section 46 relating to vote requirements, as a manifest intention that compliance with the provision was necessary to validate an enacted law. 153 Ky. 755, 156 S.W. 410, 412 (1913). However, the court went on to cite, with approval, the following holding from a Missouri case that found that the use of this language in some clauses, but not others, in a nearly identical section of Missouri's constitution was a manifest indication in the language of that section of an opposite effect for clauses without the "no bill shall become a law" language:

> But we do not regard the other clauses of the section under review as mandatory; for it is to be observed that those clauses do not declare that 'no bill shall become a law,' if the presiding officers or the members fail to perform the duties which the residue of the section imposes, but the only penalty directly expressed is that contained in the initial clause just noted.

Id. at 413 (quoting *State v. Meade*, 71 Mo. 266, 270 (1879)).

The *State v. Meade* opinion was both endorsed by an early Kentucky court and published prior to the writing and enactment of Kentucky's 1891 Constitution, which accords the opinion special weight when discerning the original intent of constitutional provisions with identical language. *Williams v. Wilson*, 972 S.W.2d 260, 267 (Ky. 1998) ("This Court has endorsed the principle of contemporaneous construction as providing special insight to the Delegates' intent."). This construction of the meaning of these provisions was subsequently cited with approval in *Kavanaugh v. Chandler*, 255 Ky. 182, 72 S.W.2d 1003, 1004 (1934).[2]

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[2] The Appellees may cite to the *Kavanaugh* court's reference to the three readings clause in Section 46 as being "mandatory" to counter this argument. *Id.* at 1004-1006. However, the language in *Kavanaugh* as to readings is *dicta*, and the actual holding was that the phrase "no bill shall become a law" preceding the presiding officer's

The delegates to the 1891 Constitutional Convention were well aware of and studied carefully the constitutions and their constructions in other states. *See, e.g.*, E. Polk Johnson, *Official Report of the Proceedings and Debates in the Convention to Adopt, Amend, or Change the Constitution of the State of Kentucky*, Vol. 3, at pgs. 3977 (1891) (hereinafter "Debates") (reference by Delegate Moore to constitutional provisions in Missouri); 4004 (reference by Delegate McDermott, a member of the committee that proposed the identical language utilized in Section 56, to constitutional provisions in Missouri); 4011 (reference by Delegate Carroll, another member of the committee that proposed the language utilized in Section 56, to constitutional provisions in other states, including Missouri); 4012 (reference by Delegate Straus, another member of the committee that proposed the language utilized in Section 56, to Missouri's constitutional provisions). It is therefore reasonable to presume that the delegates were not only aware of, but likely endorsed, the construction of identical language that had been adopted and published in a neighboring state. In *Gaines v. O'Connell*, the Court said that the general proposition that "all the provisions of the Constitution are mandatory . . . is subject to the qualification, just as often declared, that they are not to be so regarded if by express language or necessary implication a different intention is manifest." 305 Ky. 397, 400, 204 S.W.2d 425, 427 (1947). In this case, the necessary implication from the plain language utilized in both Sections 46 and 56 is that the readings clauses are directory, which is manifest from the fact that ***only select portions of those sections*** are preceded or encompassed by the clause "no bill shall become a law."

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signature requirement in Section 56 necessitated a finding that the bill was invalid when not signed. The questions of whether a constitutional provision that is not preceded by this phase and that relates to the General Assembly's own parliamentary obligations is directory or mandatory, and whether a waiver of the requirement invalidates a bill or not, are matters of first impression before this court. The numerous authorities cited demonstrate there is a clear distinction between requirements that are preceded by this phrase and ones that are not.

To be sure, the constitutional framers rejected one delegate's amendment seeking to remove the "no bill shall become a law" language from Section 56 for fear that it would effectively vest a veto power in the presiding officers. *See* Debates, Vol. 4, pg. 5283 (March 31, 1891) (Mr. Montgomery) ("He would have it in his power, by a mere refusal to sign a bill, to prevent it from becoming a law at all, because the language is emphatic that no bill shall become a law unless it is signed by the Speaker of both Houses."). To read these sections in any other way would have the effect of nullifying the use of the "no bill shall become a law" language expressly inserted by the framers into selective portions of those sections. *See Runyon v. Smith*, 308 Ky. 73, 75, 212 S.W.2d 521, 522 (1948) ("That no one provision of the Constitution is to be separated from all others and considered alone is an established rule of constitutional construction.").

The use of "directory" clauses in these sections of the constitution by the framers is also consistent with Section 39, which allows for the Legislature to determine and ***enforce*** its own rules, and is consistent with fundamental principles of parliamentary law. 67A C.J.S. Parliamentary Law, § 1 ("It is a fundamental principle that democratic bodies operate through rules and procedures known as 'parliamentary law.'"). Many of the parliamentary rules that govern legislative bodies are directory. *See Bd. of Trustees of Judicial Form Ret. Sys. v. Attorney Gen. of Com.*, 132 S.W.3d 770, 777 (Ky. 2003) ("[T]he legislature has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure, and violations of such rules are not grounds for the voiding of legislation.") (internal quotation omitted). "This is a power that is inherent in every public and private body, and mere parliamentary rules are, of course, not designed to be and are not binding upon any person or persons except the members of the body that adopts them; and they may be amended, suspended, or repealed at the pleasure of the body, or in any manner that it has prescribed for

this purpose." *Montenegro-Riehm Music Co. v. Bd. of Educ. of Louisville*, 147 Ky. 720, 145 S.W. 740, 742-43 (1912).

The delegates writing Kentucky's constitution had a deep understanding of the purpose, powers, and nature of legislative bodies. *See* Debates, Vol. 3, at 4305 (Delegate Beckner stating "Our system of government provides for the rule of the majority. A majority of people at home elect, and a majority of their representatives here should rule."); at 4016 (Delegate Bullitt stating "[N]othing ought to go before the Legislature except Legislative questions; and the Legislature ought to be able to cope with every Legislative question that goes before the Legislature."); at 3871-72 (various delegates discussing implicit parliamentary powers of legislature in relation to committees); Vol. 4, at 5908-5910 (various delegates discussing interplay between constitutional provisions and parliamentary law). As rules designed to govern parliamentary procedure, and not substantive law, it is reasonable to presume that the framers understood exactly what they were doing when they wrote directory clauses into the provisions of Sections 46 and 56.

Recognizing that some of the clauses in Sections 46 and 56 are directory does not in any way defeat their substantial purpose. The clauses continue to carry out their purpose because they serve as nonrepealable rules of procedure for the Legislature that are enforceable by the members of that body. *See, e.g., Mason's Manual of Legislative Procedure*, National Conference of State Legislatures (2010 ed.), sec. 149 ("The decision of the presiding officer on points of order may always be questioned by the body on appeal and the question decided by the body itself."); sec. 240 ("It is the duty of the presiding officer to enforce the rules and orders of the body . . . . It is also the right of every member who notices a breach of order or of a rule to insist upon its enforcement."); Senate Rule 19 ("Any pending bill, resolution,

motion or report shall be read by the Clerk upon the demand of any Senator . . . .").[3] This construction serves to harmonize these sections with sections 27, 28, and 39, which recognize and protect the Legislature's role as a "separate body of magistracy." KY. CONST. § 27.

At no point did any member of the General Assembly attempt to exercise their rights, pursuant to Sections 46 or 56 or pursuant to the rules of their own bodies, ***to raise a point of order or request that any readings be carried out in any manner other than by the long standing practice of the body.*** Thus, the Appellees arguments that their interpretation is needed to "prevent 'hasty' legislation and to prohibit any bill from being passed in a single day," was at all times in the hands of the members, but ***not one of them*** chose to make any attempt to exercise those rights. "Most rights, of course, constitutional rights included, may be waived . . . ." *Com. v. Simmons*, 394 S.W.3d 903, 907 (Ky. 2013) (discussing waiver of right to jury trial). When the plain language of Sections 46 and 56 are construed, together with their purpose and contemporaneous constructions, and in harmony with Sections 27, 28 and 39, it is clear that the reading clauses in Sections 46 and 56 are directory. *See, e.g., Stovall v. Gartrell*, 332 S.W.2d 256, 266 (Ky. App. 1960) (holding that compliance with mandatory provision of Section 50 cured preliminary procedural defect). Further, the right to insist on compliance with these directory provisions of the constitution was vested with the members of the Legislature, who waived those rights in this case by not asserting them in any way.

IV. SB 151 DID NOT VIOLATE THE THREE READINGS CLAUSE OF SECTION 46 BECAUSE AMENDING A BILL DOES NOT NECESSITATE FURTHER READINGS

The trial court, in ruling that the passage of SB 151 violated the three readings clause of Section 46 of the Kentucky Constitution, held in pertinent part that:

[3] Available online at: http://www.lrc.ky.gov/senate/SenateRules2018.pdf (last accessed on May 22, 2018).

> [t]he wholesale changes in SB 151 rendered the first three readings in the Senate and two readings before the House meaningless.[4] Reliance on those previous readings would have led the legislators to believe that they voted on a bill for the acquisition of wastewater services.[5] 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.

Order, p.22.

Consequently, the Court found 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," and the failure to do so violated the three readings clause of Section 46. Order, p.23.

The trial court's interpretation of Section 46 is flawed for two reasons: (a) when read in the context of the entire constitution, Section 46 does not require additional readings after a bill has been amended, even if the amendments do not relate to the bill's original subject matter; and (b) the 1891 debates regarding the three readings clause confirm that bills are not required to be read three times after amendments are adopted.

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[4] There is no question that SB 151 received three readings in each chamber. The only issue before this court is whether the bill required additional readings after being amended by HCS 1. Order, pgs. 6 and 20.

[5] The trial court's concern that legislators might be led "to believe that they voted on a bill for the acquisition of wastewater services," Order, pg. 24, is not a reasonable interpretation of the facts or the method utilized by the General Assembly in implementing the three readings clause of Section 46. Both the House and the Senate engaged in several hours of debate discussing the subject of the amendments being considered to SB 151, and then subsequently adopted a title amendment that reflected the subject matter of SB 151, as enacted. This procedure was in conformity with Rule 60 of both the House and Senate rules adopted for the 2018 Regular Session of the General Assembly, which allowed for and provided ample notification that the committee amendment proposed and ultimately adopted by both houses changed the subject of SB 151, as originally filed.

A. Section 46 Does Not Require Additional Readings After Amendments Are Adopted

The trial court first fails to address how Section 47 of the Kentucky Constitution relates to and informs our understanding of Section 46. Section 47 states as follows:

> All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose amendments thereto: Provided, No new matter shall be introduced, under color of amendment, which does not relate to raising revenue.

Section 47 makes a clear distinction between bills and amendments and further, prohibits in the revenue raising process any amendments unrelated to the original subject. This constitutional provision has direct implications for interpretation of Section 46 to the instant case, as both Sections 46 and 47 are unamended and in their original form as drafted in the 1891 constitutional convention. By implication, for any non-revenue raising legislation, new matters may be introduced, under color of amendment, which may be unrelated to the original subject of the bill.

In a prior controversy regarding the particular residency and eligibility of a General Assembly candidate, the Kentucky Supreme Court's predecessor court interpreted and applied Sections 31, 32, and 33 of the Constitution. *Grantz v. Grauman*, 302 S.W.2d 364 (Ky.1957). The Court held that an "important rule is that in construing one section of a Constitution a court should not isolate it from other sections, but all the sections bearing on any particular subject should be brought into consideration and be so interpreted as to effectuate the whole purpose of the Constitution. (Citation omitted). Thus sections 31, 32 and 33 should be considered together when we interpret § 32." *Id.* at 366. Similarly, it is an accepted principle of statutory interpretation that "[w]here particular language is used in one section of a statute, but omitted in another section of the same statute, it is presumed that the legislature acted intentionally and purposefully in the disparate inclusion or exclusion." *Com. v. McBride*, 281 S.W.3d 799, 806

(Ky. 2009). This principle of *expressio unius est exclusion alterius* is equally applicable to constitutional interpretation. ("For purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time." *State ex rel. O'Connell v. Slavin*, 75 Wash. 2d 554, 452 P.2d 943 (1969).

Consequently, reading Sections 46 and 47 in tandem, makes it clear that the delegates to the constitutional convention imposed the prohibition on unrelated amendments specifically to revenue raising bills only. Consistent with this interpretation, Rule 60 of both the House and Senate rules adopted for the 2018 Regular Session of the General Assembly allowed for title amendments that change the subject of legislation: "A proposal to amend the title of a bill shall be by separate title amendment. The question of adoption of an offered title amendment for a bill shall be presented to the body immediately after adoption of the bill."[6] Such a clearly articulated distinction between a bill and an amendment to a bill in Section 47 informs our understanding of what is required in the three readings clause of Section 46 – i.e., Section 46 does not require that amendments to bills be read. Appellees ask this court to add to Section 46 of the Constitution words that are in Section 47 relating to the subject of amendments. However, if the constitutional delegates wanted to limit the scope of amendments to all legislation, they clearly knew how to do so as demonstrated by the language used in Section 47.

Additionally, prior to adoption of Kentucky's 1891 Constitution, other states had adopted language in their constitutions which may be characterized as "original purpose" rules. *See, e.g.*, PA. CONST. Art. 3, Sec. 1 ("No law shall be passed except by bill, and no bill shall be

[6]http://www.lrc.ky.gov/senate/SenateRules2018.pdf; and http://www.lrc.ky.gov/house/HouseRules2018.pdf. (Last accessed August 23, 2018.)

altered or amended, on its passage through either House, as to change its original purpose."); AL. CONST. Art. IV, Sec. 61 ("No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose") (note this provision was also in the 1875 version as AL. CONST. Art. IV, Sec. 19). Kentucky did adopt a version of an original purpose clause in Section 47, but only as it relates to revenue bills.

Further, both houses of the General Assembly had some version of an "original purpose" rule in place prior to and immediately after the 1891 Constitutional Convention. *See, e.g.*, 1889-90 Journal of the House of Representatives of the General Assembly, House Rules, Rule 28, adopted January 3, 1890 ("No motion or proposition on a subject different from that under consideration shall be admitted under color of an amendment."). The necessary implication is that Kentucky's constitutional delegates purposely did not codify a comprehensive original purpose rule for all bills into our constitution because they believed it to be a procedural matter better left to the discretion of the legislative bodies. It follows that Kentucky's Constitution allows for amendments, even amendments that change the original purpose of the bill, but that only the bill is required to be read on three days prior to passage.

B. The 1891 Constitutional Debates Confirm That Section 46 Does Not Require Bills To Be Re-Read After Amendments Are Adopted

Construing Section 46 to only require readings to bills as originally filed does not, as the trial court contends, render the readings given to SB 151 "meaningless." Rather, as noted in the debates, these readings served to notify both legislators and the public that SB 151 was moving through the legislative process and ultimately was being "considered for final passage." KY. CONST. § 46. It is this notice, coupled with the reporting and printing requirements of

Section 46, that Kentucky's constitutional framers believed would ensure a "degree of consideration" for each bill prior to final passage.[7]

The debates confirm the "degree of consideration" envisioned and mandated in Section 46 did not include reading of amendments, even those that substantially altered the original purpose of a bill, or reading of the bill after those amendments were adopted. One constitutional delegate, arguing in favor of a printing requirement for amendments, stated the following:

> The gentleman from Daveiss this morning, in the interest of economy, struck out the portion of section [46] **which requires all amendments to be printed with the bill.** I appreciate his motives in so doing, because my experience on this floor, as a member of the House during two sessions, has taught me that he is correct. **But do you all know it to be a fact, that an amendment proposed to a bill or section frequently destroys the original bill and kills it entirely, and presents through the amendment, a new bill? Now if it be important that we should have the original bills printed, might not it be very important to have an amendment printed, as much so as the original bill?**

Debates, Vol. 3, at 3872-73 (emphasis added). His plea for a constitutional requirement that amendments be printed was unsuccessful. The debates illustrate that the delegates were well aware of, but expressly rejected, additional constitutional restrictions for amendments.

Taken as a whole, the framers of our Constitution, ever mindful of abuses of the past, set out to manage the flow of legislation so that, at the end of the session, the people of

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[7] Constitutional Delegate Strauss: "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 session, without printing, and pushed through, to the great loss and detriment of the State. We thought, if the Legislature were confined entirely to the consideration of general measures, that they ought to give each general measure **that degree of consideration which would secure accuracy**, and we put this in to secure that consideration. Now, under our old Constitution, the reading of a bill for three consecutive days was evaded. It was waived, by unanimous consent, and bills of every character were put through without **any sort of consideration**, frequently, without referring them to a Committee. To correct that evil, this section [46] was drawn[.]" (Emphasis added). *See* Debates, Vol. 3, at 3858.

Kentucky knew what laws had been passed, and, by a recorded vote, who had passed it upon them. The topic of titles and individual subject matters of legislation (other than revenue bills) was left to Section 51 of our Constitution,[8] and that section does not relate to bills in process – it relates to enacted laws. Only after the General Assembly had reached the point of passing a law does the constitution mention the word "title." SB 151 was read, reported and voted in accordance with Section 46, and the enacted law complies with Section 51.

V. SB 151 IS NOT AN APPROPRIATION OR DEBT CREATING BILL AND ITS PASSAGE BY THE GENERAL ASSEMBLY DID NOT VIOLATE SECTION 46 OF THE KENTUCKY CONSTITUTION

The Appellees did not include an allegation in their Complaint that SB 151 violated the appropriation or debt clause of Section 46. Rather, the trial court raised the issue *sua sponte* to the parties at an initial hearing and in the court's April 20, 2018 Order establishing the briefing schedule in the case. Following the court's presentation of the issue, the Appellees argued, and the trial court ultimately agreed, that although SB 151 received forty-nine (49) votes in the House, its passage nonetheless violated Section 46 because it was both an appropriation bill and a debt creating bill.

However, as with any pension bill, SB 151 was nothing more than a general, substantive bill to establish or amend the framework of the pension plans provided to public employees and teachers. SB 151 did not fund the plans with a single dollar, and without further action by the General Assembly in the form of the biennial branch budget bills, the pension funds contain only non-public moneys – employee contributions and investment returns on those contributions. Therefore, SB 151 is not an appropriation bill under Section 46.

[8] "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length." KY. Const. § 51.

Additionally, while the pension plans may establish a framework that requires funding, even future funding, this is not the type of debt – the actual borrowing of money – that is contemplated by Sections 46, 49, and 50. Therefore, SB 151 is also not a debt creating bill.

A. Only An Appropriation Or Debt Creating Bill Requires A Majority Vote Of The Members Elected To Each House

Section 46 of the Constitution provides, "No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each House, and a majority of the members voting." KY. CONST. § 46. In the case of one hundred (100) sitting members of the House of Representatives, any general, substantive bill requires at least forty (40) votes of the members of the House, and a majority of those voting. There is no dispute that SB 151 passed in the House by a vote of 49-46. Therefore, the vote on SB 151 satisfied the vote requirement for passage of any general, substantive bill in the House under Section 46.

Section 46 also provides, "Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each House." *Id.* Thus, on its face, and reading the two clauses together, Section 46 states that only those acts for the appropriation of money or the creation of debt require this heightened vote requirement. SB 151 neither appropriates money nor creates debt, and therefore, the General Assembly's passage of the bill did not require a vote of the majority of all the members elected to the House. Each argument will be discussed in turn.

B. SB 151 Is Not An Appropriation Bill

The heightened vote requirement in Section 46 does not apply to SB 151 because SB 151 is not an appropriation bill. In order to determine whether any given bill meets the appropriation clause standard in Section 46, it is important to determine exactly what an appropriation is, and then decide whether the bill meets the standard. The determination is

aided by reference to three sources of law: (1) the constitutional debates; (2) language from the limited Kentucky law defining the term; and (3) language in analogous court opinions from other jurisdictions. Each of these sources support a finding that the term "appropriation" is intended to be a narrowly defined term embracing only those bills that actually spend money from the state treasury. SB 151 does not meet this standard and is not an appropriation bill.

1. The Constitutional Delegates Intended Appropriation To Be Narrowly Construed

SB 151 is not an appropriation bill as intended by either Section 40 of the 1850 Constitution or its current successor, Section 46 of the 1891 Constitution. Language restricting the General Assembly's authority to appropriate money first appeared in the 1850 Constitution. This first version of the restriction specifically included a reference to a dollar amount, with the final language adopted being as follows:

> The General Assembly shall have no power to pass any act, or resolution, for the appropriation of any money, or the creation of any debt, *exceeding the sum of one hundred dollars*, at any one time, unless the same, on its final passage, shall be voted for by a majority of all the members then elected to each branch of the General Assembly; and the yeas and nays thereon entered on the journal.

KY. CONST. Art. II, Sec. 40 (1850) (emphasis added). This section was adopted without much debate; however, the limited debate also specifically referred to monetary sums in reference to the section and to an intent to protect the treasury.[9] This limited debate suggests the delegates were primarily concerned with bills passed by the General Assembly that actually spent money out of the treasury.

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[9] "I do not think . . . that the convention could throw a stronger guard around the treasury. It is true we have restricted the legislature in their power to contact debts; but I consider that no restriction in relation to an appropriation of money. They can at one session of the legislature . . . make an appropriation exceeding the amount of the revenue $1,000,000. If the amendment is adopted, the people will know who has voted for these appropriations." R. Sutton, *Report of the Debates and Proceedings of the Convention for the Revision of the State of Kentucky*, 1031 (1849). It is also significant that the first proposed version of the section included a prohibition "for the payment of money in any way whatever." *Id.* at 1030. This shows that the delegates both specifically contemplated appropriations as the actual paying over of state dollars and that they chose a more narrow formulation of the term in the adopted version.

The language relating to appropriations bills adopted in Section 46 of the 1891 Constitution was based on the 1850 Constitution. The limited debate over the section largely centered on whether the majority vote requirement should be extended to also encompass general bills that affect all of the Commonwealth's people. *See, e.g.*, Debates, Vol. 3, at 3862-3863 (Delegate Spalding discussing contention that appropriation bills are no more important than those laws affecting life, liberty, and property). In that discussion, Delegate Spalding made repeated references to "an appropriation of $25 or $50" or "the paltry appropriation of $50, or $100, or $1,000, or $5,000" being implicated by the section, "but when you pass a law affecting life, or liberty, or property . . . it may work a wrong that will last, perhaps, for generations; and it is vastly more important that we have a full vote upon that than upon the other matters referred to." *Id.*

The delegates rejected this more expansive heightened vote requirement for general bills that affect all of the Commonwealth's people as urged by Delegate Spalding – indicating the delegates understood the section as finally adopted would apply only to the narrow class of bills that actually appropriate specific sums of money out of the treasury.

SB 151 is a general bill relating to pensions, and the provisions of the bill do not direct any specific sum of public money to be spent out of the treasury on any item. Those specific sums of public money were appropriated by the General Assembly in 2018 House Bill 200, the Executive Branch Budget Bill, and in the other budget bills that have been adopted since creation of the pension systems. Those budget bills contain appropriations as contemplated by the delegates to the 1849 and 1891 conventions, SB 151 does not. The trial court's more expansive reading of Section 46 to encompass any bill that may eventually lead to the expenditure of money, even if remotely, is not consistent with the original intent in the Kentucky Constitution and should be rejected.

2. Kentucky Law Defines Appropriation Narrowly

There is limited Kentucky law defining the term appropriation for the purposes of Section 46. However, the law that is available reflects a long-held judicial and legislative definition of the term that is consistent with the narrow understanding and intent of the delegates discussed above. SB 151 is not an appropriation bill under Kentucky law.

For example, in 1923, the Court of Appeals defined "appropriation" as "the setting apart of a particular sum of money for a specific purpose." *Davis v. Steward*, 198 Ky. 248, 248 S.W. 531, 532 (1923). Similarly, the General Assembly has long defined "appropriation" as "an authorization by the General Assembly to expend a sum of money not in excess of the sum specified, for the purposes specified in the authorization and under the procedure prescribed in [KRS Chapter 48.]" KRS 48.010(3)(a).[10] Further, the General Assembly has enacted the same definition to be used for all general statutory construction purposes. *See* KRS 446.010(51). Under these definitions, there is no serious argument that SB 151 contains an immediate appropriation. No money is set aside and no authorization is given to expend money up to some specified sum. In short, SB 151 bears no resemblance to a branch budget bill or any other act providing for an immediate appropriation of public money.

Ignoring these plain definitions of an appropriation, the trial court relied primarily on *dicta* from a single case, *Fletcher v. Commonwealth*, 163 S.W.3d 852, 865 (Ky. 2005), to find that SB 151 is an appropriation bill. However, the actual holding of *Fletcher* was simply that a Governor has very limited authority to appropriate money even when the General Assembly has failed to enact a budget. In *dicta*, this Court stated: "Where the General Assembly has

[10] The definition is KRS 48.010(3)(a) was created by 1982 Ky. Acts ch. 450, sec. 1. However, the definition has a long history in Kentucky statutory law, and KRS 48.010 was created at the same time the predecessor, KRS 45.010, was repealed. KRS 45.010 was originally converted to KRS from Carroll's Code in 1942 Ky. Acts. ch. 208 § 1. The original definition dates to at least 1934 Ky. Acts. ch. 25, Art. I, sec. 2, and is nearly identical as the current definition.

mandated that specific expenditures be made on a continuing basis, or has authorized a bonded indebtedness which must be paid, such is, in fact, an appropriation." *Fletcher*, 163 S.W.3d at 865. Following that statement, this Court then listed some examples of statutes that mandate appropriations even in the absence of a budget bill, and one of the examples given is the employer contribution rate provided for in KRS 61.565(1).[11] The trial court gave great significance to this example and found that since several sections of SB 151 "specifically mandate that payments or contributions be made" SB 151 must be an appropriation bill.

There are several flaws in the trial court's simple reliance on this Court's *dicta* in *Fletcher*. First, this Court in *Fletcher* did not hold KRS 61.565(1) was part of an appropriation bill that required a majority vote under Section 46. Instead, this Court simply noted the section was the type of mandate that could be funded in the absence of an enacted budget. This is an important distinction because the former concerns a limitation placed on the legislative branch of government to legislate, while the latter concerns the breadth of the powers given to the Governor to spend the Commonwealth's funds when the General Assembly does not act.

Second, the trial court ignored the actual appropriations relative to each of the sections in SB 151 it erroneously concluded were appropriations. *See, e.g.*, 2018 House Bill 200, Part IV, 5. Employer Retirement Contribution Rates, at 167 ("HB 200" or "Budget") (available online at: http://www.lrc.ky.gov/recorddocuments/bill/18RS/HB200/bill.pdf) (last accessed August 22, 2018) (setting the appropriation to the KERS at 83.43 percent of payroll and to the SPRS at 146.28 percent of payroll). Indeed, the Executive Branch Budget Bill includes the specific sums in dollars that are appropriated for the specific purpose of each of the SB 151 provisions – unless those sections are not yet effective and will be funded in future budgets.

[11] It is worth noting that in two of the four examples given, the term "appropriation" is specifically stated in the statutes. *See* KRS 18A.015 and 45A.275. This distinguishes the provisions in SB 151 from these examples.

Third, the trial court failed to appreciate other language in *Fletcher*, as well as past General Assembly action that demonstrates the simple statutory scheme for retirement does not constitute an appropriation. For example, this Court also stated in *Fletcher*: "However, the mere existence of a statute that can be implemented only if funded does not mandate an appropriation. '[T]he General Assembly is permitted through the reduction or elimination of an appropriation, to effectively eliminate the efficacy of existing statutes ....'" *Fletcher*, 163 S.W.3d at 865. This concept is demonstrated by the General Assembly's routine and regular amendment to the employer contribution rates in each successive biennial budget, which effectively shows that the appropriation – the actual public money that is spent on the specific purpose – is created by the budget bill, not by the statutory framework that establishes the pension system and the concept of the employer contribution rate funding mechanism. *See* Historical Contribution Rates, attached as Appendix III.[12]

This point is reinforced by this Court's holding in *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995). There, the Board of Trustees brought a declaratory judgment action against the Governor and other state officials, and argued the retirement system members had a contractual right to retirement funding at a level set by the Board's actuary because of the statutory scheme in KRS 61.565. The trial court agreed and granted summary judgment to the Board. However, this Court reversed and held the General Assembly has the authority to adjust the level of appropriations to the retirement systems via the budget bills. Notably, this Court stated: "[T]he duty to oversee the budget process requires

[12] The Appellees may argue the routine suspension of the effect of KRS 61.565 by the General Assembly demonstrates that this section is an appropriation in and of itself. However, this argument is flawed because neither that section, nor any other cited by the trial court, are sufficient to calculate a specific sum of money without the amount of total annual compensation that is part and parcel of the actual appropriations to each of the Commonwealth's agencies and departments in the biennial budget bills.

an overview of all budgetary expenditures, and the power to adjust *non-mandatory funding* to balance the budget." *Id.* at 714 (emphasis added).

Further, a perfect example of why the framework is not an appropriation is the result when employees are furloughed and their pay is eliminated for those days they do not work. In this circumstance, there is no pay to the employee, and thus no employer contributions to the retirement systems for that period of work. The statutory framework of the pension system stays the same; however, the actual appropriation in the budget bill that is based on an employer contribution as a percent of pay automatically is reduced or eliminated for the period of missed work. Thus, the appropriation is clearly seen to be the budget bill, not the pension system framework. In other words, SB 151 and all of its sections are the unfunded statute, and the enacted budget—HB 200 in the present case—is the appropriation.[13]

Finally, it is erroneous to presume that SB 151, or any other pension bill, is an appropriation simply because it may create a framework for authorizing current or future expenditures of public money during the biennial budget process. One distinguishing feature of the Kentucky constitution is that our Legislature is required to enact balanced budgets. *Fletcher*, 163 S.W.3d at 856 (citing to sections 49, 50, and 171). This obligation has resulted in the enactment of KRS Chapter 48, which "is a comprehensive scheme that describes the process for preparing and enacting a 'budget bill' by which the revenues of the Commonwealth are appropriated for the operation of the three departments of government during the ensuing biennium." *Id.* When read with this constitutional framework in mind, it is clear that the

[13] This is further reinforced by imagining the very situation considered in *Fletcher* following that opinion. *Fletcher* makes clear that only federal and state constitutional and statutory mandates are permitted to be funded in the absence of a budget. In such a circumstance, non-essential governmental workers will not be permitted to report to work because there will be no budgetary allotments to pay their salaries. In that circumstance, just as in the furlough example, the retirement contributions on those employees will not be paid because there is no budget – no appropriation – to pay them.

provisions in SB 151 merely serve to inform the statutory scheme in KRS Chapter 48 for the biennial allotment of appropriations. *See* KRS 41.110 ("No public money shall be withdrawn from the Treasury . . . unless it has been appropriated by the General Assembly . . . and has been allotted as provided in KRS 48.010 to 48.800"). To find otherwise would be to say a past General Assembly can bind a future General Assembly to certain and particular amounts of appropriations. This is clearly contrary to long standing Kentucky law. *See, e.g., McGuffey v. Hall*, 557 S.W.2d 401, 409 (Ky. 1977) ("No agency of the state, including its legislature, can place an obligation against the general funds otherwise available for appropriation and expenditure by a future legislature.").

SB 151 does not in any way set apart a specific sum of money to be spent out of the treasury for a specific purpose. It may provide the framework, but the General Assembly is still required to fund the framework with an actual appropriation of funds. Simply put, SB 151 is not an appropriation bill under existing Kentucky law.[14]

3. Other Jurisdictions Similarly Define An Appropriation Bill Narrowly

Case law from other jurisdictions also supports the conclusion that SB 151 is not an appropriation bill. There are numerous cases that define appropriation with similar language as that used by Kentucky's highest court in *Davis*, 248 S.W. at 532. For example, the Nevada Supreme Court has very recently held a bill establishing a program for education savings accounts was not an appropriation bill. *See Schwartz v. Lopez*, 382 P.3d 886 (Nev. 2016). In *Schwartz*, the court stated: "An 'appropriation' is 'the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of

[14] In an analogous circumstance involving the Kentucky Education Reform Act (KERA), the Attorney General opined in 1990 that the proposed bill did not contain a provision for the appropriation of money or the creation of debt, even though it contained a mechanism for funding broad and extensive changes to Kentucky's education system. *See* OAG 90-29.

the government are authorized to use that money, and no more, for that object, and no other.'" *Id.* at 900 (citation omitted). The court further noted that while it could be argued the bill in question impliedly appropriates funds for education savings accounts, the court nonetheless held, in part, that because there was no maximum sum of money that could be utilized to fund the accounts, the bill could not be an appropriation. *Id.* at 901. This is analogous to the present case, as SB 151 creates or modifies the pension plans, but there is no setting aside from public revenue of a certain sum of money that any executive officer is authorized to use for the pension system. That is accomplished by the appropriation in HB 200, the budget bill.

More significantly, as in Kentucky, a corollary to the appropriation power in many states is the power given to the executive to line item veto appropriation measures. Thus cases construing the term appropriation for the purpose of a line item veto are illustrative to the meaning of appropriation under Section 46. In this regard, a direct analogy to the instant case is *Bengzon v. Secretary of Justice of Philippine Islands*, 299 U.S. 410 (1937). There, the United States Supreme Court considered a partial veto of the Retirement Gratuity Law by the Governor-General of the Philippines. The bill considered by the Court was entitled, in relevant part, "An Act to provide for the payment of retirement gratuities to officers and employees of the Insular Government retired from the service as a result of the reorganization or reduction of personnel thereof . . ." *Id.* at 411. The Governor-General approved the act but rejected section 7, which provided a retirement gratuity to certain Justices of the Peace. The Organic Act of the Philippines granted the Governor-General general veto power, but also provided "'[t]he Governor General shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object.'" *Id.* at 412-13. Thus, the Court stated the question for consideration was whether the bill was an appropriation bill or not.

The Court specifically distinguished an appropriation bill from an act of general legislation and stated that "[a]n appropriation bill is one the primary and specific aim of which is to make appropriations of money from the public treasury. To say otherwise would be to confuse an appropriation bill proposing sundry appropriations of money with a bill proposing sundry provisions of general law and carrying an appropriation as an incident." *Id.* at 413. The Court concluded that section 7, along with the other distinct portions of the retirement bill, are distinct parts of an act of "general legislation." *Id.* at 414. Thus, the Court held that the Governor-General was without power to separately veto section 7 of the Retirement Gratuities Act. *Id.* at 416. The holding in *Bengzon* is not an isolated case, as numerous other jurisdictions have found similar general bills to not be appropriation bills subject to a line item veto. *See, e.g., Harbor v. Keukmejian*, 742 P.2d 1290, 1295-96 (Cal. 1987) ("Although as is common with countless other measures, the direction contained therein will require the expenditure of funds from the treasury, this does not transform a substantive measure to an item of appropriation."); *Colorado General Assembly v. Owens*, 136 P.3d 262, 273-74 (Colo. 2006) (holding line item veto of portion of substantive bill containing an appropriation invalid and stating "[t]o interpret the presence of an appropriation clause in a substantive bill as an 'appropriations bill' subject to the item veto power would render the distinction between the two veto powers nugatory."); *Caldwell v. Meskill*, 320 A.2d 788, 792 (Conn. 1973) (distinguishing between appropriation items and general legislation and stating "[l]anguage merely imposing restrictions or conditions on the expenditure of money is not subject to the veto power, since it is not in itself a 'distinctly specified sum.'").

As the Supreme Court held in regard to the analogous retirement legislation in *Bengzon*, SB 151 is merely a general bill that, at best, requires future appropriations to fund the framework created by the general bill. A general bill is not an appropriation bill, and there is

no authority to suggest that Governor Bevin could have line item vetoed any parts of SB 151, just as the Court held was not permissible in *Bengzon*. To find otherwise, and to adopt the trial court's expansive finding that SB 151 is an appropriation bill, would greatly expand the line item veto power to consume nearly all legislation. That is not the intent of Sections 46 and 88 of the Kentucky Constitution.

SB 151 does not contain any appropriation, and the vote of 49-46 by which it was passed in the House did not violate the appropriation clause of Section 46.[15]

C. SB 151 Does Not Create A Debt

The trial court also ruled that SB 151 contained provisions that created a "debt" sufficient to trigger the heightened vote requirements of Section 46. *See* Order, pg. 26. In so ruling, the trial court failed to consider related sections of the constitution in construing the meaning of "debt" in that section. Those sections and court opinions construing them demonstrate that SB 151 is not a debt creating bill.

The scope of "debt" intended to be included within the vote restrictions of Section 46 cannot be determined in a vacuum, but must be informed by and harmonized with the use of that term in related sections. *Runyon v. Smith*, 308 Ky. 73, 75, 212 S.W.2d 521, 522 (1948) ("That no one provision of the Constitution is to be separated from all others and considered alone is an established rule of constitutional construction."). The scope of the term "debt" as used in sections 49 and 50 is limited to instances where the Legislature borrows money to pay "casual deficits or failures in the revenue." *See State Budget Comm'n v. Lebus*, 244 Ky. 700, 51 S.W.2d 965, 969 (1932) ("The power to contract debts for and on behalf of the state is beyond the control of the Legislature, except by the means and in the manner provided in [Sections

[15] Perhaps nothing illustrates the point better than the fact that SB 2 of the 2013 Session, a bi-partisan pension reform bill, passed the House with only 55 votes. Under the theory of the Court below, that bill was unconstitutional as odd year sessions require a super majority to pass appropriation bills.

49 and 50 of the Kentucky constitution]."); *see also Stanley v. Townsend*, 170 Ky. 833, 186 S.W. 941, 945 (1916) ("There are but two ways by which the Legislature, under the Constitution, is authorized to raise money. One is by providing a revenue law under the powers given by section 171 of the Constitution, and the other is by borrowing money under the provisions of sections 49 and 50 of that instrument").

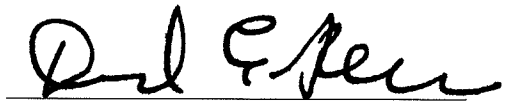
When these related constitutional provisions are read in harmony, it is apparent that the "debt" referred to in Section 46 is only that debt created when the Legislature borrows money as provided in Sections 49 and 50. *Lebus*, 51 S.W.2d at 969 ("A contingent liability is not within the meaning of the Constitution fixing *debt* limit." (Emphasis in original)). While it could be argued the General Assembly has, in the past, borrowed money to fund the pension systems, via the issuance of bonds, nothing in SB 151 borrows or even authorizes the borrowing of any money. Accordingly, the trial court erred when it ruled that SB 151 created a "debt" sufficient to trigger the heightened vote requirements of Section 46.

CONCLUSION

The implications of the decision of the Court below are devastating for the day to day operations of the General Assembly. Under a vaguely enunciated standard, it is impossible to judge what level of amendment to a bill will reset the readings clock of Section 46. Expansion of what constitutes an appropriation bill under Section 46 renders odd year sessions all but moot while greatly expanding the power of the Executive Branch through line item vetoes. Under this standard, pension reform cannot occur until 2020 at the earliest. For the reasons stated above the decision of the Franklin Circuit Court must be reversed.

Dated: August 27, 2018

Respectfully submitted,



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