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

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

v. **On Appeal From Franklin Circuit Court, Div. I**
Nos. 18-CI-379, 18-CI-414

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

REPLY BRIEF OF APPELLANT GOVERNOR BEVIN

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served on September 14, 2018 by first-class mail to Hon. Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Phillip J. Shepherd, Judge, 222 St. Clair Street, Frankfort, KY 40601; Hon. Andy Beshear, J. Michael Brown, La Tasha Buckner, S. Travis Mayo, Marc G. Farris, & Samuel Flynn, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601 (also served via email); Jeffrey Walther & Victoria Dickson, Walther, Gay & Mack, 163 E. Main St., Suite 200, Lexington, KY 40588 (also served via email); David Leightty & Alison Messex, Priddy, Cutler, Naake, Meade, 2303 River Road, Suite 300, Louisville, KY 40206 (also served via email); David Fleenor & Vaughn Murphy, Office of the Senate President, Capitol Annex, Room 236, Frankfort, KY 40601 (also served via email); Eric Lycan, Office of the Speaker, Capitol Annex, Room 332, Frankfort, KY 40601 (also served via email); Mark Blackwell, Katherine Rupinen, & Joseph Bowman, Kentucky Retirement Systems, 1260 Louisville Road, Frankfort, KY 40601 (also served via email); & Robert B. Barnes, Teachers' Retirement System, 479 Versailles Road, Frankfort, KY 40601 (also served via email). The certified record was not withdrawn.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

There are two remarkable aspects to the Attorney General's Brief. The first is his approach to the meaning of the inviolable contract, which is the single most important issue in this case. Despite the fact that he has been loudly proclaiming for months that SB 151 violates the inviolable contract, his Brief practically begs the Court not to address that issue.[1] And then, almost as an aside, he argues—for the first time in this litigation—that the California Rule is the correct interpretation of the inviolable contract. [*See* Resp. Br. at 54]. But he never explains *why* that is so. In other words, his argument is based on nothing more than his own *ipse dixit* with no supporting rationale whatsoever. He completely ignores the fact that there is a competing interpretation—the Prevailing Rule—not to mention the fact that this rule has been followed over and over by courts across the country in recent years and that states have been running away from the California Rule as quickly as they can. He cites no authority in support of the California Rule and does not even attempt to explain why the cases in the several states that have adopted the Prevailing Rule are wrong. Indeed, he does not so much as acknowledge the existence of those cases, much less attempt to refute them. This is all very telling. The reason he has avoided any actual discussion of the issue is obvious: he knows that any legitimate analysis of the two competing interpretations will show unequivocally that the Prevailing Rule is correct, and the California Rule is an unmitigated disaster.

The second remarkable aspect of the Attorney General's Brief is that it is essentially a bait-and-switch. The Attorney General has made a lot of noise over the last several months about the inviolable contract. But now that it has become obvious that the law does not

[1] This is in stark contrast to the position he took in the circuit court, where he clearly acknowledged that all issues could and should be decided by this Court. Specifically, he stated at the July 11 CR 59.05 hearing, in which the Governor asked the circuit court to rule on the inviolable contract issue, that "as both your Honor and counsel for the Governor have already noted, all issues will be in front of the Supreme Court." [VR 7/11/18; 2:19:39-46].

support him on that point, he has shifted his focus to challenging legislative procedures that have been used by the General Assembly for a century or more. Through this ill-advised tactic, the Attorney General is inviting this Court to create a constitutional crisis by declaring that the legislature's age-old process of passing committee substitute bills is actually unconstitutional. This invitation, if accepted, will upend the operation of the General Assembly and draw into question the validity of hundreds—if not thousands—of laws. For obvious reasons, the Court should avoid travelling down this path. Instead, the Court should focus its attention on the one and only legitimate legal question in this case: the meaning of the inviolable contract. Other than in the 1995 *Jones* case, this issue has never been directly addressed by a Kentucky court, and it is ripe for unambiguous clarification now. The General Assembly and the people of the Commonwealth deserve an answer. And the only legally justifiable answer is that the Prevailing Rule applies, meaning that accrued pension benefits are protected, but future accruals are not.

I. SB 151 does not impair the inviolable contract.

When it comes to the inviolable contract, the Attorney General's Brief leaves three critical points uncontested: (1) every provision in SB 151 is prospective only—not a single one is retroactive; (2) the California Rule is such an unmitigated disaster that even Governor Jerry Brown is urging the Rule's namesake state to abandon it;[2] and (3) in recent years, nearly every court that has considered what changes can be made to public pensions—including pensions that are subject to statutory protections essentially identical to our inviolable contract

[2] The Attorney General's Brief bizarrely contends that there is no such thing as the California Rule. [*See* Resp. Br. at 51]. Of course, the Brief then goes on to argue—without referring to it by name—that the California Rule should be adopted here. [*See* Resp. Br. at 54]. Regardless, anyone who is even casually acquainted with public pension law knows what the California Rule is. A simple Google search reveals that it is widely recognized.

statutes—has concluded that the Prevailing Rule applies, meaning that any change can be made as long as it is prospective only.

The failure to refute these points is fatal to the Attorney General's case. As explained in the Governor's Opening Brief, the Prevailing Rule is the only interpretation of the inviolable contract that makes sense. The Supreme Courts of Florida, Wisconsin, Oregon, and Michigan, as well as the Fifth Circuit, have all compellingly explained in recent opinions why the Prevailing Rule is the correct way to view public employees' rights to pension benefits. The Attorney General's Brief does not even mention those decisions, much less try to rebut their sound reasoning. And the reason why is obvious: there is nothing he can say. The rationale behind those decisions is logical, legally justifiable, fiscally responsible, and consistent with existing Kentucky case law. The California Rule, on the other hand, is so disastrous that even the California courts are running away from it, *see Marin Ass'n of Pub. Employees v. Marin Cnty. Employees' Ret. Ass'n*, 206 Cal. Rptr. 3d 365 (Cal. App. 2016) (review granted), and some states that previously adopted it have already abandoned it, *see Moro v. State of Oregon*, 351 P.3d 1, 37 (Or. 2015).

The Attorney General also does not deny that the Prevailing Rule is more consistent with Kentucky law than the California Rule is. He has no answer whatsoever to *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky. 1973)—indeed, he fails to say even a single word about the case—nor does he have any answer to the Governor's analysis of *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710 (Ky. 1995). Instead, the Attorney General simply regurgitates some quotes from *Jones* out of context and asserts—without any analysis whatsoever—that those quotes support his position. *Jones*, however, *refutes* the Attorney General. The Governor's Opening Brief—which contains a careful analysis of *Jones* rather than mere conclusory statements like the Attorney General's Brief—demonstrates that *Jones*

supports the application of the Prevailing Rule. Contrary to the Attorney General's argument, *Jones* does not hold that Kentucky employees are entitled to accrue for the duration of their employment whatever benefits were available on the day they were hired. [*See* Resp. Br. at 54]. Nothing in *Jones* supports that assertion. In fact, *Jones* is antithetical to the California Rule.

The Attorney General argues that the inviolable contract is formed when an employee accepts the offer of employment and starts working. [*See* Resp. Br. at 54]. He claims that when the contract is formed, the terms include the benefits that are then available, and those benefits are set in stone for all time and can never be reduced, even on a prospective basis. [*See id.*]. Of course, he cites no authority for this other than *Jones*. But *Jones* does not stand for that proposition. *Jones* says that the General Assembly cannot "reduce the benefits promised to participants [in the pension systems]." As explained in the Governor's Opening Brief, this quote actually supports the application of the Prevailing Rule instead of the California Rule. Benefits are not *promised* to anyone until they are accrued. This is the only logical answer. If future benefits were promised at the time of hiring—as the Attorney General believes—then the Commonwealth would never be able to terminate employees because doing so would amount to taking away promised benefits.

The better explanation is that pensions are like wages and salary—*i.e.*, an employee has a contractual right to be paid for work that he or she has already performed, but generally does not have a right to continue earning money at the same rate, or at any rate, in the future.[3] The general rule is that wages and salaries can always be changed on a prospective basis. The same

[3] *See, e.g., Baker v. Fletcher*, 204 S.W.3d 589, 598 (Ky. 2006) ("The parties concede that the General Assembly has the authority to adjust the salaries of its employees at any time. Included within that authority is the power to adjust annual increments. Therefore, even if the Appellants are correct that they had a right to the statutory five percent increment, the General Assembly had authority to adjust their pay to meet its fiscal objectives.").

should be true of pensions, which are nothing more than a form of deferred pay. *See, e.g.*, *Brosick v. Brosick*, 974 S.W.2d 498, 504 (Ky. App. 1998); *see also Moro*, 351 P.3d at 20. This is the only explanation that remotely makes sense.

Perhaps recognizing the overwhelming logic of the Prevailing Rule, the Attorney General makes no serious attempt to rebut the rationale for adopting that rule. Rather than address the Prevailing Rule head on, the Attorney General merely attempts to make glancing blows at it. As discussed above, he makes a misplaced attempt to argue that *Jones* supports the adoption of the California Rule. In addition, he points to the 2013 legislation that created a new hybrid cash balance plan for most public employees—but not teachers—who were hired after January 1, 2014. The Attorney General points out that this legislation provided that accrued benefits under the new plan would be protected, but that the General Assembly could make prospective changes to future benefits. *See* KRS 61.692(2)(a); 2013 Ky. Acts, ch. 120, § 70. Based on this provision, the Attorney General argues that the Prevailing Rule cannot be the correct interpretation of the inviolable contract because "[i]f the General Assembly already had the power to reduce or impair current employees [*sic*], it would have been unnecessary to pass a statute explicitly authorizing such changes for new employees." [Resp. Br. at 54 n.26]. But the Attorney General conveniently fails to mention that the 2013 legislation also provides that "[t]he provisions of this subsection shall not be construed to limit the General Assembly's authority to change any other benefit or right specified by KRS 61.510 to 61.705 [*i.e.*, the inviolable contract] . . . ." KRS 61.692(2)(c); 2013 Ky. Acts ch. 120, § 70. In other words, the statute itself contradicts the Attorney General's arguments. The General Assembly specifically provided that the provision allowing prospective changes for the new pension plan cannot be taken as an implication that the General Assembly lacks that same power with respect to the existing plans.

One might ask why the General Assembly would enact a statute that expressly allows for prospective changes to one pension plan while simultaneously providing that such a provision does not imply such authority is lacking for other plans. The answer is simple. Those provisions are belt-and-suspenders measures. The General Assembly believed that it had the authority—consistent with the Prevailing Rule—to make changes to any pension plan on a prospective basis, but it could not be sure how the courts would view the matter because no Kentucky court has ever directly and definitively stated what the inviolable contract means. Thus, when creating the new plan, the only logical and safe thing to do was to provide that it could be changed on a prospective basis, and to simultaneously state that such provision did not imply that the General Assembly lacked the authority to make prospective changes to the existing plans. This is exactly what the General Assembly did, and, when viewed in full context, it does not in any way undermine the conclusion that the Prevailing Rule is the correct interpretation of the inviolable contract.

The Attorney General also cites an unpublished Kentucky Court of Appeals opinion, *Baker v. Commonwealth*, No. 2005-CA-001588-MR, 2007 WL 3037718 (Ky. App. Oct. 19, 2007), although it is not clear why he believes that this case supports his position that the inviolable contract should be interpreted according to the California Rule. *Baker* involved a reduction in benefits to an individual who was *already retired. See id.* at *1. In other words, *Baker* involved a reduction in already-accrued benefits. This is impermissible even under the Prevailing Rule. Thus, the fact that the Court of Appeals found the reduction in accrued benefits to be unlawful does not support the Attorney General's advocacy for the California Rule.

The Prevailing Rule is the only interpretation of the inviolable contract that is sensible, fiscally responsible, consistent with existing Kentucky case law, and consistent with the manner in which other states' courts are interpreting public employees' pension rights. The

superiority of the Prevailing Rule is wholly unrefuted by the Attorney General's Brief. Also unrefuted is the fact that the Prevailing Rule is ultimately more advantageous for public employees. For these reasons, the Court should follow the Prevailing Rule. And, since all of the benefit changes in SB 151 are merely prospective, the application of the Prevailing Rule can only lead to the conclusion that SB 151 does not impair the inviolable contract.

Finally, it is important to recognize that even if SB 151 somehow impairs the inviolable contract—which it plainly does not—SB 151 would still be valid because it does not run afoul of the Contracts Clause of the Kentucky Constitution. Under the Contracts Clause, the state can impair contractual obligations as long as the impairments are either insubstantial or reasonable and necessary to serve a legitimate and important public purpose. *See Jones*, 910 S.W.2d at 717. In this case, any impairment would be both insubstantial and reasonable and necessary.

Plaintiffs bear the burden of proof under the Contracts Clause analysis. This is well established. *See United Auto., Aerospace, Agr. Implement Workers of Am. Int'l Union v. Fortuno*, 633 F.3d 37, 41-42 (1st Cir. 2011). And it is consistent with the general rule that statutes are presumed to be constitutional and that it is the plaintiff's burden to prove otherwise. *See, e.g., Star v. Commonwealth*, 313 S.W.3d 30, 37 (Ky. 2010). Nevertheless, the Attorney General claims that the *Governor*—the Defendant here—bears the burden of proof. This is an egregious misstatement of the law, and one for which the Attorney General cites no supporting authority. The reality is that the burden is on the Attorney General, and he has not—and cannot—meet it. He has not produced one iota of competent and admissible evidence to show that the impairment is both substantial *and* unreasonable or unnecessary.

As explained in the Governor's Opening Brief, the "facts" that the Attorney General cites as support for his substantiality argument are unreliable at best, and completely fabricated

at worst. In short, he has produced no competent evidence whatsoever to meet his burden on substantiality. This means that he cannot possibly prevail on his Contracts Clause claim.

The Attorney General also has not shown—and cannot show—that any impairments are unreasonable or unnecessary. His argument on this point is that SB 151 is unreasonable and unnecessary because the General Assembly could easily solve the pension crisis by pumping more money into the pension funds, and it can easily come up with that money by raising taxes. This argument reveals what this case is all about. This is not about the Constitution or the inviolable contract. Rather, the Attorney General simply disagrees with the policy decisions of the General Assembly, and he wants the judiciary to strike down his disfavored policy and essentially require the General Assembly—as the only alternative—to raise taxes. In other words, the Attorney General's argument on this point essentially is that the Court should declare his policy preferences to be the only reasonable and necessary policies and that the Court should set aside the General Assembly's considered wisdom in adopting different policies. This plainly is not a proper role for the Court.

In any event, the Attorney General is wrong to assert that the pension crisis can be saved by simply pumping more money into the pension systems. As explained in the Governor's Opening Brief, only 15 percent of the unfunded liability is attributable to underfunding. [Op. Br. at 12]. The rest of the unfunded liability is due to the fact that the pension systems are structurally imbalanced. If the structures of the systems are not changed in some measure, they will continue falling further and further behind. SB 151 makes such changes, and it does so in a very modest and reasonable manner. The Attorney General might not like this, but he has made no showing whatsoever that it is unreasonable or unnecessary.

II. SB 151 does not violate the three-readings provision of Section 46 of the Kentucky Constitution.

The Attorney General's argument regarding the three-readings provision of Section 46 of the Constitution is an exercise in misdirection. He sets up numerous strawman arguments in order avoid discussing the real issue. For example, the relevant question under the three-readings clause is not whether the General Assembly is required to follow the Constitution. Nor is it whether the public was adequately informed about the contents of SB 151 before it was passed. Instead, the *only* relevant questions are: (1) What constitutes a "reading" of a bill?; and, more importantly, (2) Who gets to decide?

The Attorney General argues that the judiciary gets to decide this issue. He could not be more wrong. This is not a justiciable question. It is a matter of legislative procedure. Section 29 of the Constitution declares that "[t]he legislative power shall be vested in a House of Representatives and in a Senate . . . ," and Section 39 of the Constitution unambiguously grants the General Assembly—and only the General Assembly—the authority to determine its own rules of procedure. Therefore, the question is one that only the General Assembly can answer. *See Philpot v. Haviland*, 880 S.W.2d 550, 553-54 (Ky. 1994).

The Attorney General contends that *Philpot v. Haviland* is inapposite here, but he is wrong once again. *Philpot* is directly on point. The Attorney General argues otherwise because he claims that *Philpot* involved the constitutionality of a Senate rule, and because it involved the interpretation of a vague phrase—*i.e.*, "unreasonable time." In reality, however, this case shares those characteristics. Like *Philpot*, this case also involves the constitutionality of a legislative rule. Although the Attorney General wants to distract attention from it, the real issue here is the constitutionality of House Rule 60,[4] which says that when a committee

[4] The Senate Rules have an analogous provision. *See* Senate Rule 60.

substitute is adopted, it "shall be considered as the original bill," meaning that the pre-substitute readings of the bill count toward the constitutional three-readings requirement. Rule 60 unquestionably and conclusively determines what constitutes a "reading" for the purposes of the three-readings requirement under Section 46 of the Constitution. Like the plaintiffs in *Philpot*, the Attorney General is essentially arguing that this Rule of legislative procedure is inconsistent with the Constitution. Because this Court found that argument to be non-justiciable in *Philpot*, it should do the same here.

The Attorney General also fails to acknowledge that this case, like *Philpot*, involves the interpretation of a vague term. At issue in *Philpot* was the meaning of the term "unreasonable time." At issue here is the meaning of the term "three readings." The Attorney General—and the circuit court below—found that the term "three readings" is objectively verifiable and does not have any subjective component, unlike the term "unreasonable time." Therefore, the Attorney General—and the circuit court—believe that this case is distinguishable from *Philpot* and that this case presents a justiciable issue. But the Attorney General and the circuit court have both misidentified the issue here. They both focused on the *number* of readings, but the real question is the *definition* of the term "readings." There is no question that the number of readings—once the definition of that term is determined—is objectively verifiable, but the definition of "readings" certainly is not. And the ultimate question here is what exactly constitutes the reading of a bill. Both the Attorney General and the circuit court proceeded on the underlying assumption that the definition is objective and requires no interpretation, but their assumption is belied by the fact that neither of them have ever articulated what exactly the definition is. In fact, the circuit court expressly declined to do so. [*See* Op. Br., Tab 1 at 23 n.11].

For his part, the Attorney General now says that the reading of a bill cannot be a "reading" for the purposes of the three-readings requirement if it occurred before the adoption of a non-germane amendment or committee substitute. The obvious problem with his argument is that it has no support in the Constitution. Section 46 simply states that a bill must have three readings, not that a bill must have three readings *in its final form*, or any other particular form for that matter. The Attorney General wants this Court to read into Section 46 language that simply is not there, and that is obviously not something the Court can do.

The definition of the term "reading" is open to broad interpretation. For example, must the requirement be satisfied by having a bill read out loud, word for word, on the floor of the legislative chamber in the presence of a quorum of legislators? What if legislators sit at their desks in the chamber and read the bill silently together? Or what if the entire bill is filed in the record and read silently and individually by legislators? Moreover, what happens when the bill is amended or—in cases like this one—there is a committee substitute? Must the readings begin again? The Attorney General and the circuit court say "yes," but what principle can be articulated for determining when there is an obligation to start over with new readings? The Attorney General says that non-germane changes trigger that obligation, but that raises the question of what constitutes a "non-germane" change, as well as the question of who would determine that issue. For instance, if a bill addressed income taxation, but there was a committee substitute changing it to a bill about sales tax, would that be a non-germane change? Who knows? The whole point is that these are issues that have always been left to the General Assembly to determine for itself, and there is good reason for that. As *Philpot* held, such matters are directly in the heartland of what must be considered non-justiciable political questions. *See Philpot*, 880 S.W.2d at 553-54.

The determination of what exactly constitutes a "reading" for the purposes of the three-readings requirement is a question of legislative procedure. That is, it is a question of how exactly the General Assembly goes about transacting its business. This is demonstrated most clearly by the fact there are specific House and Senate Rules directly addressing the issue. Because it is a question of legislative procedure, there is "a textually demonstrable constitutional commitment of the issue" to the General Assembly pursuant to Section 39 of the Constitution. *Philpot*, 880 S.W.2d at 553. There is also "a lack of judicially discoverable and manageable standard for resolving" this issue, *id.*, and it would be impossible to decide the issue "without an initial policy determination of a kind clearly for nonjudicial discretion," *id.* Moreover, it would also be impossible for this Court to resolve this issue "without expressing lack of respect" for the General Assembly. *Id.* In other words, any resolution of this issue would require this Court to second-guess the General Assembly's definition of "reading" and micro-manage the General Assembly's internal procedures. Thus, as *Philpot* explained, this is precisely the kind of issue that is non-justiciable under the political question doctrine. *See id.* at 553-54.

This Court has spoken often of the fact that Kentucky's constitutional separation of powers is among the strongest in the nation. *See, e.g., Appalachian Racing, LLC v. Commonwealth*, 504 S.W.3d 1, 4 (Ky. 2016). This is due to the fact that our Constitution contains a "'double-barreled, positive-negative approach' to separation of powers," *id.* (quoting *L.R.C. v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984)), with Section 27 mandating separation among the three branches of government, and Section 28 prohibiting any branch from exercising any power belonging to another branch. If this Court is serious about the strength of Kentucky's separation of powers, then it must maintain that strength by holding that the General Assembly's definition of a "reading" is not justiciable. Otherwise, this Court will be exercising

the power to set rules for the legislature's proceedings—power that is given expressly to the General Assembly by Section 39 of the Constitution.

The Attorney General wants this Court to ignore Kentucky's uniquely strong separation of powers, as well as the holding from *Philpot*, and instead focus on a few cases from other states. There are a number of problems with this. First and foremost, because other states' separation of powers are not as strong as Kentucky's, it should be irrelevant that the judiciary in some other states have determined what constitutes a reading. Second, the cases relied upon by the Attorney General are easily distinguishable. For example, the cases from Pennsylvania, Alabama, and Michigan are inapposite because the constitutions of those states have—or at least had at the time the cited cases were decided—what are known as "original purpose" provisions. Such provisions provide that "no bill shall be so altered or amended on its passage through either house as to change its original purpose." Ala. Const. Art. IV, § 61; *see also* Mich. Const. Art. IV, § 24; Pa. Const. Art. 3, § 1. Thus, the constitutions of those states expressly prohibit procedures like committee substitutes. Kentucky, however, has no such rule in its Constitution, and, under Section 39, expressly approves of committee substitutes.

The other out-of-state authorities relied on by the Attorney General are also inapposite. For example, he cites a North Carolina case, but North Carolina law actually supports the Governor's position. The issue in the case cited by the Attorney General was whether a revenue bill had received the requisite readings. *See Frazier v. Bd. of Comm'rs of Guilford Cnty.*, 138 S.E. 433 (N.C. 1927). North Carolina has two modern constitutional provisions addressing readings of a bill in the legislature. One provision simply requires a bill to be read three times in each house before it can be passed. *See* N.C. Const. Art. II, § 22. The other provision says that a revenue bill cannot be passed unless "the bill *for the purpose* shall have been read three several times in each house . . . ." *Id.* § 23 (emphasis added). Thus, the text of the

North Carolina Constitution specifically requires that a revenue bill have the same purpose each time it is read, but it does not have the same requirement for other bills. Thus, it is irrelevant that *Frazier* found re-reading to be necessary following material changes to a revenue bill. In fact, other North Carolina case law has recognized that "[i]n ordinary legislation, material amendments may be made even on the last reading in the second house, and when concurred in by the other House the bill is law." *Glenn v. Wray*, 36 S.E. 167, 169 (N.C. 1900). Thus, North Carolina law actually supports the Governor's position.

The same is true of Illinois law. The Illinois case cited by the Attorney General, *Giebelhausen v. Daley*, 95 N.E.2d 84 (Ill. 1950), was decided prior to the adoption of the most recent Illinois Constitution in 1970. Since the adoption of the current Constitution, a challenge to the three-readings requirement was brought in *People v. Dunigan*, 650 N.E.2d 1026 (Ill. 1995). That case involved a bill that was approved by the Senate and then amended a number of times in the House. One of the amendments to the bill "deleted entirely the bill's original text, pertaining to feticide, and replaced it with a paragraph amending the Criminal Code to expand the types of felonies that could be used to trigger the Habitual Criminal Act." *Id.* at 1033. The court held that "[w]hether or not a bill has been read by title on three different days in each house is a procedural matter, the determination of which was deliberately left to the presiding officers of the two houses of the General Assembly." *Id.* at 1034-35 (citing *Fuehrmeyer v. City of Chicago*, 311 N.E.2d 116 (Ill. 1974)). Thus, Illinois law also supports the Governor's position.

And, of course, the most recent case on the issue of legislative readings strongly supports the Governor's argument. *See Gunn v. Hughes*, 210 So. 3d 969 (Miss. 2017). The Attorney General attempts to distinguish *Gunn* by claiming that the issue there was the constitutionality of a House rule rather than a statute, and by pointing out that the Mississippi Constitution says that a full reading is necessary when demanded by a member. These

purported distinguishing points are anything but. In reality, this case too involves the constitutionality of a House Rule—*i.e.*, House Rule 60. After all, the Attorney General's entire three-readings argument is premised on his belief that it was unconstitutional for House Rule 60 to treat the SB 151 committee substitute as the original bill. Moreover, the issue in *Gunn* was exactly the same as the issue here. In that case, a legislator demanded readings, and he claimed that the House was not actually performing the required readings. Likewise, the claim in this case is that the General Assembly did not perform the required readings of SB 151. The essential question in both cases is what constitutes a "reading." The Mississippi Supreme Court rejected any argument that the judiciary could be involved in answering that question. Specifically, it held:

> By requesting the courts to force Speaker Gunn to read bills in a particular manner, Rep. Hughes seeks to involve the judiciary in legislative procedural matters. The text of our state Constitution that imposes upon the Legislature the obligation to read bills upon a member's request, necessarily commits upon the Legislature the obligation to determine how that requirement will be carried out. So this case must be dismissed, not as a matter of judicial discretion, but because we are without constitutional authority to adjudicate it. **The constitutional authority, and duty, to decide the matter lies squarely within the legislative branch of our government.**

Id. at 974 (emphasis added). The same is true here.

If this Court does not follow the lead of the Mississippi Supreme Court, it will be creating a constitutional crisis. It will be installing itself as the overseer of legislative processes and inviting lawsuits on a whole host of legislative procedural issues that no one would have ever before dreamed to be justiciable. And it will draw into question innumerable laws that were enacted under identical circumstances. For example, Senate Bill 192 from the 2015 session originally related to inmate health care. It ultimately became the bipartisan anti-heroin bill ceremonially signed into law by then-Governor Beshear less than 12 hours after it passed

the General Assembly.[5] Like SB 151, SB 192 did not receive three new readings after a committee substitute and title amendment were adopted.

The Attorney General says that SB 151 represents the worst of government. But does he feel the same way about other laws that were passed using the same procedure, like the 2015 heroin bill, and HB 362 from 2018 session, which protects local governments' solvency by allowing them to phase in higher pension contributions for their employees over several years? Surely not. Assuming that he is not willing to argue that those bills—and all other like bills—are unconstitutional, his position is shockingly unprincipled. What he really appears to mean is not that the practice of using committee substitutes is government at its worst, but that the enactment of laws that he dislikes is government at its worst. And he wants this Court to fix the purported problem by holding that the bills he dislikes are subject to different constitutional requirements than those that are acceptable to him. In other words, he is urging this Court to engage in situational interpretation of the Constitution—*i.e.*, interpretation that varies based upon the policy at issue and the outcome of a given case. This is lawless and dangerous. The Constitution has a fixed meaning, and that meaning has always been understood to be that the General Assembly has the sole authority to determine its own procedures for complying with the three-readings requirement. In other words, the Constitution leaves it solely to the General Assembly to define what constitutes a "reading" of a bill. To involve the judiciary in that process would put the courts in the business of micro-managing the internal operations of the General Assembly, which is not permissible, especially in light of the fact that Kentucky's separation of powers is among the strongest in the nation.

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[5] *See* SB 192, 2015 Legislative Record, *available at* http://www.lrc.ky.gov/record/15RS/SB192.htm (last visited Sept. 14, 2018).

III. SB 151 did not require 51 votes in the House.

In his Opening Brief, the Governor explained that SB 151 is not an "appropriation of money" under Section 46 of the Constitution because a budget unit cannot take SB 151 to the State Treasury and withdraw any money. SB 151 merely provides recommended employer contributions that the General Assembly can accept, reject, or modify in the biennial budget. The fact that prior Governors and prior General Assemblies have chronically underfunded Kentucky's public pensions demonstrates that SB 151's recommended employer contributions are not themselves appropriations. In fact, this Court has held that the employer-contribution provisions in the Commonwealth's pension statutes are not mandatory on the General Assembly. *See Jones*, 910 S.W.2d at 714.

The Attorney General does not meaningfully contest any of this. [Resp. Br. at 31-36]. His Brief does not grapple with the holding of *Jones*. He does not explain how SB 151 is an appropriation of money with respect to CERS, given that counties and cities, not the General Assembly, appropriate the funds that go to CERS. Nor does the Attorney General refute the sworn affidavits in the record from the State Treasury and the Office of the State Budget Director attesting to the inability of budget units to withdraw public money based upon SB 151. [Vol. VIII, R. 1135, 1137-38]. The Attorney General does not even contest that prior lawmakers have repeatedly ignored—with impunity—employer-contribution provisions that he now claims "require[] employers to contribute to the retirement systems based on a specific calculation." [Resp. Br. at 34]. Rather than contest these points, the Attorney General places wholesale reliance on *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005), which he views as broadly holding that any employer-contribution provision is an "appropriation of money" under Section 46. That is an untenable distortion of *Fletcher*, as the Governor has already explained. [Op. Br. at 88-93].

Regardless, the Attorney General's Brief makes a key concession about what is an "appropriation of money." In an attempt to explain away the fact that previous lawmakers have repeatedly ignored employer-contribution statutes that he now characterizes as mandatory appropriations of money, the Attorney General claims that "[*a*]*bsent budgetary language notwithstanding it*, the appropriations mandated by SB 151 must be made." [Resp. Br. at 35 (emphasis added)]. While the Governor obviously does not accept everything in this statement, it is an assertion worth dwelling on: The Attorney General's theory, in his own words, is that SB 151 appropriates money from the State Treasury *only if* the General Assembly fails to pass a budget bill—*i.e.*, "[a]bsent budgetary language." This admission eviscerates the Attorney General's 51-vote argument.[6] Taking the Attorney General at his word and following his logic to its conclusion, SB 151 is not an appropriation of money when there *is* a budget bill, as there is for the 2018-2020 biennium. By the Attorney General's admission, the operative "appropriation of money" for this biennium is not SB 151, but instead House Bill 200—the executive-branch budget bill. The Attorney General's 51-vote argument cannot recover from his concession that SB 151 does not appropriate money in a biennium, like this one, with a budget bill.

If the Court nevertheless decides that some of SB 151 is an "appropriation of money," that part of the bill should be severed while the remainder of SB 151 is enforced. On the issue of severability, the Attorney General's Brief essentially ignores the severability clause in Section

[6] The Attorney General's position is also nonsensical. Under his view, SB 151 is *not* an appropriation of money so long as a budget bill is in effect, but will be magically transformed into an appropriation of money if—at some unknown point in the future—the General Assembly fails to pass a budget. The question of whether a bill can be characterized as an appropriation of money under Section 46 cannot possibly be contingent on legislative action or inaction that might only occur years later, if at all. It simply does not make sense to say that we would have to wait years to figure out whether a bill is an appropriation of money under Section 46.

89 of SB 151, even though the Governor's Opening Brief requested severance under it. [Op. Br. at 94-97]. Ignoring SB 151's severability clause, however, does not make it go away. In Section 89 of SB 151, the General Assembly made a public-policy decision that any constitutional "section," "subsection," or "provision" of SB 151 must be enforced regardless of what other parts are struck down and no matter their importance. The Attorney General's virtual silence about SB 151's severability clause is a white flag of surrender on the issue.

The Attorney General also argues that Section 46 of the Constitution does not permit severance of a statute because Section 46 discusses an "act or resolution" requiring 51 votes in the House—as opposed to *parts* of an "act or resolution" requiring 51 votes.[7] This argument is too clever by half. If the Attorney General is right, then the Constitution prohibits severing *any* statute because elsewhere the Constitution states that "all laws contrary . . . to this Constitution[] shall be void." Ky. Const. § 26. Under the Attorney General's tortured logic, Section 26 would permit severing a statute only if Section 26 provided that all *parts* of laws that are contrary to the Constitution shall be void. Section 26, of course, does not say that, yet, for decades, it has been a "well-established rule that portions of a statute which are constitutional ma[y] be upheld while other portions are eliminated as unconstitutional." *Ky. Mun. League v. Commw. Dep't of Labor*, 530 S.W.2d 198, 200 (Ky. 1975).

The Attorney General also attempts a "gotcha" argument for why severing SB 151 is improper: Section 46 of the Constitution does not permit severance, the Attorney General argues, because this Court did not sever the unconstitutional parts of the statute in *D & W*

[7] The only case law that the Attorney General can muster for this proposition is not even a Section 46 case. In *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer District*, 72 S.W.3d 918 (Ky. 2002), the Court refused to sever a statute because the statute had previously been invalidated in its entirety by the Court of Appeals. *See id.* at 919-20. That case is so far afield as to distinguish itself.

Auto Supply v. Department of Revenue, 602 S.W.2d 420 (Ky. 1980). The Attorney General neglects to mention that, unlike SB 151, the statute in *D & W* did not have a statute-specific severability clause, which means the general severability statute governed there. *See* 1978 Ky. Acts, ch. 119. Moreover, *D & W* did not once mention the issue of severability. *See D & W*, 602 S.W.2d at 421-25. The Attorney General thus asks this Court to hold that Section 46 of the Constitution invalidates SB 151's severability provision merely because *D & W* failed to discuss severability. The better reading of *D & W*—obviously—is that it simply did not consider severability.

The Attorney General also downplays his failure to plead the 51-vote issue. He first argues that he in fact "pleaded a violation of Ky. Const. § 46." [Resp. Br. at 39]. This sleight of hand cannot work. Section 46 contains many different provisions, and the Attorney General only pled a violation of the portion of Section 46 that requires a bill to receive three readings in each legislative chamber. [Vol. I. R, 31]. The Attorney General's Verified Complaint nowhere alleges that SB 151 is unconstitutional for failing to garner 51 votes in the House. [Vol. I, R. 9-40]. To find that the Attorney General nevertheless pled this claim would water down to the point of irrelevance the requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* CR 8.01(1). Moreover, the Attorney General could have moved under CR 15.01 to amend his Verified Complaint to plead the 51-vote issue. But he did not.

The Attorney General next claims that the Governor failed to object to the trial court's *sua sponte* decision to raise the 51-vote issue. [Resp. Br. at 41]. The Attorney General could not be more wrong. After being ordered by the trial court to brief the issue, the Governor (unsurprisingly) briefed the issue to avoid the waiver argument that the Attorney General otherwise would have made. However, in his summary judgment papers, the Governor made this argument under objection, noting that "the Court *sua sponte* requested briefing on a Section

46 issue that the Plaintiffs did not raise in their Complaint" [Vol. IX, R. 1220] and that "[t]his issue is not pled anywhere in the Plaintiffs' Complaint and therefore is not properly before the Court." [Vol. X, R. 1425]. If that somehow is not sufficient to object, the Governor also asked that the circuit court be disqualified because it was effectively prosecuting the Attorney General's case for him by raising the 51-vote issue. [Vol. X, R. 1441-42]. How, after all of this, the Attorney General can argue that the Governor failed to object is baffling.[8]

Once all of the Attorney General's excuses for failing to plead a 51-vote claim are set aside, the Court is left with a simple plea from the Attorney General that the Court give him a win over the Governor and the General Assembly on a claim that the judiciary raised for him. Merely stating the Attorney General's position shows, in undeniable terms, the damage that he is asking the Court to do to the Commonwealth's separation of powers. The Court should be loath to put its imprimatur behind the circuit court's advocacy. That is not "calling balls and strikes," as Chief Justice John Roberts famously explained, but instead telling the pitcher what pitch to throw and where.[9]

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[8] The Governor's repeated objections to the circuit court's consideration of the 51-vote issue foreclose the Attorney General's argument that the parties amended his Verified Complaint by consent. *See* CR 15.02 (allowing amendment where "issues not raised in the pleadings are tried *by express or implied consent* of the parties" (emphasis added)).

[9] The circuit court's advocacy apparently did not stop after entering judgment in this case. The circuit court recently took to Facebook to register his interest in attending a protest event against pension reform at the Capitol on October 6, 2018. [*See* Appendix, Tab 1]. The event, known as the "Kentucky Moving Party," is intended "to show our legislators that we didn't forget and we are going to assist them with their packing and moving on November 6, 2018." [*Id.*]. According to the Facebook notice regarding the event, a "caravan of U-Hauls" will travel up Capitol Avenue and park up and down the street to "provide not only our state, but also our nation with a great visual of Kentucky's plans to clean out our state offices and move in those that truly care about Kentucky's hard working citizens." [*Id.*]. Because the circuit court publicly registered interest in attending this protest event, the Governor respectfully requests that if this Court decides that the case should be remanded for some reason, it do so with instructions that the case be reassigned to Division II of the Franklin Circuit Court.

Also, the Attorney General has not seriously contested the Governor's prediction of what will happen if this Court affirms even part of the circuit court's 51-vote holding. [Op. Br. at 87-88]. As the Governor explained, such a holding will take the Governor's line-item-veto pen to places it has never been. *See* Ky. Const. § 88 (allowing a line-item veto of "any part or parts of appropriation bills embracing distinct items"). Broadening the definition of an "appropriation of money" also will meaningfully limit what the General Assembly can accomplish in sessions in odd-numbered years. *See* Ky. Const. § 36 (requiring super-majorities in odd-numbered years to pass a bill "appropriating funds").

And, more importantly, an expansive reading of Section 46 will call into question what the General Assembly has already done in previous sessions in odd-numbered years. One example of this is the Commonwealth's previous attempt at pension reform—Senate Bill 2 from the 2013 session. That bill, as the Governor has explained, undeniably appropriates money under the Attorney General's contorted definition of an "appropriation of money." [Op. Br. at 87]. Yet, that bill initially failed to receive the number of votes required by Section 36 of the Constitution. It should be noted that, in his 68-page Brief, the Attorney General nowhere contests the assertion, raised both by the Governor in his Opening Brief and the General Assembly in its Amicus Brief, that SB 2 from the 2013 session will be susceptible to constitutional challenge if the Court finds that SB 151 is an "appropriation of money." And given that there are approximately 50,000 Tier III employees who could sue to request the Tier II benefits that SB 2 stopped for new hires, there will be no shortage of plaintiffs in a follow-on lawsuit. The financial chaos that would ensue is mind-boggling.

IV. Neither KRS 6.350 nor KRS 6.955 invalidates SB 151.

The Attorney General's arguments pertaining KRS 6.350 and KRS 6.955 could not be more frivolous. This Court has squarely held that compliance with such statutes is a non-

justiciable political question. *See Bd. of Trs. of Judicial Form Ret. Sys. v. Attorney Gen. of Commw.*, 132 S.W.3d 770, 777 (Ky. 2003). Moreover, it is well established that one legislature cannot bind another. *Jones*, 910 S.W.2d at 713-14. Thus, the 2018 General Assembly was not bound to follow KRS 6.350 and KRS 6.955. It was free to ignore them if it so chose. The Attorney General contends that Section 15 of the Constitution prohibits this, but nothing could be further from the truth. Section 15 provides that laws cannot be suspended except "by the General Assembly or its authority." If the General Assembly ignored KRS 6.350 and KRS 6.955—and if doing so amounted to a suspension of those laws—then such suspension was clearly done "by the General Assembly or its authority." The Attorney General suggests that a valid suspension under Section 15 can only be accomplished by enacting legislation that specifically says the law at issue is suspended, but Section 15 plainly does not require that.

Even so, the point that is lost on the Attorney General is that the General Assembly substantially complied with KRS 6.350 and KRS 6.955 when it passed SB 151. Again, this question is not remotely justiciable, but even if it were, the Court would have to conclude that the requirements of those statutes were met.

First, the actuarial-analysis requirement of KRS 6.350 was met because the provisions of SB 151 were first introduced in SB 1. At that time, the General Assembly obtained an actuarial report analyzing the provisions of SB 1 and its committee substitute. This actuarial report was provided to the legislators and made public weeks before the legislature eventually voted on SB 151. Subsequently, on March 29, 2018, the day that the committee substitute amended SB 151 to add the provisions of SB 1, the General Assembly received an amended actuarial analysis for SB 151 from GRS Retirement Consulting. The new report indicated that the previously provided actuarial analysis of SB 1 applied to the new bill.

Second, the actuarial analysis obtained for SB 1 and SB 151 was also sufficient to meet the requirement of a fiscal note under KRS 6.955. The requirements for a fiscal note are broadly worded and vaguely defined. It requires only that the Legislative Research Commission provide an estimate of the effect the law will have on expenditures or revenues of local government. *See* KRS 6.965(1). How or in what detail the fiscal note accomplishes this is left unsaid. The actuarial analysis assessing the financial impact of SB 1 and SB 151 is more than sufficient to substantially comply with this statute.

V. SB 151 does not amount to a taking of property in violation of Section 13 of the Constitution.

SB 151 does not amount to an unconstitutional taking because it does not impair any contractual rights, and, in any event, it only affects prospective benefits and therefore does not affect property. With respect to this issue, the Governor incorporates by reference the arguments made in his trial court brief. [Vol. IX, R. 1213-17].

VI. SB 151 does not violate Section 2 of the Constitution.

The Attorney General has not articulated precisely how he thinks SB 151 violates Section 2. It appears that he takes this position simply because he believes SB 151 is a bad law that was passed in a manner that he believes was unfair. But this plainly does not amount to a Section 2 violation.

The Attorney General cites *Commonwealth, Transportation Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. App. 2004), for the proposition that the General Assembly acted arbitrarily in failing to follow its own procedures. First, this a false assessment of the General Assembly's actions. Moreover, *Weinberg* does not support that proposition. What the Court of Appeals held is that "it is axiomatic that failure of an ***administrative agency*** to follow its own rule or regulation generally is *per se* arbitrary and capricious." *Id.* (emphasis added). Thus, *Weinberg* is

an administrative procedure case, not a case addressing whether legislative conduct is arbitrary within the meaning of Section 2.

In this instance, Section 2 requires nothing more than a rational basis for SB 151. *See City of Lebanon v. Goodin*, 436 S.W.3d 505, 519 (Ky. 2014). And even the Attorney General does not argue that the statute lacks a rational basis.

VII. There are no unsupported facts in the Governor's Opening Brief.

The facts recited in the Governor's Opening Brief are just that—facts. The Attorney General asserts that the Governor was displeased with SB 151, and he claims that this shows that the Governor's Opening Brief misrepresented the impact of SB 151 on the unfunded liability and the viability of the pension systems. The Attorney General is wrong. It is true that the Governor was not entirely pleased with SB 151. He wanted the legislature to make even more impactful reforms that would have put the pension systems on a faster track to solvency. But that does not mean SB 151 is not a crucial step in the right direction. Despite the Attorney General's attempts to mislead on the importance of SB 151, it is a critical piece of legislation that puts the pension systems on the path to solvency.

CONCLUSION

This Court should reverse the circuit court and declare SB 151 to be constitutional.

Respectfully submitted,

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Counsel for Governor Bevin

APPENDIX

Tab Number	Description	Record Location
1	Facebook posts regarding disqualification issue	Judicially noticeable. *See* KRE 201

Phillip Shepherd is interested in an event.

Yesterday at 8:50 AM ·

SAT, OCT 6 AT 9 AM

Kentucky Moving Party

Kentucky State Capitol

You've checked in to Kentucky State Capitol b...

INTERESTED

Like Comment Share

Events

Events

Calendar 15

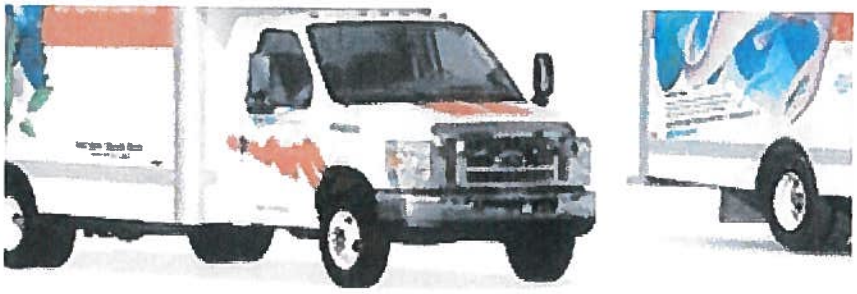
Birthdays

Discover

Kentucky Moving Party

Hosting 15

+ Create Event



OCT 6

Kentucky Moving Party

Public · Hosted by JCAESP AFSCME Local 4011 and 2 others

★ Interested ✓ Going Share ···

Saturday, October 6 at 9 AM – 12 PM

Kentucky State Capitol Show Map

About Discussion

58 Going · 377 Interested

Message

Phillip Shepherd is interested

Suggested Friends

Bernie Kunkel Invite

Kathy Brannan Sargeant Invite

Adam Hinton Invite

Share

Details

Join the KENTUCKY MOVING PARTY as we caravan our U-Hauls up Capitol Avenue to the Kentucky State Capitol on October 6, 2018. The Kentucky Public Pension Coalition, KPPC is holding a Pension Rally at 10:00 am. at the Capitol steps on October 6, 2018 and we would like to join them. We need to show our legislators that we didn't forget and we are going to assist them with their packing and moving on November 6, 2018. The KPPC Rally is a Bipartisan event and will have multiple speakers from the KPPC Coalition.

All individuals and groups who will be participating in this event should make plans to meet at Western Hills High School (located off of Kings Daughters Drive between 8:00-9:00 am. The caravan of U-Hauls will leave at approximately 9:15 a.m. as we begin our journey up Capitol Avenue and circle the Capitol building. All trucks participating will park along Capitol Avenue. This event will provide not only our state, but also our nation with a great visual of Kentucky's plans to clean out our state offices and move in those that truly do care about Kentucky's hard working citizens.