COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION \_\_\_
CIVIL ACTION NO. 19-CI-

COMMONWEALTH OF KENTUCKY ex rel. ANDY BESHEAR, ATTORNEY GENERAL

**PLAINTIFFS** 

and

JEFFERSON COUNTY TEACHERS ASSOCIATION

v. <u>VERIFIED COMPLAINT FOR A DECLARATION OF RIGHTS</u>, <u>A TEMPORARY INJUNCTION</u>, AND A PERMANENT INJUNCTION

DAVID A. DICKERSON, in his official capacity as Secretary of the Kentucky Labor Cabinet

**DEFENDANT** 

SERVE: Office of the Attorney General

The Capitol Building 700 Capitol Avenue

Frankfort, Kentucky 40601-3449

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Come now the Plaintiffs, Commonwealth of Kentucky, *ex rel*. Andy Beshear, Attorney General, and the Jefferson County Teachers Association ("JCTA"), by and through counsel, and bring this action for a declaration of rights, a temporary injunction, and a permanent injunction against the Defendant, David A. Dickerson, in his official capacity as Secretary of the Labor Cabinet, Commonwealth of Kentucky ("the Labor Secretary").

#### INTRODUCTION

Section 183 of the Kentucky Constitution states, "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."

In *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 205 (Ky. 1989), the Kentucky Supreme Court read Section 183 to mean:

First, it is the obligation, the sole obligation, of the General Assembly to provide for a system of common schools in Kentucky. The obligation to so provide is clear and unequivocal and is, in effect, a constitutional mandate. Next, the school system must be provided throughout the entire state, with no area (or its children) being omitted. The creation, implementation and maintenance of the school system must be achieved by appropriate legislation. Finally, the system must be an efficient one.

The failure to meet this mandate and attempts to visibly weaken the system have taken many forms during the past two years. In 2018, the General Assembly reduced funding for Early Childhood Education by 6.25% and cut school improvement funds by six-percent (6%). ("Lines in the Sand," *available at* https://medium.com/@ky120united/lines-in-the-sand-43de3b77b2a2 (last visited Apr. 29, 2019).) The General Assembly also failed to provide any funding for required professional development, textbooks or teacher mentoring. (*Id.*) Funding of Family Resource and Youth Service Center programs has decreased by 16%, Support Education Excellence in Kentucky (SEEK) funding per pupil has been reduced by 14%, funding for Extended School Services has decreased by 39%, and student transportation funds have fallen 40%. (*Id.*)

Also in the 2018 Regular Session, the Kentucky legislature sought to "reform" the state pension laws. To do so, they intended to breach and substantially impair the inviolable contract between teachers and the Commonwealth that promises certain retirement benefits in exchange for a lifetime of public service. In response, teachers throughout the state organized at the Capitol to protest legislative hearings on the "pension reform" bill in an exercise of their free speech and assembly rights to petition their government.

It appeared their efforts were successful. The public opposition led the sponsor of the bill to declare that the bill was "on life support," and the President of the Senate stated there was

"little hope" the bill would pass. However, on one of the last days of the session, in a small conference room to which the public was excluded, a sewage wastewater bill was stripped and replaced with the language of the "pension reform" bill. The bill passed both chambers of the legislature in a matter of hours when most teachers either had left the Capitol for the day or had been excluded from the hearings. The message sent to teachers by the 2018 General Assembly was clear: if you cannot be seen, your voice will not be heard.

In the 2019 Regular Session, the General Assembly introduced bills to divert public money to private schools, alter the process for selecting principals in Jefferson County, and minimize the Kentucky Education Association's appointments to the board overseeing teachers' pension funds, while giving the Governor an additional appointment. Teachers did not strike. Rather, teachers in at least 10 counties called in sick on important legislative days so that they could be at the Capitol to protest the bills. Two of those bills did not pass based on the teachers' efforts.

At every opportunity, Governor Bevin has voiced his disagreement with the teachers' protests. Throughout his tenure, Governor Bevin has sought to prevent peaceful demonstration and the exercise of free speech to oppose his agenda. He has restricted – and even prevented – access to the Capitol to certain groups of citizens. He has criticized and demeaned teachers who protested his administration and some members of the General Assembly's attempts to cut funding to public education and violate the inviolable contract guaranteeing retirement benefits to public employees. Now, his Labor Cabinet seeks to intimidate and potentially punish public school teachers who engaged in peaceful protests during the 2019 Regular Session.

#### **NATURE OF ACTION**

- 1. This Verified Complaint for a Declaration of Rights and a Permanent Injunction is governed by the Kentucky Declaratory Judgment Act, KRS 418.010, *et seq.*, Kentucky Rule of Civil Procedure ("CR") 57, and CR 65.
- 2. KRS 418.040 provides this Court with authority to "make a binding declaration of rights, whether or not consequential relief is or could be asked" when a controversy exists. An actual and justiciable controversy regarding violations of the Kentucky Constitution and state laws clearly exists in this action.
- 3. CR 65 permits this Court, in a final judgment, to issue a permanent injunction which may restrict or mandatorily direct the doing of an act.

#### **PARTIES**

- 4. Andy Beshear is the duly elected Attorney General of the Commonwealth of Kentucky, a constitutional office pursuant to Sections 91, 92, and 93 of the Kentucky Constitution. Pursuant to KRS 15.020, Attorney General Beshear is the chief law officer of the Commonwealth and all of its departments, commissions, agencies, and political subdivisions. Attorney General Beshear is duly authorized by the Kentucky Constitution, statutes, and the common law, including his *parens patriae* authority, to enforce Kentucky law. As Attorney General, he has the authority to bring actions for injunctive and other relief to enforce the Kentucky Constitution and the Commonwealth's statutes and regulations, including the authority to bring an action against the Governor and other state agencies for injunctive relief. *See* KY. Const. § 91; KRS 15.020.
- 5. The Jefferson County Teachers Association is a nonprofit, unincorporated Association that serves as the bargaining representative for approximately 6,000 certified

personnel employed by the Jefferson County Board of Education, including teachers, librarians, speech clinicians, physical therapists, and occupational therapists. JCTA is the bargaining representative for all certified personnel employed by Jefferson County Public Schools, regardless of membership. JCTA also has the purposes stated in its constitution to provide an official channel for the expression of the opinions of the organized profession, to provide the profession with an effective voice in the formation of educational policies, and to encourage the members of the profession to exercise their rights and privileges as citizens and to accept leadership willingly in civic affairs.

6. Defendant, David A. Dickerson, is the Secretary of the Commonwealth of Kentucky's Labor Cabinet, and is named in his official capacity.

#### **JURISDICTION AND VENUE**

- 7. An actual, justiciable controversy exists, and this Court has subject matter jurisdiction over this action pursuant to KRS 418.040, KRS 23A.010, CR 57, and CR 65.
- 8. Venue is appropriate in this Court pursuant to KRS 452.405, because the primary offices of the Attorney General and the Defendant are located in Frankfort, Franklin County, Kentucky. Furthermore, this action generally relates to violations of Kentucky law, which were either determined or accomplished in Frankfort, Franklin County, Kentucky. Additionally, this action generally relates to violations of the Kentucky Constitution that occurred in Frankfort, Franklin County, Kentucky.
- 9. Pursuant to KRS 418.040, *et seq.*, this Court may properly exercise *in personam* jurisdiction over the Defendant.

#### **FACTUAL BACKGROUND**

#### **The 2018 Teacher Protests**

- 10. In the 2018 Regular Session, the Kentucky General Assembly announced a plan to "reform" the state pension systems.
- 11. To "reform" the systems, the General Assembly intended to breach and substantially impair the inviolable contract between teachers and the Commonwealth that promises certain retirement benefits in exchange for a lifetime of public service.
- 12. Once introduced, SB 1 spawned immediate opposition from public employees, especially public school teachers who had experienced years of public education cuts and stagnant wages.
- 13. JCTA encouraged those members who could to go to Frankfort to exercise free speech and peaceful association rights. JCTA did not encourage or suggest school employees call in sick.
- 14. Grassroots teacher organizations formed in response to assist organization efforts, namely, KY 120 United.
- 15. Large numbers of teachers and other public employees organized and protested at the Capitol Building in Frankfort nearly every day of the 2018 Regular Session in opposition to SB 1.
- 16. Governor Bevin criticized the teacher protests. On a radio program on March 14, 2018, he stated, "If they get what they wish for they will not have a pension system for the younger people who are still working, and that to me is remarkably selfish and short-sighted."
- 17. During that same interview, he further stated, "It's about just straight up wanting more than your fair share. This is a group of people just throwing a temper tantrum."

- 18. Later, in a March 20, 2018, radio interview, Governor Bevin claimed teachers were expressing a "thug mentality."
- 19. It appeared the teacher protests were successful: the public opposition led the sponsor of SB 1 to declare the bill "on life support," and the President of the Senate stated there was "little hope" the bill would pass.
- 20. However, on one of the last days of the session, in a small conference room to which the public was excluded, Senate Bill 151 ("SB 151"), an 11-page sewage wastewater bill, was stripped and replaced with 291 pages of the "pension reform" bill.
- 21. In a matter of hours, the bill passed both chambers of the legislature when most teachers either had left the Capitol for the day or had been excluded from the hearings.
- 22. The message the General Assembly sent to teachers was clear: if you cannot be seen, your voice will not be heard.
- 23. In response, on March 30, 2018, 25 school districts across Kentucky closed as a result of teachers calling in sick. Thousands of teachers protested at the Capitol.
- 24. On April 13, 2018, at least 39 school districts across Kentucky closed as a result of teachers calling in sick. Thousands of teachers again protested at the Capitol.
  - 25. These protests became commonly known as "sick outs."
- 26. Following the April 13th protests, Governor Bevin exited the Capitol Building and told reporters: "I guarantee you somewhere in Kentucky today a child was sexually assaulted that was left at home because there was nobody there to watch them. I guarantee you today, a child was physically harmed or ingested poison because they were home alone because a single parent didn't have any money to take care of them. I'm offended by the fact that people so cavalierly, and so flippantly, disregarded what's truly best for children."

- 27. Later that year, on December 13, 2018, the Kentucky Supreme Court unanimously struck down SB 151 on the basis that the General Assembly failed to follow constitutionally-required steps in its passage. *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74 (Ky. 2018).
- 28. On December 17, 2019, Governor Bevin called a Special Session to address a new pension bill.
  - 29. He gave legislators and the public four hours' notice.
- 30. Fewer than 24 hours later, the General Assembly adjourned *sine die* without introducing a bill.

#### **The 2019 Teacher Protests**

- 31. Three weeks later, on January 8, 2019, the General Assembly reconvened for the 2019 Regular Session.
- 32. Understandably, teachers were prepared to organize in opposition to a new pension bill.
- 33. But the General Assembly did not attempt similar pension reform in the 2019 Regular Session. Rather, in February 2019, the General Assembly introduced, among others, three bills affecting the public education system in this state: House Bill 205 (HB 205), Senate Bill 250 (SB 250) and House Bill 525 (HB 525).
- 34. HB 205 provided for dollar-for-dollar tax breaks as an incentive for individuals and organizations to donate to private school scholarship programs. *See* HB 205, Gen. Ass., Reg. Sess. (Ky. 2019).

- 35. The Legislative Research Commission estimated the incentive program could cost the state up to \$50 million by its fourth year of implementation. *See* Commonwealth of Kentucky Fiscal Note Statement, HB 205, Gen. Ass., Reg. Sess., at 2 (2019).
- 36. SB 250, among other things, amended existing law to allow the superintendent of the Jefferson County Public Schools to appoint a principal without the participation of a school-based decision-making council. *See* SB 250, Gen. Ass., Reg. Sess. (Ky. 2019).
- 37. HB 525 provided for a reorganization of the Board of Trustees of the Teachers' Retirement System of the State of Kentucky to minimize the appointments made by the Kentucky Education Association from seven to one, to allow other school associations to nominate those members, and to give the Governor an additional appointment to the board. *See* HB 525, Gen. Ass., Reg. Sess. (Ky. 2019).
- 38. JCTA, KEA, KY 120 United, and other public school teacher organizations publicly announced their opposition to these bills.
- 39. JCTA urged its members to oppose HB 205, SB 250 and HB 515, to join rallies against these bills at the Capitol, and to call and write their representatives and senators. JCTA did not urge or suggest that any person call in sick to attend rallies.
- 40. On the evening of February 27, 2019, KY 120 United encouraged its membership to show up to protest in Frankfort regarding HB 525. In comments that evening to a reporter, however, Nema Brewer, the founder of KY 120 United, stated, "if u think this is about a pension board you haven't been paying attention."
- 41. On that same evening, Brent McKim, president of JCTA, stated that JCTA opposed HB 525 because it would dilute the voices of teachers on the state pension board.

- 42. On February 28, 2019, school districts in the counties of Jefferson, Fayette, Madison, Marion, Bath, Carter, Boyd and Letcher closed their public schools because of expected teacher absences.
- 43. Public school teachers then rallied at the Capitol Building in Frankfort to protest against HB 525.
  - 44. However, teachers did not strike or engage in a work stoppage.
- 45. On March 4, 2019, district superintendents across the state held news conferences to oppose HB 205.
- 46. All 173 district superintendents in the state voiced opposition to the bill on grounds that it would leave less money in the state's budget to support already underfunded public schools. The superintendents also expressed concern as to how the state would pay for a school safety initiatives bill while simultaneously reducing tax revenue.
- 47. Although it appeared as if a "sick out" would occur on March 5, 2019, as a result of legislative hearings on HB 205, no schools closed because of a "sick out."
- 48. On March 6 and 7, Jefferson County School District closed its schools due to teachers and other school employee protesting the bills pending the General Assembly. On March 7, Bullitt County and Oldham County School Districts closed due to "sick outs."
- 49. During the following week, on March 12, 13 and 14, Jefferson County School District again closed as a result of teachers and others going to Frankfort to protest. Bullitt County School District closed on March 13 and 14.
- 50. On each of these days, teachers and other school employees rallied at the Capitol in opposition to HB 205, SB 250 and HB 525.

- 51. In total, eight districts Bath, Boyd, Carter, Fayette, Letcher, Madison, Marion and Oldham Counties closed for one day.
  - 52. Bullitt County School District closed for three days.
  - 53. Jefferson County School District closed for six days.
- 54. All of the school days missed during the 2019 Legislative Session will be made up, just as other missed days for weather or extenuating circumstances, by extending the end of the school year pursuant to standard operating procedure. Neither teachers nor students will miss any required school days. The ACT test affected by the school closures was also rescheduled and not canceled. (*See* Exhibit F (McKim Affidavit).)
- 55. Neither HB 205 nor HB 525 reached a vote in either chamber of the General Assembly.
- 56. SB 250 passed both chambers and Governor Bevin signed it into law on March 25, 2019.

#### The Reaction of the Governor

- 57. During the 2019 Regular Session, additional security requirements were established for entry into the Capitol Building and the Capitol Annex.
- 58. According to a verified complaint filed against the Governor, upon entry to the Capitol Building during the 2019 Regular Session, security officers scanned the drivers' licenses of visitors into a computer system and took photos of each visitor entering the Capitol.
- 59. During this process, security officers asked questions of each visitor, including whether the visitor was a state employee and, if so, under which department of state government.
- 60. Apparently, visitors who did not answer the questions were not allowed entry into the Capitol.

- 61. On March 11, 2019, Governor Bevin posted a nearly four-minute video to his YouTube channel titled "Sick of 'Sickouts'?" In the video, Governor Bevin argued, "You should be offended by this. You really should be, and if you're parents with kids in school as I am you should be offended by this." He accused JCTA of "pretending" to not support the "sick outs," and instead, "reloading sick day hours into the accounts of teachers so that they can call in sick when they're not sick[.]"
  - 62. JCTA denied the Governor's claim.

#### **The Kentucky Department of Education**

- 63. On March 14, 2019, the Commissioner of Education of the Kentucky Department of Education, Wayne Lewis, sent an email to the superintendents of the school districts in Jefferson County, Fayette County, Madison County, Marion County, Bath County, Carter County, Boyd County, Letcher County, Bullitt County and Oldham County requesting teacher attendance records during these "sick outs." (*See* Exhibit A, (Lewis, Email to Superintendents).)
  - 64. Specifically, Lewis requested:

The names of all teachers that called in sick for February 28, March 5-7, and/or March 12-14, 2019 and the day(s) for which each teacher called in sick;

Any and all affidavits or certificates of a reputable physician stating that the employee was ill or caring for an ill family member on the days the employee called in sick, as required by KRS 161.155 for the granting of any sick leave; and

Documentation of the district's policies, procedures, and/or protocols for collecting sick leave affidavits or certifications and verifying qualification for the granting of sick leave.

(See id.)

- 65. Lewis requested the school districts turn over the records by March 18, 2019. (*See id.*)
  - 66. Several schools requested and received an extension for responses.

- 67. By March 25, 2019, all ten school districts responded to Lewis's requests.
- 68. In a March 27, 2019 letter to the superintendents to summarize his findings and make recommendations, Lewis noted that the Kentucky Labor Cabinet has authority to assess a civil penalty to teachers "engaged in a work stoppage" between one hundred and one thousand dollars. (*See* Exhibit B (Lewis, Summary of Findings).)
  - 69. In that same letter, Lewis stated,

If district closures because of work stoppages continue and districts are unwilling or unable to address this problem, I will explore further action to do so, including recommending that the Labor Cabinet issue citations for teachers engaged in illegal work stoppages. At this time, however, I will allow local districts an opportunity to address this issue first.

(See id.)

#### **The Labor Cabinet**

- 70. In the 2017 Regular Session, the General Assembly passed HB 1, commonly referred to as the "Kentucky Right to Work Act." 2017 Ky. Acts ch. 1, § 15.
- 71. HB 1 amended KRS 336.130(3) to provide that no employee is required to become, or remain, a member of a labor organization, or to pay dues to a labor organization. *Id*.
- 72. However, HB 1 also amended KRS 336.130(1), a subsection expressly granting employees the rights to organize, strike, and peacefully picket and assemble. The amendment carved out an exception for public employees, stating, in relevant part, that "no public employee, individually or collectively, may engage in a strike or a work stoppage."
- 73. On April 9, 2019, Governor Bevin vetoed a bill that would have allowed state universities and other government entities to exit the state's pension systems. In his veto letter to the General Assembly, the Governor announced his plan to call a special session to address the topic prior to July 1, 2019.

- 74. Between April 10 and April 15, 2019, the Kentucky Labor Cabinet's Office of Inspector General issued administrative subpoenas *duces tecum* to the superintendents of the school districts in Jefferson County, Fayette County, Madison County, Marion County, Bath County, Carter County, Boyd County, Letcher County, Bullitt County and Oldham County.
- 75. Upon information and belief, each subpoena *duces tecum* commands production, inspection and copying of:

Any and all documents related to alleged "sick outs" by employees of the [relevant school district] occurring on or about February 28, and March 5, 6, 7, 12, 13, and 14, of 2019, including but not limited to, the following records:

- (1) Copies of all documents and/or records identifying the names of any [district] employees who called in sick to [the district] for any of the dates identified above;
- (2) Copies of all documents and/or records that memorialize or record any attempt made by the [district] employees identified above to call in sick to [the district] for any of the dates identified above;
- (3) Copies of all affidavits from [district] employees or letters/notes from licensed medical professionals provided by [district] employees who called in sick to [the district] for any of the dates identified above that authenticate or confirm the reason for the employees' requested absence;
- (4) Copies of all documents and/or records maintained by [the district] that discuss the decision by [district] officials to close schools for any of the dates identified above due to an alleged "sick out";
- (5) Copies of all policies and procedures concerning the use of sick leave by [district] employees, the method by which [district] employees must notify [the district] of the need to take sick leave, and the need to provide supporting documentation, if any, upon the employees' return to work; and
- (6) A certification of the records provided.

(See Exhibit C (JCPS Subpoena).)

76. The Labor Cabinet cited its purported authority under KRS 336.130(1) to impose civil penalties against public employees who engage in a strike or work stoppage as support for the subpoenas *duces tecum*. (*See id.*)

77. The earliest a district is required to comply with a subpoena is May 10, 2019, at 9:00 a.m. EST. (*See id.*)

#### **The Attorney General Responds**

- 78. On April 16, 2019, the Attorney General sent a letter to the Labor Secretary and Governor Bevin informing them that the subpoenas are illegal as they exceed the Labor Secretary's authority and violate the teachers' free speech rights guaranteed under Sections 1 and 8 of the Kentucky Constitution. The Attorney General asked the Labor Secretary to rescind the subpoenas within ten (10) days. (*See* Exhibit D (Attorney General, Letter to Dickerson and Bevin).)
- 79. On April 24, 2019, the Labor Secretary informed the Attorney General that the Labor Cabinet would not rescind the subpoenas. (*See* Exhibit E, Labor Secretary, Letter to Attorney General).)

#### Governor Bevin and the Labor Secretary are Sued Over Firing of KY 120 United Member

- 80. On April 24, 2019, Charissa "Chris" Cooke filed a lawsuit in the United States District Court, Eastern District of Kentucky, against Governor Bevin, the Labor Secretary, and Anya Carnes, an assistant and designee for the Labor Secretary and the Labor Cabinet.
- 81. Therein, Cooke alleges that Governor Bevin and the Labor Secretary terminated her employment as a paralegal in the Office of Administrative Law Judges, Department of Workers' Claims, Kentucky Labor Cabinet, as a result of her involvement with the KY 120 United organization, in particular her assembly with members and other advocates at the Capitol during the 2019 Regular Session to exercise her constitutional free speech rights.

#### **CLAIMS**

#### Count I

#### **Violation of Kentucky Constitution § 2**

- 82. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.
- 83. Section 2 of the Kentucky Constitution provides: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."
- 84. The Labor Secretary exercised arbitrary power when he exceeded his statutory authority by issuing the Subpoenas to investigate teachers who did not engage in a "strike" or "work stoppage" under KRS 336.130(1).
- 85. Further, the Labor Secretary exercised "[a]bsolute and arbitrary power" by targeting teachers for investigation and civil penalties in retaliation for their exercise of constitutionally protected rights to speech, petition, and assembly.
- 86. The Labor Secretary further exceeded his statutory authority by issuing the Subpoenas to investigate and potentially punish teachers who called in sick powers that belong solely to their employers.
  - 87. Accordingly, the Labor Secretary violated Section 2 of the Kentucky Constitution.

#### **Count II**

#### Violation of Kentucky Constitution §§ 1, 8 – Labor Secretary

88. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

- 89. Section 1 of the Kentucky Constitution states, in pertinent part, "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Fourth: The right of freely communicating their thoughts and opinions. . . . Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance."
- 90. Section 8 of the Kentucky Constitution provides, in pertinent part, "Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty."
- 91. The teachers who assembled at the Capitol in February and March 2019 to protest proposed legislation were exercising the rights protected under these sections of the Kentucky Constitution, including their rights to speak freely, assemble peaceably, and apply to their government for the redress of grievances.
- 92. The Labor Secretary's issuance of the Subpoenas, investigation, and threats of civil penalties against teachers who engaged in the exercise of these rights have the purpose and effect of chilling and infringing the teachers' exercise of these rights.
- 93. Accordingly, the Labor Secretary has violated Sections 1 and 8 of the Kentucky Constitution.

#### **Count III**

### Declaratory Judgment that the Secretary Exceeded his Authority Under KRS 336.130

94. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.

- 95. Under KRS 336.050(2), the Secretary "may prosecute any violation of any of the provisions of any law which it is his or her duty to administer or enforce."
- 96. Under KRS 336.060(1), the Secretary may issue subpoenas to compel the production of records "relevant to the matter under investigation."
- 97. Pursuant to KRS 336.130(1), teachers, collectively or individually, may not engage in a "strike" or "work stoppage."
- 98. The Labor Secretary issued the Subpoenas purportedly to investigate violations of KRS 336.130(1).
- 99. A "strike" is a cessation of work by employees in an effort to get for the employees more desirable terms or conditions of employment.
- 100. A "work stoppage" also arises in the context of a labor dispute over employment terms or conditions.
- 101. The teachers did not engage in a "strike" or a "work stoppage," as they did not stop work in an effort to obtain more favorable employment terms or conditions. Rather, they engaged in constitutionally protected speech and assembly, protesting proposed legislation, including but not limited to, legislation relating to their representation on the board that oversees their retirement and tax credits for donations to private schools.
- 102. The Labor Secretary's Subpoenas, in seeking records relating to the teachers' constitutionally protected conduct not records relating to a "strike" or a "work stoppage" exceed the Labor Secretary's authority under KRS Chapter 336. He does not seek records relevant to a matter he may lawfully investigate or prosecute under KRS Chapter 336.
- 103. Plaintiffs therefore are entitled to a declaratory judgment that the Secretary has exceeded his authority in issuing the Subpoenas.

#### **Count IV**

### Violation of Kentucky Constitution §§ 1, 8 – KRS 336.130(1) Is Unconstitutionally Vague and Overbroad

- 104. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.
- 105. A statute is unconstitutionally vague if it does not place someone to whom it applies on actual notice as to what conduct is prohibited; a statute also is impermissibly vague if it is written in a manner that encourages arbitrary or discriminatory enforcement.
- 106. A statute is overbroad if in an effort to control impermissible conduct, the statute also prohibits conduct which is constitutionally permissible.
  - 107. KRS Chapter 336 does not define the terms "strike" and "work stoppage."
- 108. Kentucky courts have provided that the term "strike" is a cessation of work by employees in an effort to obtain more desirable terms for the employees. *Kentucky Unemployment Ins. Comm'n v. South-East Coal Co.*, 389 S.W.2d 929, 930 (Ky. 1965).
- 109. Kentucky courts have stated that a "work stoppage" can occur only due to or arising from negotiations regarding a continuing labor dispute. *Detroit Harvester Co. v. Kentucky Unemployment Ins. Comm'n*, 343 S.W.2d 365, 366 (Ky. 1961).
- 110. Here, no work stoppage by teachers occurred in an effort to obtain more desirable terms for teachers from their employers, and no continuing labor dispute or negotiations regarding a continuing labor dispute existed.
- 111. KRS 336.130(1), in prohibiting public employees from engaging in a "work stoppage," does not give teachers fair notice of the conduct that is prohibited, and it grants the Labor Secretary too much discretion for discriminatory or arbitrary enforcement.

- 112. KRS 336.130(1) is not narrowly drawn to protect teachers' constitutional rights of free speech, free expression, and free assembly.
- 113. KRS 336.130(1) unnecessarily chills the exercise of constitutionally protected rights.
  - 114. Accordingly, KRS 336.130(1) is unconstitutionally vague and overbroad.

#### Count V

#### **Violation of KRS 336.130(2)**

- 115. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.
- 116. Under KRS 336.130(2), "Neither employers or their agents . . . shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."
- 117. Here, to the extent the Governor's administration may be considered the teachers' employer, its conduct in unlawfully issuing the Subpoenas is an unfair or illegal act.
- 118. Further, the cumulative conduct of the Governor's administration in questioning teachers upon their arrival to the Capitol Building to exercise their constitutional rights, twice seeking records relating to teachers' absences on days when protests occurred through two separate agencies and making public comments about its ability to fine teachers under KRS 336 constitutes intimidation, threats, and coercion.
- 119. Clearly, it is the intent of the Governor's administration to make teachers afraid to exercise their constitutional free speech rights in the future, including during the anticipated upcoming special session of the General Assembly.
  - 120. Accordingly, the Governor's administration has violated KRS 336.130(2).

#### **Count VI**

#### **Violation of Kentucky Constitution § 51**

- 121. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.
- 122. Section 51 of the Kentucky Constitution provides, in part, "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title . . . ."
- 123. The title of 2017 HB 1 was "AN ACT relating to right-to-work provisions involving a condition of employment or continuation of employment and declaring an emergency."
- 124. 2017 HB 1, § 1, amended KRS 336.130(1) to add an exception to the right to strike, providing "that no public employee, collectively or individually, may engage in a strike or a work stoppage."
- 125. This provision concerning strikes or work stoppages by public employees was not expressed in the title of 2017 HB 1, because it does not "relate[] to right-to-work provisions."
- 126. Accordingly, this provision of 2017 HB 1 violates Section 51 of the Kentucky Constitution.

#### **Count VII**

#### **Injunctive Relief Against the Labor Secretary**

- 127. Plaintiffs incorporate by reference each and every allegation previously set forth in this Complaint as if fully set forth herein.
- 128. Plaintiffs are entitled to relief in the form of injunctive relief, both temporary and permanent, restraining and enjoining the Labor Secretary and his agents, attorneys,

representatives, and any other person in active concert or participation with him, from enforcing or compelling compliance with the subpoenas to the school districts. Additionally, Plaintiffs are entitled to injunctive relief, both temporary and permanent, restraining and enjoining the Labor Secretary and his agents, attorneys, representatives, and any other person in active concern or participation with him, from imposing civil penalties against any teacher pursuant to KRS 336.990(2)(a).

- 129. By reason of the actions and violations described above, JCTA members and other teachers, as well as the citizens of the Commonwealth, suffered immediate and irreparable injury and will continue to so suffer unless the Labor Secretary is immediately restrained and permanently enjoined from enforcing the Subpoenas, or in any way unconstitutionally reducing or eliminating the protections provided to teachers and public employees.
- 130. Plaintiffs have no adequate remedy at law or otherwise to address this injury, save in a court of equity.
- 131. No court has refused a previous application for a restraining order or injunction in this matter.

**WHEREFORE**, Plaintiffs demand judgment against Defendant as set forth in the prayer for relief, below.

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand as follows:

- I. That this Court issue a declaration and order that:
  - A. The Labor Secretary is without authority under KRS 336.130 to investigate where there is no strike or work stoppage.
  - B. The Labor Secretary's actions violate Section 2 of the Kentucky Constitution.

- C. KRS 336.130 is unconstitutionally vague and overbroad in violation of Sect.1 and 8 of the Kentucky Constitution.
- D. The Labor Secretary's issuance of the Subpoenas violates Sections 1 and 8 of the Kentucky Constitution.
- E. 2017 HB 1 § 1, in its amendment to KRS 336.130(1), violates Section 51 of the Kentucky Constitution.
- F. The actions of the Labor Secretary violate KRS 336.130(2).
- II. That the Court issue a restraining order, temporary injunction, and permanent injunction, restraining and enjoining the Labor Secretary and all his agents, attorneys, representatives, and any other persons in active concert or participation with him from acting on or otherwise enforcing the administrative subpoenas duces tecum issued by the Kentucky Labor Cabinet Office of General Counsel and served upon public school districts, including but not limited to, acting on or enforcing the administrative subpoenas through the filing of a motion to comply under KRS 336.060 against any of the public school districts in any Circuit Court of any judicial circuit of the Commonwealth.
- III. That the Court issue an order permanently enjoining the Labor Secretary from assessing civil penalties pursuant to KRS 336.990(2)(a) against teachers who called in sick on February 28 and March 6, 7, 12, 13, and 14, 2019.
- IV. That Plaintiffs be awarded any and all other relief to which they are is entitled, including attorneys' fees and costs.

DATE: April 29, 2019

Respectfully Submitted,

#### ANDY BESHEAR ATTORNEY GENERAL

By: /s/ J. Michael Brown

J. Michael Brown (jmichael.brown@ky.gov)

Deputy Attorney General

La Tasha Buckner (latasha.buckner@ky.gov)

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(502) 696-5300

(502) 564-8310 FAX

Counsel for Plaintiff Commonwealth of Kentucky, ex rel. Andy Beshear, Attorney General

#### /s/ Thomas J. Schulz, by permission

Thomas J. Schulz

Don. C. Meade

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Counsel for Plaintiff

Jefferson County Teachers Association

# COMMONWEALTH OF KENTUCKY FRANKLIN CIRCUIT COURT DIVISION \_\_\_ CIVIL ACTION NO. 19-CI-

COMMONWEALTH OF KENTUCKY, ex rel.
ANDY BESHEAR, ATTORNEY GENERAL, and
JEFFERSON COUNTY TEACHERS ASSOCIATION

**PLAINTIFFS** 

v.

DAVID A. DICKERSON, in his official capacity as Secretary of the Kentucky Labor Cabinet

**DEFENDANTS** 

#### **VERIFICATION**

I verify, under the penalty of perjury, that I have reviewed the foregoing and that the statements contained herein are true and accurate to the best of my knowledge and belief.

Brent McKim

Commonwealth of Kentucky	)	
	)	SS
State at Large	)	

Subscribed and sworn before me by Brent McKim on this day of April, 29

Notary Public

State At Large, Kentucky

My Commission Expires March 24, 2021

My Commission expires:

#### **VERIFICATION**

I, J. MICHAEL BROWN, Deputy Attorney General, upon being duly sworn, do hereby swear that I have read the foregoing Verified Complaint for a Declaration of Rights, a Temporary Injunction, and a Permanent Injunction and the factual allegations set out therein are true and correct to the best of my knowledge and belief.

	ADUL	3-
	J. Michael Br	own
COMMONWEALTH OF KENTUCK	(Y )	
COUNTY OF FRANKLIN	)	
Subscribed, sworn to and acknowledge	ed before me by this	29 day of April, 2019, by J. Michael
Brown	*	
Notary Public	- <b>-</b>	
Printed Name: Leigh Kant	00867	
My Commission Expires:	GH M. VAN HOOSER Notary Public State at Large	
My Commis	Kentucky ssion Expires Jun 20, 2019	

### **EXHIBIT A**

From: Lewis, Wayne D. - Commissioner, KY Dept. of Education < wayne.lewis@education.ky.gov >

Date: Thu, Mar 14, 2019 at 1:34 PM Subject: Request for Documentation

To: Bacon, Jesse < jesse.bacon@bullitt.kyschools.us>

CC: Durrett, Deanna - General Counsel < Deanna. Durrett@education.ky.gov>

Dear Superintendent Bacon,

Per KRS 156.010 and 156.210, I am writing to request the following documents and records from your district:

- 1. The names of all teachers that called in sick for February 28, March 5-7, and/or March 12-14, 2019 and the day(s) for which each teacher called in sick;
- 2. Any and all affidavits or certificates of a reputable physician stating that the employee was ill or caring for an ill family member on the day(s) the employee called in sick, as required by KRS 161.155 for the granting of any sick leave; and
- 3. Documentation of the district's policies, procedures, and/or protocols for collecting sick leave affidavits or certificates and verifying qualification for the granting of sick leave.

I am requesting these records be electronically scanned and submitted to me in the next three business days (no later than close of business on Monday, March 18, 2019). When sending, please CC KDE General Counsel Deanna Durrett at <a href="mailto:Deanna.Durrett@education.ky.gov">Deanna.Durrett@education.ky.gov</a>.

Should you have any questions, please don't hesitate to reach out to me.

Thank you,

Wayne

Wayne D. Lewis, Jr., Ph.D. Commissioner of Education

Kentucky Department of Education 300 Sower Boulevard – 5th floor Frankfort, KY 40601 (502) 564-3141 wayne.lewis@education.ky.gov

This email may contain confidential data or information and is intended solely for the use of the individual or entity to whom it is addressed. If you are not the named addressee, you should not disseminate, distribute, or copy this e-mail, and you are requested to notify the sender immediately.

### **EXHIBIT B**

Matthew G. Bevin Governor



Derrick Ramsey
Secretary
Education and Workforce
Development Cabinet

### Wayne D. Lewis, Ph.D. Commissioner of Education

#### KENTUCKY DEPARTMENT OF EDUCATION

300 Sower Boulevard . Frankfort, Kentucky 40601 Phone: (502) 564-3141 . www.education.ky.gov

March 27, 2019

Re: Teacher "Sick Outs" and Response to District Document Production

Dear Superintendents,

In the past month, Kentucky experienced a high number of teacher absences that caused some districts to close school since February 28, 2019, when protests regarding education legislation began. These "sick outs" have impeded students' learning, created tremendous inconveniences for thousands of families, and caused classified staff (many not participating in the "sick outs") to lose pay on days their districts closed. On March 12, high school juniors in Jefferson County were denied the opportunity to take their ACT college entrance exam, as scheduled, because of the "sick out."

On March 14, and pursuant to my authority under KRS 156.010 and 156.210, I requested documents from your districts related to the recent teacher "sick outs." Specifically, I asked for:

- 1. The names of all teachers that called in sick for February 28, March 5-7, and/or March 12-14, 2019 and the day(s) for which each teacher called in sick;<sup>1</sup>
- 2. Any and all affidavits or certificates of a reputable physician stating that the employee was ill or caring for an ill family member on the day(s) the employee called in sick, as required by KRS 161.155 for the granting of any sick leave; and
- 3. Documentation of the district's policies, procedures, and/or protocols for collecting sick leave affidavits or certificates and verifying qualification for the granting of sick leave.

Several districts requested and received an extension until March 25, 2019, to respond. As of March 25, 2019, all 10 districts responded to the requests.

The following is intended to summarize the Department's findings from a review of the submissions, to explain current law, and to issue guidance to districts to address these "sick outs" going forward.

<sup>&</sup>lt;sup>1</sup> A March 16, 2019, email from Kentucky Department of Education General Counsel Deanna Durrett clarified that for request #1, we were seeking only the names of all teachers that called in sick for any of the listed dates when the high number of reported teacher absences caused the district to close on one of those days.



#### **SUMMARY OF FINDINGS**

A review of the documents reveals the following:

- As a result of a high number of teacher sick leave requests, eight districts (Bath, Boyd, Carter, Fayette, Letcher, Madison, Marion, and Oldham) closed for one day. Bullitt County closed for three days, and Jefferson County closed for six days.
- The number of sick leave requests for many of the districts was abnormally high and coupled with the widespread and public rallying cries of teacher advocacy groups for teachers to organize in Frankfort on the days in question suggests a possible illegal work stoppage under KRS 336.130.<sup>2</sup> For example, in Jefferson County Public Schools ("JCPS"), there are approximately 500 certified employee absences on any given day. On the days the district closed, sick leave requests numbered in the thousands (even in excess of 2,000 for February 28). Similarly, Fayette County's hundreds of sick leave calls for February 28 resulted in the district not having enough substitute teachers to safely continue with the instructional day and forced the district to close.
- For many districts, when it became clear the district would not have enough substitute teachers to safely continue with the instructional day, the school day was cancelled pursuant to KRS 158.070(3)(f)(2), which allows school closures for a "local emergency which would endanger the health or safety of children[.]"<sup>3</sup>
- KRS 161.155 provides that "[s]ick leave shall be granted to a teacher or employee if he or she presents a personal affidavit or a certificate of a physician stating that the teacher or employee was ill, that the teacher or employee was absent for the purpose of attending to a member of his or her immediate family who was ill, or for the purpose of mourning a member of his or her immediate family." Yet, all 10 districts reported that they did not collect affidavits or physician certificates from teachers that called out sick for days when the district ultimately closed. Since the district closed, the day was a "non-contract" day for teachers, so no sick leave was actually taken, and teachers were not required by district policy to submit an affidavit or physician certificate in accordance with KRS 161.155.
- All 10 districts provided policy documents that state that an affidavit or physician certificate is required for granting of sick leave in accordance with KRS 161.155. Most districts' policies require the affidavit or certificate of a physician "upon return to work."

Thus, the essential problem, as identified from the documents, is that when enough teachers call in sick (whether honestly or dishonestly), the districts ultimately do not require proof of illness or utilization of a sick leave day. Rather, they declare a "local emergency" per KRS 158.070 and report the day as a "non-contract" day. Consequently, teachers can organize *en mass* to (dishonestly) call in sick and force an "emergency" without providing verification of illness as intended by law and without having to use one of their personal leave days pursuant to KRS 161.154 to engage in personal political activity.

<sup>&</sup>lt;sup>2</sup> In a statement by Brent McKim, President of Jefferson County Teachers Association, made at 8:02pm on March 11, 2019, Mr. McKim acknowledged that the district closures in Jefferson County were "work stoppages." *See* <a href="https://www.facebook.com/brent.mckim/videos/10157273438908117/">https://www.facebook.com/brent.mckim/videos/10157273438908117/</a>.

<sup>&</sup>lt;sup>3</sup> See also 702 KAR 7:140, which provides, "The regularly scheduled student attendance day shall not be shortened after the school calendar has been adopted by the local board of education and approved by the department except in cases of emergency declared by the local school district superintendent in accordance with policies of the local board of education."

While the majority of teachers in these districts, regardless of their position on policy, were ready and willing to go to work, the actions of a subset of teachers dictated a decision for entire districts that hurt many students, parents, and district employees. For the sake of our students, first and foremost, this situation must be addressed.

#### **GOVERNING LAW**

In recent days, there have been claims that teachers have a right to engage in "sick outs" and that any action to prevent them would violate teachers' First Amendment rights. This is patently false. While teachers have a First Amendment right to engage in political advocacy, they do not have a right to organize a work stoppage by lying about being sick. Rather, teachers can and should use a personal day granted to them by KRS 161.154 or engage in political advocacy outside of work hours.

KRS 336.130 explicitly prohibits public employee strikes or work stoppages, and Kentucky courts have long recognized that public employees do not have a right to engage in a strike or work stoppage. In addition, the statute governing teacher sick leave makes clear that this leave shall be taken for true illness or care of an ill family member by requiring an affidavit or physician certificate to support claims of illness. Clearly, the intent of the law is to prevent dishonesty and abuse of sick leave.

It is important to note that teachers engaging in "sick outs" can be subject to individual consequences – a fact recognized by the Kentucky Education Association's own president on March 13.<sup>5</sup>

Teachers engaged in work stoppages can be issued personal citations by the Kentucky Labor Cabinet. KRS 336.990 provides that any person who violates KRS 336.130 "shall for each offense be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000)." This fine is issued and enforced by the Secretary of the Labor Cabinet.

In addition, lying about sick leave can also result in consequences for a teacher's employment and certification. KRS 161.790 provides that a teacher contract can be terminated by a superintendent for "insubordination" or "neglect of duty." The Education Professional Standards Board ("EPSB") also can take action against an educator's certificate for violations of KRS 161.120(1) and the Professional Code of Ethics for Kentucky Certified School Personnel. Anyone can file a complaint with the EPSB regarding the conduct of a certified educator, and the EPSB may revoke, suspend, or refuse to issue or renew a teacher's certificate; impose probationary or supervisory conditions upon a teacher's certificate; or issue a written reprimand or admonishment if the EPSB finds a teacher has committed any act that constitutes "fraudulent, corrupt, dishonest, or immoral conduct," or if a teacher has demonstrated "neglect of duty" or violated "any statute relating to schools or the teaching profession[.]" Indeed, the EPSB has taken action regarding falsification of sick leave requests in the past.

Thus, not only does lying about sick leave set a poor example for our students, but it also carries the potential for personal consequences under the law.

<sup>&</sup>lt;sup>4</sup> See Jefferson County Teachers Ass'n v. Bd. of Educ. of Jefferson County, 463 S.W.2d 627, 628 (Ky. 1970) ("Under the common law, it is recognized that public employees do not have the right to strike or to engage in concerted work stoppages."); Abney v. City of Winchester, 558 S.W.2d 622, 623 (Ky. 1977) ("It is well settled that a public employee has no inherent right to strike."); Bd. of Trustees of Univ. of Ky v. Pub. Emp. Council No. 51 Am. Fed. of State, 571 S.W.2d 616, 619 (Ky. 1978) ("The right to strike on the part of public employees is not protected by either the Federal or the Kentucky Constitution, nor has the legislature granted such right to public employees.").

<sup>&</sup>lt;sup>5</sup> See <a href="https://www.wdrb.com/in-depth/even-with-closures-teachers-who-call-out-sick-could-face/article">https://www.wdrb.com/in-depth/even-with-closures-teachers-who-call-out-sick-could-face/article</a> fdb54fdc-45b8-11e9-b163-03b314265f83.html.

<sup>&</sup>lt;sup>6</sup> See Bd. of Educ. of Laurel Cty. v. McCollum, 721 S.W.2d 703, 704 (Ky. 1986).

#### **GUIDANCE TO DISTRICTS**

I have stated publicly – and I reiterate here – that I support teachers engaging in the political process, if done in accordance with the law. I supported the negotiated agreement between Jefferson County Public Schools and the Jefferson County Teachers Association, which permitted hundreds of teachers a day from the district to protest in Frankfort while schools remained open. The problem, however, is that this agreement was not followed. Many teachers chose to engage in a "sick out," closing the district and denying students their instructional day.

The Kentucky Board of Education ("KBE") has the authority to promulgate regulations on the pay of teachers during absence because of sickness, *see* KRS 158.070(1)(f)(2), and on the use of student attendance days as a result of a local emergency, *see* KRS 158.070(4)(a). Consequently, I have considered recommending to the KBE that a regulation be promulgated that addresses the loophole created by *en mass* violations of KRS 161.155 and the declaration of local emergencies under KRS 158.070. Such a regulation could require that requests for sick leave made pursuant to KRS 161.155 be accompanied by an affidavit <u>at</u> the time the sick leave request is made.

Such a regulation, however, would place an additional burden on <u>all Kentucky teachers</u> based on the dishonest actions of a subset. Because the vast majority of Kentucky teachers have not been dishonest in requesting sick leave and the vast majority of Kentucky school districts have found ways to permit some teachers to politically engage in Frankfort while keeping schools open, at this time, I decline to recommend a regulatory change to the KBE.

Rather, I believe districts must address this problem head-on. Local district superintendents have a responsibility to ensure the law is being followed by district employees. KRS 160.370 provides that "[a]s executive officer of the board, the superintendent shall see that the laws relating to the schools, the bylaws, rules, and regulations of the Kentucky Board of Education, and the regulations and policies of the district board of education are carried into effect." In addition, KRS 161.120(2) places a mandatory duty on superintendents to report to the EPSB conduct of certified employees that may warrant action against the certificate.

In Bullitt County, Superintendent Bacon has authorized a delegation to go to Frankfort on the final day of the legislative session (March 28, 2019), in an effort to keep schools open. Again, I support such efforts, and I encourage additional measures to guard against interruptions to the educational process.

It is my recommendation that all districts institute policies that close the loophole between KRS 161.155 and KRS 158.070 and make clear the following:

- Teachers desiring to miss work to engage in political advocacy must request and receive approval to use personal leave under KRS 161.154 not sick leave under KRS 161.155.
- Teachers requesting sick leave for the purpose of closing the district amounts to an illegal work stoppage. If a district suspects that sick leave has been requested to create a work stoppage, the district will preserve the list of teacher sick leave requests and submit this list to the Secretary of Labor, upon request, for investigation and possible civil penalties pursuant to KRS 336.050, 336.130, 336.985, and 336.990.
- Teachers found to have falsified sick leave requests will be disciplined by the district up to and including possible termination under KRS 161.790 and/or will be reported by the superintendent to the EPSB pursuant to KRS 161.120.

To conclude: These school closures come at a tremendous cost to families, classified district employees, tax payers, and – most importantly – our children. <u>If district closures because of work stoppages continue and districts are unwilling or unable to address this problem, I will explore further action to do so, including recommending that the Labor Cabinet issue citations for teachers engaged in illegal work stoppages. At this time, however, I will allow local districts an opportunity to address this issue first.</u>

Sincerely,

Wayne D. Lewis, Jr.

Commissioner of Education

Way D. fr. J.

## EXHIBIT C

# COMMONWEALTH OF KENTUCKY KENTUCKY LABOR CABINET

OFFICE OF GENERAL COUNSEL

657 Chamberlin Avenue Frankfort, Kentucky 40601 (502) 564-3535

IN RE: Inquiry into Possible Violations of KRS 336.130

confirm the reason for the employees' requested absence;

documentation, if any, upon the employees' return to work; and

close schools for any of the dates identified above due to an alleged "sick out";

(4)

(5)



OFFICE OF INSPECTOR GENERAL INSPECTION NUMBER:

2019-OIG-0005

DATE:

April 10, 2019

The C	ommonwealth of Kentucky to:				
Name Addre	· · · · · · · · · · · · · · · · · · ·				
Pursuant to KRS 336.060(1), you are commanded to appear before:					
Pursu	ant to KRS 336.060(1), you are to appear at:				
on the	ant to KRS 336.060(1), you are to appear at: a.m. OR p.m Eastern Central Time				
	To testify in behalf of To produce To give depositions				
Pursu	ant to KRS 336.060(1), you are commanded to produce and permit inspection and copying of the				
"sick of and M	ing documents or objects (or to permit inspection of premises): Any and all documents related to alleged outs" by employees of the Jefferson County Public School District (JCPS) occurring on or about February 28, arch 5, 6, 7, 12, 13, and 14, of 2019, including, but not limited to, the following records:				
(1)	1) Copies of all documents and/or records identifying the names of any JCPS employees who called in sick to JCPS for any of the dates identified above;				
(2)	Copies of all documents and/or records that memorialize or record any attempt made by the JCPS employees identified above to call in sick to JCPS for any of the dates identified above;				
(3)	Copies of all affidavits from JCPS employees or letters/notes from licensed medical professionals provided				

on the \_\_\_\_\_ day of \_\_\_\_\_\_, 20 \_\_\_ at \_\_\_\_ a.m OR p.m. \_\_\_\_ Eastern \_\_\_ Central Time at the following address: Attn: Rodney C. Stewart, Inspector General, Kentucky Labor Cabinet, 657 Chamberlin Avenue, Frankfort, Kentucky, 40601.

Note: This information is not to be disclosed to the above-identified individuals or to anyone associated with the account(s) because such disclosure could hinder an ongoing investigation.

by JCPS employees who called in sick to JCPS for any of the dates identified above that authenticate or

Copies of all documents and/or records maintained by JCPS that discuss the decision by JCPS officials to

Copies of all policies and procedures concerning the use of sick leave by JCPS employees, the method by which JCPS employees must notify JCPS of the need to take sick leave, and the need to provide supporting

Michael G. Shansburg Jr.  Issuing Official / Authorized Deputy	Name of Requesting Attorney or Official
Ву:	Telephone #: (502) 564- 3070

# **EXHIBIT D**

ANDY BESHEAR ATTORNEY GENERAL CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KY 40601
(502) 696-5300
FAX: (502) 564-2894

April 16, 2019

Governor Matthew G. Bevin Commonwealth of Kentucky 700 Capital Avenue, Suite 100 Frankfort, KY 40601 Secretary David A. Dickerson 657 Chamberlin Avenue Frankfort, KY 40601

#### VIA HAND DELIVERY

Dear Governor Bevin and Secretary Dickerson:

I am writing to advise you that the recent subpoenas issued by the Labor Cabinet to various school districts are unlawful, and that any attempt to punish teachers that engaged in a "sick-out" would violate their First Amendment rights. Moreover, the recent actions of the Labor Cabinet and other members of the administration towards these teachers may constitute "intimidation, threats or coercion" in violation of Kentucky Law. I am therefore requesting that the Labor Cabinet withdraw the subpoenas within the next ten (10) days.

As you are aware, the Labor Cabinet has issued multiple administrative subpoenas to various school districts as part of a supposed inquiry into possible violations of labor law, namely KRS 336.130. The subpoenas command school districts to produce records related to so-called "sick-outs." The records demanded by the Cabinet include the names of individual teachers/employees who called in sick and other details.

Because the "sick-outs" were not related to the conditions of the teachers' employment, but instead driven by their objections to legislation that would harm the overall financial and

<sup>&</sup>lt;sup>1</sup>At least six school districts have received subpoenas: Jefferson County; Fayette County; Oldham County; Madison County; Boyd County; and Bullitt County. See Taylor Durden, "More school districts receive subpoenas from Kentucky Labor Cabinet" Wave 3 News, Apr. 11, 2019, http://www.wave3.com/2019/04/12/more-school-districts-receive-subpoenas-kentucky-labor-cabinet/ (last visited Apr. 15, 2019), WSAZ News Staff, Associated Press, Boyd County Public Schools receives subpoena concerning teacher sickouts" Wave 3 News, April 12, 2019, https://www.wsaz.com/content/news/Two-Ky-school-districts-receive-subpoena-from-Bevin-administration-508458611.html (last visited Apr. 15, 2019).

structural support of the public school system, the "sick-outs" constitute free speech protected by the First Amendment.

Teachers do not surrender their constitutional rights when they become public employees. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). They retain the rights secured by the First Amendment to the United States Constitution, and Sections 1 and 8 of the Kentucky Constitution, including their rights to speak freely, to peaceably assemble, and to petition the government for redress of grievances. *See* U.S. CONST. amend. I; KY. CONST. §§ 1, 8.

Whether a "sick-out" is an illegal work stoppage, or instead protected free speech was directly litigated in Detroit. *See School Sch. Dist. of the City of Detroit v. Detroit Federation Fed'n of Teachers*, No. 16-000013-MZ (Mich. Ct. Cl. Ingham Cty. Aug. 16, 2016). There, teachers engaged in a "sick-out," and their employer – the school district – sued the perceived leaders of the movement claiming the "sick out" was an illegal work stoppage or strike.

The court ruled against the district and for the teachers. It found that the "sick-out" was based on "complaints to the state government to rectify educational, financial and structural problems in the Detroit Public School District, and not issues concerning the rights, privileges or conditions of their employment." In other words, the "sick-out" was not based on objections to the teachers' pay or work conditions, which might form the legal basis of a "work stoppage," but instead was focused on issues related to the funding or structure of the public education system itself. As such, the "sick-out" was not an unlawful strike or work stoppage, but instead constitutionally protected free speech.

The same situation exists here. Teachers involved in Kentucky's "sick-outs" were not engaged in labor negotiations; they were not advocating for higher pay, more generous benefits, or any issue related to their "rights privileges or conditions of their employment." Instead, they called in sick in order to be present and heard in opposition to legislation that would siphon money away from public education in the form of tax credits to private schools, *i.e.*, "educational, financial and structural" issues. These actions are therefore not covered by labor law, but are instead protected by the First Amendment. That means that if the Labor Cabinet continues, it will lose this fight and – like the Detroit school district – waste thousands of dollars of legal fees.

Moreover, unlike the Detroit situation, the *employer* in this situation is not objecting. The school districts in question have not requested this inquiry, and have taken the position that no strike or work stoppage has occurred. Instead, it is the Labor Cabinet trying to step into the shoes of the employers/school districts, which not only raises legal questions, but also presents a significant conflict. Indeed, the teachers' speech that is at issue was speech *against* actions by the Commonwealth. Now, that same Commonwealth – through the Labor Cabinet – seeks to punish them for speaking.

If the Labor Cabinet believes it can step into the shoes of the employer and chooses to continue with the subpoenas, its actions may further violate labor law, and subject the Commonwealth to potential liability. Pursuant to KRS 336.130(2), an employer cannot "engage or be permitted to engage in unfair practices or resort to violence, intimidation, threats or coercion." Sufficient facts exist to suggest the Cabinet, in conjunction with the Commissioner of Education, has violated or will violate this statute. Indeed, the Commissioner of Education has already made statements that may constitute intimidation. He has stated he may seek to punish individual teachers if "sick-outs" continue, *i.e.*, if they exercise their free speech rights. The Commissioner even warned that the Labor Cabinet "may" take the exact actions it is taking now. Thus, the Commissioner's "intimidation" may be turning into threats or actual coercion.

As the chief law officer of the Commonwealth, my primary obligation is to the people of Kentucky, not to the machinery of government, and not to the Executive Branch or any of its officers. *Beshear v. Bevin*, 498 S.W.3d 355, 362-63 (Ky. 2016) (citing *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 868 (Ky. 1974)). When a state actor threatens the public's legal or constitutional interests – through any act, whether through legislation or an act of the Executive Branch – I owe the people the duty to take action to vindicate their public rights. *Id.* at 362-66.

I urge the Labor Cabinet to voluntarily withdraw these unlawful subpoenas. If it refuses, I call on the Governor to order the Labor Cabinet to withdraw them. If you will not do your legal duty, I will not hesitate to take appropriate action to protect the public from their own government.

Sincerely,

Andy Beshear Attorney General

Andy Bishean

# EXHIBIT E



Matthew G. Bevin Governor

Jenean M. Hampton
Lt. Governor

Kentucky Labor Cabinet Office of the Secretary 657 Chamberlin Avenue Frankfort, Kentucky 40601 Phone: (502) 564-3070 www.labor.ky.gov

David A. Dickerson Secretary

April 24, 2019

### VIA HAND DELIVERY

Hon. Andy Beshear Attorney General Commonwealth of Kentucky Capitol Building, Suite 118 700 Capitol Avenue Frankfort, Kentucky 40601

Re: Request to Withdraw Subpoenas

Dear Attorney General Beshear:

I am in receipt of your letter dated April 16, 2019, in which you asked that I withdraw the subpoenas recently served by the Labor Cabinet's Office of Inspector General (OIG) on 10 Kentucky school districts. Although I appreciate your letter, I see no valid reason to overlook possible violations of Kentucky law.

Last week, you incorrectly stated that the Labor Cabinet is "trying to subpoena and fine [teachers] \$1,000 apiece." As you should know, this office is only beginning an investigation and has made no decision whether any statutory violation has occurred. At this early stage, we are simply gathering information about possible violations of Kentucky law. Nothing more. Permit me to explain.

First, you speak of *duty* as a privilege that is unique to *your* office. Like you, I am the leader of an Executive Branch agency. Thus, I, too, have certain duties under Kentucky law. KRS 336.050(2) authorizes my office to "prosecute any violation of any of the provisions of any law which it is [my] duty to administer or enforce." This includes violations of KRS Chapter 336. In furtherance of this mandate, KRS 336.060(1) allows that "[i]n the conduct of an investigation or hearing, [my office] or any authorized deputy may issue subpoenas to compel the attendance of witnesses and parties and the production of books, papers, and records competent and relevant to the matter under investigation." As the chief law officer of the Commonwealth, your primary *duty* should be in seeing that these laws are followed, not impeded.

Hon. Andy Beshear April 24, 2019 Page 2

Because you have raised the issue, the public has a right to understand the reason why the Labor Cabinet OIG issued the subpoenas you oppose. KRS 336.130(1) plainly states: "Employees, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, except that no *public* employee, collectively or individually, may engage in a strike or a work stoppage." (emphasis added). In other words, the General Assembly has made it unlawful for *public*-sector employees to engage in work stoppages. You, of all people, should honor and respect that law.

Kentucky is not unique in its prohibition of public-sector strikes and work stoppages. The State of Michigan, which you identify in your letter, likewise prohibits strikes by public employees. Federal law also prohibits federal-government employees from "participat[ing] in a strike, or assert[ing] the right to strike, against the Government of the United States."

The rationale for such prohibitions is obvious. In the private sector, a strike or work stoppage results in the deprivation of a product or service. A lumber yard, where I spent more than three decades of my life, cannot produce wood products when a work stoppage occurs. A steel mill cannot make rebar. A restaurant cannot offer food. But in the public sector, a strike or work stoppage means the deprivation of *critical* government services to the injury of the public at large. Streets are not policed. 9-1-1 calls are left unanswered. Children—the ultimate beneficiaries of the service of public education—are not educated.

Consequently, under Kentucky law, I have a duty to (1) investigate whether a public-sector strike or work stoppage has occurred in violation of clear Kentucky law, and (2) determine how best to hold people accountable in the event a finding is made that they have intentionally deprived the public—*i.e.*, our children—of the service they are due. It matters not that the school districts themselves have determined not to raise the issue; Kentucky law compels me to act.

There are also moral and ethical considerations in play. Many Kentuckians have expressed their frustration with the so-called "sick outs" that the Labor Cabinet OIG is investigating. Working parents have had to scramble for expensive childcare on short notice, or potentially jeopardize their jobs. Some parents are concerned that their children are going to miss summer camp. Others have been forced to cancel pre-scheduled vacations. In Louisville, students have had to postpone taking the ACT—a requirement for admission to college—and parents have expressed their concern that the significant investment they made in ACT prep courses for their children has gone to waste. This is on top of the countless accommodations parents and students had to make in 2018 for similar actions by public-school employees during the debate over pension reform.

Yet, despite all of these inconveniences and injuries to the public, it appears that your only answer is that public-school employees enjoy a right to speak out under the First Amendment. No one disputes the existence of that right. But that is not what is at stake here. What is at stake here is whether public-school employees can *lie* about being sick and force a shutdown of the entire school system so that they can get *paid* while coming to Frankfort to lobby. That you would

<sup>&</sup>lt;sup>1</sup> See Mich. Comp. Laws § 423.202.

<sup>&</sup>lt;sup>2</sup> 5 U.S.C. § 7311(3).

Hon. Andy Beshear April 24, 2019 Page 3

discard so easily the interests of the many parents and children who rely on the regular workings of the public-school system in favor of a small but vocal group who would shut down that system altogether because they oppose certain legislative proposals is an audacious position at best.

If you think that the public employees who participated in the "sick outs" truly believed they were acting free of any possible consequence, you are misinformed. For example, according to news reports, the Kentucky Education Association issued a legal opinion earlier this year informing public-school employees that they could face disciplinary action even if their school districts closed due to teacher shortages.<sup>3</sup> The then-President of the Kentucky Education Association, Stephanie Winkler, was quoted as saying: "Everyone obviously knows when they call in for any kind of leave day, but especially a sick day, that they are required to sign an affidavit, and if you violate that affidavit there are consequences. . . . That's always been the case, and there's been plenty of cases before that have had that discipline applied."

My interest and duty, first and foremost, is upholding and enforcing Kentucky law. As Attorney General, that should be you primary duty as well. Although you have apparently determined the motivation of each person who participated in "sick outs" without investigation, I choose not to make final determinations without looking at the evidence. That is why I tasked the Labor Cabinet's OIG with the job of gathering information and putting together a report so that I will be fully educated to decide whether sufficient evidence exists to issue citations against any public employee pursuant to KRS 336.985 and 336.990. It may be that, when all is said and done, this office issues some citations. It may be that this office issues no citations at all. We won't know until after an inquiry is completed and we review all the evidence.

For the record, however, I have had no direct involvement in the Labor Cabinet OIG's inquiry other than the initial referral. With nearly three decades of investigative experience, including time as the First Assistant Deputy Inspector General for the State of Ohio, the Labor Cabinet's Inspector General, Rodney Stewart, runs an office in which integrity, professionalism, and independence are paramount. I am confident that he will be fair and impartial throughout this process. You should have that same confidence.

With that background in mind, let's talk about what we know to have occurred thus far. Consistent with its usual protocols, and as reported by you and the media, the Labor Cabinet's OIG issued subpoenas to 10 Kentucky school districts and asked for the production of the following:

Any and all documents related to alleged "sick outs" by employees of [the school district] occurring on or about February 28, and March 5, 6, 7, 12, 13, and 14, of 2019, including, but not limited to, the following records:

<sup>&</sup>lt;sup>3</sup> Kevin Wheatley, Even With Closures, Teachers Who Call Out Sick Could Face Discipline, KEA Says in Legal Opinion, WDRB.com (Mar. 13, 2019), <a href="https://www.wdrb.com/in-depth/even-with-closures-teachers-who-call-out-sick-could-face/article\_fdb54fdc-45b8-11e9-b163-03b314265f83.html">https://www.wdrb.com/in-depth/even-with-closures-teachers-who-call-out-sick-could-face/article\_fdb54fdc-45b8-11e9-b163-03b314265f83.html</a>.

Hon. Andy Beshear April 24, 2019 Page 4

(1) Copies of all documents and/or records identifying the names of any [school district] employees who called in sick to [the school district] for any of the dates identified above

(2) Copies of all documents and/or records that memorialize or record any attempt made by the [school district] employees identified above to call in

sick to [the school district] for any of the dates identified above;

(3) Copies of all affidavits from [school district] employees or letters/notes from licensed medical professionals provided by [school district] employees who called in sick to [the school district] for any of the dates identified above that authenticate or confirm the reason for the employees' requested absence;

(4) Copies of all documents and/or records maintained by [the school district] that discuss the decision by [school district] officials to close schools for

any of the dates identified above due to an alleged "sick out";

(5) Copies of all policies and procedures concerning the use of sick leave by [school district] employees, the method by which [school district] employees must notify [the school district] of the need to take sick leave, and the need to provide supporting documentation, if any, upon the employees' return to work; and

(6) A certification of any records provided.

The subpoenas themselves also provide each school district with 30 days to produce the information to the Labor Cabinet's OIG. To date, that is all anyone associated with the Labor Cabinet has done or asked to be done. Moreover, no school district has publicly objected to complying with the subpoenas.

This brings me back to your letter and your public comments. You mention that, if the Cabinet persists, "thousands of dollars of legal fees" will be wasted. To be clear, the only "wasted" resources will be those needlessly expended by your office in pursuing, and by mine in defending, any meritless and premature effort by your office to obstruct the lawful inquiry undertaken by the Labor Cabinet's OIG. That is a road that does not have to be taken. You, of all people, as chief law officer of the Commonwealth, should let this statutorily authorized investigation proceed as the law provides.

Make no mistake, I will do my legal duty for all the people of the Commonwealth. What I will not do is set aside my obligations to uphold well-established Kentucky law because it might not sit well with you.

Sincerely,

David A. Dickerson

Secretary

Kentucky Labor Cabinet

RECEIVED

APPLICATION

CIVIL LITIGATION

# **EXHIBIT F**

# COMMONWEALTH OF KENTUCKY FRANKLIN CIRCUIT COURT DIVISION \_\_\_ CIVIL ACTION NO. 19-CI-

COMMONWEALTH OF KENTUCKY, ex rel. ANDY BESHEAR, ATTORNEY GENERAL, and JEFFERSON COUNTY TEACHERS ASSOCIATION **PLAINTIFFS** 

v.

DAVID A. DICKERSON, in his official capacity as Secretary of the Kentucky Labor Cabinet

**DEFENDANTS** 

## **AFFIDAVIT**

\*\*\*\* \*\*\*\* \*\*\*\*

Comes now the Affiant, Brent McKim, and for his Affidavit deposes and states as follows:

- 1. I am President, the Chief Executive Officer, of the Jefferson County Teachers Association (JCTA), an unincorporated nonprofit association comprised of approximately 9,000 active and retired certified employees of Jefferson County Public Schools (JCPS). JCTA is the bargaining representative of approximately 6,000 active certified employees of JCPS including both members and nonmembers.
- 2. During the 2019 Regular Legislative Session of the Kentucky General Assembly, JCTA actively opposed HB205, HB 525 and SB8 and encouraged the certified personnel of JCPS and its members and the general public to contact their legislators and to actively protest on their own time in Frankfort while the legislature was in session against this legislative bills.
- 3. Certified personnel are limited by law to three (3) days personal leave per school year. JCTA's contract with JCPS allows for specific amount of Association Leave to be used for the certified employees it represents.

- 4. JCTA and JCPS agreed to use Association Leave for a limited number of certified employees per school to allow for travel to Frankfort to express opposition to HB205 and other legislative bills. Members were encouraged to use this plan rather than to call in sick. JCPS's decision to close schools obviated this agreement. As a result of the cancellation no certified personnel were paid nor did they receive sick leave pay.
- 5. None of the legislative issues being opposed concerned any issue, dispute or concern with the terms and conditions of employment of the certified employees of the Jefferson County School Board.
- 6. JCPS closed its schools six (6) times during the 2019 Legislative Session for the stated reason of insufficient personnel allegedly caused by the so-called "sick-outs." JCTA did not call for, organize or encourage the use of sick leave at any time to protest in Frankfort.
- 7. All of the school days missed during the 2019 Legislative Session will be made up, just as other missed days for weather or extenuating circumstances, by extending the end of the school year pursuant to standard operating procedure. Neither teachers nor students will miss any required school days. The ACT test affected by the school closures was also rescheduled and not canceled.

Further, Affiant sayeth naught.

Brent McKim

President

Jefferson County Teachers Association

Commonwealth of Kentucky	)	
	) ss	
State at Large	)	
Subscribed and sworn before m	ne by Brent McKim on this	day of April, 2019.
	Notary Public	ABIGAIL R. HARTGE  NOTARY PUBLIC  State At Large, Kentucky
	My Commission e	My Commission Euripe Manual of anni

# COMMONWEALTH OF KENTUCKY FRANKLIN CIRCUIT COURT DIVISION \_\_\_ CIVIL ACTION NO. 19-CI-

COMMONWEALTH OF KENTUCKY, ex rel. ANDY BESHEAR, ATTORNEY GENERAL, and JEFFERSON COUNTY TEACHERS ASSOCIATION **PLAINTIFFS** 

v.

DAVID A. DICKERSON, in his official capacity as Secretary of the Kentucky Labor Cabinet

**DEFENDANTS** 

# MOTION FOR INJUNCTIVE RELIEF BY TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

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## **NOTICE**

Please take notice that Plaintiffs will make the following Motion on May 6, 2019, at 9:00 a.m., in Franklin Circuit Court, or as soon thereafter as Plaintiffs may be heard.

## **MOTION**

Pursuant to CR 65.01, CR 65.03 and CR 65.04, Plaintiffs the Commonwealth of Kentucky, *ex rel*. Andy Beshear, Attorney General ("the Commonwealth"), and the Jefferson County Teachers Association ("JCTA") move the Court for injunctive relief by entry of a temporary restraining order and a temporary injunction enjoining Defendant David A. Dickerson, in his official capacity as Secretary of the Kentucky Labor Cabinet ("the Labor Secretary"), from acting on or otherwise enforcing the administrative subpoenas *duces tecum* ("the Subpoenas") issued by the Labor Cabinet and served upon ten (10) public school districts. The Subpoenas are unlawful because they target constitutionally protected speech and assembly (chilling free speech and assembly in an upcoming special session), and they exceed the scope of authority granted under Kentucky law because the Labor Cabinet does not employ the individual

teachers that are the target of the subpoenas. Plaintiffs additionally move the Court for a temporary restraining order and a temporary injunction enjoining the Labor Secretary from imposing multiple \$1,000 civil penalties that he has threatened on any teacher, as levying fines against teachers would exceed the Labor Secretary's authority under KRS Chapter 336.

In support of their Motion, Plaintiffs adopt and incorporate by reference the allegations set forth in their Verified Complaint for Declaratory Judgment and Injunctive Relief. In further support of their Motion, Plaintiffs tender the following Memorandum of Law.

## MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

This Court should grant Plaintiffs' Motion and issue a temporary restraining order and a temporary injunction to enjoin the Labor Secretary from taking certain actions to enforce the unlawful Subpoenas and impose civil penalties pursuant to KRS 336.990(2)(a). As the Verified Complaint and this Memorandum show, Plaintiffs' rights are being or will be violated by the Labor Secretary's actions, and Plaintiffs will suffer an immediate and irreparable injury before the Labor Secretary can be heard in opposition. Further, substantial legal questions on the merits exist, Plaintiffs will suffer an immediate and irreparable injury pending a judgment on the merits, and the public interest favors injunctive relief after a weighing of the equities.

## **INTRODUCTION**

Over the past two years, Kentucky's public schools have been under attack. In 2018, the General Assembly reduced funding for Early Childhood Education by 6.25% and cut school improvement funds by six-percent (6%). (*Id.*) The General Assembly also failed to provide any funding for required professional development, textbooks or teacher mentoring. (*Id.*) Funding of Family Resource and Youth Service Center programs has decreased by 16%, Support Education Excellence in Kentucky (SEEK) funding per pupil has been reduced by 14%, funding for

Extended School Services has decreased by 39%, and student transportation funds have fallen 40%. (*Id.*)

In addition, in the 2018 Regular Session, the legislature sought to "reform" the state pension laws. *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74 (Ky. 2018). To do so, it breached and substantially impaired the inviolable contract between teachers and the Commonwealth that promises certain retirement benefits in exchange for a lifetime of public service. In response, teachers throughout the state protested by assembling at the Capitol and exercising their free speech rights.

The Governor and his administration were angered by these protests. Following the largest protest on April 13, 2018 – when over 10,000 people assembled in Frankfort - Governor Bevin exited the Capitol Building and told reporters:

I guarantee you somewhere in Kentucky today a child was sexually assaulted that was left at home because there was nobody there to watch them. I guarantee you today, a child was physically harmed or ingested poison because they were home alone because a single parent didn't have any money to take care of them. I'm offended by the fact that people so cavalierly, and so flippantly, disregarded what's truly best for children.

Mandy McClaren & Lucas Aulbach, *Bevin: Children were sexually assaulted and tried drugs because teachers were protesting*, Courier-Journal, Apr. 13, 2018, available at https://www.courier-journal.com/story/news/politics/ky-legislature/2018/04/13/matt-bevin-kentucky-governor-children-sexually-assaulted-teacher-protests/516569002/ (last visited Apr. 27, 2019).

The teachers' efforts were initially successful. The public opposition led the sponsor of the pension bill to declare the bill "on life support," and the President of the Senate stated there was "little hope" the bill would pass. Daniel Desrochers, *Kentucky pension bill still on 'life support,' says sponsor*, Lexington Herald-Leader, Mar. 27, 2018, available at

https://www.kentucky.com/news/politics-government/article206898244.html (last visited Apr. 27, 2019); Tom Loftus, 'I don't see a lot of hope for it': Kentucky's pension reform bill is unlikely to pass, Courier-Journal, available at https://www.courier-journal.com/story/news/politics/2018/03/14/stivers-dont-see-lot-hope-pension-bill/424601002/ (last visited Apr. 27, 2019).

Yet, on one of the last days of the session, in a small conference room from which the public was excluded, an 11page sewage wastewater bill was stripped and replaced with the language of a 291 page "pension reform" bill. The bill passed both chambers of the legislature in a matter of hours when most teachers either had left the Capitol for the day or had been excluded from the hearings. The message sent to teachers by the General Assembly was clear: if you cannot be seen, your voices will not be heard. Ultimately, the Attorney General filed suit over the bill and the Supreme Court unanimously upheld the lower court's ruling voiding the bill on the unconstitutional manner in which it was passed.

The General Assembly continued its attack on public education in the 2019 Regular session. On February 5, 2019, House Bill 205 ("HB 205") was introduced in the Kentucky House of Representatives. HB 205, Gen. Ass., Reg. Sess. (Ky. 2019). The bill provided for dollar-for-dollar tax breaks as an incentive for individuals and organizations to donate to private school scholarship programs. *Id.* The Legislative Research Commission estimated the incentive program could cost the state up to \$50 million by its fourth year of implementation. Commonwealth of Kentucky Fiscal Note Statement, HB 205, Gen. Ass., Reg. Sess., at 2 (2019)

On February 15, 2019, Senate Bill 250 ("SB 250") was introduced in the Kentucky Senate. SB 250, Gen. Ass., Reg. Sess. (Ky. 2019). Among other things, SB 250 amended existing law to allow the superintendent of Jefferson County Public Schools to appoint a principal without the participation of a school-based council.

On February 20, 2019, House Bill 525 ("HB 525") was introduced in the Kentucky House of Representatives. HB 525, Gen. Ass., Reg. Sess. (Ky. 2019). The bill provided for a reorganization of the Board of Kentucky's Trustees of the Teachers' Retirement System to reduce the appointments made by the Kentucky Education Association ("KEA") from seven to one, to allow other school associations to nominate those members, and to give the Governor an additional appointment to the board. *Id*.

In response to these threats, JCTA, KEA, KY 120 United (a grassroots political organization), and other public school teacher organizations publicly announced their opposition to these bills (Complaint, ¶38.) JCTA urged its members to oppose HB 205, SB 250 and HB 515, to join rallies against these bills at the Capitol, and to call and write their representatives and senators. JCTA did not urge or suggest any person to call in sick to attend rallies. (Complaint, ¶39.) On February 28, the following eight school districts closed their public schools due to expected teacher absences: Jefferson County, Fayette County, Madison County, Marion County, Bath County, Carter County, Boyd County, and Letcher County. (Complaint, ¶ 42.) Teachers from around Kentucky organized and protested at the Capitol throughout the day. (Complaint, ¶ 43.)

Jefferson County Public Schools closed five more times in the next two weeks as a result of "sick outs" – on March 6, 7, 12-14, 2019. (Complaint, ¶ 48, 49.) The Oldham County School District closed on March 7. (Complaint, ¶ 49.) And the Bullitt County School District closed on March 7, 13, and 14. (Complaint, ¶ 48.) Each time, the "sick out" was to ensure that the General Assembly would not pass the private school tax credit bill, as its direct result would be to defund public education.

Once again, Governor Bevin expressed his dissatisfaction with the teachers' protests. On March 11, 2019, he posted a nearly four-minute video to his YouTube channel titled "Sick of 'Sickouts?" (Complaint, ¶ 61.) In the video, Governor Bevin argued, "You should be offended by this. You really should be, and if you're parents with kids in school as I am you should be offended by this." (*Id.*)

Three days later, on March 14, 2019 – the final "sick out" of the 2019 Regular Session – Wayne Lewis, the Commissioner of the Kentucky Department of Education, sent an email to the superintendents of the school districts in Jefferson County, Fayette County, Madison County, Marion County, Bath County, Carter County, Boyd County, Letcher County, Bullitt County, and Oldham County, requesting teacher attendance records during these "sick outs." (Complaint, Exhibit A.)

Specifically, Lewis requested:

The names of all teachers that called in sick for February 28, March 5-7, and/or March 12-14, 2019 and the day(s) for which each teacher called in sick;

Any and all affidavits or certificates of a reputable physician stating that the employee was ill or caring for an ill family member on the days the employee called in sick, as required by KRS 161.155 for the granting of any sick leave; and

Documentation of the district's policies, procedures, and/or protocols for collecting sick leave affidavits or certifications and verifying qualification for the granting of sick leave."

(Complaint, Exhibit A.)

By March 25, 2019, all ten (10) school districts responded to Lewis' requests. (Complaint, Lewis' Summary of Findings, Exhibit B.) On March 27, 2019, Lewis summarized his findings and made recommendations in a letter to the superintendents. (*Id.*) Therein, Lewis made a direct threat, stating that the Kentucky Labor Cabinet had authority to assess civil

penalties to teachers "engaged in a work stoppage" between \$100 and \$1,000. (*Id.*) Lewis further intimidated the superintendents, stating:

If district closures because of work stoppages continue and districts are unwilling or unable to address this problem, I will explore further action to do so, including recommending that the Labor Cabinet issue citations for teachers engaged in illegal work stoppages. At this time, however, I will allow local districts an opportunity to address this issue first.

(*Id*.)

After these threats, and after the close of the 2019 session of the General Assembly, Governor Bevin vetoed a bill related to the state's pension systems. (Complaint, ¶ 73.) In his veto letter to the General Assembly, the Governor announced his plan to call a special session to address pensions. (Complaint, ¶ 73.) Teacher groups immediately began to organize, as the "sewer bill" fiasco was still very fresh.

On April 10<sup>th</sup>, the day after Governor Bevin announced he would call a special session, the Kentucky Labor Cabinet's Office of Inspector General began issuing administrative subpoenas *duces tecum* to the superintendents of the school districts in Jefferson County, Fayette County, Madison County, Marion County, Bath County, Carter County, Boyd County, Letcher County, Bullitt County, and Oldham County. (Complaint, ¶ 74.) Each subpoena commanded production, inspection and copying of:

Any and all documents related to alleged "sick outs" by employees of the [relevant school district] occurring on or about February 28, and March 5, 6, 7, 12, 13, and 14, of 2019, including but not limited to, the following records:

- (1) Copies of all documents and/or records identifying the names of any [district] employees who called in sick to [the district] for any of the dates identified above;
- (2) Copies of all documents and/or records that memorialize or record any attempt made by the [district] employees identified above to call in sick to [the district] for any of the dates identified above;

- (3) Copies of all affidavits from [district] employees or letters/notes from licensed medical professionals provided by [district] employees who called in sick to [the district] for any of the dates identified above that authenticate or confirm the reason for the employees' requested absence;
- (4) Copies of all documents and/or records maintained by [the district] that discuss the decision by [district] officials to close schools for any of the dates identified above due to an alleged "sick out";
- (5) Copies of all policies and procedures concerning the use of sick leave by [district] employees, the method by which [district] employees must notify [the district] of the need to take sick leave, and the need to provide supporting documentation, if any, upon the employees' return to work; and
- (6) A certification of the records provided.

(See Complaint, Exhibit C). The first school districts served with the subpoenas must comply by May 10, 2019, at 9:00 a.m. EST.

On April 16, 2019, the Attorney General sent a letter to Governor Bevin and Labor Secretary Dickerson informing them that the subpoenas are illegal attempts to suppress the free speech rights guaranteed to all citizens – including public school teachers – under Sections 1 and 8 of the Kentucky Constitution. (Complaint, Exhibit D.) General Beshear also notified Governor Bevin and the Labor Secretary that because the "sick outs" were not work stoppages, the Labor Cabinet had no authority to investigate or impose civil penalties on public school teachers who participated. (*Id.*)

On April 24, 2019, the Labor Secretary responded to the Attorney General. (Complaint, Exhibit E.) Though the Labor Secretary recognized that teachers could be disciplined by their local school districts for engaging in a "sick out," he nonetheless expressed his belief that the Labor Cabinet has the power to impose civil penalties on a teacher for calling in sick in order to protest government action at the Capitol. (*Id.*)

On April 29, 2019, the Commonwealth of Kentucky *ex rel*. Andy Beshear, Attorney General, filed a verified Complaint, alleging that the Labor Secretary, in his official capacity, has issued the subpoenas in violation of Kentucky constitutional and statutory law. The Commonwealth seeks a preliminary injunction to enjoin the Labor Secretary from acting to enforce or compel compliance with the unlawful Subpoenas and from imposing civil penalties on any teacher pursuant to KRS 336.990(2)(a).

## **ARGUMENT**

In issuing the Subpoenas, the Labor Secretary has violated Section 2 of the Kentucky Constitution by exceeding his authority under KRS Chapter 336, and he has infringed on the teachers' free speech and assembly rights protected under Sections 1 and 8 of the Kentucky Constitution. Until the Court decides the substantial legal questions Plaintiffs raise in this action, a temporary restraining order and a temporary injunction are necessary to prevent the further violation of Kentucky law by enforcement of the Subpoenas or imposition of civil penalties, which would irreparably harm Plaintiffs, and to protect the teachers' constitutional rights.

## I. STANDARDS FOR INJUNCTIVE RELIEF

Pursuant to CR 65.01, "[a] party may obtain injunctive relief in the circuit court by (a) restraining order, (b) temporary injunction, or (c) permanent injunction in a final judgment." A restraining order must only restrict the doing of an act, while an injunction may restrict or mandatorily direct the doing of an action. *Id.* With regard to a restraining order, CR 65.03(1) provides:

A restraining order may be granted at the commencement of an action, or during the pendency thereof, without written or oral notice to the adverse party or his attorney only if (a) it clearly appears from specific facts shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage before the adverse party or his attorney can be heard in opposition, and (b) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claims that notice should not be required.

Further, a restraining order granting injunctive relief against the enforcement of a subpoena should be directed against the acts of the person who may seek to enforce or compel compliance with the subpoena. *See Commonwealth v. Mountain Truckers Ass'n, Inc.*, 683 S.W.2d 260, 263 (Ky. App. 1984) (*citing Akers v. Floyd County Fiscal Court*, 556 S.W.2d 146 (Ky. 1977).

Under CR 65.04(1), a court may grant a temporary injunction if it is "clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual." The granting of a temporary injunction is within the sound discretion of the trial court. *Maupin v. Stansbury*, 575 S.W.2d 695, 697-98 (Ky. App. 1978). A Court should grant a temporary injunction if the movant shows irreparable injury, the existence of a substantial legal question on the merits, and a weighing of the equities favor injunctive relief. *Maupin v. Stansbury*, 575 S.W.2d 695, 697-98 (Ky. App. 1978).

As the court explained in *Maupin*:

Applications for temporary injunctive relief should be viewed on three levels. First, the trial court should determine whether plaintiff has complied with CR 65.04 by showing irreparable injury. This is a mandatory prerequisite to the issuance of any injunction. Secondly, the trial court should weigh the various equities involved. Although not an exclusive list, the court should consider such things as possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo. Finally, the complaint should be evaluated to see whether a substantial question has been presented. If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded.

575 S.W.2d at 699.

As the movants, Plaintiffs carry the burden of "clearly showing" these elements. CR 65.04(1); *Maupin*, 575 S.W.2d at 698. The rule requires that "(t)he complaining party must allege and prove facts from which the court can reasonably infer such would be the result." *Id.* at 698-99. In a departure from federal jurisprudence, in Kentucky a movant is not required to show a substantial probability of success on the merits. *Id.* 

II. SUBSTANITAIL LEGAL QUESTIONS ON THE MERIT EXIST IN THIS MATTER, FAILURE TO ISSUE TEMPORARY INJUNCTIVE TEMPORARY INJUNCTIVE RELIEF WILL RESULT IN IRREPARABLE HARM TO PLAINTIFFS, AND A BALANCING OF THE EQUITIES WEIGHS IN FAVOR OF TEMPORARY INJUNCTIVE RELIFT.

## A. Substantial Legal Questions on the Merits Exist.

Substantial legal questions on the merits exist here. Plaintiffs have shown in their Verified Complaint that they have a "substantial possibility" of succeeding on the merits. *Norsworthy v. Kentucky Bd. of Medical Licensure*, 330 S.W.58, 63 (Ky. 2009). Further, Plaintiffs have shown that serious questions exist that warrant a trial on the merits. Chief among these questions are whether, in issuing the Subpoenas, the Labor Secretary has clearly exceeded his authority in violation of the Kentucky Constitution and Kentucky statute and unlawfully targeted protected constitutional activity.

# 1. The Labor Cabinet has Exceeded Its Authority in Issuing the Subpoenas.

Substantial legal questions on the merits exist because the Labor Secretary has exceeded his authority, as the teachers here were not taking part in a "strike" or a "work stoppage" under KRS 336.130. Instead, they were engaged in protected political speech. Further, the Labor Secretary has exceeded his authority because with KRS 336.130 the General Assembly did not confer upon the Labor Secretary the power to investigate and/or punish public employees. Accordingly, the Attorney General asks this Court to enjoin the Labor Secretary from enforcing

or seeking to compel the school districts' compliance with the unlawful Subpoenas and from imposing any civil penalties on any teacher.

# a. The Teachers Did Not Engage in a "Strike" or "Work Stoppage."

The text of the statute and case law all show that the teachers' conduct did not constitute a "strike" or a "work stoppage" pursuant to KRS 336.130(1), the statute the Labor Secretary invoked in issuing the Subpoenas. Under KRS 336.130(1), "Employees, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, except that no public employee, collectively or individually, may engage in a strike or a work stoppage." (Emphasis added). Thus, after establishing the general right of employees to strike, the statute carves out an exception for public employees, who may not "strike" or engage in a "work stoppage." The Labor Secretary issued the Subpoenas to the school districts ostensibly to investigate and punish teachers for allegedly violating this clause.

The statute fails to define the terms "strike" and "work stoppage." Kentucky courts have adopted the following meaning for the context of a "strike:" "'A strike is cessation of work by employees in an effort to get for the employees more desirable terms." *Kentucky Unemployment Ins. Comm'n v. South-East Coal Co.*, 389 S.W.2d 929, 930 (Ky. 1965) (quoting *Barnes v. Hall*, 146 S.W.2d 929, 936 (Ky. 1940)). In other words, a strike occurs in a labor dispute, where employees stop working in an attempt to obtain more favorable terms or conditions of their employment. *See Detroit Harvester Co. v. Kentucky Unemployment Ins. Comm'n*, 343 S.W.2d 365, 366 (Ky. 1961) ("A labor dispute is any controversy concerning terms, tenure or conditions of employment. A strike is a cessation of work by employees in an effort to obtain more desirable terms.").

Case law also contemplates "work stoppage" occurring in the context of a labor dispute. In *Detroit Harvester Co.*, for example, the court explained:

The Company takes the position that there may be a work stoppage, arising out of a bona fide labor dispute, which is neither a strike nor a lockout. That is true and is exemplified in the case of <u>Ward v. Barnes, Ky., 266 S.W.2d 338.</u> There the employer had operated a coal tipple by the use of three staggered work shifts. The union, contending this practice violated the labor contract, went on strike. A week later the company accepted the union demands and undertook to operate on two shifts instead of three. This made it necessary to reduce the total number of workers. It was held those who lost their employment because of the change in method of operations were not entitled to unemployment compensation because their unemployment was the direct result of a continuing labor dispute.

343 S.W.2d at 366 (emphasis omitted). Again, a "work stoppage" occurs only due to or arising from negotiations regarding a continuing labor dispute, and for the purpose of more favorable employment terms.

Other cases appear to use the term "work stoppage" interchangeably with the term "strike," or perhaps to describe an illegal strike or conduct slightly less serious than a strike. In *Heltsley v. District No. 23, United Mine Workers of America*, 477 S.W.2d 134 (Ky. 1971), for example, the Court stated, "A work stoppage occurred at the employer's premises[.] . . . The work stoppage and picketing were in breach of a 'no strike' collective bargaining agreement. The employer claims that appellants aided, encouraged, and participated in the illegal strike and failed in their explicit contractual duty to sue their best efforts to terminate the illegal work stoppage." And in *Elkhorn & Jellico Coal Co. v. Kentucky Unemployment Compensation Comm'n*, 221 S.W.2d 640, 641 (Ky. 1949), the court advised:

On April 1, 1946, and later on November 20, 1946, a 'work stoppage' became effective in most of the coal mines of Kentucky. In that year this 'stoppage' was nation-wide and arose because the United Mine Workers and the coal operators could not agree on a new contract. Though it was contended at one time that the miners were not really striking, there is no question a significant labor dispute existed.

Thus, regardless of how the term "work stoppage" is used, it always refers to a dispute with an employer and over employment terms and conditions. That definition is also consistent with the rest of KRS 336.130(1), which expressly refers to organization by workers "to negotiate the terms and conditions of their employment ...."

Here, there is no labor dispute and there was no attempt to secure more favorable employment terms. The teachers are employed by their respective Boards of Education and are not employees of the Executive Branch or the Legislature. The lack of a labor dispute is evident in that the teachers' employers – the school districts – have no dispute with nor do they seek to punish their employees. Second, as explained above, the teachers were in Frankfort to oppose legislation concerning the overall funding and structure – *i.e.*, private school tax credits – and not the conditions of their employment. Accordingly, the teachers were not engaged in a "strike" or a "work stoppage." As such, KRS 336.130(1)'s prohibition on strikes and work stoppages does not, apply as a matter of law, as those terms are not otherwise defined and enforcement of the Labor Secretary's Subpoenas issued under that statute should be enjoined. Further, any attempt by the Labor Secretary to impose penalties on teachers for alleged violations of the statutes should be enjoined.

# b. KRS 336.130 Does Not Empower the Secretary to Fine Public School Teachers.

The Labor Secretary's subpoenas violate the law because KRS 336.130 does not permit the Labor Secretary to punish public teachers. The Labor Secretary's interpretation of that statute is contrary to its plain text, its purpose, and its history. Accordingly, even if the teacher protests constituted "a strike or a work stoppage" under KRS 336.130(1) – and they do not – the Labor Secretary must be restrained from enforcing the subpoenas.

The public employees provision of KRS 336.130(1) is not an affirmative ban on public employees' actions. Instead, it is an exception to the statute's conferral of affirmative rights on all employees, and corresponding duties on employers. Thus, contrary to the Labor Secretary's claimed authority, a strike or work stoppage by public employees does not "violate" KRS 336.130. The Labor Secretary is therefore without authority to investigate here because there can be no violation and there can be no civil penalty.

Prior the passage of 2017 HB 1, KRS 336.130(1) stated, in full: "Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees, collectively and individually, may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes." *See* 2017 HB 1, § 1. The statute therefore codified important workers' rights, consistent with the purpose of the Labor Cabinet to protect employees, promote friendly relations between employers and employees, eliminate unfair practices by both employers and employees, and improve working conditions. *See generally* KRS 336.040(2).

In 2017, an exception to workers' rights was added to the statute: "except that no public employee, collectively or individually, may engage in a strike or a work stoppage." *See* 2017 HB 1, § 1. That addition merely codified the holding of *Jefferson Cty. Teachers Ass'n v. Bd. of Educ. of Jefferson Cty.*, 463 S.W.2d 627, 628-29 (Ky. 1970). As a result of this amendment, the statute now clearly provides that public *employers* do not violate the statute when they punish public employees who strike.

Thus, read in context, the public employees exception does not affirmatively grant the Labor Secretary the power to levy civil penalties he claims; it merely confirms that public employers do not violate the law by disciplining their employees who strike. *See, e.g.*, *Marksberry v. Chandley*, 126 S.W.3d 747, 753 (Ky. App. 2003) ("Each section of a statute (or regulation) should be interpreted consonant with the statute as a whole.").

Moreover, the title of 2017 HB 1, the bill that made these changes, shows that it was not intended to provide the Labor Secretary with the power to punish public employees.

Commonwealth v. Barney, 74 S.W. 181, 182 (Ky. 1903) (courts must consider the title of the bill in construing the statute). That title is "AN ACT relating to right-to-work provisions involving a condition of employment or continuation of employment and declaring an emergency." See 2017 HB 1. Permitting the Labor Secretary to unilaterally fine public employees cannot plausibly relate to "right-to-work provisions."

By contrast, permitting the Labor Secretary to assess civil penalties for "unfair or illegal acts or practices" or "violence, intimidation, threats or coercion" – actions affirmatively *prohibited* by KRS 336.130 – is entirely consistent with a right-to-work bill, which is designed to regulate the relationship between employers and employees and to limit the power of unions. Accordingly, the civil penalties in KRS 336.990 may only be assessed for violation of those prohibitions.

# c. The Labor Secretary has No Power to Penalize Kentucky's Public School Administrators or Its Employees.

The Kentucky Constitution, precedent of the Kentucky Supreme Court, and acts of the General Assembly all firmly establish that the Labor Cabinet has no authority over the work-related activities of Kentucky's public school teachers. Under Section 183 of the Kentucky Constitution, "The General Assembly shall, by appropriate legislation, provide for an *efficient* 

system of common schools throughout the State." (Emphasis added). In all "matters of state law . . . all acts of the legislature, the judiciary and any government agent are subordinate[.]" to this constitutional mandate. *See Fletcher v. Commonwealth*, 163 S.W.3d 852, 867 (Ky. 2005) (quoting *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 681 (Ky. 1994)).

The General Assembly alone has the authority over the system of common schools – not the Labor Cabinet or any other executive branch agency. Because of this specificity and the fact that the General Assembly has given no explicit authority to the Labor Cabinet related to public education, the Labor Secretary has no authority to investigate or fine teachers for work-related activities. Instead, the legislature has given all disciplinary authority to the local school districts, and to state education boards that it created and has made independent from executive branch control.

Kentucky's highest court has consistently recognized this mandate of Section 183. As early as 1909, the Kentucky Court of Appeals held that "Section 183 of the Constitution *requires* the General Assembly to provide by appropriate legislation an efficient system of common schools throughout the state." *Prowse v. Bd. of Educ. for Christian Cty.*, 120 S.W. 307, 308 (Ky. 1909) (emphasis added). *See also Commonwealth v. Griffen*, 105 S.W.2d 1063, 1065 (Ky. 1937). The Court further found that the General Assembly has the sole discretion over common schools. *See Prowse*, 120 S.W. at 308; *Talbott v. Kentucky State Bd. of Educ.*, 52 S.W.2d 727, 730 (Ky. 1932); *Griffen*, 105 S.W.2d at 1065.

To carry out its constitutionally mandated duties, the General Assembly established a system of school districts as creatures of the legislature. *Board of Educ. of Kenton Cty. v. Mescher*, 220 S.W.2d 1016, 1019 (Ky. 1949). The districts "were created . . . and exist only as a means for the state to carry out the General Assembly's constitutional duty to 'provide for an

efficient system of common schools throughout the state." *Calvert Inv's., Inc. v. Louisville and Jefferson Cty. Metro. Sewer Dist.*, 805 S.W.2d 133, 138 (Ky. 1991) (citations omitted). As creatures of the General Assembly, only "the Legislature has power to alter them or even to do away with them entirely." *Mescher*, 220 S.W.2d at 1019.

In *Rose v. Council for Better Educ.*, the Kentucky Supreme Court strengthened the constitutional mandate, ruling that it is "clear and unequivocal" that the General Assembly must "create," "maintain," and "implement" the system of common schools. 790 S.W.2d 186, 205, 215-16 (Ky. 1989). As the Court wrote, "*The creation, implementation and maintenance of the school system must be achieved by appropriate legislation*." *Id.* at 205 (emphasis added). The Court provided a detailed list of criteria defining what an "efficient" system of common schools resembles, and required continuous "monitor[ing] by the General Assembly to assure that they operate with no waste, no duplication, no mismanagement, *and with no political influence*." *Id.* at 213 (emphasis added).

Thus, only the General Assembly, whose sole obligation it is to provide for an efficient system of common schools, has authority over Kentucky's public schools, including authority to determine what agencies have oversight and disciplinary responsibilities related to public schools. The legislature granted that authority to the local school districts and independent education boards – not the labor Cabinet – through statutory enactment to ensure the system of common schools be independent of any political control.

Under KRS 160.160(1), the legislature mandated that each public school district be under the management and control of a board of education, and made each local board "a body politic and corporate with perpetual succession." The General Assembly gave each local board "general control and management of the public schools in its district" and required the boards to

"exercise general all powers prescribed by law in the administration of its public school system. ...." KRS 160.290(1). It provided the school districts and superintendents supervision authority over schools and authority to make all personnel decisions. KRS 160.345; KRS 160.380(2); KRS 160.390.

At the state level, the General Assembly created various education boards to carry out its sole obligation to manage an efficient system of common schools. The Education Professional Standards Board ("EPSB"), created under KRS Chapter 161, has the duty to, among other things: issue, renew, revoke, suspend, or refuse to issue or renew a teaching certificate; impose probationary or supervisory conditions on a certificate; issue a written reprimand or admonishment on a certificate; of any combination of such actions. KRS 161.028(1)(f); KRS 161.120(1). As part of any investigation, the executive director of the EPSB – who the EPSB selects – may issue subpoenas relevant to disciplinary cases and has access to all records of educational personnel related to disciplinary actions against certified employees. KRS 161.017(4)-(5).

The EPSB may take action against a certificate for various reasons specifically identified in KRS 161.120(1). The same statute provides the procedures the EPSB must apply in disciplinary actions relating to certificates and appeals of such actions. KRS 161.120(2)-(12).

In addition to the EPSB, the General Assembly created and gave the Kentucky Board of Education the mandate to manage and control the common schools and all programs operated in them. KRS 156.029; KRS 156.070(1). The legislature made the Commissioner of the Kentucky Department of Education the chief state school officer and gave him certain powers, which Commissioner Lewis apparently used in requesting the same information the Labor Cabinet now demands. KRS 156.148(1); KRS 156.210. When the commissioner or his assistants find

wrongdoing or violation of school laws, the commissioner must report it to the state Board of Education, and local prosecutors then become involved unless prosecution is not warrantable; then, the state Board "may rectify and regulate all such matters." KRS 156.210(3).

As all of the statutory enactments reveal, the legislature has chosen to grant local school districts and independent state education boards the power to implement its sole obligation to manage Kentucky's system of common schools. Kentucky's statutes are riddled with this grant of authority. But nowhere does the legislature make the Labor Cabinet or the Labor Secretary part of the equation. This concrete legislative fact demonstrates the Labor Cabinet's true motive in issuing the Subpoenas to public school districts: to exert political influence. As the Kentucky Supreme Court established 30 years ago, the actions of the Labor Cabinet and the Labor Secretary violate Section 183 of the Kentucky Constitution and cannot stand.

As his April 24, 2019 letter confirms, the Labor Secretary is unlawfully trying to interpose himself in the management of teachers because he claims the purpose of the Subpoenas was in part to determine whether the teachers lied when they called in sick. Making such a determination cannot answer whether there was a "strike" or "work stoppage" – the only issues the Labor Secretary can investigate even under his misreading of KRS 336.130. Instead, it is only relevant to whether the local school districts – the teachers' employers – and EPSB can take action against teachers. Accordingly, the Court should enjoin the Labor Secretary from acting to enforce or compel compliance with the Subpoenas and from imposing civil penalties on any teachers under KRS 336.990(2)(a).

## 2. The Subpoenas unlawfully target protected constitutional activity.

Substantial legal questions on the merits also exist regarding whether the Subpoenas unlawfully target protected constitutional activity. Section 1 of the Kentucky Constitution lists

among the "inherent and inalienable rights" of all persons "[t]he right of freely communicating their thoughts and opinions" and "[t]he right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance." Section 8 of the Kentucky Constitution further provides that "[e]very person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty." Here, the Subpoenas unlawfully target the teachers for exercising their rights under Ky. Const. §§ 1 and 8, and therefore the Court should enjoin enforcement of the Subpoenas.

## a. Teachers do not forego constitutional rights.

Teachers do not relinquish the constitutional free speech rights "they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work[.]" *Pickering v. Bd. of Educ. of Township High Sch. Dist.* 205, 391 U.S. 563, 568 (1968). "And 'political speech directed toward public officials is at the pinnacle of protected speech." *Doe v. Coleman*, 497 S.W.3d 740, 749 (Ky. 2016) (quoting *Welch v. Am. Publishing Co. of Ky.*, 3 S.W.3d 724, 726 (Ky. 1999)).

Here, as explained above, the teachers were engaged in political speech. They were protesting proposed legislation relating to membership on their retirement board and tax credits for donations to private schools. This political speech was directed toward public officials—members of the General Assembly. Accordingly, their speech was at the pinnacle of protected speech.

<sup>&</sup>lt;sup>1</sup> Although *Pickering* expressly referred to First Amendment rights under the United States Constitution, the Kentucky Supreme Court has determined that the Kentucky Constitution provides protections "co-extensive with" the First Amendment. *McDonald v. Ethics Committee of the Ky. Judiciary*, 3 S.W.3d 740, 743 (Ky. 1999) (citing *Commonwealth v. Foley*, 798 S.W.2d 947 (Ky. 1990)).

In School Dist. of the City of Detroit v. Detroit Fed. of Teachers, No. 16-000013-MZ (Mich. Ct. Cl. Ingham Cty. Aug. 16, 2016) (attached as Exhibit A), the school district sought injunctive relief to preclude two teachers from violating a statute and order prohibiting public employees from striking or inducing any other employee to participate in a strike or work stoppage. Id., at \*2. Both teachers had been absent from school on days where at least one school in the district had to close due to teacher absences. Id., at \*4-5. Additionally, both were openly critical of government actors and encouraged or supported collective action "designed to bring about changes in the operation of the school, building safety, classroom size, equipment, supplies for education, and a return of the full franchise to the citizenry. Id.

The court, however, denied the school district's request for an injunction. In doing so, the court noted that "[a] government may not require an individual to relinquish rights guaranteed him or her by the First Amendment as a condition of public employment." *Id.*, at \*6 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1977)). The court then found that the teachers did not engage in a strike or other work stoppage "for the purpose of coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment." *Id.*, at \*7. Accordingly, the court held that "[a]ny injunction based on [the teachers'] exercise of their free speech right to petition their government would run afoul of First Amendment protections." *Id.* 

Under the facts and circumstances of this case, it is even clearer that the teachers were not engaging in a strike or work stoppage in an effort to effect a change in the terms and conditions of their employment. The speech of the teachers in *School District of the City of Detroit* involved advocating for changes in school operation, building safety, classroom size, equipment, and supplies for education, matters directly relating to the conditions of their employment. Here, in contrast, the teachers were expressing opposition to proposed legislation that did not directly

impact the terms and conditions of their employment. Accordingly, it is even more evident that teachers in Kentucky were engaged in constitutionally protected speech and assembly.

### b. The Subpoenas infringe teachers' constitutional rights.

This Court should enjoin the Labor Secretary from enforcing the Subpoenas because they were intended to, and have the effect of, chilling core political speech. Courts do not hesitate to enjoin government conduct that chills First Amendment rights. Indeed, even informal pressure tactics – such as threatening letters and in-person visits from investigators – are properly enjoined, when they have the purpose or effect of chilling protected activity. For instance, in *Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 (1963)*, the Supreme Court held that a letter hinting at potential prosecution and thanking the recipients in advance for their cooperation, followed by visits from local law enforcement, represented unconstitutional informal pressure that illegally infringed First Amendment speech rights. Thus, even a letter – significantly less formal than the compulsory Subpoenas – can infringe constitutionally protected speech. *Id.* 

Courts also quash subpoenas where those subpoenas were issued in bad faith, or where the subpoenas have the purpose or effect of chilling constitutionally protected rights. *See, e.g.*, *Ealy v. Littlejohn*, 569 F.2d 219, 228-29 (5th Cir. 1978) (holding that investigatory subpoena retaliating against protected political speech may be quashed, because when the state "goes on a fishing expedition in forbidden waters, the courts are not powerless to act"); *O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *Pebble Ltd. P'ship v. EPA*, 310 F.R.D. 575 (D. Alaska 2015) (holding that subpoenas seeking political speech infringed First Amendment rights). *See also Freeman and Bass, P.A. v. State of N.J. Comm'n of Investigation*, 359 F. Supp. 1053 (D.N.J. 1973) (balancing constitutional

rights of subpoena recipients against state interest, but declining to enjoin investigation because, *inter alia*, offending subpoenas were withdrawn).

There can be no doubt that the Subpoenas implicate core-protected activity, including exercise of the rights to petition the government, free association, and free speech. Because they implicate this constitutionally protected activity, the Subpoenas are subject to heightened scrutiny. In reviewing the constitutionality of the Subpoenas, the Court "must balance the rights of the individuals affected against those of the state." *Freeman and Bass*, 359 F. Supp. at 1061. A subpoena that infringes free speech rights must be narrowly tailored, and the state "must convincingly show a substantial relation between the information sought and a subject of *overriding and compelling state interest.*" *Id.* (emphasis added and quotation marks and citation omitted). *See also Pebble Ltd. P'ship*, 310 F.R.D. at 582 (proponent of a subpoena infringing free speech rights must "show that what it seeks goes to the heart of its claim and is carefully tailored to avoid unnecessary interference with protected activities").

Neither the Labor Cabinet nor the Labor Secretary can meet this standard. Indeed, in this case, rather than trying to avoid infringing core rights, there is compelling evidence that the Subpoenas are *intended* to interfere with constitutionally protected activity.

First, the Labor Secretary can identify *no* interest in infringing the teachers' constitutional rights because he has no authority to issue the Subpoenas, as set forth above. The teachers' exercise of their constitutional rights do not constitute a "strike" or "work stoppage," and the Labor Secretary's attempt to broaden that statute is particularly dangerous given the protected conduct he is targeting.

The *O'Keefe* decision is instructive. There, a state court quashed a subpoena that was directed at a political organization because it improperly sought information about that

organization's advocacy on right-to-work legislation. *O'Keefe*, 768 F.3d at 938. The court held that such a sweeping intrusion was improper, in part because the prosecutor who issued the subpoena "has not established any solid reason to believe that a violation of state law has occurred." *Id.* (summarizing state court decision). The same is true here: absent strong evidence of a statutory violation, it is plainly improper to tread on constitutional rights.

Nor can the Labor Secretary show that the Subpoenas are narrowly tailored, as they must be to pass constitutional muster. *See Pebble Ltd. P'ship*, 310 F.R.D. at 582. In fact, the opposite is true, as the Subpoenas seek information about teachers who called in sick *on days when school was not canceled*. Even under the Labor Secretary's misreading of KRS 336.130(1), he can have *no* basis to seek information on teachers who called in sick without school being canceled. The Labor Secretary's failure to tailor the Subpoenas simply confirms that he is not seeking to gather information about "work stoppage[s]," but instead to target teachers who sought to come to Frankfort to exercise their rights to protest proposed legislation.

The Subpoenas are also plainly duplicative, further demonstrating that the Labor Cabinet issued them not to gather information but to silence protected expression. If the Labor Secretary wanted information from the school districts, he could have merely asked for that information from the Education Commissioner, who already requested inspection of the school districts' records related to the sick-outs. KRS 61.878(5) ("The provisions of this section shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function."). The Education Commissioner then publicly suggested that the teachers could be fined by the Labor Cabinet. Thereafter, instead of merely obtaining the information from the Education Commissioner, the Labor Secretary chose to have

investigators personally serve the school districts with the Subpoenas. Such heavy-handed tactics reveal that the purpose of the Subpoenas is not to gather information, but instead to chill protected speech.

These Subpoenas do not represent the Labor Cabinet's only attempts to punish political protesters. Instead, they are part of a pattern of conduct intended to infringe constitutional rights to free speech and assembly. The recent filing of the Complaint in *Cooke v. Bevin*, No. 3:19-cv-00031-GFVT (E.D. Ky.), highlights how determined the Labor Secretary has been in his efforts to silence the teacher protests. The Plaintiff in that case avers in her Verified Complaint that she was terminated under Secretary Dickerson's authority, and that another Labor Cabinet employee confirmed that her termination was retaliation for her protests.

Finally, the timing of the Subpoenas suggests that they are intended to silence future protected expression. The Labor Secretary issued the Subpoenas one day after Governor Bevin announced that he would call a special session. The message to teachers was clear: if they choose to protest at the Capitol during the upcoming session, they will be fined.

The circumstances here suggest that the Subpoenas "were posed in bad faith for the purpose of harassing those who [engaged] in the exercise of their [constitutional rights]." *Ealy*, 569 F.2d at 230. The Court should enjoin the Labor Secretary's enforcement of the Subpoenas and imposition of civil penalties because such conduct infringes constitutional rights.

# B. Plaintiffs Will Suffer Immediate and Irreparable Injury Pending Final Judgment.

The Labor Secretary's enforcement of the unlawful Subpoenas will violate Plaintiffs' rights immediately and irreparably before the Labor Secretary can be heard in opposition.<sup>2</sup> Plaintiffs will

<sup>&</sup>lt;sup>2</sup> Simultaneous to the electronic filing of this Motion and Memorandum of Law, Plaintiffs electronically filed their Verified Complaint and served both pleadings upon the Labor Secretary. On April 24, 2019, the Attorney General

suffer immediate and irreparable injury prior to a final judgment in this action, and the acts of the Labor Secretary prior to the entry of a final judgment will render a final judgment ineffectual.

To show harm, a party must first allege possible abrogation of a concrete right. *Maupin*, 575 S.W.2d at 698. The movant must make a clear showing that these rights will be immediately impaired. *Id.* This means that "[a]n injunction will not be granted on the ground merely of an anticipated danger or an apprehension of it, but there must be *a reasonable probability that injury will be done if no injunction is granted.*" *Maupin*, 575 S.W.2d at 698 (quoting *Hamlin v. Durham*, 32 S.W.2d 413, 414 (Ky. 1930) (emphasis added)). "In the area of temporary injunctive relief, the clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur prior to trial." *Maupin*, 575 S.W.2d at 698.<sup>3</sup>

1. The Commonwealth Will Suffer Irreparable Harm Resulting from the Labor Secretary's Violation of the Kentucky Constitution and Kentucky Statutes.

As discussed above, through issuance of the Subpoenas the Labor Secretary has violated Kentucky constitutional and statutory law. The Commonwealth suffers irreparable harm when elected officials violate the Kentucky Constitution and Kentucky statutes. Such irreparable harm is presumed for governmental entities, and the Kentucky Supreme Court recognized and adopted this harm in *Boone Creek Properties, LLC v. LFUCG*, 442 S.W.3d 36 (Ky. 2014). In it, the Lexington-Fayette Urban County Government sought injunctive relief against a zip lining

stated to the public that he would file suit after the Labor Secretary refused to rescind the unlawful Subpoenas. Thus, the Commonwealth has met the notice requirement of CR 65.03(1).

<sup>&</sup>lt;sup>3</sup> Maupin relied heavily on federal law when defining irreparable injury. Maupin, 575 S.W.2d at 699 ("That rule, well recognized in the federal system, provides that if the complaint shows a probability of irreparable injury and the equities are in favor of issuance, it is sufficient if the complaint raises a serious question warranting a trial on the merits.")

company to prevent it from operating its business during the adjudication of violations of county zoning ordinances. 442 S.W.3d at 37-38. The trial court granted the injunction. *Id.* at 38.

Upon review of the Kentucky Court of Appeals' denial of the defendant's motion for interlocutory relief, the Supreme Court asked the following question:

...whether as a matter of law, the affront to governmental authority presented by an ongoing violation of the law and the enforcing government body's inability to promptly resolve the violation can be regarded as irreparable harm so as to justify the issuance of a temporary injunction to halt the violation pending the full and final adjudication of the matter.

*Id.* at 40. In answering that question, the court wrote:

For a representative government that draws its authority from the respect, good will, and consent of the people, rather than by the force of its armed police and military, the ability to promptly eliminate ongoing violations of laws enacted by the people's representatives is essential to the ability to govern and maintain order in the community. Its inability to do so is injurious and harmful to the government and the community it serves. Consequently, the irreparable harm which would occur in this case in the absence of an injunction is the genuine but intangible harm relating to the power and right of the county zoning authorities to correct open violations of the applicable zoning code.

Id.

As the Supreme Court did in *Boone Creek Properties, LLC*, this Court has recognized that potential ongoing violations of the Kentucky Constitution and Kentucky statute necessarily constitute irreparable harm warranting injunctive relief before final adjudication. *See Legislative Research Comm'n v. Fischer*, 366 S.W.3d 905, 909-10 (Ky. 2012) (noting that the Franklin Circuit issued a restraining order under CR 65.03 pending its decision on a temporary injunction, then issued a temporary injunction after an evidentiary hearing). *See also General Drivers, Warehousemen & Helpers, et al. v. Matthew G. Bevin, Governor, et al.*, Civil Action No. 16-CI-552 (Franklin Cir. Ct.) (granting a temporary restraining order on May 23, 2016, pending a ruling on a motion for a temporary injunction, and granting a temporary injunction on June 8,

2016, pending a final judgment on the merits of the action). As in those cases, the circumstances of this action warrant injunctive relief to prevent immediate and irreparable injury to the Commonwealth pending a final judgment on the merits. This Court should issue a temporary restraining order pending a ruling on a temporary injunction, which the Court should grant until it reaches a final judgment.

# 2. Plaintiffs will suffer irreparable harm by the loss of constitutional rights.

Further, there is no question that the Commonwealth and the teachers represented by JCTA will suffer immediately and irreparably if the temporary restraining order is not granted. "It is well settled that the loss of [constitutional free speech] freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989). Constitutional free speech rights are so heavily guarded because of "the intangible nature or the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *Id.* Because an abrogation of constitutional rights constitutes irreparable injury, "to the extent that the plaintiffs have established a substantial likelihood that they could succeed on the merits of their [free speech] claims, they have also established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights." *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995).

The harm this suit seeks to prevent is the violation of Plaintiffs' constitutional rights, which will be abrogated by the release of the information requested in the subpoenas described infra at II(A)(2) pp.20-26. This suit is urgently and timely filed because the first school districts served with the Subpoenas must comply by May 10,

2019. Once the Labor Cabinet receives the information requested in the subpoenas, the harm will have occurred and the teachers' constitutional rights will have been violated. This is the definition of irreparable harm. The final judgment of this Court on whether or not the Subpoenas are lawful or in violation of the Kentucky Constitution will be rendered completely meaningless because the unlawful Subpoenas will have been complied with and civil penalties may be imposed thereafter. Plaintiffs will be deterred "from exercising those rights in the future" because of fear of retaliation by the Labor Cabinet and the Governor.

# C. The Balancing of the Equities Weighs in Favor of the Granting of Temporary Injunctive Relief.

A balancing of the various equities involved in this action heavily weigh in favor of the issuance of a temporary injunction. The relative benefits and detriments should be weighed, which entails a consideration of whether the public interest will be harmed by the issuance of the injunction, whether the Labor Secretary will be harmed or whether its effect will merely be to maintain the *status quo*, among other considerations. *Maupin*, 575 S.W.2d at 698 (*citing Kentucky High School Athletic Ass'n v. Hopkins*, 552 S.W.2d 685 (Ky. App. 1977)).

The public has a strong interest in "remedying discrimination against persons for the exercise of their [free speech] rights, which, if not remedied, may result in the chilling of free expression." *Conn*, 586 F. Supp. 2d at 866. Additionally, courts nationally recognize that "the vindication of constitutional violations is always in the public interest." *Doe v. Harlan County Sch. Dist.*, 96 F.Supp.2d 667, 679 (E.D. Ky. 2000) (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995); *G & V Lounge, Inc. v. Michigan Liquor Control Com'n*, 23 F.3d

1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights.")).

The consideration of harm to the public interest is met because the Subpoenas violate teachers' constitutional rights. In contrast, granting injunctive relief will not prejudice the Labor Secretary. Such relief will merely restore the *status quo* pending a resolution on the merits.

Even if the Labor Secretary successfully defends this action, he will only be delayed in his efforts to enforce the Subpoenas. While considering the balance of the equities in *Maupin*, 575 S.W.2d at 699, the court considered whether a delay in issuing subpoenas could be considered "harm" to tip the scales in favor of the defendant. Notably, it found that a mere delay in issuing a subpoena would not be considered "harm" towards the defendant. ("In fact, the only detriment to the [defendant] is one of delay. Should a final judgment be rendered against the [Plaintiff] as to this issue, the subpoenas may be issued at that time. ").

Further, temporary injunctive relief against the Labor Secretary will not prevent the school districts, the teachers' employers, from taking any action regarding the "sick-outs." In light of the public's strong constitutional interests in this case and the lack of harm to the Labor Secretary, the balancing of the equities weighs heavily in favor of granting temporary injunctive relief.

## **CONCLUSION**

The Court should grant a temporary restraining order and a temporary injunction to enjoin the Labor Secretary from acting to enforce or compel compliance with the Subpoenas and from imposing any civil penalties against any teacher pursuant to KRS 336.990(2)(a).

Temporary injunctive relief is necessary pending a judgment on the merits. Plaintiffs have shown that their rights are being or will be violated by the Labor Secretary. Plaintiffs have

demonstrated that they have raised substantial legal questions, that they will suffer immediate and irreparable injury, and that the balancing of equities greatly weighs in favor of temporary injunctive relief. Plaintiffs have no adequate remedy at law. The relief Plaintiffs request is the only means to mitigate the irreparable harm Plaintiffs face and will face from the Subpoenas. Wherefore, the Court should grant Plaintiffs' Motion.

Respectfully Submitted,

ANDY BESHEAR ATTORNEY GENERAL

By: /s/ J. Michael Brown

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# **EXHIBIT A**

## STATE OF MICHIGAN

#### COURT OF CLAIMS

SCHOOL DISTRICT OF THE CITY OF DETROIT, a Michigan Public School District

OPINION AND ORDER

Plaintiff,

V

Case No. 16-000013-MZ

DETROIT FEDERATION OF TEACHERS, LOCAL 231, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, a Union, et al.,

Defendants.

Hon. Cynthia Diane Stephens

This matter comes before the Court of Claims on plaintiff's complaint for injunctive relief. Because plaintiff has failed to meet its burden under MCR 3.310(A)(4) to show that an injunction should issue, the complaint is DENIED.

#### BACKGROUND

Plaintiff filed this multi-count action against numerous defendants on January 20, 2016. A hearing was held on plaintiff's request for a preliminary injunction on January 25, 2016. At that hearing, plaintiff stipulated to dismiss all but four of the defendants: the Detroit Federation of Teachers (DFT), Ms. Ivy Bailey DFT interim president, and teachers Ms. Nicole Conaway and Mr. Stephen Conn. After testimony and argument, the Court dismissed all counts save the instant action for injunctive relief, and all but two defendants, namely Ms. Conaway and Mr. Conn. The Court also dismissed by order dated January 25, 2016, the advocacy entities DPS

Teachers Fight Back, BAMN<sup>1</sup> and Detroit Strikes to Win, for the reasons stated on the record. Prior to the January 25 hearing, plaintiff was reorganized by 2011 PA 4<sup>2</sup> and no longer existed as an educational entity. The duties formerly held by plaintiff were assigned to a new governmental instrumentality known as the Detroit Public Schools Community District.

Plaintiff's remaining claim seeks injunctive relief to preclude violations of section MCL 432.202 of the Public Employee Relations Act (PERA), MCL 423.201, et seq., and to insure compliance with the Emergency Manager's January 15, 2016 Order (EM 1-15), paragraph 3 which reads, "No employee of the School District of the City of Detroit shall engage in any activity directed at inducing any other employee to participate in a strike or other unauthorized work stoppage."

An evidentiary hearing was held on July 8, 2016. This Court received evidence in the form of testimony and exhibits. Testimonial evidence came from several persons. Those persons and their testimony are summarized as follows:

Mr. Frank Beckmann, a broadcaster from WJR radio station who interviewed Ms. Conaway and Mr. Conn, testified to the accuracy of the transcriptions of the interviews offered into evidence as Exhibits 3, 4 and 8.

Ms. Lisa Greene-Kaminski and Ms. Viola Newman, certified court reporters, were called to authenticate Exhibits 5 and 6, which were transcriptions of videos attributed to Mr. Conn.

<sup>&</sup>lt;sup>1</sup> BAMN is short for Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary.

<sup>&</sup>lt;sup>2</sup> The Local Government and School District Fiscal Accountability Act, 2011 PA 4, MCL 141.1501 et seq.

Mr. Darnell Earley, former Emergency Manager of the Detroit Public Schools, testified to the issuance of EM 1-15. He had no firsthand knowledge of anything regarding the two defendants.

Mr. Angel Mauro Garcia III, principal at Western International High School, provided testimony that on January 7, 2016, Mr. Conn left a classroom to which he was assigned, exited the school building and conducted an interview with the media, Channel 4 News. Mr. Garcia acknowledged that no formal discipline was meted out due to this activity but that he received complaints.

Ms. Cassandra Washington, Executive Director Division of Talent-Human Resources for plaintiff, testified regarding Exhibit 50. Exhibit 50 included a four-page affidavit and 154 pages of teacher attendance data. In her affidavit and live testimony, Ms. Washington indicated that the 154 pages of data were derived from computer inquiries made regarding teacher absences on November 3, December 1, 10 and 11, 2015 and January 5, 7, 8, 11, 12, 13, 20, and 25, 2016. Paragraphs 4 and 6 of the affidavit were summaries of absence data regarding defendants Ms. Conaway and Mr. Conn respectively. Paragraphs 5 and 7 were statements regarding whether the absence of the defendants on certain dates was authorized under the collective bargaining agreement.

The portions of Ms. Washington's affidavit and testimony that summarized the voluminous records were admissible under MRE 803(6). However, the affidavit went beyond the summary of the numerous computer results. In addition to the summary of the data, Ms. Washington's affidavit specifically opined that the defendants were absent without excuse on several days when school closures were necessitated by teacher absences. When asked the

source of this conclusion the witness indicated that that information was based on a combination of records that were not being offered and on inquiry made by unknown persons within her office to the principles at the schools where the defendants were assigned. Mr. Garcia was not asked about Mr. Conn's attendance and no corroboration was offered for the double hearsay based conclusions regarding the authorization for the absences.

The Court heard closing arguments and reviewed the exhibits which included the depositions of the defendants and the transcript of the hearing. Based upon that review the following fact-findings are made:

As to Mr. Conn,

- 1. The Court finds that he was critical of 2011 PA 4, the successive emergency managers and a myriad of other governmental actors. He endorsed and encouraged collective action designed to bring about changes in the operation of the schools, building safety, classroom size, equipment, supplies for education, and a return of the full franchise to the citizenry.
- 2. Mr. Conn was absent from his workplace on six of the days where at least one school was closed due to teacher absences. There was a failure of proof as to whether those absences were unexcused.
- 3. Mr. Conn did absent himself from his assigned classroom to give a television interview.
- 4. Mr. Conn did not hold union office during the time period in question.
- 5. Mr. Conn frequently used the word strike in defining the collective action he encouraged.

As to Ms. Conaway,

- She was also critical of the same state actors and supportive of collective action to effect change.
- Ms. Conaway was absent from her school building on five of the days when at least one school was closed due to teacher absences. There was a failure of proof as to whether those absences were unexcused.
- 3. Ms. Conway did not hold union office during the time period in question.

#### ANALYSIS OF THE PRAYER FOR INJUNCTIVE RELIEF

Generally, when determining whether to issue injunctive relief, a court must consider four factors: (1) harm to the public if the injunction issues; (2) whether harm to the applicant in the absence of an injunction outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable harm if the relief is not granted. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998). The party seeking injunctive relief has the burden of establishing that an injunction should be issued. MCR 3.310(A)(4). A public employee is precluded from striking as defined by the act. MCL 423.202. A public school employer may bring an action to enjoin a strike, and the Court shall grant injunctive relief if it finds that a strike has occurred, without regard to the existence of other remedies or a demonstration of irreparable harm. MCL 423.202a(10).

The kind of collective action for which such an analysis applies is defined in the statute.

MCL 423.201(j) provides:

(j) "Strike" means the concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment. For employees of a public school employer, strike also includes an action described in this subdivision that is taken for the purpose of protesting or responding to an act alleged or determined to be an unfair labor practice committed by the public school employer.

However, MCL 423.201(2) states:

This act does not limit, impair, or affect the right of a public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment as long as the expression or communication does not interfere with the full, faithful, and proper performance of the duties of employment.

This section voluntarily limits PERA's impairment of employee expression or communication. The First Amendment further protects employee speech where this section does not. *Michigan State AFL-CIO v Michigan Employment Relations Commission*, 453 Mich 362, 385; 551 NW2d 165 (1996). A government may not require an individual to relinquish rights guaranteed him or her by the First Amendment as a condition of public employment. *Abood v Detroit Bd of Education*, 431 US 209, 226; 97 S Ct 1782; 52 L Ed 2d 261 (1977). The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition the government for redress of grievances. *Smith v Arkansas State Hwy Employees*, *Local 1315*, 441 US 463, 464; 99 S Ct 1826; 60 L Ed 2d 360 (1979).

The language of EM 1-15 paraphrases MCL 423.201(j) but in paragraph 3 also seeks to preclude employees from engaging in "any activity directed at inducing any other employee to participate in a strike or any other unauthorized work stoppage." The argument of plaintiff throughout this proceeding has been that the defendants and any other employee of the former District was precluded from even saying that they approved work stoppages, and from

encouraging others to engage in work stoppages of any kind and for any reason. This goes far beyond the scope of PERA and such an interpretation is offensive to fundamental rights of free speech.

Here, the vast majority of the speech attributable to defendants concerns complaints to the state government to rectify educational, financial, and structural problems in the Detroit Public School District, and not issues concerning the rights, privileges, or conditions of their employment. Any injunction based on defendants' exercise of their free speech right to petition their government would run afoul of First Amendment protections.

Because the Court concludes that plaintiff did not meet its burden to establish that defendants violated PERA or relevant portions of EM 1-15, it is unnecessary to evaluate the other aspects of proofs of an injunctive claim. The Court notes that the reorganization of plaintiff renders the threat of irreparable harm most unlikely.

#### CONCLUSION

Plaintiff has failed to meet its burden of establishing that an injunction should issue. The proofs offered by plaintiff, to show that either party was absent without excuse, are not persuasive and are, at best, double hearsay. This Court does not find them reliable. Neither defendant holds an official position with the union. There is no admissible evidence showing that defendants as individuals engaged in a concerted failure to report for duty, willful absence from their position, stoppage of work, or abstinence from the performance of their duties for the purpose of coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment. Defendant Conn was not disciplined for his absence from the classroom to talk to the media, and plaintiff has not shown that he failed to perform his duties.

There is also no evidence that either defendant participated in an organized work stoppage, nor is there documentation showing an unauthorized absence from their duties.

# ORDER

IT IS HEREBY ORDERED that plaintiff's complaint for injunctive relief is DENIED.

This order resolves the last pending claim and closes the case. MCR 2.602(A)(3).

Dated:

August 16, 2016

Hop. Cynthia Diane Stephens

Court of Claims Judge

# COMMONWEALTH OF KENTUCKY FRANKLIN CIRCUIT COURT DIVISION \_\_\_ CIVIL ACTION NO. 19-CI-

COMMONWEALTH OF KENTUCKY, ex rel. ANDY BESHEAR, ATTORNEY GENERAL, and JEFFERSON COUNTY TEACHERS ASSOCIATION **PLAINTIFFS** 

v.

DAVID A. DICKERSON, in his official capacity as Secretary of the Kentucky Labor Cabinet

**DEFENDANT** 

#### **ORDER**

This matter is before the Court on Plaintiffs' Motion for Temporary Injunctive relief by Temporary Restraining Order and Temporary Injunction pursuant to CR 65.01, CR 65.03, and CR 65.04. The Court, having considered the Motion and being otherwise sufficiently advised, hereby finds that Defendant, David A. Dickerson, in his official capacity as Secretary of the Kentucky Labor Cabinet ("the Labor Secretary"), should be enjoined from acting to enforce or otherwise compel compliance with the administrative subpoenas duces tecum served on ten (10) school districts in April 2019. The Court further finds that the Labor Secretary should be enjoined from penalizing any public school teacher under KRS 336.990(2)(a). The Court finds as follows:

- Plaintiffs' rights are being or will be violated by the actions of the Secretary;
- 2. Plaintiffs will suffer immediate and irreparable injury, loss or damage pending a final judgment in this action, or the acts of the Labor Secretary will tend to render a final judgment ineffectual without the issuance of a temporary restraining order and a temporary injunction;

- 3. The balancing of equities weighs in favor of the issuance of a temporary restraining order and a temporary injunction, and Plaintiffs will suffer greater injury by the denial of temporary injunctive relief than they would by the granting of such relief;
- 4. This action presents substantial legal questions; and
- 5. Plaintiffs have no adequate remedy at law.

Wherefore, IT IS ORDERED AND ADJUDGED that until further Order of this Court the Labor Secretary and all his agents, attorneys, representatives, and any other persons in active concert or participation with him are immediately restrained and enjoined from acting on or otherwise enforcing the administrative subpoenas duces tecum issued by the Kentucky Labor Cabinet Office of General Counsel and served upon public school districts, including but not limited to acting on or enforcing the administrative subpoenas through the filing of a motion to comply under KRS 336.060 against any of the public school districts in any Circuit Court of any judicial circuit of the Commonwealth. The Labor Secretary and all his agents, attorneys, representatives, and any other persons in active concert or participation with him also are immediately restrained and enjoined from imposing any penalties against public school teachers under KRS 336.990(2)(a).

IT IS FURTHER ORDERED that this Order shall be binding upon the Labor Secretary and his agents, employees, employer, and attorneys, and upon those persons that act in concert or participation with them, who receive actual notice of this Order by personal service or otherwise.

IT IS FURTHER ORDERED AND ADJUDGED that this Order shall remain in full force and effect until such time as this Court specifically orders otherwise.

IT IS FURTHER ORDERED AND ADJUDGED that a Temporary Injunction shall
issue immediately and that security should be posted in the amount of \$00, and should
remain in place.
SO ORDERED, this of May, 2019.
FRANKLIN CIRCUIT JUDGE

## **Tendered by:**

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