BEFORE THE KENTUCKY HOUSE OF REPRESENTATIVES

In re: the Impeachment of Andrew Beshear, Governor

PETITIONER'S OBJECTION TO "COSTS" AND ATTORNEY FEES SUBMITTED BY THE GOVERNOR

To the Members of the Impeachment Committee:

Please accept this submittal as our objections to the request for attorney fees submitted by the Governor:[1]

1. "Costs" do not include attorney fees as a matter of Kentucky law unless "attorney fees" are expressly provided in statute

Kentucky has long adhered to the American Rule that each party is "to pay its own legal expenses regardless of the outcome." *Mo-Jack Distrib., LLC v. Tamarak Snacks, LLC*, 476 S.W.3d 900, 905 (Ky. App. 2015). Generally, "in the absence of a statute or contract ***expressly*** providing therefor, attorney fees are not allowable as costs, nor recoverable as an item of damages." *Cummings v. Covey*, 229 S.W.3d 59, 61 (Ky.App. 2007) (emphasis added). As noted in *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 842 (Ky. 2005), it is a rule deeply embedded in our jurisprudence: "[W]ith the exception of a specific contractual provision allowing for recovery of attorneys' fees or a fee-shifting statute, . . . each party assumes responsibility for his or her attorneys' fee[s]." *Id.*

Kentucky courts have been adamant that attorney fees must be expressly provided for, by name, and the term "costs" is not sufficient to give rise to attorney fees. *Bell v. Commonwealth*, 423 S.W.3d 742 (2014); *Dulworth & Burress Tobacco Warehouse Co. v. Burress*, 369 S.W.2d

[1] We understand the letter's directive that general challenges to the imposition of costs will not be entertained; we consider this a violation of these Petitioner's rights to due process to be heard, and nevertheless raise our objections for purposes of review in court, even if such objections will not be entertained by this Committee. We also incorporate the objections from the other impeachment petitioners of their cost bills, into these objections.

129, 133 (Ky. 1963) ("As a general rule, ... in the absence of a statute or contract expressly providing therefore, attorneys' fees are not allowable as costs.").

In *Deal v. First & Farmers Nat'l Bank, Inc.*, 518 S.W.3d 159 (2017), the Kentucky Court of Appeals dealt with KRS 425.526. That statute included costs incurred as a result of a garnishee's wrongful disclosure. Clearly, attorney fees could arise from such conduct. And yet, the Kentucky Court of Appeals was clear: "Since the statute does not expressly indicate that attorney's fees are recoverable, Cindy cannot hold the Bank liable for them." *Id.* at 173. Attorney fees cannot be assessed here for the same reason. *Mercer v. Coleman*, 227 Ky. 797 (1929) (the "cost of the proceeding" are the recognized legal "costs," and not attorney fees, though the same could be reimbursed through an appropriation from the public treasury).

So hostile to claims for attorney fees are Kentucky Courts that Kentucky has taken the view that attorney fees are never compensatory damages. "Compensatory damages are designed to equal the wrong done by the defendant." *Gibson v. Kentucky Farm Mutual Insurance Company*, 328 S.W.3d 195, 204 (Ky.App. 2010) (quoting *Jackson v. Tullar*, 285 S.W.3d 290, 297-98 (Ky.App. 2007)). Attorney fees are not compensatory damages because any award "does not compensate the plaintiff for any wrong done by the defendant." *Id.*

"There has long been a distinction in Kentucky between costs and attorney's fees with the costs encompassing the expenses of litigation excluding attorney's fees. Under all the circumstances, we cannot extend the meaning of 'whole costs' to include attorney's fees." *Federal Ins. Co. v. West*, 628 S.W.2d 632 (1981).

We finally turn to *Mercer v. Coleman*, 227 Ky. 797 (1929), in which Kentucky's highest court addressed whether the costs of the proceeding before the House of Representative could include attorney fees assessable to an election challenge pending before the House. The

language at issue in that statute was eerily familiar to that contained in KRS 63.070: "7. **The costs of the proceeding** shall be adjudged against the unsuccessful party, and a certificate thereof given by the board, or by the clerk of either branch of the general assembly, as the case may require. A judgment for the same may be obtained after five days' notice in a circuit or county court." *Id.* at 799-800 (emphasis added). Kentucky's highest court was clear about the import of the statute: "The statute, if controlling, would only apply to the legal costs. **Attorneys' fees are not a part of the legal cost, and so would not be within the statute.**" *Id.* at 801. (emphasis added).

It may be that this Committee is intent on misconstruing a statute that has been construed by Kentucky Courts to not include attorney fees to punish these petitioners for their protected First Amendment Speech, that, quite obviously, the Committee does not agree with. But Kentucky law, and KRS 63.070, does not permit the recovery of attorney fees (both the Governor's and the Committee's), which is almost the entirety of the bill.

As a matter of Kentucky law, attorney fees are not recoverable here.

2. The Governor has failed to support his request for fees with any actual showing of out of pocket costs to himself

KRS 63.070 provides: that petitioners are liable "**to witnesses and to the accused** for the costs of investigation before the committee." (emphasis added). The liability is, under the plain meaning of the statute, to the witnesses and to the accused – not to the Commonwealth. Again, the liability is for the costs to the accused or witnesses, *not the Commonwealth*.

When analyzing a statute, a court must look to the plain meaning of the words therein; if the language is clear, the court must afford the statutory language its plain meaning and the "inquiry ends." *Travelers Indemnity Company v. Armstrong*, 565 S.W.3d 550, 558 (Ky. 2018).

There is no evidence that Governor Beshear spent *any* of his own funds in defending himself – to the contrary, his evidence suggests that he used taxpayer resources to respond, as evidenced by the affidavit of Ms. Bailey. But if there were any doubts about this, one need only look at the cost bill he submitted: he does not seek personal reimbursement, but, rather, asks that the Committee "reimburse the Commonwealth for these expenses." (Cost Bill by Governor p. 2).

For this additional reason, his request should be denied.

3. The Committee Costs and Fees are not recoverable, are not supported by competent evidence, and are not appropriately assessed

Part of the fees – indeed a substantial amount of the fees – that have been taxed are those incurred directly by the committee. There is no question that none of these costs were incurred by any accused, nor to any witness. Yet the language of KRS 63.070 is clear: "In a proceeding for impeachment or removal by address, if the committee reports against the petition and the report is not overruled by the house petitioned, the petitioner shall be ***liable to witnesses and to the accused*** for the costs of investigation before the committee." (emphasis added).

When analyzing a statute, a court must look to the plain meaning of the words therein; if the language is clear, the court must afford the statutory language its plain meaning and the "inquiry ends." *Travelers Indemnity Company v. Armstrong*, 565 S.W.3d 550, 558 (Ky. 2018).

The plain language of this statute controls. There is no liability for the costs to the state or to the General Assembly, or the LRC, to conduct the committee process, because the accused has not incurred any expense related to these expenses. They are neither an accused, nor a witness.

We would be remiss in not objecting to the legal bill of Landrum and Mr. Westburry. It contains significant amounts of duplicate billing and research and fails to contain adequate proof. Attorney fees must by supported by "satisfactory evidence--in addition to the attorney's own affidavits." *Blum v. Stenson*, 465 U.S. 886, 895 n.11, 104 S. Ct. at 1541, 1547 n.11, 79 L. Ed. 2d

891 (1984). *See, also, Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056 (Fed. Cir. 1983) (evidence, not mere statements, must be submitted in support of attorney fee award). There is no such evidence here supporting the committee's costs.

At the outset, almost the entirety of the submittal involves block billing with inadequate descriptors, which have justified significant reductions in attorney fee awards, and should do so here. *Howe v. City of Akron*, 705 Fed. Appx. 376 (6th Cir. 2017). If counsel's block billing relies on inadequate descriptions of the work performed, the award should be reduced. *Smith v. Serv. Master Corp.*, 592 F. App'x 363, 371 (6th Cir. 2014).

The general subject of the submittal here has long been decried as insufficient. *In re Meese*, 285 U.S. App. D.C. 186, 907 F.2d 1192, 1204 (D.C. Cir. Spec. Div. 1990) (time entries in which "no mention is made of the subject matter of a meeting, telephone conference or the work performed during hours billed" are "not adequately documented"); *In re Olson*, 280 U.S. App. D.C. 205, 884 F.2d 1415, 1428-29 (D.C. Cir. Spec. Div. 1989) (decrying time entries "that wholly fail to state, or to make any reference to the subject discussed at a conference, meeting or telephone conference" as well as generic references to "strategy" conferences); *Kennecott Corp. v. EPA*, 256 U.S. App. D.C. 218, 804 F.2d 763, 767 (D.C. Cir. 1986) (per curiam) (citing "[a]nalysis of final NSO regulations; first joint petition for review; research" as too generalized to meet fee applicant's burden).

This entire amount must be excluded.

4. <u>The Governor has failed to support his request for fees with adequate proof where the hours submitted were not provided for by evidence</u>

A motion for attorney fees must be supported by "satisfactory evidence--in addition to the attorney's own affidavits." *Blum v. Stenson*, 465 U.S. 886, 895 n.11, 104 S. Ct. at 1541, 1547

n.11, 79 L. Ed. 2d 891 (1984). *See, also, Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056 (Fed. Cir. 1983) (evidence, not mere statements, must be submitted in support of attorney fee award).

Here, the Governor has submitted the affidavit of Ms. Bailey, about an alleged hourly rate of compensation and benefits, but that affidavit does not explain how the rates were derived for these *salaried* attorneys. It provides no meaningful way to assess the claims. She claims to also charge fringe benefits that, by their very nature, will be charged to the state in any event, no matter the number of hours the attorney works. This is a far cry from "satisfactory evidence."

Public evidence, however, suggests that the submitted rates are inflated.[2] Ms. Cubbage's reported salary is $123,809.52, and, using 40-hour weeks and 52-week years, reveals a figure of $59.52 per hour. For Mr. Mayo, the same formula reveals a $120,000.00 salary, or $57.69 per hour. For Mr. Farris, the salary is $110,000.16, or $52.88 per hour. For Mr. Payne, the salary is $110,000.16, or $52.88 per hour. For Mr. Chapman, the salary is $84,000.24, or $40.38 per hour. For Mr. Long, the salary is $110,000.16, or $52.88 per hour. For Mr. Thompson, the salary is $70,008.08, or $33.66 per hour. For Mr. Walbourn, $94,500 salary and $45.43 per hour. For Ms. Kincer, $88,366.56 salary and $42.48 per hour. And for Ms. Williamson, $94,500 salary and $45.43 per hour.

We maintain that the Governor is not permitted to charge these petitioners for the costs to the Commonwealth, when it is clear that the costs are only those incurred by the "witnesses and to the accused." But this exercise is all the more troublesome when one considers that there is no evidence as to *how* the alleged hourly rates were derived.

5. The Governor's attorney fee requests have a number of items that should be eliminated or reduced by the "bill" or are otherwise excessive

[2] https://transparency.ky.gov/search/Pages/SalarySearch.aspx#/salary (last visited 3/5/2021).

The Petition in this matter was sent to the Legislature on January 8, 2021.[3] The Governor was asked to respond January 14, 2021.[4] He did so on January 22, 2021.[5] He was asked on January 28, 2021 to provide additional information.[6] And then he failed to do so by providing a non-responsive response on February 1, 2021,[7] prompting yet another letter from the Committee due to his non-compliance with the Committee's request.[8] He then responded on February 8, 2021.[9] Which was the last communication he had in terms of the investigation. This timeline is important in assessing the Governor's request for attorney fees.

At the outset, almost the entirety of the submittal involves block billing with inadequate descriptors, which have justified significant reductions in attorney fee awards, and should do so here. *Howe v. City of Akron*, 705 Fed. Appx. 376 (6th Cir. 2017). If counsel's block billing relies on inadequate descriptions of the work performed, the award should be reduced. *Smith v. Serv. Master Corp.*, 592 F. App'x 363, 371 (6th Cir. 2014).

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3 https://apps.legislature.ky.gov/CommitteeDocuments/343/13202/2021Impeachment%20Petition.pdf

4 https://apps.legislature.ky.gov/CommitteeDocuments/343/13202/GOV%20Response%20Request.pdf

5 https://apps.legislature.ky.gov/CommitteeDocuments/343/13204/GOV%20Impeachment%20Response.pdf

6 https://apps.legislature.ky.gov/CommitteeDocuments/343/13204/January%2028,%202021,%20Impeachment%20Committee%20Letter%20to%20Governor.pdf

7 https://apps.legislature.ky.gov/CommitteeDocuments/343/13212/Gov%20Response%20(2)%20-%202.1.2021%20with%20exhibits.pdf

8 https://apps.legislature.ky.gov/CommitteeDocuments/343/13214/Cubbage%20response%20letter%20020521.pdf

9 https://apps.legislature.ky.gov/CommitteeDocuments/343/13217/GOV%20Committee%20Response%202.8.2021%20with%20exhibits.pdf

The general subject of the submittal here has long been decried as insufficient. *In re Meese*, 285 U.S. App. D.C. 186, 907 F.2d 1192, 1204 (D.C. Cir. Spec. Div. 1990) (time entries in which "no mention is made of the subject matter of a meeting, telephone conference or the work performed during hours billed" are "not adequately documented"); *In re Olson*, 280 U.S. App. D.C. 205, 884 F.2d 1415, 1428-29 (D.C. Cir. Spec. Div. 1989) (decrying time entries "that wholly fail to state, or to make any reference to the subject discussed at a conference, meeting or telephone conference" as well as generic references to "strategy" conferences); *Kennecott Corp. v. EPA*, 256 U.S. App. D.C. 218, 804 F.2d 763, 767 (D.C. Cir. 1986) (per curiam) (citing "[a]nalysis of final NSO regulations; first joint petition for review; research" as too generalized to meet fee applicant's burden). The resemblance here is uncanny.

Attorney fee awards are clear that anyone seeking such fees must remove from them any hours that are "excessive, redundant, or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). No such effort has been made here. *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 369 (D.D.C. 1983) ("Counsel is not free . . . to exercise its judgment in a fashion that unnecessarily inflates the losing party's fee liability"); Donnell v. United States, 220 U.S. App. D.C. 405, 682 F.2d 240, 250 n.27 (D.C. Cir. 1982) ("The issue is … whether the work performed was unnecessary.").

The submittals also reflect a serious overstaffing, warranting yet another reduction. *Turkupolis v. Sec'y of HHS*, 2015 U.S. Claims LEXIS 42 (Fed. Claims 2015); *Miller v. Holzmann*, 575 F. Supp. 2d 2 (DDC 2008).

Turning to each of the time entries, it is clear there has been a significant effort to overcharge these petitioners, perhaps in retaliation for their exercise of First Amendment activities. Or, at the very least, a demonstration of gross inefficiency.

Amy Cubbage:

Ms. Cubbage, on January 13, 2021, and before the Governor was even asked to respond, spent an incredible 3.2 hours on *watching the committee meeting* and meeting with staff. Perhaps the most objectionable aspect of "watching committee meeting" entries, are that almost the entirety of these meetings were held in executive session, meaning Ms. Cubbage (and others) spent her time watching an empty committee room. That is per se unreasonable and excessive on its face.

On January 15, 2021 yet another meeting was held, for apparently 4.5 hours (she also claims time for doing research but does not delineate what was research or what was meeting). This is excessive.

It is difficult to assess, in many of her entries, what she was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 30.6 hours Ms. Cubbage spent on the response for this, for a total of 4.1 hours.

On January 26, 2021, she spent 1.0 hours reviewing the Reply by petitioners, but was not asked to respond. This is excessive.

On January 27, 2021, she spent 2.1 hours again allegedly analyzing the reply, and, more significantly, watching the Committee meeting. This is excessive.

From January 28, 2021 through February 1, 2021, she spent a total of 6.6 hours preparing a non-responsive letter to the committee, prompting the committee to have to again request documents. This entire time should be excluded.

On February 4, 2021, Ms. Cubbage again spent 1.0 hours of her time watching the committee meeting. This should be excluded.

From February 11, 2021 through February 24, 2021, Ms. Cubbage spent a total of 7.4 hours watching committee meetings. This should be excluded.

Of the 58 hours claimed by Ms. Cubbage, we submit at least 29.9 hours should be excluded for the reasons set forth above, leaving her 28.1 hours.

S. Travis Mayo:

Mr. Mayo duplicates Ms. Cubbage's time in many regards, including watching a blank screen during the Committee meetings. The entire 2.8 hours, incurred before the Governor was even asked to respond, should be eliminated. Mr. Mayo spent 2.0 hours on January 14, 2021, presumably before receiving the request for a response that was sought that same day. This too should be eliminated.

Mr. Mayo spent 2.5 hours on January 15, 2021, at least a portion of which was an internal meeting. This should be eliminated.

It is difficult to assess, in many of his entries, what he was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 18.8 hours Mr. Mayo spent on the response for this, for a total of 2.5 hours.

Mr. Mayo spent 2.3 hours on January 27, 2021, reviewing the Reply to the petition, even though he was not asked to respond. This should be eliminated.

From January 27, 2021 through February 4, 2021, Mr. Mayo spent 6.7 hours preparing a non-responsive document that the Committee took issue with as non-responsive, and with viewing a committee meeting that involved almost entirely an executive session. It is inherently unreasonable to pass on to these petitioner's time spent on obstructing the Committee's process, or, at a minimum, failing to respond. All of this time should be eliminated.

From February 11, 2021 onward, the remaining time – 7.2 hours -- by Mr. Mayo is likewise unreasonable. It was spent watching committee hearings, that involved primarily executive sessions.

Of the 43.6 hours claimed by Mr. Mayo, we submit at least 24.0 hours should be excluded for the reasons set forth above, leaving him 19.6. hours.

Marc Farris:

It is difficult to assess, in many of his entries, what Mr. Farris was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 13.5 hours Mr. Farris spent on the response for this, for a total of 1.8 hours.

Taylor Payne:

It is difficult to assess, in many of his entries, what Mr. Payne was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 14.3 hours Mr. Farris spent on the response for this, for a total of 1.9 hours.

Marc Chapman:

It is difficult to assess, in many of his entries, what Mr. Chapman was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 9.2 hours Mr. Farris spent on the response for this, for a total of 1.3 hours.

Ben Long:

It is difficult to assess, in many of his entries, what Mr. Long was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 2.5 hours Mr. Long spent on the response for this, for a total of 0.3 hours.

Chad Thompson:

It is difficult to assess, in many of his entries, what Mr. Thompson was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 2.8 hours Mr. Long spent on the response for this, for a total of 0.4 hours.

Jacob Walbourn:

It is difficult to assess, in many of his entries, what Mr. Walbourn was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 0.7 hours Mr. Walbourn spent on the response for this, for a total of 0.1 hours.

Shawna Kincer:

It is difficult to assess, in many of his entries, what Ms. Kincer was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 3.0 hours Mr. Walbourn spent on the response for this, for a total of 0.4 hours.

Jessica Williamson:

It is difficult to assess, in many of his entries, what Ms. Williamson was researching or drafting. However, it is notable that, given a 44-page response, the Governor's attorneys spent 6 pages attacking the petitioners, rather than addressing the substance of the allegation. We submit a 13.6% reduction is appropriate to the total of the 8.7 hours Ms. Williamson spent on the response for this, for a total of 1.2 hours.

Overall:

It is stunning, to put it mildly, the amount of duplication and inefficiency displayed in the Governor's attorney's time entries. There was a total of 104.1 attorney hours spent on a 44 page response document, with 10 separate attorneys working on it. "Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a

good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

The amount of time actually expended is not the same as the amount of time reasonably expended, and the Court may reduce an award for overstaffing. *Copeland v. Marshall*, 641 F.2d 880, 891, 205 U.S. App. D.C. 390 (D.C. Cir. 1980) ("where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time"). A trial judge "may decline to compensate hours spent by collaborating lawyers . . . on the basis of its own assessment of what is appropriate for the scope and complexity of the particular litigation." *Handschu v. Special Services Div.*, 727 F. Supp. 2d 239, 251 (S.D.N.Y. 2010)

Much of the difficulty here in assessing the reasonableness of the staffing is the failure to adequately describe what was being researched and written by each attorney. But that is all the more reason to make additional deductions.

6. The imposition of any costs is unconstitutional

Section 1 of the Kentucky Constitution guaranties to people the right "of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance." Similarly, the First Amendment to the United States provides that "Congress shall make no law … abridging the freedom of speech … or the right of the people … to petition the government for a redress of grievances."[10] The cost provision at

[10] The cost bill KRS also presents Equal Protection and Due Process problems under both the Kentucky and federal Constitutions, ostensibly limiting the right to seek redress for serious issues by officeholders, to those with the wealth and means to pay it. That cannot be, and is not, constitutional.

here is also unconstitutional, it is a content-based provision that imposes costs and fees on petitions to the legislature for redress based on the content of the petition.

Under the *Noerr-Pennington* doctrine, absolute immunity is conferred as against *any* liability related to petitioning activities directed at the legislature, such as those by these petitioners, and it applies here as well. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). *See, also, White v. Ashland Park Neighborhood Ass'n*, 2009 Ky. App. Unpub. LEXIS 576 (Ky. App. 2009) (recognizing the exception).

Any attempt to impose costs for the exercise of a fundamental right under both the Kentucky and U.S. Constitutions is improper.

CONCLUSION

Costs should not be assessed against these petitioners and should be substantially reduced.

Respectfully submitted,

Andrew Cooperrider Jacob Clark Troy Wheatley

Issues by affidavit ... not be, and is not, ... constitutional.