COMMONWEALTH OF KENTUCKY
SUPREME COURT
Case Nos. 2016-SC-000272-TG/2016-SC-000273-TG

COMMONWEALTH OF KENTUCKY,
***ex rel.* ANDY BESHEAR, Attorney General,**
and
JIM WAYNE, DARRYL OWENS, and
MARY LOU MARZIAN, in their official
capacities as members of the Kentucky House
of Representatives, **APPELLANTS**

v. **On Appeal From Franklin Circuit Court, Division II**
Civil Action No. 16-CI-00389

COMMONWEALTH OF KENTUCKY,
***ex rel.* MATTHEW G. BEVIN, Governor;**
COMMONWEALTH OF KENTUCKY,
***ex rel.* WILLIAM M. LANDRUM III, Secretary**
of the Finance and Administration Cabinet;
COMMONWEALTH OF KENTUCKY,
***ex rel.* JOHN CHILTON, State Budget Director; and**
COMMONWEALTH OF KENTUCKY,
***ex rel.* ALLISON BALL, Treasurer,** **APPELLEES**

BRIEF OF APPELLEES BEVIN, LANDRUM, AND CHILTON

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was served via First Class Mail and electronic mail upon the following on August 8, 2016: Andy Beshear, Mitchel T. Denham, La Tasha Buckner, J. Michael Brown, and Joseph A. Newberg, Jr., 700 Capitol Ave., Ste. 118, Frankfort, KY 40601; Noah Friend, 1050 U.S. Hwy. 127 S., Ste. 100, Frankfort, KY 40601; Pierce Whites, 702 Capitol Ave., Room 303. I further certify that the record has not been removed from the Clerk's Office.

INTRODUCTION

This case is about the Governor's ability to act in a fiscally responsible manner by exercising his executive authority—which is codified in statute—to instruct budget units of state government to spend less than the full amount of an appropriation. The Appellants contend that the executive branch must spend every penny appropriated by the legislature, but the Franklin Circuit Court correctly rejected their position as "irresponsible" and unsupported by the law.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is scheduled in this matter at 10:00 a.m. on August 18, 2016.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Kentucky is in bad shape fiscally. We have one of the two worst unfunded pension liabilities in the nation—in excess of $35 billion—and the Mercatus Center at George Mason University recently ranked the Commonwealth among the *five worst states in the entire country* in terms of fiscal condition as of 2014, the most recent fiscal year studied.[1] Kentucky's fiscal ship has clearly been sailing in the wrong direction.

In the fall of 2015, Kentuckians chose Matt Bevin to turn the ship around. Immediately upon becoming Governor, he charted a new course toward fiscal solvency, proposing a responsible, sustainable budget, and announcing that he intended to reduce General Fund spending for all executive branch agencies—which includes state universities—by 4.5% during the fiscal year ending on June 30, 2016.

After the universities had over two months to prepare for the announced reductions, Governor Bevin issued a letter, on March 31, 2016, to the Secretary of the Finance and Administration Cabinet and the State Budget Director instructing them to reduce the General Fund allotment draw-downs of the Commonwealths' nine public postsecondary education institutions for the fourth quarter of Fiscal Year 2016, beginning April 1, 2016, by 4.5% of their 2015-2016 allotments.[2]

The universities quickly developed plans to make up for their reduced General Fund allotments. For example, Eastern Kentucky University informed the public that:

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[1] *See* Eileen Norcross & Olivia Gonzalez, *Ranking the States by Fiscal Condition* 27 (Mercatus Ctr. at George Mason Univ. 2016 ed.).

[2] Aff. of Kathleen R. Marshall at ¶ 14 [Circuit Court Record (hereinafter, "R. at ___") at 505]. The Commonwealth's nine public postsecondary education institutions are Eastern Kentucky University, Kentucky State University, Morehead State University, Murray State University, Northern Kentucky University, the University of Kentucky, the University of Louisville, Western Kentucky University, and the Kentucky Community and Technical College System. These nine institutions are referred to herein as the "universities," unless otherwise stated.

> To address this cut, the EKU management team has worked diligently to cut spending for the remainder of this fiscal year and identified reserves and other non-recurring funds to meet this immediate reduction. These adjustments have been made with as little impact as possible to our top priority, our students.[3]

Northern Kentucky University's president likewise expressed an ability to manage the institution's reduced allotment and an understanding of the need for the reduction, stating that:

> While I am disappointed with this action, I recognize that Governor Bevin intends to use these funds to reduce the substantial unfunded liabilities in the state pension system, a system that has been increasing our employer contribution rate dramatically. Those increases have had a significant, adverse impact on our university budget.[4]

Through its spokesperson, the University of Kentucky explained that it had anticipated the reduction and was working to implement it:

> Governor Bevin announced this measure in January, so we anticipated it. We will be working over the next few months to implement this reduction within the context of our current-year budget. It is too early to speculate on the specific measures we will take.[5]

Clearly, the universities were expecting to have their allotments reduced, and it appears that they believed they could live with reductions to their allotments.

Consistent with these statements, the presidents of eight of the nine state universities sent the Governor a letter on April 8, 2016 objecting to the 4.5% reductions,

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[3] "Universities Respond to Gov. Bevin's Executive Order Issuing Budget Cuts," April 1, 2016, *http://www.wkyt.com/home/headlines/Universities-respond-to-executive-order-issuing-budget-cuts-374273621.html.*

[4] "Bevin Orders Kentucky College, University Budgets Cut by 4.5 Percent," April 2, 2016, *http://www.wcpo.com/news/education/bevin-orders-knetucky-college-university-budgets-cut-by-45-percent.*

[5] "Students Rally in Frankfort in the Wake of School Budget Cuts," April 1, 2016, *http://www.wtvq.com/2016/04/01/students-rallying-in-frankfort-in-the-wake-of-school-budget-cuts/.*

but expressing that their institutions could cope with a 2% reduction in their General Fund allotments instead.[6] Only Kentucky State University refused to join in the letter.

On April 19, 2016, Governor Bevin directed that the reduction in Kentucky State University's allotment be reversed in its entirety, and that 2.5% of the 4.5% revision be reversed for the other eight universities.[7] Thus, Kentucky State University did not experience *any* net reduction, and the other eight state universities only experienced a net reduction of 2% in their General Fund allotments. These 2% downward revisions to the universities' allotments translated to the following dollar amounts:[8]

Institution	2% Allotment Revision
Eastern Kentucky Univ.	$(1,360,700)
Kentucky State Univ.	$0
Morehead State Univ.	$(866,800)
Murray State Univ.	$(960,500)
Northern Kentucky Univ.	$(970,800)
Univ. of Kentucky	$(5,592,200)
Univ. of Louisville	$(2,781,500)
Western Kentucky Univ.	$(1,493,000)
KCTCS	$(3,803,200)

As illustrated in the following table, these amounts represented a small fraction of the universities' total budgets for Fiscal Year 2016:

[6] Ex. 1, Marshall Aff. at ¶ 25 and Ex. D to the Aff. [R. at 509, 517-18].

[7] Ex. 1, Marshall Aff. at ¶ 23 and Ex. C to the Aff. [R. at 508-09, 515-16].

[8] Ex. 1, Marshall Aff. at ¶ 25. [R. at 509].

Institution	Total Budget[9]	Revision % of Total Budget
Eastern Kentucky Univ.	$353,315,400	0.38%
Kentucky State Univ.	$77,419,700	0%
Morehead State Univ.	$253,852,400	0.34%
Murray State Univ.	$185,910,700	0.51%
Northern Kentucky Univ.	$267,494,600	0.36%
Univ. of Kentucky	$2,913,452,000	0.19%
Univ. of Louisville	$1,249,400,800	0.22%
Western Kentucky Univ.	$407,108,200	0.37%
KCTCS	$994,999,600	0.38%

Thus, the net 2% allotment reduction had *substantially less than a 1% impact* on the bottom line of the total budget of each affected university, and in all but one case, less than one-half of 1%. In light of this fact, it is easy to understand why the universities expressed that they were able to cope with their reduced allotments.

One of the prime reasons that they were able to cope is that the Commonwealth's General Fund is not the only source of revenue for the universities. For example, they also receive money from tuition and room and board payments. Such money is held in "trust and agency accounts." Significantly, KRS 45.253(4) states that "the secretary of the Finance and Administration cabinet may withhold allotment of general fund appropriations to the extent trust and agency funds are available." Even more significantly, at the time of the allotment reductions, the universities had cash on hand in trust and agency accounts in excess of the 2% reductions.[10]

Despite the fact that the allotment revisions have had virtually no impact on the universities' bottom lines, and despite the fact that the presidents of the affected universities have expressed that their institutions are able to cope with the reductions, the Attorney General nevertheless decided that he needed to intrude in this matter. On April

[9] *See* 2014 Ky. Acts Ch. 117, Part K.

[10] *See* Ex. 1, Marshall Aff.at ¶ 25. [R. at 509].

1, 2016, the day after the Governor instructed that the universities' fourth quarter allotments be revised downward by 4.5%, the Attorney General held a press conference and sent the Governor a letter proclaiming the Attorney General's belief that the Governor had acted unlawfully. The letter demanded that the Governor restore the full allotments by April 8 or be sued.

Because the Governor's actions were expressly permitted by KRS 48.620(1), as well as KRS 45.253(4), there was no reason to restore the allotments. Nevertheless, the Attorney General filed the instant lawsuit, taking the position that the Governor cannot reduce allotments because every penny appropriated by the legislature must be spent.

Along with filing his complaint, the Attorney General held a press conference to proclaim his efforts to stop the Governor's so-called "unconstitutional and illegal order." The Attorney General felt it necessary to gratuitously state several times during his press conference that this lawsuit is not a political ploy. Tellingly, he sued in his own name, not on behalf of the universities—the allegedly aggrieved parties. In fact, none of the postsecondary education institutions affected by the March 31 allotment revisions—who are the real parties in interest—felt the need to sue the Governor or join in this litigation.

After the Attorney General filed suit, three state representatives—Jim Wayne, Darryl Owens, and Mary Lou Marzian—sought to intervene as Plaintiffs in their official capacities. The Defendants opposed their intervention on the ground that they had no standing. The Intervenors, however, argued that they had standing by virtue of their interest in preventing the invasion and nullification of their legislative ability. The Franklin Circuit Court rejected the Defendants' arguments regarding the Intervenors' lack of standing and permitted them to intervene as Plaintiffs.

Following an expedited briefing schedule, the Franklin Circuit Court granted summary judgment in favor of the Defendants on May 18, 2016, concluding that the Governor acted lawfully in reducing the universities' allotments.[11] Specifically, the Franklin Circuit Court found that the Governor's action was authorized by the plain language of both KRS 48.620(1) and KRS 45.253(4).[12] The Court also concluded that the Governor's actions were consistent with the 2014 Executive Branch Budget, which did not mandate the spending of any specific sums, but merely authorized the spending of the appropriated "discrete sums, or so much thereof as may be necessary."[13] The Court further noted—in accord with virtually every other known authority—that the expenditure and administration of an appropriation is an executive function.[14] Thus, it found that the Governor's reduction of the universities' allotments was not a violation of the doctrine of separation of powers. Finally, summing up its decision, the Franklin Circuit Court concluded that "[t]he Court simply cannot endorse the position advanced by the Attorney General and the Intervening State Representatives that all appropriated funds must be spent or made available for expenditure. **This position is both an irresponsible one and an unsustainable one for a government to take.**"[15]

Following entry of summary judgment in favor of the Defendants, the Attorney General and Intervening State Representatives appealed and successfully sought transfer to this Court.

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[11] May 18, 2016 Opinion & Order [R. at 683-706].

[12] *Id.* [R. at 696-97].

[13] *Id.* [R. at 697].

[14] *Id.* [R. at 699-700, 702].

[15] *Id.* [R. at 703] (emphasis added).

ARGUMENT

The Appellants contest the Franklin Circuit Court's ruling that the Governor has authority to reduce the state universities' allotments. They claim that the Governor has no such authority, and even if he did, it would be unconstitutional. The Appellants, however, are wrong. Part I, below, explains why the Governor has this authority. Part II explains that—contrary to the Appellants' arguments—such authority does not violate the doctrine of separation of powers. And Part III explains that the Franklin Circuit Court can be affirmed on the alternative ground that none of the Appellants have standing.

I. The Franklin Circuit Court correctly held that the Governor has authority to reduce the universities' allotments.

The question here is whether the Governor has authority to spend less than the full amount of money appropriated by the legislature, or whether—as the Appellants contend—every penny appropriated must be spent. Under the Appellants' theory, the executive branch is not allowed to be responsible with its money and spend less than what is appropriated. They would tell all executive branch agencies that they must find some way to get rid of every penny appropriated to them, whether they pile it up in a field and set it on fire or spend it on needless trinkets. This irresponsible outlook is precisely the kind of thinking that has gotten the Commonwealth in its current fiscal predicament. It is outrageously bad policy to argue that every sum of money appropriated must be spent. But, more importantly for the purposes of this lawsuit, it is also an outrageously bad legal argument. The law obviously does not require every penny appropriated to be spent. Nor should it. To the contrary, the Governor has authority to save money and act in a fiscally responsible manner by reducing allotments. The plain language of KRS 48.620(1) and KRS 45.253(4) gives him such authority.

This question ultimately boils down to one of statutory construction: the Governor says that KRS 48.620(1) and KRS 45.253(4) permit his reduction of the universities' allotments, and the Appellants say that he is wrong. Remarkably, in nearly 80 pages of combined briefing, neither the Attorney General nor the Intervening State Representatives even so much as quote the operative language of those statutes, much less provide any textual analysis or explanation as to why those statutes do not mean what the Governor says they mean. Instead, the Attorney General and Intervening State Representatives recite platitudes about the separation of powers doctrine as if they are magical incantations that will carry them to victory, and they cobble together strained arguments that the Governor's use of KRS 48.620(1) and KRS 45.253(4) is somehow implicitly prohibited by a number of irrelevant statutes. They also incorrectly argue that the Governor's actions violate the doctrine of separation of powers. These unavailing arguments are just a feeble attempt to obfuscate the key point here, which is that the plain language of KRS 48.620(1) and KRS 45.253(4) authorizes the Governor's reduction of the universities' allotments.

A. The plain language of KRS 48.620(1) authorizes the Governors' reduction of the universities' allotments.

KRS 48.620(1) provides that:

> **Allotments** shall be made as provided by the allotment schedule, and **may be revised upon the written certification of the Governor**, the Chief Justice, and the Legislative Research Commission for their respective branches of government. No revisions of the allotment schedule may provide for an allotment or allotments in excess of the amount appropriated to that budget unit in a branch budget bill, or for expenditure for any other purpose than specified in a branch budget bill.

(emphasis added). The plain language of the first sentence of this section states that *allotments* may be revised by the Governor. The phrase "may be revised" plainly modifies the word "allotments," not the term "allotment schedule." Thus, the first sentence in KRS 48.620(1) gives the Governor authority to order revisions in allotments, which is precisely what he has done—*i.e.*, he has directed that a downward revision to the universities' allotments be made.

The Appellants take the position that KRS 48.620(1) simply gives the Governor the authority to revise the allotment *schedule*. In making this argument, they ignore the plain language of the statute and instead point to its *title*. Their argument hinges on the fact that the title of the statute says "Revisions of Allotment Schedule." The fallacy in this argument, however, is that the title of a statute has no bearing on its meaning. In fact, KRS 446.140 provides that "section or subsection heads or titles, . . . in the Kentucky Revised Statutes, do not constitute *any* part of the law . . . ." (emphasis added). What matters is the actual text of the statute, not the title. And, in this case, the text of KRS 48.620(1) allows the Governor to make revisions to allotments, not just revisions to the timing of allotments.

Lest there be any confusion on this point, the second sentence of KRS 48.620(1) —which the Appellants also ignore—plainly demonstrates that revisions are not limited to the *timing* of allotments. It states that "[n]o revisions of the allotment schedule may provide for an allotment or allotments in *excess* of the amount appropriated to that budget unit in a branch budget bill . . . ." *Id.* (emphasis added). This sentence has nothing to do with the timing of allotments. To the contrary, it explicitly addresses the *amount* of allotments. This demonstrates that allotment revisions under KRS 48.620(1) are not

limited to matters of timing. If they were so limited, there would be no reason to say that a revision cannot allow for spending in excess of the *amount* appropriated. The fact that it does say so can only mean that revisions are not limited to timing.

Moreover, the fact that the sentence precludes upward revisions in excess of the amount appropriated, but is silent as to downward revisions below the amount appropriated, demonstrates that such downward revisions are permissible under the statute. This is the only logical interpretation, and it is a plain one. When the amount of an allotment is revised, there are only two options: the amount is either revised upward or downward. By specifically precluding an upward revision in excess of the appropriated amount, the statute necessarily implies permission to make a downward revision below the appropriated amount. If the legislature had intended to exclude both upward and downward revisions, it would have said so. It would make no sense for the legislature to expressly preclude one type of revision while remaining silent on the other type if it had intended for both to be impermissible. The express prohibition on upward revisions, coupled with silence on the issue of downward revisions, confirms that downward revisions are—of necessity and as a matter of logic—indeed permissible.

The accuracy of this interpretation is further confirmed by the fact that the budget bill initially passed by the House of Representatives in the 2016 Regular Session on March 16, 2016 would have expressly prohibited the Governor from using KRS 48.620 to reduce allotments to the state universities. That bill—which all three of the Intervening Plaintiffs voted for—stated:

> **35. Allotment Reductions:** (a) **Notwithstanding** KRS 48.605, **48.620**, and 12.020 any allotments made for fiscal year 2015-2016 pursuant to KRS 48.610 shall be revised to accommodate any amendments made to appropriations for

> the 2015-2016 fiscal year in this Act and shall be for the entire amount appropriated by the General Assembly for each budget unit. **The Governor shall not reduce allotment amounts below the amounts appropriated by the General Assembly to the following budget units:**
>
> 1. Those headed by a Constitutional Officer other than the Governor, Lieutenant Governor, including the Treasurer, Auditor of Public Accounts, Commissioner of Agriculture, Secretary of State, and Attorney General; and
>
> 2. **The University of Kentucky, the University of Louisville, Eastern Kentucky University, Morehead State University, Murray State University, Western Kentucky University, Northern Kentucky University, Kentucky State University, and the Kentucky Community and Technical College System.**

2016 Regular Session, House Bill 303, House Committee Substitute 1, Part III § 35 (emphasis added). Clearly, the Intervening Plaintiffs and their colleagues in the House of Representatives who voted for the bill understood that the Governor has authority under KRS 48.620 to make downward revisions to the state universities' allotments. Otherwise, there would have been no reason for them to explicitly attempt to negate that authority in their unsuccessful bill.

The Appellants' briefs diligently avoid any discussion of the plain language of KRS 48.620(1). The reason for this is clear: there is nothing that they can say because the plain language supports the Governor's action. Thus, rather than addressing the language of the statute head-on, they try to sidestep it by arguing that the Governor's use of KRS 48.620(1) is somehow implicitly inconsistent with other statutes, namely the 2014 Executive Branch Budget and various other sections in KRS Chapter 48. Once again, however, the Appellants are wrong.

Their primary argument is that the Governor's use and interpretation of KRS 48.620(1) cannot be correct because KRS 48.600—in conjunction with Part VI of the 2014 Executive Branch Budget—provides the only method for reducing appropriations in the budget. This argument is nothing but a red herring because the Governor did not reduce any "appropriations." Instead, he made a downward revision to *allotments*. The Appellants completely miss the point that there is a difference between appropriations and allotments. An appropriation is a spending limit authorized by the legislature. In other words, it is the ceiling for spending. The Appellants ridicule this point, but—in keeping with their theme of ignoring points that they cannot refute—they fail to acknowledge that Kentucky law expressly defines an appropriation as a spending ceiling. Specifically, KRS 48.010 defines an "appropriation" as "an authorization by the General Assembly to expend a sum of money **not in excess of the sum specified** . . . ."[16] (emphasis added). An allotment, on the other hand, is a sum of money disbursed within an appropriation. *See* Black's Law Dictionary 88 (9th ed. 2009) (defining "allotment" as "a share or portion of something . . .").[17] Thus, the difference between KRS 48.600 and KRS 48.620 is that the former permits the spending ceiling to be lowered in certain circumstances, while the latter permits the Governor to spend beneath the ceiling while keeping the ceiling in the same place.

This difference is constitutionally significant. The Kentucky Constitution does not strictly require the General Assembly to enact a budget, but it does require that any enacted budget be balanced. *See Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d

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[16] Consistent with this definition, the 2014 Executive Branch Budget authorizes the spending of "the following discrete sums, **or so much thereof as may be necessary**." 2014 Ky. Acts Ch. 117, Part I § 1(1) (emphasis added).

[17] *See also* Aff. of Kathleen Marshall at ¶¶ 9-11 [R. at 504-05].

852, 856 (Ky. 2005). In other words, appropriations cannot exceed revenues. When revenues fall short of appropriations, then the appropriations must be lowered to meet the revenues, or else the budget will be out of balance and therefore not in compliance with the Constitution. KRS 48.600 is the statutory mechanism by which this occurs. It is an across-the-board appropriation reduction vehicle by which the Commonwealth satisfies the constitutional mandate of having a balanced budget when revenues fail to meet projections. KRS 48.620, on the other hand, does not affect appropriations, and it does not apply across the board when used. It keeps the spending ceiling unchanged, but gives the Governor—and the LRC and Chief Justice, with respect to their branches of government—the flexibility to direct executive branch budget units to spend at a level below the authorized ceiling.

In this case, KRS 48.600 is irrelevant because the Governor did not order an across-the-board reduction in appropriations. There was no actual or projected revenue shortfall, and the authorized spending ceiling remained precisely where the General Assembly set it. The Governor simply exercised his authority to instruct budget units within the executive branch to spend below that ceiling.[18] His actions were permitted by the plain language of KRS 48.620(1), and they did not conflict with KRS 48.600.

Nevertheless, the Attorney General cites *L.R.C. v. Brown*, 664 S.W.2d 907 (Ky. 1984), for the proposition that every penny of an appropriation must be spent unless the Governor complies with the budget reduction process of KRS 48.600. This is patently false. The Attorney General's brief quotes *Brown* out of context. *Brown* addresses the issue of whether various provisions of KRS Chapter 48 infringe upon the Governor's

[18] There is no question but that the universities are within the executive branch. *See Fletcher v. Galloway*, 241 S.W.3d 819 (Ky. App. 2007).

executive authority to administer the budget. Specifically, it addresses whether the budget reduction provisions of KRS 48.130 infringe upon that authority. This Court answered that question by finding that KRS 48.130 is constitutional. In other words, this Court held that the legislature is permitted to establish a mandatory process for the Governor to follow when there is a budget shortfall. This has nothing to do with the question at hand, which is whether the Governor has authority to spend less than the full amount of an appropriation in the absence of a budget shortfall. *Brown* did not address this question. The fact that the legislature *can* establish a mandatory budget reduction process to deal with budget shortfalls does not mean that the Governor is therefore always required to spend every penny appropriated. Those are two different issues, and the latter simply does not logically follow from the former. Nothing in *Brown* stands for the proposition that the Governor is required to spend every penny appropriated by the legislature. The Attorney General wants to shoehorn into *Brown* a holding that does not exist. In reality, *Brown* supports the Governor's position in this case because it acknowledges that the act of administering a budget is an executive function. *Brown*, 664 S.W.2d at 925, 928.

The Appellants also argue that the Governor's interpretation of KRS 48.620 conflicts with KRS 48.610 because the latter statute states that "[a]llotments shall conform with the appropriations in the enacted branch budget bills or other appropriation provisions." Once again, however, their argument is based on a misunderstanding as to the nature of an appropriation. The Appellants assume that an appropriation is a mandatory spending level. This is demonstrably wrong. An appropriation is not a mandate that a certain amount of money be spent. As discussed above, it is an authorized

spending ceiling. *See* KRS 48.010. Revising an allotment downward below that ceiling is not a failure to conform to the ceiling. As long as allotments are not greater than the appropriation, then they are in conformity with it. This is made obvious not only by the very definition of the word "appropriation," but also by the 2014 Executive Branch Budget itself, which expressly authorizes, on its first page and in its first paragraph, the spending of "the following discrete sums, **or so much thereof as may be necessary**." 2014 Ky. Acts Ch. 117, Part I § 1(1) (emphasis added). In light of this language, it cannot seriously be argued that budget units are required to spend all of the funds that are appropriated to them, nor can it be doubted that any amount of spending up to the amount of the appropriation is in conformity with the appropriation.

Ignoring that the 2014 Executive Branch Budget permits the spending of either the appropriated amounts "or so much thereof as may be necessary," the Attorney General argues that the 2014 Executive Branch Budget mandates that the appropriated sums be spent in their entirety. In support of this position, he cites language from the budget stating that the executive branch "shall carry out all appropriations . . . ." 2014 Ky. Acts Ch. 117, Part III § 27. Like many of his other arguments, this one commits the logical fallacy of begging the question. In other words, his argument assumes the very point it is trying to prove—*i.e.*, it assumes that not spending every penny of an appropriation is the same as failing to carry out the appropriation. This assumption is unwarranted and incorrect. Every penny need not be spent in order to "carry out" an appropriation. That is why the 2014 Executive Branch Budget also states, with respect to appropriated amounts, that the executive branch can spend "**so much thereof as may be**

necessary." 2014 Ky. Acts Ch. 117, Part I § 1(1) (emphasis added). Of course, the Attorney General ignores this part of the 2014 Executive Branch Budget.

In support of his argument that the reduced allotments fail to conform to the appropriations in the 2014 Executive Branch Budget, the Attorney General points to the United States Supreme Court's decision in *Train v. City of New York*, 420 U.S. 35 (1975). But *Train* is inapposite. *Train* involved a situation in which the President of the United States withheld sums appropriated by Congress, but he did not do so pursuant to a statute that permitted him to make allotment revisions, as KRS 48.620(1) authorizes the Governor to do. Instead, the President simply did it on his own. Moreover, the President did so in direct contravention of the appropriation statute at issue, which stated that "the sums authorized to be appropriated . . . 'shall be allotted by the Administrator.'" *Train*, 420 U.S. at 42. In other words, the statute at issue in *Train* expressly mandated that all of the appropriated sums be spent. This is the key point upon which *Train* was decided. Professor Ronald Rotunda, one of the nation's leading experts on constitutional law, has explained that "*Train* steered clear of the broader constitutional issues on impoundment. If Congress does not make such an explicit command to spend appropriated funds, *Train* appeared to agree (or, at least, it assumed) that the President could impound funds." Ronald D. Rotunda, *Modern Constitutional Law* 399 (7th ed. 2003). Thus, the *Train* decision was not based on some absurd notion that every penny appropriated by the legislature must always be spent, but rather on the fact that the statute at issue plainly mandated that the entire amount of the appropriation be spent. No such statutory language exists in the instant case.

Finally, the Appellants also contend that the Governor's reduction of the universities' allotments violates KRS 48.605. In relevant part, KRS 48.605 provides that:

> (1) Allotments within appropriations for the activities and purposes contained in an enacted branch budget bill **may be revised** as follows:
>
> (a) For the executive branch, upon authorization of the state budget director at the request of the head of a budget unit;

KRS 48.605(1)(a) (emphasis added). According to the Appellants, this provision only allows the universities' allotments to be reduced by their boards or their presidents, not the Governor.[19] The obvious flaw in this logic is that the plain language states that allotments *may be revised* by the head of a budget unit, not that they "may only be revised" or "must be revised" by such person. Thus, KRS 48.605(1)(a) provides one possible avenue for reducing an allotment—*i.e.*, the head of the budget unit can request it—and KRS 48.620(1) provides another—*i.e.*, the Governor can request it. There is nothing inconsistent about this.

The bottom line here is that KRS 48.620(1) authorizes the Governor to reduce the universities' allotments, and the exercise of that authority does not conflict with any other provision of KRS Chapter 48 or the 2014 Executive Branch Budget. The plain language of KRS 48.620(1) compels this conclusion. The Appellants, however, ignore the plain language of the statute—not even quoting it in their nearly 80 pages of briefing—and they cling to their illogical position that every penny appropriated by the legislature must be spent. It is hard to believe that any public official would take the position that the

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[19] Interestingly, the Appellants appear to concede that, under KRS 48.605(1)(a), the head of a budget unit can revise the *amount* of a budget allotment. This position is inconsistent with their interpretation of KRS 48.620(1). Both KRS 48.605(1) and KRS 48.620(1) state that "[a]llotments . . . may be revised." There is no explanation as to why they would interpret the same language to allow revisions to the *amount* of an allotment under KRS 48.605(1), but would interpret it to only allow revisions to the *timing* of an allotment under KRS 48.620(1).

Governor cannot direct budget units to spend less than the full amount appropriated by the General Assembly, but that is indeed the position that the Appellants are taking. And it is an incorrect position because the Governor has authority to reduce allotments so as to spend less than the full amount of an appropriation. KRS 48.620(1) gives him such authority and—as explained below—KRS 45.253(4) does as well.

B. The plain language of KRS 45.253(4) also authorizes the Governors' reduction of the universities' allotments.

KRS 45.253(4) provides that "the secretary of the Finance and Administration cabinet **may withhold allotment of general fund appropriations to the extent trust and agency funds are available**." The uncontroverted facts in the record show that the universities had sufficient trust and agency funds available to cover the reduced allotments.[20] As a result, there can be no question that the reduced allotments were authorized by KRS 45.253(4).

As with KRS 48.620(1), the Appellants do not dispute that this language permits the downward revisions to the state universities' allotments. Nor could they dispute this point if he tried. Once again, rather than address the plain language of the statute, the Appellants try to obfuscate the import of the statute by arguing that it does not apply to the universities. But, once again, they are wrong.

The Appellants contend that KRS 45.253(4) does not apply to the universities because they are exempted from it by KRS 164A.630. KRS 164A.630(1) sets forth the statutes that the university boards must follow in governing their institutions. It does not list KRS 45.253(4), and so the Appellants take this to mean that the universities are

[20] It is beyond dispute that trust and agency funds available to the universities greatly exceed the minor downward revisions in the universities' Fiscal Year 2016 allotments. *See* Marshall Aff. at ¶ 24 [R. at 509].

exempt from its provisions. However, by its own terms, KRS 45.253(4) applies to the authority of the Secretary of the Finance and Administration Cabinet. It has nothing to do with the governance of the universities by their boards, nor does it establish any standards that the boards could apply to themselves. Thus, it would make no sense to list KRS 45.253(4) among the statutes that govern the university boards. Its absence from KRS 164A.630(1) therefore has no bearing on whether it applies to the universities.[21]

KRS 164A.630(2) provides that "notwithstanding" any contrary provisions of KRS Chapter 45, "KRS 164A.555 to KRS 164A.630 shall govern the financial management of higher education . . . ." Based on this provision, the Appellants argue that the universities are exempt from KRS 45.253(4) because it is contrary to KRS 164A.555. In reality, however, KRS 45.253(4) is not contrary to KRS 164A.555. And, in any event, to the extent possible, state statutes must be read with a goal of reconciliation, not conflicting interpretations. *See, e.g., Commonwealth v. Martin*, 777 S.W.2d 236, 238 (Ky. App. 1989) (*Butcher v. Adams*, 220 S.W.2d 398 (Ky. 1949)).[22]

There are no inconsistencies between KRS 164A.555 and KRS 45.253(4), and it is easy to reconcile them so as to give effect to both. Nevertheless, the Appellants contend that KRS 164A.555 requires that the universities be allotted every penny appropriated to them because it states that the Secretary of the Finance and Administration Cabinet "shall issue warrants authorizing the Treasurer of the

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[21] KRS 164A.630(1) also does not expressly list KRS 48.600, *et seq.* However, it cannot seriously be argued that the Commonwealth's budget reduction requirements would not apply to the universities, along with other state budget units, in the event of a real or projected state revenue deficit.

[22] The Attorney General argues that the statutes relied upon by the Governor should give way to the more recent 2014 Executive Branch Budget, but that argument makes no sense because none of the statutes conflict with each other. The Governor's interpretation of the statutes harmonizes them so that they can all be given full effect. This further demonstrates that the Governor's interpretation of the statutes is the correct one because it is well established that statutes should be read in harmony with each other if at all possible. *See Martin*, 777 S.W.2d at 238 (citing *Butcher*, 220 S.W.2d 398).

Commonwealth of Kentucky to pay to the treasurer of each institution any amounts due by virtue of the state appropriations for that institution . . . ." They are wrong for multiple reasons.

First, the phrase "any amounts due by virtue of the state appropriations for that institution" does not refer to every single penny appropriated for an institution. Instead, it refers to any amount up to the appropriated amount. As with many of his other arguments, the Appellants are again failing to comprehend that an appropriation is a spending ceiling, not a floor or a mandated spending level. *See* KRS 48.010 (defining an "appropriation" as "an authorization by the General Assembly to expend a sum of money **not in excess of the sum specified** . . . .").

Second, and perhaps more importantly, the Appellants fail to acknowledge the true import of KRS 164A.555. The actual point of KRS 164A.555 is not that it exempts the universities from KRS 45.253(4), but that it changes the default method of disbursement of state funds when it comes to the universities. The default method by which most state budget units spend state funds is that the Finance and Administration Cabinet submits warrants to the Treasurer to pay obligations incurred by the budget units. *See* KRS 45.451 to 45.458 (setting forth the process by which the Finance and Administration Cabinet pays the obligations incurred by the Commonwealth's organizational units and administrative bodies). But, under KRS 164A.555, funds are drawn down directly by the universities and, rather than the state writing checks to vendors or other payees, the universities directly pay their own bills. Thus, KRS 164A.555 has nothing to do with whether the universities receive the full amounts appropriated to them. Rather, it simply addresses the manner in which appropriated

money is disbursed to the universities. When KRS 164A.555 says that the Treasurer "shall . . . pay to the treasurer of each institution any amounts due by virtue of the state appropriations for that institution . . . " all it means is that any amounts that are given to the universities pursuant to an appropriation shall be given directly to them, as opposed to the more ordinary method of indirectly giving an agency its money by paying its bills for it. Thus, when properly understood, KRS 164A.555 does not conflict with KRS 45.253(4). Because there is no conflict between those two statutes, KRS 164A.630(2) does not prevent KRS 45.253(4) from applying to the universities.[23]

In sum, nothing in KRS 164A.555 to KRS 164A.630 conflicts with the application of KRS 45.253(4) to the universities. The provisions of KRS 164A.555 to KRS 164A.630 apply to the universities' *internal* control over their own finances, while KRS 45.253(4) applies to the Finance and Administration Cabinet. In other words KRS 164A.555 to KRS 164A.630 govern the manner in which the universities manage their money once they receive it, and KRS 45.253(4) applies to the Finance and Administration Cabinet's provision of money to the universities. KRS 45.253(4) applies until allotments are made to the universities, and then, once the universities have received their allotments, KRS 164A.555 to KRS 164A.630 apply to their handling of that money. Thus, the Appellants' arguments that KRS 45.253(4) does not apply to the universities are not well taken.

With respect to both KRS 48.620(1) and KRS 45.253(4), the Appellants have done nothing more than attempt to obscure the fact that the plain language of those statutes supports the Governor's position. In failing to address the plain language of

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[23] Of course, as noted above, courts are bound to make every effort to read statutes so as to reconcile them. *See Martin*, 777 S.W.2d at 238 (citing *Butcher*, 220 S.W.2d 398).

those statutes, the Appellants do not even attempt to explain what they mean if they do not mean what the Governor says they mean; they offer no alternative interpretation of the statutes. Instead, they contend that KRS 48.620(1) and KRS 45.253(4) are somehow implicitly negated by a number of irrelevant, inapplicable statutes. As explained above, these arguments are unavailing. The Appellants also contend that the Governor's use of those statutes is unconstitutional because it violates the doctrine of separation of powers. But, as explained below, this argument is also incorrect. The Governor's actions present no constitutional infirmities.

II. The Governor's actions did not violate the doctrine of separation of powers.

The Appellants contend that the Governor's actions have violated the doctrine of separation of powers because, according to them, only the legislature has power to spend money. In making this argument, the Appellants display a fundamental misunderstanding of the separation of powers. They are making the mistake of conflating the act of appropriating with the act of administering and spending an appropriation.[24] These are two separate functions, and they belong to two different branches of government.

The Governor agrees that only the legislature can appropriate money. *See L.R.C. v. Brown*, 664 S.W.2d 907, 929 (Ky. 1984). But, once the legislature appropriates money, its job is finished, and it becomes the job of the executive branch to administer

[24] The Attorney General has argued—apparently with a straight face—that he "is not asking anyone to spend anything." Pl.'s Mem. in Supp. of Mot. for Summ. J. at 9 [R. at 599]. Rather, he claims that he simply wants the Governor to disburse more money to the universities, which he admits are independent corporate entities. This Orwellian doublespeak is breathtaking and demonstrates the precise mode of thinking over many years that has gotten the Commonwealth in its current fiscal predicament. Regardless of how the Attorney General wants to characterize it, any reasonable person recognizes that the Commonwealth is spending money when it disburses funds from its coffers, especially when it disburses funds to "independent corporate entities" that depend on state General Fund monies.

the appropriations and spend the money. In *L.R.C. v. Brown*, the Kentucky Supreme Court acknowledged that it is the province of the executive branch to administer appropriations from the legislature and to spend the money. *See id.* at 926. In fact, while the Court in *L.R.C. v. Brown* noted that "[t]he preparation and adoption of a budget is a *legislative* matter," *id.* at 929, it equally recognized that it is an "executive duty to administer the budget of the executive branch of government," *id.* at 926.

To put it in the familiar terms of the "power of the purse," the legislature fills the purse with money and prescribes the purposes for which the money can be used, and then the executive branch takes the purse and spends the money toward those purposes in the most efficient manner it can. This is exactly what has happened here; the Governor has taken the purse of money provided by the legislature and has reasonably decided that the legislature's will can be satisfied without spending all of the money in the purse.

The conclusion in *L.R.C. v. Brown* that administering an appropriation and spending money is an executive function is compelled by § 81 of the Kentucky Constitution, which places upon the Governor the duty to execute the Commonwealth's laws. Because the 2014 Executive Branch Budget is indeed a law, § 81 clearly provides that administering the appropriations in that law is an executive function.

Authorities across the country uniformly recognize that administering a legislative appropriation and spending the money in it is an executive function.[25] *See, e.g., New*

[25] This has broader implications than just the Governor's authority. As is pointed out in the amicus brief submitted by the Jessamine County Attorney—and supported in a separate motion to join that brief, which was filed on behalf of the judge/executives of Boone, Kenton, Campbell, Warren, Garrard, Trigg, Crittenden, Simpson, and Bell Counties—the definition of what is and is not an executive function also affects county judge/executives. The statute that imbues them with authority, KRS 67.710, states that they "shall have all the powers and perform all the duties of an executive and administrative nature . . . ." If administering a budget and spending money is not executive in nature, then county judge/executives will have to receive authorization from their fiscal courts every time they have an opportunity to spend less money than has been appropriated. For example, if a fiscal court appropriated $10,000 to purchase a dump

Hampshire Health Care Ass'n v. Governor, 13 A.3d 145, 155-56 (N.H. 2011); *Brayton v. Pawlenty*, 781 N.W.2d 357, 365 n.3 (Minn. 2010); *Fent v. Contingency Review Bd.*, 163 P.3d 512, 521 (Okla. 2007); *McInnish v. Riley*, 925 So.2d 174, 182 (Ala. 2005); *Hunter v. State of Vermont*, 865 A.2d 381, 390 (Vt. 2004); *Rios v. Symington*, 833 P.2d 20, 29 (Ariz. 1992); *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371, 1380 (Colo. 1985); *Opinion of the Justices to the Senate*, 376 N.E.2d 1217, 1223 (Mass. 1978); *State ex rel. Meyer v. State Bd. of Equalization & Assessment*, 176 N.W.2d 920, 926 (Neb. 1970); *see also* 63C Am. Jur. 2d *Public Funds* § 35 ("Spending money appropriated by the legislature is essentially an executive task, and regardless of how minutely appropriations are itemized, some scope is left to the executive for the exercise of judgment and discretion in making expenditures within the limits of the appropriation."); 16 C.J.S. *Constitutional Law* § 447 ("spending funds, or administering appropriated funds, is an executive power . . ."); Frank H. Easterbrook, *"Success" and the Judicial Power*, 65 Ind. L.J. 277, 281 (1990) (nothing that "handing out public money is a classically executive function"); *The Federalist* No. 72 at 403-04 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that "the application and disbursement of the public moneys in conformity to the general appropriations of the legislature" is an executive duty).

The Appellants attack the Governor's citation of nationwide authority on this issue of first impression in Kentucky, and they point out that the courts actually ruled against governors in several of the cited cases. The Appellants miss the point of these cases though. In citing these cases, the Governor obviously is not attempting to make the point that the instant case is exactly like all of those cases and should reach the same

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truck, and the judge/executive found exactly what was needed for $8,000, he would either have to pay $10,000 or get authorization from the fiscal court to spend less than was appropriated. This would be inefficient and contrary to historical practices.

result. After all, the ultimate results in those cases are based on varying statutory and constitutional frameworks and disparate factual scenarios. Thus, it is no surprise that in some of the cited cases, the governors have won, and in some they have lost.[26] Those cases are not cited for the proposition that governors always prevail in the courts when they are sued for spending less than the full amount of an appropriation. Rather, they are cited because they all acknowledge the universally recognized rule that administering an appropriation and spending money is an executive function, not a legislative one.

The Intervening State Representatives make much of the fact that Thomas Jefferson wrote the separation of powers provisions in the Kentucky Constitution. It is unclear why they believe the identity of the author somehow makes the Governor's actions more violative of those provisions. In reality, the fact that they were drafted by Thomas Jefferson actually supports the Governor's position here. Jefferson understood that administering an appropriation and spending money is an executive function. For example, in 1803, President Jefferson withheld spending $50,000 appropriated by Congress for the purchase of gun boats because he believed that "[t]he favorable and peaceable turn of affairs on the Mississippi [River]" rendered it unnecessary to spend those funds. 13 Annals of Cong. 14 (1803). And, in the same year, he also declined to spend $1.5 million that had been appropriated by Congress because he found that the same favorable and peaceable turn of affairs made that expenditure unnecessary as well. *Id.* Thus, Thomas Jefferson—whom the Intervening State Representatives see as the

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[26] The Intervening State Representatives cite a law review note, Tyler J. Siewert, *The Cloying Use of Unallotment: Curbing Executive Branch Appropriation Reductions During Fiscal Emergencies*, 95 Minn. L. Rev. 1071 (Feb. 2011), for the proposition that governors may not spend less that the full amount of an appropriation. They block quote a section of the note that discusses cases in which governors have been found to have exceeded their authority. However, they conveniently fail to mention the immediately preceding section, which discusses the many cases in which courts have upheld governors' decisions to spend less than the full amounts of appropriations. *See id.* at 1079-81.

great advocate of separation of powers—recognized that spending money and administering an appropriation is an executive function and that the executive's exercising of this function so as to spend less than the full amount of an appropriation is not a violation of the doctrine of separation of powers..[27]

In light of the widespread recognition—by the Kentucky Supreme Court in *L.R.C. v. Brown*, as well as the courts of numerous other states—that administering an appropriation and spending money is an executive function, it is also widely recognized that "[t]he constitutional separation of powers and responsibilities, therefore, contemplates that the Governor be allowed some discretion to exercise his judgment not to spend money in a wasteful fashion . . . ." *Opinion of the Justices to the Senate*, 376 N.E.2d at 1223 (citing *Dwyer v. Comm'r of Ins.*, 376 N.E.2d 826 (Mass. 1978)). **Thus, the rule is that "the Governor has the constitutional prerogative to spend less than the full amount of an appropriation . . . ."** *Id.*; *see also* 16A Am. Jur. 2d *Constitutional Law* § 258 (The governor has the constitutional prerogative to spend less than the full amount of an appropriation . . . ."); 63C Am. Jur. 2d *Public Funds* § 35 ("Spending money appropriated by the legislature is essentially an executive task, and regardless of how minutely appropriations are itemized, some scope is left to the executive for the exercise of judgment and discretion in making expenditures within the limits of the appropriation."); 16 C.J.S. *Constitutional Law* § 454 ("However, a governor has the constitutional prerogative to spend less than the full amount of an appropriation . . . .").

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[27] In fact, Jefferson's position on this point was much more favorable to executive control than what the Governor is advocating in this case. Jefferson apparently believed that the executive had authority to refuse to spend any amount of an appropriation. As explained below, the Governor does not take this position. The Governor's position represents a much more restrained, modest view of executive authority than Jefferson apparently held.

This rule is so widely recognized and so sensible that it is surprising that anyone would take issue with it. And yet, the Appellants do. In doing so, they either misunderstand or deliberately mischaracterize the effect of this rule. They assert that the Governor is claiming unfettered power to withhold appropriated money and reduce spending. This is not the Governor's position, and it is not clear why the Appellants jump to this conclusion. The Governor has never articulated this as his position, nor is it the natural conclusion of the position that he has taken—which is simply that there is no requirement to spend every penny appropriated, and that his downward revision of the state universities' allotments is permitted by KRS 48.620(1) and KRS 45.253(4).

Regardless of why the Appellants believe that the Governor is claiming unfettered power to withhold or reduce allotments, they are wrong. The Governor freely admits that there is indeed a limiting principle to his ability to reduce allotments. If he were to completely withhold every penny that the legislature had appropriated to a budget unit, then such action might violate the separation of powers doctrine because it would allow him to override an enacted law and thereby unconstitutionally negate the legislature's goals in making the appropriation. But that has not happened in this instance, and the Governor is not advocating that he has such power. Instead, he recognizes that there is a limiting principle to his ability to spend less than the full amount of an appropriation. **And that limiting principle is this: the Governor may direct budget units to spend less than the full amount of an appropriation so long as "he has determined reasonably that such a decision will not compromise the achievement of underlying legislative purposes and goals."** *Opinion of the Justices to the Senate*, 376 N.E.2d 1217, 1223 (Mass. 1978) (citing *Dwyer v. Comm'r of Ins.*, 376 N.E.2d 826 (Mass.

1978)); *see also* 16A Am. Jur. 2d *Constitutional Law* § 258 (stating that a governor has "some discretion in deciding whether to expend appropriated funds, and although not obliged to spend money foolishly or needlessly, the governor may not totally negate a legislative policy decision that lies at the core of the legislative function"); 63C Am. Jur. 2d *Public Funds* § 35 (stating that while "some scope is left to the executive for the exercise of judgment and discretion in making expenditures within the limits of the appropriation . . . the executive branch of the government has no power to impound appropriated funds where to do so will compromise achievement of legislative purposes and goals"); 16 C.J.S. *Constitutional Law* § 454 (stating that "a governor has the constitutional prerogative to spend less than the full amount of an appropriation but . . . may not totally negate a legislative policy decision that lies at the core of the legislative function.").

When applied to the instant case, it is clear that the Governor's actions comply with this limiting principle. There is no suggestion here—much less proof—that the downward revisions to the universities' allotments have negated the General Assembly's purposes and goals in creating the universities and appropriating money to them. To the contrary, the universities *have actually agreed* that they can live with the downward revisions to their allotments,[28] and some have released public statements explaining that they will be able to weather the downward revisions without any overall negative impacts to their legislatively-created mission of educating students. Furthermore, the unrebutted affidavit of Kathleen Marshall demonstrates that the 2% downward revisions to the universities' allotments will have a negligible, if not completely non-existent, effect on the universities' abilities to perform their core functions—*i.e.*, to provide post-secondary

[28] Letter From University Presidents [R. at 517-18].

education and training to the citizens of the Commonwealth. These facts should be contrasted with the entirely conclusory, unsupported, and non-specific allegations in the Appellants' Complaints, as well as the unsupported assertions in their briefs. There is no genuine issue of material fact but that the universities remain quite capable of fulfilling the purposes for which the General Assembly created them and provided appropriations for them. As a result, it is impossible to say that the Governor has gone beyond the limits on his ability to spend less than the full amount of an appropriation. Thus, he has not violated the separation of powers doctrine.

The Attorney General ignores this and imagines a parade of horribles that will occur if the Governor's action is allowed to stand, arguing that the Governor will be able to defund the Executive Branch Ethics Commission, or the Kentucky State Police, or the Unified Prosecutorial System. This is a red herring. The existence of the previously discussed limiting principle eviscerates the Attorney General's "parade of horribles" argument. Contrary to the Attorney General's hand-wringing, it is not true that the Governor's use of KRS 48.620(1) could allow him to defund the Executive Branch Ethics Commission, or the Kentucky State Police, or the Unified Prosecutorial System. There are restraints on the Governor's power, and indeed the Governor has acted within those restraints in this instance, where he has reduced the universities' General Fund allotments by a mere 2%.[29] Given these restraints, the Attorney General's cacophony about potential abuses of power simply falls flat.

If and abuses of power arise under future governors, it is clear that the courts are in a position to restrain a governor if he or she were to abuse this authority. The Attorney

[29] It should also be remembered that these 2% General Fund allotment reductions represent roughly one-half of one percent or less of the universities' total overall budgets.

General is essentially asking the Court to repeal the authority given to the Governor by the General Assembly based on the potential that some future governor might abuse that authority. The Kentucky Supreme Court rejected a similar argument in *Hopkins v. Ford*, 534 S.W.2d 792, 796 (Ky. 1976), where it held:

> Appellants' argument that the actions of the Governor could and probably would lead to a deficit is negated by the provisions of the Act; and, in any event, it is not suggested in this record that such actions have been taken or are contemplated.
>
> It is not our function to sit in judgment upon the wisdom of legislative acts, but only to determine the power of the legislature in accordance with the provisions of the Kentucky Constitution. It is apparent that appellants' arguments are largely directed to the possibility of unscrupulous actions on the part of the executive which possibly could occur and thwart legislative intent. None is suggested here, and we can only say that in this respect the wisdom of the legislature is being called into question and that area does not lie within our power to adjudicate.

As this Court did in *Hopkins*, it should disregard the Attorney General's "parade of horribles" argument. This Court and the appellate courts of the Commonwealth are perfectly capable of dealing with the situation if a governor ever abuses his or her authority by making downward revisions to a budget unit's allotments to the point where the legislature's will in funding that budget unit is negated. The undisputed facts here do not even remotely approach such a situation though.

Significantly, while the courts are perfectly capable of remedying a situation in which a governor oversteps his or her bounds, there is still yet an even greater protection available for the doctrine of separation of powers: the General Assembly is always free to take away the Governor's authority to reduce allotments. The General Assembly is

capable of repealing KRS 48.620(1) and KRS 45.253(4), and it also capable of expressly stating in appropriations bills that the full amount of any specific appropriation must be spent, just as Congress did in the *Train* case. *See Train*, 420 U.S. at 42. Thus, it must be remembered that the General Assembly ultimately holds all the cards here.

With respect to the separation of powers, it is also important to point out that this is not a situation in which the Governor is attempting to redirect appropriated money to a purpose of his own choosing. While the Governor made the allotment revisions at issue here—as well as allotment revisions to other budget units, which have not been challenged in this action—out of a stated desire to help the seriously ailing state pension funds, he does not have the authority to put the saved money directly into the pensions. Instead, the saved money will lapse to the General Fund as required by KRS 45.229(2). These savings may well help the pension funds in the abstract because they will make more money available in the General Fund, which the legislature can hopefully then appropriate to the pension funds. The Governor himself cannot redirect those funds for a purpose not authorized by the legislature. Instead, the funds will go precisely where the legislature has mandated that saved and lapsed funds go—to the General Fund. *See id.* Thus, it is the *legislature*, not the Governor, that has decided where the saved funds will go.[30] This further demonstrates the point that there is no separation of powers violation here.

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[30] The Intervening State Representatives' brief oddly asserts that the Governor is trying to force the saved money into the Budget Reserve Trust Fund. It is unclear why they are claiming this, much less why they are asserting it so adamantly. No one in this case has ever even discussed the Budget Reserve Trust Fund. The Budget Reserve Trust Fund is a statutorily-created fund made up of money that is directly appropriated to it, as well as money that automatically winds up in the fund by operation of law. *See* KRS 48.705. By statute, unspent money lapses to the General Fund's surplus account. *See* KRS 45.229(2). Also by statute, a portion of the General Fund's surplus account must be deposited in the Budget Reserve Trust Fund. *See* KRS 48.705(2). Accordingly, if any of the money at issue here ends up in the Budget Reserve Trust Fund, it will not be because the Governor has put it there of his own volition, but because the General Assembly

Ironically, if there is a separation of powers issue here, it would be caused by the Intervening State Representatives—Representatives Marzian, Owens, and Wayne—attempting to impede the executive branch's administering of appropriations. Once the General Assembly makes appropriations through an enacted budget, the legislature's job is finished. *See L.R.C. v. Brown*, 664 S.W.2d at 929. The job of spending that money then falls to the governor, who may exercise discretion to spend less than the total amount appropriated as long as he or she does not divert those funds to a non-intended purpose, or spend so little of the appropriated funds as to totally negate the legislature's intent in making the appropriations. Any attempt by the legislature—or the judiciary—to impede that executive function would raise serious separation of powers issues. *See Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852, 856 (Ky. 2005) (addressing the limitations on the part of the legislature and executive to encroach on each other's powers). Here, the attempt by the Intervening State Representatives and the Attorney General to encroach upon the powers of the Governor—as well as the powers of the Chief Justice and the LRC within their respective branches of government—to decide how much money, once appropriated, must be spent must be rejected based upon the clear mandate by the Kentucky Supreme Court in *L.R.C. v. Brown*. The Appellants have used a lot of ink crowing about the extraordinary strength of Kentucky's separation of powers doctrine. If they really believe everything that they say, then they need to admit that their position would violate that very doctrine by taking the executive power to administer appropriations out of the hands of the executive.

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has mandated that it go there. This just further proves the point that the unspent money will not be redirected to a purpose of the Governor's choosing, but will be handled precisely as the General Assembly has required unspent appropriations to be handled.

The last aspect of the Appellants' separation of powers argument is their assertion that if the Governor's interpretation of KRS 48.620(1) is correct, then that statute is an unconstitutional delegation of the legislature's power to appropriate. This argument is also wrong. The nondelegation doctrine only prohibits the legislature from delegating *legislative* power. *See, e.g., Bd. of Trustees of Judicial Form Retirement Sys. v. Atty. Gen'l*, 132 S.W.3d 770, 781-83 (Ky. 2003). But, as explained above, the act of administering appropriations and spending money is an *executive* function. Therefore, the nondelegation doctrine is inapplicable.[31] Once again, the Appellants fail to recognize that the Governor is not claiming that he has the power to appropriate money. Rather, KRS 48.620(1) and KRS 45.253(4) simply give him the flexibility to direct agency spending beneath the spending ceiling set by the legislature's appropriations. As discussed above, such power is executive in nature to begin with. Thus, KRS 48.620(1) cannot possibly be an unconstitutional delegation of legislative power because the statute does not even involve the use of legislative power. In other words, the Governor's ability to direct downward revisions in allotments under KRS 48.620(1) and KRS 45.253(4) does not entail an unconstitutional delegation of legislative authority, but rather a permissible exercise of executive authority.

Finally, although it is hardly worth mentioning, the Appellees point out the obvious error in the Appellants' desperate attempts to argue that Kentucky courts have already found the conduct at issue here—*i.e.*, spending less than the full amount of an appropriation—to be unconstitutional. Any suggestion that Kentucky courts have already

[31] Applying the nondelegation doctrine here would be akin, for example, to applying it to a statute that creates an office and gives the Governor the authority to appoint the person who will hold the office. Because appointing inferior officers is an executive function, the nondelegation doctrine would not require the statute to establish specific qualifications for the office or a process that the Governor would have to follow in filling the office by appointment—the nondelegation doctrine simply would not apply.

found the Governor unable to direct spending below the full amount of an appropriation is patently false. This is a case of first impression in Kentucky. Kentucky courts have certainly held that the Governor is not permitted to spend money that has never been appropriated by the General Assembly, but they have not addressed the question of whether the Governor can choose to *not spend* money that *has been appropriated.* These are two entirely different questions, and the latter has never been addressed in Kentucky. Nevertheless, the Appellants still cite numerous cases—such as *Beshear v. Haydon Bridge Co.*, 304 S.W.3d 682 (Ky. 2010), *Beshear v. Haydon Bridge Co.*, 416 S.W.3d 280 (Ky. 2013), *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006), *Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.3d 852 (Ky. 2005), and *James v. State University*, 114 S.W. 767 (Ky. 1908)—as if they have already addressed the Governor's actions and found them to be unconstitutional. The Appellants are wrong. They are relying on inapposite cases that have no factual or legal similarities to the instant case. Even the most cursory reading of the cases they cite reveals this point. The Appellants' attempt to wedge the facts of this case into the holdings of those cases is unavailing. To the extent that any Kentucky cases apply by analogy or implication, they support the Appellees' position, as explained above. The Governor has acted constitutionally, and this point is underscored by the fact that the best the Appellants can do in arguing to the contrary is to mischaracterize and selectively quote various irrelevant cases.

III. The Appellants lack standing.

While the Franklin Circuit Court was correct in granting summary judgment for the Appellees based on the merits of the Appellants' claims, it would have been equally correct in granting summary judgment on the basis of the Appellants' lack of standing. The Attorney General has broad ability to sue on behalf of the Commonwealth, but the breadth of that ability does not extend to this case. And the Intervening State Representatives have essentially no ability whatsoever to sue on behalf of either the Commonwealth or the legislature, especially in the instant case. Therefore, this Court can affirm the Franklin Circuit Court's grant of summary judgment on behalf of the Appellees on the alternative ground that none of the Appellants have standing.

A. The Attorney General lacks standing.

The Attorney General does not have standing to bring this lawsuit. In order to have standing, a party must have "a judicially recognizable interest in the subject matter of the suit." *HealthAmerica Corp. of Ky. v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 947 (Ky. 1985) (citing *Lexington Retail Beverage Dealers Ass'n v. Dep't of Alcoholic Beverage Control*, 303 S.W.2d 268 (Ky. 1957)). Standing encompasses "the general prohibition on a litigant's raising another person's legal rights . . . ." *Lawson v. Office of Attorney General*, 415 S.W.3d 59, 67 (Ky. 2013). This prohibition is being violated here. It is the state universities—not the Attorney General—that have a judicially recognizable interest in the subject matter of this lawsuit. Tellingly, the universities have not sued, nor is there any proof that they have retained the Attorney General to act on their behalf. The Attorney General, therefore, lacks standing.

Significantly, the universities have complete and unfettered access to their own legal counsel. This negates the Attorney General's ability to represent their interests. This point is borne out in *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820 (Ky. 1942), which addressed the validity of a statute permitting government agencies to hire their own attorneys. The attorney general contested the constitutionality of that statute, arguing that it impermissibly restricted his authority to represent departments and agencies of state government. Kentucky's highest court disagreed, holding that:

> [W]hile the Attorney General possesses all the power and authority appertaining to the office under common law and naturally and traditionally belonging to it, nevertheless the General Assembly may withdraw those powers and assign them to others or may authorize the employment of other counsel for the departments and officers of the state to perform them.

Id. at 829. Thus, when a state agency hires, or can hire, its own attorneys pursuant to statutory authority, the Attorney General no longer has authority to unilaterally decide to act for that agency. It is indisputable that the universities have statutory authority to hire their own counsel. *See* KRS 12.210 (authorizing state agencies to hire their own attorneys); KRS 164.350(1) (making each state university and KCTCS "a body corporate, with the usual corporate powers"). Because the universities have their own lawyers and can make their own decisions concerning whether to sue, the Attorney General has no right to represent their interests in this matter.

The Attorney General relies on *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2009), for his claim to standing. At first glance, it appears to give the Attorney General very broad standing to pursue an action such as this one. But *Conway* is distinguishable and should be clarified to avoid future misinterpretation. In *Conway*,

the attorney general sought an injunction to prevent the Department of Corrections from retroactively applying so-called "street credit" to prisoners' sentences. *See id.* at 158-59. The effect of such retroactive application would have been to release prisoners from custody or grant them a final discharge earlier than otherwise would have been the case. *See id.* The Franklin Circuit Court found that the attorney general lacked standing because he had no personal interest in the outcome of the case. *See id.* at 172. This Court reversed, finding that "the Attorney General of the Commonwealth of Kentucky has standing to seek injunctive relief *on behalf of the citizens of the Commonwealth.*" *Id.* (emphasis added).

This seemingly broad grant of standing must be viewed in context, however. In the *Conway* case, unlike here, there were no specifically identifiable individuals or entities who had suffered any concrete, particularized harm. Instead, the only party who stood to lose anything was the Commonwealth as a whole—*i.e.*, in the event that its laws were improperly interpreted and applied so as to allow the release prisoners too early. In the instant case, however, there is not a generalized threat to the well-being of the Commonwealth's justice system. Instead, the alleged harm is the improper deprivation of money from discrete corporate state entities, *i.e.*, the eight state universities and KCTCS. Those universities are specific public corporate entities that have purportedly suffered individualized, concrete harm. If anyone has standing to sue, it would be them, not the Attorney General. Indeed, the Kentucky Supreme Court has acknowledged that standing encompasses "the general prohibition on a litigant's raising another person's legal rights . . . ." *Lawson*, 415 S.W.3d at 67; *see also* CR 17.01 (requiring every action to be prosecuted in the name of the real party in interest).

In *Conway*, the legal rights that were being raised were those of the *Commonwealth as a whole*. But, in this case, the legal rights at issue—*i.e.*, the purported rights of the universities to receive their entire appropriations—are the legal rights of the universities. And the universities are tellingly absent. Under these circumstances, the Attorney General should not be permitted to sue where the real interest holders have not seen fit to do so. He should not be able to insert himself into matters that do not directly concern him. The Attorney General has no standing to pursue the universities' rights for them and has alleged no authority to do so.

Haydon Bridge II, which the Attorney General is so fond of, has but a single point of relevance to this case. And that point is on standing. *Haydon Bridge II* holds that "[i]t is an elementary principle that [the] constitutionality of a law or its application is not open to challenge by a person whose rights are not injured or jeopardized thereby. . . . Kentucky courts have long adhered to a strict injury-in-fact requirement." *Haydon Bridge Co.*, 416 S.W.3d at 299. This requirement is not met here. The Attorney General has suffered no injury-in-fact, nor has the general public. Like the plaintiffs in *Haydon Bridge II*, none of which had paid a cent into the state pneumoconiosis fund but nevertheless sought to challenge legislative transfers from that fund, the Attorney General has no injury here and is not seeking to vindicate any right affecting the public at large any more than were the plaintiffs in *Haydon Bridge II*. The only entities that can claim to have suffered any injury are the universities, and they are conspicuously absent, both as parties and as supporters of the Attorney General's claims here. Indeed, no university has even gone so far as to provide for use by the Attorney General an affidavit explaining any dire straits they expect to experience for, indeed, as shown in the unrebutted Marshall

affidavit, there will be no such consequences. The Attorney General has no right to represent their interests, and there are no interests of the general public at risk here. Therefore, like the plaintiffs in *Haydon Bridge*, the Attorney General has no standing to sue. The Court should take this opportunity to clarify and restrict *Conway* so that its scope and breadth will not be misinterpreted in the future.

B. The Intervening State Representatives lack standing.

The legal concept of standing "focuses on whether the parties before the court have a *personal* stake in the outcome of [a] controversy." *Interactive Gaming Council v. Commonwealth*, 425 S.W.3d 107, 112 (Ky. App. 2014) (emphasis added). "'In order to have standing to sue, a plaintiff need only have a real and substantial interest in the subject matter of the litigation, as opposed to a mere expectancy.'" *Id.* (quoting *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 202 (Ky. 1989)). The determination of standing turns not on the application of the concept to general fact patterns but, rather, "requires consideration of the facts of each individual case." *Id.* (citing *Rose*, 790 S.W.2d at 202).

The Intervening State Representatives claim that the personal interest they are seeking to vindicate is their interest, as legislators, in protecting their ability "to enact a biennial budget on behalf of their constituents."[32] Essentially, they are claiming that the Governor has nullified their votes. Given that Representative Wayne *voted against* the 2014-2016 Budget, it is difficult to understand how exactly he has any such interest

[32] Intervening State Representatives' Br. at 4. Ironically, the members of the Kentucky House of Representatives who represent the districts covering the University of Louisville's three campuses—the Belknap Campus (Rep. Dennis Horlander D-40th), Health Sciences Campus (Rep. Tom Riner D-41st), or Shelby Campus (Rep. Ron Crimm R-33rd)—are not among the Intervening State Representatives.

here.[33] Regardless, the Intervening State Representatives' asserted interest is insufficient to give them standing here.

It is well established that for legislators to have standing *as legislators*, they must possess votes sufficient to have either defeated or approved the measure at issue." *Baird v. Norton*, 266 F.3d 408, 412 (6th Cir. 2001). In other words, "legislators whose votes would have been sufficient to . . . enact . . . a specific legislative Act have standing to sue if that legislative action goes into effect . . . on the ground that their votes have been completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823 (1997) (referencing *Coleman v. Miller*, 307 U.S. 433 (1939)).

The United States Supreme Court's decision in *Coleman v. Miller* is particularly illustrative of this concept. In *Coleman*, twenty (20) of Kansas' forty (40) state senators voted not to ratify a proposed amendment to the United States Constitution. *Coleman*, 307 U.S. at 435-36. With the vote deadlocked at 20-20, the amendment ordinarily would not have been ratified. However, the Lieutenant Governor of Kansas, who presided over the Kansas Senate, cast a vote in favor of the resolution. *Id.* at 436. The twenty (20) state senators who voted against the measure, joined by a twenty-first state senator and three (3) Kansas House of Representative members, filed suit, seeking a writ of mandamus which would have, in effect, endorsed the fact that the amendment was not passed. *Id.*

Taking the case on *certiorari*, the United States Supreme Court found that the plaintiffs had standing to bring their suit. In so holding, the Court stated: "[W]e find no departure from principle in recognizing in the instant case that at least *the twenty senators* whose votes, if their contention were sustained, would have been sufficient to defeat the

[33] *See* http://www.lrc.ky.gov/record/14rs/HB235/vote_history.pdf.

resolution ratifying the proposed constitutional amendment, have an interest in the controversy." *Id.* at 446 (emphasis added).

Conversely, the federal courts have found no standing in litigation brought by individual legislators, whose votes, alone, could not alter the course of a particular legislative act. *See Raines*, 521 U.S. at 824 (declining to extend *Coleman* to an action brought by four United States Senators and six United States Representatives in response to the passage of the Line Item Veto Act); *Baird v. Norton*, 266 F.3d 408, 412 (6th Cir. 2001) ("Baird claims vote nullification, but her vote alone would not have been sufficient to defeat either the concurrent resolution, which passed despite her 'nay' vote, or legislation to similar effect. . . . Thus, . . . she has not suffered an injury that satisfies the stringent requirements for legislator standing set out in *Raines*.").

In the present case, none of the Movants, either individually or collectively, has demonstrated that *his, her, or their vote* would have been sufficient to enact the 2015-16 Budget Bill. Indeed, their three total votes, both for and against the measure, constitute only a small fraction of the required number to enact legislative proposals in the Commonwealth.[34] Because they cannot do so, the Movants lack standing, and their attempt to intervene as state legislators in this matter must be denied.

While this Court has never addressed the issue of legislator standing, the Kentucky Court of Appeals has, albeit in an unpublished opinion. In *City of Burnside v. Bryan*, No. 2006-CA-002048-MR, 2007 WL 2069803 (Ky. App. July 20, 2007), the Court of Appeals held that individual legislators do not have standing to challenge a

[34] As the United States Supreme Court did in *Raines*, it should be noted by this Court that, although they are using the services of the Senior Counsel in the Speaker's Office, there appears to be no general authorization by the Kentucky House of Representatives for the Movants to represent its interest in this matter.

governmental action simply by virtue of their status as legislators. Specifically, it found that:

> Conferring standing upon legislators based on their representative status alone would permit the courts to thwart the legislative will by providing an avenue for disgruntled legislators to circumvent the democratic decision-making process. This reasoning is supported by federal precedent, which forecloses a legislator from asserting standing solely on the basis of his or her position.

Id. at *2.

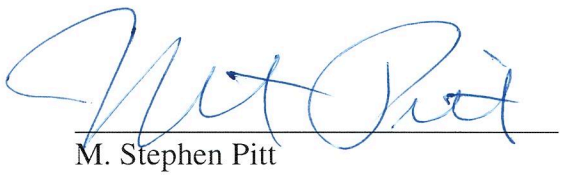
The Court of Appeals was correct. Granting standing to individual legislators based on their representative status alone would wreak havoc on the ability of government to function properly. In *City of Burnside*, the Court of Appeals focused on the threat that this would pose to the legislative process, but it would also threaten the executive branch's ability to carry out its functions. Just as a disgruntled legislator could invoke the courts to thwart the democratic decision-making process, a disgruntled legislator could likewise invoke the courts to infringe upon the functions of the executive branch. Imagine the disruptions that the executive branch will face if 138 legislators individually have standing to sue any time any one of them is displeased with the actions of an executive branch official. This would be a horrendous precedent to set. And it would be contrary to the law. Individual legislators do not have standing based solely on their representative status to challenge actions of the executive branch.

CONCLUSION

The Appellants are asking this Court to ignore the plain language of KRS 48.620(1) and KRS 45.253(4), as well as the overwhelming abundance of authority across the nation holding that administering appropriations and spending money is an executive function. Instead of following the law, they continue to advocate the absurd position that every penny appropriated by the legislature must be spent. Under their theory, executive branch agencies must find some way to get rid of every penny appropriated to them, whether they pile it up in a field and set it on fire or spend it on needless trinkets. The Franklin Circuit Court correctly found that this "**position is both an irresponsible one and an unsustainable one for a government to take.**"[35] This Court should likewise reject the Appellants' arguments. The notion that every penny appropriated must be spent is not good policy. But more importantly, it is also not the law. Administering an appropriation and spending money is an executive function, and the Governor is not prohibited from exercising this function so as to spend less than the full amount of an appropriation unless the legislature has expressly mandated that certain sums actually be spent, or unless the Governor spends so little as to negate the legislature's intent in making the appropriation. Neither scenario exists here. Instead, the plain language of KRS 48.620(1) and KRS 45.253(4) authorize the Governor to spend less than the full amounts appropriated, and there is nothing unconstitutional about this authorization. Therefore, the Franklin Circuit Court should be affirmed.

[35] May 18, 2016 Opinion & Order [R. at 703] (emphasis added).

Respectfully submitted,



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