COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2016-SC-000272-TG
~~2016-SC-000273-TG~~

COMMONWEALTH OF KENTUCKY
ex rel. ANDY BESHEAR, ATTORNEY GENERAL; APPELLANT
AND
REPRESENTATIVE JIM WAYNE;
REPRESENTATIVE DARRYL OWENS; and
REPRESENTATIVE MARY LOU MARZIAN APPELLANTS

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

MATTHEW G. BEVIN, in his official capacity
as Governor of the Commonwealth of Kentucky;
WILLIAM M. LANDRUM, in his official capacity as
Secretary of the Kentucky Finance and Administration Cabinet;
JOHN CHILTON, in his official capacity
as State Budget Director of the Commonwealth of Kentucky; and
ALLISON BALL, in her official capacity
as Treasurer of the Commonwealth of Kentucky APPELLEES

BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served, by U.S. Mail and electronic mail, upon the following: M. Stephen Pitt, S. Chad Meredith, Michael T. Alexander, Office of the Governor, 700 Capitol Avenue, Suite 101, Frankfort, Kentucky 40601; Noah R. Friend, General Counsel for Allison Ball, Kentucky State Treasurer, 1050 U.S. Hwy. 127 South, Suite 100, Frankfort, Kentucky 40601; Pierce Whites, Senior Counsel, Office of the Speaker of the House, Capitol Annex, Room 303, 702 Capitol Avenue, Frankfort, Kentucky 40601; Samuel P. Givens, Jr., Kentucky Court of Appeals. 360 Democrat Drive, Frankfort, KY 40601on this 18th day of July, 2016.

Andy Beshear

INTRODUCTION

This case involves the Governor's violation of the Kentucky Constitution and numerous state statutes by unilaterally cutting – without a shortfall and without following the Budget Reduction Plan – FY 2016 appropriations to public universities. The Appellant, the Commonwealth of Kentucky *ex rel.* Andy Beshear, Attorney General, asks this Court to declare the Appellees' actions illegal, and to mandate they deliver the duly appropriated funds.

STATEMENT CONCERNING ORAL ARGUMENT

The Court has already determined that this case is of great and immediate public importance by granting the Attorney General's motion to transfer, and it has also determined that oral argument will be helpful to the Court. Appellant agrees. The Court has scheduled the argument to take place on Thursday, August 18, 2016, at 10:00 a.m.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This case involves Governor Bevin's violation of the Kentucky Constitution and numerous state statutes by unilaterally cutting – without a shortfall and without following the Budget Reduction Plan – FY 2016 funds to Kentucky's nine public colleges and universities (the "Universities"). These funds were duly appropriated by the Kentucky General Assembly, which refused to reduce them pursuant to the Governor's request. The Governor's unlawful actions were exacerbated by the Franklin Circuit Court's (the "Trial Court") erroneous ruling below, which inserted all three branches of government into the budgeting process. This is the very ***"perfect storm"*** this Court warned against only three years ago where all three branches of government are involved in the budgeting and appropriation process, "creat[ing] an unprecedented collision of the constitutional powers accorded the three separate branches of government." *Beshear v. Haydon Bridge Co., Inc.*, 416 S.W.3d 280, 295 (2013) (*Haydon Bridge II*). Specifically, and contrary to Supreme Court precedent, the Trial Court held that in enacting a budget law, the General Assembly merely creates a spending "ceiling," and then the Governor – and not the legislature – decides how much funding any entity will actually receive. Op. and Order at 21-22 (May 18, 2016) (R. at 703-04). The Trial Court then held that if a taxpayer or group believed the Governor's funding was insufficient, they could petition the Judiciary, which would set a spending floor. Op. and Order at 21 (May 18, 2016) (R. at 703). The Trial Court's ruling must be overturned, and our Constitution and state statutes must be enforced.

A. The General Assembly Enacted A 2014-2016 Budget With Specific and Exact Appropriations to the Universities.

In 2014, the General Assembly exercised its constitutional authority pursuant to KY. CONST. § 230 and enacted House Bill 235 (2014 Ordinary Session), 2014 Ky. Acts, Chapter 117 (hereinafter the "Budget Law"). The Budget Law officially became law on April 12, 2014. 2014 Ky. Acts, Ch. 117. It made specific and exact appropriations to the Universities for fiscal years 2015 and 2016 ("FY 2015, FY 2016"). *Id.* Part I(K). The text of the Budget Law made clear that its funding was a mandate, stating: "The General Assembly directs that the Executive Branch ***shall carry out all appropriations*** and budgetary language provisions as contained in the State/Executive Budget." 2014 Ky. Acts Ch. 117, Part III § 27 (emphasis added).

In addition to mandating specific and exact appropriations, the text of the Budget Law expressly limited the instances wherein any reductions could be made. Specifically, the Budget Law stated that a reduction could only be made "in the event of an *actual or projected revenue shortfall in General Fund revenue receipts* . . . ." 2014 Ky. Acts Ch. 117 Part VI (emphasis added). This limitation is mirrored in KRS 48.600.

If an actual or projected shortfall existed, the Budget Law further mandated that a reduction could only be made pursuant to the General Fund Budget Reduction Plan (the "Budget Reduction Plan"), found in Part VI of the law. 2014 Ky. Acts Ch. 117 Part VI; *accord* KRS 48.600. Under this Plan, the Governor could not cut appropriations at his pleasure. Instead, the Plan limited his discretion by requiring the Governor to follow a specific "sequence" of steps. Specifically, the Plan outlined the excess funds that the Governor first must use to cover the shortfall, and then how and in what order any funding cuts could be made. The Budget Reduction Plan stated:

(1) The Local Government Economic Assistance and the Local Government Economic Development Funds shall be adjusted by the Secretary of the Finance and Administration Cabinet to equal revised estimates of receipts pursuant to KRS 42.4582 as modified by the provisions of this Act;
(2) Transfers of excess unappropriated Restricted Funds, notwithstanding any statutes to the contrary, other than fiduciary funds, to the General Fund shall be applied as determined by the head of each branch for its respective budget units. No transfers to the General Fund shall be made from the following:
(a) Local Government Economic Assistance and Local Government Economic Development Funds;
(b) Unexpended debt service from the Tobacco-Settlement Phase I Funds in either fiscal year;
(c) Tobacco Unbudgeted Interest Income-Rural Development Trust Fund; and
(d) Multi-County Coal Severance Fund;
(3) Any unanticipated Phase I Master Settlement Agreement revenues in both fiscal years shall be appropriated according to KRS 248.654;
(4) Use of the unappropriated balance of the General Fund surplus shall be applied;[1]
(6) Reduce General Fund appropriations in Executive Branch agencies' operating budget units by a sufficient amount to balance either fiscal year. No reductions of General Fund appropriations shall be made from the Local Government Economic Assistance Fund or the Local Government Economic Development Fund;
. . . .

2014 Ky. Acts Ch. 117 Part VI.

Thus, under the Plan – and therefore under Kentucky law – if there was a shortfall, the Governor would be required to take at least four steps before reducing an appropriation to a state agency, much less a University. However, as explained below, the uncontested facts in this case show that when the Governor cut funding to Kentucky's Universities (1) no shortfall existed, and (2) the Governor refused to follow the Budget Reduction Plan.

[1] Subsection 5 was subjected to the line-item veto and did not become law. 2014 Ky. Acts Ch. 117 Part VI.

B. Lacking A Shortfall, Governor Bevin Sought To Cut University Funding For FY 2016 Through A Legislative Act.

The Universities' FY 2015 appropriations were allotted and provided to the Universities as required by law. Allocations were also made for the first six months of FY 2016, and the Appellees were on schedule to fulfill the Budget Law's full appropriation. This was no surprise, as the Commonwealth was on its way to a significant budget surplus. The Consensus Forecasting Group projected a revenue surplus of $222.7 million for FY 2016. Compl. Ex. 3 (R. at 191-96). And that forecast was materializing. Appellee-State Budget Director John Chilton (hereinafter the "State Budget Director") began issuing monthly press releases lauding over two years of sustained revenue growth. Compl. Ex. 4 (R. at 197-200).

It is undisputed that there was no budget shortfall. Nevertheless, on January 26, 2016, Governor Bevin presented a budget recommendation to the General Assembly that sought to significantly cut funding to Kentucky's colleges and universities. Compl. at 10-11 (R. at 19-20). The Governor sought a nine percent cut for the upcoming 2016-18 fiscal biennium. He also asked the General Assembly to include – as part of the next budget law – a 4.5% reduction in the previously enacted FY 2016 appropriations. Compl. at 10-11 (R. at 19-20). Governor Bevin proposed these cuts to the General Assembly because – without a shortfall – he could not trigger the Budget Reduction Plan, and he did not want to follow its order and sequence.

In the ensuing budget negotiations, the Kentucky House of Representatives refused to cut higher education, claiming such cuts were unnecessary and harmful. University presidents also opposed them. University of Kentucky President Eli Capilouto called the cut "draconian" and stated that it "hurts Kentucky and threatens our future."

Tom Loftus, *Bevin's UK cuts called 'draconian'*, LOUISVILLE COURIER-JOURNAL, Feb. 13, 2016, at A2, *available at* 2016 WLNR 4552491 (attached at Appendix Ex. E). KCTCS President Jay Box testified the cuts would require an 8.8% tuition increase, and the elimination of 539 jobs and 61 instructional programs. Chris Kenning, *Cuts 'devastating, says KCTCS chief*, LOUISVILLE COURIER-JOURNAL, Feb. 18, 2016, at A5, *available at* 2016 WLNR 5242653 (attached at Appendix Ex. F).

Budget talks broke down over this issue during the day on March 31, 2016.

C. Failing To Get Legislative Approval, Governor Bevin Unilaterally Reduced the Universities' FY 2016 Appropriations.

Seemingly angry, on the night of the budget breakdown (March 31, 2016), Governor Bevin directed the Appellee-Secretary of the Finance and Administration Cabinet William M. Landrum III (hereinafter the "Finance Secretary") and the State Budget Director to cut the Universities' FY 2016 appropriation by 4.5%. Compl. Ex. 2 (R. at 189-90). In various jurisdictions, such a cut is referred to as "impoundment" or "unallotment."[2] Governor Bevin gave this directive in the form of a letter, which cited a single statute – KRS 48.620(1) – as his sole authority. Compl. Ex. 2 (R. at 189-90). He then issued a press release titled "Statement from Governor Bevin Regarding University Budget ***Reductions***." Compl. Ex. 8 (R. at 216).

On April 19, again relying solely on KRS 48.620(1), Governor Bevin issued a second directive modifying his reductions to the Universities' FY 2016 appropriations to two percent.[3] Defs.' Resp. Opp. Mot. Temp. Inj. Ex. 1(C) (R. at 515-16). Publicly and in

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[2] *See, e.g., Train v. City of New York*, 420 U.S. 35 (1975) ("impoundment"); *Oneida County v. Berle*, 404 N.E.2d 133 (N.Y. 1980) ("impoundment"); *Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn. 2010) ("unallotment").

[3] Kentucky State University saw no cuts in the most recent reduction order.

his underlying brief, the Governor claimed the University presidents "agreed" to this cut. Defs.' Mem. in Supp. of Mot. Dismiss at 3-4 (April 18, 2016) (R. at 441-42). In error, Judge Wingate repeated this claim as a "fact" in his order. Op. and Order at 5, 20 (May 18, 2016) (R. at 687, 702). To be clear, the only record evidence shows the University presidents would only accept the Governor's FY 2016 cut "if it is determined by the courts to be permissible." Defs.' Mem. Opp. Mot. Temp. Inj. Ex. 1(D) (R. at 517).

The Appellee-Treasurer Allison Ball (hereinafter the "Treasurer") and the Finance Secretary have obeyed the Governor's directives, refusing to provide the lawfully appropriated funds to the Universities. However, by agreed order these funds are currently in a separate account and are deemed a FY 2016 disbursement that would be immediately transferred to the Universities upon a favorable ruling by this Court. Order at 1 (April 26, 2016) (R. at 557).

D. The Attorney General Filed Suit Based On The Governor's Actions.

The Attorney General filed his Verified Complaint for a Declaration of Rights and Permanent Injunction and a Motion for a Temporary Injunction on April 11, 2016. The Complaint claimed that by unilaterally cutting the FY 2016 appropriations, the Governor violated the Kentucky Constitution by defying the separation of powers doctrine, unlawfully suspending statutes, and failing to faithfully execute the law. *See generally* Compl. (R. at 10-37). The Complaint also alleged the Governor violated numerous state statutes, including the Budget Law itself, as well as KRS 48.130(6), KRS 48.600(2), KRS 48.610, KRS 164.350, KRS 164.470, KRS 164A.555, and KRS 164A.560. *See generally id.*

State Representatives Marzian, Owens, and Wayne (the "Representatives") moved to intervene on April 13, 2016. Mot. to Intervene (April 13, 2016) (R. at 418-22).

They made similar claims, but highlighted the fact that the Constitution provides that the General Assembly – and not the Governor – decides how state funds shall be spent. *Id.*

The parties briefed the merits in the latter part of April. The Appellees argued that under KRS 48.620(1), the Governor somehow could permanently reduce "allocations" without reducing the legislative "appropriation." Mot. Dismiss (April 18, 2016) (R. at 437-38). They further claimed that KRS 45.253 allowed the Governor to withhold General Fund appropriations from the Universities until the institutions had spent all of their restricted funds, *i.e.* funds generated from tuition and other fees. Defs.' Mem. Supp. Mot. Dismiss at 11 (April 18, 2016) (R. at 449). The Governor argued these statutes gave him "discretion" or even "great discretion" to exercise his judgment not to provide legislatively appropriated funds. Defs.' Mem. Supp. Mot. Dismiss at 16-17 (April 18, 2016) (R. at 454-455). In making these arguments, Appellees relied almost entirely on foreign law. *See, e.g.* Defs.' Mem. Supp. Mot. Dismiss at 16-17 (April 18, 2016) (R. at 454-55); Defs.' Resp. Opp'n Pl's. Mot. Summ. J. at 642-43 (May 3, 2016) (R. at 644-45).

The Attorney General countered that (1) the language of KRS 48.620(1) and KRS 45.253 do not allow the Governor to reduce appropriations, (2) such a reading of the statutes would violate the separation of powers doctrine because only the General Assembly may decide how state funds "shall be spent," and (3) if KRS 48.620 and KRS 45.253 *had* delegated the power to reduce appropriations to the Governor, it would be an unconstitutional delegation. Pl's. Mem. Supp. Mot. Summ. J. at 3-20 (April 26, 2016) (R. at 593-610). As shown below, a delegation of this authority must limit – and not grant – "broad" discretion or judgment. The Attorney General's arguments were

supported with specific Kentucky Supreme Court case law. *See, e.g.*, Pl's. Mem. Supp. Summ. J. at 3, 4, 8, 13-15 (April 26, 2016) (R. at 593, 594, 598, 603-05).[4]

The Attorney General further argued that the Governor had unlawfully ignored or suspended the Budget Law, and that KRS 45.253 did not apply to Universities that had elected to operate under KRS Chapter 164A. Pl's. Mem. Supp. Summ. J. at 17-20 (April 26, 2016) (R. at 607-10).

E. The Trial Court's Order.

Following a final hearing on May 4, 2016, the Trial Court issued a final and appealable order on May 18, 2016, granting summary judgment to the Appellees. Op. and Order at 1-2 (May 18, 2016) (R. at 683-84). In its order, the Trial Court erroneously held that KRS 48.620(1) and KRS 45.253 "delegate authority to the Governor to address specific budget concerns within the executive branch," and found no constitutional infirmities with the Appellees' interpretation of those statutes. Op. and Order at 10 (May 18, 2016) (R. at 692). The Trial Court further incorrectly held that the Universities are not exempt from KRS 45.253 by virtue of their "opt-in" under KRS Chapter 164A. Op. and Order at 10 (May 18, 2016) (R. at 692).

The Trial Court also made several factual errors. Most significantly, the court found that the Governor simply "instruct[ed] budget units in the executive branch to spend below the ceiling of the appropriation." Op. and Order at 20 (May 18, 2016) (R. at

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[4] The Attorney General cited *Bloemer v. Turner*, 137 S.W.2d 387 (Ky. 1940); *Ferguson v. Oates*, 314 S.W.2d 521 (Ky. 1958); *Holsclaw v. Stevens*, 507 S.W.2d 462 (Ky. 1974); *Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982); *L.R.C. v. Brown*, 664 S.W.2d 907 (Ky. 1984); *Armstrong v. Collins*, 709 S.W.2d 437 (Ky. 1986); *Diemer v. Commonwealth Trans. Cabinet, Dep't. of Highways*, 786 S.W.2d 861 (Ky. 1990); *Fletcher v. Commonwealth*, 163 S.W.2d 852 (Ky. 2005); *Beshear v. Haydon Bridge Co.*, 304 S.W.3d 682 (Ky. 2010) ("*Haydon Bridge I*"); *Beshear v. Haydon Bridge Co., Inc.*, 416 S.W.3d 280 (Ky. 2013) ("*Haydon Bridge II*"))

702). This is not what occurred. Instead, the uncontroverted record evidence shows the Governor ordered the Finance Secretary and State Budget Director to *withhold* funds from the Universities. Compl. Ex. 2 (R. at 189-90). There was no "instruction," and there was no choice.

F. Appeal.

Appellant filed a timely Notice of Appeal on May 23, 2016. (R. at 707-709). The following day, Appellant filed a Motion for Transfer. This Court granted the request to transfer the case from the Court of Appeals on June 27, 2016 and also granted Appellants Motion to Advance Consideration of the case.

STANDARD OF REVIEW

In this case, the facts are not in dispute: the Governor unilaterally cut University funding in the absence of a budget shortfall without following the Budget Reduction Plan. The case thus turns on the legal issues of whether the Governor may unilaterally cut appropriations passed into law and ignore the General Assembly's standards, conditions, and process under the Budget Law and Budget Reduction Plan.

On appeal, "[t]he standard of review . . . of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Because there are no facts in dispute, review is *de novo*. *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014).

ARGUMENT

On March 31 and again on April 19, the Governor ordered unilateral reductions to the Universities' appropriations. Compl. Ex. 2 (R. at 189-90) (March 31 cuts); Defs.' Resp. Opp. Mot. Temp. Inj. Ex. 1(D) (R. at 515-16) (April 19 cuts). He did so in the

absence of a shortfall and refused to follow the Budget Reduction Plan. The Governor's reductions violate the Budget Law. They further directly violate the Kentucky Constitution's separation of powers doctrine by usurping the power of the purse from the General Assembly, which under this Court's precedent determines how state funds "shall be spent." The Governor's actions also violate several other Constitutional provisions and numerous additional statutes. This Court must overturn the Trial Court and restore the appropriate checks and balances.

I. The Trial Court Committed Error When It Held That The Appellees Did Not Violate The Budget Law and KRS Chapter 48.

A. The Budget Law Mandates Appropriations and a Specific Budget Reduction Plan in the Event of a Shortfall.

The Budget Law served as a mandate to the Governor and other officials. In Part III, the Budget Law states that "[t]he General Assembly directs that the Executive Branch ***shall carry out all appropriations*** and budgetary language provisions as contained in the State/Executive Budget." 2014 Ky. Acts Ch. 117, Part III § 27 (emphasis added.) Such language conforms to this Court's holding in *L.R.C. v. Brown* that the budget is a mandate, *i.e.* it states how money "shall be spent." 664 S.W.2d at 925.

The Budget Law made specific and exact appropriations to the Universities for FY 2016. 2014 Ky. Acts Ch. 117, Part I(K) §§ 3-11. By enacting these appropriations, the General Assembly exercised its constitutional authority to appropriate state funds. The appropriations then became law, as, pursuant to KRS 48.311, "[a]ny branch budget bill enacted by the General Assembly shall be enacted so that each section, each subsection, and each appropriation sum by specified fund or funds accounts shall be a separate and specific appropriation and law." KRS 48.311.

As noted above, the Budget Law does not merely mandate specific and exact appropriations; it limits the instances wherein reductions can be made. Specifically, the Budget Law states a reduction may be made only "in the event of an *actual or projected revenue shortfall in General Fund revenue receipts* . . . ." 2014 Ky. Acts Ch. 117 Part VI (emphasis added). Further, in the event such a shortfall occurs, the Budget Law directs that a reduction may only be made pursuant to the "Budget Reduction Plan" contained within the law. 2014 Ky. Acts Ch. 117 Part VI. This limitation prevents the Governor from cutting funds during a budget surplus or setting different priorities for what should be cut during a shortfall.

B. KRS Chapter 48 Limits The Power of the Governor To Reduce Appropriations Only in the Event of a Shortfall and Pursuant To the Budget Reduction Plan.

The Budget Reduction Plan is not only mandatory as part of the Budget Law, it is required by statute. KRS 48.130(1) provides that the General Assembly "shall include in each enacted branch budget bill a budget reduction plan for a revenue shortfall in the general fund or road fund of five percent (5%) or less." The statute goes on to say that the Budget Reduction Plan "shall direct how budget reductions ***shall*** be implemented...." *Id.* (emphasis added). The mandate that appropriations cannot be reduced absent a shortfall is also repeated in two statutes, KRS 48.130(6) and KRS 48.600(1), which state that "[n]o budget revision action shall be taken ... in excess of the actual or projected revenue shortfall."

This Court in *L.R.C. v. Brown* specifically discussed the operation of KRS 48.130 and the mandatory nature of cutting only through the Budget Reduction Plan. 664 S.W.2d at 926. The Court stated: "If and when such a shortfall occurs ... the legislatively enacted reduction plan *is to be implemented.* . . . Each branch of government

is simply directed to carry out the reduction plan which was enacted by the General Assembly. As we see it, *each branch of government is to do what the General Assembly has directed.* Such is not a part of the administration of the budget. It is carrying out a legislative mandate." *Id.*

In sum, the Budget Law, the statutes cited above, and *LRC v. Brown* provide that the Governor may make funding cuts *only* in accordance with the General Fund Reduction Plan, *only* when there is a projected or actual revenue shortfall, and *only* in the amount of the shortfall. These are explicit limitations on the Governor.

C. The Governor Violated The Budget Law and KRS Chapter 48.

On March 31 and April 19, the Governor unilaterally cut the funds appropriated to the Universities under the Budget Law. He did so absent a shortfall. Indeed, he faced a surplus of $227 million, well in excess of the roughly $18 million cut from Universities. Compl. Ex. 3 (R. at 191-92). The Governor also refused to comply with the Budget Reduction Plan. Under that Plan, the Governor would have been required to take at least four steps before reducing an appropriation to an agency, much less a University. 2014 Ky. Acts Ch. 117 Part VI (emphasis added).

By taking these actions, the Governor violated the mandates of the Budget Law and KRS 48.115(3), KRS 48.130, and KRS 48.600. Each one of these statutes explicitly prohibits his cuts to the Universities. Moreover, the Governor's failure to follow the Budget Reduction Plan further violates the explicit commands of these laws.

Faced with these facts, the Appellees argued below that they do not violate the Budget Law "as long as spending does not *exceed* the appropriation." Defs.' Mem. Supp. Mot. Dismiss at 13 (April 18, 2016) (R. at 451). In other words, Appellees believe an

appropriation creates only a ceiling, and the Governor is free – for any or no reason – to provide or allocate less. The United States Supreme Court disagrees.

In *Train v. City of New York*, 420 U.S. 35 (1975), the EPA refused to allot sums appropriated by Congress to the States for the cost of municipal sewers and sewage treatment works. *Id.* at 37. The Court held that the law requires "the allotment of *all sums* authorized to be appropriated . . . ." Indeed, to clear up any doubt, the Supreme Court ruled that, notwithstanding the relevant provision's text authorizing an appropriation "not to exceed" a certain specified amount, the Administrator was not authorized to allot to the states less than the entire amounts appropriated. *Id.* at 46-47.

The issue here is the same. Appellees are not authorized to allot to the Universities less than the entire amount provided by the General Assembly. *See, e.g., Cmty. Action Programs Executive Directors Ass'n of New Jersey, Inc. v. Ash*, 365 F. Supp. 1355, 1361 (D.N.J. 1973); *State Highway Comm'n v. Volpe*, 347 F.Supp. 950 (W.D.Mo. 1972), *aff'd*, 479 F.2d 1099 (8th Cir. 1973) (executive branch had no right to withhold apportionments from an appropriation).[5]

D. By Violating the Budget Law and KRS Chapter 48, The Governor Violated His Constitutional Duty To Faithfully Execute The Law.

Under § 81 of Kentucky's Constitution, the Governor must faithfully execute laws passed by the General Assembly. KY. CONST. § 81. The Budget Law is one such law. Moreover, the Supreme Court has ruled that the Governor has a duty to carry out and to

[5] The Trial Court also erred in this matter by confusing the requirement that Appellees provide/allot all sums legislatively appropriated with the issue of whether a budget unit is required to "expend all such amounts." Specifically, the Trial Court stated the law only "requires the *expenditures* . . . be less than or equal to the legislature's appropriation," reasoning, "It does not follow as a mandatory corollary, though, that in order to be in conformity with an appropriation also requires expending the funds in full." *Id.* The issue before the Court is not whether a budget unit has to expend the full amount, only whether the Appellees must make it available to a university. The Attorney General asserts that they must.

implement the budget as passed by the General Assembly. *L.R.C. v. Brown*, 664 S.W.2d at 925 (citing KY. CONST. § 81).

The General Assembly enacted a budget law that made specific and exact appropriations to the Universities. 2014 Ky. Acts Ch. 117, Part I(K) §§ 3-11. The General Assembly further required a shortfall before permitting any reductions to its budget to be made. If a shortfall existed, the Budget Law obligated the Governor to follow the Budget Reduction Plan.

As evidenced by the March 31 and April 19 directives, the Governor ignored all of these laws, as well as the other budget statutes referenced herein. *See* KRS 48.115(3), KRS 48.130, and KRS 48.600. In the face of these statutes, the Governor simply cannot "unilaterally declare an emergency" and then withhold appropriated funds or allocate unappropriated funds. *See Fletcher*, 163 S.W.3d at 871.

Such actions by a Governor were held unconstitutional by New York's highest court in *Oneida County v. Berle*, 404 N.E.2d 133 (N.Y. 1980). The issue was whether the New York State Director of the Budget could impound funds appropriated to municipalities based on an order from New York Governor Hugh Carey. 404 N.E.2d at 135-36. The court held that "no authority inheres in the Governor under the State Constitution to impound funds appropriated by law and . . . the instant ***appropriation statute conferred no discretionary authority upon the Director of the budget to disapprove otherwise proper expenditures***." *Id.* at 135 (emphasis added). The court further held that the Governor's impoundment violated his duty to "faithfully execute" the appropriations he signed into law. *Id.* at 137. The New York decision added to the

notion that governors may not inject their fiscal policy objectives into enacted appropriations; instead, governors must properly provide such appropriations. *See id.*

Kentucky law agrees. In *Baker v. Fletcher*, this Court held that an attempt by the Governor to ignore/suspend a statute and reduce a salary increase to state employees was void *ab initio* and constituted a failure of the Governor to faithfully execute the law. *See* 204 S.W.3d 589, 593 (Ky. 2006) (citing generally *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005)). Thus, where a Kentucky Governor ignores a spending mandate such as the Budget Law, he violates KY. CONST. § 81.

"With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Id.* (*citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952)). Because the Governor has failed to "take care that the law be faithfully executed," KY. CONST. § 81, the Court should reverse the Order of the Trial Court.

II. The Trial Court Erred When It Found Appellees' Had Not Violated the Separation of Powers Doctrine.

A. Kentucky's Constitution Creates The Nation's Strongest Separation of Powers.

Section 27 of Kentucky's Constitution provides that the powers of the Commonwealth "shall be divided" into three branches: legislative, executive, and judicial. This division, called the separation of powers doctrine, was explained at length in *Sibert v. Garrett,* 197 Ky. 17, 246 S.W. 455 (Ky. 1922). There, the Court found that Kentucky's Constitution sets the strongest separation of powers in this nation:

> Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of

> government than does our Constitution, which history tells us came from the pen of the great declaimer of American independence, Thomas Jefferson . . . . We conceive it to be the duty of the courts to adopt the construction most conducive ... [to prevent] ... the destruction of the edifice as contemplated."

246 S.W. at 458.[6]

Section 28 provides for the enforcement of the doctrine, stating that none of the branches "shall exercise any power properly belonging to either of the others . . . ." In *L.R.C. v. Brown*, 664 S.W.2d at 912-14 the Court stated this prohibition is concrete and must be "strictly construed":

> Our present constitution contains explicit provisions which, on the one hand, mandate separation among the three branches of government, and on the other hand, specifically prohibit incursion of one branch of government into the powers and functions of the others. . . . [I]t has been our view, in interpreting Sections 27 and 28, that the separation of powers doctrine is fundamental to Kentucky's tri-partite system of government and must be "strictly construed." . . . The precedents established by this court have been uniform in retaining the goals set out by the framers. The separation of powers doctrine is set in the concrete of history and legal precedent.

B. The Kentucky Constitution And This Court Hold That Only The Legislature Decides How State Funds Shall Be Spent.

Section 230 of Kentucky's Constitution provides and has been interpreted to mean that only the legislative branch can decide how to appropriate or spend Kentucky's tax dollars. The Kentucky Supreme Court has routinely and consistently held that, under the separation of powers doctrine, only the General Assembly determines how monies "shall be spent." *L.R.C. v. Brown* 664 S.W.2d at 925. In *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 441 (Ky. 1986), the Court held: "It is clear that

[6] This line of cases from Kentucky's highest court alone defines our separation of powers. For reasons discussed herein, Appellees' and the Trial Court's unwavering reliance on law from foreign jurisdictions is misguided.

the power of the dollar—the raising and expenditure of the money necessary to operate state government—is one which is within the authority of the legislative branch of government. The Constitution of the Commonwealth so states and we have so stated." *See also Fletcher v. Commonwealth,* 163 S.W.3d at 863-64.

In 2013, the Court repeated this holding in *Beshear v. Haydon Bridge Co., Inc.,* 416 S.W.3d 280, 296 (Ky. 2013) ("*Haydon Bridge II*"). Discussing the power of appropriations, the Court stated:

> The Kentucky Constitution is not only clear about the separation of powers among the three branches of government, ***it is also exceedingly clear that the State Treasury is solely under the control of the legislative branch.*** Section 230 states, in pertinent part, that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law."

Haydon Bridge II, 416 S.W.3d at 295 (emphasis added).

Going further, the Court specifically found that, under the Constitution, the Governor did not have the power to "allocate" public funds in a manner deviating from the enacted budget. The Court stated: "***Of course, there is no authority for the Governor unilaterally spending public funds or allocating them other than as determined by the General Assembly.***" *Haydon Bridge II*, 416 S.W.3d at 295-96 (emphasis added).

Here, the Governor has violated the separation of powers doctrine by unilaterally cutting duly appropriated funds. Moreover, by ordering the State Treasurer to withhold appropriations, the Governor has taken control of the State Treasury. The Governor here is doing exactly what *Haydon Bridge II* precludes – he is allocating funds "other than as determined by the General Assembly."

C. The Appellees Violate The Separation of Powers Doctrine By Moving Complete Discretion For How To Spend State Funds to the Governor.

The Appellees' core claim is that the General Assembly does not determine how state funds shall be spent, but instead only creates "ceilings" that the Governor cannot exceed. Defs.' Mem. Supp. Mot. Dismiss at 6, 11, 13-14 (April 18, 2016) (R. at 444, 449, 451-52). Under this "ceiling" theory, the Governor claims that he decides – for any or no reason – how much funding (if any) an entity will receive. Defs.' Mem. Supp. Mot. Dismiss at 6 (April 18, 2016) (R. at 444). The Appellees claim that such an approach – which has never been used by a previous Governor – does not violate the separation of powers set forth in the state constitution because "spending an appropriation is an executive function." Defs.' Mem. Supp. Mot. Dismiss at 16 (April 18, 2016) (R. at 454).

The Appellees are wrong. First, their argument directly violates the separation of powers doctrine by moving the power of the purse from the legislative to the executive branch. *See Armstrong v. Collins*, 709 S.W.2d 437; *L.R.C. v. Brown*, 664 S.W.2d 907; *Brown v. Barkley*, 628 S.W.2d 616, 623 (Ky. 1982). In *L.R.C. v. Brown,* this Court definitively ruled that the budget determines how monies "shall be spent." 664 S.W.2d at 925. Under the Governor's argument, the General Assembly would only decide how money "might" be spent, depending on whether the Governor agrees.

Second, the Kentucky Supreme Court's handling of the separation of powers doctrine in *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005), speaks directly to the Governor's lack of authority. In *Fletcher*, the Court ruled that the Governor possesses no "inherent" powers to appropriate money. *Id.* at 871 (citing *Brown v. Barkley*, 628 S.W.2d at 623 ("Practically speaking, except for those conferred upon him specifically by the Constitution, [the Governor's] powers, like those of the executive

officers created by Const. Sec. 91, are only what the General Assembly chooses to give him.")). The converse is also true, *i.e.* the Governor has no inherent powers to reduce spending mandated by the General Assembly. As previously referenced, in *Baker v. Fletcher*, this Court held that an attempt by the Governor to ignore or suspend a statute and reduce a salary increase to state employees was void *ab initio* and constituted a failure of the Governor to faithfully execute the law. *See* 204 S.W.3d 589 at 593 (citing generally *Fletcher*, 163 S.W.3d 852). Thus, only the General Assembly may reduce or eliminate appropriations. *See Fletcher*, 163 S.W.3d at 865; *see also Armstrong v. Collins*, 709 S.W.2d at 441 (holding that it is the General Assembly that is permitted to reduce or eliminate appropriations).

Third, while its facts were complicated, this Court's language in *Haydon Bridge II* appears dispositive. There, the Supreme Court, citing Sections 27 and 230 of the Kentucky Constitution, found it "exceedingly clear that the State Treasury is solely under the control of the legislative branch." The Court went further: "***Of course, there is no authority for the Governor unilaterally spending public funds or allocating them other than as determined by the General Assembly.***" *Haydon Bridge II*, 416 S.W.3d at 295-96 (emphasis added) (citing *Fletcher*, 163 S.W.3d at 871).

What the Governor is doing here is exactly what these cases prohibit – spending or not spending public funds in a manner contrary to the Budget Law. Moreover, in his refusal to follow the Budget Reduction Plan, the Governor violates what this Court previously stated was the only constitutional process to reduce appropriations. In *Haydon Bridge I*, the Court indicated that the Governor must follow the Budget Reduction Plan contained in the Budget Law:

> We have previously held that a Governor does not have the authority under the Constitution of Kentucky to suspend the operation of any statute and that such actions are unconstitutional and invalid *ab initio*. . . . However, ***budget reductions*** – as opposed to total suspensions – made by the respective branches of government ***consistent with the provisions of the enacted branch budget bills passed by the General Assembly would be presumably appropriate.***

Haydon Bridge I, 304 S.W.3d at 686 (emphasis added).

The Trial Court's order must be overturned and Kentucky's separation of powers restored.

D. The Trial Court Not Only Erred, It Created Additional Constitutional Violations.

The Trial Court erred as a matter of law by finding the Governor did not "run afoul of the separation of powers doctrine." Op. and Order at 18 (May 18, 2016) (R. at 700). While the court claimed to "recogniz[e] the precedential effect of *Haydon Bridge II*" and cited portions of the Constitution, it nevertheless ruled that the Budget Law creates only a ceiling and that the Governor then decides how much to actually spend. Op. and Order at 22 (May 18, 2016) (R. at 704). The Trial Court so ruled without any significant analysis, and without citing a single Kentucky precedent. Instead, it cited a string of foreign cases for the general proposition that "spending is an executive function." Op. and Order at 18 (May 18, 2016) (R. at 700). Perhaps most troubling was the Trial Court's reliance on *Opinion of the Justices to the Senate*, 376 N.E.2d 1217 (Mass. 1978). *See* Defs.' Mem. Supp. Mot. Dismiss at 16-17 (April 18, 2016) (R. at 454-55). That opinion – and the rest of the Trial Court's foreign law – come from states with weaker separation of powers doctrines than Kentucky. For example, the Massachusetts Constitution contains an express provision that allows a Governor to "reduce items or parts of items in any bill appropriating money." MASS. CONST. amend. Art, 63, § 5.

Moreover, *Opinion of the Justices* specifically states that it is only an advisory opinion: the Massachusetts Supreme Court did not have the benefits of the adversarial system for the panel's consideration. Finally, as discussed in Section V, *infra*, most of the foreign cases cited by the Trial Court actually hold that Governor Bevin's actions would violate even their states' weaker separation of powers schemes.

Nevertheless, having ruled that the Budget Law constituted only a ceiling, and that the Governor alone decides how much (if any) to spend, the Trial Court presented the Commonwealth with a new legal reality that created dangerous policy implications. Specifically, the Trial Court's interpretation would allow Governor Bevin to withhold appropriations from the Kentucky State Police. He could withhold funds from the Executive Branch Ethics Commission, virtually shutting it down. He could withhold appropriations from the Unified Prosecutorial System. In fact, the Governor could withhold appropriations to capital projects in legislative districts of legislators who question his actions or who vote in defiance of the Governor.

Recognizing this untenable outcome, the Trial Court ruled that if a taxpayer or entity believed the Governor's determination as to the amount of any particular funding was too low, they could file suit and the Judiciary would set a spending floor. The trial court stated that "the Judiciary stands fully capable of realigning the balance of power" if in its view "funding [of an agency] reach[es] constitutionally impermissibly low levels." Op. and Order at 21 (May 18, 2016) (R. at 703). Through this language, the Trial Court has not only permitted the Governor entry into the appropriations process, he has enlisted the Judiciary as well. *See* Op. and Order at 21 (May 18, 2016) (R. at 703).

If the Trial Court's order is upheld, the Judiciary will have a fundamental role in the appropriations process. Essentially, the General Assembly would establish a ceiling, while the Judiciary may establish a floor, and the Executive decides what to spend in between. This Court has directly warned against this very intrusion. In *Haydon Bridge II*, the Court called it a "perfect storm, an unprecedented collision of the constitutional powers accorded the three separate branches of government." 416 S.W.3d 280, 296 (Ky. 2013). If allowed to stand, the Trial Court's ruling opens the gates to a flood of litigation in which the Judiciary will be asked to determine the constitutional spending floor for all the Commonwealth's agencies and programs.

This Court must overturn the Trial Court's order and reinstate the Constitution's prescribed separation of powers.

III. The Trial Court Erred When It Held That KRS 48.620(1) Authorizes Budget Reductions.

In his March 31 and April 19 letters, Governor Bevin claimed a single statute authorized his actions. Compl. Ex. 2 (R. at 189-90). Specifically, he claimed that KRS 48.620(1) allowed him to cut funding, *i.e.* "appropriations," by revising "allotments". The Trial Court accepted this argument and concluded that "KRS 48.620(1) . . . delegate[s] authority to the Governor to address specific budget concerns within the executive branch." Op. and Order at 10 (May 18, 2016) (R. at 692).

The Trial Court is in error. First, for the reasons discussed above, KRS 48.620 cannot reduce appropriations without violating the separation of powers doctrine. Second, KRS 48.620 does not allow for the reduction or elimination of an appropriation. Finally, even if the legislature had intended by KRS 48.620 to delegate the power to reduce appropriations, the delegation would be unconstitutional.

A. KRS 48.620(1) Does Not Allow For the Reduction or Elimination of An Appropriation.

In their briefs and before the Trial Court, the Appellees argued that they are not "reducing" or "cutting" an appropriation. Defs.' Mem. Supp. Mot. Dismiss at 6, 14 (April 18, 2016) (R. at 444, 452). Instead, they claim to be "revising an allotment." Defs.' Mem. Supp. Mot. Dismiss at 10-11, 13 (April 18, 2016) (R. at 448-49, 451). However, they admit their "allotment revisions" permanently eliminate a portion of the appropriated funding. Defs.' Mem. Supp. Mot. Dismiss at 15 (April 18, 2016) (R. at 453). Such an action is unquestionably an appropriation reduction. The Court can simply reference the Governor's April 1 press announcement: "Statement from Governor Bevin Regarding University Budget *Reductions*." Compl. Ex. 8 (R. at 216) (emphasis added).

KRS Chapter 48 is the statutory scheme governing the state budget. It contains numerous provisions, including an explicit provision, KRS 48.600, specifically addressing appropriation reductions. It is entitled "***Appropriation Reductions in accordance with budget reduction plans*** . . . ." It states that budget reductions may be made *only* if there is a shortfall, and only according to a budget reduction plan. KRS 48.600(1). It further states that "[n]o budget revision action shall be taken by any branch head in excess of the actual or projected revenue shortfall." KRS 48.600(2).

The Trial Court failed to address or reference this statutory provision directly applicable to budget reductions. Such failure constitutes error as the statute definitively states the Governor cannot cut funding absent a shortfall.

Instead, the Trial Court discussed a single subpart of a statute, KRS 48.620(1). That statutory provision, however, does not reference an appropriation reduction.

Instead, it is entitled "Revisions of Allotment Schedule." The title both describes and limits the statute's scope to the timing and distribution of the budgeted appropriation over the four quarters of the fiscal year.

This plain reading of KRS 48.620(1)'s scope is supported by the two statutes on "allocations" that immediately precede KRS 48.620 and frame it in its proper context. First, KRS 48.605, "Revision of Allotments within appropriations," states:

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

"Budget unit" is defined in KRS 48.010(9) as "any subdivision of any branch of government, however designated in any branch budget bill." Each of the Universities is separately listed in the enacted budget as a budget unit. It is uncontroverted that none of the heads of the budget units, *i.e.* the University boards or their presidents, requested that there be revisions to the allotments.

Next, KRS 48.610, entitled "Schedule of Quarterly Allotments of Appropriations," states:

> By June 1 of the preceding fiscal year, each branch of government shall submit to the Finance and Administration Cabinet a schedule of quarterly allotments of appropriations for each budget unit of the branch for the next fiscal year. Allotments ***shall conform with the appropriations in the enacted branch budget bills or other appropriation provisions.***

(Emphasis added.) KRS 48.610 makes clear that allotment schedules – and therefore any revisions under related statutes such as KRS 48.620 – must conform to the Budget Law's appropriation. Unfortunately, the Trial Court refused to address or analyze either KRS 48.605 or 48.610.

Based on these related statutes, the context of Chapter 48 shows that KRS 48.620(1) simply allows for the timing of allocations to be revised. It does not allow a Governor to reduce an appropriation. Again, the reduction of appropriations has its own specific statute, KRS 48.600. Furthermore, it is important to note that KRS 48.620 specifically uses the word "revise," not "reduce." The General Assembly chose to use the word "reduce" in other statutes that prohibit the Governor's actions here. *See* KRS 48.130(6).

This Court must reject the argument that KRS 48.620(1)'s "allotment revision" allows Appellees to eliminate a portion of an appropriation.

B. Reading KRS 48.620 To Allow Appropriation Reductions Cannot be Harmonized With And, In Fact, Eviscerates Numerous Other Statutes.

The Trial Court's ruling must also be overturned as it conflicts with and, in fact, eviscerates numerous state statutes. "The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *Jefferson County Board of Education v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012) (quoting *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009)). To achieve this end, courts first look to the plain and common meaning of the particular words used in the statutes. *Fell,* 391 S.W.3d at 719. In the Commonwealth, this principle was codified in KRS 446.080(4). Additionally, any particular word, sentence or subsection must be viewed in context with other parts of the statue and in light of the whole act. *Petitioner F. v. Brown*, 306 S.W.3d 80, 85-86 (Ky. 2010). As the Kentucky Supreme Court has stated:

> "We presume that the General Assembly intended for the statute to be construed as a whole, for all of its part to have meaning, ***and for it to***

> ***harmonize with related statutes***.... We also presume that the General Assembly did not intend an absurd statute or an unconstitutional one....

Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 551 (Ky. 2011) (emphasis added).

The Trial Court's reading of KRS 48.620(1) fails because it would eliminate rather than harmonize with other statutes. Specifically, if an "allotment revision" allows a Governor to permanently reduce an appropriation, KRS 48.600 – the "Appropriation Reductions" statute – is meaningless and unnecessary. If KRS 48.620(1) allows him to make cuts anywhere he chooses, the Budget Reduction Plan and KRS 48.130(1) are also meaningless. And if no shortfall is required, KRS 48.130(6) and 48.600(1)-(2) are moot. Indeed, if KRS 48.620(1) gives the Governor the power to fund or not fund anything of his choosing, the entire Budget Law and biannual budget process are rendered ineffective.

The Trial Court erred in reading – out of context – several words from KRS 48.620 to give the Governor supreme budgetary authority. As stated by the United States Supreme Court, the legislative branch "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). To give KRS 48.620 the interpretation argued by the Appellees and adopted by the Trial Court would be the equivalent of pulling an elephant – the power of the purse – out of a mousehole.

C. The Trial Court's Reading Of KRS 48.620(1) Violates Kentucky's Non-Delegation Doctrine.

Under the Appellees' and Trial Court's reading of KRS 48.620(1), the Governor has the unfettered power to withhold and reduce the appropriations of any executive

branch budget unit. Defs.' Mem. Supp. Mot. Dismiss at 6 (April 18, 2016) (R. at 444). Such a reading must be rejected as it would permit an unconstitutional delegation of legislative powers. The Court has a duty to adopt "that construction which will save the statute from constitutional infirmity." *U.S. ex rel. Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909).

As noted, Kentucky's Constitution includes the nation's strongest separations of powers. *Sibert*, 246 S.W. at 458. Because of this separation and KY. CONST. § 60, this Court has recognized the non-delegation doctrine.[7]

Kentucky's highest court first addressed the non-delegation doctrine in 1940 in *Bloemer v. Turner,* 281 Ky. 832, 137 S.W.2d 387, 390 (1940). The *Bloemer* Court held: It is an accepted principle that "the legislative department has no right to deputize to others the power to perform its governing functions." 137 S.W.2d at 391. In a long line of cases since *Bloemer*, the Courts have upheld the principle that the General Assembly cannot delegate the legislative function to another authority. *See Commonwealth v. Associated Industries of Kentucky,* 370 S.W.2d 584 (1963); *Holsclaw v. Stephens,* 507 S.W.2d 462 (1974); *L.R.C. v. Brown,* 786 S.W.2d 861.

Courts have outlined practical limitations to this prohibition, stating the "delegation of discretion is not unlawful" for certain matters if, and only if, "sufficient standards controlling the exercise of . . . discretion are found." *Holsclaw*, 507 S.W.2d at 471. In *L.R.C. v. Brown,* this Court stated:

> [A] delegation of legislative power, to be lawful, ***must not include the exercise of discretion*** as to what the law shall be. . . . [S]uch

[7] KY. CONST. § 60 provides: "No law… shall be enacted to take effect upon the approval of any other authority than the general assembly,"

> delegation must have standards controlling the exercise of administrative discretion.

786 S.W.2d at 915 (emphasis added). Therefore, the legislature cannot delegate some powers at all. Where it can delegate, it must do so with controlling standards that either eliminate or set strict standards to severely limit discretion.

The Constitution specifically identifies appropriating funds as one of the primary powers belonging solely to the General Assembly. KY. CONST. § 230; *Fletcher, supra* (citing *Armstrong v. Collins,* 709 S.W.2d at 441; *L.R.C. v. Brown,* 664 S.W.2d at 925; *Ferguson v. Oates,* 314 S.W.2d at 521 (Ky. 1958)). That power may be so fundamental that it cannot be delegated. Ultimately, however, this Court need not decide that issue because the statute Appellees allege delegates to the Governor the power to reduce legislative appropriations – KRS 48.620(1) – has *no* controlling standards. As employed by the Governor, it allows for unlimited discretion. Appellees admit as much, claiming the Governor may "exercise discretion," or has "great discretion." Defs.' Resp. Opp'n Pl's. Mot. Summ. J. at 16, 17 (April 18, 2016) (R. at 648, 649). As such, it would be unconstitutional to read KRS 48.620(1) as a delegation of the spending (or, rather, the cutting) authority by the General Assembly.

This Court has reached this very conclusion before. In *Diemer v. Commonwealth, Transp. Cabinet, Dep't of Highways,* 786 S.W.2d 861, 866 (1990), the Supreme Court ruled the General Assembly had unlawfully abdicated its legislative power when it allowed certain decisions to be made on the "sound discretion" of the Secretary of Transportation. Specifically, the General Assembly attempted to give the Transportation Secretary the discretion to determine whether or not an area was "urban" in the context of granting or denying billboard advertising permits under the Kentucky Billboard Act. *Id.*

at 862. The Court, noting the strength of Kentucky's non-delegation doctrine, held that the statute was an unconstitutional delegation of legislative power because it granted discretion without sufficient standards. 786 S.W.2d at 865-66,

Diemer involved a less-guarded power and attempted to confer narrower discretion than is at issue here. Indeed, the "discretion" to reduce appropriations subject only to judicially-created floors would not be a delegation, but a complete abdication of the General Assembly's power.

Sister states have held accordingly. In *State ex rel. Schwartz v. Johnson*, New Mexico's Governor revised allotments to reflect a two and one half percent (2.5%) across-the-board reduction in appropriations. 907 P.2d 1001, 1002 (N.M. 1995). The New Mexico Supreme Court reversed on non-delegation grounds, holding that the statute authorizing reductions to "periodic allotment of funds" lacked sufficient standards to be deemed a constitutional delegation of legislative power, particularly when no deficit was forecast. *Id.* at 1008. The court found "no statutory authority by the Governor [to] regulate allotments through the application of discretionary fiscal policy." *Id.*

In *Chiles v. Children A, B, C, D, E and F*, Florida's Governor invoked a statute allowing his office to "reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund." 589 So.2d 260, 263 (Fla. 1991). The Florida Supreme Court voided the statute, stating that "under the doctrine of separation of powers, the legislature may not delegate the power to enact laws or to declare what the law shall be to any other branch. Any attempt by the legislature to abdicate its particular constitutional duty is void." *Id.* at 264. Noting that "the power to *reduce* appropriations, like any other lawmaking, is a legislative function," the court held: "The legislative

responsibility to set fiscal priorities through appropriations is totally abandoned when the power to reduce, nullify, or change those priorities is given over to the total discretion of another branch of government." *Id.* at 265 (emphasis original).

In *Fairbanks N. Star Borough*, the Alaska Supreme Court took the analysis one step further. 736 P.2d 1140 (Alaska 1987). In analyzing Alaska's budget reduction statute and its lack of controlling standards, the Alaska Supreme Court held that the unbridled power to reduce appropriations would have the effect of a second veto, which Alaska's legislature would have no power to override. 736 P.2d at 1143.

KRS 48.620 does not delegate to the Governor the power to cut or reduce and appropriation through an "allotment" reduction. If it did, it would be unconstitutional, as the statute contains no standards and allows maximum discretion.

IV. The Trial Court Erred When It Held That KRS 45.253(4) Applies to the Universities' Finances and Authorizes Budget Reductions Characterized As Allotment Withholdings.

The Trial Court also erred when it held that KRS 45.253(4) allowed the Governor's budget cuts to the Universities. First, this statute was never a basis for Governor Bevin's actions. It is undisputed that in both the March 31 and April 19 directives, the Governor acted solely under KRS 45.620(1). He neither cited nor alluded to KRS 45.253(4). Indeed, he could not, as the statute allows action by the Finance Secretary, not the Governor.

Nevertheless, the Trial Court accepted the Appellees' argument and concluded that "KRS 45.253(4) . . . delegate[s] authority to the Governor to address specific budget concerns within the executive branch." Op. and Order at 10 (May 18, 2016) (R. at 692). It does not. This Court should reverse the Trial Court.

A. University Governance and Financial Management Are Independent From The Executive Branch Under KRS Chapters 164 and 164A.

Kentucky's robust postsecondary education system consists of nine institutions.[8] Under Kentucky law, the Universities are to be independently governed by a board of regents or trustees. KRS 164.321, KRS 164.131, KRS 164.821. While the Governor has the power to appoint a certain number of trustees or regents to each board, the regents or trustees serve staggered six-year terms. KRS 164.600. Once appointed, the members may only be removed "for cause." KRS 63.080(2). These statutory terms and protections insulate the boards from political influence by preventing any one Governor from appointing all members during a single term. *Id.* The governing boards thus exercise independent governance and owe a fiduciary duty to the Universities, not to the Governor. *See, e.g., Liteky v. United States*, 510 U.S. 540, 566 (1994) (discussing fiduciary capacity of university board members).

Like other budget units, the Universities receive annual appropriations from the General Assembly. *E.g.* 2014 Ky. Acts, Ch. 117, Part I(K) (R. at. 85-90). Those dollars come from several funds, including the General Fund and the Universities' respective restricted/agency funds. *Id.* While General Fund revenue comes from sources such as income taxes and sales taxes, the Universities' restricted funds come from students in the form of tuition, room and board, and other charges and fees.

The statutes that apply to the financial management of the Universities appear in KRS Chapter 164A, entitled "Financial Management of Institutions of Higher

[8] Eastern Kentucky University, the Kentucky Community and Technical College System, Kentucky State University, Morehead State University, Murray State University, Northern Kentucky University, the University of Kentucky, the University of Louisville, and Western Kentucky University. *See* KRS 164.290.

Education." Under this Chapter, the Universities can "opt-in" to Chapter 164A, which removes them from other, older statutes. Chapter 164A specifically allows the Universities to "elect to receive, deposit, collect, retain, invest, disburse, and account for all funds received or due from any source including, but not limited to, state and federal appropriations for the support or maintenance of the general operations or special purpose activities of such institutions." KRS 164A.560(2). Each of the Universities at issue has elected to operate under KRS 164A.[9]

B. By Opting Into KRS 164A, The Universities Are Entitled To Their Full Appropriation.

By opting into KRS 164A, the Universities are entitled to their full appropriation as a matter of law. KRS 164A.555 unequivocally directs that the Secretary of the Finance Cabinet "***shall issue warrants authorizing the Treasurer of the Commonwealth of Kentucky to pay to the treasurer of each institution any amounts due by virtue of the state appropriations for that institution*** . . . ." The statute also requires that the "transfer of funds shall be handled in a manner to assure a zero (0) balance in the general fund account at the university." *Id.*

In fact, Kathleen Marshall, the Appellees' own affiant, stated the university appropriations were subject to KRS Chapter 164A and specifically to KRS 164A.555. Ms. Marshall works for the Office of the State Budget Director and is assigned as the universities' fiscal agent. Defs.' Resp. Opp. Mot. Temp. Inj. Ex. 1 at 1-2 (April 20, 2016) (R. at 501-502). In her May 22, 2015 letter to the universities at the beginning of

[9] 739 KAR 1:010 (KCTCS); 740 KAR 1:010 (Univ. of Louisville); 745 KAR 1:015 (Kentucky State Univ.); 755 KAR 1:010 (Morehead State Univ.); 760 KAR 1:010 (Northern Kentucky Univ.); 765 KAR 1:010 (Univ. of Kentucky); 770 KAR 1:010 (Western Kentucky Univ.); 772 KAR 1:010 (Murray State Univ.); 775 KAR 1:010 (Eastern Kentucky Univ.).

the 2016 fiscal year, she states, "The allotments are the amounts appropriated in House Bill 235 as enacted by the 2014 Extraordinary Session of the General Assembly. . . . The transfer of state appropriations to your institution is subject to the provisions of KRS 164A.555." Pl's. Mem. Supp. Mot. Temp. Inj. Ex. B (R. 391, 393, 395).

In reviewing a separate matter, the United States Court of Appeals for the Sixth Circuit noted that KRS Chapter 164A entitles Kentucky Universities to the funds appropriated to them. Specifically, in *Hutsell v. Sayre*, the Sixth Circuit discussed University financing, stating: "Once budgeted, UK receives an appropriation from the state treasurer in 'any amounts due by virtue of the state appropriation.' A statutory scheme then dictates how [] UK is to manage its budget and appropriate funds." 5 F.3d 996, 1002 (6th Cir. 1993) (citing KRS 164A.550-.630).

Again, the specific language of KRS 164A.555 entitles the Universities to "any amounts due by virtue of the state appropriation." Nevertheless, Appellees have refused to provide the Universities their full appropriations for FY 2016. Unfortunately, the Trial Court never mentions KRS 164A.555 in its erroneous order. This Court should reverse.

C. KRS Chapter 164A Exempts The Universities From KRS 45.253.

By "opting in" to KRS Chapter 164A, Universities are exempted from the application of KRS 45.253. KRS 164A.630(1) lists and describes the specific statutes applicable to Universities once they opt-in to KRS Chapter 164A. A review of the statute shows that KRS 45.253 is not included in this list:

> (1) In carrying out the provisions of KRS 164A.555 to 164A.630 the governing boards shall be bound by the following statutes:
> (a) KRS 56.610 to 56.820 regarding relocation assistance and lease of property for state use, and 56.870 to 56.874 regarding legislative approval of state fiscal obligations.
> (b) The Kentucky Model Procurement Code as set forth in KRS Chapter 45A.

> (c) KRS Chapter 56 as it relates to the approval of revenue bond issues by the State Property and Buildings Commission, and the issuance of revenue bonds and bond anticipation notes.
> (d) KRS 45.550 to 45.640 regarding equal employment opportunity.

KRS 164A.630(1).

"It is a familiar and general rule of statutory construction that the mention of one thing implies the exclusion of another. . . ." *Fox v. Grayson*, 317 S.W.3d 1, 8 (Ky. 2010) (internal citation omitted). Had the General Assembly intended KRS 45.253 to apply to the Universities in spite of an election under KRS Chapter 164A, it would have included the statute KRS 164A.630(1)'s list. It did not. KRS 45.253 therefore does not apply to Universities opting to proceed under KRS Chapter 164A. Indeed, as shown below, it could not as KRS 45.253 conflicts with numerous provisions under KRS Chapter 164A.

D. KRS 45.253 Is Contrary to KRS Chapter 164A And Thus Does Not Apply to the Universities.

Not only does KRS Chapter 164A exempt the Universities from KRS 45.253, it also states that KRS Chapter 164A is superior to any conflicting statutes, including those in KRS Chapter 45:

> Any other provisions of KRS Chapters 41, 42, 45, 56, 57 to the contrary notwithstanding, KRS 164A.555 to 164A.630 ***shall govern the financial management*** of higher education with the exception of KRS 45.990 and 45A.990 having to do with penalties which shall be applicable to violations of KRS 164A.555 to 164A.630.

KRS 164A.630 (emphasis added).

The specific sections of KRS 45.253 relied upon by the Trial Court and Appellees are indeed contrary to and in conflict with the controlling statutes under KRS Chapter 164A. First, as noted above, KRS 164A.555 unequivocally mandates that the Finance Secretary provide the full legislative appropriation to the Universities, stating that he "*shall issue warrants authorizing the Treasurer of the Commonwealth of Kentucky to pay*

to the treasurer of each institution any amounts due by virtue of the state appropriations for that institution . . . ." KRS 45.253(4) is contrary to this provision. Under that statute, the Finance Secretary "may withhold allotment of general fund appropriations to the extent agency or trust funds are available."

Likewise, under KRS 164A.560(2)(a), all fees and state appropriations "shall" be deposited "in a depository bank or banks designated by the governing board."

> The treasurer of the institution **shall** deposit on a timely basis **all tuition fees, fees for room and board, incidental fees**, contributions, gifts, donations, devises, **state and federal appropriations**, moneys received from sales and services, admittance fees, and all other moneys received from any source, in a depository bank or banks designated by the governing board.

(Emphasis added). KRS 45.253 again conflicts. Under KRS 45.253(2)-(3), a University would be required to "deposit[] all of the fees (which include fees for maintenance in state institutions, incidental fees, tuition fees, fees for board and room, athletics, and student activities) . . . with the State Treasury."

Because 45.253 is in conflict with KRS 164A, it cannot apply to the Universities as a matter of law. If it did, the State Treasurer and Finance Secretary would be complaining that tuition fees were being deposited improperly. Instead, in this and other cases, they admit the opposite. As such, this Court should reverse.

V. The Trial Court Erred In Its Application of Foreign Case Law and Legislative History.

A. The Trial Court Relied Upon Foreign Authority That Is Either Inapplicable Or Supports Appellant's Case.

As noted above, the Trial Court ignored applicable Kentucky precedent, opting to rely on foreign case law from jurisdictions with weaker separations of powers. Upon a closer reading, however, most of this foreign authority actively supports the Appellant's

case. For instance, the Trial Court cited *Brayton v. Pawlenty*, where Governor Pawlenty unalloted funds under Minnesota's budget reduction statute. 781 N.W.2d 357, 365-66 (Minn. 2010). That statute, like Kentucky's Budget Reduction Plan and related provisions of KRS Chapter 48, (1) requires that there be a deficit, (2) requires reserves or surpluses to be spent before cuts are made, and only then allows (3) any remaining deficit to be made up by reducing allotments. Minn. Stat. Ann. § 16A.152 (West). Pawlenty followed Minnesota's statute and his actions were still held illegal. 781 N.W.2d at 359. Here, Governor Bevin entirely ignored Kentucky law.

The Trial Court also cited *Rios v. Symington*, a case that directly disagrees with Appellees' position and the Trial Court's ruling. 833 P.2d 20 (Ariz. 1992). In *Rios*, Arizona's Governor ordered an agency to revert part of a supplemental appropriation to the state's general fund. *Id.* at 31. The Supreme Court of Arizona, sitting *en banc*, held that the order was "an attempt by the Governor to substitute his judgment for that of the Legislature" and that "[t]he Governor has no power to alter an appropriation through the use of an impoundment simply because he disagrees with the Legislature's estimates as to the amount of money needed to fund [an agency]. Therefore, this directive is void." *Id.*

Similarly, the Trial Court cited *McInnish v. Riley*, 925 So.2d 174 (Ala. 2005). There, the Alabama Supreme Court held that "[t]he power to appropriate public funds for specific purposes and to **reduce appropriations** is solely a legislative power." *Id.* at 179 (emphasis added). These cases support the Appellant's position that the Governor, absent an actual or projected revenue shortfall, has no inherent authority to reduce appropriations by withholding the allotment of funds.

Other foreign cases cited by the Trial Court are readily distinguishable or inapplicable. For example, in *New Hampshire Health Care Ass'n v. Governor*, 13 A.3d 145 (N.H. 2011), there existed a projected budget shortfall. Indeed, the Supreme Court of New Hampshire construed the statute at issue to limit the Governor, stating that he could "order reductions only if he determines either that projected state revenues will be insufficient to maintain a balanced budget and a "serious deficit" is likely or that the actual lapse of funds for each fiscal year in the biennium is not going to equal the estimated lapse." 13 A.3d at 155.

B. Additional Foreign Authority Shows Governor Bevin's Actions Were Illegal.

Still other foreign cases address the exact issue here – the withholding of appropriated funding through decreased allotments – and find it illegal. In *Etherton v. Wyatt*, 293 N.E.2d 43 (Ind. Ct. App. 1973), the Indiana State Budget Agency refused to allot to the Indiana State Teachers' Retirement Fund its full appropriation. For FY 1967-68, the State Budget Agency allotted only $24.5 million of the Fund's $35.5 million appropriation, "and thereby reduced the appropriation for that year by [$11 million]." *Id.* at 46. For FY 1968-69, the State Budget Agency allotted only $20 million of the Fund's $35.5 million appropriation, "and thereby reduced the appropriation for that year by [$15.5 million]." *Id.* Meanwhile, Indiana's General Fund had millions in unappropriated surpluses while actual revenues were only between two percent (2%) and three and one half percent (3.5%) below estimates. *Id.* Like Kentucky, Indiana had a budget reduction plan that permitted the State Budget Agency to "reduce the amount or amounts allotted or to be allotted so as to prevent a deficit." *Id.* at 49-50. The court held that "if the Budget Agency is to reduce a legislative appropriation, it must do so in conformity with the

statutory requirements and upon some reasonable basis to support its action." *Id.* at 51. Any reduction above and beyond what was necessary to prevent a deficit was held to be unconstitutional. *Id.*

Etherton is the perfect example of the illegality of the Governor's actions here. In *Etherton*, budget projections were lower than projected. Still, given the existence of surplus funds and the state's refusal to follow the budget reduction plan, the cut was ruled unconstitutional.

In yet another case, *W. Side Org. Health Servs. Corp. v. Thompson*, the Governor of Illinois used his authority to line-item-veto part of an agency's appropriation. 391 N.E.2d 392 (Ill. App. Ct. 1979) (rev'd on ground of mootness, 404 N.E.2d 208 (Ill. 1980)). The Illinois General Assembly overrode the veto. Undeterred, the Governor then refused to provide the agency its full appropriation for "budgetary reasons." 404 N.E.2d at 395-96. The court held that "the General Assembly is vested with the ultimate authority to determine both the level and allocation of public spending. The Governor is given no express authority by the constitution to reserve appropriated funds in frustration of the General Assembly's expressed intent." 391 N.E.2d 392 at 402. The court further held that the Governor had no inherent power as the supreme executive officer to reserve part of an appropriation for fiscal purposes. *Id.* (citing *Sioux Valley Empire Electric Ass'n, Inc. v. Butz*, 367 F.Supp. 686 (D.S.D.1973) (holding that where a statute provides that a certain amount of money shall be available to states or to certain parties, money must be spent to extent of qualified applicants and administrative discretion is limited to determination of qualifications) (*aff'd*, 504 F.2d 168 (8th Cir. 1974)); *Local 2677, American Fed'n of Government Employees v. Phillips*, 358 F.Supp. 60 (D.D.C. 1973).

The prevailing view federally and among Kentucky's sister states is that a chief executive has no inherent authority to unallot or impound appropriations. Given the strong statement of separation of powers recognized by Kentucky's courts and constitution, that must also be the law here. The Court should reverse the Trial Court and restore Kentucky law.

C. The Trial Court Erred When It Considered Draft Budgets.

The Trial Court further erred when it considered the "legislative history" of the wrong budget law. Specifically, the Trial Court found it "intriguing" that the Kentucky House of Representative's initial version of the *2016-18* Budget Law "referenced KRS 48.620 and specifically prohibited the Governor from reducing allotments below the total appropriation." Order at 15-16 (May 18, 2016) (R. at 697-98) (citation omitted). That budget law is not at issue here. FY 2016 appropriations, which are at issue, are instead included in and governed by the 2014-16 Budget Law.

Moreover, if the Trial Court truly wanted to review the history of the 2016-18 Budget Law, it ignored a critical component of that history. In Governor Bevin's 2016-18 budget recommendation, he explicitly asked the General Assembly to include the FY 2016 cuts that are at issue in this case. He did so because only the General Assembly could suspend the previous Budget Law. Such attempted inclusion shows even the Governor knew that only the legislature could make FY 2016 cuts absent a shortfall.

The legislative history of a different, subsequent budget law has no bearing on this litigation outside of the fact that it shows that the Appellees knew only the General Assembly could order instant cuts.

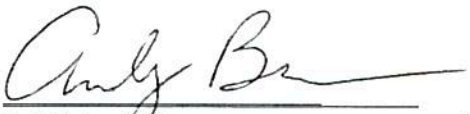
CONCLUSION

For the foregoing reasons, Appellant respectfully asks that the May 18, 2016 Opinion and Order of the Franklin Circuit Court be reversed. Appellant further respectfully asks that the case be remanded to the Franklin Circuit Court with instructions (1) to enter a judgment as a matter of law in favor of the Appellant, and (2) to enter a permanent injunction enjoining Appellees from enforcing the Governor's March 31 and April 19 directives, requiring them to provide the full FY 2016 appropriations to the Universities. In doing so, this Court will uphold state statutory and constitutional law, restore the balance and separation of powers in the Commonwealth, and fulfill the intent of the General Assembly.

Respectfully submitted,

Dated: July 18, 2016

ANDY BESHEAR
ATTORNEY GENERAL



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APPENDIX

Description	Appendix No.
March 31 Budget Reduction Letter	Exhibit A
April 19 Budget Reduction Letter	Exhibit B
Letters from Kathleen Marshall to University VPs of Finance Regarding application of KRS 164A.555	Exhibit C
Commonwealth ex rel. Beshear v. Bevin, et al., Circuit Court No. 16-CI-389, Franklin Circuit Court Opinion and Order, entered May 18, 2016	Exhibit D
Tom Loftus, *Bevin's UK cuts called 'draconian'*, LOUISVILLE COURIER-JOURNAL, Feb. 13, 2016, at A2	Exhibit E
Chris Kenning, *Cuts 'devastating, says KCTCS chief*, LOUISVILLE COURIER-JOURNAL, Feb. 18, 2016, at A5	Exhibit F