COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2016-SC-000272-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

REPLY BRIEF FOR APPELLANTS

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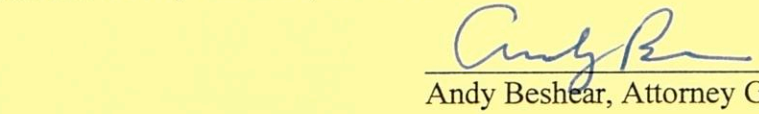
CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served this 12th day of August, 2016, 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 40601.



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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

This is not a case of first impression. This Court has previously ruled that a Governor violates the Kentucky Constitution and state budget statutes by unilaterally cutting or reducing legislative appropriations outside of the Budget Law's Reduction Plan. These rulings build on this Court's consistent holdings that the "spending" or "expenditure" of state funds is solely within the power of the General Assembly. *Beshear v. Haydon Bridge Co., Inc.*, 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*).

Here, the Governor's unilateral reductions of the Universities' FY 2016 appropriations – despite no shortfall and without following the Budget Reduction Plan – violate the Kentucky Constitution and state statutes for the same reasons. The Governor responds, claiming that the Budget Law merely creates "ceilings," and that he alone decides how state funds will be spent under that ceiling. According to his brief, he is limited only by his own discretion. This argument, and the cuts to Universities, violate the Kentucky Constitution's separation of powers, the non-delegation doctrine, the Budget Law, and numerous provisions of KRS Chapter 48 and Chapter 164A.

To be clear, Appellant does not argue that "every penny appropriated must be spent" by a budget unit. (Gov. Br. at 7.) Appellant only argues that a Governor cannot unilaterally cut an appropriation without a shortfall, without following the Budget Reduction Plan, and without any conditions save his own discretion.

ARGUMENT

I. This Court Has Previously Held Unilateral Cuts Are Unconstitutional.

This Court has addressed this very issue, amongst others, in *Haydon Bridge I* and *Haydon Bridge II*. There, it found that a Governor cannot unilaterally impose his own budget reductions, and that neither the judicial nor the executive branch can remove funds from legislative appropriations.

Haydon Bridge I dealt with a number of issues, including whether the General Assembly can ratify an unlawful act of a Governor. Specifically, in 2001, Governor Patton faced a budget shortfall. In response, he unilaterally mandated budget reductions "inconsistent with the appropriations" passed by the General Assembly. 304 S.W.3d at 691. The General Assembly subsequently met and passed legislation attempting to ratify these acts.

This Court was then faced with the question of whether the General Assembly could ratify an unlawful act. Determining that issue required the Court to comment on whether a Governor could unilaterally implement his own budget reductions. The Court found the Governor "could not legally perform" his own cuts, which it referenced as "invalid acts of the Governor." *Id.* at 693-694.

Specifically, the Court found that Governor Patton's reductions suspended appropriation statutes, violating the Kentucky Constitution's separation of powers. *Id.* at 694. Since the power to reduce appropriations is *legislative*, the Court noted that "a proper delegation of authority" from the General Assembly was required. *Id.* at 693. That delegation – according to the Court – is found only in the Budget Reduction Plan in "the enacted branch budget bills passed by the General Assembly" and authorized by KRS 48.150. *See id.* at 693.

Here, the Governor has undertaken the same act by unilaterally reducing an appropriation. Under *Haydon Bridge I*, that action is an "invalid act."

This Court came to the same conclusion through a different analysis in *Haydon Bridge II*. There, it faced the question of whether the judicial branch could render a judgment causing the Commonwealth to transfer funds in a manner inconsistent with the Budget Law. The Court first dispelled any notion that the General Assembly merely "fills the purse," and the Governor then decides how to spend it. The Court definitively stated that "the ***expenditure*** of the money necessary to operate state government – is one which is within the authority of the legislative branch of government." 416 S.W.3d 280, 296 (Ky. 2013). To leave no doubt, the Court further stated "it is also exceedingly clear that the State Treasury is solely under the control of the legislative branch." *Id.*

The Court ruled that the judicial branch could not render a judgment that would result in insufficient funds to satisfy the "General Assembly's planned appropriations." *Id.* It applied this same ruling to the Governor: "of course there is no authority for the Governor unilaterally spending public funds or allocating them other than as determined by the General Assembly." *Id.*

The Governor's actions here would create the same violation this Court prohibited in *Haydon Bridge II*. The Governor has purposefully removed the funds necessary to satisfy the General Assembly's appropriations to the Universities, and has done so by "allocating them other than as determined by the General Assembly." Both *Haydon Bridge I* and *II* directly address and prohibit the actions of the Governor here.

II. The Appellees Violated The Budget Law And KRS Chapter 48.

The Budget Law mandates the full allotment of appropriations. In section 27, the Budget Law states "[T]he 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 (R. at 175).[1] The Budget Law and KRS Chapter 48 also permit reductions only in the event of a shortfall, only in the amount of a shortfall, and only pursuant to the Budget Reduction Plan. 2014 Ky. Acts Ch. 117 Part VI (R. at 182-83); KRS 48.130(1); KRS 48.130(6); KRS 48.600(1).

Appellees nevertheless argue that appropriations are only spending "ceilings," and that the Governor has absolute discretion to determine how much to spend. (Gov. Br. at 14.) As noted above, this Court has rejected this contention, stating the "expenditure" of state funds and the control of the state treasury is solely within the control of the General Assembly. *Armstrong v. Collins*, 709 S.W.2d 437, 441 (Ky. 1986); *Haydon Bridge II*, 416 S.W.3d at 296.

Appellees also claim that they can withhold appropriations because the Budget Law uses the phrase "discrete sums, or so much thereof as may be necessary." (*E.g.* Gov. Br. at 15). Appellees completely ignore the remaining text of that paragraph which subjects the appropriations to KRS Chapter 48. 2014 Ky. Acts Ch. 117, Part I § 1. (R. at 39). KRS Chapter 48, through KRS 48.130 and KRS 48.600, mandates that cuts cannot be made without a shortfall. Moreover, "so much thereof as may be necessary" refers to the fact that a budget

[1] "Shall is mandatory." KRS 446.010(39). Simply stated, "[s]hall means shall." *Vandertoll v. Commonwealth,* 110 S.W.3d 789, 796 (Ky. 2003).

unit might come in under budget, not that the Governor can withhold funds. *See People ex rel. Kaneland Community Unit Sch. Dist. No. 302 v. Howlett*, 195 N.E.2d 678, 679-80 (Ill. 1964). As detailed herein, the General Assembly further cannot constitutionally delegate the unbounded discretion for a Governor to decide how much may be necessary for self-governing universities. (*See* p. 13, *infra*.)

Faced with this dilemma, Appellees next argue that KRS 48.600, a statute directly contradicting their argument, "is irrelevant" because it only applies to "across-the-board reduction in appropriations." (Gov. Br. at 13.) Nothing in KRS 48.600 mentions "across the board" cuts. To the contrary, KRS 48.600 mandates that a Governor "shall make any appropriation reductions . . . in accordance with the budget reduction plan included in the enacted budget bill." KRS 48.600(1). That plan is not "across the board," but instead has a specific series of funding and reduction steps. 2014 Ky. Acts Ch. 117, Part VI (R. at 182-83).

Undeterred, Appellees argue that KRS 48.600 only applies to budget shortfalls, and that here the Governor has cut without a shortfall. (Gov. Br. at 13.) The thrust of this argument is that the Governor's power to cut during a shortfall is constrained, while during a surplus he can cut at his pleasure.[2] But KRS 48.600 strictly prohibits reductions when no shortfall exists: "No budget revision action shall be taken . . . in excess of the actual or projected revenue shortfall." KRS 48.600(2). KRS 48.600 outlaws the Governor's actions.

[2] Not only is this an absurd argument, but the General Assembly has expressly provided for the disposition of unspent appropriations and surplus revenue. KRS 45.229; KRS 48.700.

Appellees finally argue that the Governor has merely "exercised his authority to instruct budget units . . . to spend below their appropriation ceiling." (Gov. Br. at 13.) The record refutes this argument. The two directives at issue show that the Governor ordered the Finance Cabinet Secretary to cut and/or reduce the funds available the Universities. Compl. Ex. 2 (R. at 189-90), Defs.' Resp. Opp. Mot. Temp. Inj. Ex. 1(C) (R. at 515-16).

The Appellees are simply not authorized to reduce appropriations by allotting less than the entire amount provided to the Universities. *See Train v. City of New York*, 420 U.S. 35 (1975).[3] They are required to follow the Budget Law, KRS Chapter 48, and the specific appropriations themselves, which are law. KRS 48.311. By refusing, the Governor has suspended these laws in violation of KY. CONST. § 15. Such directives are "antithetical to the constitutional duty to 'take care that the laws be faithfully executed.' KY. CONST. § 81." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 872 (Ky. 2005).

III. The Appellees Violated The Separation Of Powers Doctrine.

The Appellant's Brief details how Kentucky's Constitution contains the nation's strongest separation of powers doctrine. (App. Br. at 15-16.) It further discusses the consistent case law holding that the General Assembly alone determines how public funds "shall be spent." (*Id.* at 16-17.)

The Appellees respond only with a litany of foreign case law, which is problematic for several reasons. (Gov. Br. at 23-27.) First, every foreign

[3] The Governor attempts to distinguish *Train* by arguing that the President was specifically directed to provide the entire appropriation and that he did not have the benefit of an allotment revision statute. (Gov. Br. at 16). However, the Budget Law, KRS Chapter 48, and KRS 164A.555 all required the Governor to provide the Universities the entire appropriation and KRS 48.620 does not give him the authority to violate those laws.

authority comes from a state with a weaker separation of powers doctrine than Kentucky. (*See* App. Br. at 20-21.) Such courts did not face the "high wall" this Court must apply. *Fletcher*, 163 S.W.3d at 872.

Second, as discussed in the Appellant's Brief (App. Br. at 35-37), the majority of these cases are contrary to the Appellees' positions. For example, Appellees' case of *Rios v. Symington* states that "the 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]." 833 P.2d 20, 31 (Ariz. 1992). Similarly, the case of *McInnish v. Riley*, holds that "[t]he power to . . . reduce appropriations is solely a legislative power." 925 So.2d 174, 179 (Ala. 2005).

Third, Appellees' cases are largely inapplicable because they are cited for the proposition that "the Governor has the constitutional prerogative to spend less than the full amount of an appropriation." (Gov. Br. at 26.) But "spending less" than a full appropriation is not at issue. Instead, the Governor ordered reductions to the funds available to the Universities. And in the particular instance of the Universities, a Governor does not control spending directly or indirectly. Instead, each university is governed by either a board of regents or a board of trustees. *See* KRS 164.321, KRS 164.131, KRS 164.821. These trustees or regents, and not the Governor, adopt the Universities' budgets. And the regents and trustees – unlike Cabinet Secretaries – are shielded from political pressure in that they serve six-year terms, and not at the pleasure of the Governor. KRS 63.080(2).

Fourth, as noted above, this Court in *Haydon Bridge I* and *II* has held that the actions here violate the separation of powers. *See* 416 S.W.3d at 295. The Court found that not only is the judiciary prohibited from impacting or reducing legislative appropriations, so is the Governor. "Of course, there is no authority for the Governor unilaterally spending public funds or allocating them other than as determined by the General Assembly." *Id.* at 296 (internal citation omitted).

Finally, the Trial Court's Order must also be overturned because it exacerbated the violation by drawing all three branches of government into the budget process. After erroneously ruling that a Budget Law merely sets a "ceiling," it stated the judiciary could set a "floor" for anyone who believed the Governor's funding was too low. Op. and Order at *21 (R. at 700).

This ruling places the judiciary directly into the budget process, creating the "perfect storm" that this Court avoided in *Haydon Bridge II*. 416 S.W.3d at 296. The judiciary could and would be flooded with lawsuits challenging virtually every spending decision. There would no longer be any separation of powers over spending, as all three branches would be involved at all times.

IV. KRS 48.620(1) Does Not Authorize Budget Reductions.

KRS Chapter 48 "is a comprehensive scheme." *Fletcher*, 163 S.W.3d at 856. Under that scheme, reductions can be made only if there is a shortfall, only in the amount of a shortfall, and only according to a budget reduction plan. (*Supra*, pp. 4-7.) Despite these clear restrictions, Appellees argue that a single subsection, KRS 48.620(1), lets the Governor do the exact opposite, cutting at any time and in any amount, bound only by his own discretion. (Gov. Br. 8-18.) Such a reading would eviscerate Chapter 48's "comprehensive scheme."

First, the Appellees argue that KRS 48.620(1) "precludes upward revisions in excess of the amount appropriated, but is silent as to downward revisions." (Gov. Br. at 10, Treas. Br. at 14.) They conclude that this silence "demonstrates that such downward revisions are permissible under the statute." (*Id.*) This conclusion is refuted by the immediately preceding statute, KRS 48.610, which states that "[a]llotments ***shall*** conform with the appropriations in the enacted branch budget bills or other appropriation provisions." KRS 48.610 (emphasis added).[4]

Second, Appellees argue that the Governor "did not reduce any 'appropriations,' but made a downward revision to allotments." (Gov. Br. at 10.) That is not true, as even the Governor referred to his action as a budget reduction. *See* "Statement from Governor Bevin Regarding University Budget Reductions," Compl. Ex. 8 (R. at 216). It is clearly an appropriation decrease. There is "no reason in law, or theory of government, that should restrain [this Court] from directing the sums lawfully appropriated to [the Universities] be allocated to [them] for the purposes contemplated in the appropriation." *See Ferguson v. Oates*, 314 S.W.2d 518, 521 (Ky. 1958).

Third, Appellees discuss a *draft* of the 2016-18 Executive Branch Budget Law, forgetting that the appropriations at issue are governed by the 2014-16 Executive Branch Budget Law. (Gov. Br. at 10.) They further omit critical history related to the 2016-2018 Budget Law. Specifically, in his budget

[4] It is further refuted by this Court's holding that "there is no authority for the Governor unilaterally . . . allocating [funds] other than as determined by the General Assembly." *Haydon Bridge II*, 416 S.W.3d at 296. It is finally refuted by the fact that if the Governor had such power, then he – and not the General Assembly – would ultimately determine how funds "shall be spent" and control the State Treasury. *L.R.C. v. Brown*, 664 S.W.2d at 925.

recommendation, Governor Bevin explicitly requested that the General Assembly include the FY 2016 cuts that are at issue in this case. (*See* App. Br. at 4.) Even he knew that only the General Assembly could suspend the previous Budget Law.

V. KRS 45.253 Does Not Apply To The Universities.

Appellees continue to justify the Governor's unilateral cuts under KRS 45.253. But they cannot contest that he did not actually act under this statute. Instead, as evidenced by his directives, the Governor took action only under KRS 48.620. Compl. Ex. 2 (R. at 189-90), Defs.' Resp. Opp. Mot. Temp. Inj. Ex. 1(C) (R. at 515-16).

It is further uncontested that the Universities have opted into KRS Chapter 164A, which grants them great independence and allows them to directly receive, deposit, collect, retain, invest, disburse, and account for *all* funds due from any source. (App. Br. at 32-33.) It is finally uncontested that, under KRS 164A.555, "[t]he secretary of the Finance and Administration Cabinet ***shall*** issue warrants … to pay to the treasurer of each institution ***any amounts due by virtue of the state appropriations for that institution***." (Emphasis added.)

Given these statutes, Appellees first argue that KRS 164A.555 does not entitle Universities to their *appropriations*, but merely what the Governor *allots*. (Gov. Br. at 20.) But the language is clear. The General Assembly specifically used the term "appropriation," not "allotment." KRS 164A.555 requires Universities to receive "any amounts due" under their full appropriation.

Appellees next argue that, despite this language, KRS 45.253 still allows them to cut. It does not. As discussed in the Appellant Brief, the text of KRS 164A.630 explicitly applies some portions of KRS Chapter 45 to Universities.

But it excludes numerous other statutes contained in KRS Chapter 45, including KRS 45.253. (App. Br. at 33-35.) The fact that the General Assembly applied some, but not all, of KRS Chapter 45, is determinative here.

While Appellees attempt to argue KRS 45.253(4) does not conflict, the statutory language disagrees. As noted above, KRS 164A.555 states that the Finance Secretary "***shall*** . . . pay . . . any amounts dues by virtue of the state appropriations." KRS 45.253 states that the Finance Secretary may "***withhold*** allotment of general fund appropriations . . . ." (Emphasis added.) These statutes provide contrary direction to the same public official. Under KRS 164A.630, KRS 45.253 therefore cannot apply. That is why Ms. Marshall admitted that Universities receive their funds under KRS 164A.555 when she informed them of their allotment schedules at the beginning of the fiscal year. Compl. Ex. 6 (R. at 203-208).

Finally, the record itself shows KRS 45.253 is no longer applied to Universities. If it were, KRS 45.253 would require that all University funds be deposited in the state treasury, and all disbursements and investments would go through the state treasury. KRS 45.253(3). The record demonstrates that is not the case. Appellees' affiant admitted that Universities hold funds in outside banking institutions. (R. at 504-05.) Moreover, the Governor and Finance Secretary have now admitted that KRS Chapter 164A puts the Universities in control of their own finances. In an Agreed Order of Dismissal in a separate proceeding, the Governor and Finance Secretary agreed that the governing boards of Kentucky's public universities have a statutory right to elect to perform many

financial management functions. (*See* Mot. for Leave to Take Jud. Not. Ex. A, p.2 ¶ 3.) Citing specifically to KRS 164A.555 *et seq.*, the parties agreed that the University of Louisville's governing board controls its own finances. *Id.*

Once the Universities opted into KRS 164A, KRS 45.253 no longer applied.

VI. Appellees Reading Of KRS 48.620(1) And KRS 45.253 Would Violate The Non-Delegation Doctrine.

Appellees' interpretation of KRS 48.620(1) and KRS 45.253 further violates the non-delegation doctrine. As noted herein, the spending of public funds is a legislative function. *See Haydon Bridge II*, 416 S.W.3d at 295-96. Under the non-delegation doctrine, some legislative functions are so fundamental they cannot be delegated. Where they can, a delegation must contain controlling standards that eliminate or severely limit discretion. *L.R.C. v. Brown*, 786 S.W.2d at 915.

KRS 48.620(1) and KRS 45.253 contain no controlling standards. Indeed, the Governor himself claims "great discretion" to reduce appropriations. (R. at 648, 649). Before this Court, the Governor claims that the only limitation on his ability to cut is his own discretion. (Gov. Br. at 27-28.) This "limitation," which is not included in the statute and therefore not a part of any legislative delegation, directly violates the Constitutional test for delegation. The General Assembly simply could not legally delegate its authority in the manner the Governor claims.

VII. This Case Does Not Stand For The Proposition That Budget Units Must Spend Every Dime.

Finally, it is worth again refuting the repeated assertion that serves as the foundation of the Appellees' argument. The Commonwealth has never argued

that Universities, or any other budget unit, must spend every dollar they are appropriated. Instead, the Commonwealth's argument – as reflected in Kentucky law – is that a Governor cannot unilaterally cut or withhold duly appropriated funds. Indeed, if, after receiving all funds to which they are entitled, Universities come in under budget, *then* any remaining funds lapse to the General Fund. KRS 45.229. Budget units can and should be efficient, and state law already provides how unused funds return to the Commonwealth.

In the current instance, however, where Universities are enacting record-high tuition, laying off more than 700 faculty and administrators, cutting programs, and furloughing employees, it is hard to contend our state should be providing less. Suggesting that university funding is akin to lighting money on fire or spending on "needless trinkets," (*see* Gov. Br. at 7), is unnecessary rhetoric that trivializes University students, faculty, staff, and their families.

VIII. The Attorney General Has Standing.

In *Commonwealth ex rel. Conway v. Thompson*, this Court made clear that "the [A]ttorney [G]eneral has the power to bring any action which he or she thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce the state's statutes." 300 S.W.3d 152, 173 (Ky. 2009). *See also* Pl's. Mem. Supp. Mot. Summ. J. at 21-22 (April 26, 2016) (R. at 611-612). Moreover, *Thompson* addressed the Attorney General's authority to challenge the Governor himself when the Governor violates the law. It stated:

> It is unreasonable to suggest that because the person with the official responsibility to seek protection on the people's behalf has no personal stake in the outcome, there is no right of redress and

> no right to injunctive relief against the Governor's usurpation of power, if such has occurred.

Id. at 173 (Internal quotations omitted).[5]

Finally, this court has recognized the Attorney General's standing by hearing similar challenges to the Governor's budget and spending authority, *see Fletcher v. Commonwealth*, 163 S.W.2d 852 (Ky. 2005), as well as actions requiring executive branch officers to provide money appropriated in the budget that the officials refused to allot. *See Ferguson v. Oates*, 314 S.W.2d 521 (Ky. 1958). The Governor's attempts to escape accountability have previously been rejected by this Court. The Attorney General has standing to bring this action.[6]

CONCLUSION

"[T]he Constitution protects us from our own best intentions: It divides power . . . among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crises of the day." *Fletcher*, 163 S.W.3d at 872 (citing *New York v. United States*, 505 U.S. 144, 187 (1992)). Regardless of the Governor's intentions, his unilateral cuts to the Universities violate the Kentucky Constitution and state statute.

For this reason, 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,

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[5] *See Hancock v. Terry Elkhorn Mining Co.*, 503 S.W.2d 710, 715 (1973) (Attorney General had right to intervene on behalf of the Commonwealth on issue of vital public interest.); *Commonwealth ex rel. Hancock v. Paxton,* 516 S.W.2d 865, 867 (Ky. 1974) (Attorney General's obligation is to the Commonwealth and he has all authority at common law).

[6] Furthermore, the issue of standing is moot. By failing to file a cross-appeal, the Appellees have not preserved it for review. *E.g.*, *Smith v. Wal-Mart Stores, Inc.*, 6 S.W.3d 829, 830 (Ky. 1999); *Oliver v. Crewdson's Adm'r*, 256 Ky. 797, 77 S.W.2d 20, 22 (Ky. 1934).

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.

Respectfully submitted,

Dated: August 12, 2016

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