COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
SUPREME COURT CASE NO.
2016-SC-000273
(2016-CA-000745)

Appeal from:
FRANKLIN CIRCUIT COURT
HON. THOMAS WINGATE
DIVISION II
CIVIL ACTION NO. 16-CI-389

JIM WAYNE, IN HIS OFFICIAL CAPACITY AS STATE REPRESENTATIVE, ET AL.

APPELLANTS

v. **BRIEF FOR APPELLANTS, INTERVENING PLAINTIFFS STATE REPRESENTATIVES JIM WAYNE, MARY LOU MARZIAN AND DARRYL OWENS**

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE GOVERNOR
ex rel. MATTHEW G. BEVIN, et al.

APPELLEES

* * * * * *

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This is to further certify that the Record on Appeal was not removed from the Clerk's Office.

Pierce Whites

INTRODUCTION

This is an appeal from a final summary judgment of the Franklin Circuit Court finding that Kentucky Governor Matthew G. Bevin (herein "the Governor"), was statutorily and constitutionally authorized to unilaterally reduce a specific higher education appropriation made by the Kentucky General Assembly in its biennial budget, despite the absence of any budgetary shortfall. See: *Opinion and Order* of May 18, 2016, Record on Appeal, (hereinafter "R") at R. 683-706.

STATEMENT CONCERNING ORAL ARGUMENT

By Order of the Court, oral argument is set for Thursday, August 18 at 10:00 a.m. prevailing Frankfort time in the Supreme Court.

STATEMENT OF POINTS AND AUTHORITIES

IX. KENTUCKY'S SEPARATION OF POWERS DOCTRINE IS THE MOST ROBUST IN THE NATION; FOREIGN CASES SUPPORT THE GENERAL ASSEMBLY'S POSITION p.

STATEMENT OF THE CASE

The General Assembly is the sole branch of government authorized to appropriate funds and create a balanced budget for the Commonwealth. Our constitutional system guarantees that scarce resources are applied to areas of greatest need, while avoiding any spending in excess of available funds. Kentucky Constitution, Sections 49, 50 and 171; *Fletcher v. Com*, 163 SW3d 852, 856 (Ky. 2005).

The Legislature's extensive committee system provides multiple avenues for citizen involvement in the budgeting process. Numerous individual members perform specific budgetary research and drafting. See: House Rule 42, establishing seven (7) standing budget subcommittees of up to ten (10) members each. Budget subcommittees hold public hearings and formulate recommendations for standing committee review. House Rule 42A. This ensures meaningful participation by all House members and the public which elects them.

This system is mirrored in the Senate, which independently debates and devises its own proposed budget. The House and Senate versions are ultimately reconciled at the conclusion of the exhaustive budgeting process, as part of the "comprehensive scheme…for preparing and enacting a 'budget bill' by which the revenues of the Commonwealth are appropriated for the operation of the three departments of government during the ensuing biennium." *Fletcher*, *supra.*, 163 SW3d at 856, citing KRS 48.300(1).

When the General Assembly creates the Commonwealth's budget, each of the separate and specific budget appropriations has individual force of law, as provided by KRS 48.311 ("each appropriation sum …shall be a separate and specific appropriation and law.") The

General Assembly conducted extensive public hearings and debates in creating the 2014 budget, all to ensure maximum public input into the budgeting process.

This laborious process produced the Executive Branch Budget Law, House Bill 235 (2014 Ordinary Session) 2014 Ky. Acts, Chapter 117, (herein, the "Budget."). A precisely calculated general fund appropriation for the Commonwealth's public colleges and universities was among the specific sums established. Id., Part I(K) Sections 3-11. This higher education appropriation is released in stages called "allotments."

Just prior to the release of the final budgeted allotment, the Governor issued a letter to the Secretary of the Finance and Administration Cabinet and the State Budget Director purporting to eliminate 4.5% of the money appropriated to higher education and sought to impound this appropriation in the Budget Reserve Trust Fund Account, where the funds are statutorily required to "remain unallotted." KRS 48.705 (1).

The Governor claimed that elimination of the lawful budgetary appropriation was within his power "pursuant to the authority provided to me in KRS 48.620(1)...." See: Letter of March 31, 2016, R. 189-90. Following public outcry, and shortly after this suit was instituted, the Governor then reduced this higher education cut to 2%, and removed Kentucky State University from the list of affected institutions, by letter of April 19, 2016.

In stark contrast to the public access and participation guaranteed by our time honored legislative budgeting system, these gubernatorial actions appeared with no warning, no citizen involvement, no public testing of the assertions made, in short with none of the safeguards and transparent processes routinely offered by the General Assembly. The chasm between the regular

and methodical budgeting process of the General Assembly and the arbitrary actions of the Executive could scarcely be greater.

The Governor's sudden and unexpected subsequent reduction of the cuts by more than half underscores the haphazard and capricious nature of his action. The purpose of a budget is to ensure orderly availability and disbursement of funds necessary to run essential state services. The Governor's unexpected decision to cut higher education budgets late in the fiscal year ensured disruption in the higher education system.

There exists no financial emergency justifying this massive overreach by the Executive. The biennial budget contains a succinct Budget Reduction Plan which includes an express limited delegation of power to the Governor authorizing a carefully prescribed series of steps to be undertaken in the event of a budget shortfall. No such shortfall has occurred, and Kentucky is actually enjoying an unexpected $49 million dollar surplus, with the General Fund topping $10 billion dollars for the first time in the history of the Commonwealth, according to an official report from the Office of the State Budget Director on July 11, 2016.

The underlying circuit court action was instituted by the Kentucky Attorney General on April 11, 2016. The Intervening Plaintiffs joined the suit one day later, alleging constitutional and statutory bars to the Governor's attempted budget reduction. The disputed funds were placed in a trust account by Agreed Order of April 26, 2016, where they remain. R. 557-59. This appeal followed a grant of summary judgment in favor of the Governor. See: *Opinion and Order* of May 18, 2016, R. 683-706.

This Honorable Court recognized the public importance of the case, granting transfer from the Court of Appeals and ordering expedited review and oral argument, by *Order* of June 27, 2016.

ARGUMENT

I. STANDARD OF REVIEW AND PRESERVATION OF ERRORS IN THE RECORD

This Court reviews questions of constitutional law *de novo*. See: *Fletcher v. Com*, 163 SW3d 852, 856 (Ky. 2005). All errors complained of are preserved in the record in the parties' Memoranda of Law and the trial court's Opinions and Orders and are cited by reference numbers thereto.

II. THE INTERVENING PLAINTIFFS HAVE STANDING TO DEFEND THE CONSTITUTIONAL RIGHTS ENTRUSTED TO THEM BY THE PEOPLE

The Intervening Plaintiffs are members of the General Assembly elected by the citizens of their respective districts for the fundamental purpose of debating, devising and enacting a biennial state budget. To this end, the Intervening Plaintiffs solicited input from their constituents regarding budgetary needs, conducted and participated in lengthy public hearings and debates regarding the wisest use of limited public funds, filed and debated amendments to the budget plan, and voted for or against the final budget bill, all as contemplated and directed by the Kentucky Constitution, at Sections 49, 50 and 171. The Intervening Plaintiffs have suffered a grave infringement of their fundamental Constitutional duty to enact a biennial budget on behalf of their constituents by reason of the Governor's actions in unilaterally reducing a specific appropriation made by the legislature in furtherance of higher education in this Commonwealth.

The Governor argues that this Court does not have the power to allow legislators to intervene in this action. Established caselaw shows that argument to be without merit. It has been the practice of both this Court and the Kentucky Supreme Court to recognize that members of the General Assembly are willing and able to defend the Kentucky Constitution's "forceful command" that the powers of the Legislative Branch be protected from invasion by the Executive Branch. *Fletcher, supra.,* 163 SW3d at 861 (Ky. 2005), quoting *Ex Parte Auditor of Public Accounts,* 609 SW2d 682, 684 (Ky. 1980).

The Governor relies on inapposite federal cases in opposing the joinder of the three Intervening Plaintiffs. See: The Governor's *Response in Opposition to Intervention,* R.475-487. The rationale of these cases has never once been applied to issues involving the Kentucky General Assembly and goes against well-established Kentucky law.

Learned commentators note that the federal cases cited by the Governor are not the law in Kentucky:

> The courts of Kentucky seem to take a broader view of when a public official can go to court to defend the prerogatives of office than did the Supreme Court of the United States in *Raines v. Byrd* [521 US 811 (1997)].

Salamanca, "The Constitutionality of an Executive Spending Plan", 92 Ky. L. J. 149, 200 (2003-4), discussing *Legislative Research Commission v. Brown,* 664 SW2d 907 (Ky. 1984).

Indeed, both the Franklin Circuit Court and the Kentucky Supreme Court have recognized State Representative Jim Wayne (an Intervening Plaintiff here) as an appropriate party in the seminal case of *Fletcher v. Commonwealth, supra.,* where Representative Wayne appeared in his capacity as an elected member of the Kentucky House of Representatives in

order to successfully challenge previous unconstitutional budget action by an earlier Governor of Kentucky.

This Court has long recognized that no party has a stronger interest in vindicating separation of powers than a member of the offended branch of government, and so wisely allow lawmakers to brief issues and raise arguments. This assures that all relevant facts and issues are brought to the Court's attention, and it is well within the Court's purview to direct such parties to provide relevant briefing. To deny legislative standing would risk having pertinent Constitutional issues receive less briefing and analysis, which can only add to the burden of judicial decision-making. Clearly the Franklin Circuit Court has extensive experience in exercising its discretion to ensure that it is well informed and manages its docket as it sees fit.

The Governor's *Response* admits that the Legislative Branch of government has an interest in this litigation, but asserts that a majority of the members must join in the action before the Court can recognize that interest. Governor's *Response*, p. 7, R. 482. The addition of fifty one (51) members of the House as plaintiffs would not be in the interest of judicial economy, where the present intervenors are able to fully represent both the members who voted for the budget as well as those who voted against it. Requiring a majority of House members to intervene is a needlessly complex threshold for standing that is seen only in federal litigation involving members of the United States Congress, and has never been the rule in this Commonwealth. Such a mass intervention has never been found necessary before and would constitute a significant change to the time-honored practice of allowing individual representatives to offer perspective and arguments to aid the Court.

This matter cannot be fully adjudicated in the absence of members of the General Assembly. Kentucky courts have long held that members of legislative bodies must be named individually as parties-defendant in order to invoke a trial court's jurisdiction. See: *Lewis v. Board of Councilmen Of Frankfort*, 204 S.W.2d 813 (Ky. 1947). A few members may represent the interests of the whole. *Rose v. Council for Better Educ., Inc.*, 790 SW2d 186, 205 (Ky. 1989). Without Movants being permitted to intervene, important interested parties are not represented before the Court.

The Franklin Circuit Court correctly granted standing to the Intervening Plaintiffs, holding:

> [T]he Court is not persuaded by the Governor's reliance on federal law regarding Movants' standing to intervene as legislators. Movants herein allege more than the legislators in *Raines* and *Baird;* Movants do not simply allege a dilution to their institutional ability to legislate. Rather, if the Court were to ultimately rule in favor of theGovernor and find that he has not violated Kentucky's Separation of Powers clause or that he has not violated statutes governing the budget process, what Movants allege is a real and present invasion and nullification upon their legislative ability. Being recently reminded of the parentage of Section 28 of the Kentucky Constitution, as explained by the Supreme Court of Kentucky in *Fletcher v. Commonwealth*, 163 SW3d 852 (Ky. 2005), the Court concludes that Kentucky's separation of powers doctrine is both strong and unique. To the extent that this case raises a question touching upon separation of powers, Movants must have standing to participate.
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> . . . .
>
> [T]he Court is persuaded by citation to the Kentucky Supreme Court in *Appalachian Racing LLC v. Family Trust Found. Of Kentucky, Inc.*, 427 SW3d 726 (Ky. 2014), "The adversarial system promotes sound judicial reasoning by assuring that the courts are fully and fairly informed. Rather than a reason for dismissing the requirement for adversarial parties, the heightened immediacy and public importance of an issue are all the more reason to require true adversarial participation. *Appalachian Racing,* 423 SW3d at 734. The Court agrees with the Movants that "no party has a stronger interest in vindicating separation of powers than a member of the offended branch of government." Movants' Reply Brief at 3. Because the Movants have shown that they share some issues of law and fact in common with those raised in the initial action, the Court hereby exercises its discretion and permits the Movants to intervene as Plaintiffs in the above-styled suit.
>
> This case turns on the most very basic function of government – namely, the provision of services and resources to its citizens. Movants play an integral role in how this process occurs in the Commonwealth, and the Court would be remiss to conclude that Movants

do not have standing to enforce the rights and duties conferred upon them as elected representatives, and as such they are appropriate parties to this lawsuit.

Order of April 26, 2016, at pp. 4 - 6.

The Intervening Plaintiffs, who are members of the offended branch of government, urge this Court to affirm their standing as appropriate litigants, and urge the Court to restore the Constitutional guarantee of Separation of Powers, and return the operation of state finance to the balanced and democratic system envisioned by the Framers of our Constitution.

III. BUDGET LANGUAGE PREVAILS OVER CONFLICTING STATUTES

The Governor's unprecedented action in refusing to honor a specific budget appropriation made by the General Assembly is said to be authorized by a previously existing statute. Before analyzing that claim, it is appropriate to note that this Court has long ruled that existing statutes cannot be invoked to frustrate plain budgetary intent. The Governor's selective reading of existing laws cannot extinguish a lawful legislative appropriation because a budget bill is a statute which takes precedence over all preceding legislative enactments. This certainly includes any statutes relied upon by the Governor, to the extent these earlier enactments are said to constrain the prompt disbursement of the legislature's appropriation to Kentucky's higher education community. Simply citing an allotment statute and giving it a tortured reading is not sufficient to overcome the plain directives of a multi-billion dollar budget plan.

The Kentucky High Court was called upon to defend the legislature's funding of higher education nearly one hundred years ago, in a case startlingly similar to the one at bar. In *James, Auditor, v. State University*, 131 Ky. 172, 114 SW 767 (1908), an Executive branch official refused to fund the new State University at Lexington, the Eastern State Normal School at

Richmond, and the Western State Normal School at Bowling Green, claiming that the budgeted funds would "exceed the annual revenues of the state...." *James*, *supra.*, 114 SW at 768-69.

The Executive branch was ordered by the High Court to follow the budgeting directives of the General Assembly, saying "surely it has the right to make an appropriation to equip or repair its State University." *James*, 114 SW at 772. Rejecting the claim of the Executive branch that payment would unbalance the state budget, the Court recognized the legislature's unmistakable budgeting prerogatives: "[W]e see no good reason for denying to the general Assembly the right in this act to proceed to proceed to the limit of its constitutional power." 114 SW at 768-69; 772, quoting *Hager, Auditor, v. Gast* 119 Ky. 502, 84 SW 556 (1905). The High Court firmly rejected the Executive's attempt to pick and choose which higher education appropriations should be paid. "[T]he question may well be asked, is it the province of the Auditor, instead of paying the appropriations in the order made by the Legislature, to select and pay only such of them as he may think should be paid first...?" *James,* supra., 114 SW at 773.

This dispositive holding was reaffirmed in *Com. ex rel Armstrong v. Collins*, 709 SW2d 437 (Ky. 1986), holding that our law has long recognized that a valid budget provision may "effectively suspend and modify existing statutes which carry financial implication...." *Armstrong*, 709 SW2d at 443. This Court reasoned:

> Because of the General Assembly's exclusive authority with respect to public funds and the budget, we have no problem in deciding that Ky. Const. Sec. 15applies to statutes which can be affected by the budget bill of the Commonwealth. The General Assembly is mandated to operate the financial offices of the Commonwealth under a balanced budget. If revenues become inadequate, the General Assembly must be empowered to use adequate devices to balance the budget. Provisions in the budget document which effectively suspend and modify existing statutes which carry financial implication certainly are consistent with those duties and responsibilities....HB 474 is a budget—a biennial budget—directing the expenditure of literally billions of dollars to be used in the operation of state government. The provisions thereof that suspend or modify the

> expenditure of monies in the event of a financial problem are clearly appropriations, in the broad sense. **Appropriation of the people's money is the exclusive responsibility of the General Assembly, including the power to suspend or modify such appropriation under emergency financial circumstances.**

Armstrong, supra., 709 SW2d at 443-444, (emphasis supplied).

The clear holding of this Court is that budgetary language overrides and supersedes earlier statutory schemes which may be invoked to distort the plain meaning of a budget appropriation. This conclusion is buttressed by *Armstrong's* predecessor case, *Mattingly v. Kirtley*, 285 Ky 795, 149 SW2d 521 (Ky. 1941), in which a circuit court forbade the expenditure of budget funds due to an alleged conflict with earlier statutes. The High Court rejected this ruling:

> Reading all of the applicable provisions of those acts together there is no escape from the conclusion that **the last word from the legislature** with reference to the question under consideration (the 1940 appropriation act) **must prevail**-its enactment not being on conflict with any constitutional provision. That word says, as we have seen, that the state agency under consideration, and which is being directly administered by plaintiff, may expend for the purposes indicated $6,500. Therefore, we repeat, the learned circuit judge was in error in determining otherwise.

Id., at 523, emphasis supplied.

The same lesson is taught in *Beshear v. Haydon Bridge Co.,* 304 SW3d 682, 683 (Ky. 2010) ("Haydon I"), in which this Court held that only the General Assembly has the power to adopt a budget bill reducing, eliminating and/or transferring certain appropriated funds—effectively suspending, or temporarily modifying the effects of any statutes to the contrary. The Court said:

> *Armstrong* addressed several conflicts between then-existing statutes and the budgetary acts of the General Assembly. *Armstrong,* 709 SW2d at 445-338.In each instance... we ***upheld*** the budgetary acts under the recognition that then KRS 446.085(S.B. 294) authorized the suspension or modification and overrode the ***conflicting statute***. *Armstrong,* 709 SW2d at 448

Haydon I, 304 SW2d at 704-05, emphasis in original.

This line of cases forecloses the Governor's convoluted reading of earlier statutes as somehow authorizing the elimination of a lawful budget appropriation made by the General Assembly. Clearly, the individual budget appropriations are not subject to Executive manipulation, except as may be explicitly authorized in the budget itself (as in the Budget Reduction Plan, which is the carefully calibrated safety valve to be invoked in the event of a budget shortfall.)

The "last word" from the legislature regarding the funding of higher education is set out with admirable clarity in the budget. Ploys and devices to avoid executing the plain budgetary language have not been looked upon with favor by this Court. This laudable insistence upon adherence to plain budgetary directives should be reaffirmed in the present case.

IV. FAITHFULLY EXECUTING THE BUDGET LAW IS NOT UNSUSTAINABLE OR IRRESPONSIBLE

The Governor believes (as no doubt every Governor does) that he has a better idea than the legislature of where scarce resources should be applied. The circuit court decided that simply spending all budgeted funds as directed by the General Assembly was somehow unworkable, and adopted the Governor's position *verbatim*, holding:

> The Court simply cannot endorse the position advanced by the Attorney General and the Intervening State Representatives that all appropriated funds must be spent or made available for expenditure. This position is both an irresponsible one and an unsustainable one for government to take.

Opinion and Order, at p.21, R. 703.

The intentions of both the Governor and the Franklin Circuit Court are no doubt honorable, but the circuit court's adoption of this alarmist position does not withstand scrutiny. Kentucky requires that the budget created by the General Assembly be balanced. There is no danger that a budget will be "unsustainable" because it is constitutionally impermissible to spend more than the Commonwealth takes in.

As for being "irresponsible", the decision to fund specific public policy goals with tax dollars is a fundamental political judgment entrusted to the General Assembly alone. It apparently seemed to the Governor that supporting higher education in the manner directed by the legislature was "irresponsible." To others, the cutting of education funding at the end of the fiscal year was the true irresponsible action, resulting in layoffs, cuts in services, and yet more tuition increases, adding to the burdens of struggling taxpayers. As matters now stand, it is contemplated that the judiciary will sit in judgment of "the point that funding levels reach constitutionally impermissible low levels," making the courts the ultimate arbiters of all future budget funding decisions. Opinion and Order at p. 21, supra. Surely this is not a proper and workable solution

The Governor's *Combined Response to Motion for Summary Judgment of 5/3/16,* (hereinafter "*Bevin Combined Response*") R. 633-658, simply asserts that "the Governor has taken the purse of money provided by the legislature and has reasonably decided that the legislature's will can be satisfied without spending all of the money in the purse." Id., at p. 10, R.643. The Governor asks this Court to rule that this action is authorized by Kentucky Constitution Section 81, which mandates that the Governor "shall take care that the laws be faithfully executed." The Executive Branch Budget is, of course, one of the most important laws

that the Governor must "faithfully execute." The Governor's claim of expansive authority to alter budget provisions is a blatant violation of this primary duty to execute the laws.

The sudden cutting millions of dollars from the budgeted appropriations of Kentucky's higher education system wrought predictable losses and turmoil. Far from the Franklin Circuit Court's belief that the cuts could be absorbed "without negative impact," (*Opinion and Order*, at p. 20), a cascade of layoffs, cut backs and tuition increases were immediately triggered by the Governor's last minute budget slashing. The Franklin Circuit Court based its decision, at least in part, upon the alleged "agreement" of the higher education community with the cuts. *Id.* Of course, the affected colleges were not parties to the suit, and so did not "agree" with the cuts. Indeed, an experienced political observer might conclude that the Governor's actions in rolling back more than half the cuts as the lawsuit was in its earliest stages ensured that the affected schools would remain intimidated and coerced into inaction. As pointed out by the Intervening Plaintiffs, the affected institutions were hardly in a position to challenge the Governor directly, as this would only invite further incursions into the financially strapped higher education system budget.

The Governor forthrightly admits that he has simply substituted his judgment for that of the Legislature. He unilaterally has "decided" that the mass layoffs, tuition increases, and financial hardship caused by his budget cuts have no impact upon the Legislature's thoughtful and thorough funding plan for Kentucky's system of higher education. This assertion is patently false, and the Governor's unconstitutional and unprecedented action should be summarily rejected by the Court.

V. INVITING FUTURE LITIGATION ONLY COMPOUNDS THE CONSTITUTIONAL IMPASSE

Despite the General Assembly's mandatory funding directives, the Governor believes that "any amount of spending up to the amount of the appropriation is in conformity with the appropriation." *Bevin Combined Response*, at p. 8, R. 641. The Governor does admit that "[i]f he were to completely withhold every penny that the legislature appropriated to a budget unit, then such action might violate the separation of powers doctrine." *Bevin Combined Response*, at p. 12, R. 645.

Clearly, the Governor is convinced that he alone has the power to decide which public policy objectives should be funded, and which should not. This is a radical and unprecedented affront to Kentucky's time honored system of governance. The Governor does admit, for the first time, that "the courts are in a position to restrain a governor if he...were to abuse his...authority", (*Bevin Combined Response*, at p. 14, R. 647). It is respectfully suggested by the Intervening Plaintiffs that such action is needed now.

The Franklin Circuit Court adopted the Governor's argument in its entirety, holding:

> If, one day, the executive purports to wield divine power over another branch, or even over a division, cabinet or program within the executive branch, to the point that funding levels reach constitutionally impermissibly low levels, the Judiciary stands fully capable of realigning the balance of power.

Opinion and Order at p. 21.

The upshot of this holding is that a Governor may freely cut at least 4.5% of an appropriation because this does not result in a "constitutionally impermissible low level" of funding. The Executive is effectively invited to explore the limits of his new power. The

questions then arise as to whether a budget cut of 10% is too much, and may funding promised to law enforcement and public health services be cut unilaterally at the end of the fiscal year, throwing these providers of essential services into panic and disarray, as occurred to Kentucky's colleges and universities in this case. Simply file a lawsuit to find out, says the Franklin Circuit Court.

The problem with this proposed solution is that it encourages gamesmanship, provokes further cuts by the executive, effectively targets societal programs unpopular with whatever political faction holds gubernatorial power, and guarantees lengthy periods of uncertainty while litigation plays out.

It is respectfully submitted that this cannot be the proper conclusion. Rather than demarcating a bright line separating one branch of government from another, the current impasse is compounded by requiring case by case adjudication in response to each attempted budget reduction. Having invited budget cutting by the Governor in the absence of a budget shortfall, the courts would then sit in judgment of which "funding levels" are "constitutionally impermissible." From the point of view of the Intervening Plaintiffs, who are Representatives charged with debating, devising and enacting the biennial budget, this is an even worse outcome than simply sharing budget making authority with the Executive. Now the courts will sit in judgment of reductions made by the Governor to the appropriations established by the General Assembly. Budgetary uncertainty is all but guaranteed, with litigation and delay built into the system.

This unworkable outcome underscores the wisdom of the Framers of our Constitution in consigning the drafting of a budget to one, and only one, branch of government. This Honorable

Court firmly endorsed this cornerstone of our democracy in *Fletcher, supra.*, and strongly cautioned against involving the judiciary in such disputes, saying:

> The "political question" doctrine is grounded primarily in the separation of powers.... the judicial department should not interfere in the exercise by another department of a discretion that is committed by a textually demonstrable provision of the Constitution to the other department....see, e.g., ...*Dalton v. State Prop. & Bldg. Comm'n,* 304 SW2d at 345 (wisdom of fiscal policy, levy of taxes, and appropriation of revenue is outside the purview of judicial authority); *Lakes v. Goodloe,* 195 Ky. 240, 242 SW 632, 635 (1922) ("The expediency of a statute, or whether or not the public weal demands its enactment, are political questions, which address themselves to the legislative department of the government ...."). We agree with the Governor that the judicial department should neither inject itself nor be injected into the details of the executive department budget process. What constitutes an essential service depends largely on political, social and economic considerations, not legal ones. *Vaughn v. Knopf,* 895 SW2d 566, 567 (Ky. 1995) (declaring the statute requiring circuit court oversight of sheriff's budget unconstitutional: "In acting on these annual budget requests, the judges would, *per se,* be injected into the political side of the executive branch offices."

Fletcher, supra., 163 SW3d at 860.

For these reasons, this Court should swiftly act to say "what the law is" rather than invite further future litigation. This Court should recognize that public policy arguments as to what programs should be funded are inevitable, and that the General Assembly is ideally suited to conduct such inquiries. The *Opinion and Order* entered below erroneously allows the Governor to unilaterally alter the budgetary conclusions reached by the legislature, and authorizes the judiciary to sit in review of those decisions, severely undercutting Kentucky's strong Separation of Powers doctrine.

VI. THIS COURT HAS RULED THAT THE GOVERNOR CANNOT UNILATERALLY SPEND OR ALLOCATE FUNDS

The Governor's generic assertion of authority to reduce any appropriations made by the General Assembly ignores recent controlling caselaw from the Kentucky Supreme Court. This

Court has rejected the Governor's argument that merely changing an "allocation" is somehow less constitutionally suspect than other budgetary alterations, saying:

> Of course there is no authority for the Governor unilaterally spending public funds or allocating them other than as determined by the General Assembly.

Beshear v. Haydon Bridge, 416 SW2d 280, at 295-296 (Ky. 2013), (Haydon II).

Here, it is undeniable that the Governor's actions allocate funds "other than as determined by the General Assembly." No longer will the funds go to support the critical mission of higher education. Instead, the Governor has attempted to impound the funds in the Budget Reserve Trust Fund, which is a wholly separate budget account where the funds legally "remain unallotted." KRS 48.705(1). The General Assembly certainly had the power to direct these funds into the Budget Reserve Trust Fund had it so chosen, but it made an informed decision to instead allocate the funds to higher education, following extensive debate and public testimony regarding the wisdom of this investment in the future. That lawful allocation has been unceremoniously defied by the Governor, in stark defiance of *Haydon II*, supra.

If this unlawful action is unchecked, the temptation for an Executive to systematically slash multiple specific spending appropriations will form the basis of future state budgets. No longer will the question be "What did the legislature appropriate?" rather it will be "What will the Governor allow to be spent?" thus turning Kentucky's budgetary process on its head. If the Governor can decrease the final allotment of the fiscal year to the colleges and universities, (and thereby unavoidably cut the actual fiscal appropriation), it is inevitable that he and all future Governors will use this heretofore unknown authority to systematically undercut public spending for any purposes not supported by his political party, circle of advisors, or church. By simply

undertaking such budget reallocations, the Governor plainly seeks to create "his own budget", which is what this Honorable Court has made clear he cannot do. *Fletcher*, 163 SW3d, 858; 869.

Thus in one blow the moderating and democratizing effects of the legislature's budgetmaking process will be lost. The voice of the people, heard through their elected representatives, will be subsumed in the self-interested exercise of budgetary control by one person. Instead of an orderly public budgetary process of testimony, debate, amendment and reconciliation, Kentucky will be subject to the whims of political posturing. This is not a loss our citizens should be forced to endure.

The Governor is not entitled to substitute his budgetary judgment for that of the Legislature. His sweeping claims to power violate Kentucky's Constitution and statutes. Essential services specifically funded with scarce taxpayer dollars are now being eliminated due to the Governor's illegal usurpation of the duties of the General Assembly. Prompt intervention by this Honorable Court is necessary to restore the most fundamental safeguards against autocratic action.

VII. ANY BUDGET REDUCTION MUST CONFORM TO THE MANDATORY REDUCTION PLAN

The Executive Branch Budget does contain an actual delegation to the Governor of the authority to cut the budget. This is the "General Fund Budget Reduction Plan", which is a highly specific and limited guide to the precise method of reducing spending in the event of a budget shortfall. See: 2014 Ky. Acts Ch 117, Part VI. This statutory directive is an integral part of the biennial budget, and has evolved over the years as a lawful limited grant of budgetary authority from the legislative to the executive branch.

It is difficult to imagine how the Governor enjoys the broad power to cut budget provisions at will when such great care has been taken by the Legislature to limit that very power. Plainly, the Legislature decided that any alterations to the budget would be made only in the event of a specified budget shortfall, and only in the manner directed by the Legislature. The Governor has absolutely no discretion in making the budget cuts which may be necessitated by a shortfall: Each step is set out for him to follow exactly. His claim to a similar power whenever he "decides" it is needed is alien to Kentucky's jurisprudence. (For this reason, the reference to one version of the House Executive Branch Budget Bill which added language forbidding reductions in appropriations to universities is misguided. (See: *Opinion and Order* at p.16.) The Legislature is free to employ every means at its disposal to enforce the required separation of powers. Recognizing that the Governor exceeded his authority and taking every opportunity to correct this error is not an admission of the existence of the claimed power.)

In the Governor's *Memorandum of Law in Support of Motion to Dismiss* of April 18, 2016, R.439-457, (herein "*Bevin Memorandum)*, he asserts that "downward revisions [of appropriations] are indeed permissible," and that "[a]n appropriation is a spending ceiling, not a spending floor." (*Bevin Memorandum* at p. 11; 13), R, 450; 452. This contention wholly ignores the specific, multi-step process that must be followed if any budget reductions are sought. See: KRS 48.600. Step one of any attempted budget reduction is the existence of a revenue shortfall. "No budget revision action shall be taken by any branch head in excess of the actual or projected revenue shortfall." KRS 48.600(2).

It is uncontroverted that Kentucky revenues are rising, not falling, and no budget reduction power is available to the Governor under that circumstance. If a budget crisis arises, the Executive Branch Budget itself contains a highly specific Budget Reduction Plan mandating

required steps to bring the budget back into balance in the event of a shortfall. See: 2014 Ky. Acts Ch. 117, Part VI.

The Governor ignores this highly detailed and limited delegation of budget cutting authority. His actions are in clear violation of the express mandates of the budget itself. Not only is there no budget shortfall triggering his budget reduction attempt, the Governor's actions are wholly at odds with the specific measures authorized in the Budget Reduction Plan.

The meaning of the Budget Reduction Plan is self-evident: The General Assembly has taken great care to assure that the budget it debates, devises and enacts will be carried out as written, and as our Constitution directs. Any reductions in appropriations are triggered only by a shortfall in revenue, and are directed to be taken in a clearly defined and exact manner. In the present case, the Governor has acted unlawfully by unilaterally cutting a specific appropriation under a broad and mistaken claim of right. This he most assuredly cannot do.

The Budget Reduction Plan, which the Governor completely ignores in this litigation, is the only Constitutionally permissible delegation of budget-making authority made to the Executive. Such a "limited delegation" clearly establishes "policies and standards" to remove any discretion on the Governor's part, which is the essence of a proper delegation. See: *Fletcher v. Commonwealth, supra.*, at 862-863.

Contrast this with the Governor's assertion that "an omnipresent threat to Kentucky's economic stability," (i.e. pension debt), authorizes his unfettered discretion to cut the budget where he chooses. *Bevin Memorandum*, p. 2, R. 440. While the Governor's budgetary opinion is no doubt genuine, it does not operate to defeat Kentucky's "strictly construed" separation of

powers doctrine. *Fletcher, supra.*, 163 SW3d at 862, quoting *LRC v. Brown,* 664 SW2d 907, 912 (Ky. 1984).

The inescapable fact is that the Separation of Powers doctrine operates to protect the General Assembly's budget making authority regardless of what anyone else may think of its decisions. It is not enough to simply hurl invectives at the budget making process. Asserting that the process is "outrageously bad" or "irresponsible" is simply political speech, appropriate for the vigorous give and take of public debate, but in no way useful in the resolution of fundamental issues of Constitutional law. As the *Fletcher* Court appropriately summed up the rule:

> [I]n the absence of a proper delegation of authority by one department to another, or specific exception articulated by the Constitution, itself, Section 28 has erected a "high wall" … which precludes the exercise by one department of a power vested solely in either of the others.
>
> The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

163 SW3d at 863, quoting *Myers v United States*, 272 US 52, 293 (1926) (Brandeis, J., dissenting). Indeed, it is the function of all democratic government "to save the people from autocracy" and it is specifically the province of the Court of Justice to issue the orders accomplishing this primary goal.

To be sure, this argument is not intended to denigrate the opinions of the Governor or the Franklin Circuit Court, but a Kentucky Governor clearly cannot alter a lawful budget simply because he believes he has a better spending plan. Again taking guidance from the *Fletcher* Court:

> We reject the proposition that a Governor can unilaterally declare an emergency and spend unappropriated funds to resolve it. As Justice Jackson said in his famous concurring opinion in the *Youngstown* case: They [our forefathers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.
>
> ****
>
> Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.
>
> ****
>
> 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.

Fletcher, supra, at 871, quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US at 646, 649-50, 652, and 655

The Governor's attempts to justify his unprecedented claim to power are feeble. He suggests that "silence on the issue of downward revisions" somehow implies a delegation to him of budgeting authority. *Bevin Combined Response*, at p. 4, R. 637. This betrays a fundamental misconception of the nature of such a delegation. A power entrusted to one branch of government cannot be impliedly granted to another. Rather, it must be must be explicitly shared under limited conditions, and involve no discretionary authority on the part of the recipient branch. See: *Board of Trustees of the Judicial Retirement Form Retirement System v. Attorney General,* 132 SW3d 770 (Ky 2004), holding:

> Kentucky holds to a higher standard. Our predecessor court noted that Kentucky is more "restrict of powers granted" than the federal Constitution because the federal Constitution does not have a "provision expressly forbidding the Congress to delegate its legislative powers" as do Sections 27, 28, 29 and 60 of the Kentucky Constitution. . . . Indeed, in the area of nondelegation, Kentucky may be unsurpassed by any state in the Union. . . . Kentucky law mandates that "the legislature must lay down policies and establish standards."

Id.

The path forward is clear. Unilateral budget action by the Governor is unlawful and unauthorized by the tightly circumscribed power delegated under the Budget Reduction Plan.

VIII. EXECUTIVE BUDGET CUTTING IS NOT SUPPORTED BY THE GOVERNOR'S SELECTIVE STATUTORY READING

The Governor claims power to unilaterally reduce any spending provision in the Executive Branch Budget at any time and for any reason. See: *Bevin Memorandum* at p. 13, R. 452, asserting that "[a]n appropriation is a spending ceiling, not a spending floor."

The Governor acknowledges that his position is wholly dependent upon a selective reading of a single statute and boldly claims "The analysis can begin and end with KRS 48.620(1)." *Bevin Memorandum*, at p. 10. This is the also the only statute cited in the letter cutting the higher education budget. See Governor's Letter of March 31, 2016, R. 183.

The title of KRS 48.620 is "Revision of Allotment Schedule" but the Governor argues that it actually means he may alter or delete the actual "allotment" not merely the "allotment schedule." He also admits "that is exactly what he has done." *Bevin Memorandum*, at p. 10. The Governor's flawed reading of the statute is exposed as an error simply by reference to the immediately preceding statutory provision, which plainly states: "Allotments shall conform with the appropriations in the enacted . . . budget bills." See: KRS 48.610 "Schedule of Quarterly Allotments and Appropriations," (emphasis supplied). [1]

[1] The Governor's clearly recognizes that this statute prevents his budget cuts, and therefore attempted to veto it in the current fiscal year. This veto is currently being challenged by House Speaker Greg Stumbo in the Franklin Circuit Court, case number 16-CI-522. **See: VETO MESSAGE FROM THE GOVERNOR OF THE COMMONWEALTH OF KENTUCKY REGARDING HOUSE BILL 303 OF THE 2016 REGULAR SESSION,** (See Appendix to this brief, Item 2) at page 6, "General Provisions". The pertinent veto language appears as follows:

The Governor conflates the meaning of "allotment," "allotment schedule," and "appropriation." KRS 48.620 does not authorize the Governor to reduce appropriations. It clearly also does not authorize the Governor to alter allotments, otherwise KRS 48.605, ("Revision of Allotments Within Appropriations"), would simply be superfluous. What it does authorize is the one thing that the Governor clearly never did, i.e., change the schedule of allotments.

It is agreed by all parties that the multi-million dollar cut to Kentucky's universities affected the final allotment of the biennial budget. As a practical matter, if a final allotment is reduced and no other allotments are scheduled, the appropriation is unavoidably altered. A university cannot receive the full appropriation if no further payments are scheduled to take place. It is therefore undeniable that the Governor's action in cutting the final allotment of this biennial budget does not conform with the appropriation, as mandated by KRS 48.610.

The Governor's argument also fails because his action is forbidden even in the statute he exclusively relies upon. KRS 48.620 makes clear that allotments cannot exceed the appropriation, and also cannot be "expended for any other purpose than specified. . . ." Id., at Section (1). Far from granting blanket authority to cut any allotment, the statute plainly does not allow the repurposing of tax dollars at the whim of the Chief Executive. Surely if an appropriation cannot be utilized "for any other purpose" then it cannot be cut from the universities' budget in order to impound it in the Budget Reserve Trust Fund.

Revision of Appropriation Allotments: Allotments within appropriated sums for the activities and purposes contained in the enacted Executive Budget shall ~~conform to KRS 48.610 and~~ may be revised ~~pursuant to KRS 48.605 and this Act.~~

Plainly, the Governor is refusing to honor the Commonwealth's budget commitments in order to divert funds to the Budget Reserve Trust Fund for later application to his favored priorities. The Governor is remarkably forthright in this regard. See: *Bevin Memorandum*, at p. 2, R.441, making the following judicial admission:

> Governor Bevin has committed to cutting state spending so that more money can be devoted to the pension system....

This is a plain confession that the funds appropriated by the General Assembly for higher education are being cut and impounded for "some other purpose," which is specifically forbidden by the very statute relied upon by the Governor. See: KRS 48.620(1).

The Governor also ignores controlling statutory law making plain that the universities are specifically entitled to the appropriations made by the General Assembly. KRS 164A.555 directs that the Finance Secretary "shall issue warrants [for]...any amounts due by virtue of the state appropriations for that institution...." The Governor would have this Court rewrite that statute to say that the Secretary **may** issue warrants for some sum **below** the appropriated amounts, but that is clearly not what the mandatory language provides. *Bevin Combined Response*, at p. 19, R.652. In fact, this statute 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." KRS 164A.555. This statutory directive is explicitly declared to be superior to the superseded rules of KRS Chapter 45:

> Any other provisions of KRS Chapter...45...to the contrary notwithstanding, KRS 164A.555...shall govern the financial management of higher education....

KRS 164A.632(2).

Quite clearly, the universities have a specific statutory right to the actual amounts appropriated by the legislature on their behalf. The Governor's citation of KRS 45.253(4), which purportedly authorizes the raiding of agency trust accounts "when actually needed," is unavailing for several reasons. First, the statute is plainly superseded by KRS Chapter 164A, which mandates payment of the amounts appropriated. Second, explicit budget appropriations may not be constrained by statutes predating passage of the budget itself, as argued *supra.* Third, any budget revision is forbidden in the absence of a budget shortfall:

> No budget revision action shall be taken by any branch head in excess of the actual or projected budget shortfall.

KRS 48.600(2).

The Court will note that this explicit limitation is contained in a statute which postdates the law cited by the Governor, and so properly limits the attempted application of KRS 45.253(4) to these facts. In addition, of course, there is no budget shortfall at all, foreclosing the very possibility of "budget revision action" by the Executive.

Even if KRS 45.253 were applicable to the universities in question, it does not authorize the Executive budget cutting seen here. Nothing in the record suggests that the Finance Secretary directed the universities to spend down trust or agency funds prior to withholding appropriated funds. Further, the Governor did not withhold general fund appropriations so that trust and agency funds would be used first. Rather, the Governor withheld money to reduce the overall appropriation to colleges and universities in order to transfer the funds to the Budget Reserve Trust Fund, as part of his avowed plan to dedicate this funding to pension needs. No part of the Governor's attempt reflects a reasonable reading of KRS 45.253(4).

The Governor's actions in seeking to impound these funds in the Budget Reserve Trust Fund, stripped of all relation to higher education, certainly violates the mandatory provisions of the statute he now seeks to use as a shield. Furthermore, agency accounts may only be accessed "when actually needed, on requisition to the Finance and Administration Cabinet …." Id. Here, the only arguable reason that the funds may be "actually needed" is due to the unlawful cutting of the appropriation lawfully made to higher education by the legislature. The statute was further violated by the failure to appropriately "requisition" the funds appropriately. This failure is hardly surprising since reliance upon this statute is only a belated *post hoc* attempt to legitimize the Governor's budget cutting actions. The Governor's arguments that his actions are authorized by statute therefore must fail.

If this Executive budget cutting action is allowed to stand, any future Governor may slash appropriations that do not reflect his or her personal political vision, and force the entirety of the cuts to be impounded in the Budget Reserve Trust Fund. It is then a simple matter to hold this threat of continuing cuts over the legislature, in order to coerce the funding of the Governor's personal priorities as dictated. Any failure to heed the Governor's directive would result in another round of cuts and impoundments in the Budget Reserve Trust Fund. Legislative priorities will be starved, balanced budget funds will be diverted and remain unspent, societal needs will go unmet, and legislative budget making will be forever altered, replaced with an open ended standoff that could play out over many years, all to the detriment of the taxpaying public. This Honorable Court is the last redoubt before that unfortunate future materializes.

Whatever the Governor's power may be to juggle amounts between allotments is not at issue in this case. The Governor's budget cut had the direct and undeniable effect of reducing a

specific appropriation enacted by the Legislature. The Governor clearly does not have the authority to "decide" to ignore the binding budget law.

IX. KENTUCKY'S SEPARATION OF POWERS DOCTRINE IS THE MOST ROBUST IN THE NATION; FOREIGN CASES SUPPORT THE GENERAL ASSEMBLY'S POSITION

Kentucky's unique Separation of Powers clause is unequalled by any other in the nation. Whether its origins are legend or fact hardly matters now, since the saga is so firmly woven into the unique fabric of our jurisprudence. This Court recently quoted the time honored story as set forth in *Comm'rs of Sinking Fund v. George,* 104 Ky. 260,47 SW 779, 785 (1890)(Du Relle, J., dissenting):

> When [Thomas] Jefferson returned from France, the federal constitution had been adopted; and, having been appointed secretary of state, he obtained permission to go to Monticello for some months. John Breckinridge and George Nicholas paid him a visit there, and informed him that Kentucky was about to frame a constitution for herself, and that Virginia was about to permit Kentucky to become a separate and independent state. He told them that there was danger in the federal constitution, because the clause defining the powers of the departments of government was not sufficiently guarded, and that the first thing to be provided for by the Kentucky constitution should be to confine the judiciary to its powers, and the legislative and executive to theirs. Mr. Jefferson drew the form of the provision, and gave it to Nicholas and Breckinridge; and it was taken by Nicholas to the convention which met at Danville, and there presented,—Breckinridge not being present at the convention. There was much discussion and dissent when the article was offered, but, when its author was made known, the respect of Kentucky for the great name of Jefferson carried it through, and it was at once adopted.

Fletcher, supra., 163 SW3d at 861. If our celebrated Separation of Powers clause means anything, it ensures that the fundamental legislative function of appropriating is kept wholly separate from the executive.

The Franklin Circuit Court adopted a string cite of foreign cases proffered by the Governor in support his supposed budget cutting powers. *Opinion and Order* at pp. 17-18. It should be noted that even the foreign cases selected by the Governor come nowhere near authorizing his attempts at seizing budgeting power. The cases typically involve a severe financial shortfall and rely upon proper delegations of budgetary authority from the state legislature. Where these prerequisites are satisfied, and the state does not share Kentucky's singularly strong separation of powers doctrine, some limited budgetary authority has been found to exist in the executive branch. This is clearly not the case before this Court, where no financial shortfall exists, no attempt was made to comply with the Budget Reduction Plan, and statutory directives mandating payment to Kentucky's colleges and universities are ignored.

The Governor ignores well established Kentucky law making plain that the separation of powers doctrine is to be "strictly construed", (*Fletcher, supra.*, at 862), in favor of foreign caselaw which has no such limitation. See: pp. 16-17 of the *Bevin Memorandum,* R. 455-56. Upon review, it is clear that the proffered cases actually prove the opposite of what is claimed. The first case cited by the Governor, and adopted by the Franklin Circuit Court, actually holds:

> Once a bill has been duly enacted, however, the Governor is obligated to execute the law as it has emerged from the legislative process. He is not free to circumvent that process by withholding funds or otherwise failing to execute the law on the basis of his views regarding the social utility or wisdom of the law.....

Opinion of the Justices to the Senate, 376 NE2d 1217, 1221-22 (Mass., 1978).

The Governor is trying to do exactly what his own authority says he **cannot** do. The Governor says that the pension liability is "an omnipresent threat" and that his cuts to the universities are made "to eliminate this threat." *Bevin Memorandum*, at p. 2, R. 440. The Governor's actions merely substitute one man's judgment for the voice of the popularly elected

members of the General Assembly, who act at the direction of the public. That is an impermissible result.

More recent cases cited by the Governor reach the same commonsense conclusion:

> We are of the view that our Constitution prohibits the Governor from substituting his judgment for that of the Legislature except through the use of the veto power. In the instances before us, the types of reversions ordered by the Governor represent something more than fiscal management. The effect of the reversions ordered here is to substitute the Governor's judgment for that of the legislature on matters of appropriation. Therefore, we hold that the Governor's reversion orders were improper.

Rios v. Symington, 833 P2d 20, 29 (Ariz. 1992), emphasis supplied.

Contrary to the Governor's assertion, there is no "general rule" allowing a Governor to spend less than the amount appropriated by a Legislature. Any attempted reduction must be made in strict conformity with all statutory and Constitutional requirements. To hold otherwise would be to render meaningless the careful and considered appropriations made by the Kentucky Legislature pursuant to its Constitutional duty.

The other foreign cases cited by the Governor and adopted by the Franklin Circuit Court similarly make plain that the Governor's action should not be sustained here. In *New Hampshire Health Care Assoc. v. Governor*, 13 A3d 145 (NH 2011), cited approvingly on page 17 of the *Opinion and Order*, (R. 700), the court actually trumpets the fact that New Hampshire has the weakest separation of powers doctrine in the nation, saying:

> "Unlike most state constitutions the language of the New Hampshire Constitution recognizes that separation of powers in a workable government cannot be absolute." *Opinion of the Justices,* 110 N.H. 359, 362, 266 A.2d 823 (1970).... Part I, Article 37 "contemplates no absolute fixation and rigidity of powers between the three great departments of government." ....Instead, it expressly recognizes that, as a practical matter, "there must be some overlapping" among the three branches of government and

> that "the erection of impenetrable barriers" among them is not required. *Opinion of the Justices,* 110 N.H. at 363, 266 A.2d 823....Moreover, unlike the construction given to separation of powers clauses by courts in other jurisdictions... we give Part I, Article 37 "a practical construction." *Opinion of the Justices,* 110 N.H. at 363, 266 A.2d 823 (quotation omitted).

New Hampshire, supra., 13 A3d at 153.

Kentucky's law is the exact opposite of the cases relied upon in the *Opinion and Order*. This Court laid down the law in *Fletcher, supra.*, and made plain that budgetary power cannot "flow over the 'high wall' erected by Section 28 [of the Kentucky Constitution].... " Id., 163 SW 3d at 872. Kentucky simply does not have "overlapping" of its Constitutional divisions.

Other foreign cases supposedly authorizing the Governor's actions are also inapposite. In *Brayton v. Pawlenty*, 781 NW2d 357 (Minn 2010), the Minnesota Supreme Court authorized a budget reduction only where a budget shortfall was demonstrated, and the Governor complied with the legislature's budget reduction guidelines:

> [I]t appears clear to us that the object to be attained...was the creation of a mechanism for adjusting expenditures, to be available **in the event of an unanticipated revenue shortfall after enactment of a balanced budget.** This narrow purpose and interpretation is consistent with and reflected in all prior use of the statute.

Brayton, supra., 781 NW2d at 367, emphasis supplied. Here, of course, Kentucky enjoys a budget surplus, and no credible claim of financial exigency can be made.

Still more cases cited in support of the Governor's actions are irrelevant, and provide no guidance in the present dispute. *McInnish v. Riley*, 925 So 2d 174 (Ala 2005), dealt only with legislation which "allowed the legislative body to control, post-enactment, the executive branch in the execution of the law," and has been limited to its facts. See: *State ex rel. King v. Morton*, 955 So2d 1012, 1019 (Ala 2006).

Rather than relying solely upon the hodgepodge of foreign cases selected by the Governor, this Court may find a more inclusive overview helpful. Persuasive guidance may be found in a survey article which analyzes not only the foreign cases cited by the Governor, but also the multitude of cases making clear the limits upon gubernatorial budget cutting. See: Siewert, *The Cloying Use of Unallotment: Curbing Executive Branch Appropriation Reductions During Fiscal Emergencies,* 95 Minn. L. Rev. 1071 (February 2011). (See: Appendix hereto, Item 1.) This survey, conducted in response to the decision in *Brayton, supra.,* 781 NW 2d 357 (Minn 2010), offers a succinct riposte to the generic assertion that a Governor may freely spend less than directed in a lawful budget, noting:

> **Unconstitutional and Void**
> State courts have overturned executive changes of appropriations in … particular circumstances: (1) where discretionary unallotments **usurped legislative policy intent**, (2) where the executive **impounded appropriations**, [and] (3) where the executive **failed to follow proper statutory procedures**, ….A trio of state cases has offered corresponding justifications against an executive's discretion to abate appropriations. The Florida Supreme Court held that constitutional unalloting could only exist where "legislative intent [to delegate the power to reduce appropriations] is clearly established and can be directly followed." Taking the analysis one step further, the court in State v. Fairbanks North Star Borough concluded that unabridged unallotments constituted nothing more than a second veto power that the legislature could not override. The clearest articulation of these holdings, expressed by the New Mexico Supreme Court, is that the legislature cannot delegate "its policy-making responsibility"and allow the "discretionary fiscal policy" of the governor to take its place. Courts have overturned gubernatorial impoundments on parallel grounds.

95 Minn L. Rev., at 1081-1082, *supra.*, footnotes deleted, emphasis supplied, citing, *inter alia*: *State v. Fairbanks N. Star Borough,* 736 P.2d 1140, 1142-43 (Alaska 1987) (per curiam) (noting that the statute failed to set forth "principles, intelligible or otherwise, to guide the executive"); *Chiles v. Children A, B, C, D, E, & F,* 589 So. 2d 260, 264-65 (Fla. 1991); *State Emps. Ass'n,*

Inc. v. Daines, 824 P.2d 276, 279-80 (Nev. 1992) (per curiam); *Commcn's Workers v. Florio, 617 A.2d 223, 234 (N.J. 1992)* ("The Legislature properly has the power to reduce appropriations for the operation of State government."); *State ex rel. Schwartz v. Johnson*, 907 P.2d 1001, 1008 (N.M. 1995); *State ex rel. Hudson v. Carte*r, 27 P.2d 617, 626 (Okla. 1933) ("The legislature is without authority of law to confer upon the governor the power to reduce ... appropriation[s]."); see also *Winter v. Barrett*, 186 N.E. 113, 127 (Ill. 1933) (per curiam) (holding that the legislature determines the "objects and purposes" for appropriations and shall not delegate this discretionary power).

Here, the Governors actions violate each and every precept set out above. First, legislative intent to support higher education with a specific appropriation has been summarily negated. Second, The Executive branch has effectively "impounded" the appropriation by forcing its commitment to the Budget Reserve Trust Fund. Third, the Governor has failed to follow numerous mandatory statutory procedures governing budget reductions, including the Budget Reduction Plan as well as the specific statutes guaranteeing institutions of higher education access to the total amount of their appropriated funds.

Foreign caselaw is replete with rejections of the actions taken by the Governor here. A typical holding from Illinois states:

> Reading the applicable constitutional and statutory provisions together, it is apparent 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.

West Side Org. Health Servs. Corp. v. Thompson, 391 NE2d 392, 402 (Ill. App. Ct. 1979), rev'd on grounds of mootness, 404 N.E.2d 208 (Ill. 1980).

Far from supporting the Governor's position, a fair reading of the foreign cases confirms that his actions are not acceptable in any sister jurisdiction. This Court should rule that the actions are unlawful in this Commonwealth as well.

X. THIS COURT HAS REJECTED UNAUTHORIZED EXECUTIVE BRANCH CUTS TO HIGHER EDUCATION FOR NEARLY ONE HUNDRED YEARS

Kentucky's judiciary has considerable experience in resolving higher education funding disputes such as this one. Time honored caselaw teaches that the Executive branch habitually seeks to cut, delay and deny legislative funding for higher education, always claiming that the state's finances cannot bear the strain. Thus, in *James, supra.,* 114 SW 767 (1908), an Executive branch official was ordered by the High Court to follow the budgeting directives of the General Assembly to fund the newly create State University at Lexington, saying "surely it has the right to make an appropriation to equip or repair its State University." Rejecting the claim of the Executive branch that payment would unbalance the state budget, the Court recognized the legislature's unmistakable budgeting prerogatives: "[W]e see no good reason for denying to the General Assembly the right in this act to proceed to proceed to the limit of its constitutional power." 114 SW at 768-69; 772, quoting *Hager, Auditor, v. Gast* 119 Ky. 502, 84 SW 556 (1905).

The High Court adopted these precedents again in *Rhea v. Newman*, 153 Ky. 604, 156 SW 154 (1913), in holding that "when [the General Assembly] appropriates money for the purpose of maintaining…one…of the state institutions…it is acting strictly within the rule laid down in the *Gast* case." Thus, "[i]t is the duty of the Treasurer to pay outstanding warrants in the order they were issued, and as the money available for the purpose reaches the treasury. This practice insures fair treatment of all, alike." 156 SW at 160.

This line of cases was cited by this Court most recently in *Fletcher*, supra., in which it was emphatically held that it is solely the prerogative of the legislature to decide upon an appropriate funding level for state operations:

> If the legislative department fails to appropriate funds deemed sufficient to operate the executive department at a desired level of services, the executive department must serve the citizenry as best it can with what it is given. If the citizenry deems those services insufficient, it will exercise its own constitutional power—the ballot. Ky Const. Sections 31, 70.

Fletcher, 163 SW3d at 873.

The Governor completely reverses the above quoted holding by asserting that **he** has the power to reduce budget appropriations, and that **he** will be held accountable at the ballot box. The Governor candidly admits that there are "an infinite number of ways" that this newly discovered power may be "abused", but dismisses these grave concerns by simply saying "the answer is at the ballot box." *Bevin Memorandum*, at p. 16, R455.

This Court should correct this erroneous reading of the *Fletcher* case and reaffirm that the budgetary power resides in the legislature, not the executive. It is the members of the General Assembly who are held to account for "fail[ing] to appropriate funds deemed sufficient" for essential services such as higher education, not the Governor. He is simply required to administer the balanced budget according to the social needs and priorities identified by the legislature. This is the essential meaning and import of our Separation of Powers doctrine.

XI. ANY CLAIMED STATUTORY GRANT OF BUDGETARY DISCRETION IS PLAINLY UNCONSTITUTIONAL

The question is not whether a statute can be given a tortured reading permitting the cuts to higher education. That, however, is the sole justification offered by the Governor in defense of

his unilateral reduction of a specific appropriation. The question is whether the Governor can have the sort of power he claims at all. The plain answer is that he cannot.

It is beyond argument that any grant of budget making authority from the legislative to the executive branch must be absolutely free of any discretionary elements, not subject to the random subjective reductions imposed by the Governor, first of 4.5%, then of 2% a short time later. It must be as rigid and binding as the Executive Branch Budget Reduction Plan, which permits only a specific and well ordered series of non-discretionary steps. No budget reduction at all is contemplated or authorized in the absence of a funding shortfall. Certainly the erratic, unstable and unpredictable cuts imposed by the Governor here are not authorized in Kentucky law. The value of any budget lies in its resistance to such caprices. Our budget has always been a solid public record of the uses to which public tax dollars are devoted. With this Court's guidance, it will remain so.

This Honorable Court has been eminently fair in applying the stringent requirements of the Separation of Powers clause to each branch of government evenly. The Court has acted forcefully, "[r]ejecting an argument that the provisions should be liberally construed in the modern era to permit some legislative encroachment on executive powers...." *Fletcher*, supra., citing *LRC v. Brown*, 664 SW2d 907 (Ky 1984.)

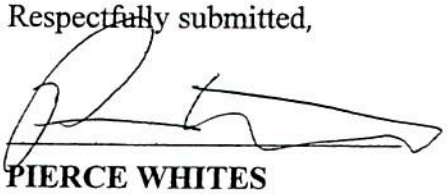
The Court will no doubt note that this "liberal construction" is exactly what the Governor requested and received from the Franklin Circuit Court, "a small amount of breathing room to perform his executive function", as the *Opinion and Order* puts it at p. 21. But this "breathing room" comes at a high price, with the elimination of millions of dollars in higher education funding based on nothing more than the substitution of the Executive's notion of budgeting for

that of the General Assembly. The fallacy of actually allowing the elimination of specifically appropriated funds under the fig leaf of simply revising the timing of an allotment cannot be ignored. Countenancing "some encroachment" upon the rights reserved to the legislature is no more permissible than allowing "some encroachment" on the rights reserved to the Executive. This Court should so rule.

CONCLUSION

For the foregoing reasons, the Appellants, Intervening Plaintiffs herein, respectfully request that this Honorable Court reverse the *Opinion and Order* of the Franklin Circuit Court and remand the case for a Judgment in favor of Intervening Plaintiffs.

Respectfully submitted,



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