COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
SUPREME COURT CASE NO.
2016-SC-000273

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. **REPLY BRIEF FOR APPELLANT STATE REPRESENTATIVES**

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

APPELLEES

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was this the 12th day of August, 2016, mailed First Class and also courtesy copy by email/hand delivery to:Mitchel T. Denham, Andrew Beshear,Office of the Attorney General,700 Capitol Avenue,Capitol Building, Suite 118,Frankfort, Kentucky 40601-3449; Clerk, Franklin Circuit Court,222 St. Clair St.,Frankfort KY 40601; Steve Pitt, Office of the Governor,The Capitol, Suite 100,700 Capitol Avenue,Frankfort, Kentucky 40601;Noah Friend, General Counsel,Kentucky State Treasurer,1050 U.S. Highway 127 South, Suite 100,Frankfort, Kentucky 40601;Clerk, Kentucky Court of Appeals,360 Democrat Drive,Frankfort KY 40601;Clerk, Kentucky Supreme Court,700 Capitol Avenue, Room 209,Frankfort KY 40601.

Pierce Whites

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

Appellants, Intervening State Representatives, are members of the General Assembly, elected for the primary purpose of enacting a state budget to fund government operations in Kentucky. This Reply Brief is submitted pursuant to CR 76.12(4)(e) in opposition to the *Brief of Appellees Bevin, Landrum and Chilton* of August 8, 2016, (herein, "*Governor's Brief*") and the *Brief for Appellee Treasurer Allison Ball*, (herein "Treasurer's Brief".)

The purpose of the action is to challenge the Governor's claim that he can "spend less than the full amount of an appropriation.", as asserted in the *Governor's Brief* at p. i, "Introduction." Specifically, the Governor seeks judicial approval to cut $17,828,700 from the final allotment of the 2014-2015 budget for Kentucky's universities. The Governor asserts that this "small fraction" of the higher education budget is his alone to control. *Governor's Brief* at p.3. The Governor also asks the Court to endorse and legitimize his earlier threat to cut more than twice this amount from Kentucky's higher education budget, (4.5% rather than 2%). *Id.*

ARGUMENT

I. THE GOVERNOR CLAIMS UNPRECEDENTED POWER

The Governor has set out an extraordinary claim to executive authority in his brief. The legal authorization for this unprecedented position is the supposed power of any governor to unilaterally decrease whatever appropriations are made by a legislature, so long as doing so seems "reasonable" to the executive officer. The Governor explains his position as follows:

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

Governor's Brief at p.23.

The Governor identifies only one limit to this heretofore unknown power, which is again set out in his brief:

> And that limiting principle is this: the Governor may direct budget units to spend less than the full amount of an appropriation so long as "he has determined reasonably that such a decision will not compromise the achievement of underlying legislative purposes and goals."

Governor's Brief at p. 27, quoting Opinion of the Justices to the Senate, 373 NE2d 1217, 1223 (Mass. 1978).

The relief requested by the Governor is entirely alien to Kentucky law. This Court is asked adopt a "reasonable person" (or "Reasonable Governor") standard, which permits the elimination of at least 4.5% of appropriated funds on no other basis than the chief executive's personal beliefs and opinions. This unprecedented alteration of Kentucky's Constitutional requirements should be summarily rejected.

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 2014-2015 budget, all to ensure maximum public input into the budgeting process.

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. Shortly after this suit was instituted, the Governor abruptly reduced his higher education cut to 2%, (in the amount of $17,828,700), by letter of April 19, 2016. The Governor asserts that the universities voluntarily declined to join this action, but the restoration of more than $20 million dollars to the schools just after the suit's inception suggests another, less innocent, explanation. An experienced political observer might suggest that the universities avoided this additional $20 million dollar cut by prudently remaining bystanders in this action. This is scarcely a ringing endorsement of the Governor's action by the affected schools.

One of the most disturbing aspects of the Governor's actions is the lack of public access and accountability for his budget cutting. The Governor's cuts were decided upon behind closed doors. There was no citizen involvement, no public debate, and none of the safeguards and transparent processes required in the legislative arena, where budgeting is a process that invites extensive participation by the affected universities, as well as the public at large.

The Governor's sudden and unexpected subsequent reduction of the cuts by more than half underscores the unpredictable and capricious nature of his action. Budgets cease being budgets when the scheduled disbursements are abruptly cancelled, particularly the final allotment.

The purpose of a budget is to ensure the regular availability of funds for 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.

These impetuous budget cuts were not triggered by any financial shortfall in the Commonwealth's expected revenue stream. Indeed, Defendant/Appellee State Budget Director John Chilton appeared before the Interim Joint Committee on Appropriations and Revenue on August 1 2016, to report a $52 million dollar surplus, not including the $17 million dollars taken from higher education.

II. BUDGET LANGUAGE PREVAILS OVER CONFLICTING STATUTES

The Court may take note that the Governor has failed to even address the very first substantive argument made by the Intervening State Representatives, that the budget law supersedes inconsistent existing statutes. See: *Brief For State Representatives Jim Wayne, Mary Lou Marzian and Darryl Owens* of July 18, 2016, at pp. 8-11. The Governor states that the argument "is hardly worth mentioning," and in fact he hardly does mention it. Governor's Brief at p.33. Clearly this argument must be dealt with prior to analyzing the statutes relied on by the Governor, since it asserts that the budget language prevails over arguably inconsistent earlier statutes. If correct, the argument completely eviscerates the Governor's position.

This Court has long ruled that a budget bill is a statute which takes precedence over preceding legislative enactments. This 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. Far from having "no legal or factual similarities to the instant case" as the Governor asserts at p. 34 of his brief, the cases cited by the State Representatives are actually startlingly similar to the facts here. More than one hundred

years ago, the High Court decided *James, Auditor, v. State University*, 131 Ky. 172, 114 SW 767 (1908), in which an Executive branch official refused to honor a budget item funding 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 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.

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. Recent case law reaffirms this holding. In *Com. ex rel Armstrong v. Collins*, 709 SW2d 437 (Ky. 1986), it is squarely held that

a valid budget provision may "effectively suspend and modify existing statutes which carry financial implication...." *Armstrong*, 709 SW2d at 443, emphasis supplied.

The clear rule of law 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 same outcome is seen in *Beshear v. Haydon Bridge Co.*, 304 SW3d 682, 683 (Ky. 2010) ("Haydon I"), in which this Court held:

> *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.

The Governor argues in a footnote that he has successfully "harmonized" all existing statutes, so that "none of the statutes conflict with each other." Governor's Brief at p. 19, footnote 22. This Court may well question how the following statutes can possibly be harmonized with the Governor's actions:

KRS 48.600(2): "No budget revision action shall be taken by any branch head in excess of the actual or projected budget shortfall."

KRS 48.610: "Allotments shall conform with the appropriations in the enacted...budget bills."

KRS 48.620: Allotments cannot be "expended for any other purpose" than the support of higher education.

KRS 164A.555: The Finance Secretary "shall issue warrants [for]…any amounts due by virtue of the state appropriations for that institution….transfer of funds shall be handled in a manner to assure a zero (0) balance in the general fund account at the university."

Plainly, these statutes conflict with the Governor's actions. There is no budget shortfall, the allotments do not conform to the appropriation, the education funds have been misdirected away from their intended purpose, and the Finance Secretary freely ignores the statutory mandate to issue warrants for all appropriated sums.

The Governor's claim to have "harmonized" these statutes is clearly in error. This Court should adhere to the time honored rule recognizing budget law priority over arguably conflicting statutes and rule that 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.)

III. THE GOVERNOR HAS NOT FAITHFULLY EXECUTED THE BUDGET LAW

The Governor states the central issue clearly: "[T]he 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." Governor's Brief at p. 23. The Governor asks this Court to rule that this action is authorized by Kentucky Constitution Section 81, which he characterizes as "the duty to execute the Commonwealth's laws." Id.

Oddly, the Governor omits a single word from his reading of the Kentucky Constitution. That word is "**faithfully.**" Section 81 actually 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 omits this critical term

for the obvious reason that his actions have NOT been faithful to the budget law, they have been in derogation of it.

The Governor asks this Court to give birth to a new rule of law, apparently called the "Reasonable Governor Standard." Under this new system, a governor is free to impound appropriations any time he "reasonably decides" that his vision is superior to "the legislature's will." The Governor will make these life altering decisions in his own time and with his own counsel. He may "reasonably" take guidance from his religious advisors, and eliminate funding for budget items not approved by his church. Gone will be the democratizing effect of the General Assembly's budgeting system, which admirably reflects the diverse face of Kentucky, replaced with the private preferences of one person. This would be a tragic loss.

The Governor forthrightly admits that he has simply substituted his judgment for that of the Legislature. He has unilaterally "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 impoundment of lawfully appropriated funds should be summarily rejected by the Court.

IV. THE GOVERNOR'S POSITION INVITES GAMESMANSHIP AND CONTINUING LITIGATION

The Governor believes that "any amount of spending up to the amount of the appropriation is in conformity with the appropriation," although he 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." Governor's Brief at p. 27. The Franklin Circuit Court agreed, and ruled that the courts could restrain the Governor only if he cut

appropriations "to the point that funding levels reach impermissibly low levels...." *Opinion and Order*, at p. 21.

If the Governor's actions are allowed to stand, every future governor will feel free to cut at least 4.5% of an appropriation because this apparently does not result in a "constitutionally impermissible low level" of funding. Any Governor will naturally explore the limits of this new power, and presumably engage in progressively greater cuts until the mysterious tipping point is identified in a court challenge. Surely this is not the law. 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.

This Court should demarcate a bright line separating one branch of government from another, and avoid exacerbating the current impasse by requiring case by case adjudication of each attempted budget reduction. The State Representatives urge this Court to 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 Court should reject the ruling below, in which budgetary uncertainty is all but guaranteed, with litigation and delay built into the system, and instead set a clear course to guide future generations wisely.

V. STATUTES DO NOT AUTHORIZE THE GOVERNOR'S BUDGET CUTS

The Governor claims that two statutes authorize his budget cuts. The first is KRS 48.620, entitled "Revision of Allotment Schedule." The Governor believes that this statute, which applies solely to "allotments," somehow authorizes an actual appropriation cut. 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).

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.

The Governor's cut of $17 million dollars unavoidably 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 itself is 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 actually diminished the appropriation.

Despite the self-evident impact of the cut, the Governor still asserts that "Appellants completely miss the point that there is a difference between appropriations and allotments." Governor's Brief at p. 12. It is clear that one party or the other completely misses the point. This Court has the opportunity to make plain which party is correctly reading the statutes.

The other statute relied on by the Governor is KRS 45.253(4), which purportedly authorizes the raiding of agency trust accounts "when actually needed." Reliance on this statute is unavailing for several reasons. First, the statute is plainly superseded by KRS Chapter 164A, which mandates payment of the amount appropriated, (discussed *infra.*). 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. KRS 48.600(2). Here, there is no budget shortfall at all, foreclosing the very possibility of "budget revision action" by the Executive.

KRS 45.253 certainly 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. But the law makes clear that these 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 a direct result of the unlawful cutting of the appropriation made to higher education.

The Governor makes much of the fact that our universities "also receive money from tuition and room and board payments." *Governor's Brief* at p. 4. This is certainly true, and it is also true that "tuition and room and board payments" INCREASE when state funding for university operations DECREASE. It is the struggling students and their hardworking parents who are left holding the bill.

The budgetary shortfall created by the Governor in slashing final payments to the schools is not magically absorbed without cost to anyone; rather, it is paid for by students grinding away at low paying jobs to meet constant tuition hikes, and by families forced to pay ever increasing room and board costs. This is precisely the economic impact considered by the General Assembly in deciding what level of funding to provide to the universities. The Governor's arbitrary decision to reduce this funding, first by 4.5%, then by 2%, creates turmoil and losses not only within the universities, but also in the lives of the students and families served by the General Assembly. This is certainly not a choice of whether to "pile (funding) up in field and set

it on fire, or spend it on needless trinkets." Governor's Brief at p.7. This funding is directed to our college students, and cutting this aid is not a cause for jeers.

Clearly, the Governor fails to meet any of the criteria of KRS 45.253. He illegally created an artificial shortfall in university accounts by cutting an appropriation, he failed to "requisition" the agency funds, and he made no claim to be acting under this statute until this litigation was well underway. Obviously, reliance upon this statute is only a belated *post hoc* attempt to legitimize the Governor's unlawful budget cutting actions.

This Court will no doubt recognize that the Governor ignores all statutes 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. 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. Quite clearly, the universities have a specific statutory right to the actual amounts appropriated by the legislature on their behalf.

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.

VI. THE CONSTITUTION GOVERNS THE GRANT OF BUDGETING AUTHORITY

It is difficult to give any credence to the Governor's claim that he "did not reduce any 'appropriations.' Instead he made a downward revision to *allotments*." Governor's Brief at p. 12, emphasis in original. A fair assessment of the case simply does not permit this strained and unnatural reading of the situation. The fact that more than $17 million dollars appropriated to Kentucky's universities now sits in an escrow account is surely sufficient to dispel any notion that an "appropriation" was not adversely impacted.

The Governor desperately tries to convince this Court that he did not cut an actual appropriation because he knows he does not possess such budget altering authority. Instead, he must pretend that he has only shifted allotments, and not cut actual dollars from an appropriation. That, however, is not a viable argument. The true question presented is whether the Governor can have the sort of budget cutting power he claims under any circumstances. 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. The Commonwealth's 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). 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.

VII. THE INTERVENING STATE REPRESENTATIVES HAVE STANDING

The Intervening State Representatives have suffered a grave infringement of their fundamental Constitutional duty to enact a biennial budget on behalf of their constituents. As the Franklin Circuit Court correctly observed:

> [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. 2009) the Court concludes that Kentucky's separation of powers doctrine is bothstrong 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.
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> 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, R----.

The Governor and Treasurer rely on inapposite federal cases in opposing the joinder of the three Intervening Plaintiffs. See: *Governor's Brief* at pp. 39-41; *Treasurer's Brief* at pp. 9-11. The rationale of these cases has never once been applied to issues involving the Kentucky General Assembly and goes against well-established Kentucky law. The Governor's claim that legislative standing "would wreak havoc on the ability of government to function properly," (Governor's Brief at p.42), is nonsense. Indeed, both the Franklin Circuit Court and this Court have recognized State Representative Jim Wayne (an Intervening Plaintiff/Appellant 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. The Franklin Circuit Court "exercises its discretion and permits" the intervention by the State Representatives to assist the court, not to impede it. *Opinion and Order, supra,* at p. 6, R.---. Government will not grind to a halt due to our time honored practice

of allowing courts to decide upon appropriate litigants who may assist in the full and fair airing of the legal issues.

The Governor makes plain that he does not recognize the authority of any entity to question his budget cutting activities. Neither the State Representatives nor the Attorney General may question his actions in court, he claims. Governor's Brief at pp. 35-42. Indeed, the Governor denies that the judicial system itself has any business hearing this matter. "[I]t would be impossible for the Court to resolve this issue without expressing a lack of due respect for the executive branch." *Bevin Memorandum* at p.18, R.457.

Given the Governor's success in dissuading the universities themselves from challenging this action (by the simple expedient of giving the schools $20 million dollars of their own money back shortly after the case incepted), he is well on his way to achieving the "breathing room" he seeks. Unfortunately for Kentucky, that newfound power will be unchallengeable by any person or entity, if the Governor's arguments are upheld. Clearly, this Court should reject this expansive and self-serving view of the law. Our citizens deserve the full protections of their Constitution.

CONCLUSION

For the foregoing reasons, the Intervening State Representatives urge this Honorable Court to reverse the judgment of the Franklin Circuit Court, and reaffirm the longstanding principles of the Kentucky Constitution.

Respectfully submitted,

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