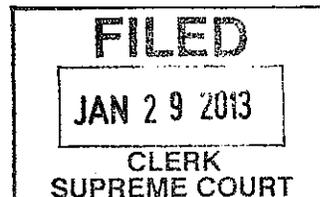


COMMONWEALTH OF KENTUCKY
SUPREME COURT
2012-SC-000071



ERVIN KLEIN, THOMAS C. RECHTIN,
EDDIE NOEL and DAVID MILLS

APPELLANT

v.

APPEAL FROM THE COURT OF APPEALS
CASE NO. 2010-CA-000750

LORI HUDSON FLANERY, In her official capacity as
Secretary of the Finance and Administration Cabinet,

JANE DRISKELL, In her official capacity as
State Budget Director, and

AMBROSE WILSON IV, In his official capacity as
Commissioner of the Dept. of Housing Buildings and Construction

APPELLEES

BRIEF FOR APPELLEES

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of this brief were served upon the following by first class mail on January 28, 2013: Hon. Thomas Wingate, Chief Judge, Franklin Circuit Court, Franklin County Courthouse, 669 Chamberlin Ave., PO Box 678, Frankfort, Kentucky 40602; Edward O'Daniel, Jr., O'Daniel Law Office, 110 West Main Street, Springfield, Kentucky 40069; and Mark D. Guilfoyle, Dressman Benzinger & LaVelle PSC, 207 Thomas More Parkway, Crestview Hills, Kentucky 41017. It is further certified that the record on appeal was not removed from the Office of the Clerk of the Franklin Circuit Court by the undersigned counsel.



Christopher W. Brooker

STATEMENT CONCERNING ORAL ARGUMENT

Appellees request oral argument because they believe it would assist the Court address the issues in this case.¹

¹ The names of the Appellees listed in the style of this brief are different from the names listed in the style of Appellants' brief. All Appellees in this case are State officers in their official capacities, and the original Appellees – Jonathan Miller, in his official capacity as Secretary of the Finance and Administration Cabinet; Mary Lassiter, in her official capacity as State Budget Director; and Richard Moloney, in his official capacity as Commissioner of the Department of Housing, Buildings, and Construction – no longer hold those offices. Those three positions have been filled by Lori Hudson Flanery, Jane Driskell, and Ambrose Wilson, IV, respectively. Pursuant to CR 76.24(c)(1), the new office holders are automatically substituted as Appellees, and Appellees have styled their brief accordingly.

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COUNTERSTATEMENT OF THE CASE

Appellees do not accept the Appellants' statement of the case. The following is Appellees' counterstatement of the case.

I. OVERVIEW.

There is one question presented by this case: When the Commonwealth imposes fees to cover the costs of a regulatory scheme, and those fees happen to generate marginally more revenue than is needed to cover the regulatory costs, can the Commonwealth temporarily suspend a statute that forbids the transfer of such "excess" fee revenue from an agency account to the General Fund, and then transfer that "excess" revenue to the General Fund to help balance the budget? For instance, if the annual cost of regulating plumbing activities in Kentucky is \$100,000, and fees are imposed to cover that cost, but the fees actually generate \$105,000 in revenue because those who set the fee schedule do not have a crystal ball allowing them to predict exactly how much revenue the fees will ultimately produce, can the "excess" \$5,000 in fee revenue be transferred from the Department of Housing, Building and Construction's ("HBC's") plumbing account to the General Fund to help balance the budget?

This Court answered "yes" in the seminal case of *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437 (Ky. 1986). In *Armstrong* this Court made clear that our Constitution requires the General Assembly to operate government under a balanced budget. This Court also recognized that the General Assembly must be afforded "adequate devices" enabling it to do so, and one of those devices is the ability to transfer "excess funds" from fee-supported agency accounts to the General Fund. This Court also specifically held that the legislature is free to temporarily suspend statutes forbidding the

transfer of “excess” fee revenue out of agency accounts, and then transfer the “excess” to the General Fund to help balance the budget. *Id.* at 446-447.

Therefore, in the above example, if the plumbing fees happen to generate \$100,000 (or less) in revenue, which is the cost of the regulation, *none* of the fee revenue would be available for transfer to the General Fund. But if the fee revenue turns out to be \$105,000, the Commonwealth can transfer the excess \$5,000 to the General Fund, so long as it temporarily suspends the statute forbidding transfers of excess funds out of HBC plumbing account. This Court has repeatedly cited *Armstrong*, which establishes this rule, as good and binding law over the past 26 years.²

That said, the Commonwealth certainly cannot impose fees designed to intentionally generate “excess” funds. Fees are constitutionally required to bear a reasonable relationship to the costs of the regulation they are supporting. *Henderson v. Lockett*, 157 Ky. 366, 163 S.W. 199, 201 (1914), *Reeves v. Adam Hat Stores*, 303 Ky. 633, 198 S.W.2d 789, 791-92 (1946); *Renfro Valley Folks, Inc. v. City of Mount Vernon*, 872 S.W.2d 472, 474 (Ky. App. 1993). While the legislature sets the regulatory costs through appropriation statutes (*i.e.*, the legislature declares the amount to spend on plumbing regulation in a given year), it is literally impossible to prospectively set fee schedules to create a precise match between the actual revenues and those costs. Accordingly, it is inevitable that fees with a “reasonable relationship” to regulatory costs

² See, e.g., *Beshear v. Haydon Bridge Co., Inc.*, 304 S.W.3d 682, 686 (Ky. 2010); *Baker v. Fletcher*, 204 S.W.3d 589, 592 (Ky. 2006); *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710, 714 (Ky. 1995).

will sometimes generate “excess” revenues. And this Court has unequivocally held that when they do, the legislature gets to decide how to spend the excess.

Here, Appellants have never alleged (nor could they allege) that the various HBC fees do not bear a “reasonable relationship” to HBC’s regulatory costs. Instead, Appellants contend that under no circumstance should *any* fee revenue – even marginal excess funds – be transferred to the General Fund. Accordingly, Appellants challenge the legislature’s prior transfers of marginal “excess funds” from certain HBC agency accounts to the General Fund. As a result, Appellants actually seek to overturn *Armstrong*, where this Court declared that 47 transfers identical in nature to those now at issue were constitutional.

Both courts below correctly recognized that the issue in this case was decided by *Armstrong*. Accordingly, both courts below applied *Armstrong* and rejected Appellants’ claims. This Court should do the same and affirm the Court of Appeals.

II. MATERIAL FACTS.

A. **The History of the HBC Regulatory Funds.**

The HBC was established on January 1, 1978 by executive order of Governor Julian Carroll to unite all related functions of the state’s building industry in order to provide a uniform and more effective building inspection process.³ Four separate divisions are governed by the HBC, including Building Code Enforcement, HVAC, Plumbing, and Fire Prevention.⁴ The HBC is primarily responsible for oversight of building construction in the state through enforcement of standard building and fire

³ Depo. of Hank Hancock, April 21, 2009, pp. 6-7.

⁴ KRS 227.205.

codes pertaining to elevators, boilers, manufactured housing, hazardous materials, electrical installations, and the like.⁵ To this end, the HBC is in charge of licensing and certifying various tradesmen including plumbers, electricians, boiler contractors, sprinkler and/or fire alarm contractors, and building inspectors.⁶

The HBC is partly funded by a statutory fee system, which imposes (1) licensing fees upon regulated contractors and tradesmen in exchange for the right to perform such services in the state, and (2) inspection fees on various building and machinery owners to ensure compliance with provisions of the Uniform State Building Code.⁷ The underlying statutes authorizing the HBC fees provide that funds derived from such fees are to be kept in separate regulatory accounts for the regulation of specific trades. Specifically at issue in this case are seven regulatory accounts created by statutes governing various HBC industries such as electricians, plumbers, and building inspectors.⁸ Like many other statutes creating special fund or agency fund regulatory accounts, several of these statutes provide that funds in the various regulatory accounts not expended by the agency at the close of the fiscal year do not lapse and/or do not revert to the General Fund of the Commonwealth. Inclusion of such "no lapse" language clearly demonstrates that the legislature envisioned the possibility of excess funds

⁵ Moloney Depo., pp. 8-9.

⁶ Hancock Depo., pp. 4-5.

⁷ Hancock Depo., pp. 7-8, 10.

⁸ The HBC regulatory accounts at issue include: Local Building Inspectors, KRS 198B.095(2); Fire Protection Sprinklers Contractors, KRS 198B.615; HVAC Contractors, KRS 198B.676(2); Mobile Home & RV Businesses, KRS 227.620(5); Electricians, KRS 227A.050(1)(2); Boilers and Pressure Vessels, KRS 236.130(3); and Plumbers, KRS 318.136. See Memorandum in Support of Declaration of Rights and Motion for Injunctive Relief, pp. 17-18, R. 147-148.

remaining in these regulatory accounts after the biennium is over. Indeed, excess amounts in these accounts occur in some years, while at other times, expenditures outweigh receipts. Ideally, fee income and related program expenditures would match each other and funds derived from these regulatory fees would be expended by the HBC only in the administration and enforcement of the provisions of the Uniform State Building Code. But a precise match is literally impossible, and marginal surpluses and deficits are the natural result.

B. The Necessity of a Balanced Budget.

The Kentucky Constitution requires the General Assembly to operate government under a balanced budget. *Armstrong*, 709 S.W.2d at 443. In light of this constitutional mandate, the General Assembly is necessarily authorized to adjust priorities and to use “adequate devices” in an effort to ameliorate projected budget deficits. *Id.* “Provisions in the budget document which effectively suspend and modify existing statutes which carry financial implication certainly are consistent with those duties and responsibilities.” *Id.* Section 15 of the Kentucky Constitution firmly establishes the General Assembly’s power to suspend or modify statutory appropriations, including statutes prohibiting the transfer of surpluses in agency accounts to the General Fund, in an effort to balance the state’s budget. This unquestionable power to suspend appropriation statutes in a budget bill was affirmed in *Armstrong*.

As might be expected, however, budget shortfalls do not always conveniently arise during the relatively brief window of time each year that the General Assembly is in session in Frankfort. Accordingly, the General Assembly long ago enacted laws directing the Office of the State Budget Director (“OSBD”) to “continuously monitor” the Commonwealth’s financial situation, and immediately alert

all government branches of anticipated revenue shortfalls. KRS 48.400. Based on the financial information provided by the OSBD, the General Assembly directed the Governor to implement budget reductions to keep the budget in balance. KRS 48.130(5); 2006 House Bill 380; 2008 House Bill 406.⁹ For instance, in the 2006-2008 budget passed in 2006, the General Assembly instructed the Governor to take necessary budget reduction actions in the event of a shortfall, and explicitly addressed the use of “excess funds” in implementing any budget reduction. 2006 House Bill 380, p. 438-40.¹⁰

C. The Legislature Took Action To Fulfill Its Constitutional Duty to Balance the Budget.

In the midst of fiscal year 2008 (2007-2008), the OSBD projected a General Fund budget shortfall of \$265 million.¹¹ Consequently, on January 4, 2008, Governor Beshear issued General Fund Budget Reduction Order 08-01, which directed, *inter alia*, the transfer of excess, or surplus, funds held in various trust and agency accounts into the state’s General Fund to balance the budget notwithstanding statutory provisions otherwise prohibiting the transfer of such funds to the General Fund.¹² The HBC regulatory accounts at issue had excess balances at that time over and above the amounts appropriated for the particular biennium, and pursuant to the General Fund Budget Reduction Plan in the 2006 Budget Bill, \$4,895,200 in excess funds were

⁹ KRS 48.130(5) was revised in 2009.

¹⁰ See Affidavit of John Hicks, at ¶ 2, attached as Exhibit A to Response in Opposition to Plaintiffs’ Motion for Declaration of Rights and Memorandum in Support of Defendants’ Cross-Motion for Summary Judgment, R. 200; hereinafter “Hicks Aff. ¶ ____.” Mr. Hicks is Deputy Budget Director of the Commonwealth of Kentucky.

¹¹ See Hicks Aff. ¶ 2, R. 200.

transferred from those accounts to the General Fund during the 2007-2008 fiscal year. See 2006 House Bill 380, p. 438-40.

Pursuant to its constitutional and statutory powers to temporarily suspend statutes, the General Assembly subsequently ratified and codified Governor Beshear's budget reduction order as part of the biennial Budget Bill that it passed in 2008. 2008 House Bill 406, p. 195 (HB 406). Additionally, HB 406 authorized another transfer to the General Fund of \$600,000 from excess funds in the various HBC accounts during the 2007-2008 fiscal year, and authorized a transfer of \$1.3 million from those same accounts for the 2008-2009 fiscal year. HB 406, p. 210. Despite HB 406's authority to transfer \$1.3 million in excess funds from the various HBC accounts for the 2008-2009 fiscal year, only \$1.1 million was ultimately transferred from these accounts to the state's General Fund during that time. Appellants challenge both the 2007-2008 transfers and the more recent \$1.1 million transfer that occurred in July 2009.

D. The Trial Court Found The Transfers Constitutional and The Court of Appeals Affirmed.

Appellants challenged the transfers at issue on numerous grounds. The Franklin Circuit Court rejected all of Appellants arguments, recognizing that such transfers long ago received this Court's blessing in the landmark *Armstrong* case. The Court of Appeals affirmed in a unanimous decision. Specifically, the Court of Appeals held that (1) the transfers of HBC funds were proper "in light of our caselaw, namely

(...continued)

¹² *Id.* "Excess funds" are the monetary resources over and above the spending appropriated by the General Assembly. Opinion and Order, January 19, 2010, R. 267; Hicks Aff. ¶ 7, R. 202.

Armstrong and its progeny,” (2) the transfer did not violate KRS 48.315, and (3) the transfers did not violate the constitutional provisions enumerated by Appellants.¹³ The Court of Appeals is right and its opinion should be affirmed.

ARGUMENT

I. THE FUND TRANSFERS ARE CONSTITUTIONAL.

A. Agency Accounts are “Public,” “Private,” or “Commingled.”

Agency accounts in Kentucky are generally funded by three sources: (1) taxes, (2) fees, and/or (3) assessments.¹⁴ These three funding mechanisms are different, and ultimately help determine whether the account is “public,” “private,” or “commingled.”

“Taxes” are “universally defined as an enforced contribution to provide for the support of government.” *Long Run Baptist Ass’n v. Sewer Dist.*, 775 S.W.2d 520, 522 (Ky. App. 1989). Therefore, taxes are always “public” revenues.

“Fees” are different from taxes. They generally take the form of specific charges, levied pursuant to the Commonwealth’s police power, that generate revenue to regulate a specific trade, occupation or activity. Revenues from fees are “public.” *Commonwealth v. Louisville Atlantis Community/Adapt, Inc.*, 871 S.W.2d 810, 815 (Ky. App. 1997) (discretionary review denied; citing *Gray v. Methodist Episcopal Church*, 272 Ky. 646, 114 S.W.2d 1141, 1144 (1938)). Such fees, however, are constitutionally

¹³ Court of Appeals’ Opinion, pp. 12-22.

¹⁴ These three mechanisms are not the exclusive funding sources for agency accounts. Some accounts receive donations (such as some university accounts), while others may receive inter-agency transfers for services provided. There are also other potential funding sources that are not listed here. This appeal, however, involves only taxes, fees, and assessments, and therefore those three sources are the primary focus of this brief.

required to bear a reasonable relationship to the costs of the regulation they are supporting. *Reeves*, 198 S.W.2d at 791-92; *Renfro Valley Folks*, 872 S.W.2d at 474.

“Assessments” are different from taxes and fees. Specifically, assessments are defined as “mandatory donations”¹⁵ that “are specifically beneficial to particular individuals or property,” and are “imposed in proportion to the particular benefits supposed to be conferred.” *Beshear v. Haydon Bridge Company, Inc.*, 304 S.W.3d 682, 698 (Ky. 2010). Assessments are not intended to regulate activity, nor are they primarily designed to benefit the public. Examples of “assessments” are charges levied upon landowners for sewer, lighting or street improvement projects that may benefit them and their neighbors, but not the public at large. *Kentucky River Authority v. City of Danville*, 932 S.W.2d 374, 377 (Ky. App. 1996). Therefore, revenue collected pursuant to assessments is generally considered to be “private” in nature. *Armstrong*, 709 S.W. 2d at 446-447.

Accordingly, under Kentucky law, agency accounts funded entirely by “taxes” and/or “fees” are public accounts, whereas agency accounts funded entirely by “assessments” are private accounts. If tax and/or fee revenue is combined with assessment revenue in an agency account, that account is a “commingled” account. *Id.*

These basic distinctions were recognized by *Armstrong*, where this Court ruled on the legality of transfers of excess funds from dozens of agency accounts to the General Fund. Specifically, this Court blessed *all* transfers of surplus funds from *all* of the fee-funded agency accounts – 47 in total. *Id.* The only agency accounts that the Court protected from excess fund transfers were (1) retirement funds supported entirely

by retirement contributions and (2) an account funded entirely by workers' compensation insurance *assessments* charged to Kentucky employers. *Id.*

None of the accounts at issue in *Armstrong* was a "commingled" account, wherein public funds (*i.e.*, tax or fee generated funds) were combined with private funds (*i.e.*, assessment generated funds). Nevertheless, the Court opined that in such a situation, public funds could be transferred out of a commingled account so long as the public funds "can be differentiated" from the private funds in the account. *Id.* at 446.

B. This Court Recently Addressed a Dispute Over a "Commingled Fund" In *Beshear v. Haydon Bridge*.

This Court's desire to address the issue of commingled funds in *Armstrong* was prescient because in 1998 one of the two "private" accounts at issue in *Armstrong* – the Workers' Compensation Benefit Reserve Fund ("BRF") – was transformed from a "private" account into a "commingled" account as a result of its receipt of a new annual \$19 million appropriation of *tax* revenues. KRS 342.122(1)(c).

Specifically, from 1998 through 2001, the BRF received \$19 million per year in tax revenues to supplement the assessment revenues it received from Kentucky's employers. The General Assembly, however, faced a budget shortfall during the post 9/11 recession, and therefore in the 2002-2004 Budget Bill transferred approximately \$5 million from the BRF to the General Fund to help address that shortfall. The General Assembly reasoned that there were sufficient public funds in the commingled BRF to cover the transfer – at that point the BRF had already received nearly \$80 million in *tax*

(...continued)

¹⁵ *Armstrong*, 709 S.W.2d at 446-447.

revenues. Certain Kentucky employers challenged that transfer, arguing that the BRF was an entirely “private” fund. This Court disagreed with the employers’ reasoning, but nevertheless found the \$5 million transfer to be improper on grounds that no formal mechanism had been set up for differentiating between the public revenues (*i.e.*, tax revenues) and private revenues (*i.e.*, assessment revenues) commingled in the BRF:

Mathematical calculations, however, cannot identify the actual source of every dollar that would be transferred, as there were no directories in the budgets which funded the KWCF and BRF disclosing whether the nineteen million dollars (\$19,000,000) in public contributions would be spent currently for authorized programs during the biennium or would be invested to pay future liabilities, or apportioned between current and future needs, or in any other way differentiated from the employers’ assessments and investment income.

Haydon Bridge, 304 S.W.3d at 705.

For purposes of this case, it is important to understand that *Haydon Bridge* only decided the propriety of transfers out of one particular agency account where *tax* and *assessment* revenues were commingled. Unlike the *Armstrong* decision, the *Haydon Bridge* opinion says absolutely nothing about transfers out of accounts funded entirely by *fees*. In fact, the word “fee” does not appear a single time in the entire 21-page *Haydon Bridge* opinion. Accordingly, contrary to Appellants’ repeated suggestion, the *Haydon Bridge* decision actually has no direct impact on this case, as the HBC agency accounts at issue here are funded entirely by regulatory fees, contain no private funds, and therefore are public accounts. As a result, the transfers of excess funds out of the HBC accounts were constitutional, just as the vast majority of transfers at issue in *Armstrong* were constitutional.

C. The Courts Below Correctly Applied the Law.

The courts below correctly applied the legal precedent in holding that HBC agency accounts hold “public” funds and therefore and therefore excess funds in those accounts are available for the operation of the state government. The courts below correctly recognized that the transfers at issue are identical in nature to the 47 agency account transfers that were approved in *Armstrong*, and did not involve commingled funds, in contrast to *Haydon Bridge*.¹⁶ The courts below also properly rejected Appellants’ numerous statutory and constitutional arguments, none of which emanate even the faintest whiff of merit.

II. APPELLANTS’ MULTIPLE CHALLENGES TO THE TRANSFERS FAIL.

From the outset of this case Appellants have employed a shotgun approach, offering as many arguments as possible in hopes that one of them will strike a blow against the transfers at issue. Each and every one of Appellants’ pellets, however, ricochets off of the iron shield provided by *Armstrong*, where this Court unequivocally ruled that transfers identical to the ones at issue represent a legal and constitutional “device” for balancing the budget.

A. There Is No Line of Cases Supporting Appellants’ Position.

Appellants lead off their argument by proclaiming that there is a “line of cases” from Kentucky’s highest court establishing a “rock solid rule of law” that the transfers at issue here are unconstitutional and illegal. Appellants proclaim that this rule was first established in *Henderson v. Lockett*, 157 Ky. 366, 163 S.W. 199 (1914), and that

¹⁶ Court of Appeals’ Opinion, p. 14.

the rule was followed and confirmed by “its progeny of nearly 100 years,” including *Reeves v. Adam Hat Stores*, 303 Ky. 633, 198 S.W.2d 789 (1947).¹⁷

Appellants mislead. Neither *Lockett*, *Reeves*, nor any decision of any Kentucky appellate court has ever found transfers like those at issue here to be illegal or unconstitutional. To the contrary, this Court explicitly declared that such transfers represent a legal and constitutional “device” for balancing the budget. *Armstrong*, 709 S.W.2d at 443. Moreover, this Court still regards *Armstrong* as good and binding precedent, as it has consistently, and recently, cited it as authority in numerous cases. See, e.g., *Haydon Bridge*, 304 S.W.3d at 686; *Baker v. Fletcher*, 204 S.W.3d 589, 592 (Ky. 2006); *Jones v. Board of Trustees of Kentucky Retirement Systems*, 910 S.W.2d 710, 714 (Ky. 1995).

Moreover, an examination of *Lockett* and its progeny confirm that they are in lockstep with *Armstrong*. In *Lockett*, the plaintiffs challenged the constitutionality of a local ordinance imposing a license fee on all cars owned by residents of the city of Henderson. Kentucky’s high court rejected the challenge. Specifically, the Court held that “where a license fee is imposed under the policy power, the fee enacted must not be so large as to charge the ordinance with the imputation of a revenue producing purpose.” *Lockett*, 163 S.W. at 201. In other words, so long as there is a reasonable relationship between the amount of the fee and the regulatory costs, the fee is constitutional. Since the license fee at issue in *Lockett* was not “unreasonable for the purpose for which it may be imposed . . . and the amount of the license fee imposed is not so large as to indicate a revenue-producing purpose,” the fee was upheld as constitutional. *Id.*

¹⁷ Appellants’ Brief, pp. 12-16.

If, however, there is no reasonable relationship between the fees and the costs it is designed to cover, the fee “amounts to a tax for revenue, and cannot be upheld as a valid exercise of the police power.” *Id.* That was exactly the case in *Reeves v. Adam Hat Stores*, where Kentucky’s high court struck down as unconstitutional a fee imposed on retail merchants operating chain stores in the state because the receipts generated by the fee (\$177,188.65) were *over sixty times* greater than the costs of administration (\$2,861.67). *Reeves*, 198 S.W.2d at 791. That “fee” at issue in *Reeves* was “so greatly in excess of the cost to the State of issuing the license and enforcing the statute” that it was found to be a revenue raising measure rather than a police measure. *Id.*

Accordingly, the only rule actually laid down by “*Lockett* and its progeny of nearly 100 years” is that a police power fee must bear a “reasonable relationship” to the costs it is designed to cover. Contrary to Appellants’ claims, those cases do not hold that the relationship must be precise, nor do those cases prohibit the General Assembly from transferring excess revenues that inevitably occur even where there is the required “reasonable relationship” between the fee revenue and the cost of the regulation that it funds.

Here, the General Assembly has satisfied the *Lockett* rule, as it is an undisputed fact that the HBC fees bear a “reasonable relationship” to the regulatory costs that they are designed to cover. As a result, the actions at issue are entirely constitutional and the Court of Appeals’ decision should be affirmed.

B. Fees Levied Under Police Power are not “Private Funds.”

This Court’s *Armstrong* and *Haydon Bridge* decisions establish that assessment-supported agency accounts, as opposed to fee-supported agency accounts, are “private” in nature, and therefore “no lapse” statutes protecting those “private” accounts

cannot be suspended so that excess funds therein can be transferred to the General Fund. *Armstrong*, 709 S.W.2d at 446-447; *Haydon Bridge*, 304 S.W.3d at 705. Accordingly, Appellants' now suggest that "HBC fees equate with assessments," and "[a]ssessments and fees are interchangeable terms," thereby rendering HBC accounts "private" and untouchable.¹⁸

Appellants are wrong. Kentucky's appellate courts have repeatedly and consistently held that there is a difference between "fees" and "assessments." While fees and assessments are both designed to pay for something specific, and therefore the amount charged must bear a reasonable relationship to its purpose, this one commonality does not render the terms synonymous. Fees, on one hand, are generally levied pursuant to the Commonwealth's police power to generate revenue to regulate a specific trade, occupation, or other public purpose. *Kentucky River Authority v. City of Danville*, 932 S.W.2d 374, 376-377 (Ky. App. 1996). Each HBC fee falls squarely within this category, as they are levied to regulate building construction trades such as plumbing, electrical installation, elevators, and HVAC, as well as to ensure compliance with the state building code.

Assessments, on the other hand, are defined as "mandatory donations," that "are specifically beneficial to particular individuals or property," and are "imposed in proportion to the particular benefits supposed to be conferred." *Haydon Bridge*, 304 S.W.3d at 698. Examples of "assessments" are charges levied upon landowners for sewer, lighting or street improvement projects that may benefit them and their neighbors, but not the public at large. *Kentucky River Authority*, 932 S.W.2d at 377.

¹⁸ Appellants' Brief, p. 17.

Again, this Court unmistakably confirmed the difference between fees and assessments in *Armstrong*, where it upheld the transfer of excess funds from 47 fee-funded agency accounts to the General Fund, but overruled transfers from assessment-funded accounts. *Armstrong*, 709 S.W.2d at 446-447. If assessments and fees were “interchangeable terms” as Appellants contend, this Court would have declared those 47 transfers unconstitutional. But it did not. And it did not because fees and assessments are not the same thing.

In this case, the courts below recognized the difference between accounts funded with public fee revenues and those funded with private assessment revenues, and therefore properly denied Appellants’ groundless attempt to equate the two. This Court should as well.

Appellants, however, also suggest that HBC agency accounts are “private” funds because “HBC fees come solely from licenses and permits paid for by private contractors.”¹⁹ In other words, Appellants contend that any money paid to the government from a “private” source constitutes a “private” assessment payment.²⁰ Appellants mislead again. In *Thompson v. Kentucky Reinsurance Association*, 710 S.W.2d 854 (Ky. 1986), this Court held that in distinguishing between “public” and “private” funds, the Court examines *two* things: (1) “the nature and purpose” of the agency account and (2) its “source of funding.” *Id.* at 857.

If both “the nature and purpose” and the “source of funding” are private, such as with assessments, then the account is “private.” If, however, *either* “the nature

¹⁹ Appellants’ Brief, p. 19.

²⁰ *Id.*

and purpose” or the “source of funding” is public, such as with taxes and fees, then the account is “public.” If the “source of funding” were the sole determining factor as Appellants now suggest, the General Fund would be a “private” fund, as the source of tax revenue is “private” individuals and businesses. The General Fund, however, is obviously not a “private” fund.

Here, there is no dispute that the “nature and purpose” of the fee-based HBC agency accounts is “public.”²¹ Accordingly, the fee-based HBC accounts are identical in nature to the 47 fee-based agency accounts that this Court held were properly subject to excess revenue transfers in *Armstrong*. As a result, the Court of Appeals correctly ruled that “the HBC accounts at issue were comprised of public funds,” and therefore held that the suspensions and transfers at issue were proper under *Armstrong*.²² The Court of Appeals’ ruling should be affirmed.

C. KRS 48.315 Does Not Foreclose the Transfers.

The General Assembly’s power to suspend statutes comes directly from Section 15 of the Kentucky Constitution. Appellants, however, contend that when the legislature passed KRS 48.315 in 1984, it restricted its own ability to suspend “no lapse” statutes, and can now only suspend “no lapse” statutes concerning the statutory funds actually listed by name in KRS 48.315.

This contention fails for numerous reasons. First, KRS 48.315 does not purport to provide an exhaustive list of statutory funds. Instead, the list of funds

²¹ Appellants’ Brief, p .4 (admitting that the Department of Housing, Buildings, and Construction was established “to create a standard uniform building code and protect[] the consumer in health and safety matters.”)

²² Court of Appeals’ Opinion, p. 14.

unmistakably ends with the term “etc.” The legislature’s inclusion of the term “etc.” confirms that the legislature did not intend for this list of transferable statutory funds to be exhaustive or all-encompassing. Elementary rules of statutory construction dictate that the legislature intends all words in a statute to have meaning, and that each word in a statute should be given meaning whenever it is possible to do so. *See, e.g.*, KRS 446.080; *Lach v. Man O’ War LLC*, 256 S.W.3d 563, 568 (Ky. 2008); *Head v. Commonwealth*, 165 Ky. 603, 177 S.W. 731, 734 (Ky. 1915).

The term “etc.” or “et cetera” is a Latin phrase which means:

And others; and other things; and others of like character; and others of the like kind; and the rest; and so on; and so forth. In its abbreviated form (*etc.*) this phrase is frequently affixed to one of a series of articles or names to show that others are intended to follow or understood to be included.

BLACK’S LAW DICTIONARY 496 (5th ed. 1979). In enacting KRS 48.315, the General Assembly no doubt recognized that the number and nature of agency funds, special funds, and other funds created under Kentucky statutory law would necessarily change over time. Rather than attempt to draft an initial all encompassing list and require repeated statutory amendments to account for all newly enacted statutory funds, it is apparent that the General Assembly inserted the term “etc.” to ensure that all then-existing similar statutory funds, as well as all similar funds enacted in the future, would fall within the scope of KRS 48.315.

Moreover, the language in the “no lapse” statutes concerning the HBC regulatory accounts is no different in nature from the “no lapse” language concerning the statutory funds listed in KRS 48.315. Indeed, several of the statutes listed in KRS 48.315 contain language virtually identical to that in various HBC statutes, including an explicit

directive that any excess revenue shall not revert to the General Fund. *See, e.g.*, KRS 248.540; KRS 230.218; KRS 311.450; KRS 315.195; KRS 321.320; KRS 325.250.

The legislature's inclusion of the term "etc." at the end of the list provided in KRS 48.315, which the legislature enacted as guidance to itself, demonstrates that any regulatory accounts comparable to those expressly identified also are subject to transfer to the Commonwealth's General Fund. Because the statutes creating the various HBC regulatory accounts are inarguably analogous to the enumerated statutory funds, KRS 48.315 permits the General Assembly to suspend these statutes and transfer any excess funds in the HBC regulatory accounts to the General Funds when it deems fit to do so.

Further, in *Armstrong*, this Court upheld the transfer of excess monies from several statutory funds that were not expressly listed in KRS 48.315(1). For example, the Court upheld General Fund transfers of excess funds from, *inter alia*, the Board of Hearing Aid Dealers Fund (KRS 335.160); the Occupational Safety and Health Review Commission Fund (KRS 154.150); the Fish and Wildlife Fund (KRS 150.150), and the Firefighters Foundation (KRS 94A.220), none of which are expressly enumerated in KRS 48.315(1)'s list of statutory examples subject to suspension.²³ Accordingly, the Court of Appeals correctly concluded that the statutes underlying HBC statutory funds are not exempt from suspension and General Fund transfers merely because they are not expressly mentioned in KRS 48.315.

What is more, in its recent *Haydon Bridge* decision, this Court unequivocally rejected Appellants' argument that the General Assembly lacks the power to suspend "no lapse" statutes unless they are specifically listed in KRS 48.315.

Specifically, this Court noted that “in 1990, the General Assembly enacted KRS 48.310(2), which provides ‘a budget bill may contain language which exempts the budget bill or any appropriation or the use thereof from the operation of a statute for the effective period of the budget bill.’” *Haydon Bridge*, 304 S.W.3d 703. It then held that “[l]ooking at the contrasting statutes and considering that KRS 48.315 and KRS 48.316 were enacted together in 1984, and that KRS 48.310(2) was added in 1990, it seems clear that the Legislature intended to retain the statutory authority ‘to suspend’” *any* statute “dealing with ‘public’ funds.” *Id.* This Court explained that while *Armstrong* denied the legislature the right to suspend “no lapse” statutes dealing with “private” funds, *Armstrong* also confirmed the legislature’s authority to suspend *any* “no lapse” statutes dealing with “public” funds regardless of the language in KRS 48.315. *Id.*

Accordingly, the Court of Appeals’ opinion, which properly rejects Appellants’ argument that KRS 48.315 prohibits the suspensions and transfers at issue, should be affirmed.

D. The Concept of “Excess Funds” is Simple And They May Be Transferred.

Section III of Appellants brief presents a thoroughly disjointed and confusing discussion of excess funds and “year-end balances.” In that section, however, Appellants suggest that the term “excess funds” is a “manufactured” and confusing term incapable of comprehension.²⁴ Appellants also suggest that Appellees are trying to employ the term “excess funds” to create a “hybrid form of finance accounts” which are

(...continued)

²³ See 1984 House Bill 747, pp. 167-172, R. 213-218.

subject to transfer to the General Fund.²⁵ Finally, Appellants suggest that the Court of Appeals held that all license and permit fees collected by HBC are public funds that may be taken for general government operations.²⁶ These contentions are groundless.

First, the concept of “excess funds” is simple and straightforward. As described above, fee rates are set before they are collected, and there is no way to know in advance exactly how much revenue the fees will generate. Consequently, it is inevitable that after fees are set, and start to be collected, those fees will either generate too much revenue or too little revenue in relation to expenses. When they generate too much revenue – *i.e.*, a surplus – there are monies in the agency account above and beyond the costs appropriated by the General Assembly. And those monies in excess of the expenses are referred to as “excess funds.” For instance, if the General Assembly appropriates \$100,000 to cover the costs of regulating plumbers, and plumbing license and inspection fees generate \$105,000, there would be \$5,000 in “excess funds” in the HBC plumbing account.

Second, Appellees are not trying to create a “hybrid form of finance accounts” which are subject to transfer to the General Fund. To be clear, in terms of the above example, all \$105,000 in fees in the plumbing account are “public” funds. They are, however, *restricted* public funds, meaning that the \$100,000 appropriated to HBC must be spent by HBC to regulate the plumbing industry, and is not subject to transfer to

(...continued)

²⁴ Appellants’ Brief, p. 26.

²⁵ *Id.* at 26.

²⁶ *Id.* at 30.

the General Fund (or any other fund). Therefore, the only issue here is whether the General Assembly can transfer the \$5,000 in “excess funds” to the General Fund. *Armstrong* answers with an unequivocal “yes.”

Third, Appellants suggest that when the Court of Appeals held that funds in the HBC accounts are “public” funds, that it *ipso facto* held that *all* money in those accounts is available to transfer to the General Fund at anytime:

Under the reasoning of the Court of Appeals, all license and permit fees collected by HBC are public funds that may be taken for general government operations – not just year-end balances!²⁷

Appellants read far too much into to the Court of Appeals’ finding that HBC accounts contain “public” funds. The Court of Appeals did not in any way suggest (nor have Appellees ever argued) that *all* money in a “public” agency account is available for general government purposes. Instead, the Court of Appeals explicitly recognized that this case concerns *restricted* statutory funds,²⁸ meaning that *all* of the fee revenue up to the amount of the appropriated costs can be spent on the stated purpose of the fund. Accordingly, the Court of Appeals’ Opinion only condoned the same action that this Court condoned in *Armstrong* – the transfer of excess funds to the General Fund. Accordingly, its decision should be affirmed.

In Section III of their brief Appellants also seem to complain that the General Assembly allowed the transfer of “excess funds” from agency accounts during the middle of a fiscal year, and that the Governor initially directed the transfer in the

²⁷ Appellants’ Brief, p. 28; highlighting, italicizing, and exclamation mark in original.

²⁸ Court of Appeals Opinion, p. 4.

context of a Budget Reduction Order.²⁹ Such mid-year transfers, however, are neither surprising nor problematic. Instead, they are the natural result of the General Assembly's constitutional duty to balance the budget, and its corresponding charge to the Executive to "continuously monitor the financial situation of the Commonwealth" and take action to keep the budget in balance in the interim. *See* KRS 48.400. As this Court recognized in *Armstrong*, a state government charged with balancing its budget must be afforded "adequate devices" for doing so, and suspensions and transfers like the ones at issue here are one of these devices. This "device," like all other budget-balancing devices, is available for use at anytime during a budget biennium. Its use is not artificially restrained to the end of a fiscal year as Appellants illogically suggest.

E. The Transfers and Suspensions At Issue Do Not Violate Section 15 or Section 51.

Appellants also contend that the statutory suspensions, and accompanying transfers, violate Sections 15 and 51 of the Kentucky Constitution.³⁰ Appellants are wrong again. First, Section 15 unquestionably provides the General Assembly with the power to temporarily suspend statutes. Therefore, it is literally impossible for a suspension of any statute, including a "no-lapse" statute, to violate Section 15.

As for Appellants' claim that the suspensions violate Section 51, this Court squarely rejected that very argument in *Armstrong*. Specifically, this Court explained Section 51's title and republication requirements at length, and then unequivocally ruled that suspensions and transfers from 47 fee-based agency accounts identical in nature to the suspensions and transfers now at issue do not violate either of

²⁹ Appellants' Brief, pp. 27-29.

Section 51's requirements. *Armstrong*, 709 S.W.2d at 446-447. Only "the transfers of funds which related to appropriations of *private* contributions [could] not be termed suspensions or modifications of the operations of statutes," and therefore violated Section 51. *Id.* at 446 (emphasis added).

Therefore, the Court of Appeals properly rejected Appellants' Section 51 argument. Its decision should be affirmed.

F. The Transfers Do Not Violate Section 180, As HBC Fees Are Not Taxes.

Appellants speak out of both sides of their mouths in this case. In one breath they try to convince this Court that "HBC fees equate with assessments," and "[a]ssessments and fees are interchangeable terms."³¹ Then, in their next breath, they characterize the HBC fees as "taxes," and claim that the transfers therefore violate Section 180, which provides that "no tax levied and collected for one purpose shall ever be devoted to another purpose."³²

Ignoring the double-speak, Appellants' "tax" argument is as follows: Appellants contend that State-collected revenue can only be characterized as "fee" revenue if 100% of it is spent on funding regulation for which the charge is initially made. Appellants suggest that if any portion of that revenue is ever transferred to the General Fund, that transfer, in and of itself, magically transforms that "fee" revenue into "tax" revenue. Appellants then suggest that such "tax" revenue is collected for a

(...continued)

³⁰ *Id.* at pp. 30-34.

³¹ Appellants' Brief, p. 17.

³² *Id.* at pp. 34-38.

particular purpose, and as a result, the transfer to the General Fund is unconstitutional under Section 180.³³

Not surprisingly, under this magical transformation argument, it is literally impossible for the General Assembly to ever constitutionally transfer excess fee revenues from agency accounts to the General Fund. This magical transformation argument, however, fails as a matter of law. First, it flies directly in the face of *Armstrong*, which specifically holds that the General Assembly can suspend “no lapse” statutes and transfer excess fees to the General Fund. *Armstrong*, 709 S.W.2d at 446-447.

Second, it disregards our appellate courts’ unbroken directive that where “the primary purpose of the legislature in imposing [] a charge is to regulate the occupation or the act, *the charge is not a tax even if it produces revenue for the public.*” *Louisville Atlantis*, 871 S.W.2d at 815 (emphasis added). In this case, it is undisputed that the primary purpose of HBC fees is the regulation of the various building trades, and therefore the charge is not a tax.

Third, it ignores the fact that the excess funds of certain fee-supported agency accounts are statutorily required to lapse to the General Fund. For instance, KRS 198B.615 holds that excess funds collected from fees on fire protection sprinkler contractors “shall lapse to the General Fund of the Commonwealth” at the end of the fiscal year. There is absolutely no Kentucky authority even remotely suggesting that such fees are actually taxes because the excess funds that they generate lapse to the General Fund. Nor is there any authority holding that such transfers violate Section 180.

³³ *Id.*

Finally, Appellants' argument violates the doctrine of separation of powers, because if it is accepted, it means that the judiciary, and not the legislature, will be deciding how excess fee revenues are spent. The judiciary, however, has no say over how these public revenues are spent. That is a question left wholly to our elected legislature. *Armstrong*, 709 S.W.2d at 441.

Accordingly, the Court of Appeals properly rejected Appellants' Section 180 argument on grounds that "the transfers of the agency funds did not convert fees into taxes." This Court should affirm.

G. The Transfers At Issue Were Not Arbitrary and Therefore Did Not Violate Section 2 of The Kentucky Constitution Or the Equal Protection Clause.

Section 2 to the Kentucky Constitution, which denies the General Assembly arbitrary power, embraces the Equal Protection Clause of the Fourteenth Amendment. *Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985). In doing so, it guarantees Kentucky's citizens the equal protection of the laws by requiring that all laws must be rationally related to a legitimate state objective. *Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621, 623-624 (Ky. 2005).

Appellants here contend that the suspensions and transfers at issue here constitute arbitrary actions in violation of Section 2 and the Equal Protection Clause. Accordingly, in order to succeed on this argument, Appellants must demonstrate that the suspensions and transfers at issue in this case are not rationally related to a legitimate state objective. *Id.*

Appellants have not carried this heavy burden. First, balancing the state's budget is undeniably a legitimate state objective. In fact, as the General Assembly is

constitutionally *required* to do it. *Armstrong*, 709 S.W.2d at 443. Accordingly, the key question is this: Are the suspensions and transfers at issue rationally related to the balancing of the budget? The answer is “yes.” During the biennia at issue, there was a budget shortfall that the General Assembly was constitutionally required to address. And it did so, in part, by employing the very budget balancing “device” condoned in *Armstrong* – it suspended “no lapse” statutes and transfer excess funds from fee-based agency accounts to the General Fund.

Appellants, however, also suggest that the transfers were “arbitrary” because different amounts were taken from the different HBC accounts. Appellants bemoan that “there was no uniformity in amounts transferred,”³⁴ and suggest that this lack of uniformity is proof of arbitrary action.³⁵

Appellants’ argument is misplaced. There is a very simple reason that “there was no uniformity in amounts transferred” – the various HBC accounts all had different revenues and expenses, and therefore all had differing amounts of “excess funds” available for transfer. Put simply, the accounts with more excess funds available for transfer were subject to larger transfers than accounts with fewer excess funds available for transfer.³⁶ This can hardly be characterized as “irrational” or “arbitrary” action. Instead, it is proof of a conscious and rational effort to ensure that the State only transferred “excess funds” from each HBC account, thereby ensuring that all HBC regulatory costs were fully funded.

³⁴ Appellants’ Brief, p. 41.

³⁵ *Id.* at 38-48.

³⁶ Appellants’ Brief p. 40 (quoting Appellees’ response to Appellants’ Interrogatory No. 15).

This is exactly the same situation that was presented in *Armstrong*, where the 47 transfers from fee-based agency accounts were all of different amounts. This Court approved those transfers of differing amounts, and certainly did not find such transfers to be “arbitrary” because the transfers were not uniform in amount. *Armstrong*, 709 S.W.2d at 446, fn. 9 (\$500,000 from the Tobacco Research Trust Fund; \$3,000,000 from the Department of Banking Securities, etc.).³⁷

In fact, since the HBC accounts at issue had differing amounts of “excess funds” available for transfer, it would have been “irrational” and “arbitrary” to transfer a uniform amount from each of those accounts. Fortunately the General Assembly did not make arbitrary “uniform” transfers as Appellants now suggest were required, but instead made rational transfers based upon the amount of excess funds that each HBC account actually had.

Accordingly, the Court of Appeals correctly concluded that “Appellants have not met the burden imposed upon those seeking to have legislation declared unconstitutional for violation of the Equal Protection Clause” and Section 2 of the Kentucky Constitution.³⁸ This decision should be affirmed.

H. The Transfers At Issue Were Not a “Taking” In Violation of Section 242 of The Kentucky Constitution.

Lastly, Appellants summarily contend that the suspensions and transfers “constitute a taking [of private property] in violation of Section 242.”³⁹ Notably, this contention is not accompanied by any actual argument – much less any cogent argument

³⁷ See also 1984 House Bill 747, pp. 167-172, R. 213-218.

³⁸ Court of Appeals’ Opinion, pp. 20-22.

³⁹ Appellants’ Brief, p. 43.

– and therefore has been abandoned. CR 76.12(4)(c)(v); *Haydon Bridge*, 304 S.W.3d at 697, n.17.

Nevertheless, even if the contention has not been abandoned, it is groundless. Section 242, in general terms, prohibits the taking of private property without the payment of just compensation. Accordingly, in order for there to be a violation of Section 242, there must be a taking of private property. The suspensions and transfers at issue do not take “private property.” Instead, they are transfers of money from state-owned HBC agency accounts, comprised entirely of “public” funds, to the General Fund. There is nothing “private” about these transfers of “public” funds.

But even if the HBC accounts are deemed to be funded by assessments (and they are not), and therefore constitute “private” agency accounts (and they are not), the transfers at issue would still not constitute a “taking” of private property in violation of Section 242. It is beyond dispute that when a tradesman such as a plumber pays the State for a license or permit, that tradesman cedes ownership of the money that he or she pays to the State. The State therefore is the sole owner of *all* license and permit revenues that it receives, even if they are held in a “private” agency account whose excess funds are not subject to transfer. Therefore, while a subsequent transfer of funds from an assessment-based account may violate Section 51, and may possibly violate “no lapse” statutes, it is still not a “taking” of private property in violation of Section 242, as it is logically impossible for the State to take property belonging to the State.

It is obvious that Appellants do not really buy into their Section 242 “takings” contention because they offer no supporting argument. The Court of Appeals did not buy into it either, stating that we “fail to see how the taking of year-end balances

from HBC constitutes a retrospective use in violation of Section 242.” The Court of Appeals correctly rejected Appellants’ off-the-cuff takings claim, and this Court should as well.

CONCLUSION

The suspensions and transfers at issue in this case fall entirely inside constitutional and statutory bounds. If Appellants are opposed to the General Assembly’s practice of transferring excess funds from agency accounts to the General Fund to help balance the budget, the proper forum for Appellants to obtain the relief they seek is the General Assembly. It is not the Courts. Therefore, Appellees respectfully request that this Court affirm the Court of Appeals’ opinion in its entirety.

Respectfully submitted,



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