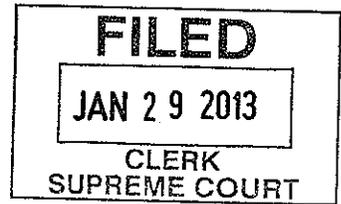


COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2012-SC-000197



LOUISVILLE SOCCER ALLIANCE, et al.

APPELLANTS

v. APPEAL FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2011-CA-000406

STEVEN L. BESHEAR, in his official
capacity as the Governor of the
Commonwealth of Kentucky, et al.

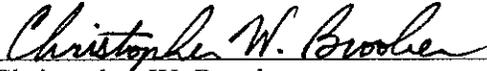
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BRIEF FOR APPELLEES
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of this brief were served upon the following by first class mail on January 28, 2013: Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, Franklin County Judicial Center, 669 Chamberlin Ave., PO Box 678, Frankfort, Kentucky 40602; and Oliver H. Barber, BARBER BANASZYNSKI & HIATT, P.S.C., 802 Lily Creek Road, Suite 101, Louisville, Kentucky 40243. 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.

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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.

The primary question in this case is this: 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 charitable gaming 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 produce, can the "excess" \$5,000 in fee revenue be transferred from the charitable gaming regulatory account the General Fund to help the 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 charitable gaming fees happen to generate exactly \$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 charitable gaming regulatory account. This Court has repeatedly cited *Armstrong*, which establishes this rule, as good and binding law over the past 26 years.¹

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. *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 (Ky. App. 1993). While the legislature sets the regulatory costs through appropriation statutes (*i.e.*, the legislature declares the amount to spend on charitable gaming regulation each year), it is literally impossible to prospectively set fee schedules to create a precise match between the actual revenues and costs. Accordingly, it is inevitable that fees with a “reasonable relationship” to regulatory costs 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.

¹ 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).

Here, it is undisputed that the Charitable Gaming fee bears a “reasonable relationship” to HBC’s regulatory costs. Nevertheless, Appellants contend that under no circumstance should *any* fee revenue – even marginal excess funds – be transferred to the General Fund. Accordingly, Appellants challenged the legislature’s recent transfer of marginal “excess funds” from the charitable gaming regulatory account to the General Fund. As a result, Appellants actually seek to overturn *Armstrong*, where this Court declared that 47 transfers identical in nature to the transfer now at issue were constitutional.

The trial court obviously shares Appellants’ displeasure with the General Assembly’s use of this “device” to balance the budget. Accordingly, the trial court chose to ignore *Armstrong* and unilaterally declared the suspensions and transfers unconstitutional. The Court of Appeals, however, did not ignore *Armstrong*, and in a unanimous decision overruled the trial court. The Court of Appeals stated that “[w]e can find no meaningful distinction between the legislative actions authorized in *Armstrong* and the facts herein,” and recognized that the trial court’s Opinion and Order essentially legislated from the bench [Opinion, pp. 11, 14]. The Court of Appeals was right and its decision on this primary question should be affirmed.

The second claim presented in this case is a challenge to a July 1, 2008 increase in the charitable gaming fee imposed under KRS 238.570. The Court of Appeals, however, found that Appellants abandoned this claim because the trial court never ruled on this discrete claim, meaning there was no judgment or decision to actually review. The Court of Appeals’ refusal to address this abandoned claim was correct and this decision should also be affirmed.

II. MATERIAL FACTS.

A. **The History of the Charitable Gaming Act and its Regulatory Fund.**

The Kentucky General Assembly enacted the Charitable Gaming Act in 1994 in response to amendments to the state constitution permitting charitable lotteries and charitable gift enterprises in the Commonwealth. *Commonwealth v. Louisville Atlantis Community/Adapt, Inc.*, 971 S.W.2d 810, 814 (Ky. App. 1997). This Act set forth a comprehensive scheme for the conduct, oversight, and regulation of charitable gaming in the state, which was designed “to prevent the commercialization of charitable gaming, to prevent participation in charitable gaming by criminal and other undesirable elements, and to prevent the diversion of funds from legitimate charitable purposes.” KRS 238.500. To this end, the Act created an Office of Charitable Gaming (now the Department of Charitable Gaming) which is responsible for regulating charitable gaming in the state through various means including, *inter alia*, establishing and enforcing reasonable standards for the conduct of charitable gaming; establishing standards of accounting, recordkeeping, and reporting; and licensing entities that engage in charitable gaming, and prescribing reasonable fees for charitable gaming licenses. KRS 238.515.

Although the General Assembly recognized that charitable gaming is an important method of raising funds for charitable purposes and is in the public interest, it was unwilling to thrust the cost of regulating this activity upon Kentucky taxpayers. Instead, the General Assembly opted to fund the regulation of charitable gaming by imposing a fee on entities licensed to sponsor charitable gaming activities. KRS 238.515(3); KRS 238.570(1).

As originally enacted, the Charitable Gaming Act set forth a fee of .50% of gross receipts derived from all charitable gaming conducted by charitable organizations licensed in the state. The Act requires that this fee be reassessed at least every biennium, and that it be set using a specific formula designed to maintain a reasonable correlation between funds derived from the fees and the cost of enforcing and administering charitable gaming regulations. KRS 238.570(3). Fees collected in accordance with this provision of the Charitable Gaming Act are to be kept in the “charitable gaming regulatory account.” KRS 238.570(2).

But even with the help of the statutory formula it is literally impossible to precisely match fee revenues with the exact cost of regulation. Fees 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 the appropriated costs. When they generate too much revenue – *i.e.*, a surplus – there are monies in the agency account above and beyond the appropriated costs. And those monies in excess of the appropriated expenses are referred to as “excess funds.” If, for example, the cost of regulating charitable gaming was \$100,000, and the charitable gaming licenses and fees generate \$105,000 in revenue, there would be \$5,000 in “excess funds” in the charitable gaming account.

This case only concerns the fate of “excess funds” in the charitable gaming regulatory account. Like many other statutes creating special fund or agency fund regulatory accounts, the Charitable Gaming Act includes a “no lapse” provision providing

that funds in the account not expended at the close of the fiscal year “shall not lapse [to the General Fund] but shall be carried forward to the next fiscal year.” KRS 238.570(2).

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.* Indeed, Section 15 of the Kentucky Constitution firmly establishes the General Assembly’s power to suspend any statute, including a “no lapse” statute, which allows the General Assembly transfer of surpluses from agency accounts to the General Fund.

As one might expect, however, budget shortfalls do not always conveniently arise during the 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) (prior to 2009 amendment). In the 2006-2008 budget passed in 2006, the General Assembly anticipated the possibility of General Fund deficits, and instructed the Governor to take necessary budget reduction

actions, explicitly addressing the use of “excess funds” in implementing any budget reduction. 2006 House Bill 380, p. 438-40; *see also* R. 124-125.

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. R. 124-125. 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. *Id.* The charitable gaming regulatory account had a surplus at that time, and pursuant to the General Fund Budget Reduction Plan in the 2006 Budget Bill, \$700,000 in excess funds were transferred from that account to the General Fund. *See* 2006 House Bill 380, p. 438-40; *see also* R. 125. 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. By suspending a “no lapse” statute and transferring *excess funds* from an agency account to the General Fund, the General Assembly took action specifically blessed by the Kentucky Supreme Court in *Armstrong*. 709 S.W.2d at 446-447.

D. The Trial Court Found The Transfers Unconstitutional, and The Court of Appeals Reversed.

The Franklin Circuit Court was obviously troubled by the fact that some “no lapse” statutes are frequently suspended so that the General Assembly can use excess agency account funds to balance the budget. Accordingly, in an effort to bring such suspensions (and transfers) to a halt, it issued a ten (10) page opinion and order ruling

that the transfer at issue violated Sections 51 and 180 of the Kentucky Constitution. R. 201-210. Specifically, without citing any supporting authority, the trial court held that the transfer violated Section 51 on grounds that there were too many suspensions in the 2008 Budget Bill -- which the trial court pegged at nearly 150 -- and therefore concluded that this one particular suspension, while constitutional on its own, was somehow unconstitutional because it was in a budget bill with dozens of other suspensions not at issue in this case. R. 208.

Also, without citing any supporting authority, the trial court held that when the legislature suspended the "no lapse" statute, it "converted" the charitable gaming fee into an unconstitutional tax, thereby violating Section 180 of the Kentucky Constitution:

The record is clear in this case that the fee required by the 2008 budget exceeds the actual costs of state regulation. In these circumstances, the legislature, through its suspension of the statute in the budget bill has converted the fee to a tax. To that extent, the challenged portion of the 2008 budget bill violates Sections 51 and 180 of the Kentucky Constitution, which provides that "no tax levied and collected for one purpose shall ever be devoted to another purpose."

R. 209.

Defendants appealed, and in an unanimous unpublished opinion, the Court of Appeals reversed and remanded. The Court of Appeals stated that "[w]e can find no meaningful distinction between the legislative actions authorized in *Armstrong* and the facts herein," and "we are compelled to conclude that the legislation in question comports with the constitutional requirements of § 51" [Opinion, p. 11]. The Court of Appeals "likewise disagree[d] with the circuit court that suspension of KRS 238.570(2) and the transfer of excess funds violated Kentucky Constitution § 180," finding that "[s]imply because the revenue exceeded the expenditures in 2008 does not support the circuit

court's determination that the regulatory fee was somehow converted to an unconstitutional tax" [*id.* at 11-14]. While the Court of Appeals recognized that "the trial court has expressed valid concerns that some statutes are routinely and repeatedly suspended," it concluded that "the proper forum is not this Court but rather the General Assembly itself" [*id.* at 14].

ARGUMENT

I. THE FUND TRANSFER WAS CONSTITUTIONAL.

A. **A Fee Must Be Reasonably Related to the Costs of the Regulation It Funds. A Precise Match Is Not Required.**

Kentucky law does not require the General Assembly to precisely match the cost of regulation with the revenue from a regulatory fee. The amount of a licensing or regulatory fee exacted under the police powers must simply be reasonably related to the costs of administering and enforcing the regulation. *Reeves v. Adam Hat Stores*, 198 S.W.2d 789, 791-92 (Ky. 1946). So long as "the primary purpose of the legislature in imposing such 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*, 971 S.W.2d at 815 (disc. review denied)(emphasis added). This principle is firmly rooted in Kentucky law.

For example, in *Gray v. Methodist Episcopal Church, South, Widows & Orphans Home in State of Ky.*, 272 Ky. 646, 114 S.W.2d 1141 (1938), a charitable organization argued that registration fees imposed on vehicle owners that exceeded the cost of vehicle regulation in the state constituted a tax from which it was exempt. The Court disagreed, concluding that the registration fee was not a tax because the legislature's primary purpose in imposing the fee was to regulate an activity rather than to produce revenue. *Id.* at 1145.

Similarly, in *Oak Park Trust & Sav. Bank v. Village of Mount Prospect*, 536 N.E.2d 763 (Ill. App. 1989), individuals in the real estate industry challenged the constitutionality of a landlord-tenant ordinance imposing licensing fees on landlords, on grounds that the fee was a revenue raising device and thus, beyond the state's police powers. In assessing the constitutionality of the fee, the court recognized that, although the fee must bear some reasonable relationship to the cost of regulation, as long as it contained genuine regulatory provisions, "the mere possibility or even the probability that the fee might exceed in some degree the cost of regulating the business does not invalidate the ordinance on the grounds that it is a revenue raising measure." *Id.* at 767. Noting that the challenged ordinance contained genuine regulatory provisions, and that the plaintiffs had presented no evidence or testimony demonstrating that the fees were unreasonable or unrelated to the cost of regulation, the court upheld the constitutionality of the challenged licensing fee. *Id.*

Only when there is an unreasonable relationship between a regulatory fee's revenue and the costs of regulation will it be deemed unconstitutional. For instance, Kentucky's former high court struck down as unconstitutional a "regulatory" license tax 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). *Adam Hat Stores*, 198 S.W.2d at 791.

The fact is that neither the General Assembly, nor any of its fee-setting authorities, possess a crystal ball, and they therefore cannot precisely match the fee revenues with the costs of the regulatory scheme, which are established in various appropriations. As a result, regulatory fee revenues can and do sometimes produce more

revenue than needed to cover the regulatory costs (*i.e.*, the appropriated amount), thereby causing an agency account to have a surplus, or “excess funds.”

Here, the Charitable Gaming Act itself provides an objective, statutory formula for computing the biennial adjustment of the regulatory fee. KRS 238.570(3). This formula is unmistakably designed to match the revenues from the fees, as closely as possible, with the cost of regulating charitable gaming. Accordingly, so long as the Public Protection Cabinet follows the formula set forth at KRS 238.570(3) when setting the amount of the fee, then the fee is reasonable as a matter of law. And it has done so.²

If that were not enough, a chart that the Appellants include in their brief reflects the reasonable relationship between the fee imposed and the cost of regulating charitable gaming [Appellants’ Brief, p. 9]. As the Court of Appeals noted, Appellants’ chart shows that, in most years, the total expenditures closely tracked the amount of funds received from imposition of the regulatory fee [Opinion, p. 12]. And, in some years, the total expenditures were actually greater than the current receipts [*id.*].

In sum, the statutory formula at KRS 238.570(3) confirms as a matter of law that the primary purpose of the charitable gaming fee is to create funds sufficient to cover the costs of regulating the activity, not to generate revenue for the state. Moreover, the Charitable Gaming Act contains genuine regulatory provisions. Therefore, the charitable gaming regulatory fee is a constitutional exercise of the state’s police power,

² R. 129-130, Affidavit of Marty Hammons, Deputy Commissioner of the Kentucky Department of Charitable Gaming. Appellant presented no proof to the contrary.

regardless of the fact that it happened to produce a surplus that could be transferred to the General Fund in 2008 in order to balance the budget.

As the Court of Appeals correctly held, “there is no indication that the fee is intended to generate excess revenue for the state. Simply because the revenue exceeded the expenditures in 2008 does not support the trial court’s determination that the regulatory fee was somehow converted into an unconstitutional tax” [Opinion p. 14]. This ruling should be affirmed.

II. THE FUND TRANSFER DID NOT VIOLATE SECTION 51.

A. **This Court Specifically Held that Transfers Such as The One at Issue Do Not Violate Section 51.**

Twenty-five (25) years ago this Court squarely addressed the very issue in this case: Can the General Assembly suspend a “no lapse” statute in a budget bill and then transfer excess funds from a fee-based agency account to the General Fund? The answer was an unequivocal “yes.” Specifically, in *Armstrong*, this Court blessed provisions of the 1984 Budget Bill that suspended “no lapse” statutes and transferred surpluses from forty-seven (47) fee-based agency accounts to the General Fund. *Armstrong*, 709 S.W.2d at 446, n.9. This Court recognized that Section 15 of the Constitution provides the General Assembly the authority to suspend such statutes, as that the General Assembly must have “adequate devices” available to balance the budget, including the transferring of excess fee revenue to the General Fund. This Court certainly did not rule that by suspending the “no lapse” statutes that the General Assembly transformed the underlying fees into taxes levied for a particular purpose.

The only agency accounts that this Court protected from such suspensions and transfers were agency accounts with “private” funds: (1) retirement accounts with

employee retirement contributions, and (2) a workers' compensation account funded by *assessments*, not *fees*. *Id.* at 446-447.³

In *Armstrong* this Court addressed a Section 51 challenge to the transfers of excess funds from fee-based agency accounts. First, it held that such transfers do not violate the "title" section of Section 51, as the 1984 Budget Bill was entitled "AN ACT relating to appropriations," and the suspensions and excess fund transfers "clearly relat[e] to appropriations." *Id.* at 446. This Court also held that the suspensions did not violate Section 51's reenactment and republication requirement, as suspensions do not fall within Section 51's ambit. Instead, Section 51's "application is limited by its own wording to amendment, revision, extension, or conferring of existing statutes." *Id.* at 445.

There are no material differences between this case and *Armstrong*. The title of the 2008 Budget Bill, where the one suspension now at issue is found, is identical to the title of the 1984 Budget Bill ruled to be sufficient in *Armstrong*, as it is also "AN ACT relating to appropriations" Moreover, the no-lapse provisions in KRS 238.570 were suspended for one two-year budget biennium, just as the no-lapse provisions were suspended in *Armstrong*. Finally, the charitable gaming account at issue here is

³ "Fees" 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. *Louisville Atlantis*, 871 S.W.2d at 815. 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." *Beshear v. Haydon Bridge Company, Inc.*, 304 S.W.3d 682, 698 (Ky. 2010). Examples of "assessments" are charges levied upon landowners for sewer, lighting or street improvement projects that primarily benefit them and their neighbors, not the public at large. *Kentucky River Authority v. City of Danville*, 932 S.W.2d 374, 377 (Ky. App. 1996).

undeniably a fee-based fund, not an assessment-based fund, and therefore is identical in nature to the 47 accounts whose excess funds were transferred in *Armstrong*. Accordingly, the \$700,000 transfer at issue was constitutional, and the suspension of KRS 238.570's "no-lapse" provision did not turn the underlying fees into taxes.

This Court recently confirmed that *Armstrong* is still good law, even in this era in which the trial court suggests that "statutory suspensions have become a way of life." Namely, in *Beshear v. Haydon Bridge Company*, 304 S.W.3d 682 (Ky. 2010), the plaintiffs challenged the repeated suspension of an annual appropriation of \$19,000,000 being made to the Workers' Compensation Special Fund. The statute was suspended in the 2000-2002 and 2002-2004 biennia, and the budget bills for those biennia each contained far more than 47 suspensions. See 2000 House Bill 502; 2003 House Bill 269. Relying on *Armstrong* and Section 15, this Court upheld the suspensions as constitutional. *Id.* at 707. Moreover, this Court specifically confirmed that *Armstrong's* approval of suspensions is good law, and was not affected by the fact that KRS 446.085 (referred to by the trial court as SB 294), which required a declaration of "financial emergency" before any such suspensions were made, was repealed in 1994. *Id.* at 700.

B. The Trial Court Erred In Finding a Violation of Section 51.

It is evident from Opinion and Order that the trial court was deeply troubled by the General Assembly's practice of suspending "no lapse" statutes, and transferring excess agency account funds to the General Fund, as a tool for balancing the budget. The trial court suggested that "such statutory suspensions have become a way of life," and claimed that the "2008 Budget Bill at issue in this case contains literally

hundreds of suspensions,” and that budgets “now routinely suspend up to 150 statutes.” R. 204-205, 208. The trial court stated that “[m]any of these suspensions of statutes, especially those involving the transfer of funds from restricted accounts, are now re-enacted in each biennial budget, to the point that many of the statutes codified in the Kentucky Revised Statutes could fairly be characterized as having been effectively repealed. . . .” R. 205. The trial court then claimed that “there is considerable doubt about the constitutional validity of the legislative practice of routinely and repeatedly suspending statutes in the budget, to the point that many statutes remain law in name only.” R. 206.

This case, however, is not a referendum on the wisdom of balancing the budgets through the use of suspensions. Moreover, this case does not concern the constitutionality of the entire 2008 Budget Bill, nor the other 149 or so suspensions the trial court alleges to be in the Budget Bill, most of which are not even identified in the trial court’s opinion. This case also did not call on the court to determine whether repeated suspensions are constitutional, *i.e.*, if there is a limit on the number of times the General Assembly can suspend a statute in a row, and if so, how many are too many. Instead, this case concerns the constitutionality of only *one* suspension – the suspension of the “no-lapse” provisions of KRS 238.570 by the 2008 Budget Bill. That *one* suspension permitted \$700,000 in excess funds to be transferred from the fee-based charitable gaming account to the General Fund. Petition, R. 9-11. And as described above, the constitutionality of such a suspension was squarely approved by *Armstrong*, where the Supreme Court approved *forty-seven* such suspensions contained in the 1984 Budget Bill.

The trial court, however, suggested that Section 51 sets a constitutional limit on the number of suspensions that can be in a budget bill, and that the number of suspensions in the 2008 Budget Bill exceeds the limit. Notably, however, the trial court did not suggest that the *one* suspension at issue here would be unconstitutional if it were the only suspension in the 2008 Budget Bill. Nor did the trial court suggest that 47 suspensions in a budget bill is unconstitutional, as *Armstrong* confirmed that it is not. Instead, it concluded that the constitutional limit on the number of suspensions in a budget bill falls somewhere between 47 and 150 suspensions:

It now appears that the legislature has extended its authority under *Armstrong* beyond any meaningful limits, ignoring the plain constitutional restrictions of Section 51, by enacting budgets that now routinely suspend up to 150 statutes.

R. 208.

The trial court, however, did not tell us exactly what it believes the limit on suspensions to be. Is the limit 48? 50? 100? 125? It did not say. Instead, the trial court simply concluded that the 2008 Budget Bill had too many suspensions, and therefore concluded that all suspensions in that budget violate Section 51, including the *one* suspension actually at issue in this case.

The trial court's arbitrary reasoning fails instantly, as Section 51 of the Kentucky Constitution contains no such limitation on suspensions. Nor does any case addressing Section 51 – a fact confirmed by the lack of supporting authority in the trial court's Opinion and Order.

Moreover, the trial court's reasoning violates Section 15 of the Kentucky Constitution. Namely, Section 15, which states that “[n]o power to suspend laws shall be exercised unless by the General Assembly or its authority,” provides the General

Assembly with the unfettered right to suspend statutes. *Armstrong*, 709 S.W.2d at 442. There is no limit on the number of statutes it can suspend, just as there is no limit on the number of statutes it can pass or repeal. There is no constitutional provision saying “150 suspensions is too many.”

Furthermore, there is no constitutional limit on the number of times a particular statute can be consecutively suspended. While the trial court may find suspensions to be distasteful, or perceive them to amount to bad government, they are not unconstitutional. And just as the General Assembly has the constitutional authority to temporarily suspend 47 statutes in a Budget Bill, it has equal constitutional authority to suspend 150 statutes. The trial court’s suggestion that 47 suspensions is acceptable, but 150 is not, is arbitrary. Furthermore, just as the General Assembly is free to repeal a statute, Section 15 provides it with the freedom to take the less drastic step of suspending a statute 2, 3, 4, or even 10 biennia in a row if our elected representatives determine that to be in the public interest. Therefore, the Court of Appeals opinion in this case should be affirmed.

III. THE FUND TRANSFER DID NOT VIOLATE SECTION 180 OF THE KENTUCKY CONSTITUTION.

The revenue at issue in this case is generated by charitable gaming fees. In *Louisville Atlantis*, the Court of Appeals specifically ruled that this revenue is not *tax* revenue, and therefore is not subject to the constitutional limits imposed on taxation:

If the primary purpose of the legislature in imposing such 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 (citing *Gray*, 114 S.W.2d at 1144). This Court then denied discretionary review of *Louisville Atlantis*. In fact, as the quote above

demonstrates, our appellate courts recognize that a fee will “produce revenue for the public” if it happens to generate excess funds, and the fact that it does so does not render it a tax. And there is no constitutional requirement that excess funds remain in agency accounts rather than be transferred to the General Fund. Such “no lapse” requirements are purely statutory constructs, and while perhaps good policy, nevertheless may be temporarily suspended by the General Assembly that created them. *Armstrong*, 709 S.W.2d at 446-447. In fact, there are certain fee-supported agency accounts whose excess funds are statutorily required to lapse to the General Fund, and there is absolutely no case, statute, or other authority suggesting that transfers of such excess funds violate Section 180. *See, e.g.*, KRS 198B.615 (which 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).

Again, the only constitutional requirement is that the fees be set in a manner that their revenue have a reasonable relationship with the costs of the regulation they are designed to cover. And here, KRS 238.570(3) guarantees that requirement will be fulfilled in the context of charitable gaming.

IV. KRS 48.315 PERMITS THE TRANSFER OF EXCESS FUNDS FROM THE CHARITABLE GAMING ACCOUNT TO THE GENERAL FUND.

While the trial court held that the General Assembly lacked the constitutional authority to transfer of \$700,000 in surplus charitable gaming funds to the General Fund, it also “noted” that it believed that the General Assembly also lacked any statutory authority for the transfer because the charitable gaming regulatory account was

not expressly listed in KRS 48.315, where the General Assembly listed statutory funds whose excesses it may transfer to the General Fund. R. 209-210.

The Court of Appeals properly reversed. One thing the trial court ignored is the fact that the General Assembly enacted KRS 48.315 in 1984, ten years before it passed the Charitable Gaming Act. Thus, the charitable gaming regulatory fund did not even exist at the time the General Assembly enacted KRS 48.315. It therefore obviously would not have been included in the original list of special statutory funds referenced by that statute.

Moreover, there is no limiting language in KRS 48.315 suggesting that the legislature intended to restrict the scope of this statute only to the expressly enumerated statutory funds listed in 1984. Quite to the contrary, the legislature ended its listing of over 60 expressly listed statutory funds with the inclusion of the term “etc.” The use of the term “etc.” establishes that the legislature did not intend for this list of transferable statutory funds set out in 1984 to be exhaustive or all-encompassing. Elementary rules of statutory construction dictate that the legislature intends that all words in a statute 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 (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). The General Assembly no doubt recognized that the number and nature of agency funds, special funds, and other funds created under Kentucky statutory law will necessarily change over time. Rather than require constant amendments of KRS 48.315 every two years to account for all newly enacted statutory funds, it is apparent that the General Assembly inserted the term "etc." to ensure that similar statutory funds enacted in the future would fall within the scope of KRS 48.315. As the Court of Appeals correctly observed, the list of statutes in KRS 48.315(1) is "illustrative rather than exhaustive," and "[t]o hold otherwise would render its inclusion meaningless and nonsensical" [Opinion, p. 16].

What is more, the "no lapse" language in KRS 238.570(2) does not set it apart from the transferable statutory funds actually listed in KRS 48.315. Indeed, several of the statutes listed in KRS 48.315 contain virtually identical language. *See, e.g.*, KRS 248.540; KRS 230.218. Further, unlike KRS 238.570(2), several of the statutes listed in KRS 48.315 contain an explicit directive that the special funds created shall not revert to the General Fund. *See, e.g.*, 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 provided list in KRS 48.315, which the legislature provides as guidance to itself,⁴ demonstrates that

⁴ While KRS 48.315 provides guidance and acts as a reminder to the legislature, it is not necessary for the suspension of statutes, as KY. CONST. § 15 is all the authority that is needed.

any regulatory accounts comparable to those expressly identified are subject to transfer to the Commonwealth's General Fund.⁵

Therefore, since the charitable gaming regulatory account is inarguably analogous to the statutory funds enumerated in KRS 48.315, that statute provides the General Assembly with express authority to suspend KRS 238.570(2) and transfer any excess funds from the account to the General Fund when it deems it appropriate.

Finally, in its recent *Haydon Bridge* decision, this Court unequivocally rejected the 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

⁵ The use of "etc." does not render the statute impermissibly vague. "A statute is impermissibly vague when a person disposed to obey the law could not determine with reasonable certainty from the language used that a contemplated conduct would amount to a violation." *Louisville Atlantis*, 971 S.W.2d at 816. Here, the legislature enacted KRS 48.315 to provide guidance to itself. "Because [KRS 48.315] does not itself prohibit any conduct, the vagueness argument has no applicability." *Id.*

legislature's authority to suspend *any* "no lapse" statutes dealing with "public" funds regardless of the language in KRS 48.315. *Id.*

**V. CHARITABLE GAMING FEE REVENUES ARE NOT
"PRIVATE FUNDS."**

Appellants also summarily assert that "charitable gaming regulatory fees are private funds" because they "come solely from private not-for-profit licensees and permittees" [Appellants' Brief, p. 20]. Appellants mislead. In *Thompson v. Kentucky Reinsurance Association*, 710 S.W.2d 854 (Ky. 1986), this Court showed how to differentiate between a "public" and "private" statutory account. "Private" accounts, on one hand, have both (1) a private "nature and purpose" *and* (2) a private source of funding. *Id.* at 857. "Public" accounts, on the other hand, have either (1) a public "nature and purpose" *or* (2) a public source of funding. *Id.*

Accordingly, accounts funded solely by assessment revenues are "private," as assessments have both a private purpose *and* a private source: They are "mandatory donations"⁶ 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). As a result, in *Armstrong*, this Court found that the Workers' Compensation

Benefit Reserve Fund, which was funded entirely by “assessments” when *Armstrong* was decided, was a “private” account. *Armstrong*, 709 S.W. 2d at 446-47.

Accounts funded by “fees,” on the other hand, are “public” in nature because fees are collected in the furtherance of a public purpose, such as the regulation of a specific trade, occupation or activity. *See id.* In general, fees are levied pursuant to the police power, and are collected because the General Assembly wants to ensure sufficient regulation of an activity that poses a potential harm to the public.

Here, it is undisputed that the charitable gaming charges paid by Appellants are *fees* that are levied pursuant to the police power in order to ensure that charitable gaming is conducted properly in Kentucky [Appellants’ Brief, p. 13].⁷ Accordingly, the fee-based charitable gaming account consists of “public” funds, and is identical in nature to the 47 fee-based accounts that this Court held were properly subject to excess revenue transfers in *Armstrong*. Accordingly, the Court of Appeals correctly held that “there can be no contention the gaming fees constitute private funds” [Opinion, p. 14].

Appellants’ current suggestion that the “source of funding” is the sole determining factor in determining whether an account is “public” or “private” does not even pass the smell test. If such were the case, Kentucky’s General Fund would be a

(...continued)

⁶ *Armstrong*, 709 S.W.2d at 446-447.

⁷ “The fees imposed pursuant to KRS 238.570 are for the specific purpose of fulfilling the statutory mandates regulating charitable gaming. Funds generated from those fees are to
(continued...) ”

“private” account, as the primary source of General Fund revenue is taxes paid by “private” individuals and businesses across Kentucky. The General Fund, however, is obviously not a “private” fund, as “the nature and purpose” of a State account is also considered in determining whether it is “public” or “private.”

That said, the fact that the charitable gaming regulatory account, like the General Fund, is a “public” account does not mean that *all* of the money therein is available for general government purposes. It is not. The charitable gaming regulatory account is a *restricted* statutory account, meaning that *all* of the fee revenue it holds, up to the amount of the appropriated costs, must be spent on the regulation of charitable gaming. Accordingly, the only funds that are subject to transfer to the General Fund are the excess funds that may be in the account.

Moreover, the amount of excess funds that may be available for transfer to the General Fund will be marginal, as the Constitution requires a reasonable relationship between the amount of fee revenue generated and the cost of regulation being funded. *Henderson v. Lockett*, 157 Ky. 366, 163 S.W. 199, 201 (1914), *Reeves*, 303 Ky. 633, 198 S.W.2d at 791-92.

VI. APPELLANTS ABANDONED THEIR CHALLENGE TO THE 2008 INCREASE TO THE CHARITABLE GAMING FEE.

Appellants’ brief attacks the legality of a July 1, 2008 increase in the charitable gaming fee imposed under KRS 238.570 from 0.53% of gross receipts to

(...continued)

be used for the specific purpose of administering and enforcing the charitable gaming
(continued...)

0.60% of gross receipts [Appellant's Brief, pp. 20-23]. This challenge, of course, presents a completely different issue, both in fact and in law, to Appellants' primary challenge in this case, which is their challenge to the suspension of the "no lapse" statute and the resulting \$700,000 transfer to the General Fund.

The trial court did not address Appellants' fee challenge, and Appellants made no effort to seek further findings or clarification from the trial court on this discrete and separate issue prior to appeal. Accordingly, when Appellants tried to raise this issue again in the Court of Appeals, the Court of Appeals refused to review it:

[As Appellants] acknowledge in this Court, the trial court did not rule on these matters in its opinion and order granting summary judgment. We are of the opinion that it was incumbent upon [Appellants] to seek further findings or clarification from the trial court and their failure to do so precludes appellate review herein.

[Court of Appeals Opinion, p. 17].

The Court of Appeals' decision was correct. When a plaintiff presents multiple, discrete issues to a trial court for decision, it must obtain a ruling by the trial court on each and every discrete issue that it wants reviewed. Otherwise there is no ruling for the appellate court to actually affirm or reverse:

We only review decisions of the lower courts for prejudicial error, consequently, without a ruling of the lower court on the record regarding a matter, appellate review of that matter is virtually impossible. This is why we require that an appellant not only present an issue to the lower court on the record but also to make reasonable efforts to obtain a ruling from the court on the record concerning that issue. Here, the appellants failed to invoke legitimate procedural mechanisms, such a motion to alter or amend, to obtain a ruling on any issues that the circuit court failed to

(...continued)

statutes and regulations.”

address. Consequently, we hold that the issues not ruled upon in the circuit court are not properly preserved for our review.

Jewell v. City of Bardstown, 260 S.W.3d 348, 350-351 (Ky. 2008)(discretionary review denied).

Appellants, however, contend that *Fischer v. Fischer*, 97 S.W.3d 98 (Ky. 2006), and other similar cases, hold that an appellate court may review any matter “presented to the trial court, although there were no specific findings made on the issue” [Appellants’ Brief, p. 22]. Appellants are wrong. Cases like *Fischer* do not hold that an appellate court may consider discrete *claims* that are not ruled upon by a trial court. Instead, cases like *Fischer* hold that appellate courts may consider *arguments* made in the trial court concerning a claim actually decided by the trial court, even if that argument is not addressed by the trial court. For instance, if a defendant moves to dismiss a breach of contract claim on grounds that (1) the plaintiff has no standing and (2) named an improper defendant, but the trial court dismisses the claim solely on grounds that plaintiff lacks standing, and does not address the improper defendant argument, the defendant can still advance both arguments on appeal. As this Court succinctly stated in *Fischer*, where a judgment “is sustainable on any basis, it must be affirmed.” *Id.* at 103. Stated differently, “a correct decision by a trial court is to be upheld on review, notwithstanding it was reached by improper route or reasoning.” *Revenue Cabinet v. Joy Technologies, Inc.*, 838 S.W.2d 406, 410 (Ky. App. 1992). *See also Brewick v. Brewick*, 121 S.W.3d 524, 527 (Ky. App. 2003)(appellate court may affirm a trial court for reasons other than those relied on by trial court, so long as such is sustainable under the record); *Kentucky*

Farm Bureau Mut. Ins. Co. v. Gray, 814 S.W.2d 928 (Ky. App. 1991) (an appellee may offer an “alternate ground for affirmance,” even if not ruled upon by the trial court).

Here, however, Appellants’ challenge to the increase in the charitable gaming fee rate is not an “alternative ground for affirmance” of the trial court’s decision concerning the \$700,000 transfer. Instead, it is an entirely different claim that was never decided in the first instance by the trial court.⁸ Accordingly, it cannot be reviewed. Appellants abandoned this discrete claim by failing to obtain a ruling on it from the trial court.

VII. THE 2008 INCREASE IN THE CHARITABLE GAMING FEE WAS VALID.

The circuit court having ignored the issue, and the Court of Appeals having refused to consider it on its merits, this Court should not make the first ever determination on Appellants’ challenge to the increase in the charitable gaming fee. Doing so would be procedurally improper. Nevertheless, if it is inclined to do so, it should reject the challenge. As Appellants note, this .07% increase was implemented by the Public Protection Cabinet (where the Department of Charitable Gaming is administratively assigned) in 2008. Appellants contend that this fee increase was void because the Public Protection Cabinet exacted the increase in an even numbered year [*id.*]. This argument is unavailing. Although the charitable gaming fee is typically adjusted in odd-numbered years, the fee was not adjusted in 2007 [R. 129-130, Aff. of

⁸ It is an undisputed fact that there was *no connection* between the \$700,000 transfer and the increase in fees, as the 2008 fee increase was calculated using account balances as they existed *before* the \$700,000 transfer even took place [R. 167, Aff. of Greg Troutman, ¶¶ 1-4].

Marty Hammons ¶ 3]. Consequently, the Public Protection Cabinet assessed and adjusted the fee in 2008. *Id.* Because the Cabinet was clearly authorized to adjust the fee in 2007 but did not, its later adjustment in 2008 was sound.

Moreover, KRS 238.570(1) provides that “[t]he amount of the [charitable gaming] fee shall be adjusted by October 1 of each odd-numbered year” Contrary to Appellants’ assertion, this statute does not prohibit readjustments of the charitable gaming fee in even-numbered years. Rather, the statute merely requires the Cabinet to perform a biennial recalculation of the charitable gaming fee at least by October 1 of odd-numbered years. The obvious purpose of this statute is to ensure that the charitable gaming fee is evaluated at least every two years in order to guarantee that it meets the constitutional requirement that fee revenues reasonably correspond to the cost of enforcing and administering charitable gaming regulations. Accordingly, the more often the rate is readjusted the better.

It is also well settled that courts must construe statutes in accordance with the legislative intent as ascertained by the words used in enacting the statute, rather than surmising what may have been intended but was not expressed. *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775, 784 (Ky. 2008). Nothing in the language of the statute suggests that the Public Protection Cabinet is prohibited from performing more frequent recalculations. Thus, Appellants’ argument that KRS 238.570 forecloses fee adjustments in even-numbered years fails even if it is heard.

CONCLUSION

The transfer of \$700,000 in excess funds from the charitable gaming regulatory account (which is the only issue properly before this court) falls 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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