



Received: 2024-SC-0254 05/09/2025  
 Filed: 2024-SC-0254 05/09/2025  
 M. Katherine Bing, Clerk  
 Supreme Court of Kentucky

# Supreme Court of Kentucky

No. 2024-SC-0254

JONATHAN SHELL, in his official capacity as  
 Commissioner of the Department of  
 Agriculture, *et al.*

*Appellants/Cross-Appellees*

v.

On appeal from  
 Jefferson Circuit Court No. 21-CI-002234;  
 Court of Appeals Nos. 2021-CA-1459,  
 2021-CA-1503, 2022-CA-0020

ANDY BESHEAR, in his official capacity as  
 Governor of the Commonwealth of Kentucky, *et al.*

*Appellees/Cross-Appellants*

---



---

## OPENING BRIEF OF APPELLANTS/CROSS-APPELLEES

---



---

Matthew F. Kuhn  
 John H. Heyburn  
 Jacob M. Abrahamson  
 Office of the Attorney General  
 700 Capital Avenue, Suite 118  
 Frankfort, Kentucky 40601  
 Matt.Kuhn@ky.gov  
*Counsel for the Commonwealth*

Heather L. Becker  
 Department of Agriculture  
 105 Corporate Drive  
 Frankfort, Kentucky 40601  
 HeatherL.Becker@ky.gov  
*Counsel for Agriculture  
 Commissioner Jonathan Shell*

David E. Fleenor  
 Vaughn Murphy  
 Jean Bird  
 Office of the Senate  
 President  
 702 Capital Ave., Room 236  
 Frankfort, Kentucky 40601  
 Dave.Fleenor@lrc.ky.gov  
*Counsel for the Senate  
 President*

D. Eric Lycan  
 Office of the Speaker  
 702 Capital Ave., Room 332  
 Frankfort, Kentucky 40601  
 Eric.Lycan@lrc.ky.gov  
*Counsel for the House Speaker*

Ellen Benzing  
 State Fair Board  
 P.O. Box 37130  
 Louisville, Kentucky 40233  
 Ellen.Benzing@kyvenues.com  
*Counsel for Dr. Mark Lynn*

### CERTIFICATE OF SERVICE

I certify that this brief was served by U.S. mail on May 9, 2025 on the following: S. Travis Mayo, Office of the Governor, 700 Capital Avenue, Suite 106, Frankfort, Kentucky 40601 (also served via email); Mitchel T. Denham, McBrayer PLLC, 500 West Jefferson Street, Suite 2400, Louisville, Kentucky 40202 (also served via email); Sarah G. Cronan, Tourism, Arts and Heritage Cabinet, 500 Mero Street, Fifth Floor, Frankfort, Kentucky 40601 (also served via email). I also sent copies by U.S. mail to the Clerks of the Jefferson Circuit Court and the Court of Appeals. The record on appeal was not withdrawn in preparing this brief.

*Matthew F. Kuhn*

## INTRODUCTION

This appeal presents two questions. First, it asks whether the Governor must appoint a majority of the voting members of every board and commission in the Commonwealth. The answer is no. Section 93 says that the General Assembly gets to decide who makes such appointments with no mention of a role for the Governor. This Court unanimously rejected the Governor's primary argument to the contrary just four years ago in *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021).

Second, this appeal asks whether a legislator or his or her designee can serve as a nonvoting member of a state board or commission. The answer is yes. Because a nonvoting member of a board or commission cannot exercise executive power, and because nonvoting service facilitates legislative oversight of the executive branch, a legislator or his or her designee merely serving as a nonvoting member of a board or commission is in keeping with the separation of powers.

## STATEMENT CONCERNING ORAL ARGUMENT

The Court has ordered that oral argument will be held.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION ..... i
Cameron v. Besbear, 628 S.W.3d 61 (Ky. 2021)..... i
STATEMENT CONCERNING ORAL ARGUMENT ..... i
STATEMENT OF THE CASE..... 1
1902 Ky. Acts ch. 112..... 1
Ky. Live Stock Breeders’ Ass’n v. Hager, 85 S.W. 738 (Ky. 1905)..... 1
1906 Ky. Acts ch. 99 ..... 2
1906 Ky. Acts ch. 90 ..... 2
1912 Ky. Acts ch. 82 ..... 2
1934 Ky. Acts ch. 2 ..... 2
Ferguson v. Chandler, 99 S.W.2d 732 (Ky. 1936) (per curiam)..... 2
1938 Ky. Acts ch. 29 ..... 2
1940 Ky. Acts ch. 7 ..... 2
1972 Ky. Acts ch. 321 ..... 3
1976 Ky. Acts ch. 192..... 3
1982 Ky. Acts ch. 454..... 3
LRC v. Brown, 664 S.W.2d 907 (Ky. 1984)..... 3
2016 Ky. Acts ch. 142..... 3
2017 Ky. Acts ch. 9 ..... 3
2021 Ky. Acts ch. 163 ..... 3
Ky. Const. § 69 ..... 4
Ky. Const. § 76 ..... 4
Ky. Const. § 81 ..... 4
North Carolina v. Berger, 781 S.E.2d 248 (N.C. 2016)..... 5
Shell v. Besbear, 2024 WL 1005023 (Ky. App. Mar. 8, 2024) ..... 6, 7
Coleman v. Besbear, 2024 WL 875611 (Ky. App. Mar. 1, 2024) ..... 6

**ARGUMENT** ..... 7

*Wynn v. Ibold, Inc.*, 969 S.W.2d 695 (Ky. 1998) ..... 7

*Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493 (Ky. 1998) ..... 7

Ky. Const. § 69 ..... 8

Ky. Const. § 81 ..... 8

**I. HB 518 does not violate Sections 69 and 81 of the Constitution.** ..... 8

*Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982)..... 8

Press Conference (Apr. 4, 2024), <https://www.youtube.com/live/4csn9LyZk5k?t=2596s> ..... 9

*Coleman v. Besbear*, 2024 WL 875611 (Ky. App. Mar. 1, 2024) ..... 9

*Cameron v. Besbear*, 628 S.W.3d 61 (Ky. 2021) ..... 10

**A. The constitutional text does not support the Governor.** ..... 10

*Ward v. Westerfield*, 599 S.W.3d 738 (Ky. 2019)..... 10–11

*City of Louisville v. German*, 150 S.W.2d 931 (Ky. 1940) ..... 10

Ky. Const. § 69 ..... 10–11, 13, 15

Ky. Const. § 81 ..... 10–11, 13, 15

*LRC v. Fischer*, 366 S.W.3d 905 (Ky. 2012) ..... 12

Ky. Const. § 76 ..... 12–13

Ky. Const. § 93 ..... 12–16

Ky. Const. § 152 ..... 12

*Rouse v. Johnson*, 28 S.W.2d 745 (Ky. 1930)..... 12

*Commonwealth ex rel. Att’y Gen. v. Howard*, 180 S.W.2d 415 (Ky. 1944) .... 13

*Landrum v. Commonwealth ex rel. Besbear*, 599 S.W.3d 781 (Ky. 2019) ..... 14

*Sibert v. Garrett*, 246 S.W.455 (Ky. 1922)..... 14

*Elrod v. Willis*, 203 S.W.2d 18 (Ky. 1947) ..... 14

*Ky. Ass’n of Realtors, Inc. v. Musselman*, 817 S.W.2d 213 (Ky. 1991) ..... 14

KRS 15.291 ..... 15

*Ferguson v. Chandler*, 99 S.W.2d 732 (Ky. 1936) (per curiam) ..... 15

*Fox v. Grayson*, 317 S.W.3d 1 (Ky. 2010) ..... 16

*Shell v. Beshear*, 2024 WL 1005023 (Ky. App. Mar. 8, 2024) ..... 16

**B. History confirms that Sections 69 and 81 do not grant the Governor any appointment power to the Fair Board..... 17**

*Keck v. Manning*, 231 S.W.2d 604 (Ky. 1950) ..... 17

Ky. Const. § 69 ..... 17, 19–20

Ky. Const. § 81 ..... 17, 19, 20–21

*Shell v. Beshear*, 2024 WL 1005023 (Ky. App. Mar. 8, 2024) ..... 17–23

Ky. Const. § 93 ..... 17

Ky. Const. Art. III, § 25 (1850)..... 17

Ky. Const. Art. II, § 8 (1792) ..... 17

Ky. Const. Art. II, § 16 (1792) ..... 17

Ky. Const. Art. II, § 17 (1792) ..... 17

Ky. Const. Art. III, § 9 (1799)..... 17

Ky. Const. Art. III, § 23 (1799)..... 17

Ky. Const. Art. III, § 24 (1799)..... 17

*Votteler v. Fields*, 23 S.W.2d 588 (Ky. 1926) ..... 18, 20

1992 Ky. Acts ch. 168..... 19

*Fox v. Grayson*, 317 S.W.3d 1 (Ky. 2010) ..... 19

*Jones v. Forgy*, 750 S.W.2d 434 (Ky. 1988) ..... 19

Ky. Const. § 76..... 19

Ky. Const. Art. II, § 9 (1792) ..... 19

Ky. Const. Art. III, § 10 (1799)..... 19

Ky. Const. Art. III, § 21 (1850)..... 20

1 Official Report of the Proceedings and Debates (1890) ..... 21

*Miller v. Johnson*, 18 S.W. 522 (Ky. 1892)..... 22

*Kraus v. Ky. State Senate*, 872 S.W.2d 433 (Ky. 1993)..... 22

4 Official Report of the Proceedings and Debates (1891) ..... 23

*Coleman v. Beshear*, 2024 WL 875611 (Ky. App. Mar. 1, 2024) ..... 23

**C. Caselaw makes clear that Sections 69 and 81 do not impliedly grant appointment authority to the Governor.** ..... 24

Ky. Const. § 69..... 24, 26

Ky. Const. § 81..... 24, 26

Ky. Const. § 93..... 24, 26

*Rouse v. Johnson*, 28 S.W.2d 745 (Ky. 1930)..... 24–29

1992 Ky. Acts ch. 168..... 24

*LRC v. Brown*, 664 S.W.2d 907 (Ky. 1984)..... 25

Ky. Const. § 76..... 25

*Shell v. Besbear*, 2024 WL 1005023 (Ky. App. Mar. 8, 2024) .. 25, 34, 37, 42

*Calloway Cnty. Sheriff’s Dep’t v. Woodall*, 607 S.W.3d 557 (Ky. 2020) ..... 27

*Coleman v. Mulligan*, 28 S.W.2d 980 (Ky. 1930) ..... 27

Gen. Stats. of Ky. (J. Bullitt, J. Feland, eds.) ch. 33, art. V, § 6 (1887).... 27

Gen. Stats. of Ky. (J. Bullitt, J. Feland, eds.) ch. 92-II, art. III, § 3 (1887) ..... 27

Gen. Stats. of Ky. (J. Bullitt, J. Feland, eds.) ch. 92-II, art. III, § 3 (1887) ..... 27

Gen. Stats. of Ky. (J. Bullitt, J. Feland, eds.) ch. 101, § 1 (1887) ..... 28

Ky. Stats. (J. Carroll, ed., 3d ed.) ch. 118, § 4588 (1903) ..... 28

Ky. Stats. (J. Carroll, ed., 3d ed.) ch. 105, § 3953 (1903) ..... 28

Ky. Stats. (J. Carroll, ed., 4th ed.) ch. 59a, § 2007a.3. (1909) ..... 28

Ky. Stats. (J. Carroll, ed., 4th ed.) ch. 113, art. Va., § 4421a(1) (1909) ..... 28

Ky. Stats. (J. Carroll, ed., 3d ed.) ch. 113, art. III, § 4377 (1903)..... 29

*Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982)..... 29–38

Ky. Const. § 91 ..... 30–35

*Coleman v. Besbear*, 2024 WL 875611 (Ky. App. Mar. 1, 2024) ..... 32, 39

*Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005)..... 34

*Cameron v. Besbear*, 628 S.W.3d 61 (Ky. 2021) ..... 35–39

KRS 39A.180 ..... 35

Initial Brief for Respondents, *Cameron v. Besbear*, 628 S.W.3d 61 (Ky. 2021) (No. 2021-SC-0107), 2021 WL 2404982 ..... 36

*McClure v. Augustus*, 85 S.W.3d 584 (Ky. 2002) ..... 37

*Martin v. Franklin Cap. Corp.*, 546 U.S. 132 (2005) ..... 38

*Gasaway v. Commonwealth*, 671 S.W.3d 298 (Ky. 2023) ..... 38

Ky. Const. § 15..... 38

*Royster v. Brock*, 79 S.W.2d 707 (Ky. 1935) ..... 39–41

*McChesney v. Sampson*, 23 S.W.2d 584 (Ky. 1930)..... 39

Ky. Const. § 80..... 40

*Martin v. Chandler*, 318 S.W.2d 40 (Ky. 1958) ..... 40

*Ky. Emps. Ret. Sys. v. Seven Cnty. Servs.*, 580 S.W.3d 530 (Ky. 2019) ..... 41

*Besbear v. Acree*, 615 S.W.3d 780 (Ky. 2020)..... 42

*North Carolina v. Berger*, 781 S.E.2d 248 (N.C. 2016)..... 42

**D. The consequences of the Governor’s argument counsel against sustaining it..... 43**

Ky. Const. § 69..... 43, 45–47

Ky. Const. § 81..... 43, 45–47

KRS 15.291..... 43, 45

KRS 15.300..... 43

KRS 41.450..... 43

*Besbear v. Coleman*, 2024-SC-0228 (Ky.) ..... 44

KRS 11A.060..... 44

KRS 246.120..... 44

KRS 15.264..... 44

KRS 15.705..... 44

KRS 15.910..... 44

KRS 18A.226..... 44

KRS 65.320..... 44

KRS 65.360..... 44

KRS 148.034..... 44

KRS 148.0222..... 44

KRS 156.007..... 44

KRS 171.311..... 44

KRS 171.420..... 44

KRS 175B.030..... 44

KRS 183.132..... 44

KRS 198A.750 ..... 44

KRS 217B.505..... 44

KRS 218B.020..... 44

KRS 230.400..... 45

KRS 247.804..... 45

KRS 247.944..... 45

KRS 248.510..... 45

KRS 248.707..... 45

KRS 260.018..... 45

Ky. Opioid Abatement Advisory Comm’n, <https://perma.cc/7ZMP-NZAH> ..... 45

2021 Ky. Acts ch. 113 ..... 45

*Gasaway v. Commonwealth*, 671 S.W.3d 298 (Ky. 2023) ..... 46

*Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982) ..... 47–48

Ky. Const. § 91..... 47–48

*Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021)..... 48

Ky. Const. § 93..... 48

*Rouse v. Johnson*, 28 S.W.2d 745 (Ky. 1930) ..... 48

*Coleman v. Beshear*, 2024 WL 875611 (Ky. App. Mar. 1, 2024)..... 48

**II. The Constitution allows legislators or their designees to serve as nonvoting members on the Fair Board.**..... 49

Ky. Const. § 27..... 49, 63

Ky. Const. § 28..... 49, 63

2021 Ky. Acts ch. 163..... 49, 51, 57–58, 61

*LRC v. Brown*, 664 S.W.2d 907 (Ky. 1984) ..... 49–50, 52–54, 56–64

*Shell v. Beshear*, 2024 WL 1005023 (Ky. App. Mar. 8, 2024)..... 49, 53, 55, 60

*Commonwealth Cabinet for Health & Fam. Servs., Dep’t for Medicaid Servs. v. Sexton*, 566 S.W.3d 185 (Ky. 2018)..... 50–51

*Commonwealth v. Bredhold*, 599 S.W.3d 409 (Ky. 2020) ..... 50

*City of Pikeville v. Ky. Concealed Carry Coal., Inc.*, 671 S.W.3d 258 (Ky. 2023) ..... 50

Ky. Const. § 69 ..... 51

Ky. Const. § 81 ..... 51

*Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355 (Ky. 2016)..... 51

1982 Ky. Acts ch. 131..... 52

*Seiler v. O’Maley*, 227 S.W. 141 (Ky. 1921) ..... 52

*Comm’rs of Sinking Fund v. George*, 47 S.W. 779 (Ky. 1898)..... 52–53

*Taylor v. Commonwealth*, 26 Ky. 401 (Ky. 1830)..... 53

*Pratt v. Breckenridge*, 65 S.W. 136 (Ky. 1901) ..... 53

*Sewell v. Bennett*, 220 S.W. 517 (Ky. 1920) ..... 53–54

*Sibert v. Garrett*, 246 S.W.455 (Ky. 1922)..... 54–56, 58–59

*Philpot v. Patton*, 837 S.W.2d 491 (Ky. 1992)..... 55

*In re Constitutionality of House Bill No. 222*, 90 S.W.2d 692 (Ky. 1936) ..... 55

*Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021) ..... 59

*Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982)..... 59

KRS 15.910 ..... 60

KRS 15A.063 ..... 60, 63

KRS 15A.075 ..... 60, 61, 63

KRS 18A.226 ..... 60, 61

KRS 620.055 ..... 60, 64

KRS 31.015 ..... 60, 61

1940 Ky. Acts ch. 7..... 61

*Rouse v. Johnson*, 28 S.W.2d 745 (Ky. 1930)..... 61

KRS 11.026 ..... 61

KRS 12.550 ..... 61

KRS 15.264 ..... 61, 64

KRS 15.315 ..... 61

KRS 18A.035 ..... 61

KRS 18A.245 ..... 61

KRS 42.747 ..... 61

KRS 61.470 ..... 61

KRS 65.028 ..... 61, 63

KRS 65.503 ..... 61

KRS 65.7623 ..... 61

KRS 72.225 ..... 61

KRS 90.120 ..... 61

KRS 95A.020 ..... 61

KRS 117.015 ..... 61

KRS 148.260 ..... 61

KRS 151B.245 ..... 61

KRS 153.380 ..... 61

KRS 154A.030 ..... 61

KRS 154.12-203 ..... 61

KRS 154.12-205 ..... 61

KRS 154.20-010 ..... 61

KRS 156.029 ..... 61

KRS 156.740 ..... 61

KRS 158.648 ..... 61

KRS 158.6485 ..... 61

KRS 158.796 ..... 61

KRS 161.028..... 61  
KRS 161.250..... 61  
KRS 164.011 ..... 61  
KRS 164.2802..... 61, 64  
KRS 164.2807..... 61, 64  
KRS 164.746..... 61  
KRS 164.9817..... 61  
KRS 164A.050..... 61  
KRS 171.311 ..... 61  
KRS 171.800..... 61  
KRS 175B.015 ..... 61  
KRS 177.375..... 61  
KRS 183.862..... 61  
KRS 194A.160..... 61  
KRS 196.702..... 61  
KRS 198A.030..... 61  
KRS 199.8983..... 61  
KRS 200.560..... 61  
KRS 200.700..... 61, 64  
KRS 205.540..... 61  
KRS 205.5636..... 61  
KRS 210.775..... 61  
KRS 216A.040..... 61  
KRS 217C.070 ..... 61  
KRS 223.020..... 61  
KRS 224A.030..... 61  
KRS 224.10-024 ..... 61  
KRS 224.18-710 ..... 61

KRS 224.50-855 ..... 61

KRS 224.71-110 ..... 61

KRS 229.151 ..... 61

KRS 229.260 ..... 61

KRS 257.192 ..... 61

KRS 257.472 ..... 61

KRS 260.570 ..... 61

KRS 260.840 ..... 61

KRS 286.1-013 ..... 61

KRS 304.17B-003 ..... 61

KRS 311.530 ..... 61

KRS 313.020 ..... 61

KRS 318.080 ..... 61

KRS 322.230 ..... 61

KRS 323.150 ..... 61

KRS 333.220 ..... 61

KRS 341.110 ..... 61

KRS 342.906 ..... 61

KRS 353.565 ..... 61

KRS 367.130 ..... 61

KRS 441.615 ..... 61

KRS 439.562 ..... 61

*Ward v. Westerfield*, 599 S.W.3d 738 (Ky. 2019) ..... 62

*Grantz v. Grauman*, 302 S.W.2d 364 (Ky. 1957) ..... 62

*Coleman v. Mulligan*, 28 S.W.2d 980 (Ky. 1930) ..... 63

KRS 15.291 ..... 63

KRS 148.034 ..... 64

KRS 148.0222 ..... 64

KRS 151.113..... 64

KRS 151.629..... 64

KRS 257.192..... 64

KRS 257.472..... 64

KRS 353.752..... 64

*Ky. Ass’n of Realtors, Inc. v. Musselman*, 817 S.W.2d 213 (Ky. 1991) ..... 64

**III. Even if part of HB 518 is unconstitutional, any offending provision should be severed.**..... 65

*Shell v. Besbear*, 2024 WL 1005023 (Ky. App. Mar. 8, 2024).....65–66

KRS 446.090.....65–66

*Martin v. Commonwealth*, 96 S.W.3d 38 (Ky. 2003)..... 66

*Ky. Mun. League v. Commonwealth Dep’t of Lab.*, 530 S.W.2d 198 (Ky. 1975) ..... 66

**IV. The Court of Appeals should have at least considered its sister panel’s *Coleman* decision.**..... 67

Ky. Const. § 91 ..... 67

*Besbear v. LRC*, No. 22-CI-002228 (Jefferson Cir. Ct.)..... 67

*Coleman v. Besbear*, 2024 WL 875611 (Ky. App. Mar. 1, 2024).....67–68

Ky. Const. § 69..... 68

Ky. Const. § 81 ..... 68

RAP 35 ..... 68

RAP 40 ..... 68, 70

*Shell v. Besbear*, 2024 WL 1005023 (Ky. App. Mar. 8, 2024)..... 68

SCR 1.030..... 69

*Castle v. Commonwealth*, 411 S.W.3d 754 (Ky. 2013)..... 69

*Martin v. Franklin Cap. Corp.*, 546 U.S. 132 (2005)..... 69

*Gasaway v. Commonwealth*, 671 S.W.3d 298 (Ky. 2023) ..... 69

**CONCLUSION**..... 70

**WORD-COUNT CERTIFICATE** ..... 72

**APPENDIX** ..... 73

A

000014 of 000087

## STATEMENT OF THE CASE

Anyone who has attended the Kentucky State Fair will not soon forget it. From record-size pumpkins, to award-winning livestock, to deep-fried delicacies, the State Fair is a proud Kentucky tradition. Of course, the State Fair doesn't happen by itself. The State Fair Board, which is part of state government, runs it. The Fair Board has been around for nearly as long as our 1891 Constitution. And for just as long, the General Assembly has changed the Fair Board as the legislature saw fit. This case concerns the constitutionality of the latest iteration of those many changes.

### History of the State Fair Board

Kentucky did not have a State Fair before 1902. At that time, the legislature decided that the Commonwealth had “lost the prestige and high standing her live stock once gave her.” 1902 Ky. Acts ch. 112. So the General Assembly declared that “an annual State fair for the exhibition of agricultural, mechanical, horticultural, dairy, forestry, poultry, and live stock” should be held. *Id.* § 1. To avoid “any political appearance,” the legislature directed that a private association—the Kentucky Live Stock Breeders’ Association—would oversee the State Fair with a board of directors elected by the association’s stockholders. *Id.* § 2. This Court’s predecessor upheld an appropriation of state funds to this private association. *Ky. Live Stock Breeders’ Ass’n v. Hager*, 85 S.W. 738, 739–40 (Ky. 1905).

A few years later, the General Assembly moved responsibility for the State

Fair into state government to the Board of Agriculture, Forestry and Immigration. 1906 Ky. Acts ch. 99, § 2. This board was initially chaired by the Agriculture Commissioner and had nine members: two ex officio members and seven “experienced and practical farmers” who were appointed by the Governor from each of the appellate districts. 1906 Ky. Acts ch. 90, §§ 2–3; *see also* 1912 Ky. Acts ch. 82, § 1 (renaming board to State Board of Agriculture). In 1934, the General Assembly attempted to place the Agriculture Commissioner in “charge of” the State Fair, 1934 Ky. Acts ch. 2, § 1, but the bill never took effect because it “was not signed by the presiding Lieutenant Governor,” *Ferguson v. Chandler*, 99 S.W.2d 732, 735 (Ky. 1936) (per curiam).

In 1938, the legislature renamed the Board of Agriculture to the Kentucky State Fair Board and “attached” it to and “made [it] a part of the Department of Agriculture, Labor and Statistics.” 1938 Ky. Acts ch. 29, § 1–2. Two years later, the General Assembly changed the Fair Board’s membership. It made the Governor, the Agriculture Commissioner, and the Dean of the University of Kentucky College of Agriculture members, along with “[s]ix members to be appointed from the State at large by the Governor.” 1940 Ky. Acts ch. 7, § 1.

Changes to the Fair Board have continued apace in more recent times. In 1972, the legislature expanded its membership to 10 members with a seventh appointment made by the Governor from a list submitted by an agriculture or-

ganization. 1972 Ky. Acts ch. 321, § 1. In 1976, the legislature granted the Governor two more appointments. 1976 Ky. Acts ch. 192, § 1. In 1982, the legislature added three more voting appointees, one of which was made by the Senate President and another of which was made by the House Speaker. 1982 Ky. Acts ch. 454, § 1(f). Those legislative appointments technically remained on the books until 2016,<sup>1</sup> when the General Assembly overhauled the composition of the Fair Board yet again. 2016 Ky. Acts ch. 142, § 1. And in 2017, the General Assembly added the Finance Secretary or his or her designee as a nonvoting member of the Fair Board. 2017 Ky. Acts ch. 9, § 1.

### **House Bill 518**

All these legislative changes to the Fair Board bring us to the law at issue. During its 2021 session, the General Assembly passed House Bill 518, which made two relevant changes to the Fair Board.<sup>2</sup>

First, the General Assembly changed the makeup of the Fair Board's voting membership. Under HB 518, the Fair Board contains 16 voting members. 2021 Ky. Acts ch. 163, § 2. The Governor, who himself serves on the Fair Board as an ex officio, voting member, appoints four voting members from the state at large and

---

<sup>1</sup> This Court invalidated those appointments of voting members in *LRC v. Brown*, 664 S.W.2d 907, 920 n.15, 924 (Ky. 1984).

<sup>2</sup> HB 518 made several other changes that are the subject of the Governor's cross-appeal. The Defendants will address those amendments as appropriate in their cross-appellee brief.

one voting member from a list submitted by a Louisville-based organization. *Id.* § 2(1)(a), (g), (n). The Agriculture Commissioner, who likewise serves on the Fair Board as an ex officio, voting member, appoints three voting members from the state at large and five voting members from lists submitted by agriculture organizations. *Id.* § 2(1)(b), (h)–(m). As a result, the Agriculture Commissioner is responsible for nine of the 16 voting members, while the Governor is responsible for six of them. HB 518 also directed that the Agriculture Commissioner would appoint all voting members whose terms expired in 2021. *Id.* § 2(2)(d).

Second, HB 518 added two new nonvoting members on the Fair Board: the President of the Senate and the Speaker of the House, or their designees. *Id.* § 2(1)(c)–(d).

### **This litigation**

Governor Beshear and his Tourism Secretary (together, the Governor) sued to challenge HB 518. R.1–20, 56–74. The Governor claimed that the Agriculture Commissioner’s appointment powers under HB 518 infringes on the Governor’s constitutional authority under Sections 69, 76, and 81 of the Constitution. R.17–18. He also alleged that the parts of HB 518 making the Senate President and House Speaker, or their designees, nonvoting members violates the separation of powers in Section 28 of the Constitution. R.16. The Commonwealth, through the Attorney General, intervened to defend the law alongside the Agriculture Commissioner, the Senate President, the House Speaker, and the

State Fair Board Chairman (together, the Defendants). R.170–77.

The Jefferson Circuit Court (Shaw, J.) declared the appointment provisions of HB 518 unconstitutional and permanently enjoined their enforcement. Ex. 1 at 12–22. The circuit court found that removing the Governor’s ability to appoint a majority of the Fair Board’s voting members violates Sections 69 and 81 of the Constitution. *Id.* at 20–21. The circuit court viewed Kentucky constitutional law as “unsettled” on this issue, so it relied on the North Carolina Supreme Court’s decision in *North Carolina v. Berger*, 781 S.E.2d 248 (N.C. 2016). Ex. 1 at 18–20. The circuit court also held that allowing the Senate President and House Speaker to serve as nonvoting members of the Fair Board violates Kentucky’s separation of powers. *Id.* at 16. That the legislative leaders are only nonvoting members was of “no matter.” *Id.*

The Defendants promptly moved the circuit court to stay its injunction pending appeal. R.1012–23. At that point, HB 518 had been in effect for about eight months. While the circuit court was holding oral argument on the Defendants’ motion, they learned that Governor Beshear had tried to appoint a new Fair Board member in reliance on the circuit court’s decision. VR 12/06/2021 at 11:35:40. The Jefferson Circuit Court stayed its injunction pending appeal. Ex. 2. The Defendants appealed, and the Governor cross-appealed. R. 1059–62, 1102–05, 1187–91.

Several weeks later, the Governor moved the Court of Appeals to lift the

circuit court's stay of its injunction and thus prevent the enforcement of HB 518 while this case proceeds. A motion panel (Dixon, Combs, Taylor, JJ.) mostly denied the Governor's motion. Ex. 3 at 18–19. The court lifted the circuit court's stay only as to the part of HB 518 making the Senate President and House Speaker nonvoting members of the Fair Board. *Id.* at 14. The court otherwise allowed HB 518 to remain in force. As a result, the part of HB 518 enabling the Agriculture Commissioner to appoint a majority of the Fair Board's voting members has been in effect since March 29, 2021—for over four years. During that time, the Fair Board has overseen *four* successful state fairs with a fifth to come in August 2025.

On merits review (and more than two years after the circuit court ruled), the Court of Appeals affirmed the judgment below. *Shell v. Beshear*, 2024 WL 1005023, at \*14 (Ky. App. Mar. 8, 2024) (attached as Ex. 4). Before doing so, however, the panel refused to consider an intervening, to-be-published decision from another panel of the Court of Appeals that held that the General Assembly can constitutionally empower state officials other than the Governor to appoint a majority of the members to a state board. Order (Mar. 5, 2024) (refusing to consider *Coleman v. Beshear*, 2024 WL 875611 (Ky. App. Mar. 1, 2024) (attached as Ex. 5)).

That wrinkle aside, the panel found the appointment provisions of HB 518 unconstitutional. *Shell*, 2024 WL 1005023, at \*5–11. As to the part of HB

518 granting appointment authority to the Agriculture Commissioner, the panel held that it “expressly removed” the Governor’s “authority as Chief Magistrate.” *Id.* at \*9. And as to the part of HB 518 allowing the Senate President and House Speaker, or their designees, to serve as nonvoting members of the Fair Board, the Court of Appeals held that it violates the separation of powers because “statutorily appointing legislators *ex officio* board members infringes upon the appointment authority of the Executive Branch.” *Id.* at \*6. Judge Acree dissented in an opinion that “resembles a law review in length and citation.” *Id.* at \*15 (Acree, J., dissenting). He would have upheld HB 518 in full.

All parties moved for discretionary review, which the Court granted.

## ARGUMENT

The Governor’s constitutional challenge to HB 518 faces an uphill battle. As a duly enacted statute, HB 518 expresses the public policy of the Commonwealth as determined by the people’s representatives in the General Assembly. As summarized above, HB 518 is simply the latest in a long series of statutory amendments to the composition of the Fair Board. Because the General Assembly is a coordinate branch of government, HB 518 comes to court with a “strong presumption of constitutionality.” *Wynn v. Ibold, Inc.*, 969 S.W.2d 695, 696 (Ky. 1998). This means that a “violation of the Constitution must be clear, complete and unmistakable in order to find the law unconstitutional.” *Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998).

This brief addresses four issues. *First*, it argues that allowing the Agriculture Commissioner to appoint a majority of the voting members of the Fair Board conforms to Sections 69 and 81. *Second*, it argues that allowing legislators or their designees to serve in a nonvoting capacity on the Fair Board does not violate the separation of powers. *Third*, it argues that the Court should sever any unconstitutional provision in HB 518. *And fourth*, it argues that the Court of Appeals erred by refusing to consider an intervening decision from another Court of Appeals panel about one of the legal issues raised here.

### **I. HB 518 does not violate Sections 69 and 81 of the Constitution.**<sup>3</sup>

Over 40 years ago, this Court issued the seminal decision of *Brown v. Barkley*, 628 S.W.2d 616 (Ky. 1982). With Chief Justice Palmore writing, the Court unanimously held that a constitutional officer like the Agriculture Commissioner is a “convenient receptacle[] for the diffusion of executive power.” *Id.* at 622. It follows, held the Court, that the General Assembly “definitely has the prerogative of withholding executive powers from [the Governor] by assigning them to . . . constitutional officers who are not amenable to his supervision and control.” *Id.*

This holding from *Brown v. Barkley* recognizes that Kentucky is a divided

---

<sup>3</sup> The Defendants preserved this argument below. R.359–66, 460–67, 488–92, 584–86, 597–605, 613–22, 631–40, 713–18; Appellants’ Brs. 6–17 (Ky. App. Oct. 17, 2022); Appellants’ Reply Br. 2–4 (Ky. App. Jan. 24, 2023); Response-Reply Br. 17–20 (Ky. App. Mar. 13, 2023).

executive, not a unitary one. Under our system of government, constitutional officers like the Attorney General and the Agriculture Commissioner can undertake important tasks on behalf of the Commonwealth without answering to the Governor. Just like the Governor, the Attorney General and Agriculture Commissioner answer to the people. If this holding from *Brown v. Barkeley* is faithfully applied here, there can be no question that HB 518 is constitutional. To quote *Brown v. Barkeley*, HB 518 simply treats the Agriculture Commissioner as a “convenient receptacle[] for the diffusion of executive power” and “assign[s]” him the ability to appoint certain members of the Fair Board without consulting the Governor. *See id.* This case is that simple.

Make no mistake, the Governor’s legal theory is incompatible with *Brown v. Barkeley*. He has all but admitted as much. After the Court of Appeals ruled below, Governor Beshear publicly stated that “we ultimately need a new binding Supreme Court decision that *rebalances* that separation of powers.” Press Conference, 44:40–50 (Apr. 4, 2024), <https://www.youtube.com/live/4csn9LyZk5k?t=2596s> (emphasis added). To be sure, the Governor is not the only one inviting the Court to revisit *Brown v. Barkeley*. Even though Judge Sara Combs recognized in the companion case that she was “inescapably bound by the reasoning and holding of *Brown v. Barkeley*,” she urged this Court to reconsider the decision given that “[m]any political winds—both ill and fair—have blown over our Commonwealth since” *Brown v. Barkeley*. *Coleman*, 2024 WL 875611, at \*15 (Combs, J., concurring).

The Defendants respectfully ask the Court not to retreat from *Brown v. Barkley*—just as it refused to do four years ago. *Cameron v. Beshear*, 628 S.W.3d 61, 76–77 (Ky. 2021). *Brown v. Barkley* is a load-bearing wall for our system of government, and the Court should reaffirm it.

In asking the Court to faithfully apply *Brown v. Barkley*, the Defendants’ argument proceeds as follows. They begin with the text of the relevant constitutional provisions. They then turn to the history that led to those provisions, before finally discussing the relevant caselaw. All three things—text, history, and caselaw—support upholding HB 518. The Defendants conclude by discussing the consequences of the Governor’s contrary argument.

**A. The constitutional text does not support the Governor.**

The text of the 1891 Constitution is what the Court considers “first and foremost” when interpreting our charter. *Ward v. Westerfield*, 599 S.W.3d 738, 747 (Ky. 2019). Its words must be given their “plain and usual meaning.” *Id.* (citation omitted). The Court “presume[s] that in framing the constitution great care was exercised in the language used to convey [the Constitution’s] meaning and *as little as possible* left to implication.” *Id.* at 748 (emphasis added) (quoting *City of Louisville v. German*, 150 S.W.2d 931, 935 (Ky. 1940)).

The Governor rests his argument on Sections 69 and 81 of the Constitution. Those provisions state in full:

- Section 69: “The supreme executive power of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the ‘Governor of the Commonwealth of Kentucky.’”
- Section 81: The Governor “shall take care that the laws be faithfully executed.”

To state the obvious, neither provision mentions gubernatorial appointments or statutory boards and commissions. It follows that the Governor’s argument is that these provisions *impliedly* grant him some quantum of appointments to every board and commission in the Commonwealth.

This implied-authority theory should be rejected. As noted just above, this Court “presume[s]” that our framers left “as little as possible” to “implication.” *Westerfield*, 599 S.W.3d at 748 (citation omitted). Yet implication is the beginning and the end of the Governor’s position. His argument asks the Court to conclude that Sections 69 and 81 impliedly grant him appointment authority to statutory boards and commissions even though the constitutional provisions mention neither gubernatorial appointments nor boards and commissions. In short, his position takes a maximalist view of implied authority while this Court presumes just the opposite.

The Governor’s implied-authority theory would also modify the provisions of the Constitution that *do* concern gubernatorial appointments and boards and commissions. This violates the “cardinal rule of construction that the different sections of the Constitution shall be construed as a whole so as to harmonize the

various provisions and not to produce a conflict between them.” *LRC v. Fischer*, 366 S.W.3d 905, 913 (Ky. 2012) (citation omitted). In particular, the Governor’s argument creates tension with two more specific constitutional provisions: Sections 76 and 93.

Start with Section 76. It expressly grants the Governor limited appointment authority that does *not* include the statutorily created positions at issue here. Section 76 empowers the Governor “except as otherwise provided in this Constitution, to fill vacancies by granting commissions, which shall expire when such vacancies have been filled according to the provisions of this Constitution.” By its terms, Section 76 has no bearing on appointments to a statutorily created board like the Fair Board. Vacancies on such statutory boards are not “filled according to the provisions of this Constitution,” which is what implicates Section 76, and Section 93 (discussed below) falls within Section 76’s carveout for “except as otherwise provided.”<sup>4</sup> *Rouse v. Johnson*, 28 S.W.2d 745, 751 (Ky. 1930) (so holding).

The mere existence of Section 76 is powerful textual evidence that Sections 69 and 81 do not impliedly grant unwritten appointment authority to the Gover-

---

<sup>4</sup> Because Section 76 applies to vacancies that are “filled according to the provisions of this Constitution,” it applies to the vacancies for “elective offices” discussed in Section 152 of the Constitution. *Rouse*, 28 S.W.2d at 751; *accord Shell*, 2024 WL 1005023, at \*7 n.8 (noting that Section 152 “details when and how vacancies for *elective* (not appointive) officers are filled”).

nor. Our constitutional framers no doubt knew how to grant appointment authority to the Governor. They included Section 76 for that very purpose. Yet that explicit grant of gubernatorial appointment authority has no applicability here. The framers' intentional decision to grant only limited appointment authority to the Governor must matter. Section 76 refutes any contention that the framers intended to smuggle unwritten appointment authority into Sections 69 and 81. The only sensible reading of Section 76 is that it establishes the extent of the Governor's constitutional appointment power. Indeed, if Sections 69 and 81 provided a general appointment power, that implied power would seemingly render the express power in Section 76 superfluous. The Court should not read Section 69 and 81's general terms to overcome Section 76's specific and limited grant of appointment authority to the Governor. *Commonwealth ex rel. Att'y Gen. v. Howard*, 180 S.W.2d 415, 418 (Ky. 1944) ("It is also the rule that if there be conflict it is the duty of the court to uphold that provision containing express language relating to the subject, rather than the one dealing with matters in general terms.").

This conclusion becomes even more apparent in light of Section 93 of the Constitution, which specifically concerns appointments to statutorily created boards and commissions. Section 93 states:

Inferior state offices and *members of boards and commissions*, not specifically provided for in this Constitution, may be appointed or elected, *in such manner as may be prescribed by law*, which may include a requirement of consent by the Senate, for a term not exceeding four years, and until their successors are appointed or elected and qualified.

Ky. Const. § 93 (emphasis added). Relevant here, this provision states that the “manner” of appointments to “boards and commissions” is made according “to law.” By its terms, Section 93 does not provide *any* role for the Governor in such appointments. Instead, Section 93’s mention of “by law” is an unmistakable reference to the General Assembly’s law-making authority. See *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 785–86 (Ky. 2019). As a result, Section 93 provides that the General Assembly, and it alone, determines the “manner” of appointments to statutorily created boards or commissions like the Fair Board.

At a minimum, to determine the “manner” of an appointment to a statutory board like the Fair Board is to determine *who* makes the appointment. The Defendants do not understand the Governor to argue otherwise. With good reason, given that this Court’s predecessor long ago determined that Section 93 empowers the General Assembly to direct “upon whom or with whom the power to appoint or elect was lodged.” *Sibert v. Garrett*, 246 S.W.455, 460 (Ky. 1922). Indeed, the General Assembly can even direct that a private group provide a list of nominees from which an appointment to a statutory board or commission is made. See *Elrod v. Willis*, 203 S.W.2d 18, 20–21 (Ky. 1947); *Ky. Ass’n of Realtors, Inc. v. Musselman*, 817 S.W.2d 213, 215–17 (Ky. 1991). Section 93’s text thus empowers the General Assembly to determine who appoints the members of a statutory board like the Fair Board without allowing *any* role for the Governor.

Section 93’s empowering of the General Assembly to decide who makes appointments to boards and commissions makes good sense. If the General Assembly creates a commission that relates to the work done by the Attorney General, it makes sense for the legislature to give him the majority of such appointments. The Kentucky Opioid Abatement Advisory Commission is just such a commission. KRS 15.291(2)(a) (allowing the Attorney General to make the majority of appointments). And given all that the Agriculture Commissioner and employees of the Department of Agriculture do for Kentucky agriculture, it’s easy to understand why the General Assembly gave the Agriculture Commissioner such a prominent role in determining the membership of the Fair Board. Indeed, the legislature tried to do something similar nearly a century ago. *Ferguson*, 99 S.W.2d at 735. This intuition—that the General Assembly can empower the appropriate official with respect to a board or commission that is within the official’s bailiwick—is borne out in Kentucky caselaw. As this Court’s predecessor said more than a century ago, Section 93 allows the legislature to conclude that the appointing official should “be selected from the department to which the duties of the office necessarily appertain.” *Sibert*, 246 S.W. at 460.

Section 93 could not be more inconsistent with the Governor’s contention that Sections 69 and 81 impliedly grant him appointment authority to statutory boards and commissions. In adopting Section 93, our framers specifically considered such appointments and unambiguously directed that the General Assembly

alone determines who makes such appointments. Our framers provided *no role* for the Governor in such appointments unless the General Assembly grants him such appointment authority “by law.” The Governor’s contrary argument requires adding words to Section 93. *Fox v. Grayson*, 317 S.W.3d 1, 8 (Ky. 2010) (“It is well settled law that a court may not add language to the written law to achieve a desired result.”). Section 93 does not say that the General Assembly gets to decide who appoints the Fair Board’s members as long as the Governor gets a certain quantum of appointments. Section 93 says that the General Assembly gets to decide who makes the appointments—full stop.

Neither the Governor nor the Court of Appeals offered any meaningful rebuttal to this straightforward textual analysis. The Court of Appeals mentioned Section 93 only briefly. *Shell*, 2024 WL 1005023, at \*7, \*8. The Governor’s only response has been to emphasize that he is the “Chief Magistrate” with the “supreme executive power” and the responsibility to “take care that the laws be faithfully executed.” But those abstract constitutional provisions cannot overcome the simple fact that our framers specifically considered gubernatorial appointments and appointments to statutory boards and commissions and did not grant the Governor any constitutional role with respect to appointments to a statutory body like the Fair Board.

**B. History confirms that Sections 69 and 81 do not grant the Governor any appointment power to the Fair Board.**

The framers' decision to empower the General Assembly to decide who appoints the Fair Board's members must be understood against the backdrop of our history. *Keck v. Manning*, 231 S.W.2d 604, 607 (Ky. 1950) (“[I]n construing constitutional provisions [courts] will look to the history of the times and the state of existing things to ascertain the intention of the framers of the Constitution and the people adopting it[.]”). That history confirms that Sections 69 and 81 are not an unwritten fount of gubernatorial appointment power to statutory boards and commissions.

Sections 69 and 81 are not original to our current Constitution. Largely identical provisions have been included in all four of Kentucky's constitutions. *Shell*, 2024 WL 1005023, at \*20 (Acree, J., dissenting) (collecting those historical provisions in Table 1). Section 93, by contrast, is much newer than Sections 69 and 81. *See id.* A provision like Section 93 first appeared in our 1850 Constitution. Ky. Const. Art. III, § 25 (1850). This predecessor to Section 93 was a reaction to what the 1850 delegates viewed as excesses of the Governor's appointment power. Before the 1850 Constitution, the Governor appointed essentially every state officer, including officials who are now independently elected like the Attorney General and the Secretary of State. Ky. Const. Art. II, §§ 8, 16, 17 (1792); Ky. Const. Art. III, §§ 9, 23, 24 (1799). As the Court's predecessor summarized, “[o]ne of the

moving causes for the calling of [the 1850] constitutional convention was the hostility of the people” to the Governor’s “great power” to appoint “a host of officials of the state.” *Votteler v. Fields*, 23 S.W.2d 588, 590 (Ky. 1926); accord *Speed v. Crawford*, 60 Ky. 207, 211 (Ky. 1860) (similar). The delegates that adopted the 1850 Constitution did not hide their desire to pare back the Governor’s appointment power in the new constitution. *Shell*, 2024 WL 1005023, at \*17–18 (Acree, J., dissenting) (collecting the 1850 delegates’ statements).

The result of those efforts to rein in the Governor’s appointment power was Section 93’s direct predecessor. It provided:

A Treasurer shall be elected by the qualified voters of the State for the term of two years; and an Auditor of Public Accounts, Register of the Land Office, and Attorney General, for the term of four years. The duties and responsibilities of these officers shall be prescribed by law: provided, that *inferior State officers*, not specially provided for in this Constitution, may be appointed or elected *in such manner as shall be prescribed by law*, for a term not exceeding four years.

Ky. Const. Art. III, § 25 (1850) (emphasis added). The end of this provision should sound familiar. It is basically identical to Section 93. Similar to Section 93, this previous provision directed that the “manner” of appointing inferior state officers “shall be prescribed by law.” As a result, the text of the 1850 Constitution unmistakably provided that the manner of appointing inferior state officers was determined by the General Assembly. Like Section 93, this predecessor provision provided no role for the Governor in these appointments unless the legislature gave him one by statute.

The framers of our current Constitution adopted this language almost verbatim. Much like its predecessor provision, Section 93 originally stated: “Inferior state officers, not specifically provided for in this Constitution, may be appointed or elected, in such manner as may be prescribed by law, for a term not exceeding four years, and until their successors are appointed or elected and qualified.” Relevant here, this language was amended in 1992 to confirm that deciding who appoints the “members of boards and commissions” is within the General Assembly’s Section 93 authority. 1992 Ky. Acts ch. 168; *accord Fox v. Grayson*, 317 S.W.3d 1, 5 (Ky. 2010). This clarifying language appears to have been a response at least in part to *Jones v. Forgy*, 750 S.W.2d 434, 435–37 (Ky. 1988), which had declined to decide whether members of a university board qualify as inferior state officers under Section 93.

In adopting the 1891 Constitution, there is no historical evidence that the delegates intended to impliedly reinvigorate the Governor’s appointment power beyond the limits set in the 1850 Constitution. More specifically, there is no indication that the framers intended for Sections 69 and 81 to implicitly grant appointment power to the Governor beyond that expressly granted him in Section 76. After all, a version of Sections 69 and 81 has existed in all of Kentucky’s prior constitutions, including in an era when the constitution expressly granted the Governor expansive appointment authority. Ky. Const. Art. II, §§ 8, 9 (1792); Ky. Const. Art. III, §§ 9, 10 (1799). This historical reality confirms that Sections 69

and 81 are not, and have never been, an unwritten basis for appointment authority. Were it otherwise, the 1792 and 1799 constitutions would have had no need to expressly grant the Governor such vast appointment authority. *Shell*, 2024 WL 1005023, at \*19 (Acree, J., dissenting) (“Such an express grant [in the 1792 and 1799 Constitutions] would be superfluous if [the Governor’s] thinking is correct.”).

This Court’s predecessor squarely held that the 1891 Constitution essentially readopted the limitations on the Governor’s appointment authority established in the 1850 Constitution. *Votteler*, 23 S.W.2d at 590 (“By the [1850 Constitution], the Governor was shorn of a great deal of the [appointment] power he had heretofore enjoyed, and much of it has never been restored to him.”). If anything, the 1891 Constitution is more restrictive of the Governor’s appointment authority than our 1850 charter, given that the current Constitution removes the Governor’s ability to appoint the Secretary of State—a power he retained under the 1850 Constitution. *Compare* Ky. Const. § 93, *with* Ky. Const. Art. III, § 21 (1850).

Not only is there no historical evidence that Sections 69 and 81 grant implied appointment authority to the Governor, the 1891 constitutional debates refute any such contention. The best indications of the framers’ desire to keep the Governor’s appointment power in check are a series of failed, self-serving efforts undertaken during the 1890 debates by Kentucky’s then-Governor, Simon Bolivar

Buckner. Several times, Governor Buckner tried to return Kentucky to the pre-1850 regime of sweeping gubernatorial appointment power. Governor Buckner initially “offer[ed] resolutions to restore the pre-1850 Constitution gubernatorial appointment powers,” which the delegates declined to adopt. *Shell*, 2024 WL 1005023, at \*30 & n.49 (Acree, J., dissenting).

Governor Buckner next proposed an amendment to what ultimately became Section 81—Kentucky’s Take Care Clause. He proposed that the Governor have the “power to suspend from office any Executive or ministerial officer who may fail and refuse to discharge the duties of this office, and to fill the vacancy thus occasioned.” 1 Official Report of the Proceedings and Debates 1458 (1890) (Debates). But Governor Buckner’s proposal for plenary removal and appointment power by the Governor went nowhere. *Id.* at 1462 (reflecting that Governor Buckner withdrew the amendment). In fact, “[t]he Governor’s fellow delegates skewered the idea.” *Shell*, 2024 WL 1005023, at \*33 (Acree, J., dissenting). One delegate worried that “one man will have the power with one stroke of his pen to remove every subordinate, executive, and ministerial officer in the Commonwealth and supply his place by appointment.” 1 Debates at 1459 (Bronston). Another rejected this “kingly power which would be foreign to our idea of Government.” *Id.* at 1460 (Sachs). The delegate emphasized that the Governor “occupies a position which is *co-ordinate or equal with* the other elective officers of the

State.” *Id.* (emphasis added). Another delegate lodged his “most earnest and solemn protest” against “return[ing] to the days of Kings.” *Id.* at 1461 (Beckham).

It is hard to overstate the importance of the delegates’ emphatic rejection of Governor Buckner’s amendment. At the urging of the then-Governor, the delegates objected to writing into our Constitution what the current Governor now argues is implicitly there. As Judge Acree put it below, the delegates’ “out-right refusal to grant the Governor even the slightest explicit powers of appointment, removal, or vacancy-filling, and the People’s adoption of the current Constitution withholding such powers, should give every Kentucky jurist pause before deciding such powers can be found implicitly.” *Shell*, 2024 WL 1005023, at \*34 (Acree, J., dissenting). In short, the Court should reject the Governor’s argument for the simple reason that the delegates already rejected it over 130 years ago.

One final aspect of the 1890–91 convention merits emphasis. Shortly before our Constitution was finalized, the revisory committee removed a provision “to eliminate any possible conflict with what was to become Section 93 of the same constitution.”<sup>5</sup> *Kraus v. Ky. State Senate*, 872 S.W.2d 433, 438 (Ky. 1993). The

---

<sup>5</sup> This Court’s predecessor refused to decide a challenge to the revisory committee’s actions because the remedy is left to the people “who can and properly should remedy the matter, if not to their liking.” *Miller v. Johnson*, 18 S.W. 522, 524 (Ky. 1892).

removed provision offers contemporaneous insight into how the framers understood Section 93. The struck provision stated that the Governor “shall appoint, with the advice and consent of the Senate, *all* State officers who are not required by this Constitution, or the laws made thereunder, to be elected by the people.” IV Debates at 5728 (emphasis added). The committee was concerned that this provision “would disturb that settled principle which, we believe, has been approved by the people, that as to all these subordinates, it should be left to the power of the General Assembly to say whether they should be elected or appointed, and if not elected by the people, *by whom* they should be appointed.” *Id.* (Bronston) (emphasis added); *see also Fox*, 317 S.W.3d at 12 (relying on Delegate Bronston’s statement to explain the deletion). So to protect the integrity of Section 93, the committee removed this provision from the Constitution. IV Debates at 5729; *accord Shell*, 2024 WL 1005023, at \*31–32 (Acree, J., dissenting) (discussing this deletion); *Coleman*, 2024 WL 875611, at \*10–11 (same).

This revision to protect Section 93 is devastating to the Governor’s position. As the Court of Appeals explained in *Coleman*, the “delegates were cognizant that deleting the language” would mean that “the General Assembly would have the power to determine ‘by whom’ the non-elected, non-constitutional officers or members should be appointed.” *Coleman*, 2024 WL 875611, at \*11. In short, the delegates not only readopted the provision from the 1850 Constitution that became Section 93, but they simultaneously protected the sweep of that provision

by deleting language that would have weakened Section 93's force. And in taking the latter act, the delegates confirmed beyond all question that the General Assembly decides who makes appointments to positions created by statute.

**C. Caselaw makes clear that Sections 69 and 81 do not impliedly grant appointment authority to the Governor.**

Consider now the caselaw applying Sections 69, 81, and 93 of the Constitution. There are three key cases: (i) *Rouse v. Johnson*; (ii) *Brown v. Barkley*; and (iii) *Cameron v. Beshear*. None of those cases comes close to holding that Sections 69 and 81 grant the Governor an unwritten right to make a majority of appointments to every statutory board and commission. In fact, each decision recognizes the General Assembly's latitude to allocate power among the various constitutional officers. And other Kentucky caselaw reinforces the notion that Sections 69 and 81 do not implicitly grant appointment authority to the Governor.

***Rouse v. Johnson.*** *Rouse* is the leading Section 93 precedent. There, the General Assembly exercised its Section 93 authority to reorganize a statutory commission. The Governor had previously appointed every member of the commission. *Rouse*, 28 S.W.2d at 746. The General Assembly, however, directed that going forward all members of the commission would be appointed by a three-member "Appointing Board" made up of the Governor, the Lieutenant Governor,<sup>6</sup> and

---

<sup>6</sup> At the time, the Lieutenant Governor was constitutionally independent of the Governor. 1992 Ky. Acts ch. 168, § 1 (amending Ky. Const. § 70).

the Attorney General. *Id.* As a result, the Governor went from appointing *every* member of the commission to potentially having *none* of his preferred appointees on the commission. *Rouse* spoke clearly about what the law did: appointment power “was taken away from the Governor.” *Id.*

This Court’s predecessor upheld the law as a valid exercise of Section 93. *LRC v. Brown*, 664 S.W.2d 907, 923 (Ky. 1984) (noting that *Rouse* upheld the law “as being consistent with Ky. Const. Sec. 93”). Relevant here, *Rouse* rejected the argument that the law infringed on the Governor’s express appointment power under Section 76. 28 S.W.2d at 751. It reasoned that Section 76 “should be read in connection with section 93 of the same instrument.” *Id.* It explained that when “read together” the two sections “confine the vacancies mentioned in section 76 to such officers as are created by the Constitution, and not to the filling of vacancies in those created by the Legislature under the provisions of the inserted excerpt from section 93.” *Id.* More to the point, *Rouse* made clear that a law that potentially enables the Governor to appoint *no members* to a statutory commission is in keeping with Section 93. *See id.*

The Court of Appeals distinguished *Rouse* because “the Governor remained involved (by way of the Appointing Board) in the appointment of *all* members.” *Shell*, 2024 WL 1005023, at \*8. That argument blinks reality. The statute in *Rouse* could readily lead to none of the Governor’s preferred nominees ending up on the commission. Indeed, it appears that’s what happened in *Rouse*. 28 S.W.2d at 746

(noting that the appointing board and the Governor appointed competing slates of members). As the Court of Appeals persuasively explained in *Coleman*, in *Rouse* “the Governor could potentially have *zero say* in which members were appointed if neither the Lieutenant Governor nor the Attorney General agreed with the Governor’s choices.” 2024 WL 875611, at \*11 (emphasis added).

The Governor’s argument is irreconcilable with *Rouse*. If, as *Rouse* holds, Section 93 permits the General Assembly to remove all the Governor’s statutory appointment power to a commission, Section 93 likewise permits the legislature to remove only some of his appointment power, as the legislature did in HB 518. The Governor’s only counterargument is that *Rouse* does not mention his theory that Sections 69 and 81 impliedly grant him a majority of all appointment authority across state government. But that contention is just an argument that *Rouse* was wrongly decided. As the Governor sees it, his predecessor in *Rouse* would have won the case if he had merely argued that Sections 69 and 81 impliedly grant him power not expressly mentioned in the Constitution. The reality is that *Rouse* necessarily rejected the Governor’s theory. It considered the scope of Section 93 and held that a law that potentially removes all the Governor’s statutory appointment power is authorized by that provision.

*Rouse* is important for one final reason. It listed a number of statutory boards and commissions on which the Governor and Kentucky’s other constitutional officers served. *Rouse*, 28 S.W.2d at 749. Relevant here, the Governor did

*not* appoint a majority of the members to several of these boards and commissions. These historical boards and commissions, many of which existed close in time to the adoption of our Constitution, are uniquely persuasive of the delegates’ intent. *See Calloway Cnty. Sheriff’s Dep’t v. Woodall*, 607 S.W.3d 557, 572 (Ky. 2020). If the framers intended for Sections 69 and 81 to impliedly grant the Governor a majority of appointments to every board and commission, it stands to reason that contemporaneous legislatures would have not have created boards or commissions directly contrary to that intent. *See Coleman v. Mulligan*, 28 S.W.2d 980, 981 (Ky. 1930) (“A contemporaneous legislative exposition of a constitutional provision is entitled to great deference, as it may well be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded.” (citation omitted)).

The boards and commissions listed in *Rouse* to which the Governor did not appoint a majority of the members are:

- The previous “state board of election commissioners”<sup>7</sup>;
- The “old state board of valuation and assessment”<sup>8</sup>;

---

<sup>7</sup> “The Governor, Attorney General, and Secretary of State, and, in the absence of either, the Auditor, or any two of them, shall be a board for examining the returns of election for any of the officers named in the last section.” Gen. Stats. of Ky. (J. Bullitt, J. Feland, eds.) ch. 33, art. V, § 6 (1887).

<sup>8</sup> “That the said reports [of distilled spirits] shall be, by the Auditor of Public Accounts, submitted to a board of valuation and assessment, composed of the Auditor of Public Accounts, the Treasurer of the State, and the Secretary of State,

- The then-present “commissioners of the sinking fund”<sup>9</sup>;
- The then-present “state printing commission”<sup>10</sup>;
- The “state geological survey”<sup>11</sup>;
- The previous “state text book commission”<sup>12</sup>; and

---

who are hereby constituted such board, and said board shall fix the values for purposes of taxation under this act, and assess the same accordingly.” Gen. Stats. of Ky. (J. Bullitt, J. Feland, eds.) ch. 92-II, art. III, § 3 (1887); *see also* Ky. Stats. (J. Carroll, ed., 3d ed.) ch. 108, § 4106 (1903) (same).

<sup>9</sup> “The Governor, the Secretary of State, the Attorney General, the Auditor, and Treasurer of the Commonwealth, shall, *ex officio*, constitute the Commissioners of the ‘Sinking Fund of Kentucky,’ and by that name and style shall be a body-corporate and politic, and may contract and be contracted with, sue and be sued, and do and perform all things necessary to execute the duties required and the powers vested in them by law.” Gen. Stats. of Ky. (J. Bullitt, J. Feland, eds.) ch. 101, § 1 (1887); *see also* Ky. Stats. (J. Carroll, ed., 3d ed.) ch. 118, § 4588 (1903) (same).

<sup>10</sup> “The Governor, Auditor of Public Accounts, Secretary of State, Treasurer and Attorney-General shall be *ex-officio* Commissioners to let contracts for the printing, binding and stationery used by the various State departments. The Governor shall be chairman of the Board of Commissioners, and he or any two of the Commissioners may, at any time, call a meeting thereof, and three of the Commissioners shall constitute a quorum; the Commissioners shall transact all business at stated or special meetings, and shall cause to be kept a record of their proceedings.” Ky. Stats. (J. Carroll, ed., 3d ed.) ch. 105, § 3953 (1903).

<sup>11</sup> A “supervisory board, consisting of the Governor, Secretary of State and Auditor” inspects and approves the expenditures of the geological survey. Ky. Stats. (J. Carroll, ed., 4th ed.) ch. 59a, § 2007a.3. (1909).

<sup>12</sup> “There is hereby created a State School Book Commission, which shall consist of the Governor, the Auditor of Public Accounts, the State Treasurer, the clerk of the court of appeals, and the three members of the State board of education. The Governor shall be chairman, and the Superintendent of Public Instruction shall be secretary, and they shall be the executive officers of said commission.” Ky. Stats. (J. Carroll, ed., 4th ed.) ch. 113, art. Va., § 4421a(1) (1909).

- The then-present “state board of education.”<sup>13</sup>

*Rouse*, 28 S.W.2d at 749. The mere existence of these historical boards and commissions demonstrates that our framers did not intend for Sections 69 and 81 to impliedly grant the Governor a majority of appointments to every board and commission in the Commonwealth.

***Brown v. Barkley***. The next case in line is perhaps the most important state-government decision that the Court has issued since it became Kentucky’s court of last resort. In *Brown v. Barkley*, the Court considered a Governor who, by executive fiat, arrogated to his administration authority that the General Assembly had granted by statute to the Agriculture Commissioner. 628 S.W.2d at 618. That statutory authority empowered the Agriculture Commissioner to undertake executive actions on behalf of the Commonwealth without answering to the Governor. *Brown v. Barkley* unanimously upheld the General Assembly’s law-making authority to place executive authority with the Agriculture Commissioner and beyond the reach of the Governor. *Id.*

In reaching this conclusion, the Court considered the constitutional status

---

<sup>13</sup> “The Superintendent of Public Instruction, together with the Secretary of State and Attorney-General, shall constitute the State Board of Education. The board thus constituted shall be a body-politic and corporate, by the name and style of the Kentucky State Board of Education.” Ky. Stats. (J. Carroll, ed., 3d ed.) ch. 113, art. III, § 4377 (1903).

of what are known as the Section 91 officers: the Attorney General, the Agriculture Commissioner, the Secretary of State, the Auditor, and the Treasurer. Those constitutional officers, with two exceptions,<sup>14</sup> “have only such powers and duties as are assigned to them by legislative enactment or by executive order expressly authorized by statute.” *Id.* at 621. That these constitutional officers have so little constitutional authority prompted the Court to ask “why they were not made appointive or, indeed not mentioned at all” in the Constitution. *Id.* at 622. The “answer,” the Court held, “is that these independent executive officers provide convenient receptacles for the diffusion of executive power.” *Id.* Put more directly, the General Assembly “definitely has the prerogative of withholding executive powers from [the Governor] by assigning them to these constitutional officers who are not amenable to [the Governor’s] supervision and control.” *Id.*

Pause on this passage, the key holding from *Brown v. Barkeley*. It instructs that the General Assembly is “definitely” empowered to give executive power to the Section 91 officers without the Governor overseeing the exercise of that authority. Of course, the General Assembly has done this throughout the Kentucky Revised Statutes. For example, KRS Chapter 15 grants the Attorney General expansive authority that he exercises without the Governor’s approval. And KRS

---

<sup>14</sup> Those exceptions are the common-law authorities of the Attorney General and certain duties of the Secretary of State listed in Section 91. *Brown v. Barkeley*, 628 S.W.3d at 621–22.

Chapter 246 similarly empowers the Agriculture Commissioner without giving the Governor oversight. If Kentuckians disagree with how a Section 91 officer exercises his or her independent statutory powers, the remedy is the ballot box or convincing the legislature to amend the governing statutes. Oversight by the Governor is not part of the calculus. Put differently, “[t]hat the Const. Sec. 91 officers are to be elected by the people suggests that, whatever their duties, they are not answerable to the supervision of anyone else.” *Id.* at 623.

The prerogative of Section 91 officers to operate independently from the Governor leads to the question of what role the Governor plays in our system of government. *Brown v. Barkley* tells us that too. The Governor is different from the Section 91 officers because the Constitution expressly grants him certain powers. “The powers and duties expressly conferred upon him are” found in Sections 75 through 81. *Id.* at 621. But outside those express constitutional powers, the Governor is similarly situated to the Section 91 officers. As *Brown v. Barkley* instructs, “[p]ractically speaking, except for those [powers] conferred upon him specifically by the Constitution, [the Governor’s] powers, like those of the executive officers created by Const. Sec. 91, are only what the General Assembly chooses to give him.” *Id.* at 623. And as much as the Governor “has any implied or inherent powers in addition to those the Constitution expressly gives to him, it seems clear that such unexpressed executive power is subservient to the overriding authority of the legislature.” *Id.* at 621.

In sum, *Brown v. Barkley* instructs that the Governor is simultaneously different from and similar to the Section 91 officers. He is different because he has express constitutional powers that the Section 91 officers lack. But he is similar to the Section 91 officers because his remaining powers are up to the General Assembly to establish as the law-making branch of government. Indeed, *Brown v. Barkley* held that the “executive branch,” which houses the Governor and the Section 91 officers, “exists principally to do [the legislature’s] bidding.” *Id.* at 623.

So understood, *Brown v. Barkley* is fully consistent with HB 518. As Judge Combs put it in the companion case, a Kentucky court considering a law that transfers appointment power from the Governor to a Section 91 officer is “inescapably bound by the reasoning and holding of *Brown v. Barkley*.” *Coleman*, 2024 WL 875611, at \*15 (Combs, J., concurring). That’s because *Brown v. Barkley* instructs that the legislature “definitely has the prerogative of withholding executive powers from [the Governor] by assigning them to these constitutional officers who are not amenable to his supervision and control.” 628 S.W.2d at 622. That is all HB 518 does. It “withhold[s]” some appointment power from the Governor and “assign[s]” it to the Agriculture Commissioner. *Brown v. Barkley* compels the conclusion that the General Assembly “definitely” has such authority.

The Governor has argued otherwise by relying on two snippets from *Brown v. Barkley*. They are quoted in full below:

- “As the Governor is the ‘supreme executive power,’ it is not possible for the General Assembly to create another executive officer or officers who will not be subject to that supremacy, but it definitely has the prerogative of withholding executive powers from him by assigning them to these constitutional officers who are not amendable to his supervision and control.” *Id.*
- “That article 2, Sec. 1 [of the federal Constitution] says ‘The executive power shall be vested in a president,’ whereas Sec. 69 of our Constitution vests the ‘supreme executive power’ in the Governor probably reflects the fact that under our Constitution there are other constitutional officers in whom executive powers may be vested by the legislative body. Sec. 69 makes it clear that these officers are inferior to the Governor and that no other executive office can be created which will not also be inferior to that of the Governor.” *Id.* at 622 n.12.

In particular, the Governor has focused on the parts of these quotes that mention his “supremacy” and the “inferior[ity]” of the Section 91 officers. Three points in response.

First, no one disputes that Section 69 vests the “supreme executive power” in the Governor. But as one of the Governor’s favored quotes from *Brown v. Barkley* explains, Section 69’s use of the word “supreme” likely “reflects the fact” that the legislature can grant independent executive power to the Section 91 officers. *Id.* In other words, the word “supreme” connotes that the Governor does not exercise all executive power. It establishes that we are a divided executive—that our Constitution leaves room for the Section 91 officers to operate independently of the Governor. Thus, *Brown v. Barkley* simply confirms that, as this Court later held, Section 69 “only vests the Governor with executive powers, just as Section

29 vests the General Assembly with legislative powers and Section 109 vests the Court of Justice with judicial powers.” *Fletcher v. Commonwealth*, 163 S.W.3d 852, 869 (Ky. 2005). So understood, Section 69 is just a vesting clause for executive power. It does not enhance the scope of the Governor’s executive power such that he must exercise a certain quantum of executive power across state government.

Second, the Governor argues that his “supremacy” means that he gets to make a majority of appointments to every state board and commission. That reads far too much into the word “supremacy.” If the framers intended such a sweeping appointment power, they would not have used such nonspecific language. And given the importance of such a power, at least one of the framers surely would have mentioned this intent during the debates. *See Shell*, 2024 WL 1005023, at \*35 (Acree, J., dissenting) (“Except for Governor Buckner’s surprising kerfuffle over § 81, there was no debate over any section of the Constitution relied upon by [the Governor].”). In any event, the Governor’s argument is just subterfuge to overrule *Brown v. Barkley*. Look again at the first sentence that the Governor cites. Although the first half of the sentence mentions the Governor’s “supremacy,” the second half states that the General Assembly “definitely” can “withhold[]” executive power from the Governor and “assign[]” it to an independent Section 91 officer. So whatever it means for the Governor to exercise the “supreme executive

power,” *Brown v. Barkley* tells us that the General Assembly remains free to empower Section 91 officers to act without the Governor’s oversight. At bottom, the Governor’s supremacy argument focuses on one part of a sentence in *Brown v. Barkley* while ignoring its other half. (More on this half-sentence gambit below.)

Third, it is important to focus on the precise language used by *Brown v. Barkley*. Both of the Governor’s favored quotes state that Section 69 limits the General Assembly from acting to “create” another executive officer who is not subject to the Governor’s supremacy. Section 91 officers like the Attorney General and the Agriculture Commissioner, however, are created by the Constitution. Merely assigning executive power to an already created Section 91 officer, as HB 518 does, does not “create” another Section 91 officer by statute. It instead assigns executive power to an office created by the Constitution. What the Governor’s favored parts of *Brown v. Barkley* actually say is that the General Assembly cannot by statute create a new Section 91 officer. For example, the General Assembly cannot transfer all the Finance Cabinet’s responsibilities to a statutorily created Commissioner of Finance who is independent of the Governor and the Section 91 officers. HB 518 does nothing close to that.

***Cameron v. Beshear.*** Next up is *Cameron v. Beshear*—this Court’s most recent case examining *Brown v. Barkley*. There, the General Assembly passed a statute (KRS 39A.180(2)(b)2.) that requires the Governor and the Attorney General to agree before the Governor can suspend a statute during an emergency. 628

S.W.3d at 76. In an argument that should sound very familiar, the Governor argued to this Court that the law was unconstitutional under Section 69 because it “purports to place an executive function of the Governor under the supervision of the Attorney General.” Initial Brief for Respondents at 26, *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021) (No. 2021-SC-0107), 2021 WL 2404982, at \*26. This Court rejected that argument, and it did so unanimously. 628 S.W.3d at 76; *see id.* at 79 (Hughes, J., concurring).

The Court rejected the Governor’s argument because of *Brown v. Barkley*. As *Cameron v. Beshear* recognized, “[i]n *Barkley*, we recognized [that] the Constitution[s] framers created these independent, statewide-elected offices to ‘provide convenient receptacles for the diffusion of executive power.’” *Id.* (quoting *Brown v. Barkley*, 628 S.W.2d at 622). Even more relevant, *Cameron v. Beshear* addressed the Governor’s argument based on *Brown v. Barkley* that “the General Assembly has impermissibly ‘create[d] another executive officer or officers who will not be subject to [the Governor’s] supremacy.’” *Id.* (quoting *Brown v. Barkley*, 628 S.W.2d at 622). This of course is the very same supremacy argument that the Governor is pressing here—that a half sentence from *Brown v. Barkley* creates a gubernatorial supremacy that cannot be infringed.

This argument did not succeed in *Cameron v. Beshear*. The Court unanimously rejected it by simply providing the “complete quotation” from *Brown v. Barkley*. It block-quoted *Brown v. Barkley* and bolded the operative part of the quote.

That passage from *Cameron v. Beshear* is reproduced immediately below with the emphasis as provided by the Court:

As the Governor is the ‘supreme executive power,’ it is not possible for the General Assembly to create another executive officer or officers who will not be subject to that supremacy, but **it definitely has the prerogative of withholding executive powers from him by assigning them to these constitutional officers who are not amenable to his supervision and control.**

*Id.* at 77 (quoting *Brown v. Barkley*, 628 S.W.2d at 622). In other words, just four years ago, the Court unanimously rejected the Governor’s supremacy argument by merely quoting *Brown v. Barkley*.<sup>15</sup>

It is impossible to find a case that is more on all fours with this case than *Cameron v. Beshear*. There, as here, the Governor argued that his supremacy prohibited the General Assembly from assigning independent authority to a Section 91 officer. And there, as here, the Governor based this argument on part of a quote from *Brown v. Barkley*. Faced with the very same argument that Governor Beshear has raised here, the Court unanimously held that the Governor was misinterpreting *Brown v. Barkley*. It simply provided the “complete quotation” from

---

<sup>15</sup> *Cameron v. Beshear* is not the only time this Court has reaffirmed *Brown v. Barkley*. *McClure v. Augustus*, 85 S.W.3d 584, 586 (Ky. 2002) (*Brown v. Barkley* “stand[s] for the proposition that the General Assembly may take common-law powers away from executive constitutional officers and assign them to different executive officers or agencies without violation the constitution.”). This Court’s affirmances of *Brown v. Barkley*’s reasoning refute the lower court’s suggestion that the key part of *Brown v. Barkley* is dicta. *Shell*, 2024 WL 1005023, at \*9.

*Brown v. Barkley* to reaffirm that the General Assembly can in fact “withhold[]” executive power from the Governor and “assign[]” it to a Section 91 official who is “not amenable to [the Governor’s] supervision and control.” *Id.* (quoting *Brown v. Barkley*, 628 S.W.2d at 622).

A key tenet of the judicial power is that “like cases should be decided alike.” *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005). As this Court recently explained, the judiciary has a duty “to maintain stability and consistency in the law.” *Gasaway v. Commonwealth*, 671 S.W.3d 298, 328 (Ky. 2023). That duty can only mean that the rejection of the Governor’s supremacy argument in *Cameron v. Beshear* requires that his identical argument be rejected here. To put a finer point on it, the Governor and the Attorney General have already litigated this very issue. If stare decisis means anything, it means rejecting the *same* argument rejected in *Cameron v. Beshear* pressed again a few years later by the *same* litigant against one of the *same* litigants.

The Governor’s only response, which the Court of Appeals adopted, is that *Cameron v. Beshear* dealt with the General Assembly’s Section 15 authority to delegate its power to suspend statutes. But that distinction works against the Governor. Section 15 empowers the General Assembly alone to decide who gets to suspend statutes. Ky. Const. § 15 (“No power to suspend laws shall be exercised unless by the General Assembly or its authority.”). As discussed above,

Section 93 likewise empowers the General Assembly alone to decide who appoints the members of statutory boards and commissions. As a result, *Cameron v. Beshear* holds that the Governor’s Section 69 authority does not trump a separate provision in the Constitution that grants plenary power to the General Assembly on a specific topic. Just as “the power to suspend statutes does not belong to the Governor” under the Constitution, 628 S.W.3d at 76, the power to decide who appoints the members of statutory boards and commission does not belong to him either. To quote *Cameron v. Beshear*, that power “belongs to the General Assembly” under Section 93. *See id.* The Court of Appeals in *Coleman* made this very point by recognizing that “[b]oth” Sections 15 and 93 “permit the General Assembly to decide how powers will be used.” *Coleman*, 2024 WL 875611, at \*9.

***Other caselaw.*** Aside from the discussion of the Governor’s constitutional powers in *Brown v. Barkley* and *Cameron v. Beshear*, other Kentucky caselaw is clear that the Governor lacks implicit authority on top of his express constitutional powers. The tension between these decisions and the Governor’s implied-authority theory is hard to miss.

Caselaw about the extent of the Governor’s implicit constitutional authority starts with the decision of *Royster v. Brock*, 79 S.W.2d 707 (Ky. 1935).<sup>16</sup> The

---

<sup>16</sup> Technically, this principle is seen even earlier in *McChesney v. Sampson*, which held that the Governor lacks an inherent right to revoke an appointment granted to him by statute. 23 S.W.2d 584, 586 (Ky. 1930).

question there was whether the Governor could revoke a special-session call before the legislature meets. *Id.* at 708. This Court’s predecessor said no. It emphasized that the constitutional provision governing special-session calls (Section 80) does not mention revocation. Thus, “[i]f the power to revoke exists, it must be implied, for no such power is expressly given.” *Id.* at 709. And the Court rejected such implied authority. It reasoned: “[W]hether or not the power of revocation should be lodged with the executive is a question of expediency, and since the framers of the Constitution failed expressly to grant the power *it ought not to be implied.*” *Id.* at 711 (emphasis added). The Court reached this conclusion despite one of the dissents repeatedly invoking Section 69’s mention of the “supreme executive power” as a reason to hold otherwise. *Id.* at 712–13 (Thomas, J., dissenting). Thus, *Royster* rejected an implied-authority argument based on the simple fact that the applicable constitutional provision did not expressly grant the Governor such authority. The Court did not view Section 69 as a gap-filler that grants implied authority.

This Court’s predecessor built on *Royster* in *Martin v. Chandler*, 318 S.W.2d 40 (Ky. 1958). There, the Governor, by executive order, attempted to transfer a function from one agency to another. *Id.* at 42. Relying on *Royster*, the Court held that “the Governor has no inherent or implied authority to revoke or retract a completed executive act.” *Id.* at 44. And it reaffirmed that “[t]he Governor has

only such powers as are vested in him by the Constitution and the statutes enacted pursuant thereto.” *Id.* The Court found the Governor’s executive order unlawful simply because there was no statute granting authority to the agency that the Governor sought to empower. *Id.* *Martin* thus insisted on express authority, whether statutory or constitutional, in assessing whether the Governor can undertake a given executive act. In other words, “[b]asically, [the Governor’s] power is to execute the laws, not to create laws.” *Id.*

The most recent case in this line of implied-authority cases is *Kentucky Employees Retirement System v. Seven Counties Services*, 580 S.W.3d 530 (Ky. 2019). There, the Court considered whether the “Governor ha[s] some broader ‘contracting’ authority” apart from the authority granted to him by statute. *Id.* at 540. It gave a negative answer based on *Royster* and *Martin*. Quoting *Royster*, the Court held—unanimously—that the Governor “has only such powers as the Constitution and Statutes, enacted pursuant thereto, vest in him, and *those powers must be exercised in the manner and within the limitations therein prescribed.*” *Id.* at 539 (emphasis in original).

The through-line in these cases is that apart from his enumerated constitutional powers, the Governor has only such power as the General Assembly grants him by law. These decisions reject the notion that Sections 69 and 81 grant the Governor implicit authority when he lacks explicit authority.

\*\*\*

One final point on caselaw. The circuit court relied on a North Carolina high court decision to find a violation of Sections 69 and 81. Ex. 1 at 18–19. The Court of Appeals (correctly) refused to “turn to out of state authority as did the trial court.” *Shell*, 2024 WL 1005023, at \*10. In fact, the Court of Appeals’ motion panel distinguished the North Carolina precedent from this “more nuanced” case. Ex. 3 at 16.

If Governor Beshear turns to the Tar Heel State to justify his constitutional authority in the Bluegrass State, the Court should reject that argument (just as college basketball fans across Kentucky would surely do). Although out-of-state precedent can be instructive, “this Court’s North Star is our own Constitution” and “the language used.” *Beshear v. Acree*, 615 S.W.3d 780, 805 n.30 (Ky. 2020). Even still, the North Carolina Supreme Court’s decision has no possible bearing here. The case dealt with granting majority appointment power to the legislature, not to an independently elected constitutional officer. *North Carolina v. Berger*, 781 S.E.2d 248, 250–51 (N.C. 2016). In fact, *Berger* could not have been clearer that it was not considering a case in which the legislature had vested appointment power in another “independently elected” executive official. *Id.* at 256 n.5. Its opinion took “no position” on that issue. *Id.*; see also *Shell*, 2024 WL 1005023, at \*44–46 (Acree, J., dissenting) (explaining why reliance on *Berger* was not only “unnecessary” but a “bad choice”).

**D. The consequences of the Governor's argument counsel against sustaining it.**

As summarized above, the text of the Constitution, Kentucky's history, and our caselaw could not be more inconsistent with the Governor's boundless view of Sections 69 and 81. If the Court sustains his argument, it will usher in a sea change not only in how appointments to statutory boards and commissions are made but also to how state government functions day to day.

Start with how other statutory boards and commissions currently operate. The Fair Board is not unique in allowing someone other than the Governor to appoint a majority of its members. Other such boards or commissions include:

- The Kentucky Opioid Abatement Advisory Commission, to which the Attorney General appoints or designates six of the nine voting members. KRS 15.291(2)(a).
- The Tobacco Master Settlement Agreement Compliance Advisory Board, to which the Attorney General appoints or designates three of the six members. KRS 15.300(2)(a), (e).
- The Kentucky Financial Empowerment Commission, to which the State Treasurer appoints or designates six of the 11 members. KRS 41.450(3)(a), (g).
- The Executive Branch Ethics Commission, to which the Governor ap-

points two members and the Section 91 officials each appoint one member.<sup>17</sup> KRS 11A.060(2).

- The State Board of Agriculture, to which the Agriculture Commissioner appoints or designates 14 of the 15 voting members. KRS 246.120(1).

These five boards or commissions only scratch the surface. There are nearly two dozen other boards or commissions across state government to which the Governor does not directly appoint a majority of the members. KRS 15.264(2) (General Regulatory Sandbox Advisory Committee); KRS 15.705(2) (Prosecutors Advisory Council); KRS 15.910(1) (State Child Abuse and Neglect Prevention Board); KRS 18A.226(1) (Group Health Insurance Board); KRS 65.320 (Local Government Training Advisory Council); KRS 65.360(1) (land bank authorities); KRS 148.034(8)(a) (Kentucky Ohio River Regional Recreation Authority); KRS 148.0222(8)(a) (Kentucky Mountain Regional Recreation Authority); KRS 156.007(1) (Local Superintendents Advisory Council); KRS 171.311 §§ III, XII (governing board of the Kentucky Historical Society); KRS 171.420(1) (The State Libraries, Archives, and Records Commission); KRS 175B.030(2)(b) (bi-state authority); KRS 183.132(5)–(11) (air boards); KRS 198A.750(1) (Rural Housing Trust Fund Advisory Committee); KRS 217B.505(1) (Structural Pest Management Advisory Board); KRS 218B.020(2) (Board of Physicians and Advisors);

---

<sup>17</sup> The constitutionality of the composition of this board is at issue in the companion case. *Besbear v. Coleman*, 2024-SC-0228 (Ky.).

KRS 230.400(2) (Kentucky Thoroughbred Development Fund Advisory Committee); KRS 247.804 (Agrotourism Advisory Council); KRS 247.944(3) (Kentucky Agricultural Finance Corporation); KRS 248.510(1) (Kentucky Tobacco Research Board); KRS 248.707(2) (Agricultural Development Board); KRS 260.018(1) (Kentucky Proud™ Advisory Council).

The Governor’s theory of Sections 69 and 81 casts doubt on all these boards and commissions, each of which serves an important role for the Commonwealth. Consider the Kentucky Opioid Abatement Advisory Commission, which is tasked with “distribut[ing] the Commonwealth’s portion of the over \$842 million from settlements the Attorney General reached, in 2022, with opioid companies for their role in exacerbating the deadly opioid crisis.” Ky. Opioid Abatement Advisory Comm’n, <https://perma.cc/7ZMP-NZAH>. Taking the Governor’s theory at face value, the composition of that board seemingly violates Sections 69 and 81, given that the Governor does not appoint a majority of the members. Indeed, he appoints *no members*. Instead, his CHFS Secretary or his designee is only one of nine voting members.<sup>18</sup> KRS 15.291(2)(a)3.

If the Governor prevails on his Sections 69 and 81 theory, what happens

---

<sup>18</sup> The same legislative session that Governor Beshear vetoed HB 518 for allegedly making the Fair Board unconstitutionally composed, he signed into law the bill that established the composition of the Kentucky Opioid Abatement Advisory Commission. 2021 Ky. Acts ch. 113.

to this board and the many other boards and commissions like it? And what happens to those boards' and commissions' past actions that were undertaken by the vote of members who were (in the Governor's estimation) unconstitutionally serving? Throughout this litigation, the Governor's only response to these serious questions has been to say that these other boards and commissions are not before the Court. That's technically correct, but it is a dodge. This Court's published opinions apply statewide. And as Kentucky's court of last resort, this Court thinks deeply about how its rulings will apply beyond the circumstances before it. Any lawyer who has encountered the vexing hypotheticals posed by members of the Court during oral argument can attest to this fact. Ultimately, if the Court sustains the Governor's sweeping argument and a follow-on challenge to these other boards and commissions is filed, the judiciary would have a duty to "maintain stability and consistency in the law." *Gasaway*, 671 S.W.3d at 328. As a result, the Governor cannot avoid the cascading consequences of his theory.

Those consequences are not limited to appointments to boards and commissions. If Sections 69 and 81 guarantee the Governor a majority of appointments to each and every board and commission, it would seem to follow that Sections 69 and 81 likewise guarantee the Governor a majority of Kentucky's executive power across state government. This is where the conflict with *Brown v. Barkley* comes fully into view. Recall that the decision holds that the General Assembly can "definitely" "withhold[]" an executive power from the Governor

and “assign[]” it to a Section 91 official. 628 S.W.2d at 622. Yet under the Governor’s paradigm, that foundational rule of Kentucky constitutional law is true only if the Governor otherwise retains a majority of the executive power across state government. How the Court can make such an amorphous judgment is anyone’s guess. Will the Court ask whether a given executive action is too important for someone other than the Governor to exercise? Or will the Court somehow sum up all the Governor’s executive powers to see how they stack up to the collective powers of the Section 91 officials?

No matter how it is framed, the Governor’s Section 69 and 81 theory cannot avoid conflict with *Brown v. Barkley* and our divided-executive form of government. It is an everyday occurrence in Kentucky state government that independently elected constitutional officers other than the Governor take final executive action with no oversight or even input from the Governor, even on topics of surpassing importance to the Commonwealth. To give one example of many, the Commonwealth, through the Attorney General, and the Agriculture Commissioner are filing this legal brief on their own accord, without an obligation to answer to the Governor for their arguments. But under the Governor’s theory of the case, even filing this legal brief could be problematic because it altogether removes the Governor from the executive-power calculus.

The Governor cannot explain why, on the one hand, he must appoint a majority of the members to every board and commission in the Commonwealth

while, on the other hand, Section 91 officers take independent executive actions every day. The Governor cannot reconcile the two because his legal theory, taken to its logical end, is at war with our Constitution’s creation of “independent, statewide-elected officers to ‘provide convenient receptacles for the diffusion of executive power.’” *Cameron v. Beshear*, 628 S.W.3d at 76 (quoting *Brown v. Barkley*, 628 S.W.2d at 622). Ultimately, the Governor’s quarrel is not with HB 518, but with seminal Kentucky decisions like *Brown v. Barkley* and *Cameron v. Beshear*—not to mention the plain text of Section 93 and *Rouse*.

The Governor may respond that, in recent years, the General Assembly has passed several bills like HB 518 that remove some of his statutory power and grant it to a Section 91 official. But that is a political point, not a legal one. The current push and pull between the Governor and the legislature is not new. For better or worse, disputes between the political branches are a feature, not a bug, of Frankfort. As Judge Combs summarized in the *Coleman* matter, “[m]any political winds—both ill and fair—have blown over the Commonwealth” across the decades. *Coleman*, 2024 WL 875611, at \*15 (Combs, J., concurring). Respectfully, the constancy of such political disputes is a powerful reason *not* to reconsider longstanding caselaw. The Court should hold firm to seminal decisions like *Rouse*, *Brown v. Barkley*, and *Cameron v. Beshear*. Politics will wax and wane across Governors and legislatures, but the rules of the road established by those foundational cases must stand the test of time. Constancy regardless of the politics of the

moment is what makes the judiciary the judiciary.

**II. The Constitution allows legislators or their designees to serve as non-voting members on the Fair Board.<sup>19</sup>**

The second constitutional question raised in this appeal is whether the separation of powers in Sections 27 and 28 of the Constitution prohibits the General Assembly from making a legislator or his or her designee a *nonvoting* member of a state board or commission. As noted above, HB 518 makes the Senate President and the House Speaker, or their designees, nonvoting members of the Fair Board. 2021 Ky. Acts ch. 163, § 2(1)(c)–(d). Both courts below determined that this part of HB 518 violates the separation of powers. In so concluding, both courts relied almost exclusively on *LRC v. Brown*. Ex. 1 at 16; *Shell*, 2024 WL 1005023, at \*5–6.

No one disputes that *LRC v. Brown* says that legislative service as a *voting* member on a statutory board or commission can violate the separation of powers. Although Judge Acree wrote at length about why this part of *LRC v. Brown* is mistaken, *id.* at \*46–134 (Acree, J., dissenting), the Court need not consider that issue. That’s because *LRC v. Brown* did not consider the constitutionality of

---

<sup>19</sup> The Defendants preserved this argument below. R. 366–68, 468–70, 494–501, 590–97, 623–27, 640–42, 718–19; Appellants’ Brs. 18–22 (Ky. App. Oct. 17, 2022); Appellants’ Reply Br. 5–6 (Ky. App. Jan. 24, 2023); Response-Reply Br. 21–23 (Ky. App. Mar. 13, 2023). As noted in Part II.A below, standing was not fully preserved.

legislative service as a nonvoting member of a state board or commission. And the logic of *LRC v. Brown* conveys that nonvoting service does not implicate the separation of powers. Indeed, following *LRC v. Brown*, the General Assembly has passed a host of statutes that, just like HB 518, allow a legislator or his or her designee to serve as a nonvoting member of a board or commission. That established practice confirms that HB 518 is constitutional.

**A.** A quick word about standing before discussing *LRC v. Brown*. This Court is unflagging in requiring a plaintiff to prove constitutional standing to sue. E.g., *Commonwealth Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton*, 566 S.W.3d 185, 196 (Ky. 2018). Standing goes to a court's subject-matter jurisdiction, so it need not be preserved, or even raised, for a court to consider it.<sup>20</sup> *Commonwealth v. Bredhold*, 599 S.W.3d 409, 419–20 (Ky. 2020). As relevant here, standing requires a plaintiff to establish an injury in fact. An injury in fact must be “distinct and palpable,” not “abstract,” “conjectural,” or “hypothetical.” *Sexton*, 566 S.W.3d at 196 (citation omitted). Standing is assessed claim by claim. *City of Pikeville v. Ky. Concealed Carry Coal., Inc.*, 671 S.W.3d 258, 264 (Ky. 2023).

Allowing legislators or their designees to serve in a nonvoting capacity on the Fair Board does not injure the Governor. HB 518 did not take nonvoting

---

<sup>20</sup> The Defendants acknowledge that they did not raise constitutional standing in the Court of Appeals. The Agriculture Commissioner did press a standing argument in circuit court, R.456–59, which the court rejected, Ex. 1 at 7–11.

appointments away from the Governor and give them to legislators. Instead, the nonvoting positions at issue did not exist before HB 518. 2021 Ky. Acts ch. 163, § 2(1)(c)–(d). In addition, the Governor did not bring a claim under Sections 69 and 81 to challenge the nonvoting-member part of HB 518, which is the theory that gives him standing to challenge the other part of the law. R.71–73. Moreover, nowhere in the operative complaint did the Governor explain how allowing nonvoting service by a legislator or his or her designee harms him in a cognizable way. R.55–74. Without an injury in fact, the Governor has not established constitutional standing to challenge this part of HB 518. *See Sexton*, 566 S.W.3d at 196.

This is not to say that no one can challenge this aspect of HB 518. For example, if a voting member of the Fair Board thinks a nonvoting member is interfering with the voting member’s duties, standing could exist. And someone injured by an action of the Fair Board (say, a disappointed vendor) could have standing to sue if a nonvoting member played some role in the challenged action. In addition, if the Attorney General had constitutional concerns with this part of HB 518 (he does not), he would have standing to vindicate the people’s interests. *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 361–66 (Ky. 2016). But the Governor has not been injured. He is impermissibly raising an abstract constitutional question. As a result, the Court needn’t consider this claim.

**B.** If the Court finds that the Governor has proved standing, the question becomes whether *LRC v. Brown* applies. At issue there were several statutes that allowed legislators or the Legislative Research Commission to play a role in appointments to or service on boards and commissions. 664 S.W.2d at 920. Relevant here, one of those statutes made the Senate President and House Speaker ex officio members of the Enterprise Zone Authority. 664 S.W.2d at 920 & n.16. Importantly, the Enterprise Zone Authority did not have any nonvoting members. *See* 1982 Ky. Acts ch. 131, § 6(1). So the Senate President’s and House Speaker’s service as ex officio members entitled them to vote on all matters that came before the Enterprise Zone Authority. *See Seiler v. O’Maley*, 227 S.W. 141, 143 (Ky. 1921) (holding that an ex officio member has “all of the authority of other members”). No one in this litigation has questioned that the legislative appointments at issue in *LRC v. Brown* were voting members.

In considering whether a legislator’s service as a voting member of the Enterprise Zone Authority offends the separation of powers, *LRC v. Brown* noted that this Court’s predecessor had been altogether inconsistent on this point of law. In fact, “close in time to the adoption of the present Constitution,” this Court’s predecessor upheld a statute that allowed the legislature to elect three members of a statutory commission. *LRC v. Brown*, 664 S.W.2d at 921 (citing *Comm’rs of Sinking Fund v. George*, 47 S.W. 779 (Ky. 1898)). In *George*, our high court held that “the power of appointing or electing to office does not necessarily

and ordinarily belong to either the legislative, the executive or judicial departments . . . . It is an executive function when the law has committed it to the executive . . . .” 47 S.W. at 781 (citation omitted).<sup>21</sup> Thus, a mere seven years after our Constitution was ratified, this Court’s predecessor held that it was consistent with the separation of powers for the General Assembly to elect who serves on a statutory board or commission.

If *George* had been the final word on this issue, there would be no question that HB 518 is constitutional. This Court’s predecessor, however, reversed itself a few years later. As *LRC v. Brown* recounted, the Court “veered sharply away from the holding in *George*” in *Pratt v. Breckenridge*, 65 S.W. 136 (Ky. 1901). 664 S.W.2d at 921–22. The *Pratt* decision, *LRC v. Brown* recognized, has received “much adverse notoriety from both contemporary and subsequent historians.” *Id.* at 922. That’s because *Pratt* overturned *George* in the context of a bitterly disputed election contest for Attorney General. *Id.*

*Pratt*’s reasoning did not fare well in the near term. As *LRC v. Brown* summarized, “[s]everal years later, in a less volatile atmosphere in the Commonwealth than had existed in *Pratt*, this Court made a veer back towards the holding in *George*” in *Sewell v. Bennett*, 220 S.W. 517 (Ky. 1920). 664 S.W.2d at 922 (footnote

---

<sup>21</sup> That notion was not new to Kentucky, even in 1898. *Taylor v. Commonwealth*, 26 Ky. 401, 401–02 (Ky. 1830); see also *Shell*, 2024 WL 1005023, at \*50–53 (Acree, J., dissenting) (discussing the importance of *Taylor*).

omitted). Like *George*, *Sewell* held that a statutory board was “purely a legislative creation and in providing for the appointment of members of the board the Legislature had the undoubted power to make these appointments itself or give them to the Governor, or indeed any other person or body that it might designate.” 220 S.W. at 519. As *LRC v. Brown* recounted, *Sewell* “seemed to retreat from *Pratt* and revitalize *George*.” 664 S.W.2d at 922.

This jurisprudential shifting did not end even with *Sewell*. A mere two years later, this Court’s predecessor “veered” yet again in *Sibert v. Garrett*. In *Sibert*, this Court’s predecessor did something extraordinary—aside from continuing the Court’s veering jurisprudence. *Sibert* exercised the judicial power to opine on the constitutionality of a bill that the legislature had “attempted” to pass. 246 S.W. at 455. That is to say, *Sibert* apparently considered the constitutionality of a bill that *was not law*. The note appended by the Senate President in the appendix to the 1922 Kentucky Acts explains what happened:

478 COMMONWEALTH OF KENTUCKY

Section 12a. If any of the provisions of this act be held to be unconstitutional, then no provision thereof shall become operative.

.....  
President of the Senate.  
JAMES H. THOMPSON,  
Speaker of the House of Representatives.

The following endorsement appears on this bill:  
"This bill carries an appropriation. Under Section 46 of the Constitution 20 votes in the Senate were necessary to legally pass same. I know of my own knowledge and from the Journal of the Senate that it received only 19 votes in the Senate. I therefore decline to sign this bill as having legally passed the Senate.

THRUSTON BALLARD,  
President of the Senate."

As a result, *Sibert* continued the “veering” from *George* to *Pratt* to *Sewell* in a case that, by all appearances, was not a case. In other words, *Sibert* opined on the separation of powers in an opinion the issuance of which itself violated the separation of powers. A first principle of Kentucky’s separation of powers is that the judiciary does not issue advisory opinions even on matters of public interest. *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992). Indeed, not that long after *Sibert*, this Court’s predecessor invalidated a bill that allowed the Governor or a house of the legislature to obtain the Court’s “written opinion” about “important constitutional questions.” *In re Constitutionality of House Bill No. 222*, 90 S.W.2d 692, 692–93 (Ky. 1936). That appears to be essentially what happened in *Sibert*. See *Shell*, 2024 WL 1005023, at \*123–28 (Acree, J., dissenting).

Putting that aside, the proposed law in *Sibert* would have changed the composition of a state board such that the members would eventually be “elected by the Legislature.” 246 S.W. at 455–56. *Sibert* recognized the divergence between *George* and *Pratt*, and it “accepted as true” that *Pratt* “might be termed a political [decision].” *Id.* at 458. That criticism notwithstanding, *Sibert* determined that *Pratt* was better reasoned than *George*. *Id.* *Sibert* thus held that, under Section 93, “the authority of the Legislature is limited to making such provisions by exercising its authority to pass an act containing them and directing upon whom or with whom the power to appoint was lodged, which electing and appointing agency should, perhaps, be selected from the department to which the duties of the office necessarily appertain.” *Id.* at 460.

Although *Sibert* was an advisory opinion, *LRC v. Brown* adopted its reasoning as the most recent word on the issue. 664 S.W.2d at 923 (“It is our view that *Sibert* has been unchanged and is therefore dispositive of the central issue present in these contested statutes.”). Relying on *Sibert*, *LRC v. Brown* determined that the provision allowing the Senate President and the House Speaker to serve as voting members of the Enterprise Zone Authority violated the separation of powers. *Id.* at 924 (finding the statute “invalid because such constitutes a legislative appointment which infringes on the right of the Governor to make such appointments”).

In the end, where did all this “veering” leave us? Since *LRC v. Brown*, it

has been the rule in Kentucky that legislative service as a voting member of a state board or commission can violate the separation of powers. Although there are jurisprudential problems with the route to reaching that conclusion, the Court need not reconsider *LRC v. Brown* to uphold HB 518. More to the point, unlike the Governor, the Defendants do not ask the Court to retreat from existing precedent. That's because HB 518 operates comfortably within the lines drawn by *LRC v. Brown*.

C. Turn now to that issue. As summarized above, both courts below viewed *LRC v. Brown* as dispositive of the part of HB 518 that allows the Senate President and House Speaker, or their designees, to serve as nonvoting members of the Fair Board. The problem with that reasoning is that the statute in *LRC v. Brown* made the Senate President and House Speaker *voting* members of the board. Here, by contrast, the Senate President and House Speaker serve as *non-voting* members of the Fair Board. 2021 Ky. Acts ch. 163, § 2(1)(c)–(d). The question thus becomes whether to extend *LRC v. Brown* to nonvoting service by a legislator or his or her designee. There are two overarching reasons not to extend *LRC v. Brown* to this distinct context.

First, the reasoning of *LRC v. Brown* does not apply to nonvoting membership. *LRC v. Brown* determined that allowing the legislature to appoint its members in a voting capacity would enable the legislature to overtake the executive branch, in violation of the separation of powers. Such a regime, *LRC v.*

*Brown* warned, would “enable [the legislature] to gradually absorb to itself the patronage and control of the greater part of the functioning agencies of the state and county governments, and thus endowed it would be little short of a *legislative oligarchy*.” 664 S.W.2d at 923 (emphasis added) (quoting *Sibert*, 246 S.W. at 460). So *LRC v. Brown*’s holding about the Enterprise Zone Authority was driven by the reality that allowing legislative appointments of voting members would allow the legislature to exercise executive power contrary to the separation of powers.

Concerns about creating a “legislative oligarchy” are absent here. A member of a board or commission exercises executive power *by voting*. A nonvoting member thus has no mechanism to exercise executive power. For example, when the Fair Board adopts its budget, a nonvoting member has no formal say. So too when the Fair Board makes hiring and firing decisions. By making the Senate President and House President, or their designees, only nonvoting members, the General Assembly walled them off from undertaking any executive action. They stand in the same position as the other nonvoting members of the Fair Board, which include the state presidents of the Kentucky FFA Association and the Kentucky 4-H Organization. 2021 Ky. Acts ch. 163, § 2(1)(o)–(p). In this simple way, HB 518 respects the separation of powers.

Not only that, HB 518 *promotes* the separation of powers by enabling the legislature to more effectively exercise the legislative power. As this Court recently reiterated, the executive branch’s “principal[]” job is to do the legislature’s

“bidding.” *Cameron v. Beshear*, 628 S.W.3d at 74 (quoting *Brown v. Barkley*, 628 S.W.2d at 623). The legislature best exercises this aspect of the law-making power when it has more information about what the executive branch is doing. Put differently, an ill-informed legislature is not exercising the legislative power as ably as a well-informed one. The more complete information the legislature has, the better its exercise of the legislative power.

Viewed this way, HB 518 allows the Senate President and House Speaker to see what the Fair Board is doing in real time and report back to their colleagues in the General Assembly without distracting from the work of the Fair Board. This is not a breach of the separation of powers. It is good government. HB 518 keeps legislators separate from the Fair Board’s exercise of executive power (*i.e.*, voting) while allowing them to exercise the legislative power (*i.e.*, oversight) with better information. A common gripe from the executive branch is that the legislature does not fully appreciate the day-to-day issues confronting the executive branch. HB 518 seeks to bridge that gap by creating synergy, not conflict, between the executive branch and the legislature.

The intuition that legislative service on a board or commission promotes the legislative power is rooted in this Court’s caselaw. In fact, *LRC v. Brown* itself recognized this principle. Quoting *Sibert*, this Court said that although the appointment of officers is an “intrinsically administrative or executive act,” this holding “does not imply that no appointment can be made by any department

of government other than the executive.” 664 S.W.2d at 922 (quoting *Sibert*, 246 S.W. at 458). *LRC v. Brown* then emphasized that “all the authorities agree that the courts and the legislature may appoint those public officers which are necessary to the exercise of their own function.” *Id.* (emphasis added) (quoting *Sibert*, 246 S.W. at 458). HB 518 operates well within this carveout for legislative (and judicial) service on a board or commission. By serving as nonvoting members of the Fair Board, the Senate President and House Speaker exercise “their own function” of legislative oversight of the executive branch.

The Governor likely will respond, as did the Court of Appeals, that *LRC v. Brown* bars both legislative service on a board *and* legislative appointments thereto. *Shell*, 2024 WL 1005023, at \*6. According to this view, the legislature cannot by statute designate anyone to serve on a board or commission. But that categorical rule reads *LRC v. Brown* too broadly. It would nullify the holding from *LRC v. Brown* that was just discussed. That passage allows legislative (and judicial<sup>22</sup>) appointments in some cases, 664 S.W.2d at 922, while the Governor’s position never

---

<sup>22</sup> The Director of the Administrative Office of the Courts sits on several state boards or commissions. KRS 15.910(1)(b)8. (State Child Abuse and Neglect Prevention Board); KRS 15A.063(2)(a)6. (Juvenile Justice Oversight Council); KRS 15A.075(3)(e) (Criminal Justice Council); KRS 18A.226(1)(h) (Group Health Insurance Board). Plus, a family-court judge appointed by the Chief Justice serves as a nonvoting member of the External Child Fatality and Near Fatality Review Panel. KRS 620.055(2)(d). And this Court appoints three members to the Public Advocacy Commission. KRS 31.015(1)(a)3.

permits them.

The Governor’s no-appointments position would also take a wrecking ball to the established norm of statutory ex officio appointments to boards and commissions. If it is unconstitutional for the legislature to make *any* appointments, as the Governor urges, then the part of HB 518 making the Governor an ex officio member of the Fair Board is unconstitutional. 2021 Ky. Acts ch. 163, § 2(1)(a). The Governor has been an ex officio member of the Fair Board—by statute—for 85 years. 1940 Ky. Acts ch. 7, § 1. And *Rouse* tells us that the practice of the legislature making ex officio appointments to boards and commissions has been ongoing since we adopted our Constitution. 28 S.W.2d at 749; *accord supra* at 26–29 (summarizing those ex officio appointments). The logical consequences of the Governor’s reading of *LRC v. Brown* are stunning. His argument would seemingly upend the many dozens of statutes in which the legislature by statute has made an ex officio appointment to a statutory board or commission.<sup>23</sup> He would do so even

---

<sup>23</sup> KRS 11.026(5); KRS 12.550(1)(a); KRS 15.264(2)(c)–(d); KRS 15.315(1); KRS 15A.075(3); KRS 18A.035(4); KRS 18A.226(1); KRS 18A.245(1); KRS 31.015(1)(a)5., (4); KRS 42.747(4); KRS 61.470(5); KRS 65.028(11)(a); KRS 65.503(5); KRS 65.7623(3); KRS 72.225; KRS 90.120(1); KRS 95A.020(6); KRS 117.015(2); KRS 148.260(3); KRS 151B.245(2)(o)–(p); KRS 153.380(3); KRS 154A.030(1); KRS 154.12-203(3)(m); KRS 154.12-205(3); KRS 154.20-010(4); KRS 156.029(1); KRS 156.740(1); KRS 158.648(1)(b); KRS 158.6485(3)(a); KRS 158.796(2)(a); KRS 161.028(2)(a); KRS 161.250(1)(b)4.; KRS 164.011(1); KRS 164.2802(2)(c)5.–6.; KRS 164.2807(4)(a)15.–16.; KRS 164.746(1)(b); KRS 164.9817; KRS 164A.050(3)(a)2., (b); KRS 171.311, § 3; KRS 171.800(2); KRS 175B.015(2)(a), (3); KRS 177.375(2); KRS 183.862(1); KRS 194A.160; KRS 196.702(9)(a); KRS 198A.030(3); KRS 199.8983(1)(f)–(j); KRS 200.560(1); KRS

though *LRC v. Brown* held that a law establishing an ex officio position in fact “creat[es] a *proper category* of classification of membership on the board or commission.” 664 S.W.2d at 924 (emphasis added). For these reasons, the Governor’s absolute position of no legislative (and judicial) appointments being allowed cannot be right.

This leads to the second reason to reject the Governor’s overreading of *LRC v. Brown*. One of the tools that the Court uses to interpret the Constitution is established practice. That is to say, if the political branches have interpreted the Constitution in a particular way for many years without objection, the Court gives that established practice due weight when interpreting the Constitution. This is not to say that established practice automatically makes that practice constitutional. See *Ward*, 599 S.W.3d at 748. It is only to say that the “actual, practical construction” of the Constitution “by the people” over time matters in the overall analysis. *Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957); accord *Coleman*, 28

---

200.700(3); KRS 205.540(1); KRS 205.5636(1)(e); KRS 210.775(2)(a); KRS 216A.040; KRS 217C.070(2); KRS 223.020(1); KRS 224A.030(1); KRS 224.10-024(1)(c); KRS 224.18-710(1); KRS 224.50-855(2)(a)–(b); KRS 224.71-110(2); KRS 229.151(2)(a); KRS 229.260(2)(c); KRS 257.192(2); KRS 257.472(2); KRS 260.570(2); KRS 260.840(2); KRS 286.1-013(1)(b); KRS 304.17B-003(1)(c)–(d); KRS 311.530(2)(e); KRS 313.020(1); KRS 318.080(1); KRS 322.230(1); KRS 323.150; KRS 333.220; KRS 341.110(1); KRS 342.906(5), (6); KRS 353.565(1); KRS 367.130(2); KRS 441.615(1)–(2); KRS 439.562(2)(a)–(c); KRS 620.055(2).

S.W.2d at 981 (“Legislative or executive construction of constitutional provisions, adopted and acted on with the acquiescence of the people for many years is entitled to great weight with the courts; and where not manifestly erroneous, it will not be disturbed.” (citation omitted)).

The practical construction of Sections 27 and 28 adopted by the political branches following *LRC v. Brown* confirms HB 518’s constitutionality. To the best of the Defendants’ knowledge, in the nearly 40 years following *LRC v. Brown* until the Governor sued, no court has questioned the constitutionality of legislators serving as nonvoting members of a board or commission. Neither the Governor nor the courts below identified such a decision. Yet following *LRC v. Brown*, the practice of legislators serving as, or designating, a nonvoting member of a board or commission has become increasingly common. Such boards or commissions include the:

- General Regulatory Sandbox Advisory Committee. KRS 15.264 (2)(c)–(d);
- Kentucky Opioid Abatement Advisory Commission. KRS 15.291(2)(b);
- State Child Sexual Abuse and Neglect Prevention Board. KRS 15.910(1)(c);
- Juvenile Justice Oversight Council. KRS 15A.063(2)(a)8.–11.;
- Criminal Justice Council. KRS 15A.075(3)(c)–(d);
- Kentucky Local Government Public-Private Partnership Board. KRS 65.028(11)(a)8.;

- Kentucky Ohio River Regional Recreational Authority. KRS 148.034(6)(f)–(g);
- Kentucky Mountain Regional Recreation Authority. KRS 148.0222(6)(f)–(g);
- Kentucky Water Resources Board. KRS 151.113(3)(e);
- Interagency Technical Advisory Committee on Groundwater. KRS 151.629(2);
- Kentucky Nuclear Energy Development Authority. KRS 164.2802(2)(c)5.–6.;
- Energy Planning and Inventory Commission. KRS 164.2807(4)(a)15.–16.;
- Early Childhood Advisory Council. KRS 200.700(3)(d)–(e);
- Kentucky Livestock Care Standards Commission. KRS 257.192(2);
- Kentucky Equine Health and Welfare Council. KRS 257.472(2)(m)–(n);
- Kentucky Health Care Improvement Authority. KRS 304.17B-003(1)(c)–(d);
- Kentucky Gas Pipeline Authority. KRS 353.752(1)(h); and
- External Child Fatality and Near Fatality Review Panel. KRS 620.055(2)(a).

All these boards and commissions with nonvoting legislative members or designees confirm a simple point: After *LRC v. Brown*, the settled view across state government has become that nonvoting service by a legislator respects the separation of powers. These are strong headwinds for the Governor to overcome after all these years. See *Musselman*, 817 S.W.2d at 215 (requiring “compelling and

specific reasons” to discard a “large body of statutory law” about boards and commissions that “developed . . . in reliance on” a court decision). If it is unconstitutional for the Senate President and House Speaker to serve on the Fair Board as nonvoting members, as the Governor insists, it is similarly problematic in all these other statutes. As the circuit court recognized, in light of these many other statutory boards and commissions with nonvoting legislative members, the Governor’s argument could “lead to Pyrrhic victories that make the processes of governing more difficult than anticipated.” Ex. 1 at 16 n.5.

**III. Even if part of HB 518 is unconstitutional, any offending provision should be severed.**<sup>24</sup>

If the Court finds that part of HB 518 is unconstitutional, the appropriate remedy is not wholesale invalidation of the statute but severance. The circuit court got this issue right. Ex. 1 at 22. As did the Court of Appeals. *Shell*, 2024 WL 1005023, at \*14.

HB 518 does not have its own severability clause. Nor does it prohibit severing any problematic provision. That means Kentucky’s catch-all severability statute applies. KRS 446.090. The General Assembly “originally created [this provision] in order to obviate the necessity of attaching a severability clause to each

---

<sup>24</sup> The Defendants preserved this argument below. R.368–69, 501–02, 605–08, 627–28, 642–44, 719–20; Appellants’ Brs. 22–23 (Ky. App. Oct. 17, 2022); Appellants’ Reply Br. 6–7 (Ky. App. Jan. 24, 2023); Response-Reply Br. 23–24 (Ky. App. Mar. 13, 2023).

act as it is passed.” *Martin v. Commonwealth*, 96 S.W.3d 38, 57–58 (Ky. 2003). It reflects the “well-established rule that portions of a statute which are constitutional ma[y] be upheld while other portions are eliminated as unconstitutional.” *Ky. Mun. League v. Commonwealth Dep’t of Lab.*, 530 S.W.2d 198, 200 (Ky. 1975).

Under Kentucky’s severability statute, the Court can refuse to sever a problematic provision only in narrow circumstances, none of which apply here. The Court need not sever a problematic provision if the “remaining parts [of the law] are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part.” KRS 446.090. It is by no means “apparent,” as the severability statute requires, that the General Assembly would not have passed HB 518 if it lacked either or both of the challenged appointment provisions. As will be explained in the Defendants’ cross-appellee brief, HB 518 made other separate and meaningful changes to the Fair Board.

The other exception to severance does not apply for mostly the same reasons. Under this exception, a court can refuse severance if the remaining constitutional provisions “standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.” *Id.* The circuit court was exactly right that any problematic provisions in HB 518 “are severable because they include structural changes to the [Fair Board] that are complete and independent from the appointment provisions.” Ex. 1 at 22. Or as the Court of

Appeals held, “[t]he remaining aspects of the KRS Chapter 247 modifications are complete and capable of being executed in accordance with the intent of the General Assembly.” *Shell*, 2024 WL 1005023, at \*14.

**IV. The Court of Appeals should have at least considered its sister panel’s *Coleman* decision.<sup>25</sup>**

Beyond ruling on HB 518’s constitutionality, the Defendants ask the Court to correct the Court of Appeals’ refusal to address the considered views of its sister panel in *Coleman*. Respectfully, this aspect of the Court of Appeals’ decision is jurisprudentially intolerable. This Court should say so.

A summary of what happened below is necessary to set the stage. As the Court is aware, there are two cases, both filed by Governor Beshear, that challenge a law granting appointment authority to a Section 91 official or officials. For the sake of simplicity, there is this case (the Fair Board case) and the EBEC case. Governor Beshear filed the Fair Board case first, in April 2021. R.1. He filed the EBEC case about a year later, in May 2022. *Beshear v. LRC*, No. 22-CI-002228 (Jefferson Cir. Ct.). Both cases proceeded through circuit court and the Court of Appeals on somewhat parallel tracks. The Court of Appeals issued its ruling in the EBEC case first, on March 1, 2024. *Coleman*, 2024 WL 875611.

---

<sup>25</sup> The Defendants preserved this argument in the Court of Appeals. Mtn. to Cite Supplemental Auth. (Ky. App. Mar. 4, 2024); Mtn. to Hold Appeals in Abeyance (Ky. App. Mar. 4, 2024); Petition for Rehearing 5–10 (Ky. App. Mar. 28, 2024).

There, a unanimous panel (Combs, Eckerle, Jones, JJ.) held that Sections 69 and 81 of the Constitution do not prohibit the General Assembly from allowing Section 91 officials to appoint a majority of the voting members of a board or commission. *Id.* at \*1. The *Coleman* panel designated its decision for publication.

Upon *Coleman*'s rendition, the Defendants here quickly alerted the Fair Board panel of the EBEC ruling via a RAP 35(A) motion to cite supplemental authority. They made clear that the *Coleman* ruling was "not final." Indeed, they also asked the Fair Board panel to hold this matter "in abeyance pending finality" in *Coleman*. The Fair Board panel did not wait for the response time on either motion to run. Instead, the panel entered a terse order the next day denying both motions. Its only explanation was that "[n]on-final opinions 'may not be cited as binding precedent.'" Order (Mar. 5, 2024) (quoting RAP 40(H)). Three days later, the Fair Board panel issued its 333-page ruling and designated it as not to be published. Nowhere in that lengthy opinion did the Court mention the *Coleman* ruling. *Shell*, 2024 WL 1005023. As a result, the EBEC panel and the Fair Board panel issued flatly contradictory rulings about the meaning of Sections 69 and 81 on back-to-back Fridays, and the Fair Board panel refused to acknowledge, much less distinguish, the intervening, to-be-published ruling in the EBEC case.

In light of this sequence of events, the Defendants respectfully ask the Court to hold that the Court of Appeals below had a duty to address the intervening ruling in the EBEC matter and to distinguish it if the panel disagreed with

it. No doubt, it sometimes happens that different panels of an intermediate appellate court disagree on a legal question. In fact, this Court's rules provide an en banc procedure to allow the Court of Appeals to work out such panel disagreements. SCR 1.030(7)(d). But there is no indication that the panel pursued this option. It simply acted as if the EBEC decision did not exist. As a result, the problem with what happened below is not that the Fair Board panel disagreed with the to-be-published decision in the EBEC case. After all, under the appellate rules, even a to-be-published decision is not binding until finality is achieved. RAP 40(G)(2)–(4).

The problem with what happened below is that the Fair Board panel did not even mention the EBEC panel's to-be-published decision. Maybe the Fair Board panel would have found the EBEC ruling persuasive. Maybe not, given that Judge Acree's tome of a dissent did not change the majority's mind. At a minimum, the Fair Board panel should have explained *why* it was not convinced by the EBEC panel's reasoning. Indeed, this Court has instructed that even non-binding caselaw "do[es] act as persuasive authority." *Castle v. Commonwealth*, 411 S.W.3d 754, 760 (Ky. 2013).

No less importantly, the judiciary is distinct because it strives to treat like cases alike. *Martin*, 546 U.S. at 139. Or put more directly, the judiciary has a duty to "maintain stability and consistency in the law." *Gasaway*, 671 S.W.3d at 328. That's part of saying what the law is. *Id.* And it is especially needed in a politically

charged case like this one. Political power can shift at the voters' whim. Stability and consistency in the law are the countermeasure. Courts act as neutral arbiters in part by treating like cases alike. These rule-of-law principles should have compelled the Fair Board panel to discuss the EBEC panel's decision.

The only justification that the panel offered for refusing to address *Coleman* is RAP 40(H)'s statement that nonfinal opinions "may not be cited as binding precedent." But the Defendants have never suggested that *Coleman* was binding on the Fair Board panel. In fact, the Defendants' motions regarding *Coleman* made clear that it was not binding. Nothing in the appellate rules prohibits a litigant from alerting an appellate court of an on-point, nonfinal decision. In fact, RAP 40(H) allows a nonfinal case to be cited as long as the citing party "indicat[es] the non-final status" of an opinion, which the Defendants did.

### CONCLUSION

The Court should uphold HB 518 in full. If the Court disagrees in any respect, it should sever the problematic provision. The Court should also correct the Court of Appeals' refusal to consider the intervening *Coleman* decision.

Respectfully submitted,



---

Matthew F. Kuhn  
John H. Heyburn  
Jacob M. Abrahamson  
Office of the Attorney General  
700 Capital Avenue, Suite 118  
Frankfort, Kentucky 40601  
Matt.Kuhn@ky.gov  
*Counsel for the Commonwealth*

D. Eric Lycan  
Office of the Speaker  
702 Capital Ave., Room 332  
Frankfort, Kentucky 40601  
Eric.Lycan@lrc.ky.gov  
*Counsel for the House  
Speaker*

Heather L. Becker  
Department of Agriculture  
105 Corporate Drive  
Frankfort, Kentucky 40601  
HeatherL.Becker@ky.gov  
*Counsel for Agriculture  
Commissioner Jonathan Shell*

Ellen Benzing  
State Fair Board  
P.O. Box 37130  
Louisville, Kentucky 40233  
Ellen.Benzing@kyvenues.com  
*Counsel for Dr. Mark Lynn*

David E. Fleenor  
Vaughn Murphy  
Jean Bird  
Office of the Senate  
President  
702 Capital Ave., Room 236  
Frankfort, Kentucky 40601  
Dave.Fleenor@lrc.ky.gov  
*Counsel for the Senate  
President*

## WORD-COUNT CERTIFICATE

This brief complies with the word limit of RAP 31(G)(3)(a) because, excluding the parts of the brief exempted by RAP 15(D) and 31(G)(5), this brief contains 17,407 words.

*Matthew F. Kl*

---