Supreme Court of Kentucky

No. 2024-SC-0228

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

v.

On appeal from Jefferson Circuit Court
No. 21-CI-002228; Court of Appeals
Nos. 2022-CA-0837, 2022-CA-0838

RUSSELL COLEMAN, in his official capacity as Attorney General of the Commonwealth of Kentucky, *et al.* — *Appellees*

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CERTIFICATE OF SERVICE

I certify that this brief was served by U.S. mail on June 13, 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); Susan Stokley Clary, EBEC, 1025 Capital Center Drive, Suite 104, Frankfort, Kentucky 40601 (also served via email); Gregory A. Woosley, LRC, 700 Capital Avenue, Suite 300, 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 The record on appeal was not withdrawn in preparing this brief.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

The Executive Branch Ethics Commission ("EBEC" or "the Commission") ensures that executive-branch employees follow Kentucky's ethics code. During its 2022 legislative session, the General Assembly passed House Bill 334 to make the Commission more independent and more representative of the executive branch it oversees. Before HB 334, only the Governor selected EBEC's members. Now, other constitutional officers have a say in who sits on EBEC, with the Governor having twice the appointments of any official. HB 334 is simply a good-government measure to ensure that the Commission is beholden to no one.

The Jefferson Circuit Court found HB 334 unconstitutional and enjoined its enforcement. The Court of Appeals unanimously reversed. This Court should uphold HB 334. Our Constitution does not require the Governor to supervise everything EBEC does by appointing a majority of its members. The General Assembly may make EBEC more independent by allowing other constitutional officers to make appointments to the Commission.

STATEMENT CONCERNING ORAL ARGUMENT

The Court has designated this appeal for oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE[1]

The General Assembly created EBEC to oversee executive-branch employees' compliance with Kentucky's ethics code. That mission could not be more important. EBEC ensures that "public servant[s] . . . work for the benefit of the people of the Commonwealth" and that the "public has confidence in the integrity of its government and public servants." *See* KRS 11A.005(1) & (1)(d).

The General Assembly created EBEC in the wake of the BOPTROT scandal. *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 950 (Ky. 1995). In the more than 30 years since, the General Assembly has given the Commission a measure of independence from the rest of state government. For example, although the Governor was previously able to appoint and remove EBEC's members (but removal was for "cause only"), the Commission has never reported to the Governor, his administration, or any other official. *See* 1992 Ky. Acts ch. 287, § 8(7) (enacting KRS 11A.060(7)); 1994 Ky. Acts ch. 208, § 1(10) (enacting KRS

[1] The Constitutional Officers do not accept the statement of the case in the appellants' brief. RAP 32(B)(3).

11A.060(10)). And the Commission has always selected its own executive director and employees. 1992 Ky. Acts ch. 287, § 9 (enacting KRS 11A.070). As such, EBEC describes itself as an "independent agency of the Commonwealth."[2]

The General Assembly passed HB 334 to *strengthen* EBEC's independence. From its creation in 1992 until the passage of HB 334, EBEC had five members who were appointed by the Governor, although the procedure for appointing members has varied over the years (more on that later). 1992 Ky. Acts ch. 287, § 8(2) (enacting KRS 11A.060(2)). HB 334 changed EBEC in three main ways. First, HB 334 made EBEC a seven-member body. 2022 Ky. Acts ch. 203, § 2(3). Second, HB 334 changed who appoints EBEC's members: the Governor makes two appointments while the Attorney General, Agriculture Commissioner, Treasurer, Auditor, and Secretary of State (together, "the Constitutional Officers") each makes one appointment. *Id.* § 2(2). Third, HB 334 provides that only the constitutional officer who appointed the EBEC member can remove him or her—and "for cause only." *Id.* § 2(7).

Because EBEC oversees the executive branch, it makes sense that other constitutional officers have a role in shaping its membership. By making EBEC more representative of the executive branch, the General Assembly ensured that

[2] Home Page, Executive Branch Ethics Commission, https://perma.cc/G8YG-6XYH (last visited June 5, 2025).

the Commission is not beholden to any one official. More to the point, HB 334 ensures that EBEC lives up to its name as the *Executive Branch* Ethics Commission. So understood, HB 334 is simply a good-government measure.

The intuition underlying HB 334—that the authority to select all of EBEC's members should not rest with any one official—is not new. Early steps in this regard began with an executive order issued by Governor Steve Beshear. In 2008, he created a rotating system for appointing EBEC's members. First, the Governor would appoint a member; second, the Governor would appoint a member from a list submitted by the Attorney General; and third, the Governor would appoint a member from a list submitted by the Auditor. Exec. Order 2008-454 ¶ 2 (May 27, 2008) (found at R.259–66). This rotating system of appointments applied on a going-forward basis. It did not affect the term of any then-serving member. *Id.*

In 2016, Governor Matt Bevin rescinded this system of rotating appointments, directing instead that "[a]ll vacancies among the membership of [EBEC] that exist on or after the date of this Order shall be filled by the Governor as set forth in KRS 11A.060." Exec. Order 2016-377 (June 24, 2016) (found at R.268–69). Although Governor Bevin recentralized the appointment process in the Governor's office, his executive order did not affect the term of any member then serving. *Id.*

Upon taking office, Governor Andy Beshear approached the issue differently than both his predecessors. He "abolished" the Commission, unilaterally terminating the service of its members.[3] Exec. Order 2020-423 ¶ 2 (May 27, 2020) (found at R.36–40). The Governor then recreated a five-member Commission with three members to be appointed by him alone, a fourth member to be appointed by him from a list submitted by the Attorney General, and a fifth member to be appointed by him from a list submitted by the Auditor. *Id.* ¶ 3. Unlike his two predecessors, Governor Beshear terminated the service of the then-serving EBEC members. And unlike the first Governor Beshear, the current Governor Beshear ensured that he would always appoint a majority of EBEC's members. Governor Beshear's executive order also underscored that he could reject a list of EBEC nominees submitted to him by the Attorney General or Auditor and demand a new list. *Id.* ¶ 3(b)–(c) (incorporating KRS 12.070(3)).

The General Assembly responded to Governor Beshear's executive order by passing HB 334. The Governor vetoed the bill, but the General Assembly overrode his veto. The Governor then went to court. R.1–23. He sued alongside EBEC Member David Karem, who the Governor had appointed to the Commission. The Governor's General Counsel appeared on the complaint as counsel

[3] Governor Beshear abolished and reorganized EBEC under the authority of KRS 12.028(2). The General Assembly has since repealed that provision. 2021 Ky. Acts ch. 5, § 1(2).

for *both* Governor Beshear and Member Karem. R.19; *see also* R.119, 126, 231–32, 435, 504, 523. So in filing this lawsuit, the Governor treated Member Karem just like he might treat a cabinet secretary—as an appointee who reports to the Governor and whose interests are necessarily aligned with the Governor's.

The constitutional theories asserted in their complaint are not shy. The Governor and Member Karem claim that, as a constitutional matter, the Governor must oversee *everything EBEC does*. They allege that HB 334 removes the Governor's "ability to ensure that the Commission, which is tasked with enforcing the code of ethics, properly executes the ethics laws and regulations of the state." R.4. In the Governor and Member Karem's view, the Governor is constitutionally required to supervise matters like "investigating alleged violations of the [Ethics] Code, making findings of fact and conclusions on those allegations, and imposing civil fines." R.5; *see also* R.16.

The Governor and Member Karem based their expansive theory on Sections 27, 28, 69, and 81 of the Kentucky Constitution. R.15–17. Their lawsuit sought relief against EBEC, the Legislative Research Commission, and the Constitutional Officers. R.14–15. Upon cross-motions for summary judgment, the Jefferson Circuit Court (Chauvin, J.) sided with the Governor and Member Karem. R.531–37. The court held that HB 334 violates the Governor's supreme executive power under Section 69 and his responsibility under Section 81 to ensure that the laws are faithfully executed. R.534–35. With little discussion, the

court also concluded that HB 334 violates the separation of powers in Sections 27 and 28. *Id.*

The Constitutional Officers appealed. R.538–42, 562–67. The Court of Appeals (Eckerle, Combs, Jones, JJ.) unanimously reversed in a to-be-published decision.[4] *Coleman v. Beshear*, 2024 WL 875611 (Ky. App. Mar. 1, 2024). The panel held that "the General Assembly has the [c]onstitutional authority to distribute among the Governor and the elected Constitutional Officers appointive and removal powers over inferior state officers and members of executive branch boards and commissions." *Id.* at *1. Judge Combs concurred because she was bound by this Court's precedent, but she urged this Court to consider overruling *Brown v. Barkley*. *Id.* at *15 (Combs, J., concurring).

The Governor and Member Karem sought discretionary review, which this Court granted. Order (Feb. 13, 2025).

ARGUMENT

The Governor and Member Karem's argument is expansive. In their view, the Constitution requires that the Governor oversee everything that EBEC does—every investigation, every charging decision, and every punishment meted

[4] Before the Court of Appeals ruled on the merits, the Constitutional Officers sought a stay pending appeal. The Governor implies (at 6) that the motion panel agreed with him on the merits. That is wrong. The panel expressly did not reach the merits. Order at 9 (Jan. 26, 2023) (noting that the merits question "is not currently before this panel").

out. As they put it (at 14), the Constitution demands that the Governor have "oversight of [EBEC's] decision-making." In their view (at 13), the Governor must have "supreme authority over execution of the [Ethics] Code." Agree or disagree with this constitutional theory, no one can dispute that it is an extraordinary assertion of authority. As the Governor and Member Karem see it, an EBEC appointee must report to the Governor on all matters just like a cabinet secretary. As this lawsuit shows, an EBEC appointee must apparently sue the Constitutional Officers and EBEC itself at the Governor's direction with the Governor's General Counsel as his lawyer.[5] R.19.

The consequences of the Governor and Member Karem's argument cannot be overstated. Remember that EBEC is charged with overseeing ethics compliance for the executive branch, including compliance by the Governor and his administration. The Governor's constitutional theory is that he must supervise EBEC's oversight of himself and his administration. Not only that, the Gover-

[5] When the Constitutional Officers pointed out below that the Governor's General Counsel is representing an EBEC appointee who is charged with policing the ethics of the Governor's administration, the Governor and Member Karem changed their attorneys' signature block without explanation. But the Governor's General Counsel has not moved to withdraw from representing Member Karem under RAP 12(B).

nor's theory means that he must oversee every EBEC investigation and prosecution—even those involving a political opponent.[6] In the Governor's paradigm, the General Assembly is powerless to ensure that EBEC is not beholden to any one official.

The Governor previously thought otherwise. When he was Attorney General, he publicly stated that EBEC is an "independent agency, and not a cabinet that answers to the Governor." Richard Pérez-Peña, *Matt Bevin, Kentucky Governor, Orders Inquiry Into Beshear Administration*, N.Y. Times (Apr. 19, 2016). And while Attorney General, Governor Beshear won an important case in this Court affirming the legislature's ability to create boards with "fundamental independence" from the Governor. *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 381 (Ky. 2016). In that case, then-Attorney General Beshear argued to this Court that gubernatorial appointees to university boards "exercise independent governance and owe a fiduciary duty to the Universities, not to the Governor." Brief of Appellants at 31, *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355 (Ky. 2016) (No. 2016-SC-0272), 2016 WL 4059034.

[6] As of last month, EBEC was pursuing charges against former Attorney General Daniel Cameron for alleged misconduct during his race against Governor Beshear. John Cheves & Austin Horn, *Ethics Panel Investigates Daniel Cameron Over Donations to KY Governor Campaign*, Lexington Herald Leader (May 15, 2025).

The Court should emphatically reject the Governor's current view that he must exercise unilateral authority over EBEC. The Court has never so much as hinted that the Constitution compels the Governor to control every aspect of the activities of every state board and commission through a majority of appointees. The General Assembly acted lawfully by making EBEC more independent and more representative of state government.

I. HB 334 does not violate Sections 69 and 81 of the Constitution.

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 the Attorney General, Agriculture Commissioner, Secretary of State, Auditor, and Treasurer are all "convenient receptacles 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 landmark holding from *Brown v. Barkley* recognizes that Kentucky is a divided executive, not a unitary one. Under our system of government, the Constitutional Officers can and do undertake important tasks on behalf of the Commonwealth without answering to the Governor. If this holding from *Brown v. Barkley* is faithfully applied here, there can be no question that HB 334 is constitu-

tional. To quote *Brown v. Barkley*, HB 334 simply treats the Attorney General, Agriculture Commissioner, Secretary of State, Auditor, and Treasurer as "convenient receptacles for the diffusion of executive power" and "assign[s]" each official the ability to appoint one member of EBEC and remove that member for cause without consulting the Governor. *See id.* This case is that simple.

The Governor's legal theory is incompatible with *Brown v. Barkley*. He has all but admitted as much. After the Court of Appeals ruled below, the Governor 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. Barkley*. Even though Judge Sara Combs recognized below that she was "inescapably bound by the reasoning and holding of *Brown v. Barkley*," she urged the Court to reconsider the decision given that "[m]any political winds—both ill and fair—have blown over our Commonwealth since" *Brown v. Barkley*. *Coleman*, 2024 WL 875611, at *15 (Combs, J., concurring). The Constitutional Officers respectfully ask the Court not to retreat one inch from *Brown v. Barkley*—just as it held firm four years ago in *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 again.

In asking the Court to faithfully apply *Brown v. Barkley*, the Constitutional

Officers' 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 334.

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 primarily 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 a majority 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* encompass the statutorily created positions 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 EBEC. Vacancies on statutory boards are not "filled according to the provisions of this Constitution," which is what invokes Section 76.[7] *See Rouse v. Johnson*, 28 S.W.2d 745, 751 (Ky. 1930). More importantly, Section 93 (discussed below) falls within Section 76's carveout for "except as otherwise provided in this Constitution," as this Court's predecessor long ago held. *See id.*

The Governor tries to shoehorn EBEC appointments into Section 76.[8] He broadly reads (at 10–11) Section 76 to provide that "the Governor alone is assigned the constitutional role of appointing executive branch officials." So the Governor apparently views Section 76 as granting him not just a majority of EBEC's appointments but *all* such appointments. In making such an expansive assertion, the Governor does not grapple with Section 76's language saying that the provision applies only if the vacancy is "filled according to the provisions of this Constitution." Yet no provision of the Constitution specifies how such a statutory vacancy is filled. Nor does the Governor mention Section 76's carveout,

[7] 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.

[8] The Governor did not think enough of this argument to allege a claim under Section 76 in his complaint. Indeed, he didn't mention this provision. R.1–21.

which plainly encompasses Section 93. The Governor also does not mention that his Section 76 argument would require overturning nearly a century of precedent about Section 76. *See Rouse*, 28 S.W.2d at 751 (holding that Section 76 is "confine[d]" 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").

The mere existence of Section 76 is powerful textual evidence that Sections 69 and 81 do not impliedly grant unwritten appointment authority to the Governor. 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 is not applicable 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 include unwritten appointment authority in Sections 69 and 81. The only sensible reading of Section 76 is that it establishes the universe of the Governor's constitutional appointment power. Indeed, if Sections 69 and 81 provided a general appointment power, as the Governor urges, that implied power would seemingly render the express power in Section 76 superfluous. The Court should not read Sections 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 and commissions such as EBEC.

At a minimum, to determine the "manner" of an appointment to a statutory board like EBEC is to determine *who* makes the appointment. The Constitutional Officers 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). Section 93 thus empowers the General Assembly to determine who appoints the members of a statutory board like EBEC without allowing any role for the Governor.

It makes sense that Section 93 empowers the General Assembly to decide who makes appointments to boards and commissions. If the General Assembly creates a commission that relates to the work done by the Attorney General, the legislature should give him the majority of such appointments. The Kentucky Opioid Abatement Advisory Commission is such a commission. KRS 15.291(2)(a) (empowering the Attorney General to make the majority of appointments). The same line of thinking explains why the Treasurer appoints or designates a majority of the members of the Kentucky Financial Empowerment Commission, KRS 41.450(3)(a), (g), and why the Agriculture Commissioner appoints or designates the majority of the voting members to the State Board of Agriculture, KRS 246.120(1). 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 decide 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 a majority of appointment authority to every statutory board and commission. In adopting Section 93, our framers specifically considered such appointments and unambiguously directed that the General Assembly alone determines who makes them. 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 EBEC's members as long as the Governor gets a majority of appointments. Section 93 says that the General Assembly gets to decide who makes the appointments—full stop. The words "Governor" and "majority" are nowhere found in Section 93.

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

Sections 69, 81, and 93 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 v. Beshear*, 2024 WL 1005023, at *20 (Ky. App. Mar. 8, 2024) (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. 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 decided 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*, 317 S.W.3d at 5. 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 1890–91 constitutional debates refute any such contention. The best indication of the framers' desire to keep the Governor's appointment power in check is a failed, self-serving effort undertaken during the 1890–91 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). 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).

One cannot overstate the importance of the delegates' emphatic rejection of Governor Buckner's proposal. 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 in the companion case, the delegates' "outright 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.

The Governor's brief fails to address his predecessor's unsuccessful efforts at the 1890–91 convention. Instead, he cites (at 36) two delegates' general desire to limit the power of the General Assembly. The Constitutional Officers do not dispute that one of the reasons for the constitutional call was stopping the General Assembly from passing special and local laws, as the Governor's cited quote from Delegate Carroll shows. *See Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 571 (Ky. 2020). But the Governor's favored snippets from the debates offer no support for the distinct notion that the framers intended to impliedly reinvigorate the Governor's appointment power by readopting Sections 69 and 81. Indeed, as noted, the delegates expressly refused to do that expressly by rejecting a proposed amendment to Section 81.

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."[9] *Kraus v. Ky. State Senate*, 872 S.W.2d 433, 438 (Ky. 1993). The

[9] The 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

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.

This revision to protect Section 93 is devastating to the Governor's position. Indeed, even though the Court of Appeals relied on it below, the Governor's 49-page brief ignores it. As the Court of Appeals explained, 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

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should remedy the matter, if not to their liking." *Miller v. Johnson*, 18 S.W. 522, 524 (Ky. 1892).

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. In taking the latter action, 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,[10] and 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 any contention 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 one he prefers* to a statutory commission is in keeping with Section 93. *See id.*

[10] At the time, the Lieutenant Governor was constitutionally independent of the Governor. 1992 Ky. Acts ch. 168, § 1 (amending Ky. Const. § 70).

The Governor seeks (at 43) to distinguish *Rouse* on the basis that the Governor there remained involved in the appointment of all the members. That argument blinks reality. The statute in *Rouse* could readily lead to none of the Governor's preferred appointees ending up on the commission. Indeed, it appears that's what happened in *Rouse*. *Id.* at 746 (noting that the appointing board and the Governor appointed competing slates of members). As the Court of Appeals persuasively explained below, 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." *Coleman*, 2024 WL 875611, at *11 (emphasis added).

The Governor's challenge to HB 334 cannot overcome *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 334. The Governor's only counterargument (at 43) is that *Rouse* did not mention his theory that Sections 69 and 81 impliedly grant him a majority of all appointment authority across state government. That contention is simply an argument to overrule *Rouse*. 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 to a commission is authorized by Section 93.

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 historically 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 Woodall*, 607 S.W.3d at 572. 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"[11];
- The "old state board of valuation and assessment"[12];
- The then-present "commissioners of the sinking fund"[13];
- The then-present "state printing commission"[14];

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[11] "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).

[12] "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, who are herby 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).

[13] "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).

[14] "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).

- The "state geological survey"[15];
- The previous "state text book commission"[16]; and
- The then-present "state board of education."[17]

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. If that were the framers' intent, contemporaneous legislatures apparently ignored it. The Court should not presume such motives by early legislatures.

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

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[15] 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).

[16] "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).

[17] "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).

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 take 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 power with the Agriculture Commissioner and beyond the reach of the Governor. *Id.*

In reaching this conclusion, the Court considered the constitutional status of what are known as the Section 91 officials: the Attorney General, Agriculture Commissioner, Secretary of State, Auditor, and Treasurer. Those constitutional officers, with two exceptions,[18] "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

[18] 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. Barkley*, 628 S.W.3d at 621–22.

"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. Barkley*. It instructs that the General Assembly can "definitely" give executive power to the Section 91 officials without the Governor overseeing that authority. Of course, the General Assembly has done this throughout the Kentucky Revised Statutes. *See generally* KRS Chapter 14 (Secretary of State); KRS Chapter 15 (Attorney General); KRS Chapter 41 (Treasurer); KRS Chapter 43 (Auditor); KRS Chapter 246 (Agriculture Commissioner). If Kentuckians disagree with how a Section 91 official exercises his or her executive 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." *Brown v. Barkley*, 628 S.W.2d at 623.

The prerogative of Section 91 officials to operate independently from the Governor leads to the question of what role the Governor plays in our system of government. *Brown v. Barkley* answers that question as well. The Governor is different from the Section 91 officials because the Constitution expressly gives 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 officials. 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 officials. He is different because he has express constitutional powers that the Section 91 officials lack. But he is similar to the Section 91 officials 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 officials, "exists principally to do [the legislature's] bidding." *Id.* at 623.

So understood, *Brown v. Barkley* is fully consistent with HB 334. As Judge Combs put it in her concurrence, a Kentucky court considering a law that transfers appointment power from the Governor to Section 91 officials 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 334 does. It "withhold[s]" some appointment power from the Governor and "assign[s]" it to the Section 91 officials. *Brown v. Barkley* compels the conclusion that the General Assembly "definitely" has such authority.

The Governor argues to the contrary (at 11–13) by relying on two passages 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 focuses on the parts of these quotes that mention his "supremacy" and the "inferior[ity]" of the Section 91 officials. 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 officials. *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 officials to operate independently of the Governor. Thus, *Brown v. Barkley* simply confirms that, as this Court later held, Section 69 is simply a vesting clause: it "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 does not define the scope of the Governor's executive power such that he must exercise a certain quantum of all 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," and it ignores Section 93's plain language. If the framers intended such a sweeping appointment power, they would not have used nonspecific language like that in Section 69. Indeed, if the framers wanted to give the Governor the majority of appointments to every board and commission, they would have just said so given that the Constitution specifically

mentions gubernatorial appointments in Section 76. And because of the importance of such a power, at least one of the framers surely would have mentioned this intent during the constitutional 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 official. 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 officials 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 officials, however, are created by the Constitution. Merely assigning executive power to already created Section 91 officials, as HB 334 does, does not "create" another Section 91 official by statute. It

instead assigns executive power to offices 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 de facto Section 91 official. 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 officials. HB 334 does nothing close to that.

The Governor suggests (at 17) that the constitutional discussion in *Brown v. Barkley* is mere dicta. That is wrong. The Court addressed the constitutional issues there because it had to. As the Court explained, its statutory holding wouldn't matter if "the Governor nevertheless has constitutional power to effect such a reorganization regardless of the statute." *See* 628 S.W.2d at 618. In any event, even if the constitutional discussion was an alternative holding, it remains binding. *Swiss Oil Corp. v. Shanks*, 270 S.W. 478, 479 (Ky. 1925) ("Nor can an additional reason for a decision, brought forward after the case has been disposed of on one ground, be regarded as dictum." (citation omitted)). And even if the Governor is right about the constitutional discussion being dicta, the Court has reaffirmed that discussion several times since. *Cameron v. Beshear* (discussed below) is the latest case, but it is not the only one. *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 violating

the constitution.").

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. The Court rejected that argument unanimously. 628 S.W.3d at 76; *see id.* at 79 (Hughes, J., concurring).

The Court rejected the Governor's "supremacy" argument because of *Brown v. Barkley*. As *Cameron v. Beshear* summarized, "[i]n *Barkley*, we recognized [that] the Constitution['s] framers created these independent, statewide-elected officers to 'provide convenient receptacles for the diffusion of executive power.'" *Id.* (quoting *Brown v. Barkley*, 628 S.W.2d at 622). And *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). That of course is the same supremacy argument that the Governor is pressing here—that half of a sentence from *Brown v. Barkley* creates a gubernatorial

supremacy that cannot be infringed.

This argument did not carry the day 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*.

It is impossible to find a case that is more on all fours with this one 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 official. And there, as here, the Governor based this argument on part of a sentence from *Brown v. Barkley*. Faced with the same argument that Governor Beshear is raising here, the Court unanimously held that the Governor was misinterpreting *Brown v. Barkley*. This was so apparent that the Court did nothing more than provide the "complete quotation" from *Brown v. Barkley* to reaffirm

that the General Assembly may "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 rejecting the Governor's supremacy argument in *Cameron v. Beshear* requires rejecting his identical argument here. To put a finer point on it, the Governor and the Attorney General have already litigated this supremacy 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 (at 41) 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 can suspend statutes. Ky. Const. § 15 ("No power to suspend laws shall be exercised unless by the General Assembly or its authority."). Section 93 similarly 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 commissions 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 below 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.

This aspect of *Cameron v. Beshear* shows why this case does not squarely implicate the hypotheticals that the Governor mentions in his brief. For example, the Governor speculates (at 33) that the legislature might "move" the Department of Corrections to the Attorney General's office. But such a shuffling of executive power would not implicate Section 93. Instead, such a case would be a straightforward application of *Brown v. Barkley*, where the Court considered the legislature's general law-making power (under Section 29) to assign functions to executive officers without a specific constitutional provision governing that assignment. Here, by contrast, we have a specific constitutional provision in Section 93 directing that the General Assembly decides who makes appointments to statutory boards and commissions. In this way, this case is easier to decide

than *Brown v. Barkley*. As in *Cameron v. Beshear*, there is a constitutional provision that empowers the legislature to act on a given topic—Section 15 there and Section 93 here.

To be clear, *Brown v. Barkley* unmistakably allows the General Assembly to shift executive power between constitutional offices as it deems appropriate. 628 S.W.2d at 622. For example, in 2023, the legislature shifted child-support enforcement from the Cabinet for Health and Family Services to the Attorney General. 2023 Ky. Acts ch. 124, §§ 9, 100. The same bill also shifted the Office of the Ombudsman from the Cabinet for Health and Family Services to the Auditor. *Id.* §§ 5, 86, 90–91, 102. Those transfers of executive power, which drew no lawsuit from the Governor, are perfectly constitutional under *Brown v. Barkley*.

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).[19] The

[19] 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. Put more simply, "[b]asically, [the Governor's] power is to execute the laws, not to create laws." *Id.*

The most recent decision 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 unanimously held 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 authority, 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.

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. EBEC 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 Treasurer appoints or designates six of the 11 members. KRS 41.450(3)(a), (g).
- The State Fair Board, to which the Agriculture Commissioner appoints or

designates a majority of the voting members.[20] KRS 247.090(1)(b), (h)–(m).

- 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);

[20] The constitutionality of the composition of this board is at issue in the companion case. *Shell v. Beshear*, 2024-SC-0254 (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 commission 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 Health Secretary or his designee is only one of nine voting members.[21] KRS 15.291(2)(a)3.

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

[21] Governor Beshear 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? The Governor's responds (at 45 n.8) that these other boards and commissions are not before the Court. That is a dodge. Our Constitution is not situational. It means what it says, and this Court's published opinions interpreting it apply statewide. 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 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. Indeed, at one point in his brief (at 14–15), he seems to embrace those repercussions, saying that his constitutional theory applies to "agencies, boards, and commissions within the executive branch that implement the Commonwealth's laws."

The logical consequences of the Governor's constitutional theory, however, 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 held 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 Sections 69 and 81 theory cannot avoid conflict with our divided-executive form of government. It is an everyday occurrence in state government that independently elected constitutional officers other than the Governor take final executive action with no input from the Governor, even on topics of surpassing importance to the Commonwealth. For example, the Attorney General enforces Kentucky's criminal laws without the Governor's involvement. In addition, the Constitutional Officers 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, the Attorney General's enforcement of the criminal laws and even the Constitutional

Officers' filing of this legal brief could be problematic because these acts altogether remove 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 officials 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 the 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 334, but with our divided-executive form of government.

The Governor's only response is to make a political point, not a legal one. He asserts (at 13) that HB 334 just favors the constitutional officials who are "politically-aligned with the majority of the General Assembly." And he worries (at 33) about the legislature "drastically reorganiz[ing] the executive branch every session in order to house executive authority with [its] favored constitutional officers." Political statements like these have no place in a legal brief filed in Kentucky's highest court. Under its law-making authority, the legislature is entitled to amend statutes it previously passed to address what it determines are changed circumstances, just as it did in enacting HB 334. That is the very definition of the legislative power. In any event, HB 334 does not oust the Governor from making

appointments to EBEC. Under HB 334, he gets twice the appointments of any of the Section 91 officials. 2022 Ky. Acts ch. 203, § 2(2).

The Governor no doubt believes he should get more appointments to EBEC. But that is a public-policy objection, not a constitutional one. And public policy is the domain of the legislature. *Cameron v. Beshear*, 628 S.W.3d at 75. The legislature's reasons for passing HB 334 are obvious. The law keeps EBEC independent. Far from the "power grab[]" the Governor describes (at 1), HB 334 prevents power from consolidating in one official. Put differently, it ensures the Executive Branch Ethics Commission does not become the Governor's ethics commission. That in turn promotes "confidence in the integrity of [Kentucky's] government and public servants," as intended since EBEC's creation. KRS 11A.005(1)(d). If the General Assembly ever goes too far with its public policy, the antidote is to elect new legislators to fix the overstep. Remaking our divided executive into a unitary one by judicial fiat, as the Governor invites, is not the remedy.

To be clear, 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, "[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). The constancy of such political disputes is a powerful reason for the Court to faithfully

apply its precedents of *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 Governor's Sections 69 and 81 counterarguments are unavailing.

The Governor presses a variety of counterarguments opposing the Court of Appeals' holding under Sections 69 and 81. Not one has merit.

A. The Governor first mentions several cases that he says support his Section 69 argument. He leads (at 15–16) with *Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459 (Ky. 1998). There, the Court addressed whether participation by a private group in executive-branch appointments constitutes an improper delegation of executive authority in violation of Section 27. *Id.* at 471–72. The Court said no, explaining that "[n]owhere in the statute is [the private group] given the authority to appoint members" of the applicable boards. *Id.* at 472. Notably, *Yeoman* did not consider executive-branch appointments made by a Section 91 official. At most, *Yeoman* stands for the proposition that a "non-governmental person" cannot make an appointment to a statutory board or commission. *See id.* So *Yeoman* would have force here only if the General Assembly had given an outside ethics watchdog an appointment to EBEC instead of keeping appointments within the constitutional family.

The Governor's reliance (at 16) on *Kentucky Association of Realtors v. Musselman*, 817 S.W.2d 213 (Ky. 1991), and *Elrod v. Willis*, 203 S.W.2d 18 (Ky. 1947), is likewise of no help. Those cases concerned statutes that allowed a private group or individual to submit a list of appointees to a board or commission to the Governor, who then selected an appointee from the list. *Musselman*, 817 S.W.2d at 214; *Elrod*, 203 S.W.2d at 19. In both cases, the Court upheld the appointment statute, despite the limitation on the executive's appointment authority. As the Court held in *Elrod*, which *Musselman* followed, "the Legislature has not attempted to appoint administrative officers, nor has it completely denied the appointive function of the Executive." *Elrod*, 203 S.W.2d at 20; *see Musselman*, 817 S.W.2d at 215–17. To state the obvious, neither case holds that the Governor must appoint a majority of the members of every board and commission in Kentucky. The issue of appointments by Section 91 officials was simply not an issue in either case.

If anything, *Musselman* supports the Constitutional Officers. In a part of the decision that the Governor does not mention, the Court pointed out that the challenger's argument called into question many boards and commissions that similarly provided for appointments from a list provided by a private group. *Id.* at 215 & n.2 (noting the existence of "no less than twelve other state regulatory Boards and agencies"). The Court explained that this "large body of statutory law ha[d] developed . . . in reliance" on prior caselaw. *Id.* at 215. Overruling that

precedent in the face of such reliance, the Court emphasized, would be "unsettling." *Id.* The Court declined to take such a dramatic step because no "specific and compelling reasons for overruling [the prior precedent] have been presented here." *Id.*

The Court should mirror that careful approach here. As noted above, EBEC is not an outlier. There are more than two dozen other statutory boards and commissions to which the Governor does not directly appoint a majority of the voting members. *Supra* at 45–47. Those boards and commissions rest on *Rouse* as well as the "convenient receptacles" holding in *Brown v. Barkley* as unanimously reaffirmed in *Cameron v. Beshear*. To invalidate the composition of all these boards and commissions would indeed be "unsettling." And there are no "specific and compelling reasons" to overturn these decades of caselaw.

B. The Governor focuses particular attention on the Court of Appeals' discussion of Section 81 and *Franks v. Smith*, 134 S.W. 484 (Ky. 1911). Indeed, he mentions the Court of Appeals' application of *Franks* no less than nine times in his brief. Before jumping into *Franks*, some table-setting about Section 81 is helpful.

To recap, Section 81 is Kentucky's Take Care Clause. The provision mentions neither gubernatorial appointments nor statutory boards and commissions. It simply says that the Governor "shall take care that the laws be faithfully executed." As written, this provision does not impose any limitation on the General

Assembly. It instead is a responsibility placed on the Governor to follow the General Assembly's law-making lead. So from a purely textual perspective, the Governor seeks to rewrite Section 81 from a responsibility imposed on him into a limitation placed on the legislature.

As we know from the historical discussion above, the constitutional delegates, at the invitation of the then-Governor, considered revising Section 81 to grant the Governor a plenary removal and appointment power for inferior state officers. If the people had adopted such a version of Section 81, the Governor would have a point about the provision limiting the legislature. The delegates, however, did not take kindly to this amendment to Section 81. *Supra* at 21–23. The upshot is that the delegates essentially considered Governor Beshear's Section 81 argument over 130 years ago. Because the delegates rejected it then, the Court should reject it now.

In any event, the Governor's Section 81 argument fails on its own terms. In particular, he gives little attention to *Fletcher*, which is the leading modern Section 81 precedent. The facts there are familiar to the Court. Governor Fletcher tried to impose a budget by executive fiat because of legislative gridlock. As support, he invoked Section 81 (and Section 69). He argued that Section 81 granted him "the inherent power to order the appropriations necessary to prevent the imminent collapse of governmental services." *Fletcher*, 163 S.W.3d at 869. That argument did not succeed. Relying on federal precedent, *Fletcher* responded that

the Governor's duty "to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than [the legislature] sees fit to leave within his power." *Id.* (citation omitted). *Fletcher* also considered the Governor's attempt to suspend laws by executive order. It found the "suspension of statutes by a Governor is also *antithetical* to the constitutional duty to 'take care that the laws be faithfully executed.'" *Id.* at 872 (emphasis added) (citation omitted). The only way to read these parts of *Fletcher* is that Section 81 imposes a duty on the Governor to follow, not flout, the laws passed by the legislature.

Fletcher refutes any contention that Section 81 somehow operates to invalidate HB 334. Section 81, *Fletcher* instructs, is about the Governor following the laws enacted by the General Assembly—about the Governor "serv[ing] the citizenry as best [as he] can with what [he] is given" by law. *Id.* at 873. Section 81 is not a limitation on the law-making power of the General Assembly. It is a responsibility placed on the Governor to enforce Kentucky's laws as best as he can—to enforce what the legislature "sees fit to leave within his power." *Id.* at 869 (citation omitted). This remains true, as in *Fletcher*, even when the lack of a law threatens the "imminent collapse" of state government. *See id.*

With this understanding of Section 81, the Court of Appeals' discussion of *Franks* makes good sense. *Franks* explained that the "power to call out the state militia was vested in the Governor" by statute as a means of "enabling him to carry into effect the mandate of the Constitution that he must 'take care that

the laws be faithfully executed.'" 134 S.W. at 487. In the passage that gives the Governor so much heartburn, *Franks* continued:

> If this power was not lodged in [the Governor], then this provision [Section 81] of the Constitution would be an idle and meaningless phrase, because, although charged with the duty of taking care that the laws of the state should be faithfully executed, he would have no authority to enforce the obligation imposed upon him.

Id. This passage does not write Section 81 out of the Constitution, as the Governor contends. It simply acknowledges that Section 81 does not apply to every law. Section 81 applies only if the Governor has the authority to enforce the applicable law. This is no different than saying that any other provision of the Constitution does not apply unless the circumstances warrant. For example, Section 47 of the Constitution is "idle and meaningless" as to a law that does not raise revenue. Viewed this way, all *Franks* means is that Section 81 applies only when the Governor has something to enforce. In this simple respect, *Franks* parallels *Fletcher*. Both cases reflect that without a law to enforce, Section 81 does not require anything of the Governor.[22]

The Governor next falls back (at 28–32) on the federal Take Care Clause and federal precedent interpreting it. This retreat is proof that the Governor wants to remake Kentucky's divided executive into more of a unitary executive

[22] The only nuance to this rule arises when a law does not specify who is to enforce it. In that circumstance, Section 81 requires the Governor to step forward and enforce the law. *Brown v. Barkley*, 628 S.W.2d at 623.

like that in the federal system. To be sure, the Court has noted the textual similarity between Section 81 and the federal Take Care Clause. *Fletcher*, 163 S.W.3d at 869. But the Court did so simply to note that, like the President with respect to laws passed by Congress, the Governor must follow the laws passed by the General Assembly. As *Fletcher* instructs, Section 81 "refutes the idea that [the Governor] is to be a lawmaker." *Id.* (citation omitted). Similarly, Section 81 imposes a responsibility "that does not go beyond the laws or require [the Governor] to achieve more than [the legislature] sees fit to leave within his power." *Id.* (citation omitted).

Although Section 81 is textually similar to the federal Take Care Clause, each provision operates within a distinct system of government. In the federal system, "[t]he entire 'executive Power' belongs to the President alone." *Seila Law LLC v. Consumer Fin. Protection Bureau*, 591 U.S. 197, 213 (2020). Our tradition in Kentucky is different—very much so. We do not give the Governor all the executive power. We proudly elect other constitutional officers and entrust them with significant independent authority. That's why Section 69 vests the Governor with only the "supreme executive power," as opposed to the federal vesting clause, which gives the President "[t]he executive power" without limitation. U.S. Const. art. II, § 1. As *Brown v. Barkley* instructs, this textual difference between the federal vesting clause and Section 69 is key; it "probably reflects the fact that under [Kentucky's] Constitution there are other constitutional officers in whom

executive powers may be vested by the legislative body." 628 S.W.2d at 622 n.12.

This textual difference between the state and federal vesting clauses matters for purposes of Section 81. In the federal system, the Take Care Clause allows the President to oversee essentially every exercise of executive power because all such power is his.[23] In our state system, by contrast, Section 81 allows the Governor to oversee only the executive power that is his to execute. In other words, Section 81 does not empower the Governor to superintend the exercise of executive power that our laws place elsewhere. For example, unlike the President through his Attorney General, the Governor has no responsibility for criminal prosecutions. That executive power is vested elsewhere in Kentucky—in Commonwealth and County Attorneys and the Attorney General as the "chief law enforcement officer" and "chief prosecutor of the Commonwealth." KRS 15.700. Under no circumstances does Section 81 empower the Governor to oversee the enforcement of Kentucky's criminal laws. Yet that is the repercussion of the Governor's unbounded view of Section 81. As he sees it (at 29), he is "the only executive charged under the Take Care Clause." That view, which would recast our divided executive into a unitary one, is profoundly wrong.

The Governor responds by worrying (at 26) about a Section 91 official

[23] The Constitutional Officers say "essentially" because of narrow limitations on the President's removal power currently allowed by U.S. Supreme Court precedent. *See Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025).

making an unwise appointment to EBEC who then convinces a majority to "launch meritless, politically-motivated investigations and make findings and impose civil penalties in those matters." But if that happens, the Section 91 official who made the appointment can remove the appointee for cause. Plus, the Governor can take the issue to the people through his bully pulpit. The Governor also can petition the legislature to change the law to give him the relevant authority. Under our divided executive, those are the Governor's recourses. During the constitutional debates, one of the delegates made an analogous point. In arguing that Section 81 should not grant the Governor plenary removal and appointment power, Delegate Bronston explained that this would not leave the Governor powerless under what became Section 81:

> I differ from [then-Governor Buckner] that there is any great lack of power in this provision of the present Constitution where it says that "he shall see that the laws are faithfully executed." [The Governor] can do that by calling the attention of those tribunals having power to remove the respective officials to the fact that they have failed to discharge their duties. By calling the attention of the Legislature to those officials that it has the power to remove; and by calling the attention of the Courts to the officials that they have the power to remove.

1 Debates at 1459. For all these reasons, Section 81 does not come anywhere close to granting the Governor majority appointment power to every board and commission in Kentucky.

C. Because there is no support in Kentucky caselaw for his position, the Governor leaves the Bluegrass State for helpful caselaw. Although out-of-state

precedent can sometimes be instructive, "this Court's North Star is our own Kentucky Constitution" and "the language used" in it. *Beshear v. Acree*, 615 S.W.3d 780, 805 n.30 (Ky. 2020). This case is a particularly poor fit for relying on out-of-state precedent. As explained above, Kentucky's unique history and distinct constitutional text drive the inquiry here.

In the interest of completeness, the Constitutional Officers provide a quick word about the Governor's non-Kentucky cases. First up is *North Carolina v. Berger*, 781 S.E.2d 248 (N.C. 2016). That Tar Heel State case dealt with granting appointment power to the legislature, not to an independently elected constitutional officer. *Id.* at 250–51. In fact, *Berger* was clear that it was not considering a statute 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.*, which of course is the issue here.

The Governor next relies on *Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018) (*Cooper I*)—another case that did not involve appointments by an independently elected constitutional official. There, the North Carolina governor appointed all eight members of the State's election board, but he had to appoint four members from each major political party, with the party chair providing the governor a list of proposed appointees. *Id.* at 100–01. By a 4–3 vote, North Carolina's high court threw out the bipartisan composition of the election board because it "limit[s] the extent to which individuals supportive of the Governor's policy preferences have

the ability to supervise the activities" of the board. *Id.* at 112–13.

The Governor's reliance on *Cooper I* shows how very broad his argument is. If *Cooper I* is applied here, the Court might call into question the composition our own State Board of Elections, which must be bipartisan similar to the election board in *Cooper I*. *See* KRS 117.015(2)(b)–(c), (4)–(5). In fact, North Carolina's high court quickly grew uncomfortable with *Cooper I*. Two years later, the court clarified that the Governor's authority in *Cooper I* "was delegated to, rather than inherently possessed by, the Governor." *Cooper v. Berger*, 852 S.E.2d 46, 64 (N.C. 2020) (*Cooper II*). Of course, the General Assembly has not delegated authority over EBEC to the Governor. Since EBEC's creation and now with HB 334, the General Assembly has made EBEC independent from the Governor—and from any other official, for that matter.

The Governor's reliance on Indiana precedent is even further afield. Indeed, he admits (at 48) that "Indiana's constitution has only one executive officer." That critical distinction should have persuaded the Governor not to cite Indiana precedent. Merely reading the Governor's favored Indiana precedent shows how very different our neighbor's form of government is from ours. *Tucker v. State*, 35 N.E.2d 270, 289–91 (Ind. 1941).

III. HB 334 respects the separation of powers.

The Governor lastly claims (at 34–45) that HB 334 violates the separation of powers established by Sections 27 and 28 of the Constitution. The Court of

Appeals disagreed because "HB 334 only disburses the appointment and removal powers of the executive branch among other members of the executive branch." *Coleman*, 2024 WL 875611, at *14. This holding is demonstrably correct.

The Governor's argument to the contrary misunderstands how the separation of powers works. Sections 27 and 28 govern *inter-branch disputes*, not an *intra-branch dispute* like this one. Put differently, these sections have nothing to say about shifting powers within the executive branch. They restrict the shifting powers among the three branches. *See Yeoman*, 983 S.W.2d at 472 ("Sections 27 and 28 regulate the distribution of power among those three branches of government.").

So understood, Sections 27 and 28 prohibit the legislature from intruding on the judiciary's or the executive's domain. *ARKK Props., LLC v. Cameron*, 681 S.W.3d 133, 141–42 (Ky. 2023) (legislature intruding on the judiciary); *LRC v. Brown*, 664 S.W.2d at 917–24 (legislature intruding on the executive). They prohibit the executive from intruding on the legislature's or the judiciary's domain. *Fletcher*, 163 S.W.3d at 872–73 (executive intruding on the legislature); *Commonwealth v. Jones*, 73 Ky. 725, 749, 751 (Ky. 1874) (executive intruding on the judiciary). And they prohibit the judiciary from intruding on the executive's or the legislature's domain. *Prater v. Commonwealth*, 82 S.W.3d 898, 899 (Ky. 2002) (judiciary intruding on the executive); *Fawbush v. Bond*, 613 S.W.2d 414, 415 (Ky. 1981) (judiciary intruding on the legislature). The rule is thus: "a constitutional violation

of separation of powers occurs when, and only when, one branch of government exercises power properly belonging to another branch." *Prater*, 82 S.W.3d at 907.

HB 334 does not cross that clear line. It keeps all the appointments to EBEC within the executive branch. 2022 Ky. Acts ch. 203, § 2(2). No legal citation is required for the proposition that the Governor and the Section 91 officials are all part of the executive branch. Were it otherwise, those officials and the public servants they employ would not be subject to EBEC's jurisdiction. *See* KRS 11A.010(7), (9). By empowering an executive-branch official to appoint all of EBEC's members, the General Assembly respected the separation of powers. A separation of powers violation could arise only if the General Assembly moved voting appointments to EBEC to the legislative or judicial branch.

CONCLUSION

The Court should uphold HB 334.

Respectfully submitted,

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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 15,742 words.