



Kentucky Court of Appeals

Case No. 2025-CA-1303

ALLISON JOY BALL, in her official capacity as
Kentucky Auditor of Public Accounts

Appellant

v. On Appeal from
Franklin Circuit Court
No. 25-CI-00412

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

Appellees

OPENING BRIEF FOR AUDITOR BALL

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Certificate of Service

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/s/ Alexander Y. Magera

INTRODUCTION

Kentucky Auditor of Public Accounts (APA) Allison Ball asked the Kentucky Cabinet for Health and Family Services (CHFS) for information. That information is needed for Auditor Ball's investigation into why Governor Andrew Beshear and CHFS refuse to execute 2024 Senate Bill (SB) 151, a law designed to help Kentucky's kinship care families. CHFS refused to comply with many of Auditor Ball's information requests. Even after acknowledging that refusal, and after CHFS admitted its refusal, the Franklin Circuit Court nonetheless dismissed as unripe Auditor Ball's suit to get that information.

The Franklin Circuit Court also dismissed Governor Beshear from this action, believing him to be an improper party. But he is responsible for CHFS's refusal to execute SB 151 and to comply with Auditor Ball's investigation, evidenced, in part, by a letter he wrote that engineered that refusal to provide, in part, Governor's Office information. And of course, CHFS is his cabinet, and he has many times treated his office and CHFS as indistinguishable.

This Court should reverse the Franklin Circuit Court's dismissal of (1) this action as unripe and (2) Governor Beshear from this action.

STATEMENT CONCERNING ORAL ARGUMENT

This fact-intensive case involves an examination of the Governor's constitutional responsibilities and an issue of first impression: At what point does a state entity's refusal to comply with an APA investigation justify a court action to force compliance? As such, Auditor Ball requests oral argument.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION	i
STATEMENT CONCERNING ORAL ARGUMENT	i
STATEMENT OF POINTS AND AUTHORITIES	ii
STATEMENT OF THE CASE	1
<i>J. B-K by E.B. v. CHFS</i> , 48 F.4th 721 (6th Cir. 2022)	1
<i>Fletcher v. Commonwealth</i> , 163 S.W.3d 852 (Ky. 2005)	3
KRS 43.050	9
2023 Ky. Acts Ch. 124	11
<i>Rogers v. Commonwealth</i> , 366 S.W.3d 446 (Ky. 2012).....	12, 13
<i>Collins v. Combs</i> , 320 S.W.3d 669 (Ky. 2010).....	12, 13
<i>Stack v. Ball</i> , 25-CI-01200 (Franklin Cir. Ct.)	13
ARGUMENT	14
Ky. Const. § 69	15
Ky. Const. § 81	15
CR 12.02	15
<i>Fox v. Grayson</i> , 317 S.W.3d 1 (Ky. 2010).....	15
<i>Hardin v. Jefferson Cnty. Bd. of Educ.</i> , 558 S.W.3d 1 (Ky. App. 2018)	15
.....	15
I. The Governor's and CHFS's challenges to Auditor Ball's investigatory authority are ripe for review.....	16
KRS 43.080	16, 17
KRS 43.050	16
<i>Berger Fam. Real Estate, LLC v. City of Covington</i> , 464 S.W.3d 160 (Ky. App. 2015).....	17
<i>Lassiter v. Landrum</i> , 610 S.W.3d 242 (Ky. 2020).....	18, 20
<i>Fox v. Grayson</i> , 317 S.W.3d 1 (Ky. 2010).....	18, 19
<i>Hardin v. Jefferson Cnty. Bd. of Educ.</i> , 558 S.W.3d 1 (Ky. App. 2018)	18, 19
.....	18, 19
<i>W.B. v. CHFS</i> , 388 S.W.3d 108 (Ky. 2012)	20, 21
KRS 43.080	21

<i>Johnson v. Commonwealth ex rel. Meredith</i> , 165 S.W.2d 820 (Ky. 1942)	22
<i>United States v. Markwood</i> , 48 F.3d 969 (6th Cir. 1995).....	22
II. The Governor is a proper party.....	23
Ky. Const. § 69	23
Ky. Const. § 81	23
<i>Beshear v. Bevin</i> , 498 S.W.3d 355 (Ky. 2016)	23
<i>Fletcher v. Commonwealth</i> , 163 S.W.3d 852 (Ky. 2005)	23
<i>Brown v. Barkley</i> , 628 S.W.2d 616 (Ky. 1982).....	23
<i>Stivers v. Beshear</i> , 659 S.W.3d 313 (Ky. 2022)	23
<i>Coleman v. Beshear</i> , No. 2022-CA-0837, 2024 WL 875611 (Ky. App. Mar. 1, 2024), <i>discretionary review granted</i> No. 2024-SC-0228 (Ky. Feb. 13, 2025).....	25
<i>California v. Department of Agriculture</i> , No. 3:25-cv-06310 (N.D. Cal.).....	25
<i>Massachusetts v. Department of Agriculture</i> , No. 1:25-cv-13165 (D. Mass.).....	25
<i>New Jersey v. Office of Management and Budget</i> , No. 1:25-cv-11816 (D. Mass.).....	25
<i>California v. McMahon</i> , No. 1:25-cv-00329 (D. R.I.)	25
<i>Rogers v. Commonwealth</i> , 366 S.W.3d 446 (Ky. 2012).....	25, 27
<i>Collins v. Combs</i> , 320 S.W.3d 669 (Ky. 2010).....	25, 27
<i>Hisle v. Lexington-Fayette Urb. Cnty. Gov't</i> , 258 S.W.3d 422 (Ky. App. 2008)	26
<i>Ball v. Beshear</i> , 24-CI-00844 (Franklin Cir. Ct.)	27
<i>Johnson Bonding Co., Inc. v. Commonwealth of Kentucky</i> , 420 F. Supp. 331 (E.D. Ky. 1976).....	27, 28
<i>Kasey v. Beshear</i> , 626 S.W.3d 204 (Ky. App. 2021)	28
<i>Commonwealth v. Sexton</i> , 566 S.W.3d 185 (Ky. 2018).....	29
<i>United States v. Am. Tel. & Tel. Co.</i> , 551 F.2d 384 (D.C. Cir. 1976)	29
<i>Lassiter v. Landrum</i> , 610 S.W.3d 242 (Ky. 2020).....	29

III. The Court should remand for the trial court to decide the remaining issues and arguments in this case.	29
<i>Ten Broeck Dupont, Inc. v. Brooks</i> , 283 S.W.3d 705 (Ky. 2009)	29
CR 99.03	30
CONCLUSION	30
WORD-COUNT CERTIFICATE	31
APPENDIX	32

STATEMENT OF THE CASE

Kinship care families need SB 151.

The tragic reality for an estimated 55,000 Kentucky children is that they cannot be with their parents for a variety of reasons. TR 5–6, 25. Fortunately, tens of thousands of Kentucky kinship caregivers—family members or close family friends of these children—have stepped up to provide them with safe, loving homes where they can thrive. *Id.* This has been a saving grace for many of these children, as kinship care is usually the best option to promote the overall well-being of children who cannot be with their parents. *Id.*

When it is determined that a child is to be placed in the care of a kinship caregiver, that caregiver has a critical decision to make: the type of custody the caregiver will take of the child. TR 7. This decision has massive long-term financial and custodial implications for the child and usually comes down to a choice between one of two custodial options: (1) taking temporary custody of the child; or (2) becoming a kinship care foster parent for that child, meaning CHFS has legal custody of the child while the kinship caregiver provides day-to-day care. TR 7–8, 58–59, 71–72, 81–82; *see generally J. B-K by E.B. v. CHFS*, 48 F.4th 721, 724 (6th Cir. 2022) (outlining these choices).

So how does a kinship caregiver go about choosing between those two options? When CHFS shows up at the doorstep of a kinship caregiver with a child in hand, it gives the caregiver Form DPP-178. TR 81–82. That form lists the caregiver’s custodial options but does not share any real details about the

consequences of the options, leaving it up to the kinship caregiver to become informed about those consequences. *Id.* And while CHFS policy gives kinship caregivers ten working days to make their decision, CHFS does not always adhere to that full ten-working-day window. TR 8.

If the choice is between taking “temporary custody” of a child or becoming a “DCBS foster parent” as it is called on Form DPP-178, TR 81, taking temporary custody *sounds* like the better option. Why go through the purported rigmarole of becoming a foster parent when you don’t have to by choosing the temporary-custody route?

For most kinship caregivers though, that is the wrong choice. That’s because the kinship-care-foster-parent route (i.e., becoming a “DCBS foster parent”) actually provides greater financial assistance for the benefit of the child and creates a path for the kinship caregiver to obtain subsidized permanent custody of the child, all while the child remains in the home of the kinship caregiver at all times just as the child would on the temporary-custody route. TR 7–8, 58–59, 71–72.

A prospective kinship caregiver needs to know all of this from the beginning because once a kinship caregiver makes her custodial choice, that choice is locked in. So if a kinship caregiver chooses the temporary custody route, thus foregoing the financial benefits of the kinship-care-foster-parent route, there is no way for the kinship caregiver to redo that choice even if the kinship caregiver later realizes what she gave up.

All of that is why the General Assembly unanimously passed SB 151 during the 2024 general session. TR 7–8. SB 151 makes a simple but crucial change to the existing kinship care system: It gives kinship caregivers 120 days to make their critical custodial decision. TR 33–34. So kinship caregivers now have 120 days to process all of the emotions of becoming a kinship caregiver, seek counsel, and do whatever else is needed for them to truly understand the benefits and drawbacks of their custodial decision. TR 8–9.

But Governor Beshear and CHFS are refusing to let kinship caregivers exercise their rights under SB 151.

The problem for many kinship caregivers is that Governor Beshear and CHFS are refusing to give them that 120-day decision-making window. The Governor relayed that position on April 10, 2024, when he sent a letter to the General Assembly declaring his refusal to execute SB 151 and 23 other duly enacted laws passed by the General Assembly. TR 36–38.

His position is difficult to comprehend, but it appears that the Governor is asserting that *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005), holds that if the Governor simply thinks he doesn't have enough money to execute a law, he doesn't have to execute that law. *Id.* at 36–37. This is a position that the Governor doubled down on towards the end of the General Assembly's 2025 regular session to justify his refusal to execute an additional 11 laws. TR 84–87. This unprecedented position has led to laws about coverage for cancer detection, coverage for breast examinations, child abuse, kratom, child protection, childcare, student safety, health services, youth employment

programs, crime victims, data privacy, and a host of other topics go unexecuted for almost two years now. TR 36–38, 84–87.

With SB 151 specifically—a bill Governor Beshear himself signed into law—his reasoning for refusing to execute that law doesn’t make much sense. As outlined above, all SB 151 does is extend the window of time for kinship caregivers to make a decision *that they already have to make even without SB 151*. Every single kinship caregiver in Kentucky, even without SB 151, had to make the custodial choice described above the moment CHFS showed up on their doorsteps with children needing care. TR 81.

So if all SB 151 does is extend the window of time for caregivers to make a decision they must make even without SB 151, how does CHFS not have the money to execute that law? Shouldn’t CHFS have, when budgeting, accounted for the scenario that every single kinship caregiver in Kentucky could have chosen the kinship-care-foster-parent route and its greater financial benefits from the start? This line of questioning is just one example of the kinds of questions Auditor Ball has been trying to get honest answers to for over a year now. And all these questions coalesce to form the overarching question: Why won’t Governor Beshear and CHFS execute SB 151?

Auditor Ball stepped in to see what can be done but has been met with defiance from CHFS and Governor Beshear.

With thousands of kinship caregivers getting locked into a custodial choice leaving them financially worse off, and in an attempt to understand the head-scratching assertions made by Governor Beshear and CHFS, Auditor

Ball launched an investigation on October 23, 2024. TR 10–11. As the investigation has continued since the inception of this lawsuit and more facts have been discovered, the goal of the investigation now is to uncover the true reason or reasons why Governor Beshear and CHFS refuse to execute SB 151 and to provide a path forward to do so.

But so far, this has been a difficult goal to achieve. On November 8, 2024, Auditor Ball sent CHFS her first set of documentation and information requests. TR 91–93. CHFS’s response was essentially to simply provide Auditor Ball with its 2024 biennium budget request sent to the General Assembly. Gov. & CHFS Reply Mot. Dismiss, Ex. A.¹ While this information may have fulfilled CHFS’s duty to provide all responsive information to Auditor Ball when requested for *some* of her requests, it did not fulfill that duty with respect to *all* of them.

And that is exactly why, on April 4, 2025, after analyzing the information CHFS provided, Auditor Ball followed up on her requests to which CHFS failed to provide any or all responsive documents. TR 42. In that same correspondence, Auditor Ball made additional information requests, asked for CHFS to name a liaison for the investigation, and noted that she needed to

¹ This exhibit is included in the certified record separately from the paginated record. CHFS characterizes this exhibit as its “full response” to Auditor Ball’s November 8, 2024 request. TR 160. Out of full candor to the Court, CHFS provided an additional seven documents to Auditor Ball that CHFS, for some reason, did not submit into the record here. The extent of those documents, however, are fiscal notes for SB 151 and two letters to a legislator.

conduct interviews with CHFS officials. TR 41–42, 46–47.

Having heard nothing from CHFS for almost a week, Auditor Ball followed up on these requests on April 10. TR 46. She also noted in this correspondence that she needed to take the next step in her investigatory process by having an entrance conference with CHFS to “go over examination information, make additional document requests, and ask the individuals present some questions.” *Id.*

A day later, Auditor Ball got CHFS’s response: CHFS would no longer provide responsive information. TR 49–52. And it used, in part, Governor Beshear’s *Fletcher* rationale as the justification for that refusal. In the words of CHFS: “Any further inquiry into the Cabinet’s inability to implement the *unfunded mandated* [sic], Senate Bill 151, is inappropriate and unnecessary.” TR 51 (emphasis added). Further: “Th[e] documents and th[e] information [sent in response to Auditor Ball’s November 2024 information request] remain the only relevant items concerning the Cabinet’s inability to implement Senate Bill 151 *without any appropriation from the legislature.*” *Id.* (emphasis added). Finally: “[Auditor Ball’s] ‘preliminary assessment’ to determine the validity of ‘concerns’ regarding legislation *that cannot legally be implemented* falls outside the scope of the authority of the Auditor’s office.” TR 52 (emphasis added).

What CHFS is saying here is not that it has no further responsive information to Auditor Ball’s information requests. Instead, CHFS is saying that because *Fletcher* allegedly places with Governor Beshear the ultimate

authority to refuse to execute laws that he believes his administration doesn't have the money to execute, Auditor Ball has no authority to continue to investigate the Governor's and CHFS's refusal to execute SB 151.

This position becomes more apparent in two of the four specific CHFS refusals to provide responsive documents and information to Auditor Ball:

Auditor Ball's Request	CHFS's Response
"All internal CHFS communications and external communications between CHFS and the Governor's Office, CHFS and the Office of State Budget Director, CHFS and the General Assembly, CHFS and the federal government, and CHFS and any other party pertaining to the execution of SB 151, including documents exchanged in the course of those communications."	"Again, the Cabinet is unable to implement Senate Bill 151 because of the General Assembly's failure to provide a budget appropriation for the bill. <i>As such</i> , there are no documents responsive to this request. However, the Cabinet did seek guidance from our federal partners on this issue and they provided the attached letter, which the Cabinet provided to members of the General Assembly."
"All information pertaining to CHFS's and the Governor's Office's execution of SB 151."	"Again, the Cabinet is unable to implement Senate Bill 151 because of the General Assembly's failure to provide a budget appropriation for the bill. <i>Therefore</i> , there are no documents responsive to this request."
"All documentation, including communications, pertaining to and showing DCBS's decision-making for when, how much, for what purpose, and why certain unrestricted funds became obligated in fiscal year 2025."	"This request seeks information outside of the functions of the Auditor's office and seeks information related to the internal policy making process of the Cabinet, specifically, the Department of Community Based Services."
"A list of every DCBS officer and employee and his or her salary, status, title, organizational unit, and job duties."	"This request is overly broad and burdensome. . . ."

Compare TR 42 with TR 51–52 (emphasis added). Again, at least with respect

to the two refusals above subtly invoking Governor Beshear’s *Fletcher* position, CHFS is not disclaiming having responsive information to Auditor Ball’s requests. Rather, CHFS is saying that it doesn’t have to provide that responsive information because *Fletcher* places with the Governor the authority to refrain from executing a law, which renders null and void any Auditor Ball investigation into the execution of that law. But putting *Fletcher* aside for a moment, the main point is that, apart from a single letter it received from the federal government purportedly confirming CHFS’s inability to use Title IV-E funds to execute SB 151, CHFS outright refused to provide responsive information and documents to all four Auditor Ball requests outlined above.

But that’s not all. CHFS also refused to provide any of its active contracts with vendors or any documentation or communications showing itemized accounts of DCBS’s expenditures, telling Auditor Ball to look elsewhere. *Id.* CHFS additionally refused to provide anything more in the way of communications about its budget request and the creation of its budget other than two letters to a legislator and two emails about SB 151 fiscal notes. *Id.* Finally, CHFS refused to sit for an entrance conference and answer questions, name an investigation liaison, and acknowledge Auditor Ball’s ability to interview its officers. *Compare* TR 41–42, 46–47 with TR 49–52.

Tying the knot on its refusal, CHFS finished its letter by, once again, invoking *Fletcher* to characterize Auditor Ball’s examination as “improper.” TR

52. As mentioned above, CHFS specifically stated that Auditor Ball's examination "to determine the validity of 'concerns' regarding legislation *that cannot legally be implemented* falls outside the scope of the Auditor's office." *Id.* (emphasis added). That being the case, CHFS would not be paying its bill for this examination. *But see* KRS 43.050(5) (requiring the subject of an APA investigation to pay for the investigation).

So Auditor Ball sued.

CHFS having planted its flag, and with kinship caregivers every day precluded from getting the time they need to make their crucial and irrevocable custodial decision for the benefit of the children under their care, Auditor Ball sued Governor Beshear and CHFS in Franklin Circuit Court on May 15, 2025. Auditor Ball sought declaratory relief, with corresponding injunctive relief, that (1) the Governor and CHFS participate in Auditor Ball's investigation, provide all relevant requested information, and make available all relevant officials and employees for interviews and (2) rejects the Governor's *Fletcher* argument, thereby removing the main barrier CHFS is using to refuse to provide any further responsive information. TR 19–21.

On June 4, 2025, Governor Beshear and CHFS jointly moved to dismiss. TR 100–19. At the same time that they explicitly admitted to CHFS's refusal to provide responsive information to at least two Auditor Ball information requests, TR 105–06, 115, 159, 161–62; VR 06/11/25 at 07:45–08:05, the Governor and CHFS argued that Auditor Ball's claim seeking enforcement of

her investigatory authority was unripe because CHFS's compliance with *some* of Auditor Ball's information requests was good enough. TR 114–15, 117–19, 160–62. And even though the Governor gave CHFS the *Fletcher* position to use to obstruct Auditor Ball's investigation seeking Governor's Office records, TR 36–37, 51–52, and continuously relies on his constitutional authority to attempt to establish total dominance over the executive branch, *see generally* APA Sur-Reply Mot. Dismiss Ex. 1,² the Governor argued that he has nothing to do with Auditor Ball's investigation, TR 113–14, 117, 168–69.

The Franklin Circuit Court bought these arguments. First, again, despite the obstructive use of the Governor's *Fletcher* position to justify refusing to turn over Governor's Office records in conjunction with the Governor's in-court representations about his gubernatorial authority, the Franklin Circuit Court found that the Governor caused no injury to Auditor Ball sufficient to give her the standing to sue him or to have stated a claim for which relief could be granted against him. TR 195–97. Second, despite explicitly recognizing CHFS's refusal to provide responsive information to "two requests" made by Auditor Ball, the Franklin Circuit Court believed her action to force the Governor's and CHFS's compliance with her requests to be unripe based on CHFS's responsiveness to *some* of those requests. TR 202–04.

Auditor Ball timely appealed both orders. TR 206–07.

² This exhibit is also included in the certified record separately from the paginated record.

Auditor Ball needs this Court to put an end to Governor Beshear's and CHFS's disrespect of her authority.

This isn't the first time Auditor Ball has had to sue Governor Beshear and CHFS to vindicate her authority to get what she needs to help Kentucky's most vulnerable.

When the General Assembly transferred the Commonwealth Office of the Ombudsman from CHFS to the APA during the 2023 general session, it made sure to note that the Ombudsman was to carry with it to the APA the same information access it had while a part of CHFS. 2023 Ky. Acts Ch. 124 §§ 86, 102, 105. Governor Beshear and CHFS didn't see it that way though. They precluded the Ombudsman from maintaining its access to a database called iTWIST, which houses all child and adult abuse and neglect information CHFS maintains. TR 144–53; *see generally* APA Resp. Mot. Dismiss Ex. 4.³ For five months, the APA tried to work with both CHFS and Governor Beshear's office to get access to that database—to no avail. APA Resp. Mot. Dismiss Ex. 4 at ¶¶ 51–116. It was only when Auditor Ball sued that Judge Shepherd was able to end that five-month blockade in less than a month by forcing the Governor and CHFS to mediate, which resulted in the Ombudsman getting the exact iTWIST access it needed. TR 144–53.

But this isn't the only way that Governor Beshear and CHFS have challenged Auditor Ball's authority. When the Franklin Circuit Court

³ This exhibit is also included in the certified record separately from the paginated record.

dismissed this action, it seemed to suggest that Auditor Ball had to issue subpoenas, *see generally* KRS 43.080, to ripen the dispute. TR 204. So right after the Franklin Circuit Court’s dismissal of this action, Auditor Ball did so (but more on this later). APA Mot. Prehearing Conference Exs. 1, 3, 5, 7.⁴

Governor Beshear’s and CHFS’s responses to those subpoenas were astounding. Their response to Auditor Ball’s subpoenas for records (again, more on this later) can be summed up like this: While *some* responsive documents were given, many weren’t because the Governor and CHFS believe that Auditor Ball has no greater authority to obtain records from them than what the Open Records Act provides her. *Id.* at Exs. 2, 4, 6, 8.⁵ And even though CHFS told Judge Wingate that “[t]he Auditor need only provide a name and CHFS will set up an interview just as it always has,” TR 161, when Auditor Ball later issued subpoenas to interview four CHFS officials, CHFS moved to quash those subpoenas. CHFS Mot. Quash at 1–16, Ex. 1, *Stack v. Ball*, 25-CI-

⁴ The Court can take judicial notice of these documents. *See Rogers v. Commonwealth*, 366 S.W.3d 446, 451 (Ky. 2012) (“Under KRE 201, . . . court records . . . like other sources of information, may now be resorted to for judicial notice provided that the particular record’s accuracy cannot reasonably be questioned and provided further that the fact established by the record is not subject to reasonable dispute.”); *Collins v. Combs*, 320 S.W.3d 669, 678 (Ky. 2010) (finding that KRE 201 “expands the prior rule” that “limited judicial notice of court records to those in the same court, involving the same parties and issues, or records in the current proceeding” and “provides that a court may take judicial notice *sua sponte*, at any time during the proceedings”).

⁵ The Court can take judicial notice of these documents. *See Rogers*, 366 S.W.3d at 451; *Collins*, 320 S.W.3d at 678.

01200 (Franklin Cir. Ct.) (attached as Exhibit 3).⁶ But Judge Wingate refused to do so, and only then did CHFS allow the interviewing of its officials. 01/05/2026 Mot. Hour, *Stack v. Ball*, 25-CI-01200 (Franklin Cir. Ct.).⁷

At this point, Auditor Ball is no longer surprised when she receives responses like these from the Governor and CHFS. Going back to the start of the iTWIST dispute, Auditor Ball has always sought collaboration—to no avail—with the Governor and CHFS to fix problems that ultimately negatively affect Kentuckians. That's why she tried working out a solution with them to the iTWIST dispute for five months—again, to no avail—before finally suing. APA Resp. Mot. Dismiss Ex. 4 at ¶¶ 51–116.

Carrying over that desire for collaboration, at the start of her investigation into why Governor Beshear and CHFS refuse to execute SB 151, Auditor Ball specifically declared her hope of engaging in a “collaborative effort” among her, Governor Beshear, and CHFS to figure out how to get SB 151 executed. TR 11, 126. This desire for collaboration was reiterated when Auditor Ball sent her April 4th information request. TR 46–47. She even suggested a meet-and-confer conference, a prehearing conference, and mediation in this litigation. TR 141; APA Mot. Prehearing Conference.

But Governor Beshear and CHFS specifically refused to pursue

⁶ The Court can take judicial notice of this document. *See Rogers*, 366 S.W.3d at 451; *Collins*, 320 S.W.3d at 678.

⁷ The Court can take judicial notice of this hearing. *See Rogers*, 366 S.W.3d at 451; *Collins*, 320 S.W.3d at 678.

anything of the sort, even after Judge Wingate thought this would be a “brilliant idea,” VR 06/11/2025 at 05:26–10:27; VR 07/30/2025 at :29–2:25, and have not once reached out (unless ordered) to Auditor Ball to come to the table and work out a solution to the pertinent issues here. And all the while, kinship caregivers are locking themselves into decisions that are leaving the children in their care financially worse off, with Auditor Ball unable to get the information she needs to figure out how to help them. Kentucky’s kinship care families need this Court to force Governor Beshear and CHFS to give Auditor Ball the information she needs to figure out what they won’t.

ARGUMENT

Auditor Ball respectfully requests that this Court do two things: (1) conclude that the Governor’s and CHFS’s obstruction of Auditor Ball’s investigation is ripe for review; and (2) reinstate Governor Beshear as a party to this case.

The Governor, CHFS, and the trial court have all already identified two admitted CHFS refusals to comply with Auditor Ball’s information requests. That’s what makes the trial court’s decision to dismiss this investigatory enforcement action as unripe so baffling. Without judicial review of those two refusals, plus all the other instances of obstruction the trial court overlooked, Auditor Ball will not get the information she needs to move her investigation forward. Nor will Kentuckians get the answers they deserve about Governor Beshear’s and CHFS’s refusal to execute SB 151.

So too, then, is Governor Beshear needed in this case. The Governor created the *Fletcher* rationale that CHFS used to rebuff Auditor Ball's investigation; his and his office's communications were requested and refused to be turned over after Auditor Ball made clear that he was part of this investigation; and he is the "Chief Magistrate" with "supreme executive power" and the duty to "take care that the laws be faithfully executed." Ky. Const. §§ 69, 81. At this early stage of the case, when applying the right standard of review, there is enough that has been pleaded and in the record to tie Governor Beshear to CHFS's refusal to comply with Auditor Ball's investigation. Not only that, the Governor's in-court assertions about his authority over CHFS foreclose any attempt to distance himself from its actions here.

In reviewing the trial court's granting of the Governor's and CHFS's CR 12.02 motion to dismiss, this Court does so "de novo." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010). Stepping into the shoes of the trial court, then, this Court should not affirm the trial court's dismissal of Auditor Ball's investigatory enforcement claim and of Governor Beshear from this case "unless it appears th[at Auditor Ball] would not be entitled to relief under any set of facts which could be proved." *Id.* (citation omitted). And in making that determination, "the pleadings should be liberally construed in the light most favorable to [Auditor Ball], all allegations being taken as true," *id.* (citation omitted), while "draw[ing] all reasonable inferences in [Auditor Ball's] favor," *Hardin v. Jefferson Cnty. Bd. of Educ.*, 558 S.W.3d 1, 5 (Ky. App. 2018). When

employing that standard properly, it becomes clear that this Court should reverse the trial court’s dismissal of this action and Governor Beshear from this action and remand for further proceedings consistent with its opinion.

I. The Governor’s and CHFS’s challenges to Auditor Ball’s investigatory authority are ripe for review.⁸

CHFS has admitted to refusing to provide responsive information and documents to at least two of Auditor Ball’s requests. TR 105–06, 115, 159, 161–62; VR 06/11/2025 at 07:45–08:05. The trial court specifically recognized and acknowledged those refusals. TR 202–04. But even in light of these admissions and acknowledgements, the trial court still found Auditor Ball’s enforcement action to force cooperation with her examination to be unripe. And it appears that the rationale given is essentially that CHFS’s cooperation with *some* and *certain aspects* of the examination was good enough for now.

But in Kentucky, there is no “good enough” rule for cooperating with an APA investigation. Auditor Ball has the authority to, at any time, “have access to” and “examine all books, accounts, reports, vouchers, correspondence files, records, money and property of any state agency.” KRS 43.080(1); *see also* KRS 43.050 (also laying out Auditor Ball’s authority). To reinforce this authority, “[e]very officer or employee of any such agency having such records or property in his or her possession or under his or her control shall permit access to and examination of them upon the request of the Auditor.” KRS 43.080(1). She also

⁸ This argument is preserved. TR 132–33, 173–80.

has the authority to, at any time, “require information on oath from any person touching any matters relative to any account or matter that [she] is required or authorized to state, audit, investigate, review, or settle.” KRS 43.080(3). She even has the authority to, at any time, “issue process and compel the attendance of witnesses and administer oaths and compel witnesses to testify in any of the audits, reviews, or investigations the Auditor is authorized to make.” KRS 43.080(4).

In short, an executive branch entity or official cannot, at any point, refuse to provide Auditor Ball with the information and documents she is seeking. Such a refusal immediately infringes on the authority of Kentucky’s constitutional officer statutorily charged with acting as the watchdog over the executive branch.

The ripeness doctrine is meant to “prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements” because “[a] court is precluded from deciding ‘[q]uestions which may never arise or which are merely advisory, academic, hypothetical, incidental or remote, or which will not be decisive of a present controversy.’”

Berger Fam. Real Estate, LLC v. City of Covington, 464 S.W.3d 160, 166 (Ky. App. 2015) (citations omitted). But there is no “abstract disagreement” or “advisory, academic, hypothetical, incidental or remote” non-present controversy here. *Id.* Auditor Ball asked for information from CHFS, and CHFS refused to provide that information. *Compare* TR 42, 46–47 *with* TR 49,

51–52; Statement of the Case at 6–9. What further refusal—refusal that has been admitted by CHFS and the Governor and acknowledged by the trial court—is needed to give rise to a ripe controversy?

The trial court ruled this case to be unripe because allegedly “CHFS did not outright refuse to cooperate in the Auditor’s investigation,” CHFS hasn’t said it “has no intention of cooperating with the investigation,” and CHFS hasn’t “refused to comply to the same degree as that found in” *Lassiter v. Landrum*, 610 S.W.3d 242 (Ky. 2020). TR 202–04. These simply cannot be the right conclusions drawn from the pleadings and record to this point, especially when comparing Auditor Ball’s requests for information and access with CHFS’s responses and looking at everything in this case “in the light most favorable to” Auditor Ball, *Fox*, 317 S.W.3d at 7 (citation omitted), “draw[ing] all reasonable inferences in [her] favor,” *Hardin*, 558 S.W.3d at 5.

As outlined in the record and above, CHFS:

- 1) called Auditor Ball’s investigation “inappropriate and unnecessary” and concluded that it “falls outside the scope of the authority of the Auditor’s office,” invoking the *Fletcher* argument in doing so;
- 2) stated that the documents it has already given to Auditor Ball “remain the only relevant items concerning the Cabinet’s inability to implement Senate Bill 151 without any appropriation from the legislature”; in other words, CHFS will not be providing any further

information unless it receives an appropriation from the General Assembly to execute SB 151;

- 3) outright refused to provide responsive material to four of Auditor Ball's information requests (except for turning over one letter from the federal government responsive to one request);
- 4) told Auditor Ball to look elsewhere for information for two specific information requests; and
- 5) refused to participate in Auditor Ball's entrance conference, where she would "make additional document requests[] and ask the individuals present some questions."

Compare TR 42, 46–47 *with* TR 49, 51–52; Statement of the Case at 6–9. The only possible conclusion to draw when viewing CHFS's refusals "in the light most favorable to" Auditor Ball, *Fox*, 317 S.W.3d at 7 (citation omitted), and "draw[ing] all reasonable inferences in [her] favor," *Hardin*, 558 S.W.3d at 5, is that CHFS will not be turning over all information responsive to Auditor Ball's examination. Statement of the Case at 6–9. It is unreasonable to view CHFS's conduct here as indicating anything but a "no," especially since Auditor Ball has yet to receive all responsive information to the requests she's made. And even just one "no" to one request is enough to make an investigatory enforcement claim ripe.

That "no" was sufficient to make ripe the Secretary of the Finance and Administration Cabinet's action to force a private citizen's refusal to

participate in an investigation. *Lassiter*, 610 S.W.3d at 245–46. The trial court, though, tried to distinguish *Lassiter* by saying that (1) CHFS’s unwillingness to participate here has not yet risen to the level of refusal in *Lassiter* and (2) Auditor Ball has not yet issued subpoenas like the Secretary did in *Lassiter*. TR 203–04.

But there is no difference between the “no” given in *Lassiter* and the “no” given here. The “no” in *Lassiter* was given when the Secretary told the private citizen to show up for questioning, 610 S.W.3d at 245–26, which is exactly what happened here when CHFS said “no” to participating in Auditor Ball’s entrance conference where CHFS was told questions would be asked, *compare* TR 46–47 *with* TR 49–52. The “no” in *Lassiter* also came when the citizen was asked to provide “evidence,” 610 S.W.3d at 245–26, which is, again, exactly what happened here when CHFS said “no” to turning over responsive documents and information to several requests, *compare* TR 42, 46–47 *with* TR 49, 51–52; Statement of the Case at 6–9.

The “yeses” and *partial* “yeses” CHFS gave to *some* requests do not excuse any of its outright or partial “noes,” and these “noes” create a “necessary” judicial look at their merits. *W.B. v. CHFS*, 388 S.W.3d 108, 114 (Ky. 2012). Without a review of the merits of the “noes,” Auditor Ball cannot get the information she needs to move forward with her investigation. *Id.* (“[R]ipeness involves weighing . . . the hardship to the parties of withholding court consideration.”). Similarly, there is simply no reasonable prospect that

those “noes” change here. *Id.* (“[R]ipeness [also] involves weighing . . . the fitness of the issues for judicial review.”). Auditor Ball has still not received all the information she requested on April 4, 2025, and Governor Beshear’s and CHFS’s responses to Auditor Ball’s subpoenas make it clear that the Auditor will *never* get all responsive information while they continue to believe that she has no greater authority to obtain information than what the Open Records Act provides her. APA Mot. Prehearing Conference Exs. 2, 4, 6, 8. In short, Auditor Ball needs a ruling on the merits of CHFS’s refusals to provide responsive information to her requests.

And as for the trial court’s position that Auditor Ball had not yet issued “subpoenas” to make the case ripe, TR 204, that is incorrect. As mentioned, KRS 43.080 requires all state executive branch entities and officials to give Auditor Ball whatever she asks for, whenever she asks for it. A KRS 43.080 request from Auditor Ball *is* a *de facto* subpoena. Were it not, there would be language in KRS 43.080 to the effect of authorizing Auditor Ball to “issue process and compel” the *production of documents* along with the existing language about “witnesses.” KRS 43.080(4). But since that language doesn’t exist, it must be the case that the ability to force production of documents and information is wrapped within KRS 43.080(1), (2), and (3). That must be true because without such authority, no executive branch entity would ever provide Auditor Ball with records responsive to any audit, examination, or

investigation. And that would render her office an “empty shell.” *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 829 (Ky. 1942).

So Auditor Ball’s April 4, 2025 request letter *was* a “subpoena” because a request from Auditor Ball pursuant to her KRS 43.080 authority is, “at its essence, a subpoena.” *United States v. Markwood*, 48 F.3d 969, 975–76 (6th Cir. 1995) (equating a civil investigation demand with an administrative subpoena). And to be clear, Auditor Ball later issued “subpoenas” for documents and information explicitly labeled as such only to attempt to satisfy the trial court’s purported condition to move the investigation along. TR 204; APA Mot. Prehearing Conference Exs. 1, 3, 5, 7. Good thing, too, because it revealed the Governor’s and CHFS’s true feelings about Auditor Ball’s authority. APA Mot. Prehearing Conference Exs. 2, 4, 6, 8.

Those feelings are clear: They will not provide Auditor Ball with all the information she has requested so she can determine a path forward to executing SB 151 for the benefit of Kentucky’s kinship care families. *Compare* TR 42, 46–47 *with* TR 49, 51–52; Statement of the Case at 6–9; APA Mot. Prehearing Conference Exs. 2, 4, 6, 8. Governor Beshear’s and CHFS’s flags have been planted, and Auditor Ball needs court intervention to right that wrong. This Court should reverse the trial court’s determination that Auditor Ball’s investigatory enforcement claim is unripe.

II. The Governor is a proper party.⁹

Governor Beshear is the “Chief Magistrate” of the Commonwealth wielding “supreme executive power” and the duty to “take care that the laws be faithfully executed.” Ky. Const. §§ 69, 81. These constitutional responsibilities place on him the duty to ensure that cabinets like CHFS that are “directly under [his] control” and that “answer to” him, *Beshear v. Bevin*, 498 S.W.3d 355, 380–81 (Ky. 2016), follow the law.

When one of his cabinets refuses to abide by the law, it falls on Governor Beshear to “use[] his best endeavors to secure the faithful execution of the laws” by requiring that cabinet to abide by the law. *Fletcher*, 163 S.W.3d at 873 (citation omitted). Only then can it be said that the Governor is “perform[ing] his full constitutional duty.” *Id.* at 872–73 (citation omitted). Indeed, the whole point of having a “chief executive” who is “required” to carry out the law, *Brown v. Barkley*, 628 S.W.2d 616, 623 (Ky. 1982) (emphasis added), is to ensure that the executive branch officers and agencies within the chief executive’s control are not “free to disregard or refuse to enforce statutes [they] dislike,” *Stivers v. Beshear*, 659 S.W.3d 313, 325 (Ky. 2022).

But that is exactly what happened here. On April 10, 2024, and then again on March 27, 2025, Governor Beshear gave his cabinets an intellectually dishonest legal argument to use to attempt to justify their refusal to execute and follow a number of laws. He posited that *Fletcher* holds that if he doesn’t

⁹ This argument is preserved. TR 133–36, 186–88.

think he has the money to execute a law, the law doesn't have to be executed. TR 36–38, 84–87. CHFS fell in line with its boss's instructions and refused to execute SB 151. TR 9–10. Auditor Ball then announced her investigation into *both the Governor's* and CHFS's failure to execute SB 151. TR 10–11. In response to two specific requests for information *encompassing information from the Governor's Office*, CHFS refused to provide responsive information. *Compare* TR 42 with TR 51. And it used *Governor Beshear's Fletcher* argument to justify those two refusals and its general refusal to provide any further responsive information. *Compare* TR 42, 46–47 with TR 49–52.

With Auditor Ball having relayed many times that her investigation involves the Governor's Office, TR 10–11, 40, 46, with her asking for the Governor's Office's information and records, TR 42, and with CHFS using the Governor's *Fletcher* argument to justify its refusals to provide that information, TR 51–52, it is reasonable to draw the inference that CHFS consulted the Governor's Office in formulating its response of refusals to Auditor Ball's April 4, 2025 request. And this entanglement with CHFS in this dispute is confirmed by the way the Governor has generally asserted authority over not just CHFS but many executive branch entities, including ones that are purportedly independent from him.

Right now, Governor Beshear is using his Section 81 authority to attempt to assert total control over an “independent” Executive Branch Ethics Commission, *Coleman v. Beshear*, No. 2022-CA-0837, 2024 WL 875611, at *1

(Ky. App. Mar. 1, 2024), *discretionary review granted* No. 2024-SC-0228 (Ky. Feb. 13, 2025), by making arguments like this:

Section 81 of the Kentucky Constitution *requires* that the Governor – and only the Governor – “**shall** take care that the laws be faithfully executed. Like Section 69, this is an affirmative duty and responsibility placed on the Governor by the Constitution. . . . *LRC v. Brown* recognized that the Take Care Clause imparts a “positive duty” on the Governor to “go forward” and ensure that the laws are executed. By its plain language, this is not an optional charge, and it cannot be removed by the General Assembly.

APA Sur-Reply Mot. Dismiss Ex. 1 at 21–22. According to the Governor himself then, his Section 81 duty is an “affirmative” and “positive” one that is “not an optional charge” and that “*requires*” him and “only” him to “go forward and ensure that the laws are executed.” So, in the Governor’s own words, he has an affirmative responsibility to entangle himself with all the actions of his cabinets, like CHFS, to ensure that they comply with the law. It is only right, then, for a party negatively affected by those actions to be able to hold him accountable for them in the courts, especially when the Governor is as factually entangled in those actions as he is here.

The Governor has had no problem using this line of thinking to bring various lawsuits against the Trump administration in the place of his cabinets (including CHFS), treating his office and them as one in the same when acting as a plaintiff in those cases.¹⁰ It is completely inconsistent for the Governor to

¹⁰ Compl. ¶ 33, *California v. Department of Agriculture*, No. 3:25-cv-06310 (N.D. Cal.) (Ex. 4); Compl. ¶¶ 22, 57, *Massachusetts v. Department of Agriculture*, No. 1:25-cv-13165 (D. Mass.) (Ex. 5); Compl. ¶¶ 27, 205, 209, *New*

then try and separate himself from CHFS when a party tries to hold him responsible as a defendant because of, in part, that very relationship. *Hisle v. Lexington-Fayette Urb. Cnty. Gov't*, 258 S.W.3d 422, 434–35 (Ky. App. 2008) (outlining the doctrine of judicial estoppel).

The Governor's proximity to CHFS here is also evidenced by a comparison of their responses to Auditor Ball's post-litigation subpoenas. More than half of the content of these responses is a word-for-word copy-and-paste of each other's. *Compare* APA Mot. Prehearing Conference Exs. 2, 8 *with* Exs. 4, 6. This is just another fact that raises all sorts of reasonable inferences about Governor Beshear's entanglement in this dispute and his willingness to comply with Auditor Ball's investigation and ensure that his cabinet does so, as well.

The trial court dismissed the Governor in part because it believed that neither the complaint nor the record established that Auditor Ball was seeking information from the Governor's Office that had been refused. TR 195–97. While Auditor Ball, at the start of the litigation, had not yet sought information *directly* from the Governor, information from the Governor's Office was sought and refused after Auditor Ball made clear many times that the Governor's Office was a subject of the investigation. TR 10–11, 40, 46; *compare* TR 42 *with* TR 51. And in examining all the facts and reasonable inferences about those

Jersey v. Office of Management and Budget, No. 1:25-cv-11816 (D. Mass.) (Ex. 6); Compl. ¶¶ 31, 169, *California v. McMahon*, No. 1:25-cv-00329 (D. R.I.) (Ex. 7). The Court can take judicial notice of these documents. *See Rogers*, 366 S.W.3d at 451; *Collins*, 320 S.W.3d at 678.

facts as outlined above, there is enough in the complaint and record to tie Governor Beshear to CHFS's refusal.

The trial court also cited two cases for the assertion that the Governor cannot be held accountable for failing to abide by his Section 81 duty when facilitating his cabinet's noncompliance with the law.¹¹ TR 196–97. First, the trial court cited *Johnson Bonding Co., Inc. v. Commonwealth of Kentucky*, 420 F. Supp. 331 (E.D. Ky. 1976). But the obvious response there is that *Johnson Bonding* is a nonbinding federal district court case that preceded *Brown*, *Fletcher*, and *Stivers*, cases that make it clear that the Governor breaches his constitutional duty when he fails to do everything in his power to ensure compliance with the laws.

On the merits though, *Johnson Bonding* is irrelevant because its procedural posture did not involve a final adjudication on the merits. This is important because *Johnson Bonding* did not hold that the Governor's Section 81 duty does not force him to ensure his cabinet's compliance with the law. Rather, the district court noted it could "find[] no Kentucky authority" on that point (since this case preceded *Brown*, *Fletcher*, and *Stivers*), which simply raised "some question" at the preliminary-injunctive-relief stage about the

¹¹ Judge Shepherd rejected this position when Governor Beshear tried to assert it in the iTWIST dispute, forcing Governor Beshear to mediate. 11/04/2024 Mot. Hour, *Ball v. Beshear*, 24-CI-00844 (Franklin Cir. Ct.). The Court can take judicial notice of this hearing. See *Rogers*, 366 S.W.3d at 451; *Collins*, 320 S.W.3d at 678.

merits of that point. *Johnson Bonding*, 420 F. Supp. at 333–34. So there is no actual holding from *Johnson Bonding* relevant here.

Second, the trial court cited *Kasey v. Beshear*, 626 S.W.3d 204 (Ky. App. 2021). But *Kasey* involved a board that is not under the control of the Governor but rather the control of the Commissioner of Agriculture. *Id.* at 209–10. It is, of course, true that the Governor has no control over a board that is overseen by a different constitutional officer. But that is the not case here—CHFS is one of his cabinets.

In sum, whether it is couched in terms of needing to establish “standing” or a “claim upon which relief can be granted,” Auditor Ball’s Complaint and the record, when properly viewed in the light most favorable to her after drawing all reasonable inferences therefrom in her favor, establish enough of a tie between Governor Beshear and CHFS’s obstruction to keep him in this case for now. This is especially true when considering the Governor’s constitutional duty to ensure CHFS’s compliance with the law and the Governor’s assertion of control over CHFS and other executive branch entities in court.

Based on everything outlined above, Governor Beshear has injured Auditor Ball by causing CHFS’s obstruction of her investigation both by his actions and failure to act, which can be redressed by an order from this Court prohibiting the Governor from causing that obstruction and forcing him to ensure CHFS’s cooperation. *See Commonwealth v. Sexton*, 566 S.W.3d 185, 196

(Ky. 2018) (outlining the elements of constitutional standing in Kentucky); *see also United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) (“It is clear that [an investigatory agency] has standing to assert its investigatory power.”). And, of course, a claim to vindicate Auditor Ball’s investigatory authority is a proper one to bring before this Court because of the facts and legal duties of the Governor that tie him to this dispute. *See Lassiter*, 610 S.W.3d at 246, 254 (adjudicating the merits of an action brought by an investigatory agency to enforce its investigatory authority against a party obstructing it). The Court should reverse the trial court’s dismissal of Governor Beshear from this case.

III. The Court should remand for the trial court to decide the remaining issues and arguments in this case.¹²

There are other issues in this case, but because “[a]n appellate court ‘is without authority to review issues not . . . decided by the trial court,’” *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009) (citations omitted), the proper ruling here would be to reverse the trial court’s ripeness determination and dismissal of Governor Beshear and remand the case for further proceedings. As much as Auditor Ball would like for this Court to rule on the merits of the arguments CHFS is using, including its adoption of the Governor’s *Fletcher* argument, to refuse to provide responsive information to Auditor Ball’s requests, that is for the trial court to initially decide.

¹² These arguments are preserved. TR 136–41, 180–86.

One more point. This Court has the authority to refer this case to mediation. CR 99.03. Auditor Ball would be happy to participate in mediation, as doing so could lead to a speedy resolution of this entire dispute and a path toward executing SB 151 for the benefit of Kentucky's kinship care families.

CONCLUSION

The Court should reverse and remand this case back to the Franklin Circuit Court for consideration of the remaining issues in this case.

Respectfully submitted,

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WORD-COUNT CERTIFICATE

This appellant brief complies with the word limit of 8,750 under RAP 31(G)(2)(a) because, excluding the parts of the brief exempted by RAP 31(G)(5) and 15(D), this document contains 8,189 words.

/s/ Alexander Y. Magera

APPENDIX

1. Opinion & Order of the Franklin Circuit Court granting dismissal in favor of the Governor. TR 192–97.
2. Opinion & Order of the Franklin Circuit Court granting dismissal in favor of CHFS. TR 198–205.
3. CHFS’s Motion to Quash filed in *Stack v. Ball*, 25-CI-01200 (Franklin Cir. Ct.).
4. Governor Beshear’s Complaint filed in *California v. Department of Agriculture*, No. 3:25-cv-06310 (N.D. Cal.).
5. Governor Beshear’s Complaint filed in *Massachusetts v. Department of Agriculture*, No. 1:25-cv-13165 (D. Mass.).
6. Governor Beshear’s Complaint filed in *New Jersey v. Office of Management and Budget*, No. 1:25-cv-11816 (D. Mass.).
7. Governor Beshear’s Complaint filed in *California v. McMahon*, No. 1:25-cv-00329 (D. R.I.).