

STATEMENT OF POINTS AND AUTHORITIES

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ARGUMENT

I. This dispute is ripe.

The Court can ignore Governor Beshear's and CHFS's distortion of the facts, issues, and law relevant to this case because the Court has before it the complaint and primary source documents to view "in the light most favorable" to Auditor Ball, *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citation omitted), while "draw[ing] all reasonable inferences [from them] in [her] favor," *Hardin v. Jefferson Cnty. Bd. of Educ.*, 558 S.W.3d 1, 5 (Ky. App. 2018). CHFS indisputably refuses to provide Auditor Ball with all requested information. That's what makes this case ripe for judicial review.

1. Once again, Governor Beshear and CHFS admit facts proving this case is ripe for review. They explicitly admit CHFS refused to provide responsive information to Auditor Ball's list-of-employees request. CHFS Br. i, 7–8, 14–16; Gov. Br. 4; *compare* TR 42 *with* TR 52. So at the same time they claim Auditor Ball is trying to "manufacture" a dispute here, CHFS Br. 1; Beshear Br. 13, they specifically concede that there is at least one legitimate dispute, a concession fatal to their ripeness argument.

Even after making this concession, CHFS argues Auditor Ball should have somehow interpreted its refusal to fulfill her request, TR 52, as nonetheless indicating a willingness to do so, CHFS Br. 15–16. Accepting CHFS's position here, however, would require ignoring:

- 1) the plain reading of CHFS's refusal, TR 52;

- 2) the concession, CHFS Br. i, 7–8, 14–16; Gov. Br. 4;
- 3) that the request remains unfulfilled;
- 4) the totality of CHFS’s April 11, 2025 letter refusing to provide (except for two links and one federal government letter) any additional responsive information, including second-time refusals to unfulfilled follow-up requests, TR 51–52;
- 5) CHFS’s refusal to participate in Auditor Ball’s April 10 request for an examination entrance conference where, among other things, she would interview CHFS officials present, TR 46; and
- 6) the need for a court order to end a prior five-month refusal to provide access to a needed database, Auditor Ball Br. 11; TR 144–53; APA Resp. Mot. Dismiss Ex. 4 at ¶¶ 51–116.

All of these uncontroverted facts dispel any notion that CHFS intended to fully comply with Auditor Ball’s request for a list-of-employees or any other information request.

Facing that reality, CHFS and Governor Beshear continuously double down on the trial court’s conclusion that their *partial* compliance with Auditor Ball’s *other* information requests is good enough. But Auditor Ball is entitled to *all* information she asks for from state entities and officials. KRS 43.080. There is no such thing as “good enough” when responding to an information request from the Auditor’s Office—the information the Auditor requests is either provided or it is not. And if *Lassiter v. Landrum*, 610 S.W.3d 242 (Ky.

2020) is to be read to mean that partial compliance is sufficient to stave off court action seeking full compliance, CHFS Br. 17, then a state agency wishing to hide something from the Auditor's Office would never fully cooperate, without any repercussion.

A court ruling on CHFS's objection to Auditor Ball's list-of-employees request is needed.

2. Governor Beshear and CHFS have admitted another key fact demonstrating that this case is ripe for review: CHFS refused to fulfill Auditor Ball's request for documentation reflecting CHFS's Department for Community Based Services' (DCBS) decision-making in obligating its unrestricted funds for certain uses. CHFS Br. i, 7–8, 14; Gov. Br. 4; *compare* TR 42 *with* TR 52. CHFS believes this request “seeks information outside of the functions of the Auditor's office and seeks information related to the internal policy making process of [CHFS], specifically, [DCBS].” TR 52. But, as before, that's for a court to decide.

Even after its concession though, CHFS also attempts to improperly introduce new rationale for its objection, claiming that “the Auditor was requesting documentation that did not exist.” CHFS Br. 15; *see also Faust v. Commonwealth*, 142 S.W.3d 89, 98 (Ky. 2004) (“[P]ost-hoc rationalizations are inappropriate.”). But that rationale completely ignores a key portion of Auditor Ball's request.

In her November 8, 2024 request,¹ Auditor Ball didn't just ask for, as CHFS conveys, DCBS's "restricted and unrestricted balance beginning fiscal year 2025" or whether or not CHFS had "unobligated funds." CHFS Br. 14–15 (quoting TR 94). She also asked for all documentation showing "when, how much, for what purpose, and why certain unrestricted funds became obligated" within DCBS. TR 92. But CHFS ignored that part of the request, which seeks documents explaining *how, why, and for what purpose* DCBS's "current cash balances plus funds that are expected to come in throughout the year are entirely obligated to [DCBS]'s enacted appropriation." TR 94. This would include not just stated balances but also memos, emails, internal budget documents, and other relevant documents outlining DCBS's reasoning for obligating the hundreds of millions of dollars in non-line-itemed general fund and, to some extent, federal dollars that DCBS receives and can spend as it wishes. TR 184–85; APA Resp. Mot. Dismiss Ex. 1 at 52–55.

So when CHFS claimed on December 11, 2024 that it had "no additional [responsive] documents" to that request, TR 95, it failed to capture the totality

¹ CHFS and Governor Beshear make numerous misrepresentations about this request. To start, Auditor Ball *did at least twice* "apprise the circuit court" of this request. CHFS Br. 6, 13; Beshear Br. 13; TR 40, 42. Additionally, the third bullet point of the request asks for after-expended, while the fourth asks for pre-expended, financial information, TR 92, so these requests aren't "duplicative," CHFS Br. 5 n.2. Finally, CHFS's December 11, 2024 assertion that it had "no additional documents that are responsive" to Auditor Ball's November 8, 2024 requests, TR 95, is true only upon acceptance of CHFS's flawed and refuted reasoning for refusing to provide any additional responsive information and, as explained, was not the rationale given in its April 11, 2025 response to Auditor Ball's follow-up request. TR 52.

of that request. This is exactly why Auditor Ball followed up on and rephrased that request in her April 4, 2025 letter. TR 42. And, tellingly, when she did, CHFS did not respond with, “no documents or additional information responsive to this request,” as it did on December 11, 2024, and in other April 11, 2025 responses. Instead, as the trial court recognized, TR 202–04, it used the same objection it made before the trial court, TR 52, 105–06, 115, 159, 161–62; VR 06/11/2025 at 07:45–08:05, an objection it also makes here, CHFS Br. i, 7–8, 14; Gov. Br. 4.

Court intervention is needed to ascertain this objection’s validity, too.

3. CHFS also refused to provide all responsive information to two other requests, attempting to justify that refusal using Governor Beshear’s *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005) argument.² Auditor Ball Br. 6–8. CHFS has posited that *Fletcher* supposedly allows CHFS to refuse to execute a law by claiming it doesn’t have the money to do so, therefore rendering any Auditor’s Office inquiries about that law’s execution or nonexecution null and

² CHFS and Governor Beshear argue about *Fletcher* and their alleged inability to execute SB 151, mischaracterizing a plethora of facts along the way. CHFS Br. 2–4, 20–22; Gov. Br. 2–3, 8–10. While Auditor Ball might not have the requisite standing to force Governor Beshear and CHFS to execute SB 151, she does have standing to seek a declaratory ruling on their *Fletcher* argument. That’s because CHFS is using that argument to refuse to cooperate with Auditor Ball’s examination. Auditor Ball Br. 6–9; TR 136–41, 180–86. Auditor Ball needs a court ruling on the merits of that argument to fully vindicate her investigatory authority. She has never abandoned that aspect of her claim but has simply recognized this is for a trial court to address on remand.

void. TR 51–52. A trial court ruling is needed on the merits of this objection. Auditor Ball Br. 29–30.

Now though, CHFS has slightly tweaked its argument. CHFS is now interpreting Auditor Ball’s two requests for communications and documents about the “execution” of SB 151 as excluding all CHFS information about SB 151’s *nonexecution*. CHFS Br. 16. Using that newfound interpretation, it now represents to this Court that responsive “documents do not exist.” *Id.*

This kind of gamesmanship is exactly why court intervention is needed. We know CHFS previously interpreted Auditor Ball’s two requests as encompassing information about SB 151’s *nonexecution* as well as its execution *because CHFS specifically provided information about SB 151’s nonexecution in response to one of those requests*: When Auditor Ball asked for “communications . . . between CHFS and the federal government . . . pertaining to the *execution of SB 151*,” CHFS provided a letter from the federal government explaining why SB 151 *could not be executed* using Title IV-E funds. TR 42, 51; Reply Br. Exhibit 1.³

As before, the Court should not accept CHFS’s post hoc change in justification for refusing to provide information about the basis for its refusal to execute SB 151. This is especially so because CHFS’s reliance on *Fletcher*

³ The Court can take judicial notice of this letter that was referenced by CHFS in its April 11, 2025 letter to Auditor Ball, especially since CHFS, throughout its brief, argues that its April 11 response, which includes the providing of this letter, satisfied its obligation to fully respond to Auditor Ball’s inquiries. TR 51; *see* Auditor Ball Br. 12 n. 4 (outlining judicial notice rules).

(instead of its newfound interpretation of the Auditor’s request to obtain this information) is demonstrated by its failure to also provide responsive information about the *execution* of SB 151. As explained to the trial court, CHFS failed to provide Auditor Ball with its draft regulations *designed to execute SB 151*. TR 128–29. The fact that these responsive documents were withheld shows that CHFS is not relying on any alleged distinction between the “execution” and “nonexecution” of SB 151 in deciding whether to provide responsive documents; rather, it is relying on *Fletcher* to refrain from having to provide *any* SB 151-related documents whatsoever. And this is exactly why court intervention is needed here.

4. If all of that were not enough, several other disputes here need court intervention.

First, CHFS failed to provide any requested DCBS contracts, merely noting a website on which they are allegedly available. *Compare* TR 42 *with* TR 52; CHFS Br. 19. As already explained, however, “numerous contracts with vendors whose names appear as having received public funds on DCBS’s expenditure reports” are not available on CHFS’s referenced website. TR 13.

Even if they were, the issue remains whether failing to collect and turn over these requested contracts is an acceptable response. It wouldn’t be under the Open Records Act. Ky. Op. Atty. Gen., 06-ORD-036, 2006 WL 618348, at *3 (Feb. 14, 2006) (“Furnishing a requester with a website address . . . where the requested records are also available is not a substitute for complying with

the [ORA's] mandatory terms"). And such a response is particularly unacceptable considering that a state agency's inability to produce its contracts on demand is a serious record-keeping issue.

The same problem exists with CHFS's failure to produce responsive information to Auditor Ball's request for all information "showing itemized accounts of DCBS's expenditures." *Compare* TR 42 *with* TR 52; CHFS Br. 19. No authority exists allowing CHFS to refrain from producing responsive information to Auditor Ball simply because she *may* be able to find it elsewhere. And as before, CHFS's response indicates a serious record-keeping issue, as it did not disclaim possessing information outside of the state's accounting system about its expenditures. TR 52.

Additionally, as mentioned, CHFS has explicitly refused to participate in Auditor Ball's requested entrance conference and claims abstractness in what Auditor Ball would do there. CHFS Br. 19–20. This misrepresentation of the record is directly refuted by Auditor Ball's April 10, 2025 correspondence to CHFS, where she indicated she "*will . . . ask the individuals present some questions,*" among other things. TR 46 (emphasis added). And there is no authority that allows CHFS to refuse to submit to questioning. KRS 43.080.

Finally, it cannot be true that CHFS has provided all responsive information to Auditor Ball's request for "[a]ll communications associated with DCBS's budget request and the creation of its budget." *Compare* TR 42 *with* TR 52. CHFS, throughout its brief, misleads the Court into thinking that the

165 pages of documents it provided to Auditor Ball in response to her November 8, 2024 request fulfilled its duty to comply with the totality of Auditor Ball’s examination, including her budget communications request. But even a cursory review of those 165 pages shows that they simply constitute CHFS’s budget request; they show nothing more than what CHFS asked the General Assembly to give it. Reply Mot. Dismiss Ex. A. To say that these documents constitute the totality of DCBS’s budget communications ignores the actual content of those documents and the fact that CHFS has not supplied Auditor Ball with, for example, any *internal* DCBS budget communications. And it would be extremely concerning if DCBS did not have any such internal budget communications to turn over.

All of these disputes, too, need court intervention.

5. Although CHFS asserts that it has “never contested the Auditor’s authority to investigate,” CHFS Br. 13, 20, its brief is riddled with such disrespect. For example, CHFS flippantly references in quotes Auditor Ball’s “investigation,” calling it “*ultra vires*.” CHFS Br. 4, 6; *but see* KRS 43.050 (giving Auditor Ball authority to “investigate”).

What is even more concerning is Governor Beshear’s and CHFS’s belief that Auditor Ball has no mechanism to force state agencies to provide her with records. CHFS Br. 17–19; Beshear Br. 7 n.2. All at the same time, CHFS and Governor Beshear claim that: (1) Auditor Ball cannot sue here because she didn’t issue subpoenas like the plaintiff in *Lassiter* did; (2) Auditor Ball’s

information requests cannot be considered de facto subpoenas; and (3) Auditor Ball actually has no subpoena power at all to obtain records. *Id.* If all of this is true, then CHFS and Governor Beshear have created a world that allows state agencies to refuse to provide records to the Auditor's Office. What remedy would they propose, then, if a state agency refuses to adhere to the Auditor's Office's KRS 43.080(1) right of access to such information?

CHFS and Governor Beshear don't like that Auditor Ball informed the Court that their answer to that question is nothing. CHFS Br. 10–12; Beshear Br. 7 n.2. Notably, because they couldn't, they don't refute the legitimacy of any of the information Auditor Ball asked this Court to take judicial notice of. Instead, they argue only that this Court shouldn't, *as a matter of its discretion*, do so. *Id.*

Auditor Ball is not attempting to use judicial notice to correct evidentiary or preservation problems on appeal. Instead, she is presenting the Court with undisputed information that directly refutes representations made by CHFS and Governor Beshear relied upon by the trial court in dismissing this case, including that:

- 1) “[T]he Auditor has yet to exercise any administrative means to obtain documents she argues CHFS has failed to provide.” TR 108;
- 2) “Nor does CHFS’s response indicate it will not participate or take any action to obstruct her investigation.” TR 115;

- 3) “The Auditor need only provide a name and CHFS will set up an interview just as it always has.” TR 161;
- 4) “We’ve never objected to her authority. We’ve never indicated we would not comply in the future with her authority.” VR 06/11/2025 at 12:19–28;
- 5) “Neither the Governor or the Cabinet has disputed any of her statutory authority,” VR 07/30/2025 at 16:30–45;
- 6) “We are not questioning [the Auditor’s] investigative authority.” *Id.* at 20:02–12.

In accepting these assertions, after Auditor Ball pointed out that Governor Beshear and CHFS never refuted her statutory investigatory authority in their briefing, the trial court specifically indicated at oral argument, “I don’t think they’re refuting it now.” VR 07/30/2025 at 08:30–09:06. And in its opinion, the trial court found, “No subpoenas have been sought, CHFS has complied with many of the Auditor’s requests, and, finally, CHFS has asserted that the Auditor ‘need only provide a name and CHFS will set up an interview just as it always has[.]’” TR 215 (citation omitted).

So the trial court, in part, based its dismissal on acceptance of Governor Beshear’s and CHFS’s representations that they weren’t challenging Auditor Ball’s statutory authority, she could interview their employees, and she could subpoena CHFS for documents. As previously explained, Auditor Ball Br. 11–13, the documents Auditor Ball asks this Court to take judicial notice of show

those inaccurate representations were all designed to distract the trial court from their obstruction of Auditor Ball's investigation outlined above.⁴

Court intervention is needed to vindicate Auditor Ball's investigatory authority.

II. Governor Beshear is a proper defendant.

Although Governor Beshear tries to distance himself from his constitutional responsibilities, Auditor Ball Br. 23, he cannot deny the following facts showing he belongs here:

- 1) He refuses to execute SB 151, misrepresenting *Fletcher* to attempt to support that refusal. TR 36–38;
- 2) CHFS, a cabinet “directly under [his] control” and that “answer[s] to” him, *Beshear v. Bevin*, 498 S.W.3d 355, 380–81 (Ky. 2016), is obeying Governor Beshear and reiterating his flawed reading of *Fletcher* while doing so. TR 9–10;
- 3) Auditor Ball has relayed, many times, that her investigation into that refusal is of *both* the Governor's Office and CHFS, TR 10–11, 40, 46, and specifically asked CHFS for Governor's Office records, TR 42;

⁴ However it paints the motion to quash proceedings, CHFS Br. 11, CHFS cannot deny that, after Auditor Ball acted on the trial court's acceptance of CHFS's representation that she “need only provide a name and CHFS will set up an interview just as it always has,” TR 215, CHFS asked the same trial court to “quash the [Auditor's] subpoenas and enter a protective order,” Auditor Ball Br. Ex. 3 at 2, 7–15, which the trial court refused to do.

- 4) Partly based on his *Fletcher* argument, CHFS refused to provide Governor’s Office records and, more generally, to continue to participate in Auditor Ball’s investigation. TR 51–52;
- 5) He has consistently substituted himself in the place of his cabinets and “independent” entities by arguing that he has an “affirmative” and “positive” constitutional duty that is “not an optional charge” that “requires” him and “only” him to “go forward and ensure that the laws are executed.” APA Sur-Reply Mot. Dismiss Ex. 1 at 21–22; Auditor Ball Br. Exs. 4–7.

In making Governor Beshear a part of this action, Auditor Ball is merely taking him at his word about his constitutional authority⁵ and recognizing his entanglement with his cabinet and its refusal to provide all responsive records, including Governor’s Office’s records. Auditor Ball has always asserted that Governor Beshear and CHFS are in lockstep in obstructing her investigation, TR 2–20 (Compl. ¶¶ 5–6, 9–10, 40–42, 46, 48, 56, 70–72, 74–78, 87–104, A–E), and provided record evidence indicating that entanglement both directly and through reasonable inferences (like the fact that Governor’s Office consultation

⁵ Nothing Governor Beshear says about *Johnson Bonding* meaningfully disputes Auditor Ball’s refutation of his reliance on that case. Auditor Ball Br. 11. Neither does he meaningfully refute Auditor Ball’s refutation, *id.*, of his reliance on *Kasey*: It doesn’t matter whether the Governor appointed the members of the board there, since oversight of the board fell to a different constitutional officer (an individual Governor Beshear has asserted does not carry his Ky. Const. §§ 69 and 81 duties). Beshear Br. 9; APA Sur-Reply Mot. Dismiss Ex. 1 at 21–22.

almost certainly happened here), TR 36–52; APA Sur-Reply Mot. Dismiss Ex. 1; Auditor Ball Br. Exs. 4, 5, 6, 7.

All of this is enough to move past the complaint stage on the assertion that Governor Beshear has injured Auditor Ball by both participating in and refusing to put an end to CHFS’s obstruction of her investigation, which this Court can redress through Auditor Ball’s requested declaratory and injunctive relief. This is not a theory that “would subject the Governor to suit” beyond what would be appropriate. Beshear Br. 12. It is simply a theory that recognizes that, coupled with his factual entanglement here, Governor Beshear’s consistent offensive use of his constitutional duties subjects him to suit when both his exercise of and failure to exercise those duties causes the obstruction of an Auditor’s Office investigation and, ultimately, harm to Kentucky’s kinship caregivers and children.

The Court should not let Governor Beshear off the hook for his actions and inaction here.

CONCLUSION

The Court should reverse and remand.

Respectfully submitted,

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WORD-COUNT CERTIFICATE

This appellant brief complies with the word limit of 3,500 under RAP 31(G)(2)(b) because, excluding the parts of the brief exempted by RAP 31(G)(5) and 15(D), this document contains 3,495 words.

/s/ Alexander Y. Magera

APPENDIX

1. Correspondence between CHFS and the federal government.