SUPREME COURT OF KENTUCK
2024-SC-0228-D
(2022-CA-0837, 2022-CA-0838, & 2022-CA-0991)

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

v.

Appeal from Jefferson Circuit Court
22-CI-002228

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

BRIEF FOR APPELLANTS GOVERNOR ANDY BESHEAR AND COMMISSIONER DAVID KAREM

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was filed with the Clerk, Supreme Court of Kentucky, through the Court's electronic filing system on April 14, 2025, and served through electronic mail upon Matthew F. Kuhn, Solicitor General, Office of Attorney General, 700 Capital Ave., Ste. 118, Frankfort, KY 40601, matt.kuhn@ky.gov, *Counsel for Attorney General Russell Coleman*; Gregory A. Woosley, Legislative Research Commission, 700 Capitol Ave., Ste. 300, Frankfort, KY 40601, greg.woosley@lrc.ky.gov, *Counsel for Legislative Research Commission*; Jennifer Scutchfield; Michael R. Wilson, Office of Secretary of State, 700 Capital Ave., Ste. 152, Frankfort, KY 40601, jscutchfield@ky.gov, michael.wilson@ky.gov, *Counsel for Secretary of State Michael Adams*; Heather L. Becker, Kentucky Department of Agriculture, 105 Corporate Dr., Frankfort, KY 40601, heatherl.becker@ky.gov, *Counsel for Commissioner of Department of Agriculture Jonathan Shell*; Sam P. Burchett, Robert L. Gullette, III, Office of Kentucky State Treasurer, 1050 U.S. Hwy. 127 South, Ste. 100, Frankfort, KY 40601, sam.burchett@ky.gov; robert.gullette@ky.gov, *Counsel for Kentucky State Treasurer Mark H. Metcalf;* Susan Stokley Clary, Executive Branch Ethics Commission, 1025 Capital Center Dr., Ste. 104, Frankfort, KY 40601, susan.clary@ky.gov, *Counsel for Executive Branch Ethics Commission*; Alexander Y. Magera and Maira Gomez, Office of the Auditor of Public Accounts, 209 St. Clair Street, Frankfort, KY 40601, alex.magera@ky.gov; maira.gomez@ky.gov;, *Counsel for Auditor Ball,* and mailed to Hon. Jennifer Bryant Wilcox, Jefferson Circuit Court, Division 8, 700 W. Jefferson St., Louisville, KY 40202, and to the Clerk, Court of Appeals, 669 Chamberlin Ave., Ste. B, Frankfort, KY 40601, via U.S. Mail.

I also certify that the record was not withdrawn before the filing of this brief.

/s/ Mitchel T. Denham
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INTRODUCTION

This case raises the question of whether Kentucky courts will give meaning to Sections 69 and 81 of the Kentucky Constitution. During the 2022 Regular Session, the General Assembly passed House Bill 334, legislation that would have abolished the Executive Branch Ethics Commission, an executive board that executes the Executive Branch Code of Ethics, and replaced it with a new Commission with the majority of members appointed by officers other than the Governor. HB 334 also prevents the Governor from removing any member he does not appoint, even for cause. The Circuit Court correctly held HB 334 unconstitutional and permanently enjoined its enforcement. The Court of Appeals erroneously reversed, holding that a section of the Kentucky Constitution – Section 81 – is an "***idle and meaningless phrase.***" It then misreads this Court's precedent to similarly render meaningless the Governor's duty to take care that the laws be faithfully executed and his supreme executive power as Chief Magistrate.

The destructive ramifications of the Court of Appeals' Opinion are clear. If it stands, it would allow the General Assembly to control the executive branch by moving executive power to executive officials other than the Governor whenever they disagree with an executive branch action. This Court should reverse the Court of Appeals and reinstate the judgment of the Jefferson Circuit Court in order to give meaning to all parts of the Constitution and prevent the General Assembly's continued unconstitutional and politically-motivated reorganization of executive branch power.

STATEMENT CONCERNING ORAL ARGUMENT

This Court has designated this case with important constitutional questions for oral arguments, and the Appellants look forward to presenting their case to the Court.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In one of its many power grabs, on April 6, 2022, the General Assembly passed HB 334 by overriding the Governor's veto. (R. 74-96.) The bill makes sweeping changes to the Executive Branch Ethics Commission ("Commission"). Specifically, it takes away the Governor's constitutional power and responsibility to appoint the majority of the Commission's members. (*Id.*) Under the bill, all other statewide constitutional officers except the Lieutenant Governor – the Treasurer, Auditor, Commissioner of Agriculture, Secretary of State, and Attorney General – would collectively have that power constitutionally reserved for the Governor. (R. 24-44.) This is not only a dramatic shift from a longstanding statute that governed the Commission's composition, but it upends the Governor's constitutional powers to the point of rendering them meaningless and violates the Kentucky Constitution's bedrock separation of powers provisions.

I. The Executive Branch Ethics Commission.

The Executive Branch Ethics Commission enforces the Executive Branch Code of Ethics ("Code" or "Code of Ethics"), which exists so "that a public servant shall work for the benefit of the people of the Commonwealth." KRS 11A.005(1). The Code of Ethics began more than 30 years ago in an executive order from then-Governor Brereton Jones in response to revelations from the BOPTROP scandal, which involved an FBI investigation of the actions of several legislators in accepting bribes to influence votes on horse racing and trot racing. (R. 217.) Shortly after taking office, Governor Jones issued Executive Order 91-2 to set standards for ethical conduct for executive branch employees. (*Id.*; *see also* R. 45-50.) In 1992, the legislature ratified the Code in KRS Chapter 11A and empowered the Executive Branch Ethics Commission to enforce it. (R. 217.)

The Code of Ethics prohibits certain activities by executive branch employees, former employees, and those interacting with employees. In KRS 11A.020, the Code enumerates prohibitions on self-dealing by public servants. KRS 11A.030 provides guidelines for considering abstention in official decisions where a potential conflict of interest exists. KRS 11A.040 sets out prohibitions on officers and public servants related to self-dealing, post-state employment, and financial arrangements with the state. For violations of these provisions, the Code empowers the Commission to investigate, issue subpoenas, hold hearings, make findings, and issue fines. KRS 11A.080-110. All state officers and public servants are subject to the Code of Ethics. KRS 11A.010. This includes the Governor, the Lieutenant Governor, statewide officials under Section 91 of the Kentucky Constitution, all executive branch employees, full-time, non-seasonal contractors, and all state agencies. KRS 11A.010(9). The Code also applies to executive branch lobbyists. KRS 11A.010(11); KRS 11A.201.

In enforcing the Code, the Commission has the authority to: (1) issue an order requiring a purported violator to cease and desist from continuing the alleged violation; (2) issue an order requiring the violator to file reports; (3) publicly reprimand the violator; (4) recommend to the violator's appointing authority that the violator be removed from office; and (5) issue an order requiring the violator to pay a civil penalty of not more than five thousand dollars for each violation. KRS 11A.100. The Commission may also promulgate administrative regulations regarding its procedures and operations, KRS 11A.110(3), and issue formal advisory opinions, KRS 11A.110(1). The party requesting an advisory opinion may rely on it in the event of an alleged violation of the Code. *Id.* The advisory opinions

can also bar a public servant from engaging in a course of conduct the Commission believes violates the Code.

The importance of the Commission's charge to the ethical operations of state government cannot be understated. Simply put, the Commission operates as a regulatory body of the executive branch to ensure its employees operate in an ethical manner. Since its inception 34 years ago, the Governor has maintained the authority to appoint **all** five Commission members and remove any member for cause. KRS 11A.060(7).

In 2008, then-Governor Steve Beshear issued Executive Order 2008-454, allowing the Attorney General and the Auditor of Public Accounts to nominate members for two of the Governor's appointments to the Commission. (R. 258-266.) Former Governor Matt Bevin rescinded those provisions of Executive Order 2008-454. (R. 267-269.) After taking office, Governor Andy Beshear again sought to include others in the nominating process. After supporting statutory changes to again allow the Attorney General and Auditor to make nominations for appointments, which the General Assembly did not pass, the Governor issued Executive Order 2020-423, reorganizing the Commission to restore the nomination process allowing input from other constitutional officers while still complying with his constitutional duty to ensure that the laws are faithfully executed. (R. 219.) In that same executive order, the Governor appointed Commission members from the recommendations of the Attorney General and also appointed Appellant David Karem. (R. 220, 53-57.)

II. The General Assembly Passes HB 334, Stripping the Governor of the Ability to Appoint a Majority of the Commission Members.

Through the enactment of HB 334, the legislature sought to change the membership of the Commission and strip the Governor of his power to appoint a majority of the

members. House Bill 334 would expand the Commission from five members to seven. (R. 233-238.) It would terminate the existing membership, requiring appointment of seven new members. (*Id*.) Section 91 officers would appoint five of these seven new Commission members. (*Id*.) The Governor would appoint the remaining two members. (*Id*.) The bill gives the Lieutenant Governor zero appointments.

Initially, under HB 334 the State Treasurer would appoint a member for a one-year term, the Auditor would appoint a member for a two-year term, the Governor and the Commissioner of Agriculture would each appoint a member for a three-year term, and the Governor, Secretary of State, and Attorney General would each appoint a member for a four-year term. (*Id*.) After the initial appointments, all appointments would be for staggered terms of four years. (*Id.*)

House Bill 334 would also change the procedure for the removal of members for cause. *Id*. Under the bill, the Governor would no longer have the ability to remove all members of the Commission for cause, such as substantial neglect of duty or inability to discharge the duties of office. (*Id*.) Instead, the officer who appoints each member would have the exclusive authority to remove that member for cause. (*Id.*)

Under HB 334, absent the permanent injunction currently in place, a Commission whose majority is not appointed by the Governor will control whether the Executive Branch Code of Ethics is enforced. All of the current members, including Appellant David Karem, will immediately lose their posts when HB 334 becomes effective. Because HB 334 usurps the Governor's supreme executive power under Section 69 of the Kentucky Constitution by not providing the Governor with a majority of the appointments to the Commission and prevents him from carrying out his duty to take care that the laws are

faithfully executed in violation of Section 81 of the Kentucky Constitution, the Governor vetoed HB 334. (R. 248-252.) The General Assembly overrode the veto.

III. The Governor and Commissioner Karem Challenge the Constitutionality of HB 334, and the Circuit Court Declares it Unconstitutional and Permanently Enjoins its Enforcement.

To address the General Assembly's unconstitutional actions, the Governor and Karem filed suit in Jefferson Circuit Court on May 5, 2022, against the Attorney General, the Commissioner of Agriculture, the Secretary of State, the State Auditor, the State Treasurer, and the Legislative Research Commission ("LRC").[1] (Verified Complaint, R. 1-23, Appendix, Tab 2.) The Governor and Karem also sought a temporary injunction to keep the bill from taking effect on July 15, 2022, its effective date.

The case proceeded quickly through the trial court. The LRC filed a Motion to Dismiss based on legislative immunity. (R. 307-330.) Following the Governor and Karem's Response, the Court denied the LRC's Motion. (R. 424-435; R. 597-600.) The Governor and Karem filed a motion for summary judgment, (R. 214-232), and the and the constitutional officers filed a competing motion for summary judgment. (R. 321-330; R. 321-330.) On July 11, 2022, the Jefferson Circuit Court granted summary judgment in favor of the Governor and Karem. (Circuit Court Order, July 11, 2022, R. 531-537, Appendix, Tab 3.) The trial court held HB 334 unconstitutional and void and permanently enjoined it. (*Id*. at R. 536.) In its Opinion and Order striking down HB 334, the trial court held:

> In order to carry out the constitutional duty to take care that the laws of Kentucky are faithfully executed, a Governor must have sufficient control over the mechanisms through which that responsibility is effected. . . A

[1] The constitutional officers were named in their official capacities. Since the action was initiated, aside from the Secretary of State, the officeholders have changed.

> Governor's ability to do so depends on his or her ability to appoint the commissioners, supervise their day-to-day activities, and where appropriate, remove them. HB-334 so severely divests, diminishes, and diverts the current Governor's ability to do so that it functionally, practically, and effectively prohibits him from ensuring (i.e. "taking care") that the Executive Branch Code of Ethics (i.e. "the law") is faithfully executed and cedes that authority and control to constitutional officers who are not charged with that same constitutional duty. In so doing, it improperly impedes his supreme executive authority as Chief Magistrate and, functionally, practically, and effectively creates a superior executive body (i.e. one over which the Governor has no control). As such, HB-334 is unconstitutional.

(*Id*. at 535.)

IV. The Court of Appeals Reverses, Holding that the Governor's Constitutional Powers Are "Meaningless."

The constitutional officers filed notices of appeal. (R. 538-542; R. 562-567.)[2] Shortly after, the constitutional officers filed a motion for a stay of the permanent injunction against HB 334. (R. 576-582.) The trial court denied the motion. (R. 601-605, Appendix, Tab 4.)

The constitutional officers filed a joint motion for interlocutory relief in the Court of Appeals pursuant to then-CR 65.08. (R. 648-725.) A panel of the Court of Appeals denied the motion, writing that it "agree[d] with [the] reasoning of the trial court" when it denied the constitutional officers' request for relief. (*See Cameron v. Beshear*, 2022-CA-0837; 2022-CA-0838, Order Denying Interlocutory Relief, at 8, (Ky. App., Jan. 26, 2023), Appendix, Tab 5.) The Court of Appeals also noted that the constitutional officers failed to "provid[e] evidence or arguments that the current Commission has abused its powers or made decisions detrimental and irreversible to the operation of the Commission or the

[2] The Attorney General, Secretary of State, State Auditor, and State Treasurer appealed in Case No. 22-CA-0837. The Commissioner of Agriculture filed a separate appeal in case No. 22-CA-0838. Those appeals were heard together at the Court of Appeals.

people it oversees." (*Id*. at 10.) The constitutional officers did not seek relief from that Order in this Court.

After briefing and oral arguments, the Court of Appeals issued its Opinion and Order reversing on March 1, 2024. (Opinion and Order, Appendix, Tab 1) In reversing, the Court of Appeals made several erroneous holdings. First, it misapplied the cardinal rules of constitutional construction and misunderstood the holding of *Franks v. Smith*, 142 S.W 484 (1911), to find that Section 81 of the Kentucky Constitution is "idle and meaningless." (*Id.* at 7-13.) This holding cannot stand under both the basic principles of constitutional construction and the purpose, intent, and history of the Take Care Clause.

Second, the Court misinterpreted and misapplied *Brown v. Barkley*, 628 S.W.2d 616, 622 (Ky. 1982), to render the Governor's supreme executive authority under Section 69 meaningless. (Opinion, at 20). The Court ignored the holding of *Legislative Research Comm'n by and Through Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984) ("*LRC v. Brown"*), which warned that such an interpretation of *Barkley* would be tantamount to repealing Kentucky's strong separation of powers doctrine. (*Id.* at 13-15.)

Finally, the Court misconstrued *Rouse v. Johnson*, 28 S.W.2d 745 (Ky. 1930), interpreting it to mean that Section 93 authorizes the General Assembly to allow an executive other than the Governor to appoint a majority of members of boards that operate as mechanisms for the Governor to execute the law. (*Id*. at 11.) In doing so, it ignored this Court's holding in *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 472-73 (Ky. 1998),

that interprets Section 69 to require the Governor to appoint members to these executive branch entities.[3]

The effect of the Court of Appeals' opinion is stark and endlessly troubling to the constitutional structure of state government. It makes Sections 69 and 81 of the Kentucky Constitution hollow, as it allows the General Assembly to place the responsibility of executing nearly every law with boards that are not subject to or governed by the Governor's supreme executive authority. If affirmed, under the opinion the legislative branch could restructure the entire executive branch so that its operations are conducted by various boards and commissions appointed by someone other than the Governor or place the execution of any law under the supervision of any inferior constitutional officer. In short, the General Assembly could ignore the constitutional role created for the Governor, a reality that is "tantamount to []repealing Sections 27 and 28." *LRC v. Brown*, 664 S.W.2d at 912.

The Governor and Karem petitioned the Court of Appeals for rehearing, which was denied. (Order Denying Petition for Rehearing, April 22, 2024, Appendix, Tab 6.) This Court then granted the Governor and Karem's Motion for Discretionary Review.

This Court must give meaning to Sections 69 and 81 of the Kentucky Constitution and reverse the Court of Appeals to ensure the popularly elected Governor may fulfill his constitutional role regardless of the party alignments of the General Assembly and the inferior constitutional officers. A different result would permit the General Assembly to

[3] The LRC filed a separate appeal before the Court of Appeals based on legislative immunity. *See Legislative Research Comm'n v. Beshear*, 2022-CA-0991. The Court of Appeals also reversed the trial court's now-moot denial of legislative immunity based on *Stivers v. Beshear*, 659 S.W.3d 316 (Ky. 2022). (Opinion, at 12).

drastically shift executive power between executive offices every few years depending on who holds those offices.

ARGUMENT

House Bill 334 violates Sections 69, 81, and the separation of powers of the Kentucky Constitution because it usurps the Governor's role as Chief Magistrate with the supreme executive power of the Commonwealth and obstructs his ability to take care that the laws are faithfully executed – here, the Code of Ethics under KRS Chapter 11A. By stripping the Governor of the power to appoint and remove the majority of members of a board that executes the law, HB 334 eliminates the Governor's supreme authority over the executive branch in favor of other constitutional officers who are not the Chief Magistrate. This violates Section 69 of the Constitution. The bill also prevents the Governor from fulfilling his duty to take care that the laws are faithfully executed under Section 81 of the Constitution – a duty that is only his – by removing his ability to ensure the Commission enforces the Code of Ethics. This Court should reverse the Court of Appeals and reinstate the judgment of the Jefferson Circuit Court finding HB 334 unconstitutional and permanently enjoining its enforcement.

I. Standard Of Review.

This case presents pure questions of law as to the constitutionality of HB 334. "Questions of constitutional and statutory construction are reviewed *de novo* by this Court, and [] no deference [is given] to the lower courts." *Bluegrass Trust for Historic Preservation v. Lexington Fayette Urban Cty. Gov't Planning Comm'n*, 701 S.W.3d 196 (Ky. 2024) (citing *Louisville and Jefferson Cty. Metro. Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 535 (Ky 2007)); *see Teco/Perry Cty. Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019).

II. House Bill 334 Violates The Governor's Powers And Duties Under Sections 69 And 81 Of The Kentucky Constitution.[4]

The Kentucky Constitution only grants executive *powers* to one statewide officer: the Governor. Of those powers bestowed on him, Section 69 declares:

> 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.'

KY. CONST. § 69. This Court has understood this to mean that no executive authority may exist in Kentucky's constitutional scheme that is greater than the Governor. *See Barkley*, 628 S.W.2d at 622 n. 12.

Significantly, Section 81 empowers only the Governor, stating that he "shall take care that the laws be faithfully executed." KY. CONST. § 81. Known as the "take care clause," this Court recognizes that "[u]nder Section 81 the Governor has the positive duty to go forward and 'take care that the laws be faithfully executed'" such that a legislative act that operates to prevent the Governor from faithfully executing a law would violate Section 81. *LRC v. Brown*, 664 S.W.2d at 919-20 (holding that statutes preventing the Governor from promulgating administrative regulations violated Section 81).

The Constitution contains other specific powers of the Governor. *See* KY. CONST. §§ 75-80. Notably, the Governor's executive powers also include the authority to fill vacancies:

> [The Governor] shall have the power, except as otherwise provided in this Constitution, to fill vacancies by granting commissions, which shall expire when such vacancies shall have been filled according to the provisions of this Constitution.

[4] The arguments in this section were preserved below at R. 1-23; R. 222-230.

KY. CONST. § 76. Like Sections 69 and 81, the Governor alone is assigned the constitutional role of appointing executive branch officials.

This Court has outlined cardinal rules of construction to interpret constitutional provisions. First, the language of these provisions must be given their plain meaning so as not "to thwart the deliberate purpose and intent of the framers." *Westerfield v. Ward*, 599 S.W.3d 738, 737 (Ky. 2019) (cleaned up). *See also State Journal Co. v. Commonwealth*, 160 S.W.2d 145, 149 (Ky. App. 1942) (Constitutional provisions are "construed in the light of their purpose and [] given a practical interpretation so that the plainly manifest purpose of those who created them may be carried out.") (quoting Am. Juris. 11, pp. 674, 675). "[I]t is to be presumed that in framing the constitution great care was exercised in the language used to convey its meaning and as little as possible left to implication." *Westerfield*, 599 S.W.3d at 737. In addition, "[n]o one provision of the Constitution is to be separated from all others and considered alone" and "every constitutional provision should be construed, where possible, to give effect to every other constitutional provision." *Runyon v. Smith*, 121 S.W.2d 521, 522 (Ky. 1948). Read together, Sections 69, 81, and 76 establish a supreme executive to execute the law, in part, through the appointment, removal, and supervision of executive branch officials.

In Section 91, the Constitution calls for certain "inferior" constitutional officers – the Treasurer, the Attorney General, the Secretary of State, the Commissioner of Agriculture, and the State Auditor. However, Sections 69 and 81 prohibit these officers from possessing "supreme executive power" or the positive constitutional duty to take care that the laws be faithfully executed. *See Barkley*, 628 S.W.2d at 622 n. 12. They have no power under the Constitution, only duties and responsibilities that are as prescribed by

law and must remain inferior to the Governor's constitutional role. KY. CONST. § 91. In other words, the General Assembly may provide these officers with duties and responsibilities *under* the law, but Sections 69 and 81 prohibit the General Assembly from reassigning them the power to execute the law held by the Governor or to elevate them above the Governor. *See Barkley*, 628 S.W.2d at 622 (the transfer of an executive function from one executive agency to another is an executive action).

The Court of Appeals failed to follow the cardinal rules of construction and interpretation by holding that Section 81 is an "idle and meaningless phrase" and subverted the holding of *Barkley* and the purpose of Section 69 by allowing the General Assembly to strip the Governor of appointment powers over officials that execute the law and reassign that executive power to inferior constitutional officers. The Court of Appeals' decision is fundamentally flawed and cannot be squared with the purpose of the framers as expressed through the plain language of Sections 69 and 81. If Sections 69 and 81 are read to mean nothing, the General Assembly could deprive that office of nearly any executive power and subject the oversight of the executive branch to the political whims of the moment.

A. House Bill 334 Subverts the Governor's Supreme Executive Authority.

The plain language of Section 69 is clear and not optional: it commands that the Governor possess the supreme executive power. *See Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 89 (Ky. 2018) ("[S]hall is a word of command and … must be given a compulsory meaning.") (quoting *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 795-96 (Ky. 2003)). By its plain language, Section 69 commands two things: 1) a supreme executive authority must exist; and (2) that authority must reside in the Office of the Governor. KY. CONST. § 69. House Bill 334 violates both of these commands. It dilutes

the Governor's authority by no longer allowing him to appoint a majority of members to the Commission, thereby depriving him of his supreme executive authority over execution of the Code of Ethics and creating a Commission not subject to the Governor's supreme executive authority. It reassigns that authority to five inferior constitutional officers, thereby either eliminating *any* supreme authority over execution of the Code or, accepting the current political reality, assigning supreme authority collectively to the inferior constitutional officers politically-aligned with the majority of the General Assembly. (*See* R. 233-38 (providing all inferior constitutional officers but the Lieutenant Governor with appointment authority).) Under either view, Section 69 is rendered meaningless.

Section 69 prohibits assigning the inferior constitutional officers the power to oversee the execution of law. In fact, Section 91 only creates their positions, but gives them no powers except "such as may be prescribed by law[.]" KY. CONST. § 91. *See also Barkley*, 628 S.W.2d at 621 (noting it interesting that the Constitution refers to the Governor's powers, but the "duties" and "responsibilities" of the Section 91 officers); *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820 (Ky. 1942) (holding the General Assembly may withdraw powers from the Attorney General and assign them to others). Thus, although the legislature may prescribe certain executive tasks to these officers, *e.g.* KRS 41.160 (prohibiting money be paid from Treasury except by the check of the Treasurer upon a state depository), it cannot reassign them powers belonging only to the Governor, just as the Constitution would prohibit the General Assembly from assigning these officers judicial or legislative power, *see Ex parte Auditor of Public Accounts*, 609 S.W.2d 682, 686 (Ky. 1980) (holding the legislature could not give the State Auditor power to impede on the judiciary in violation of Section 109). If it means anything,

Section 69 prohibits these inferior constitutional officers from assuming the Governor's supreme constitutional authority to execute the law. *See Barkley*, 628 S.W.2d at 622. House Bill 334, in conflict with Section 69, subverts the Governor's supreme constitutional authority to oversee execution of the Code of Ethics and ensure that law is being faithfully executed through the appointment of Commission members in favor of the other constitutional officers.

The Governor exercises his supreme executive authority partly through his appointment authority of officials who execute the law. While the General Assembly has created a framework of administrative agencies, including administrative boards and commissions, that regulate and execute the law, oversight of their decision-making is performed by the supreme executive. *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 820 (Ky. 1992) ("Decisionmaking performed by an administrative agency is an executive function."). And simply because the General Assembly may create a framework of administrative bodies to assist the Governor does not mean that the General Assembly may create a framework that removes these administrative bodies from the Governor's oversight by reallocating appointment authority. *See LRC v. Brown*, 664 S.W.2d at 923-24 ("The statutes…which direct the Governor to make appointments from a list submitted to him…are…invalid because they restrict and subvert the Governor's executive prerogatives to appoint without limitation by the General Assembly."). *See also Barkley*, 628 S.W.2d at 622 ("[T]he transfer of an existing, legislatively-created function from one executive agency or department to another is essentially an executive action[.]"). Section 69 requires the Governor to have the ability to appoint, oversee, and remove a majority of members of the agencies, boards, and commissions within the executive branch that implement the

Commonwealth's laws, including the Executive Branch Ethics Commission. *Id.* House Bill 334 deprives the Governor of sufficient control over the new Commission such that he can no longer exercise the supreme executive power that Section 69 grants exclusively to him.

The Governor's Section 69 authority protects his ability to appoint executive officials that execute the laws. In *Yeoman v. Com., Health Policy Bd.*, the General Assembly passed wide-ranging health care reforms, including the creation of a Health Policy Board and Health Purchasing Alliance, each of which consisted of five members appointed by the Governor. 983 S.W.2d 459, 472-73 (Ky. 1998). The bill was challenged based on various provisions of the Kentucky Constitution, including the separation of powers provisions in Section 27 and 28, as an illegal delegation of executive authority. *Id.* at 271-72. The appellant there claimed that the Governor could not seek advice from a non-profit foundation when making appointments to the Board. *Id.* In considering the challenge, the Court stated:

> [T]here is a section of the constitution which this Court believes is relevant to the matter at hand: "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.'" Ky. Const. § 69. This section clearly grants the executive power of the Commonwealth exclusively to the Governor. Any law which infringes on the Governor's executive power would be violative of § 69.

Id. at 472.

The Court held that the legislation did not violate Section 69 *because* the Governor appointed all five members to the Health Policy Board and all five members of the Health Purchasing Alliance. *Id.* Importantly, the Court discussed the Governor's ability to exercise his Section 69 power. The Court stated:

> There is no limitation, constitutional or otherwise, on whose advice the Governor is to seek in deciding who to appoint to an official position.

> Equally important, there is no floor or ceiling on how much weight a Governor is to put on a certain person's advice on a given matter.
>
> As long as it is the Governor who actually exercises the power in question, then no improper delegation can occur.

Id. at 472 n. 11. In other words, *Yeoman* holds that under Section 69, it is the Governor – and only the Governor – who must appoint members to boards and commissions.

While the General Assembly may establish policy by providing for certain criteria, qualifications or affiliations of executive branch board members, Section 69 operates as the check by placing ultimate appointment authority with the Governor. In *Kentucky Association of Realtors, Inc. v. Musselman*, a law required the Governor to appoint members of the Real Estate Commission from a list provided by the Kentucky Association of Realtors. 817 S.W.2d 213, 214 (Ky. 1991). This Court found the nomination process did not violate Section 69 because it did not "compel the Governor to appoint someone from the list." *Id.* He could still reject all of the names nominated "until provided with a list that includes a person whom *the Governor* deems suitable for appointment to the office." *Id.* (emphasis added). Once again, the constitutionality of the bill turned on the Governor's ability to ultimately exercise his appointment power under Section 69. *Id*. *See also Elrod v. Willis*, 203 S.W.2d 18, 20-21 (Ky. 1947) (The Governor maintained final authority to appoint from or reject a list provided by the League of Kentucky Sportsmen for appointment to the Game and Fish Commission.).

The Court of Appeals ignored this specific purpose of Section 69 to reach a result that renders it as meaningless as it expressly found Section 81 to be. While the General Assembly did not reassign the power to appoint a majority of a board that executes the law to just one other inferior constitutional officer as it did in *Shell v. Beshear*, 2024 WL

1005023 (Ky. App. Mar. 8, 2024)[5], here it sought to avoid the mandate of Section 69 by reassigning the Governor's supreme executive authority to all of the other inferior constitutional officers, excepting only the Lieutenant Governor. The Court of Appeals recognized the violation of Section 69 in *Shell*, but here it failed to give meaning to the Supreme Court's admonition in *Barkley* that "it is not possible for the General Assembly to create another executive officer *or officers* who will not be subject to" the Governor's supreme executive power. 628 S.W.2d at 622. The Court of Appeals incorrectly relied solely on the qualifying statement in *Barkley* that the legislature has the prerogative of withholding executive powers from the Governor by assigning them to the officers named in Section 91. *See id.*

Unlike *Yeoman* and *Musselman, Barkley* does not involve the appointment of members to executive branch boards and commissions. *Barkley* involved then-Governor John Y. Brown's attempt through an executive order to transfer "various functions, personnel and funds from the Department of Agriculture" to the newly-created Energy and Agriculture Cabinet. *Id.* at 618. This Court found that the Governor lacked the authority to transfer these functions under the reorganization statute at the time, which was the centerpiece of the litigation. *Id.* After deciding the issue, the Court discussed in dicta the interplay between the constitutional powers of the Governor and the duties the General Assembly could prescribe to Section 91 officers. *Id.* at 621. In holding that the General Assembly could prescribe certain duties and responsibilities to the Department as a

[5] *Shell v. Beshear* involved the General Assembly stripping the Governor of his ability to appoint the majority of members to the Kentucky State Fair Board in House Bill 518 (R.S. 2021). As here, the Governor challenged the constitutionality of HB 518. That case is also pending before this Court, with discretionary review granted the same day it was granted in this case. *Shell v. Beshear*, 2025-SC-0254; 2025-SC-0256.

receptacle for executive authority, the Court clearly held that the Section 91 officers only have such powers as prescribed by the General Assembly. *Id.* at 621-622. The Governor, however, is different. While this Court discussed the General Assembly's ability to diffuse executive duties and responsibilities, it provided an important limiting principle:

> 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.

Id. at 622. Then, to remove all doubt, this Court stated that "Sec. 69 makes it clear that these [constitutional] 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. *Barkley* does hold that the General Assembly may assign executive powers to other constitutional officers, but such assignment cannot violate Section 69. Section 69 provides an express "power" in the Constitution, the plain language of which cannot be ignored.

In *LRC v. Brown*, this Court rejected the expansive reading of *Barkley* that the Court of Appeals adopted in this case. 664 S.W.2d at 913. *LRC v. Brown* involved the creation of numerous boards and commissions whereby the General Assembly appointed its own members to boards and commissions, provided its own members with the power to appoint, and otherwise took a litany of acts that infringed on the powers of the Governor. *Id*. It was argued that *Barkley* gave the legislature all residual powers not otherwise defined in the Constitution. *Id*. In rejecting this argument, this Court wrote:

> Nothing in *Barkley* can be construed to deny the existence of the doctrine of separation of powers and the equality of the three coparceners in government. Implicit in *Barkley* is that the General Assembly as the legislative branch, has all powers which are solely and exclusively legislative in nature. To argue that any other power is given to the General Assembly simply won't wash.

Id.

The constitutional officers' argument below that the Court of Appeals erroneously adopted would do just that, allowing the General Assembly to use Section 93 to usurp the Governor's authority through the creation of an independent board outside of his appointment authority. Of course, if the power to appoint is executive in nature, as all parties agree, and the supreme executive authority resides *only* with the governor, then any law that infringes on that authority cannot stand.[6] *LRC v. Brown* put an end to a similar indirect attempt to expand *Barkley* to usurp the Governor's authority 36 years ago. To now permit it to go forward would "destroy the separation of powers of government . . .," *LRC v. Brown*, 664 S.W.2d at 914 (quoting *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922), and would be "tantamount to []repealing Sections 27 and 28." *Id.* at 912.

The Court of Appeals' expansive misreading of *Barkley* would allow the legislature to give the officers named in Section 91 all of the Governor's power, leaving the office of the Governor an empty shell. Such an outcome would disregard Section 69 of the Kentucky Constitution and ignore one of the primary reasons for the 1890 Constitutional Convention: to curb legislative power over the executive branch. *See LRC v. Brown*, 664 S.W.2d at 912. While *Barkley's* analysis seeks to balance the Governor's Section 69 and 81 powers with the General Assembly's ability to prescribe certain duties to the Section 91 constitutional officers, no court has ever held, until the Court of Appeals here, that the General Assembly may completely strip the Governor of his supreme executive authority to execute the law in favor of other Section 91 officers,

[6] *See also LRC v. Brown* for discussion of the history of Kentucky's appointment power jurisprudence where a similar argument was made in order to attempt to revise *George v. Sinking Fund*, 47 S.W. 779 (Ky. 1898), which was overruled by *Pratt* and *Sibert. LRC v. Brown*, 664 S.W.2d at 920-924.

leaving Section 69 meaningless. (Opinion, at 25-28.) The Circuit Court correctly acknowledged that the legislature had "functionally, practically, and effectively create[d] a superior executive body (i.e. one over which the Governor has no control)." (R. 538-542.)

The Commission is an executive regulatory agency that enforces the laws on behalf of the Chief Magistrate. *Ky. Exec. Branch. Ethics Comm'n v. Atkinson*, 339 S.W.3d 472, 474 (Ky. App. 2010) ("The Commission is granted statutory authority to enforce provisions of the Executive Branch Code of Ethics."). *See also* KRS 11A.080. It enforces the Code of Ethics as to public servants, *see* KRS 11A.020, executive branch officers and candidates for office, *see* KRS 11A.050, and lobbyists, *see* KRS 11A.201-.246. It includes wide-ranging authority to promulgate rules, conduct investigations, hold hearings, issue subpoenas, advise on the law, make public findings of violations, order enforceable cease and desist letters, issue fines, and refer for prosecution. KRS 11A.080-110. House Bill 334 eliminates the Governor's power to appoint the majority of members of the Commission, and it takes away the Governor's power to remove members for cause. (R. 233-238.) Moreover, after his initial appointments, the Governor must wait three years before he may appoint another member, while other executive officers will appoint new members in the interim. (R. 24-44.)

Given the Commission's role as an agency that assists the Governor in enforcing and executing the law, oversight of the Commission – through appointment and removal of its members – is not an executive task or responsibility that may be reassigned from the Governor to an inferior constitutional officer. Unlike the laws in *Yeoman* and *Musselman*, under HB 334, the Governor retains no discretion to appoint the majority of the

Commission and is without any authority to remove Commission members appointed by others that fail to enforce the Code of Ethics. If permitted to take effect, HB 334 would render Section 69 meaningless: The Governor would not be the supreme executive authority as to enforcement of the Code of Ethics, the Commission would not be subject to a supreme executive authority, and the inferior constitutional officers would control more appointments to the Commission than the Governor. Section 69 exists principally to prevent such reassignment of executive authority to inferior constitutional officers. If this Court were to find HB 334 does not violate Section 69, there is no end to the reassignment of executive power it would permit the General Assembly to undertake. As a result, this Court must give Section 69 meaning and find HB 334 unconstitutional.

B. House Bill 334 Infringes on the Governor's Duty to Take Care that the Laws Be Faithfully Executed.

House Bill 334 also violates Section 81 of the Kentucky Constitution because it deprives the Governor of the ability to appoint a majority of members of the Commission to faithfully execute Kentucky's Code of Ethics and to remove any member who fails to execute the law.

Section 81 of the Kentucky Constitution *requires* that the Governor – and only the Governor – "**shall** take care that the laws be faithfully executed." KY. CONST. § 81 (emphasis added). Like Section 69, this is an affirmative duty and responsibility placed on the Governor by the Constitution. By its plain language, this power cannot be taken from him. *See Bevin*, 563 S.W.3d at 89 ("[S]hall is a word of command and … must be given a compulsory meaning."). Far from an "idle and meaningless phrase," *LRC v. Brown* recognized that the Take Care Clause imparts a "positive duty" on the Governor to "go forward" and ensure the laws are executed. 664 S.W.2d at 919. By its plain language, this

is not an optional charge, and it cannot be removed by the General Assembly. *See Franks v. Smith*, 134 S.W. 484, 487 (Ky. 1911) ("The power thus lodged in the Governor is extensive [and] unrestrained[.]"); *Myers v. United States*, 272 U.S. 52, 123 (1926) ("He shall take care that the laws be faithfully executed are sweeping words.") (quoting 2 Bancroft, History of the Constitution of the United States, 192).

1. Contrary to the Court of Appeals' misinterpretation of *Franks v. Smith*, Section 81 of the Constitution must have meaning.

Soon after the adoption of the current Constitution, Kentucky's then-highest court acknowledged the Governor's authority to ensure that the laws are faithfully executed under Section 81 by calling the state's militia into active service. *Franks v. Smith*, 134 S.W. 484 (Ky. 1911). *Franks* involved a claim for damages brought by a private citizen against members of the state militia after his arrest. *Id.* Kentucky State Guard Major Basset had general orders from the Governor to command the militia then in western Kentucky, and on a night in 1908 "detail a squad of men [] to prevent [] any trouble" from a "raid of armed men known as 'night riders.'" *Id.* During the ensuing encounter, Smith was injured and brought action against members of the militia. *Id.* In seeking to avoid liability, the militiamen claimed they were acting pursuant to the orders of their commanders and under the authority of the Governor. *Id.* at 486. However, Smith argued that the Governor did not have the authority to order the militia into active service unless requested by local civil authorities, which had not been done. *Id.* Thus, the sole and limited constitutional question before the Court was whether the Governor had the authority to call the militia into active service and direct their service without being requested to do so by a civil officer of any city, town, or county. *Id.*

In this context, the Court addressed the power of the Governor to order the state's militia into active service. *Id.* at 485. Consistent with the cardinal rules of construction, the Court sought to harmonize the relevant sections of the Kentucky Constitution. *Franks* held that Sections 69, 75, and 81 provide that "the Governor is the chief civil officer of the commonwealth, [] is charged with the duty of taking care that the laws of the state are faithfully executed," and that the militia "shall be at all times in strict subordination to [the Governor]." *Id.* at 487. Importantly, in holding that local civil authorities could not supersede the Governor's authority, the *Franks* court recognized that each of these constitutional powers is lodged in the Governor, and in no one else. *Id.* The Court wrote, "The power thus lodged in the Governor is extensive, unrestrained, and subject to abuse." *Id.* Allowing local government officials to interfere "would in many instances deny him the right to take prompt and decisive action to suppress threatened or actual disorder or violence[.]" *Id*. at 487-88.

In its opinion below, the Court of Appeals completely misunderstands the *Franks* Court's harmonization of Sections 69, 75, and 81. *Franks* does not hold that Section 81 is idle and meaningless without another provision to give it effect – ***because that can never be the case***. *See Runyon*, 121 S.W.2d at 522 ("every constitutional provision should be construed, where possible, to give effect to every other constitutional provision."). Instead, when discussing the Governor's authority to call out the militia, the *Franks* Court held that the Governor's mandatory duty under Section 81 that he take care that the laws be faithfully executed ***would be*** idle and meaningless ***if*** he did not have the authority of the militia to "enforce the obligation imposed on him." *Franks*, 134 S.W. at 487. In other words, if the Governor could not use his power to call out the militia to protect citizens from the 'night

riders,' *then* he would not be able to enforce the mandate to faithfully execute the laws. Section 75 was simply the mechanism the Governor used in that situation to quell the insurrection.

Thus, contrary to the Court of Appeals' decision, the mandate of Section 81 is not dependent on the grant of a power under Section 69, 75, or any other provision. It is a "positive duty" in and of itself, given only to the Governor, and the Governor must have powers to enforce it when necessary. *LRC v. Brown*, 664 S.W.2d at 919.

The Court of Appeals' misinterpretation of *Franks* is highlighted by the decision in *Begley v. Louisville Times Co., Inc.*, 115 S.W.2d 345 (Ky. 1938). In *Begley*, the Court upheld a defense verdict for a newspaper after it published an article based on an Adjunct General's report to the Governor. *Id.* at 347. The report detailed actions by the Governor, including ordering military officers to Clay County for the purpose of investigating lawlessness. *Id.* In looking at the report's content, the Court cited to both *Franks* and Section 81 of the Constitution to discuss the Governor's constitutional powers, stating, "[t]hat the Governor had the power and authority to send troops or military officers into Clay county for the [] purpose [of inquiring into lawlessness] there can be no doubt. See section 81 of the Constitution; Franks v. Smith, supra." *Id.* Thus, the only case that discusses *Franks* for this purpose shows that Section 81 is not an "idle and meaningless phrase." The Court of Appeals' erroneous interpretation cannot stand.

2. House Bill 334 prevents the Governor from fulfilling his duty under Section 81.

Through HB 334, the General Assembly infringes on the Governor's appointment and removal powers with respect to the members of the Commission, preventing him from carrying out his duty under Section 81 to ensure the laws are faithfully executed by the

Commission. Section 81 not only places a duty upon the Governor to faithfully execute the law, but it also prevents reassignment of executive authority in a manner that would prevent the Governor from carrying out this duty. Once again, *LRC v. Brown* shows the constitutional violation. There, in addition to the General Assembly appointing its own members and granting itself authority to appoint others to executive branch boards, it created a subcommittee restricting the Governor's ability to implement regulations. *LRC v. Brown*, 664 S.W.2d at 918. This Court rejected that usurpation of executive power, relying in part on Section 81, holding that "[t]he adoption of administrative regulations . . . is executive in nature," and the purpose of such regulations "is to enable the Governor to successfully carry out the constitutionally mandated executive and administrative duties bestowed upon that office." *Id.* at 919 (citing *Barkley*, 628 S.W.2d 616). When the General Assembly passes a law requiring implementation by the executive branch, Section 81 mandates that "*the chief executive would be required to carry it out and have the right to choose the means by which to do it*." *Id.* (quoting *Barkley*, 628 S.W.2d at 623). By seeking to prevent the Governor from choosing the means by which to carry out laws that require implementation, this Court held that the laws restricting the promulgation of administrative regulations violated Section 81. *Id*. at 920.

As in *LRC v. Brown*, here the Governor's ability to oversee those who promulgate regulations has been usurped by HB 334. Like the promulgation of regulations, the Kentucky Supreme Court has routinely held that appointment power is executive in nature. *Id*. at 923; *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922). The Governor carries out his Section 81 duties in choosing the means to execute laws through the appointment of members to executive boards and commissions that carry out executive responsibility by

promulgating rules, conducting investigations, and ordering punitive measures when such rules are broken. Indeed, the Commission is the prime example of an executive branch board that serves the purpose of implementing, enforcing, and executing the law, specifically, the Code of Ethics. KRS 11A.080-110 (granting the Commission authority to create rules, hold investigations, and impose civil and criminal penalties upon violators); *Atkinson*, 339 S.W.3d at 474. With only two appointments to the seven-member Commission, and without any authority over the other five members appointed by the inferior constitutional officers, the Governor is unable to carry out his Section 81 authority to ensure the members of the Commission are faithfully enforcing the Code.

Other potential consequences of the usurpation of the Governor's powers exist under HB 334. The voters of the Commonwealth have now twice put their faith in Governor Beshear to faithfully execute the law, including the Code of Ethics. With such expansive authority, the Commission could launch meritless, politically-motivated investigations and make findings and impose civil penalties in those matters. The Commission would reign supreme over employees of the executive branch with no singular elected executive to ensure they are faithfully executing the law. Any regulation the Commission promulgates, no matter how absurd, would not be subject to the checks and balances of the electorate through the Governor. The Governor would have no power to remedy such conduct and ensure the Commissioners are faithfully executing the law, and voters would be deprived of a singular executive to hold responsible for such abuse. Unlike the legislative branch, accountability in the executive branch rests with one official. Depriving that official – the Governor – of the discretion to appoint and remove the officials who execute the law negates the accountability required by our Constitution under Section 81.

House Bill 334 would prevent the Governor from taking care that the laws are faithfully executed in favor of the other constitutional officers. The General Assembly may not diffuse executive power among other constitutional officers in a manner that violates other provisions of the Constitution. For example, it could not pass a law allowing the Commissioner of Agriculture to issue pardons, because only the Governor possesses that authority under Section 77. Nor could it pass a law allowing the Secretary of State to call the General Assembly into special session because, again, only the Governor possesses that authority under Section 80. And it certainly cannot diffuse or subvert the Governor's constitutional duty under Section 81 to ensure that the laws are faithfully executed. *See Barkley*, 628 S.W.2d at 622, n. 12.

3. Like Section 81, the Take Care Clause of the U.S. Constitution gives the Executive the duty to ensure the laws are faithfully executed through appointees.

The positive and important duty in Section 81 requires that the Governor be able to enforce the laws through the appointment of members to boards and commissions. Likewise, as case law interpreting the Take Care Clause of the federal Constitution shows, the power to appoint and oversee those who are executing the law on behalf of the chief executive are paramount to performing this duty. Reflecting on the Take Care Clause in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, the United States Supreme Court held, "As Madison stated on the floor of the First Congress, 'if any power whatsoever is in the nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 561 U.S. 477, 483 (2010) (internal citation omitted). Similarly, in *Myers v. United States*, the Court stated: "As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of

express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws . . . . [S]o must be his power to removing those for whom he can not continue to be responsible." 272 U.S. 52 (1926). In *United States v. Armstrong*, the Court recognized that the Attorney General and United States Attorneys retain broad discretion to enforce criminal laws because they are "designated by statute as the President's delegates to help him discharge his constitutional responsibilities to 'take Care that the Laws be faithfully executed.'" 517 U.S. 456, 464 (1996).

At the federal level, the Take Care Clause and the President's appointment and removal power require that the President oversee executive branch operations that are carried out by other officers. *See Free Enter. Fund*, 561 U.S. at 483. And, "[s]ince 1789, the [United States] Constitution has been understood to employ the President to keep these officers accountable—by removing them from office, if necessary." *Id.* While Congress can place reasonable limits on the removal authority for certain officers, such as for-cause provisions, the Take Care Clause prevents it from diluting the authority in a manner that would prevent the President from ensuring the laws are faithfully executed. *Id.*

Importantly, this Court has recognized that the clauses are the same and Kentucky's Take Care Clause confers the same duty on the Commonwealth's Governor as the federal Constitution confers on the President. "The same constitutional powers and duties described in Sections 69 and 81 are granted to the President of the United States by Article II, Section 1 and 3 of the United States constitution." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 869 (Ky. 2005). *Barkley* recognized that "[t]he powers given to the Governor by our Constitution closely resemble, for obvious historical reasons, those given to the

President by the United States Constitution." 628 S.W.2d at 622; *see Hoskins v. Maricle*, 150 S.W.3d 1, 16 (Ky. 2004) ("Like Section 81 of the Kentucky Constitution, Article II, Section 3 of the United States Constitution vests the power 'to take Care that the Laws be faithfully executed' in the executive branch of government [.]"). In fact, the sections are virtually identical. *Compare* KY. CONST. § 81 ("[The Governor] shall take care that the laws be faithfully executed.") *with* U.S. CONST., ART. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America," who must "take Care that the Laws be faithfully executed."). Like the President, the Governor exercises his constitutional appointment and removal powers to ensure the officers throughout the executive branch effectively discharge the duties assigned only to the Governor.

The Court of Appeals' attempt to distinguish the clauses of the two Constitutions reaches for differences that either do not exist or are not relevant to this case. First, as discussed above, the clauses are virtually identical, a fact the Court of Appeals essentially ignores. Instead, the Court focuses primarily on the fact that the President is the sole executive under the federal constitution and returns to this crutch throughout the faulty analysis. (Opinion, at 20.) But that distinction is irrelevant because the Governor, with the supreme executive power, is still the only executive charged under the Take Care Clause. "Under Kentucky's Constitution, the executive powers and responsibilities of the Commonwealth lie within the province of the Governor." *LRC v. Brown*, 664 S.W.2d at 919. *See also* KY. CONST. § 69. That power is not given to any other officer, including those in Section 91. *See Yeoman*, 983 S.W.2d at 472 ("[Section 69] clearly grants the executive power of the Commonwealth exclusively to the Governor.").

In *Seila Law LLC v. Consumer Financial Protection Bureau*, the United States Supreme Court held that the federal Consumer Financial Protection Bureau's director must be removable by the President at will, instead of only for inefficiency, neglect, or malfeasance. 591 U.S. 197, 203 (U.S. 2020). In doing so, the Court recognized the significance of the removal power in enabling the President to carry out his duty to take care that the laws are faithfully executed. *Id.* at 203-04. "Without such power, the President could not be held fully accountable for discharging his own responsibilities [.]" *Id.* at 204.

Seilla Law LLC only related to a dispute about the removal of an inferior officer, and not to the President's authority to appoint. That issue has been long resolved since the adoption of the federal constitution by the First Congress. *See Myers*, 272 U.S. at 163-64 (the "general administrative control of those executive the laws, including the power of appointment and removal of executive officers."). But the rationale in *Seilla Law LLC* equally applies to *support* the Governor's authority to appoint the majority of members to the Commission. If the Governor cannot appoint a majority of the members to Commission, he cannot discharge the duties he was elected to carry out – exercise his supreme executive authority as Chief Magistrate to faithfully ensure the laws are followed. If he cannot appoint members to enforce the Ethics Code, it "would make it impossible for the [Governor] … to take care that the laws be faithfully executed." *Seilla Law LLC*, 591 U.S. at 214 (quoting *Myers*, 272 U.S. at 164).

The Court of Appeals' Opinion also unconstitutionally limits the Governor's powers under Section 81 by contrasting Kentucky's removal jurisprudence with federal removal jurisprudence as a means to render Section 81 meaningless. (Opinion, at 20-21.) That comparison is also irrelevant to the issue at hand. While in Kentucky "the power of

removal is not incident to the power of appointment," *Johnson v. Laffoon*, 77 S.W.2d 345, 348 (Ky. 1934), it is an executive function. *Holliday v. Fields*, 269 S.W. 539, 540 (Ky. 1925) ("[R]emoval of a public official from office by the Governor pursuant to the authority vested in him by the statute [] is the exercise of an executive or administrative function."). Like the President, the Governor is responsible to the electorate for those he appoints to offices, and the "buck stops with [him]." *Free Enterprise Fund*, 561 U.S. 477, 493. Thus, he must have the ability to remove those whom he appoints, and as discussed above, Sections 69 and 81 demand that he be able to appoint the members to the Commission. *See Yeoman*, 983 S.W.2d at 472.

The Court of Appeals' conclusion that the President's removal power is inconsistent with the Governor's is extremely overstated. As discussed, generally the President may remove federal officers appointed to agencies and other federal entities created by Congress at will, with some exceptions. *Seilla Law LLC*, 91 U.S. at 203. For example, Congress may place restrictions on the removal of certain officers for cause. *Id.* These, however, are the same restrictions that the General Assembly may place on the removal of officers appointed to boards or commissions by the Governor. *See Laffoon*, 77 S.W.2d at 348.

Laffoon involved then-Governor Ruby Lafoon's attempt to remove Ben Johnson, the chairman of the state highway commission, at will. *Id.* at 346. After Johnson had been appointed by Laffoon to a four-year term, the General Assembly amended a statute that had required any removal during the term must be for cause. *Id.* at 346. The new statute allowed the Governor to remove at will. *Id.* The Court held that the Governor could remove Johnson at will because the change in the statute did not restrict removal to for cause. *Id.*

at 350. In doing so, the Court held that "the power of removal thus vested in the Governor is neither legislative nor judicial in character." *Id.*

The crux of *Laffoon* is that the removal power is executive in nature and is vested in the Governor. However, the General Assembly may require the Governor to show cause for removing an already appointed officer during that officer's term. In the context of Section 81, this makes sense. The Governor may appoint people he trusts to assist him to faithfully execute the laws. Once appointed, if the Governor wishes to remove the member, the General Assembly may place restrictions where the Governor may only remove the appointee if she is committing malfeasance, misfeasance, or some other act constituting cause. But it certainly cannot grant that removal authority to another executive officer who does not have the positive duty under Section 81. Allowing a Section 91 officer to exercise this authority would be stripping the Governor of his constitutional duty and power. Thus, Kentucky's removal jurisprudence is consistent with the federal jurisprudence as it currently exists and has existed since *Meyers*, 272 U.S. at 164.

Under the plain language of Section 81, HB 334 is unconstitutional and therefore void. *See* KY. CONST. § 26 (". . . [A]ll laws contrary thereto, or contrary to this Constitution shall be void."). This Court should reverse the Court of Appeals and affirm the decision of the Circuit Court because HB 334 strips the Governor of his ability to ensure the Commission faithfully executes the laws it was created to enforce.

C. The Court of Appeals' Opinion Would Allow the General Assembly to Move All Executive Branch Functions Outside of the Governor's Authority.

The ramifications of the Court of Appeals' opinion are stark and troubling. If the Governor's supreme executive authority under Section 69 means so little as to permit

execution of law by an executive board not subject to his supremacy, and his Section 81 duty to take care that the laws be faithfully executed is "idle and meaningless," then the General Assembly could drastically reorganize the executive branch every session in order to house executive authority with their favored constitutional officers. This Court must read Sections 69 and 81– as it previously has – to prohibit reassignment of the Governor's appointment authority as to boards that implement the laws to inferior constitutional officers.

The General Assembly has already taken actions to do just this. In another case pending before this Court, *Shell, et al. v. Beshear, et al.*, 2024-SC-0254; 2024-SC-0256, it stripped the Governor of the authority to appoint and remove the majority of the members of the Kentucky State Fair Board. There, legislation gave the Commissioner of Agriculture the majority of appointments to the State Fair Board. Taken to its logical conclusion, the General Assembly could create a board whose members are appointed solely by the Auditor to oversee the Kentucky Department of Medicaid Services, an agency that provides healthcare benefits to thousands of vulnerable poor and disabled Kentucky citizens. It could create a board whose members are appointed by the Attorney General to oversee the Kentucky Department of Corrections, or move that department to the Attorney General's office altogether. Worse, it could change its mind based on who holds the elected office and move the agencies based on the political winds of the day. There is no logical or reasonable line that can be drawn beyond the one this case demonstrates was crossed. While the General Assembly may withhold certain executive tasks and responsibilities from the Governor by placing them with the inferior constitutional officers, it cannot create

a board to execute the law that is not subject to the Governor's oversight through the appointment and removal of a majority of its members.

III. Kentucky's Strict Separation Of Powers Provisions Must Be Strictly Enforced To Protect The Governor's Supreme Executive Authority To Faithfully Execute The Laws.[7]

Under Kentucky's separation of powers provisions, "one branch of Kentucky's tripartite government may not encroach upon the inherent powers granted to any other branch [.]." *Arkk Properties, LLC v. Cameron*, 681 S.W.3d 133 (Ky. 2023) (quoting *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984)). Section 27 of the Kentucky Constitution states:

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistrate, to wit: Those which are legislative, to one; those which are executive, to another, and those which are judicial, to another.

Section 28 further provides:

> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

These provisions appear in all four of Kentucky's Constitutions. *LRC v. Brown*, 664 S.W.2d at 911. Together, Sections 27 and 28 provide for what this Court has called a "double-barreled, positive-negative" approach. *Appalachian Racing, LLC v. Commonwealth*, 504 S.W.3d 1, 4 (Ky. 2016) (quoting *LRC v. Brown*, 664 S.W.2d at 911-912). Those provisions, "on the one hand mandate separation among the three branches of government, and on the other hand, specifically prohibit incursion of one branch of government into the powers and functions of the other." *Conn v. Kentucky Parole Bd.*, 701

[7] The arguments in this section were preserved below at R. 1-23; R. 222-224; 230-231.

S.W.3d 76, 858 (Ky. 2024) (quoting *LRC v. Brown*, 664 S.W.2d at 912). "Perhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does [the Kentucky] Constitution ... ." *Conn v. Kentucky Parole Bd.*, 701 S.W.3d 76, 858 (Ky. 2024) (quoting *Sibert*, 246 S.W. at 457). To ensure that these provisions are given their intended purpose, they are to be "strictly construed." *Id*. (quoting *Arnett v. Meredith*, 121 S.W.2d 36, 38 (Ky. 1938)).

Moreover, all constitutional provisions must be "construed in the light of their purpose and [] given a practical interpretation so that the plainly manifest purpose of those who created them may be carried out." *State Journal Co. v. Commonwealth*, 160 S.W.2d 145, 149 (Ky. 1942) (quoting Am. Juris. 11, pp. 674-75). The "constitutional provisions must be interpreted with reference to 'the times and circumstances under which the state constitution was formed—the general spirit of the times and the prevailing sentiments among the people.'" *Id.* (quoting *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 992 (1931)).

In *LRC v. Brown*, this Court recognized that Sections 27 and 28 of the Kentucky Constitution were intended primarily "to curb the power of the General Assembly." 664 S.W.2d at 912. *See also Purnell v. Mann*, 50 S.W. 264, 266 (Ky. 1899). In 1890, the framers of the current Constitution called the constitutional convention both to restore the separation of powers between the three co-equal branches of Kentucky's government and rein in the power of the legislature. *LRC v. Brown*, 664 S.W.2d at 912. At the time, "there existed in the minds of the people a deep-seated distrust of legislative methods, and a fear of legislative usurpation of power." *Purnell*, 50 S.W. at 266. *See* Sheryl G. Snyder &

Robert M. Ireland, *The Separation of Governmental Powers under the Kentucky Constitution: A Legislative and Historical Analysis of L.R.C. v. Brown*, 73 Ky. L.J. 165, 167 (1984) ("A desire to control legislative excesses constituted the principal reason for the calling of the 1890-91 Constitutional Convention.").

Delegate John D. Carroll of Henry County summarized this sentiment during the Constitutional Convention:

> It is a well-known fact that one of the prime causes for the calling of this Convention was the abuses of practice by the Legislative Department of this State; and I venture the assertion that except for the various legislation and the local and special laws of all kinds and character passed by the Legislatures that have met in Kentucky for the last twenty years, that no proposition to call a Constitutional Convention could ever have received a majority of the votes of the people of Kentucky. The people in Kentucky are more in danger from abuses by the Legislative Department than they are from abuses by any other Department of the State Government.

I OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 1482 (1890) ("1890 Debates"). Indeed, Delegate Askew stated during the debates that former Kentucky House Speaker William C. Owens of Scott County had said to him, "I do not care what you do; every reform you attempt will turn to ashes in your hands unless you do something to reform the Legislative Department." III 1890 Debates, at 3821.

This led the framers, who were "undoubtedly familiar with the potential damage to the interests of the citizenry if the powers of government were usurped by one or more branches of that government," to adopt "a Constitution whose language more emphatically separates and perpetuates []the American tripod form of government." *LRC v. Brown*, 664 S.W.2d at 912 (quoting *Sibert*, 246 S.W. 455). As a result, Sections 27 and 28 of the

Kentucky Constitution contain perhaps the strictest separation of powers provisions of any state in the Union. *See Diemer v. Commonwealth, Ky. Transp. Cabinet, Dep't of Highways*, 786 S.W.3d 861, 864-65 (Ky. 1990) (citing *Sibert v. Garrett,* 246 S.W. 455, 457 (Ky. 1922)).

A. House Bill 334 Violates the Separation of Powers.

One of the executive powers belonging to the Governor as the Chief Magistrate is the "supreme executive power of the Commonwealth[]." KY. CONST. § 69. Again, the Governor is the only officer that the Constitution requires to take care that the laws be faithfully executed. KY. CONST. § 81.

Section 91 of the Constitution lists additional statewide elected officers, but those officers do not have the supreme executive power of the Commonwealth and are not charged with the affirmative duty to ensure the laws are faithfully executed. *See Brown*, 628 S.W.2d at 622 n. 12. Instead, their duties and responsibilities are as prescribed by law. KY. CONST. § 91. No law, however, may specify duties or responsibilities that elevate the Section 91 officers, or any executive officer or agency, above the Governor. *See Barkley*, 628 S.W.2d at 622.

Further, it is an established principle of constitutional law that the appointment of officers is intrinsically executive in nature. *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922); *see also Pratt v. Breckinridge*, 65 S.W. 136 (Ky. 1901). This Court and its predecessor court have consistently rejected legislation that purports to usurp the Governor's appointment power. *LRC v. Brown*, 664 S.W.2d at 923-24 (reaffirming that the general appointment power for non-elected state officers was executive in nature and the laws usurping this power violated the separation of powers doctrine); *Pratt*, 65 S.W. at 136

(finding the General Assembly's appointment of members of the election commission in violation of the constitution because "[t]he filling of [a board appointment], when not exercised by the people, or in some manner directed or permitted in the constitution, is executive and must be performed by an executive officer"); *Sibert*, 246 S.W. at 457 (rejecting the General Assembly's ability to appoint members of the State Highway Commission and holding that while Section 93 of the Kentucky Constitution "authorizes the Legislature to provide by law for the appointment or election of such officers, it does not authorize the Legislature itself to make such appointment or election.").

As to the legislative branch, it is "clear that the makers of the constitution intended the legislature to discuss and enact laws, and to *do nothing else.*" *LRC v. Brown*, 664 S.W.2d at 912 (citing *Pratt v. Breckenridge*, 65 S.W. 136, 140 (Ky. 1901)). In other words, the legislature may only legislate, and cannot act as the executive or the judiciary. *Sibert*, 246 S.W. at 22 (". . . the Legislature may perform all legislative acts not expressly or by necessary implication withheld from it, but it may not perform or undertake to perform executive or judicial acts . . . .").

As explained above, HB 334 unconstitutionally usurps and subverts the Governor's supreme executive authority by giving other constitutional officers a majority of appointments to the Commission. It also infringes on the Governor's constitutional duty to take care that the laws are faithfully executed. House Bill 334 violates the separation of powers under Sections 27 and 28 of the Kentucky Constitution because it has "restricted the power of the Governor to carry out his duties." *See LRC v. Brown*, 664 S.W.2d at 918. Therefore, the Court should hold HB 334 unconstitutional.

B. The General Assembly Does Not Possess Plenary Power To Impede The Governor's Supreme Executive Authority and His Duty to Take Care the Laws are Executed.

Sections 27 and 28 of the Kentucky Constitution prohibit the General Assembly from infringing upon the power of another branch in any way. This, of course, includes stripping the Governor's constitutionally mandated executive powers and giving them to another officer. The General Assembly cannot create an executive or group of executives more supreme than the Governor. Neither can it take away so much of the Governor's authority that he cannot fulfill his constitutional duty to take care that the laws be faithfully executed. *See LRC v. Brown*, 664 S.W.2d at 911-12. House Bill 334 violates the separation of powers under Sections 27 and 28 of the Kentucky Constitution because it has "restricted the power of the Governor to carry out his duties." *See id*. at 918. The act of the General Assembly in usurping such power, even if it gives the power to other executive branch officers, violates the separation of powers by infringing on the constitutional authority of another branch of government – here, the Chief Magistrate of the executive branch. *See id.* at 923-24 (The General Assembly cannot "do indirectly what it cannot do directly").

1. Section 93 does not give the legislature the ability to withhold power explicitly reserved for the Governor.

Contrary to the constitutional officers' arguments below, Section 93 of the Kentucky Constitution does not allow the General Assembly to give those officers appointment power that elevates them above the Governor. In relevant part, Section 93 provides:

> Inferior State officers 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.

Thus, Section 93 allows the General Assembly to determine whether state offices are filled by election or by appointment, and the manner in which they are appointed or elected. However, under Section 76 the power to appoint resides with the Governor.

Reading Section 93 to permit the legislature to take away the Governor's power and give it to other executive officers ignores the balance of powers in Kentucky's Constitution. It is also contrary to the clear limits placed on the General Assembly as articulated in *Barkley* and *L.R.C. v. Brown*, as well as the express language of Sections 69 and 81.

Below, the Court of Appeals also misapplied *Fox v. Grayson*, 317 S.W.3d 1 (Ky. 2010). In *Fox*, this Court considered whether the 1990 amendments to Section 93 permitted only the Senate to participate in the confirmation process of inferior state officers, ***who were appointed by the Governor***. *Id.* at 12. The Debates cited in that case and repeated in the opinion show that the delegates' intent was "only to give the General Assembly flexibility in determining which inferior state officers must be *subject to confirmation at all*." *Id.* (emphasis added.) Senate confirmation is not at issue in this case. Regardless, Section 93 must be read in conjunction with the other constitutional provisions to give them all meaning.

Any act the legislature passes that implicates Section 93 cannot ignore other constitutional provisions. *See Pinkston v. Watkins*, 216 S.W. 852, 854 (Ky. 1919) ("It has frequently been held . . . that in construing constitutional provisions different sections relating to the same subject but making different provisions concerning them should be read together and construed so as to reconcile the provisions found in all sections…."). Allowing the General Assembly to invoke Section 93 to infringe on the Governor's Section

69 and 81 powers would render Sections 69 and 81 meaningless. Section 93 does not permit the General Assembly to deprive the Governor of the majority of the appointments to the Commission.

In addition, the Court of Appeals was misguided in its reliance on *Cameron v. Beshear*, 628 S.W.3d 61 (Ky. 2021). In *Cameron,* the Supreme Court reviewed a temporary injunction issued by the circuit court related to legislation passed by the General Assembly affecting the Governor's emergency powers. *Id.* at 66-67. The Court found the legislation likely did not violate the Kentucky Constitution. *Id.* at 78. Unlike the instant case, *Cameron* involved a delegation of distinctly *legislative* power. Specifically, it involved the legislature's delegation of its own power to suspend the law under Section 15 of the Kentucky Constitution to both the Governor and the Attorney General during a state of emergency. *Id.*

Here, however, Section 15 is not at issue. This case involves *only* an executive power – the power to appoint members to Kentucky's boards and commissions. The legislature cannot delegate powers that it does not have. Or, as the Court stated in *LRC v. Brown*, "[t]he General Assembly has attempted to do indirectly what it cannot do directly." 664 S.W.2d at 923-24. *Cameron* simply does not apply.

Moreover, even if *Cameron* was factually similar to this matter – which it is not – nothing in that decision limits or changes the holdings of *Barkley* and *LRC v. Brown*, or their relevance to this case. In *LRC v. Brown*, the Court rejected the constitutional officers' interpretation – that the Governor's executive power can be diffused without regard to the constitutional provisions providing him with those powers. *See LRC v. Brown*, 664 S.W.2d at 913.

Although the facts of *LRC v. Brown* focused on the legislature's delegation of the executive appointment power to itself or other legislative entities, the Court generally looked at the question of whether, like here, the General Assembly could prescribe appointing authority for inferior state officers. *Id.* at 920-24. Relying on Kentucky case law such as *Barkley* and *Sibert*, the Court reaffirmed that the general appointment power for non-elected state officers is executive in nature. *Id.* at 923. *See also Pratt v. Breckinridge*, 65 S.W. 136, 136 (Ky. 1901) ("[t]he filling of [a board appointment], when not exercised by the people, or in some manner directed or permitted by the Constitution, is executive, and must be performed by an executive officer"). Moreover, the Court noted that the General Assembly cannot overstep constitutional limits and strip the Governor of his powers as Chief Magistrate and supreme executive of the Commonwealth. *LRC v. Brown*. 664 S.W.2d at 920-24.

2. The General Assembly cannot strip the Governor of oversight of the Commission.

Furthermore, in *LRC v. Brown* this Court found that accepting such a narrow interpretation of *Barkley* as to allow the General Assembly to render the Governor powerless "would be tantamount to saying that we were repealing Sections 27 and 28 of the Kentucky Constitution. We would be eliminating the separation of powers doctrine. We would reach a result which would fly in the face of the Commonwealth." 664 S.W.2d at 913.

Indeed, under the constitutional officers' theory below the General Assembly could remove all powers from the Governor except for those specifically enumerated in the Constitution. This would leave the Governor subservient to one or more of the other constitutional officers or to another entity created by the General Assembly, such as a board

appointed by the other constitutional officers. The Kentucky Supreme Court has struck down such an outcome as unconstitutional. *See Barkley*, 628 S.W.2d at 622. The notion that the General Assembly has unlimited authority to diffuse executive appointment power among other Section 91 constitutional officers ignores long-standing Kentucky case law limiting the General Assembly's ability to usurp the Governor's authority.

The Court of Appeals also misapplied *Rouse v. Johnson*, 28 S.W.2d 745 (Ky. 1930). In *Rouse*, the former Court of Appeals held that a law allowing an appointing board consisting of the Governor, Lieutenant Governor, and Attorney General to appoint members of the State Highway Commission was constitutional. *Id.* at 752. However, under the appointing board in *Rouse*, the Governor still had input into the filling of every vacancy. *Id.* at 746. Here, contrary to *Rouse,* the General Assembly has completely stripped the Governor's power to have any say on the majority of members of the Commission. Further, HB 334 goes further than the law in *Rouse* by taking away the Governor's ability to fill the vacancies for any of the members and remove all members for cause. (R. 24-44.) Thus, the Governor clearly does not "ha[ve] more power under HB 334 than the Governor had in *Rouse*." (Opinion, at 34.)

Importantly, the *Rouse* Court did not review the law at issue there in light of Sections 69 and 81 of the Kentucky Constitution, because such claims were not at issue or brought before the Court. Here, a clear violation of Section 69 exists, as the General Assembly creates an executive superior to the Governor. Section 69 was, however, addressed in both *Yeoman*, 983 S.W.2d at 472-73, and *Musselman*, 817 S.W.2d 213 (Ky. 1991), where the statutes were upheld because *the Governor* maintained the authority to appoint. "As long as it is the Governor who actually exercises the power in question, then

no improper delegation can occur." *Yeoman* 983 S.W.2d at 473, n. 11. Moreover, *Barkley*, decided 52 years after *Rouse*, warned against stripping the Governor of his supreme executive power. 628 S.W.2d at 621-22. *Rouse* is easily distinguishable.

The Court of Appeals' interpretation of *Rouse* cannot stand while still giving meaning to ***all*** sections of the Constitution. With the Governor subservient to others who can appoint members of an executive branch agency, he is no longer the supreme executive power and cannot ensure the laws are faithfully executed. Rendering these provisions "idle and meaningless" are antithetical to Kentucky's strong separation of powers provisions that must be strictly construed and the cardinal rules of constitutional construction that require all provisions to be read together and be given meaning. Moreover, allowing the General Assembly to create boards not answerable to the Governor would allow it to create agencies independent of the executive branch.

In fact, this Court has rejected the idea that agencies may exist independent of any branch of government, flatly stating that "there is no autonomous fourth branch of government under these constitutional provisions." *Univ. of Ky. v. Moore*, 599 S.W.3d 798, 806 (Ky. 2019); *LRC v. Brown*, 664 S.W.2d at 917 (striking language from the statute in question declaring that the LRC is an "independent" agency of state government). Even university boards, which maintain some independence for "financial self control" are tied to the executive branch through the Governor's appointment powers. In *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, this Court addressed whether the Governor could withhold already appropriated funds from various universities. 498 S.W.3d 355 (Ky. 2016). The Court explained that the independent nature of the university boards largely entailed "financial self-control[,]" not complete independence from executive branch

oversight. *Id.* at 381. Indeed, the Court noted that, despite lacking authority related to the appropriation of funds by university boards, the Governor maintains control to "appoint most of the board members" and "remove members for cause." *Id. See also, e.g., Moore*, 599 S.W.3d at 809.[8]

Ultimately, the legislature's ability to diffuse executive authority is limited by mandate under Section 69 that the Governor have supreme executive power and the affirmative duty Section 81 gives the Governor to ensure the laws are faithfully executed. *LRC v. Brown*. 644 S.W.2d at 920-24. House Bill 334 is not simply an exercise of the General Assembly's power under Section 93, but a violation of the Governor's constitutional authority.

IV. Kentucky's Sister States Similarly Require the Governor to Appoint a Majority of the Members of Boards and Commissions.

Kentucky is not the only state to address the issue of a governor's executive authority and his ability to ensure the laws are faithfully executed through his appointment power. This Court regularly looks to guidance from our sister states for their interpretation of similar constitutional provisions. *See LRC v. Brown*, 664 S.W.2d at 914 (citing opinions from North Carolina and South Carolina supporting its holding that "[n]early every one of our sister states courts have similarly resisted any weakening of the doctrine of the separation of powers."). In *State v. Berger*, the North Carolina Supreme Court found that legislation authorizing the legislature to appoint a majority of the voting members of three

[8] Below, the constitutional officers argued that the construction of other boards will be threatened. (Appellants' Court of Appeals Brief, at 22-23). But none of the enabling statutes of those boards has been constitutionally challenged with the exception of the State Fair Board, a challenge that is also pending before this Court. The fact that the Governor challenges the constitutionality of HB 334 but not other legislation is irrelevant to the Court's determination of whether HB 334 is unconstitutional.

administrative commissions violated the separation of powers. 781 S.E.2d 248, 257 (N.C. 2016). The three affected commissions had final authority over executive branch decisions, implicating the governor's constitutional duty to take care that the laws are faithfully executed. *Id.* at 256.

The North Carolina Supreme Court addressed this usurpation of power under its similar constitutional provisions. *Id.*; *see* N.C. Const. art III, §§ 5(4), 6. *Id.* It held, "The degree of control that the Governor has over the three commissions depends on his ability to appoint the commissioners, to supervise their day-to-day activities, and to remove them from office." *Id.* at 257. As a result, the governor must always have enough control over the commissions to perform his constitutional duty. *Id.*

While *Berger* applies to legislative appointments, it formed the basis for the North Carolina Supreme Court decision in *Cooper v. Berger*, 809 S.E.2d 98, 99-100 (N.C. 2018). In *Cooper*, the North Carolina legislature created a "Bipartisan State Board of Elections and Ethics Enforcement" to oversee a multitude of executive branch functions, including elections, campaign finance, lobbying and ethics laws. *Id.* at 99-100. The bill created a board consisting of eight members appointed by the Governor, four of whom had to be members of the opposing political party selected from a list of nominees submitted by the chair of that party, thus controlling who the Governor could appoint. *Id.* at 112. The other four members were selected from a list of members of the Governor's own political party submitted by that party's chair. *Id.* In addition, the bill precluded the Governor from removing any member of the board except for "misfeasance, malfeasance, or nonfeasance." *Id.* Finally, the bill prohibited the Governor from appointing the executive director and gave that power to the board. *Id.* at 114.

Finding the law violated North Carolina's Take Care Clause, the North Carolina Supreme Court struck it down, holding that it "leaves the Governor with little control over the views and priorities of the Bipartisan State Board." *Id.* at 112 (quoting *Berger,* 781 S.E.2d at 257). The court rejected the same limited reading of *Berger* that Appellees raise here, holding that the analysis of whether the Governor maintains sufficient supervision and control under the Take Care Clause is functional, not formulaic. *Id.* The court in *Cooper* explained:

> [*Berger*] focuses upon the practical ability of the Governor to ensure that the laws are faithfully executed rather than upon (1) the exact manner in which his or her ability to do so is impermissibly limited or (2) whether the impermissible interference stems from (a) direct legislative supervision or control or from (b) the operation of some other statutory provision.

Id. at 113.[9]

The North Carolina Supreme Court's holdings in *Berger* and *Cooper* are consistent with Kentucky precedent, such as *LRC v. Brown* and *Barkley*. As there, if the Governor is stripped of his ability to appoint a majority of Executive Branch board members, Sections 69 and 81 of the Kentucky Constitution will be left meaningless. The legislature, as argued by the Attorney General below, could remove swaths of executive authority from the Governor merely by placing it under a board whose members (in their entirety or a majority) are appointed by an inferior constitutional officer.

Likewise, Indiana's Supreme Court, many decades ago, established the rule that the power to appoint subordinate officers to carry out laws was "a necessary incident to

[9] Like Kentucky, the North Carolina Constitution provides for other statewide constitutional officers in addition to its Governor. *See* N.C. CONST. Art III, § 7. The language of North Carolina's Take Care Clause, N.C. Const. Art. III, § 5(4), which was the basis for the holdings in *Berger* and *Cooper*, is identical to the Take Care Clause in the Kentucky Constitution, KY. CONST. § 81.

the power [of the Governor] to execute the laws" under the Indiana constitution. *Holcomb v. City of Bloomington*, 158 N.E.3d 1250 (Ind. 2020) (quoting *Tucker v. State*, 35 N.E.2d 270, 291 (Ind. 1941)). In *Tucker*, the Indiana General Assembly passed a number of laws which provided for wide ranging reorganization of state government, including placing the appointment power for various boards and commissions under "ministerial" officers named in the Indiana Constitution, such as the Treasurer. *Id.* at 278-279. In construing provisions of the Indiana constitution nearly identical to those of Kentucky's, the Court found that the "power to make the appointment can be vested only in the Governor" and not in the other constitutional officers. *Id.* at 303. This was because it is the Governor, and only the Governor, who holds the executive power. *Id.* at 290-291; *see* Ind. Const., art. V, §§ 1, 12, 16. While Indiana's constitution has only one executive officer, the Governor's appointment and removal authority primarily emanated from Indiana's Take Care Clause, which also vests its Governor with the duty to "take care that the laws be faithfully executed." *Id.* at 288. *See* Ind. Const., art. V, § 16; *Holcomb*, 158 N.E.3d at 1260 (reaffirming the power to appoint subordinate officers to carry out laws is "a necessary incident to the power [of the Governor] to execute the laws" under the Indiana constitution.)

Like Section 69 and 81, North Carolina and Indiana's constitutional provisions demand that the Governor have the power to appoint and remove officers from boards created by the legislative branch.

CONCLUSION

House Bill 334 strips the Governor of his supreme executive power and his ability to take care that the laws are faithfully executed. The Court of Appeals erred in holding that Section 81 is an "idle and meaningless phrase," and essentially holding Section 69 meaningless as well. For those reasons and the other reasons cited herein, this Court should affirm the Circuit Court's finding that House Bill 334 violates Sections 26, 27, 28, 69 and 81 of the Kentucky Constitution and is, therefore, void.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RAP 31(G)

This Brief complies with the word limit of Kentucky Rule of Appellate Procedure 31(G)(3)(a) because, excluding parts of the brief exempted by Kentucky Rule of Appellate Procedure 31(G)(5), this Brief contains 14,668 words.

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