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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

**REPLY BRIEF FOR APPELLANTS GOVERNOR ANDY BESHEAR
AND COMMISSIONER DAVID KAREM**

S. Travis Mayo
General Counsel
Taylor Payne
Chief Deputy General Counsel
Laura C. Tipton
Deputy General Counsel
Office of the Governor
700 Capitol Ave., Suite 106
Frankfort, KY 40601
(502) 564-2611
travis.mayo@ky.gov
taylor.payne@ky.gov
lauractipton@ky.gov
*Counsel for Appellee
Governor Andy Beshear*

Mitchel T. Denham
McBrayer PLLC
500 W. Jefferson St., Suite 2400
Louisville, KY 40202
(502) 805-1468
mdenham@mcbrayerfirm.com
*Co-counsel for Appellees
Governor Andy Beshear and
Member David Karem*

(Certificate of Service on back of cover)

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 July 1, 2025, and served through electronic mail upon Matthew F. Kuhn, Solicitor General, Office of Attorney General; John H. Heyburn; Jacob M. Abrahamson, 700 Capital Ave., Ste. 118, Frankfort, KY 40601, matt.kuhn@ky.gov; john.heyburn@ky.gov; jacob.abrahamson@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; Jeremy J. Sylvester; Savannah G. Baker, Office of the Auditor of Public Accounts, 209 St. Clair Street, Frankfort, KY 40601, alex.magera@ky.gov; jeremy.sylvester@ky.gov; savannah.baker@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

Mitchel T. Denham

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ARGUMENT

Appellees ask this Court to hold that Sections 69 and 81 of the Kentucky Constitution have no meaning. Appellees theorize that Sections 69 and 81 give the Governor no authority that cannot be reallocated by the legislature to another executive officer. The General Assembly would then be free to place the bulk of executive power with any other executive officer, creating a new “Governor” whenever it pleases. Not only would this upend the Constitution and make any new executive officer subservient to the will of the legislature, it would deprive the voters of any consequential role in choosing the Governor. However, like every section of the Constitution, Sections 69 and 81 must have meaning. The voters elect the Governor to lead the executive branch and ensure the laws are faithfully executed, including the Executive Branch Code of Ethics (“Ethics Code”) through the appointment and removal of members of the Executive Branch Ethics Commission (“Commission”). With House Bill 334 (“HB 334”), the General Assembly suppressed the voters’ will.

Appellees do not confront the plain, express language of Sections 69 and 81, because to do so compels a finding that HB 334 violates the Constitution. Rather, they ask this Court to elevate one constitutional provision above Sections 69 and 81, instead of harmonizing all three. They further rely on dicta from a case that has nothing to do with the Governor’s executive appointment power, and ignore its more enduring and relevant language recognizing the supremacy of the Governor within the executive branch.

This Court must decline Appellees’ invitation to make Sections 69 and 81 meaningless and reverse the Court of Appeals’ decision.

I. Under Sections 69 And 81 Of The Kentucky Constitution, The Governor Must Have Supreme Oversight Of The Executive Branch Ethics Commission To Ensure The Commission Faithfully Executes The Law.

Contrary to Appellees' contention that the Governor seeks complete control of the inner workings of the Commission, the Governor neither seeks nor has sought to control the Commission's day-to-day operations. That is the very purpose of the Commission. But the Commission must be subject to the Governor's constitutional role defined in Sections 69 and 81. While the General Assembly has the power to create executive offices to execute the laws, it is not free to create offices not subject to the Governor's constitutional oversight. *Brown v. Barkley*, 628 S.W.2d 616, 622 (Ky. 1982); *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 472 (Ky. 1998).

Rather, the Governor challenges the usurpation of the *express* authority bestowed upon him by the People through the Constitution to appoint Commission members to faithfully execute the Ethics Code. Although Appellees argue such authority is vast, when it comes to executing the law the Constitution is clear: "the supreme executive power" is vested with the Governor. KY. CONST. § 69. Accountability of that power is also clear: the People elect the person to wield that power and may seek recourse at the next election if the person fails to properly exercise that power. But when the General Assembly seeks to limit the Governor's authority by diffusing it among the other constitutional officers, it nullifies the will of the People to elect the leader of the executive branch and to hold that leader accountable at the next election.

If adopted, Appellees' argument and the Court of Appeals' ruling would make Sections 69 and 81 of the Kentucky Constitution meaningless, erasing the authority and duty those sections give only to the Governor. Such a holding would allow the General

Assembly to remove all executive authority from the Governor in favor of other executive officers – officers without the supreme executive power and the duty to take care that the laws be faithfully executed. Such a result is at direct odds with our Constitution.

As discussed in Appellants’ Opening Brief, this Court has expressly held that the Governor’s appointment power flows directly from the Executive Vesting Clause in Section 69. *See Yeoman*, 983 S.W.2d at 472-73; *Kentucky Assoc. of Realtors, Inc. v. Musselman*, 817 S.W.2d 213, 214 (Ky. 1991); *Elrod v. Willis*, 203 S.W.2d 18, 20-21 (Ky. 1947). *Yeoman* and *Musselman* hold that the Governor has the authority to appoint members to executive branch boards pursuant to Section 69, while *Elrod* holds that statutes do not violate the separation of powers so long as the Governor maintains final authority to appoint members. That authority is not “implied,” but is inherent in the authority of the chief executive. Appellees do not even mention these cases until page 52 of their Brief, where they struggle to grapple with their holdings.

Appellees’ attempt to limit *Yeoman*’s application ignores its clear holding. *Yeoman* considered whether allowing a foundation to make recommendations to the Governor for appointments to the Health Policy Board violated the Constitution. Justice Stephens, in a section that enjoyed unanimous support,¹ wrote:

[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 the 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

¹ A concurring opinion and a dissenting opinion in *Yeoman* both addressed a tax imposed on physicians, a separate issue raised in that litigation that is irrelevant here. There was no disagreement with the analysis regarding the Governor’s Section 69 power.

Governor. Any law which infringes on the Governor's executive power would be violative of § 69.

983 S.W.2d at 472.

Yeoman further explains, “[i]f a law grants executive branch authority to either the judicial branch, legislative branch or a non-governmental person, natural or otherwise, it is in clear violation of KY. CONST. § 69.” *Id.* This Court found the statute did not violate Section 69 because *the Governor* maintained ultimate appointing authority. *Id.* The Court reiterated its holding:

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. 12 (emphasis added).

Yeoman follows a line of cases recognizing the Governor's power to appoint under Section 69 beginning with *Elrod*. Appellees' only argument against *Elrod* is that it did not involve Section 91 officers. While it did not, it clearly held that appointment power is with the Governor. In considering a law limiting the governor's appointments to a list, the Court held:

The limitation imposed is a recognition that organizations whose objectives coincide with the objectives of the law creating the agency, **may render a material service to the Governor** by nominating men to staff that agency who are qualified by interest, experience, and background.

203 S.W.2d at 20 (emphasis added).

Musselman similarly discussed “the Governor's appointive powers,” finding that the General Assembly did not violate Sections 27, 28, or 69 in requiring the Governor to

appoint from a list of people provided by a private organization. 817 S.W.2d at 214. Appellees misconstrue language from *Musselman*, implying it was decided because a large body of statutory law had developed after *Elrod*. (at 53.) *Id.* at 215. But *Musselman*'s holding did not turn on unrelated statutes passed by the legislature. This Court merely noted other boards that required the Governor to choose from a list, and that the appellees presented no “compelling and specific reason[] why [*Elrod*] is clearly erroneous” and must be overruled. *Id.* As in *Yeoman*, the provision that gave the executive the authority to appoint in *Musselman* was Section 69, which applies only to the Governor and not the Section 91 officers.

That last point addresses two issues. First, *Yeoman*, *Musselman*, and *Elrod* are the controlling precedents in this case. Those cases, along with *Pratt v. Breckinridge*, 65 S.W. 136 (Ky. 1901), *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922), and *Legislative Research Comm'n By and Through Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984) (“*LRC v. Brown*”), recognize two fundamental pillars of Kentucky's constitutional jurisprudence: (1) the appointment power is inherently an executive function, and (2) it is vested in the Governor as the Chief Magistrate of the executive branch. Appellees present no “compelling and specific reason[] why this precedent is clearly erroneous” and should be overturned. *Musselman*, 817 S.W.2d at 215.

Second, Appellees' slippery slope argument that certain boards will be upended if the Governor is successful fails. (at 46.). Many of the Boards they reference are

municipal boards² or advisory boards that do not execute the laws.³ On the other hand, the Governor appoints members to hundreds of boards and commissions, all of which would be in jeopardy if the Governor’s appointment power is stripped.⁴ Regardless, this Court has never shied away from declaring actions of the General Assembly invalid merely because it has previously acted in a similar unconstitutional manner. *See LRC v. Brown*, 664 S.W.2d at 912 (invalidating numerous statutes giving the General Assembly appointment authority).

Although they retreat from the Court of Appeals’ erroneous statement that Section 81 is an “idle and meaningless phrase,” (at 54), Appellees still misconstrue the holding of *Franks v. Smith*, 134 S.W. 484, 487 (Ky. 1911) the same way the Court of Appeals did. The Court of Appeals, not *Franks*, wrote Section 81 out of the Constitution. (Opinion, at 7-13.) Contrary to the Court of Appeals’ ruling, *Franks* harmonizes the various constitutional provisions and recognizes that Section 81 is not “idle and meaningless,” but would be if the Governor did not hold sufficient executive power to see that laws are faithfully executed.

In *Franks*, that executive power was calling out the militia to control the rough riders. *Id.*, at 487. Here, it is appointing the majority of members to the Commission so

² Local Airport Boards under KRS 183.132 are municipal boards, established by local governments.

³ For example, Appellees cite to the Local Superintendents Advisory Council in KRS 156.007. (at 46). That Board advises state superintendents on developing administrative regulations but does not actual execute the law. *See also e.g.* the Board of Physicians and Advisors, KRS 218B.020.

⁴ *See* Governor’s Office of Boards and Commissions, Alphabetical List of Boards and Commissions, available at <https://governor.ky.gov/Documents/board-listing-6-5-20171.pdf> (last visited June 24, 2025).

they may enforce the Code. In both instances, Section 81 is effectuated by the other relevant constitutional provisions – namely Section 69, that gives the Governor executive “power [that is] extensive [and] unrestrained[.]” *Id.* The Governor’s Section 81 duty is not, as Appellees argue, limited to enforcing the laws passed by the General Assembly. It is a positive duty to enforce the Constitution – Kentucky’s highest law. *See LRC v. Brown*, 664 S.W.2d at 919-20 (“[u]nder Section 81 the Governor has the positive duty to go forward and ‘take care that the laws be faithfully executed’”).

Like *Franks*, *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005), does not render Section 81 meaningless. *Fletcher* decided whether the Governor could withdraw funds from the treasury and suspend statutes to fund executive branch operations when the legislature failed to pass a budget. *Id.* at 864-65. The Court held that Sections 69 and 81 did not give the Governor any emergency power to withdraw funds or suspend statutes, as those were *explicitly* reserved for the legislature under Sections 230 and 15, respectively. *Id.* at 869-72.

Thus, *Fletcher* involved the executive attempting to wield legislative power and is inapposite. *Fletcher* cannot be read to limit the Governor’s *executive* powers – it only holds that he cannot exercise *legislative* powers. Here, there is no express provisions allowing the legislature to strip the Governor of his executive power in Sections 69 and 81.

II. Section 93 Of The Constitution Must Coexist With Sections 69 And 81.

Contrary to Appellees’ arguments, Section 93 of the Kentucky Constitution cannot diminish Sections 69 and 81 by allowing the legislature to give Section 91 officers appointment power and dilute the Governor’s ability to ensure faithful execution of the

law. In *Zuckerman v. Bevin*, this Court reiterated “a ‘cardinal rule’ of constitutional interpretation [is] the principle that rules of construction may not be employed where the language of the provision is clear and unambiguous.” 565 S.W.3d 580, 591 (Ky. 2018) (quoting *Fletcher v. Graham*, 192 S.W.3d 350, 358 (Ky. 2006 (internal citations omitted))). Moreover, constitutional provisions should be read together “to give effect to every [] constitutional provision.” *Runyon v. Smith*, 121 S.W.2d 521, 522 (Ky. 1948).

Invoking Section 93 to infringe on the Governor’s Section 69 and 81 powers would render Sections 69 and 81 meaningless and ignore their plain language. By its plain language, Section 93 allows the legislature to determine whether state offices are filled by election or appointment and provide for certain parameters surrounding those appointments or elections. *See e.g. Prater v. Commonwealth*, 82 S.W.3d 898, 909 (Ky. 2002) (recognizing the limitations of the legislature’s ability to affect executive branch appointments to “before-and-after-fact parameters”). It does not contain any express authority to reallocate the executive vesting clause or the power to ensure faithful execution of the law.

All parties agree, even the dissenting opinion in *Shell v. Beshear* cited by Appellees, that the “power of appointment is intrinsically executive.” 2024 WL 1005023, at *50 (Ky. App. Mar. 8, 2024) (Acree, J., dissenting); (at 64.) The legislature cannot use words that do not appear in the provision to infringe on this, or any, executive powers vested in the Governor “unless expressly directed or permitted.” KY. CONST. § 28. The plain language of Section 93 does not expressly direct or permit the legislature to say “who” gets to appoint, even though Appellees would like to add it to the provision.

Thus, read in conjunction with Sections 69 and 81 – as it must be – Section 93 does not “expressly” allow the legislature to dictate that anyone, other than the Governor, may appoint members to executive branch boards. Appellees attempt to read the words “and by whom” into Section 93, which violates of “the basic rule [] to interpret a constitutional provision according to what was said and not what might have been said; according to what was included and not what might have been included.” *Commonwealth of Kentucky v. Claycomb By and Through Claycomb*, 566 S.W.3d 202, 216 (Ky. 2018) (quoting *Pardue v. Miller*, 206 S.W.2d 75, 78 (1942)).

To bootstrap this authority into Section 93, Appellees adopt the argument from the dissent in *Shell*, claiming that the phrase “as may be prescribed by law” provides the legislature the power to determine who appoints. (at 15.) Taken to its logical conclusion, as the *Shell* dissent does, see *Shell*, 2024 WL 1005023, at *21 (Acree, J., dissenting), this would leave the legislature with the *plenary* power to dictate all manner of appointments or elections in clear violation of Kentucky’s longstanding jurisprudence. See e.g. *LRC v. Brown*, 664 S.W.2d at 918. But just as it does not expressly state that the General Assembly may direct who may appoint, the language of Section 93 does not expressly permit the legislature to exercise the inherent executive power of appointment itself.

Lacking support from the plain language, Appellees revert to a historically inaccurate analysis of Section 93 and its predecessor provision in the 1850 Constitution. (at 18-25.) But the 1850 provision was never discussed during the debates and was not even sent to the People to ratify. See 1849 Const. Debates (Frankfort, Ky., R. Sutton), 1095 (reading of final proposed Art III, § 25). It was only added after ratification and

appears in the final version.⁵ Nothing from the 1849 constitutional convention debates supports Appellees' argument that Section 93's predecessor intended to strip the Governor of his power to appoint newly created inferior state officers. The delegates knew how to do this through plain language,⁶ but did not in this instance.

Of course, had the legislature been given this power in 1850, it undoubtedly would have enacted legislation creating offices and appointing members or dictating which of the now newly-elected executive officers could appoint these officials. There is no evidence that it contemporaneously passed statutes providing appointment power to anyone but the Governor. *See Collins v. Henderson*, 74 Ky. 74 (1874) (holding contemporaneous legislative constructions are entitled to great weight).

Furthermore, Appellees' reliance on a quote from Delegate Bronson during the 1890 constitutional convention is misplaced and grossly overstates its importance. Bronson was one delegate out of one hundred in 1890. It is absurd to rely on the comments of a single delegate about a provision that was never even approved by the People as grounds to strip the Chief Magistrate of his express executive authority. This Court, in *Zuckerman*, rejected the "selective quotations from [the] four-volume set of over 6,000 pages" of the debates as "not a useful exercise in 'divining the intent of the framers.'" *Zuckerman*, 565 S.W. at 591.

⁵After the voters approved the new constitution, the convention reassembled and "spent several days making *minor* changes." Lowell H. Harrison & James C. Klotter, *A New History of Kentucky* (1997), 119 (emphasis added).

⁶ *See e.g.* 1850 KY. CONST., Art. III, § 25 (Treasurer, Auditor of Public Accounts, Register of Land Office, and Attorney General to be elected); Art. IV, § 6 (judges to the Court of Appeals be elected); Art IV, § 20 (judges to Circuit Courts elected); Art. IV, § 13 (Clerk of Court of Appeals to be elected) Art. VI, § 30 (judges to County Court to be elected).

Regardless, the Court need not wade into the various positions taken in the debates because, when read together, the plain text of Sections 69, 81, and 93 leave no room for interpretation. Appellees simply cannot read the words “and by whom” into Section 93.

III. *Brown v. Barkley* Does Not Allow The General Assembly To Strip The Governor Of Constitutional Power In Favor Of Section 91 Officers.

Appellees continue to misuse dicta from *Barkley* to argue it compels a decision that the legislature may give the Governor’s appointment power to the Section 91 officers. (at 34.)

First, *Barkley* did not involve appointments to executive branch boards and its applicability to this case is limited to its enduring language – the express prohibition 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] supremacy.” 328 S.W.2d at 622. But this is exactly what HB 334 does – it strips the Governor of his Section 69 and Section 81 authority in favor of the Section 91 officers. *Id.* at 622 n. 12; see *Yeoman*, 983 S.W.2d at 472-73.

Second, as the Court of Appeals in the State Fair Board litigation recognized, the Court in *LRC v. Brown* rejected Appellees’ expansive reading of *Barkley* two years after it was decided, when the legislature attempted a similar usurpation. *Shell*, 2024 WL 1005023, at *4. In *LRC v. Brown*, the legislature argued that *Barkley* gave it all residual powers not otherwise defined in the Constitution. *Id.* In this seminal decision, this Court ruled that *Barkley*’s holding was limited to only those powers “solely and exclusively legislative in nature[.]” *LRC v. Brown*, 664 S.W.2d at 913. As it did in *LRC v. Brown*, this Court must again reject an expansive reading of *Barkley*.

Finally, if *Barkley* said what Appellees argue, then the legislature can strip the Governor of his Section 69 and Section 81 authority, rendering those provisions meaningless, by creating boards and commissions outside of his control. This cannot stand, and would allow the legislature to render the Governor an “empty shell.” See *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 829 (Ky. 1942). This unconstitutional result is avoided by applying the full language of *Barkley*, the limiting language of *LRC v. Brown*, and the specific appointment cases of *Yeoman*, *Musselman*, and *Elrod*.

As expected, Appellees cite to *Cameron v. Beshear*, 628 S.W.2d 61 (Ky. 2021), and *Rouse v. Johnson*, 28 S.W.2d 745 (Ky. 1930), for support. (at 25-30; 38-42.) Appellants adequately distinguish those cases in their opening brief and refer the Court thereto. (Appellants’ Brief, at 41-45.) Appellants further cite to *Royster v. Brock*, 79 S.W.2d 707 (Ky. 1935), *Martin v. Chandler*, 318 S.W.2d 40 (Ky. 1958), and *Kentucky Employees Retirement System v. Seven Counties Services*, 580 S.W.3d 530 (Ky. 2019), to argue there are no “implied” executive powers in the Constitution. (at 42.) But as discussed, the power to appoint is intrinsically and inherently an executive power, not implied. See *Sibert*, 246 S.W. at 458. Those cases are inapplicable here.

CONCLUSION

The Court of Appeals’ holding that the Governor’s constitutional authority is “idle and meaningless” cannot stand. Sections 69 and 81 must be given meaning and effect. This Court must reverse the Court of Appeals and hold HB 334 unconstitutional.

Respectfully submitted,

/s/Travis Mayo
S. Travis Mayo
Taylor Payne
Laura Tipton
*Counsel for Appellee,
Governor Andy Beshear*

/s/Mitchel T. Denham
Mitchel T. Denham
*Counsel for Appellees,
Governor Andy Beshear and
Commissioner David Karem*

CERTIFICATE OF COMPLIANCE WITH RAP 31(G)

This Brief complies with the word limit of Kentucky Rule of Appellate Procedure 31(G)(3)(b) because, excluding parts of the brief exempted by Kentucky Rules of Appellate Procedure 15 (E) and 31(G)(5), this Brief contains 3,482 words.

/s/Mitchel T. Denham
Mitchel T. Denham