COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2007-SC-000058

ERNIE FLETCHER, in his official capacity as the Governor of the Commonwealth of Kentucky; and BRADFORD L. COWGILL, in his official capacity as State Budget Director

APPELLANTS

v.

HAYDON BRIDGE COMPANY, INC.; GREATER LOUISVILLE AUTO DEALERS ASSOCIATION; KENTUCKY AUTOMOBILE DEALERS ASSOCIATION; M&M CARTAGE CO., INC.; SPRINGFIELD LAUNDRY & DRY CLEANERS, INC.; USHER TRANSPORT, INC. and KENTUCKY WORKERS' COMPENSATION FUNDING COMMISSION

APPELLEES

APPEAL FROM FRANKLIN CIRCUIT COURT
Honorable Thomas Wingate
No. 03-CI-01547

BRIEF FOR APPELLANTS GOVERNOR ERNIE FLETCHER AND STATE BUDGET DIRECTOR BRADFORD L. COWGILL

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Appellants' Brief has been served upon the following, by U.S. Mail, postage prepaid, on the 5th day of October, 2007: Hon. Thomas Wingate, Courthouse, 214 St. Clair St., Frankfort, Kentucky 40601; Edward O'Daniel, Jr., 110 West Main Street, Springfield, Kentucky 40069; Mark D. Guilfoyle, Deters, Benzinger & LaVelle, PLLC, 207 Thomas More Parkway, Crestview Hills, Kentucky 41017-2596; Frank Dickerson, General Counsel, Kentucky Workers' Compensation Funding Commission, 42 Millcreek Park, P.O. Box 1128, Frankfort, Kentucky 40602-1128.

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INTRODUCTION

The Franklin Circuit Court ruled that whenever the General Assembly temporarily suspends an appropriation statute in a budget bill, it must reenact and publish the suspended statute in whole in the budget bill pursuant to the publication requirement of Section 51 of the Kentucky Constitution. The Governor and State Budget Director challenge this ruling because Section 51's publication requirement does not apply to temporary suspensions of statutes – a fact this Court firmly established 21 years ago in *Com. ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 441 (Ky. 1986).

STATEMENT CONCERNING ORAL ARGUMENT

Appellants Governor Ernie Fletcher and State Budget Director Bradford L. Cowgill ("Appellants") respectfully request oral argument. The General Assembly's ability to suspend statutes in a budget bill without reenactment and publication is a matter of great and immediate public importance. It is a critical device that the legislature uses to fulfill its constitutional duty to balance the budget. Oral argument may assist the Court in deciding the important constitutional question presented.

STATEMENT OF POINTS AND AUTHORITIES

May It Please The Court:

STATEMENT OF THE CASE

The General Assembly's power to suspend statutory appropriations in a budget bill rests firmly on the Kentucky Constitution: "Laws to be suspended only by the General Assembly. No power to suspend laws shall be exercised unless by the General Assembly or its authority." Ky. Const. § 15. As this Court has observed, in upholding budgetary suspensions: "It is clear that the power of the dollar – the raising and expenditure of the money necessary to operate state government – is one which is within the legislative branch of government. The Constitution of the Commonwealth so states and we have so stated." *Com. ex. al. Armstrong v. Collins*, 709 S.W.2d 437, 441 (Ky. 1986). In the 2000-02 and 2002-04 biennial budgets, the Legislature invoked its exclusive right under section 15 and, to balance the budget, suspended General Fund appropriations to the Workers' Compensation Benefit Reserve Fund ("BRF").

Despite *Armstrong* and the specific constitutional grant in section 15, the lower court held the budgetary suspensions to the BRF unconstitutional. It relied on another constitutional provision, section 51, which requires "re-enactment and publication" of a statute **only** when it is "revised, amended, extended or conferred." On its face, section 51 has no application when the Legislature **suspends** a statute under section 15. The lower court's reasoning is equivalent to using section 51 to erase section 15. Every word in our Constitution has meaning, however, and for all the reasons in *Armstrong*, section 51 simply does not apply when the General Assembly suspends statutes in a budget bill. Section 51 applies solely to an amendment, and the budget bills did not amend

any statute. We respectfully ask this Court to adhere to the wisdom of *Armstrong* and reverse.

The Parties. Appellee Plaintiffs are three Kentucky employers and two associations of automobile dealers who, like all Kentucky employers, pay assessments on their workers' compensation insurance premiums to BRF.[1] In 2002, the assessment rates on their premiums rose from 9 percent to 11.5 percent.[2] Plaintiffs blamed this increase on the General Assembly's budgetary suspensions of General Fund appropriations to BRF in the 2000-2002 and 2002-2004 budget bienniums.[3] The record fails to support this contention, however. The undisputed evidence proves otherwise. Nevertheless, Plaintiffs sued the Governor, the State Budget Director, and the Kentucky Workers' Compensation Funding Commission ("KWCFC") alleging that the suspension of public monies to BRF violated sections 51 and 180 of the Kentucky Constitution.[4]

BRF's History. The General Assembly substantially altered funding to BRF after the Court decided *Thompson v. Kentucky Reinsurance Ass'n*, 710 S.W.2d 854 (Ky. 1986). *Thompson* involved the transfers of premiums from the Kentucky Reinsurance Association to the General Fund. As this Court explains in *Thompson*, the Legislature established the Kentucky Reinsurance Association in 1982 to oversee what was then the "Special Fund," created in 1946 to

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[1] Plaintiffs' First Amended Complaint, pp. 2-3, T.R. 2-3.

[2] *Id.* at 7, T.R. 7.

[3] *Id.* at 7-11, T.R. 7-11.

[4] *Id.*, T.R. 1-12.

encourage employers to hire injured veterans; when an employer hires a person with a preexisting injury who is then injured again while on the job, the Special Fund paid for costs arising from the injury. The liability of the Special Fund grew tremendously as years passed. "The purpose for the creation [in 1982] and operation of KRA is to provide a means for the assumption of the liabilities of the Special Fund." *Id.* at 855. KRA operated "**entirely on premiums** collected from Kentucky insurance carriers ... Kentucky self-insurance groups and Kentucky self-insured employers." *Id.*

The General Assembly abolished KRA in 1987 and replaced it with the KWCFC, which uses its revenues to fund and pre-fund the liabilities of BRF. During the early 1990's, BRF's liabilities continued to grow, and the premium funding mechanism became inadequate. The General Assembly responded. First, it closed BRF to any new claims; KRS 342.120(2); no workers could bring a claim against the BRF for injuries suffered after December 12, 1996, and the BRF's liabilities will expire by 2018. KRS 342.120(2) and 342.122(1)(b). Second, the General Assembly changed BRF's sources of income. It repealed the additional assessment levied against coal companies and **for the first time** added a public component to the funding.

On July 1, 1997, the General Assembly began appropriating $19 million annually from the General Fund to BRF in four quarterly payments:

> In addition to the assessment imposed in paragraph (a) or (b) of this subsection . . . the Kentucky Revenue Cabinet shall credit nineteen million dollars ($19,000,000) in coal severance tax revenues levied under KRS 142.020 to the benefit reserve fund within the Kentucky Workers' Compensation Funding Commission each year beginning with fiscal year 1998 and all fiscal years

> thereafter. The annual transfer of nineteen million dollars ($19,000,000) shall occur in four (4) equal quarterly payments . . . of four million, seven hundred fifty thousand dollars ($4,750,000).

KRS 342.122(1)(c).[5]

KWCFC also continued to receive assessments on premiums. The General Assembly established the annual assessment rate at 9 percent for the calendar year 1997. *See* KRS 342.122(1)(a). Thereafter, the KWCFC Board had the authority to establish rates based on an actuarial analysis of what would be necessary to cover BRF's obligations by the 2018 statutory deadline. *See* KRS 342.122(1)(b).

Thus, as of July 1, 1997, BRF was slated for funding from three sources: (1) assessments on premiums, (2) $4.75 million per quarter from the General Fund, and (3) income on investments. *See* KRS 342.122. BRF received funding from all three sources from July 1, 1997 through the beginning of Fiscal Year 2002.

The Necessity of a Balanced Budget. The Kentucky Constitution requires the General Assembly to pass a balanced budget. This constitutional command derives from Sections 49, 50, and 171, which together authorize and require the General Assembly to raise revenues sufficient to pay the debts and expenses of government. *Fletcher v. Commonwealth*, 163 S.W.2d 852, 856 (Ky.

[5] The three purposes of the coal severance tax are (1) to fund resource recovery road projects, (2) to fund the Kentucky Coal Council, and (3) to provide revenue to the General Fund. KRS 143.090(4). Consequently, the $19 million annual appropriation set forth at KRS 342.122(1)(c) is an appropriation of General Funds.

2005).[6] Balancing a budget necessarily entails adjusting priorities and appropriations accordingly. Under the Constitution, the Legislature has no other choice.

Thus, KRS 48.130 compels each branch of government to include a "budget reduction plan" in the event of deficits. Services that are not "essential to constitutional functions shall be subject to reduction." Further, "[t]ransfers of funds may be authorized by the budget reduction plan." KRS 48.130(2). Under KRS 48.400, the Office of the State Budget Director must "continuously monitor" the Commonwealth's financial situation and immediately notify all government branches of a revenue shortfall. Based on information from the Budget Office, the Governor must implement budget reductions to balance the budget. KRS 48.130(5).

Suspended Appropriations. This is precisely what happened for fiscal year 2002, prompting Governor Patton to recommend the temporary suspension of appropriations to numerous state agencies [General Fund Budget Reduction Orders 02-01 and 02-02], including all appropriations to the BRF. After the General Assembly failed to pass a budget for the executive branch before the 2002–2004 budget biennium began, Kentucky operated under the Governor's Emergency Spending Plan, which suspended appropriations to BRF. When the

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[6] Section 49 of the Constitution addresses the General Assembly's power to contract debts to meet casual deficits or failures in the revenue, Section 50 addresses the purposes for which the General Assembly may contract debt, and Section 171 addresses the General Assembly's power to tax.

General Assembly eventually passed the 2002–2004 biennium Budget Bill in 2003, it ratified and codified the Governor's plan.

> Notwithstanding KRS 342.122(1)(c), no General Fund appropriation is provided to the Workers' Compensation Funding Commission in fiscal year 2002-2003 and fiscal year 2003-2004.
>
> . . .
>
> Notwithstanding KRS 48.130 and 48.600, the General Assembly confirms, adopts, and enacts the revised General Fund appropriations levels for the budget units of the Executive Branch contained in General Fund Budget Reduction Order 02-01, General Fund Budget Reduction Order 02-02, General Fund Budget Reduction Order 02-03, General Fund Budget Reduction Order 02-04, and confirms and enacts the advances, transfers, and lapses to the General Fund of non-General Fund moneys identified in General Fund Budget Reduction Order 02-01, General Fund Budget Reduction Order 02-02, General Fund Budget Reduction Order 02-03, and General Fund Budget Reduction Order 02-04.[7]

The General Assembly also adopted other measures to balance the budget. It reclaimed approximately $5 million in public appropriations from BRF for the General Fund, and transferred $1,700,000 from BRF to the Department of Mines and Minerals.[8] The Legislature expressly stated that it was only reclaiming public money originally transferred from the General Fund and leaving untouched private premium assessments:

> Funds lapsed in Part V include no employer benefit premiums or liability payments and are the recapture of fiscal year 2001 – 2002 General fund transfers to the Benefit Reserve Fund.[9]

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[7] 2003 House Bill 269, pp. 57, 202 (the 2003 Budget Bill).

[8] *Id.* at 57.

[9] *Id.*

The BRF Remained Financially Strong. At the end of fiscal year 2002, the BRF had more than $43 million in public funds and continued to receive revenue from assessments and income on investments.[10] The only evidence in the record proves that the BRF remained sound and also that no private monies from assessments were touched.[11] As acting Budget Director under Governor Patton and currently Deputy Executive Director of the Governor's Office of Policy Research in the Office of State Budget Director, Mary E. Lassiter knows well the Budget Bills and transfers involved in this case.[12] Her analysis stands unrebutted and proves that prior to the suspensions at issue, BRF had received $76,000,000 in General Fund appropriations, plus $5,903,746 in investment income off those appropriations.[13] As a result, there were plenty of public funds in the BRF to cover the 2003 transfers out of it.[14] In fact, at the end of fiscal year 2003, the BRF still had $19,355,889 remaining in public funds, even though the $5 million had been transferred out of the BRF, millions of dollars in BRF expenditures had

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[10] Affidavit of Mary E. Lassiter, Deputy Executive Director of the Governor's Office of Policy Research in the Office of State Budget Director. Supplemental T.R. 41-47, App. 2, hereto.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

been paid using public funds, and the $19 million annual appropriations had been suspended for nearly two years.[15]

KWCFC Establishes Rates. Plaintiffs never disputed BRF's financial soundness. They complain, instead, that the budget caused their premium assessment rates to rise.[16] The lower court agreed by assuming a connection between the suspension of appropriations and an assessment increase when the **only evidence** in the record proves otherwise: In reality, other significant changes in the world affected assessment rates.

On October 16, 2001, the KWCFC Board met to decide the assessment rate on premiums for 2002, which at the time, was 9 percent.[17] But interest rates on investments were declining.[18] An actuarial firm that KWCFC hired to assist in setting the rates found that the assessment rate would have to be 11.41 percent in a pessimistic scenario, even assuming the public fund appropriations would be made to the BRF.[19] And, the fiscal outlook was indeed pessimistic and unpredictable after the numbing tragedy of September 11, occurring just weeks before. The Board therefore increased the premium assessment rate from 9

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[15] *Id.* Plaintiffs argued below that the General Assembly reclaimed "private funds" when it transferred funds from BRF to the General Fund. But as Ms. Lassiter's Affidavit proves, public money can be differentiated from private funds in BRF.

[16] Plaintiffs' First Amended Complaint, pp. 7-11, T.R. 7-11.

[17] Affidavit of Jon Nielsen, the Commission's Executive Director at that time, Supplemental T.R. 49-50, App. 3, hereto.

[18] *Id.*

[19] *Id.*

percent to 11.5 percent. This increase was unrelated to any suspension of appropriations from the General Fund.[20] The General Assembly thereafter adopted the 11.5 percent rate in 2003 in its 2002-2004 biennium Budget Bill: "Notwithstanding KRS 342.122(1)(b), the workers' compensation assessment rate shall remain at 11.5% for the biennium."[21]

Proceedings Below. Unable to this day to show how any budget provision affected their assessment rates, Petitioners nevertheless filed a declaratory judgment action alleging that the budget actions concerning the BRF were unconstitutional under sections 51 and 180 of the Kentucky Constitution.[22] The parties filed cross motions for summary judgment.[23] The lower court granted Petitioners' motion and denied the Governor's motion.[24]

The lower court recognized that "this case turns solely upon interpretation of law."[25] It rejected Petitioners' argument that the budget actions violated Ky. Const. § 180, which provides that "no tax levied and collected for one purpose shall ever be devoted to another purpose."[26] Petitioners insisted that the coal severance tax is "dedicated" to the BRF. The lower court disagreed and correctly

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[20] *Id.*

[21] 2003 House Bill 269, p. 57.

[22] Plaintiffs' First Amended Complaint pp. 7-11, T.R. 7-11.

[23] T.R. 55-79 and 90-91, Supplemental T.R. 1-58.

[24] Opinion and Order, T.R. 252-263, App. 1, hereto.

[25] *Id.* at 2.

[26] *Id.* at 2-4.

found that "[t]he express language of KRS Chapter 143 states that these funds may be levied for the purpose of the General Fund."[27]

The lower court also recognized that the General Assembly has the power to temporarily "suspend" statutes in order to balance the budget, and that the actions at issue in the case were indeed "suspensions."[28] Turning to Section 51, however, the lower court ruled the suspensions and transfers violated the reenactment and publication requirement.[29] In doing so, the lower Court narrowed *Armstrong* as creating a "limited exception to Section 51's requirement for re-enactment and publication for the discrete situation where the Legislative Branch in its [enactment of the Executive Branch] Budget Bill 'suspends' rather than 'repeals' legislation."[30] The lower court then summarily concluded that "the rationale of *Armstrong* fails to address the facts of this case."[31]

Given the obvious importance of this case to the Governor, the Budget Director, the Commission, and Plaintiff's below (albeit for different reasons), the parties asked the lower court to make its declaratory judgment final and appealable under CR 54.02.[32] The lower court then entered final Judgment on

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[27] *Id.* at 4.

[28] *Id.* at 1, 4-5, 10.

[29] *Id.* at 4-11.

[30] *Id.* at 6.

[31] *Id.* at 5.

[32] T.R. 315-316.

December 19, 2006.[33] The Governor and Budget Director appealed and the parties agreed that transfer to this Court is essential because this case directly impacts the budgeting process for all governmental operations and responsibilities. Appellants respectfully urge this Court to reverse the judgment and reinforce *Armstrong*, which did not create an "exception" to the publication requirement. To the contrary, by its own terms, section 51 is limited to situations where a statute is permanently "revised, amended, extended or conferred" and has no application to suspensions or modifications. The budget provisions here were **not** amendments and are no different from those upheld in *Armstrong*. And, the unassailable fact remains that the budget cannot be balanced as constitutionally required without the power to suspend appropriations.

ARGUMENT

There are three specific questions of law currently before the Court: (1) Whether a budget bill can suspend statutes appropriating public funds to the BRF without republishing them, (2) whether a budget bill can transfer trust and agency funds to the General Fund or another agency without republishing the appropriation statutes, and (3) whether a budget bill can suspend and temporarily modify a statute setting assessment rates on workers' compensation premiums.[34]

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[33] T.R. 317-318, App. 1, hereto.

[34] These issues were properly preserved for review in Appellants'/Defendants' Motion for Summary Judgment [T.R. 90-91], Memorandum in Support of Summary Judgment [Supplemental T.R. 1-58], and Reply Brief in Support of Motion for Summary Judgment [T.R. 123-143].

This Court answered these three questions with an unqualified "yes" in *Armstrong* and should do so again in this case.

I. ***ARMSTRONG V. COLLINS.***

In 1984 Kentucky faced a budget crunch. The government's revenues were simply not sufficient to allow the legislature to make all constitutionally and statutorily required expenditures. To balance the 1984-1986 budget, the General Assembly took a number of difficult but necessary actions. Specifically, it temporarily suspended or modified numerous statutory appropriations to make ends meet. For example, the 1984 Budget Bill suspended the effectiveness of statutes mandating specific raises for various state employees, and then provided for annual increases that were less than were provided for in the suspended statutes:

> Notwithstanding the provisions of KRS 15.755, 15.765, 18A.355, 64.055, 64.480, and 64.485, the salaries of the various state officials for fiscal year 1984-85 and fiscal year 1985-86 shall be as provided for in this Act.

(1984 House Bill 474, as enacted, p. 165).

The legislature also required that certain public funds be transferred from 47 trust and agency funds, similar to the BRF, to the General Fund so that the Legislature could pay for the most pressing financial needs of the day.[35]

> There is hereby transferred from the agency and special funds enumerated below to the general fund the following amounts in fiscal years 1984-85 and 1985-86.

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[35] "Trust and agency funds" are monies state agencies, boards, commissions, or other such entities receive through fees, rentals, sales, gifts, or other public income, which are generally statutorily appropriated to those units of Government. *Armstrong*, 709 S.W.2d at 446.

		1984-85	1985-86
1.	Board of Accountancy (KRS 325.250)	5,000	5,400
2.	Board of Architects (KRS 323.190, 323.210)	1,500	1,600
. . .			
47.	Reinsurance Association	1,908,000	2,072,000

(*Id.* at 167-172).

The suspensions and modifications in the 1984 Budget Bill spawned the *Armstrong* litigation, which led this Court to address three questions of Kentucky law: (1) whether the General Assembly has the Constitutional power to suspend or modify statutes in a budget bill, and if so, (2) whether the 1984 budget bill, as a whole, complied with the title provisions of Section 51 of the Kentucky Constitution, and if so, (3) whether each contested suspension or transfer therein complied with the reenactment and publication requirement of Section 51.

This Court answered the first two questions in the affirmative. *Armstrong*, 709 S.W.2d at 441-445. It then conducted a provision-by-provision analysis of the suspensions in the 1984 Budget Bill to determine whether each was a temporary "suspension" or a permanent "amendment," because it held that Section 51's procedural requirements did not apply to temporary suspensions or modifications. *Id.* at 445-448.

A. The General Assembly Has the Constitutional Power to Suspend or Modify Appropriation Statutes in a Budget Bill.

Armstrong holds that the General Assembly has the power to suspend or modify appropriation statutes in the budget bill, even if the suspension

temporarily nullifies the effectiveness of a previously enacted statute. *Id.* at 441-443. This power arises from a combination of (1) Section 15, which specifically provides the power to "suspend," (2) the constitutional requirement of a balanced budget, and (3) the General Assembly's power of the purse:

> Because of the General Assembly's exclusive authority with respect to public funds and the budget, we have no problem in deciding that Ky. Const. Sec. 15 applies to statutes which can be affected by the budget bill of the Commonwealth. The General Assembly is mandated to operate the financial offices of the Commonwealth under a balanced budget. If revenues become inadequate, the General Assembly must be empowered to use adequate devices to balance the budget. Provisions in the budget document which effectively suspend and modify existing statutes which carry financial implication certainly are consistent with those duties and responsibilities.

Id. at 443. Kentucky's courts have never questioned this compelling logic, nor have Plaintiffs/Appellees, which recognized that "[s]uspending laws is a constitutional power conferred upon the General Assembly by Section 15." App. 1, p. 10.

B. The 1984-1986 Budget Bill Complied with the "Title" Requirement of Section 51 Because All of Its Provisions Concerned Appropriations.

Armstrong first observed that Section 51 has two components: The so-called "title" requirement, directing that "[n]o law of the General Assembly shall relate to more than one subject . . . expressed in the title," and the publication demand, directing the General Assembly to reenact an existing statute in entirety when it "amends, revises, or extends the statute." *Id.* at 443, 445.

This Court declared that the 1984-1986 Budget Bill complied with the "title" requirement of section 51, even with the numerous statutory changes included

therein. Because the Budget Bill was "AN ACT relating to appropriations," and the statutory changes at issue concerned "appropriations," the title requirement was satisfied:

> The fact that the title tells the reader that the act is an appropriation for the funding of state government clearly alerts one to the fact that the act deals with "appropriations" including possible changes. No person could claim to have been misled by the title of HB 474 because the content of the act sets a course of action when the financial condition of the Commonwealth deteriorates.

Id. at 444. The lower court here also found no violation of the title requirement.

C. Section 51's Publication Requirement Is Inapplicable.

Petitioners in *Armstrong*, like Plaintiffs here, complained that suspensions in a budget bill violate the reenactment and publication requirement of Section 51 because they do not republish the suspended statute. Rather, the budget provision will reference the statutes and make clear that the budget provision is effective for the budget period "notwithstanding" the existence of the statute. *See, e.g.*, 1984 House Bill 474, as enacted, p. 165.

Section 51 does not govern such "notwithstanding" language in a budget bill because, as this Court held in *Armstrong,* the publication requirement "is limited by its own wording to amendment, revision, extension or conferring of existing statutes." *Armstrong*, 709 S.W.2d at 445. When a budget provision is not an amendment, as here, section 51 is irrelevant. As a result, this Court held that the publication requirement does not, and constitutionally cannot, apply to temporary suspensions or modifications:

> If a challenged statutory enactment falls within the proscribed activities, as opposed to being merely suspensory in nature, it is

violative of this section part of Section 51. If it is, however, merely a suspension or modification, it is not violative thereof.

Id.

The genesis of this distinction is the language of sections 15 and 51 of Kentucky's Constitution. Without question, section 15 gives the General Assembly the authority to "suspend" statutes and section 51 governs its power to "amend" statutes. It is equally clear, however, that section 51 provides a specific list of activities that the publication requirement covers, and "suspend" does not appear on that list. The framers of the Constitution had every opportunity to include "suspend" on that list, as sections 15 and 51 were ratified simultaneously. But the framers chose instead to provide for suspensions in an entirely separate section. This Court therefore logically concluded that "suspensions" simply are not subject to section 51's publication requirements, while permanent amendments and revisions are.

The appellants' section 51 challenge in *Armstrong* then hinged entirely on whether the Budget Bill actions constituted a "suspension" outside the scope of publication requirement, or an "amendment," which must be republished at length. This Court then made this determination separately on each budget provision. *Id.* at 440-441, 445-448.

1. Changes to State Employee Salary Statutes are Suspensions.

The first Budget Bill provision this Court considered in its "suspension" versus "amendment" analysis was the one suspending the effectiveness of six statutes mandating specific raises for various state employees. *Id.* at 445-446.

Id.

This Court held such provisions to be valid "suspensions" for three reasons: they were (1) temporary modifications (2) that reduced state expenditures (3) in an effort to balance the budget.

> As we view this statute, the General Assembly has – as a premise for its action – cited the shaky financial condition of the Commonwealth. It has exercised its discretion – nay, it has performed its constitutional obligation – that of operating the Commonwealth within a balanced budget, by reducing expenditures in areas which it felt were proper. It has exercised proper legislative discretion and judgment. It has not repealed or amended the existing salary statutes, it has simply temporarily suspended them, as it clearly has the power to do.

Id.

2. Provisions Requiring the Transfer of Trust and Agency Funds to the General Fund Were Also "Suspensions" and "Revisions."

The Court next analyzed the Budget Bill provisions that required millions of dollars of "trust and agency funds" to be transferred to the General Fund. *Id.* at 446-447. This Court upheld these Budget Bill provisions as valid "suspensions" because they were (1) temporary measures (2) that related to appropriations and (3) brought about due to the "financial condition of the state:"

> The trial court upheld the validity of these transfers, declaring that the General Assembly has the authority under Section 15 of the Kentucky Constitution and under KRS 48.315 to suspend, for the duration of the biennium, sections of the Kentucky Revised Statutes that pertain to trust and agency funds. We agree in part.

Id. at 446.

The Court reversed part of the lower court's order, however, which allowed the General Assembly to transfer "private" funds, such as (1) employee contributions to retirement funds and (2) assessments on workers' compensation

insurance premiums paid to the BRF, out of those special funds and into the General Fund. "Suspensions" were only valid as to appropriations of public funds:

> However, the transfer of funds which relate to appropriations of private contributions cannot be termed suspensions or modifications of the operation of the statutes.

Id.

As a result, special funds comprised solely of private funds are beyond the reach of the General Assembly in a budget bill:

> Because the General Assembly has no authority to transfer private funds to the general fund, the transfer of money from agencies in which public funds and private employee contributions are commingled, and cannot be differentiated, is unconstitutional.

Id. Under this reasoning, to the extent that a special fund commingles public and private monies, and the funds can be differentiated, the public funds can be transferred to the General Fund. The record is undisputed here that the budget provisions had no effect on private monies in the BRF because the funds can be differentiated.

D. *Armstrong* Defines "Suspensions" and "Modifications" as Temporary Changes, Whereas "Amendments, Revisions, or Extensions" Are Permanent Changes.

Under *Armstrong*, when distinguishing between "suspensions and modifications," on one hand, and "amendments, revisions, and extensions," on the other, the key question is plain: Is the change temporary or permanent? If the change is temporary, it is a "suspension" or "modification." If it is permanent, it is an "amendment," "revision," or "extension." If a suspension in a budget bill does not extend past the biennium, it is necessarily a suspension. This

distinction jibes with the definitions lexicographers give these terms. For instance, "suspension" is defined as "temporarily stopped, interrupted," while "revision" is defined as "to make new, amended, improved, or up-to-date version of." WEBSTER'S NEW INTERNATIONAL DICTIONARY, 83, 2541 (2nd Ed. 1950).

This distinction also jibes with common sense. The framers of the Constitution would naturally want to require permanent changes to statutes, like amendments, to be clearly indicated through a reenactment and revision so that everyone knows what the law is in the future. Accordingly, the publication requirement appears in section 51. The framers, however, may not have been as eager to require the same of a temporary change, as the very intent of a suspension is that the original statute will remain on the books and once again become effective once the suspension expires. A reenactment or republication for a temporary change might cause more confusion than clarity. Therefore the framers did not include a publication requirement in section 15.

While this Court in *Armstrong* frequently noted that the budget actions were taken due to a "financial emergency," the Court's reference to "financial emergency" flowed from a now repealed statute. In 1984, KRS 446.085 required a "financial emergency" to exist before the General Assembly could suspend an appropriation statute in a budget bill. The Legislature repealed KRS 446.085 in 1994. Since then, the absence or presence of a fiscal crisis is immaterial. A financial emergency is not part of the Court's constitutional distinction between "suspension" and "revision," nor was it a constitutional prerequisite for a budget bill action to be deemed a "suspension." Section 15 says nothing about a

"financial emergency" as pertinent to the power to suspend law. The General Assembly may constitutionally suspend statutes in a budget bill absent a financial emergency.

Nevertheless, to this day, the primary reason that the General Assembly suspends and modifies appropriation statutes in a budget bill is to balance the budget and to provide for the immediate and pressing needs of the Commonwealth. Indeed, that was the very motivation behind the suspensions at issue here: The Commonwealth faced a budget crunch and utilized suspensions to fulfill its constitutional mandate to balance the budget:

> It is the finding of the General Assembly of the Commonwealth of Kentucky that the financial condition of state government requires the [transfer of $5 million from the BRF to the General Fund].

(2003 House Bill 269, p. 217).

E. This Court Has Consistently, and Recently, Affirmed Its Opinion In *Armstrong* Because It is Correct.

For the past 21 years *Armstrong* has provided the General Assembly, the Budget Office, and the Governor with invaluable guidance on how to constitutionally balance the budget. And during those years this Court has confirmed that *Armstrong* reflects valid reasoning. In fact, this Court cited *Armstrong* as binding precedent in two recent cases, *Fletcher v. Commonwealth*, 163 S.W.3d 852, 865 (Ky. 2005)(citing *Armstrong* to confirm that "the General Assembly is permitted through the reduction or elimination of an appropriation, to effectively eliminate the efficacy of existing statutes"), and *Baker v. Fletcher*, 204

S.W.3d 589, 592 (Ky. 2006)(citing *Armstrong* to confirm that "the General Assembly may also suspend statutes in a budget bill.").[36]

By contrast, the lower court here discussed *Armstrong* but simply did not believe *Armstrong* meant what it said. The plain language of sections 15 and 51 of the Kentucky Constitution command that a distinction be drawn between "amendments, revisions, and extensions" on one hand and "suspensions and modifications" on the other. After all, section 15 of the Constitution provides the General Assembly with express authority to "suspend" legislation. It does not, however, include any requirement that the suspended statute be reenacted or published at length.

Likewise, section 51, by its very language, does not include "suspensions" in the its list of covered activities. The framers could have and would have included "suspensions" in section 51 had that been their intention, as sections 15 and 51 were simultaneously ratified. But it did not. It provided for them in a completely separate section in the Bill of Rights.

By recognizing a distinction between "amendments, revisions, and extensions" on one hand and "suspensions and modifications" on the other, the Court fulfilled one of its foremost duties of interpreting "a constitutional provision according to what was said and not what might have been said." *Fletcher v. Com.*, 163 S.W.3d at 864 (quoting *Pardue v. Miller*, 306 Ky. 110, 206 S.W.2d 75, 78 (1947)). As this Court observed in *Armstrong,* "it is not a function of this court

[36] This Court issued its opinion in *Baker v. Fletcher*, and therein confirmed *Armstrong's* validity, on June 15, 2006 – 15 days before the court below issued the Opinion and Order now at issue in this case.

to construe that language as meaning something that the framers of the Constitution did not say, or to hold that while the Constitution says something definitely and unequivocally, no special importance is to be attached to its language." *Id.* (citing *Harrod v. Hatcher*, 281 Ky. 712, 137 S.W.2d 405, 407 (1940)).

What is more, the distinction drawn in *Armstrong* prevents section 51 from swallowing whole section 15. This Court recognized that accepting the argument that "suspensions" fall within the realm of section 51's publication requirement – Plaintiffs' argument here – is equivalent to finding that "suspension" and "amendment" mean the same thing. As a result, section 15 would have absolutely no teeth of its own or reason to exist. Any provision changing a statute would qualify as an "amendment" governed by section 51. This consequence violates the long-standing principle of construction that requires courts to accord meaning to all sections in the Constitution. *See Reuben H. Donnelley Corp. v. City of Bellevue*, 283 Ky. 152, 140 S.W.2d 1024, 1026 (1940)("The constitution is not to be construed as destroying itself. Its principles are of equal dignity and none must be so enforced as to nullify or substantially impair the other.").

Perhaps most important, while *Armstrong* is grounded in the "plain language" of section 15 and 51 (and therefore comports with a literalist's interpretation of the Constitution), it also rests "upon the whole of the document, tempered by the accumulation of historical occurrences and the wisdom gained by those accounts." *Fletcher v. Commonwealth*, 163 S.W.3d at 878 (Lambert,

C.J., concurring in part and dissenting in part). *Armstrong* affirms that the Constitution provides the General Assembly with the power of the purse **and** imposes a duty to balance the budget. Historical occurrences prove that revenue shortfalls are a frequent and inevitable fact of life, and the General Assembly must be armed with constitutional tools to balance the budget.

> The General Assembly is mandated to operate the financial offices of the Commonwealth under a balanced budget. If revenues become inadequate, the General Assembly must be empowered to use adequate devices to balance the budget. Provisions in the budget document which effectively suspend and modify existing statutes which carry financial implication certainly are consistent with those duties and responsibilities.

Armstrong, 709 S.W.2d at 443.

In short, *Armstrong* construes sections 15 and 51 in a manner that is not only consistent with the plain words of those sections, but is also consistent with the remainder of the Constitution. It gives the General Assembly the power to balance the budget, as it is constitutionally bound to do, without making unwanted and unnecessary permanent revisions to any appropriation scheme.

II. THE GENERAL ASSEMBLY CONSTITUTIONALLY SUSPENDED THE $19 MILLION APPROPRIATION TO THE BRF.

Applying *Armstrong* to the facts here readily demonstrates that the budget suspensions and transfer of public funds was lawful.

A. The Suspensions of the $19 Million Appropriation Are Identical To the Suspension of State Employee Salary Statutes in *Armstrong* and Are Therefore Constitutional.

The Budget Bill provisions suspending the $19 million appropriation were (1) temporary suspensions lasting for only the biennium that (2) reduced

expenditures (3) in an effort to balance the budget. As such they are identical in purpose and nature to the suspensions of state employee salary statutes at issue in *Armstrong*.[37] The only difference is the specific appropriation suspended by the Budget Bill – in *Armstrong* the Budget Bill suspended six statutes mandating salary raises paid from the General Fund to state employees at certain rates; here the Budget Bill suspended the General Fund appropriations to the BRF. As in *Armstrong*, the publication requirement of section 51 is inapplicable.

B. The Lower Court Erred By Holding that The Suspensions of the $19 Million Appropriation Violated Section 51's Publication Requirement.

When considering the constitutionality of the suspensions of the $19 million Appropriation, the lower court properly looked to *Armstrong* as the controlling precedent. (Opinion, pp. 4-5). And pursuant to *Armstrong*, it correctly confirmed that the General Assembly has the power to suspend statutes in a budget bill. *Id.* The lower court also did not question the titles of the 2000-2002 and 2002-2004 Budget Bills. Moreover, the lower court explicitly, and correctly, referred to the Budget Bill actions concerning the $19 million appropriations as "suspensions" of KRS 342.122(1)(c). *Id.* at 1. The lower court, however, implausibly invalidated the suspensions on grounds that they violated section 51's publication requirement. This decision was wrong for a number of reasons:

[37] Again, a "financial emergency" or revenue shortfall is no longer required for a budget bill suspension of an appropriation statute to be valid. Nevertheless, to the extent it is, one existed during the 2000-2002 and 2002-2004 budget bienniums. [September 27, 2004 Affidavit of Mary Lassiter, T.R. 142-143, App. 4, hereto]. The 2000-2002 and 2002-2004 budget bienniums are the only ones addressed by the Opinion and Order currently on appeal. (Opinion, p. 1).

1. The Lower Court Misconstrued *Armstrong*.

Armstrong could not be more plain in confirming that the publication requirement has no application to a budget bill provision that suspends or modifies an existing statute. The lower court, however, read *Armstrong* to make a different pronouncement. It concluded that section 51's publication requirement ***does*** apply to "suspensions," and that *Armstrong* created a "limited exception" to that general rule:

> In *Armstrong*, the Supreme Court has created a limited exception to Section 51's requirement for re-enactment and publication for the discrete situation where the Legislative Branch in its Budget Bill "suspends" rather than "repeals" legislation.

(Opinion, p. 6). The lower court then summarily opined that under "the facts of this case, that discrete exception now swallows Section 51," and that "the underlying facts in the case present a compelling demonstration of *Armstrong v. Collins* run amok" (*id.* at 5).

The flaw in this reasoning lies in disregarding of the rule that Section 51's publication requirement ***has never applied to suspensions***. The lower court improperly equates "suspensions" with "amendments," effectively holding that the two words mean exactly the same thing, squarely opposite to the holding in *Armstrong*.

The lower court's interpretation of *Armstrong* goes even further, holding that section 51's publication command applies to the "repeal" of statutes. This too is incorrect. For nearly a century, courts have held: "It is not necessary, when the body of the new act repeals, or has the effect of repealing, all or part of an existing act, to republish or set forth the parts repealed." *Board of*

Penitentiary Com'rs v. Spencer, 159 Ky. 255, 166 S.W. 1017, 1022-1023 (1914).[38] Therefore, even if the suspensions of the $19 million appropriations were viewed as "temporary repeals" (which is wholly improper under *Armstrong*), they ***still*** are not subject to section 51's publication requirement. The lower court's order not only effectively erases section 15, it also unilaterally amends section 51 to add "repeals" to the list of actions governed by the publication requirement. Courts cannot add words to the Constitution any more than they can add words to a statute. *See Jefferson County ex rel. Grauman v. Jefferson County Fiscal Court*, 273 Ky. 674, 117 S.W.2d 918, 924 (1938)("Neither legislatures nor courts have the right to add to or take from the simple words and meaning of the Constitution.").

2. The Lower Court Failed To Provide Any Valid Reason For Invalidating the Suspensions of the $19 Million Appropriation.

The lower court offers three primary reasons for invalidating the suspension of the $19 million appropriations. First, it asserts that republication is necessary to ensure that legislators will fully understand the "implications and ramifications" of the suspensions. Second, it believed section 51 was being "swallowed" by suspensions that are not republished at length. Third, the lower court found that, under KRS 48.316, the General Assembly had no authority to

[38] The lower court quotes this passage of *Board of Penitentiary Com'rs v. Spencer* in its Opinion and Order (Opinion p. 8), but simultaneously indicates that Section 51's republication requirement applies to repeals (*id.*, p. 6).

suspend or modify provisions of Chapter 342 in the Budget Bill. None of these reasons find support in law or logic.

a. A Court Cannot Unilaterally Amend The Constitution to Require Clearer Budget Bills.

The heart of the lower court's analysis appears to be doubt over whether a person reading the Budget Bill would appreciate the "implications and ramifications" of the suspensions without republication:

> Few, if any, members of the General Assembly could have a full notion and understanding of the implications and ramifications of removing $19 million in coal severance tax funds from the BRF with the simple phrase "notwithstanding KRS 342.122."

(Opinion, p. 9).

This finding is speculative on its face. And, it makes no sense as a practical matter because section 15 gives the General Assembly the power to suspend law without republication and it can go so far as to repeal an entire statute without republication. Under these circumstances, the law assumes that the General Assembly either has a "full notion and understanding" or could care less if it does.

The lower court's speculation about the Legislature's "understanding" also rests on unfounded "ramifications." First, it says "without serious doubt," Kentucky employers "are now being required to make up the difference with increased premiums." *Id.* Second, it found that the suspension would have a ripple effect on other statutes, and complained that these ancillary statutes were not mentioned by the suspensions:

> No mention is made of provisions of KRS 42.4582 and KRS 42.4585(3) requiring that the $19 million . . . must be credited to the Commission's BRF before any funding from coal severance tax revenues is allocated to economic development projects. No mention is made of the entire statutory framework for workers' compensation reform.

Id. at 6. The lower court then required that the suspensions be reenacted and published in accordance with section 51 to ensure that legislators are "fully informed" of such "ramifications."

The critical problem with the lower court's reasoning, of course, is that even if its fears are entirely valid, they do not provide any basis for amending the Constitution or ignoring *Armstrong*. Under no circumstance can a court rewrite the Constitution to cure a perceived ill. The Constitution can be amended only through the processes set forth in sections 256 through 263. As this Court recently held in *Fletcher*, "it is not our prerogative to amend the Constitution or enact statutes." 163 S.W.3d at 872.

Moreover, there is no proof to support the lower court's perceived ills. First, the only evidence in the record proves that the suspension of the $19 million appropriation did **not** cause any increase in assessment rates. The increase resulted from other factors. The economy was weakening at the time the KWCFC Board met in October, 2001 to decide the assessment rates for calendar year 2002. An actuarial firm hired by the KWCFC to assist in setting the rates found that the rate would have to be 11.41 percent in a pessimistic scenario, even assuming the public fund appropriations would be made to the

BRF.[39] The Board was indeed pessimistic, considering the tragedy of September 11 had occurred just weeks before, and uncertainty was at a high. The Board therefore increased the premium assessment from 9 percent to 11.5 percent. The KWCFC's Executive Director confirmed under oath that this increase was unrelated to any suspension of the $19 million appropriation.[40]

Plaintiffs provided no evidence to the contrary. Yet, the lower court speculates "without serious doubt" that there is a connection, committing one of the more fundamental violations of the laws of logic – *post hoc ergo propter hoc* – namely, that X caused Y simply because X occurred before Y, "reasoning" that is particularly odd here because the evidence **proves** that X did not cause Y.

Second, the General Assembly understood the suspension's ramification on KRS 42.4582 and KRS 42.4585(2) – the statutes governing transfers to the Local Government Economic Assistance Fund ("LGEAF") and the Local Government Economic Development Fund ("LGEDF"). This understanding is demonstrated by the 2003 Budget Bill itself, wherein the provisions appropriating funds to the LGEAF and LGEDF pursuant to 42.4582 and KRS 42.4585(2) specifically referenced the suspension of KRS 342.122(1)(c), and accounted for the fact that the $19 million statutorily slated for the BRF would instead remain in the General Fund (2003 House Bill 269, p. 13-19).

Ironically, the lower court's order, while seeking clarity, only serves to create unprecedented confusion. Republication would result in a reprinting of

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[39] Affidavit of Jon Nielsen, App. 3, hereto.

[40] *Id.*

KRS 342.122 in the pages of the Budget Bill, which presumably would appear with section (c) having a line through it. The legislators would then have to deduce for themselves what the potential impact of the suspension would be. Of course, legislators can already do this when they see a suspension in the Budget Bill – they can open the books and see what statute has been suspended. Republication would significantly increase the size of an already voluminous bill.

Section 51 also does not, and has never, required the General Assembly to set forth the name of every statute affected by a statutory amendment:

> Of course, many laws that are enacted by the Legislature touch in some way existing laws, either by amending, extending, or repealing them, but notwithstanding this, the Legislature, by a new act that does not purport in its title or body to amend, revise, or extend an existing law, may, in fact, revise, amend or extend it, free from control of Section 51, and this has often been done.

Board of Penitentiary Com'rs, 166 S.W. at 1021. Any other rule would impose an unworkable burden on legislators. The Court recognized this problem in *Gross v. Fiscal Court of Jefferson County*, 225 Ky. 641, 9 S.W.2d 1006 (1928). There, it upheld the validity of a challenged law, despite the fact that it "repeal[ed] all existing laws in conflict with it, without setting out these laws, and it ma[de] a substantial change in [another law], without setting out the existing law:"

> Section 51 of the Constitution requires that the title shall express the subject legislated upon; but there is no requirement that the title of an Act shall also undertake to state what former acts are thereby repealed. Such a requirement would not only be unreasonable; it would be impracticable; and it would lay upon the Legislature the duty of weighing the legal effect of prior legislation . . . .

Id. at 1007 (quoting *Brown v. Hamlett*, 159 Ky. 184, 166 S.W. 1008, 1010 (1914)).

Thus, a republication of KRS 342.122(1)(c) would not result in a reference to KRS 42.4582, KRS 42.4585(3), or a "mention" of "the entire statutory framework for workers' compensation reform." To the extent these sections are affected, it is by implication, which is acceptable in Kentucky. *See Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Paducah v. City of Paducah,* 333 S.W.2d 515, 521 (Ky. 1960) ("Section 51 of the Constitution does not require that statutes which are amended or repealed merely by implication, or by the superseding effect of the later enactment, be republished and set forth at length.").

A review of the Kentucky Revised Statutes reveals that there are dozens, if not hundreds, of non-budgetary statutes that "notwithstand" other statutes without any mention of the statutes being notwithstood. *See, e.g.*, KRS 61.535(c); KRS 65.030; KRS 116.025(4); KRS 194A.707(7); KRS 205.5607; KRS 211.951(3). These statutes, however, have never been found to run afoul of section 51 for failing to "mention" the numerous other statutes that they "notwithstand," as they constitutionally supersede the other statutes by clear implication.

b. The Legislature Obeys Section 51's Publication Requirement When It Applies.

The lower court appears to believe that *Armstrong* has now become the death knell for section 51. But the Legislature follows its requirements each and every time it amends, revises, extends, or confers an existing statute. The lower court's concern is unfounded. The current vitality of section 51 is vividly

illustrated in the Acts of the 2007 Regular Session, where literally hundreds of statutory provisions were permanently amended. Attached hereto at Appendix 5 is the "Table of Sections Affected," which demonstrates just how many permanent amendments were made. Pursuant to section 51, each of these amendments had to be made in accordance with the sections' publication requirement. And they were. The various chapters of the acts are filled with reenactments, strikethroughs, brackets, and other proof of section 51's current strength.

c. Requiring Republication of All Suspensions Would Cause More Confusion And Less Understanding.

Under the lower court's reasoning, the General Assembly presumably must "reenact and publish" every statute it suspends in a budget bill. While the lower court apparently believes that republication will make it easier for legislators to "have a full notion and understanding of the implications and ramifications" of the suspension, in reality, it will do anything but make the Budget Bill easier to understand. Republication would necessarily cause the Budget Bill to explode in size from an already large document to one that may require wheels to be transported.

For example, the 2004-2006 Budget Bill is 672 pages long. And in these pages, there are at least 135 suspensions. The lower court's ruling would literally require the General Assembly (and thus the Budget Office and Governor, who draft the budgets) to add the full text of each and every one of the suspended statutes to the Budget Bill. What is more, the lower court's ruling

seems to suggest that the General Assembly must also search for and republish any and all statutes that the suspended statute may affect. For example, the lower court complained that the Budget Bill language suspending KRS 342.122(1)(c) did not "mention" KRS 42.4582(2) and 42.4585(3) – statutes that were arguably affected by the suspension.

As common sense alone instructs, republication would not make the Budget Bill easier to understand. Most ironically, it would transform the Budget Bill into a document so mammoth in size and replete with strikethroughs and temporarily added language that few, if any, legislators or citizens will have the time to read it, much less the physical power even to pick the document up. The framers could not have intended to bring about such a consequence. Far more likely is the opposite desire – to provide the General Assembly with the power to "suspend" in section 15, but omit "suspensions" from section 51's republication requirement.

3. KRS 48.316 Provides No Basis for Invalidating the Suspensions of the $19 Million Appropriation.

The lower court also relied on KRS 48.316, which provides:

> To the extent that the provisions of a budget bill are in conflict with any provisions of KRS Chapters 12, 42, 56, 152, 177, or 341, the provisions of those chapters are hereby suspended or modified. Such suspension or modification shall not extend beyond the duration of the budget bill.

The lower court found that this statute provides the sole statutory authority for suspending statutes and reasoned that because "KRS 48.316 makes no mention

of KRS Chapter 342 in this grant of authority . . . no authority exists to amend or modify Chapter 342 in the Budget Bill." (Opinion, p. 10).

This conclusion errs in ignoring KRS 48.310(2), which is more general, not confined to any particular statute, and explicitly permits the General Assembly to suspend an appropriation for the duration of a budget bill:

> A budget bill may contain language which exempts the budget bill or any appropriation or the use thereof from the operation of a statute for the effective period of the budget bill.

Moreover, KRS 48.316 was part of Senate Bill 294, the same legislation that this Court considered in *Armstrong* in upholding the Legislature's power to suspend existing statutes in a Budget Bill. In *Armstrong*, this Court relied, not on KRS 48.316, but on KRS 446.085, which this Court interpreted as giving the General Assembly "the power to **suspend or modify the operation** of any statute, but only if the financial condition of the state government so requires." *Id.* at 440 (emphasis in original). KRS 446.085 necessarily trumps KRS 48.316. The General Assembly repealed KRS 446.085 during the 1994 Regular Session. Currently, KRS 48.310, which was enacted in 1990, provides the Legislature's statutory suspension authority and allows its actions here. In fact, KRS 48.310 is less limiting than KRS 446.085, as it does not require the suspension to be necessitated by the "financial condition of state government."

III. THE GENERAL ASSEMBLY CONSTITUTIONALLY RECLAIMED PUBLIC FUNDS FROM THE BRF AND TRANSFERRED THEM TO THE GENERAL FUND AND ANOTHER AGENCY.

A. The Transfer of Public Funds from the BRF to Other Funds Is Identical To the Transfers in *Armstrong* and Therefore Are Constitutional.

Plaintiffs below challenged the General Assembly's 2003 Budget Bill (1) transfer of $5 million from the BRF to the General Fund, and (2) transfer of approximately $1.7 million from the BRF to the Department of Mines and Minerals. Plaintiffs claimed that these transfers were improper for two reasons: (1) Plaintiffs claimed that the transfers were of "private" funds, and (2) that the transfers violated KRS 342.1227, which states that "funds which are under the jurisdiction of the commission shall not . . . [b]e subject to transfer to the Commonwealth or any agency or instrumentality thereof, except for purposes specifically authorized by this chapter."

These transfers, however, were wholly constitutional. First, they were identical in nature and purpose to the transfer of agency funds at issue in *Armstrong*: the temporary "suspension of enumerated statutes to provide for the transfer of certain agency and special funds to the general fund"[41] and department of mines and minerals to ensure that the immediate needs of the Commonwealth were met in the face of a revenue shortfall. *See* 2003 House Bill 269, p. 217. Therefore, the transfers here are constitutional for the exact same

[41] *Armstrong*, 709 S.W.2d at 446.

reasons the transfers in *Armstrong* were constitutional: they comport with section 15, section 51, the General Assembly's power of the purse, and the constitutional requirement that the General Assembly balance the budget.

Second, the transfers were only of public funds. Since 1998, BRF has been a "commingled" fund: It consists of public funds received in the form of $19 million General Fund appropriations it received in each of fiscal years 1998 through 2002, and the private funds received in the form of assessments on workers' compensation insurance premiums. So long as public funds can be differentiated from private funds, they can be transferred out of the BRF to other places where the General Assembly concluded they were more urgently needed:

> Because the General Assembly has no authority to transfer private funds to the general fund, the transfer of money from agencies in which public funds and private employee contributions are commingled, and cannot be differentiated, is unconstitutional.

Armstrong, 709 S.W.2d at 446.

Here, the General Assembly made clear that it was following *Armstrong* and only reclaiming "public" funds in the BRF:

> Funds lapsed in Part V [transfers to the General Fund] include no employer benefit premiums and are the recapture of fiscal year 2001-2002 General Fund transfers to the Benefit Reserve Fund.

(2003 House Bill 269, Regular Session, p. 57). And, the unrebutted evidence in the form of Mary Lassiter's affidavits confirms that the "public" funds in the BRF can be differentiated from the "private" funds therein, and that ample "public" funds were available to cover this transfer. In fact, the BRF still had $19,355,889 in public funds after the transfer was complete. The transfers from BRF to the

Department of Mines and Minerals did not violate the prohibition against the transfer of "private" funds.

B. The Lower Court Erred By Holding that The Transfer of Public Funds from the BRF to Other Funds Violated KRS 342.1227.

The lower court did not subscribe to Plaintiffs' theory that the $5 million transfer was an unconstitutional transfer of "private" funds. Instead, it reasoned that the transfer was invalid because the Budget Bill did not specifically reference KRS 342.1227, which otherwise prohibits transfers from the BRF. This, again, is error. ***Any*** suspension is going to create "conflict" with existing statutes. For example, the suspensions of the $19 million appropriation conflict with KRS 342.122(1)(c)'s command that the appropriation ***"shall"*** be made. Here, the transfers at issue here conflict with the KRS 342.1227's command that transfers from the BRF ***"shall not"*** be made.

Such transfers, however, have been confirmed by *Armstrong* as constitutional exercises of Section 15 and the power of the purse, even if they conflict with existing statutory law. It makes no difference whether the suspension conflicts with a "shall" or "shall not" provision. The lower court cites no authority for the proposition that the General Assembly must list, much less reenact, every single statute conceivably implicated by a Budget Bill's temporary suspension.

Moreover, the lower court's reliance on KRS 342.1227 to invalidate the special fund transfers disregards KRS 48.315(1), which specifically condones the transfer at issue:

> The General Assembly may provide in a budget bill for the transfer to the general fund for the purpose of the general fund all or part of the agency funds, special funds, or other funds established under the provisions of KRS . . . 342.122.

The General Assembly's 2003 Budget Bill transfer of $5 million from the BRF to the General Fund and $1.7 million the Department of Mines and Minerals is valid.

IV. THE MAINTENANCE OF THE ASSESSMENT RATE ON PREMIUM WAS PROPER.

In the 2003 Budget Bill, the General Assembly suspended the KWCFC Board's statutory authority to set assessment rates and, instead, mandated that the rate remain static at 11.5 percent for the duration of the 2002-2004 budget cycle:

> Notwithstanding KRS 342.122(1)(b), the workers' compensation assessment rate shall remain at 11.5 percent for the biennium.

(2003 House Bill 269, p. 57).

The constitutionality of this suspension, like all the others at issue in this case, was confirmed in *Armstrong*, where this Court held that the Legislature has the inherent right to make statutory modifications with "financial implication" in a budget bill because they are absolutely necessary to ensure the solvency and proper operation of state government:

> The General Assembly is mandated to operate the financial offices of the Commonwealth under a balanced budget. If revenues become inadequate, the General Assembly must be empowered to use adequate devices to balance the budget. **Provisions in the budget document which effectively suspend and modify existing statutes which carry financial implication certainly are consistent with those duties and responsibilities.**

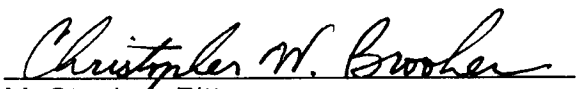
Armstrong, 709 S.W.2d at 443 (emphasis added).

In *Armstrong*, the Court specifically upheld provisions (1) providing for annual salary increases for state workers at rates lower than those set by statutes, and (2) adding a certification condition on the receipt of state funds by county jails for medical contracts, which the existing funding statute did not contain. *Id.* at 445-448. And those two actions are no different than the General Assembly's freezing of the assessment rate at 11.5 percent in 2003.

CONCLUSION

In *Armstrong,* this Court upheld the General Assembly's power to suspend or modify appropriation statutes without full reenactment or publication. The lower court misapplied *Armstrong*, and the constitutional provisions upon which it is based, and found that temporary suspensions must be reenacted and published in the very same way as permanent amendments to statutory law. The lower court's order does tremendous violence to the Constitution, as it uses section 51 to constructively erase section 15. Moreover, on a practical level, the lower court's order does tremendous violence to future budget bills, as it requires that they be cluttered with reenactments and publications of dozens, if not hundreds, of appropriation statutes that will only be temporarily suspended. We respectfully ask this Court to adhere to the wisdom of *Armstrong* and reverse.

Respectfully submitted,



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