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

STEVEN L. BESHEAR, in his official capacity as the Governor of the Commonwealth of Kentucky; and MARY E. LASSITER, in her official capacity as State Budget Director

APPELLANTS / CROSS-APPELLEES

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 / CROSS-APPELLANTS

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

REPLY / RESPONSE BRIEF FOR APPELLANTS / CROSS-APPELLEES GOVERNOR STEVEN L. BESHEAR AND STATE BUDGET DIRECTOR MARY E. LASSITER

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Appellants' Reply / Response Brief has been served upon the following, by U.S. Mail, postage prepaid, on the 25th day of February, 2008: 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.

Christopher W. Brooker

STATEMENT OF POINTS AND AUTHORITIES

May It Please the Court:

Appellee/Cross-Appellant Haydon Bridge Company, Inc. ("Haydon Bridge")[1] contends that certain provisions of the 2002-2004 Budget Bill violated the publication clause of Section 51 of the Kentucky Constitution. Specifically, Haydon Bridge challenges (1) the temporary suspension of an annual $19 million appropriation to the Workers' Compensation Benefit Reserve Fund ("BRF"); (2) the "reclamation" of general funds previously provided to BRF; and (3) the temporary suspension and modification of a statute setting assessment rates on workers compensation premiums.

Haydon Bridge's argument is nothing new. In *Com. ex rel. Armstrong v. Collins*, 709 S.W.2d 437 (Ky. 1986), this Court rejected a Section 51 challenge to budget bill provisions that were nearly identical, and in legal contemplation are identical, to the budget bill provisions now at issue. This Court reasoned that Section 51, by its own text, does not apply to temporary suspensions or modifications. Section 51 only applies to permanent statutory amendments.

Haydon Bridge's Response Brief tries to shift the focus away from the Constitution and onto what Haydon Bridge believes to be the distasteful ***effects*** of the suspensions now at issue. Haydon Bridge hopes this Court, like the court below, will find that the alleged effects are so bad that the suspensions must be unconstitutional. Section 51, however, is not a "catch-all" provision that allows a Court to strike down a statute to cure a perceived ill. The section simply requires

[1] There are actually six Appellees/Cross-Appellants in this case. For simplicity's sake, the Governor and Budget Director refer to all six Appellees/Cross-Appellants collectively herein as "Haydon Bridge."

that permanent amendments to statutes be republished in full. Since the provisions at issue were not permanent amendments, Haydon Bridge's Section 51 argument fails.

Haydon Bridge also contends that the temporary suspension of the $19 million annual appropriation to the BRF violated Section 180 of the Kentucky Constitution, which prohibits a tax levied for a particular purpose being used for another purpose. Haydon Bridge argues that because the BRF appropriation originates in Coal Severance Tax revenues, the purpose of the Coal Severance Tax is to fund the BRF. The trial court properly rejected this flawed logic. The Coal Severance Tax was enacted 26 years prior to any BRF appropriation, and states that its purpose is to supplement the General Fund. The General Assembly appropriated some of the general funds generated by the tax to the BRF. But that appropriation does not establish the purpose of the tax. Coal Severance Tax revenues are general funds that are available to the General Assembly for any proper state purpose, and therefore the suspension at issue did not violate Section 180.

ARGUMENT

I. WHETHER GOVERNOR PATTON HAD THE POWER TO SUSPEND KRS 342.122(1)(C) IS A MOOT ISSUE.

Haydon Bridge opens its brief by arguing that Governor Patton had no authority to suspend the $19 million appropriation at KRS 342.122(1)(c) when there was no budget bill in effect in 2002. [Brief, pp. 17-20]. Haydon Bridge claims that pursuant to *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005),

the $19 million appropriation at KRS 342.122(1)(c) is "self-executing," and therefore should have been made in the absence of a budget in 2002. [*Id.*].

Haydon Bridge may be right – the appropriation at issue may be "self-executing," meaning that in hindsight Governor Patton should have made the appropriation in the absence of a budget bill. But this separation of powers issue is moot for two reasons. First, the 2003 Budget Bill retroactively adopted Governor Patton's actions by specifically suspending the $19 million appropriation for the ***entire*** 2002-2004 budget biennium.

> 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.

[2003 House Bill 269, Regular Session, p. 57].

Second, this issue was squarely addressed in *Fletcher*, which set precedent for the Governor to follow in the event the General Assembly fails to pass a budget in the future. There is absolutely no reason for this Court to revisit this already decided issue.

Haydon Bridge, however, apparently thinks that the Governor and Budget Director take the position that the 2003 Budget Bill rendered Governor Patton's budgetary actions constitutional. [*Id.* at 19-20]. We argue nothing of the sort. We merely point out that the Legislature's retroactive adoption of the suspension at issue made it a legislative action, and thereby mooted Haydon Bridge's separation of powers argument. *See Brown v. Barkley*, 628 S.W.2d 616, 624 (Ky. 1982) ("confirming statutes render moot the question of whether the [Governor's] orders were valid in the first instance"). The retroactive adoption did

not render the suspension constitutional. Like all actions of the General Assembly, the suspension at issue must pass constitutional muster. And it does.

II. HAYDON BRIDGE FAILED TO PRESERVE ANY CLAIM THAT THE BUDGET BILL VIOLATED SECTION 51'S "TITLE" REQUIREMENT.

Section 51 of the Kentucky Constitution 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, extends, or confers the statute.

Haydon Bridge relied solely upon Section 51's publication provision at the lower court: **"Petitioners do not contend that either the 2000-02 or the 2002-04 biennial budget violated the single subject title rule**." [Trial Court Reply Brief, p. 6, T.R. 103](emphasis added)].

Haydon Bridge now reverses course, arguing for the first time ever in its Response brief that the 2003 Budget Bill violated the "title" requirement of Section 51. In fact, Sections III and V of Haydon Bridge's brief appear to be wholly premised on Section 51's "title" requirement. Haydon Bridge cannot do this. It is a bedrock principle of appellate practice that "a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court." *Fischer v. Fischer*, 197 S.W.3d 98, 102 (Ky. 2006). Since Haydon Bridge waited until now to contend that the 2003 Budget Bill violated the "title" requirement, that contention must be disregarded.

Nevertheless, even if this Court considers Haydon Bridge's new "title" requirement argument, it fails. This Court need look no further than *Armstrong* to

understand why. The budget bill provisions at issue here are identical in nature to the ones in *Armstrong*, as they involve (1) a temporary suspension of a General Fund appropriation, (2) a "reclamation" of general funds previously provided to an agency or special fund, and (3) a provision changing certain statutorily-set rates for the period of the biennium.

The title of the 2003 Budget Bill at issue here is also virtually identical to the title of the 1984 Budget Bill at issue in *Armstrong*, as both were "AN ACT relating to appropriations . . . for the operation, maintenance, support, and functioning of the government of the Commonwealth of Kentucky and its various officers, cabinets, departments, boards, commissions, institutions, subdivisions, agencies, and other state supported activities."

In *Armstrong*, this Court held that because the 1984 Budget Bill was "AN ACT relating to appropriations," and the statutory changes at issue concerned "appropriations," Section 51's title requirement was satisfied:

> The provisions [of the Budget Bill] that suspend or modify the expenditure of monies in the event of a financial problem are clearly appropriations, in the broad sense. . . . 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 2003 Budget Bill satisfies the "title" requirement for the same reason. Its title tells the reader that the act is an appropriation for the funding of state government, and alerts the reader that the act deals with "appropriations," including possible changes. Moreover, the budget bill provisions at issue, like

those scrutinized by this Court in *Armstrong*, are plainly appropriations, in the broad sense. Accordingly, Haydon Bridge's new "title" requirement challenge fails as a matter of law.[2]

III. HAYDON BRIDGE FAILS TO SHOW THAT SECTION 51 APPLIES TO THE SUSPENSIONS AT ISSUE.

Appellees/Cross-Appellants primary contention is that the suspension of the annual $19 million BRF appropriation violated the republication provision of Section 51 of the Kentucky Constitution. The critical error in this argument (and the trial court's opinion below) is that Section 51's publication requirement ***does not apply*** to temporary suspensions and modifications of statutes.

Without question, Section 15 gives the General Assembly the authority to "suspend" statutes. Section 51 gives the General Assembly the power to "amend" statutes. Section 51 contains a publication requirement, and provides a specific list of activities to which that the requirement applies. "Suspensions" do 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. As a result, this Court concluded in *Armstrong* that "suspensions" are not subject to Section 51's publication requirements, while permanent amendments and revisions are:

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[2] Haydon Bridge's brief also summarily concludes that the suspension in question "violates due process and Section 242 of the Kentucky Constitution." [Brief, p. 36]. Haydon Bridge ***never*** raised these issues in the lower court, and cannot raise them now – especially without any argument or explanation.

> 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.

Armstrong, 709 S.W.2d at 445.

Therefore, in cases such as this, where statutory changes are at issue, the Court is charged with distinguishing between "suspensions and modifications," which are not governed by Section 51, and "amendments, revisions, and extensions," which are governed by Section 51. The key question is plain: Is the ***statutory 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 the change is contained in a budget bill, and it does not extend past the biennium, it is necessarily a suspension.

In its Response brief, Haydon Bridge admits that the suspensions at issue were temporary and did not extend beyond the biennium:

> Indeed, the suspension of KRS 342.122 was itself limited to the two-year budget period. The suspension was temporary, not a permanent repeal.

[Brief, p. 4]. Pursuant to *Armstrong* (and the Kentucky Constitution), this one admission destroys Haydon Bridge's entire Section 51 argument, as "Section 51 is limited by its own wording to amendment, revision, extension or conferring of existing statutes." *Armstrong*, 709 S.W.2d at 445.

Knowing this to be true, Haydon Bridge subtly tries to shift the "permanence" inquiry away from the ***statutory change itself*** to the ***effect of the statutory change***. It contends that the suspension had a permanent ***effect***, and therefore was "clearly" a permanent amendment governed by Section 51:

> [T]he effect of suspending the $19 million credit to the BRF was to permanently shift that liability from the Commonwealth to private employers. Private employers have coughed up an additional $19 million per year over the last six years. And that money is long gone absent relief in this case. Clearly, the suspension of KRS 342.122 effected a permanent "amendment" of the entire workers' compensation statutory framework. And any such amendment is subject to the publication requirement of Section 51.

[Brief, p. 5].

Haydon Bridge's reasoning is flawed. First, it confuses the (1) permanence of a change to a statute with (2) the permanence of the effect of a change to a statute. A temporary change in a statute may indeed have a "permanent effect," but it does not follow that the statute is forever changed.

For example, in *Armstrong*, the General Assembly temporarily suspended the effectiveness of six statutes mandating specific raises for various state employees, and set different lower rates for the period of the biennium. *Id.* at 445-446. These suspensions and modifications had the "permanent effect" of keeping income out of the state employees' pockets. The General Assembly spent those funds elsewhere, "and that money is long gone." This Court, however, did not find that the "permanent effect" transformed the otherwise temporary suspensions and modifications into a permanent amendment of law governed by Section 51. To the contrary, this Court correctly ruled that Section 51 did not apply because the ***change to the appropriation statute itself*** was temporary, as it expired at the end of the budget biennium. *Id.*

Second, there is no truth to Haydon Bridge's conclusory allegation that the temporary suspension permanently changed "the entire workers' compensation statutory framework." One look at KRS Chapter 342 confirms that "the entire

workers' compensation statutory framework" remains unchanged, save for the temporary budgetary suspensions at issue. It also remains valid and fully operational, despite the suspensions. Haydon Bridge simply dislikes the operation of the "statutory framework" in the absence of the appropriation.

Haydon Bridge also proffers a "public policy" argument, claiming that the suspension "permanently altered the public policy underlying the workers' compensation Special Fund in this state," and the "actions of the General Assembly under review in this case permanently turn this public policy on its ear." [Brief, 29-30]. This claim is also groundless. Every statute reflects "public policy." For instance, statutes appropriating money for teacher's raises reflect a public policy of supporting education. Statutes appropriating money to the state's social programs and institutions reflect a public policy of taking care of those in need. The list goes on and on.

In a perfect world, all appropriation statutes – and therefore all "public policy" – would be fully funded in each biennial budget. But the unfortunate reality is that Kentucky's revenues have rarely, if ever, allowed for full funding of all appropriation statutes. And whenever such shortfalls occur, Kentucky's Constitution requires the General Assembly to balance the budget by, at the very least, temporarily suspending or modifying appropriation statutes. The Constitution commands that balancing the budget is a "public policy" that trumps all others.

Therefore, the fact that a statute reflects "public policy" does not protect it from temporary suspension. If such were the case, the General Assembly could

not suspend any statute, and therefore could not balance the budget in the face of a shortfall without permanently repealing appropriation statutes. Surely Haydon Bridge would prefer the "public policy" reflected in the $19 million appropriation be temporarily suspended rather than be permanently repealed.

In sum, Haydon Bridge provides absolutely no authority supporting its unsound contention that the "effect" of a statutory change determines whether Section 51's publication provision applies. As a result, the Governor and Budget Director urge this Court to confirm the constitutionality of the Budget Bill provisions now at issue.

IV. HAYDON BRIDGE FAILS TO SHOW THAT THE TRANSFERS OUT OF THE BRF WERE UNCONSTITUTIONAL.

The 2003 Budget Bill transferred $5 million from BRF into the General Fund, and $1.7 million from the BRF to the Department of Mines and Minerals. Haydon Bridge challenges these transfers as unconstitutional.

This Court first addressed the propriety of transfers from "special" or "agency" funds, like the BRF, to the General Fund in *Armstrong* and its sister case, *Thompson v. Kentucky Reinsurance Ass'n*, 710 S.W.2d 854 (Ky. 1986). In those cases this Court held that as a general rule, the Legislature has the authority to transfer money from certain agency funds and special funds back into the General Fund:

> What we decide is simply that the transfers of funds which are merely temporary, determinable suspensions of the operation of the statutes relating to appropriations of public funds are within the legislative authority . . . and Ky. Const. Sec. 51, the amendment section.

Armstrong, 709 S.W.2d at 446. *See also* KRS 48.315(1).

This authority to transfer, however, only extended to monies that were originally "public" in nature, such as General Fund appropriations. Monies that are paid directly to a "special" or "agency" fund from private sources, such as employee contributions and assessments on employers, are "private" in nature and cannot be transferred:

> [T]he transfers of funds which relate to appropriations of private contributions cannot be termed suspensions or modifications of the operation of the statutes.

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

The Court held that such "private funds" must stay in the special fund, and cannot be used by the state for other purposes:

> Diversions from the Kentucky Employees Retirement System, County Employees Retirement System, State Police Retirement System, and Teachers' Retirement System fall within this category, as do Workers' Compensation and Workers' Claims Special Fund. The employee contributions and insurance company assessments constitute private, mandatory donations.

Id. at 446-47. Therefore, the ***source*** of the funding controls whether money can be transferred out of a special fund to meet other budgetary needs – if the source is public in nature, the transfer is permissible; if the source is private in nature, the transfer is not.

Pursuant to this decree, this Court struck down 1984 Budget Bill provisions transferring money from the Workers' Compensation Special Fund to the General Fund because the KRA, which operated the Special Fund in 1984, received ***all*** of its income from private sources:

> To arrive at this conclusion it is only necessary to identify the nature and purpose of the KRA and to **identify its sole source of funding**. . . . Its **sole** income is from premiums charged its subscribers--insurance carriers, self-insurance groups, and self-

> insured employees. The amount of the premiums is to be determined--actuarily--to be that amount of dollars necessary to fund the Special Fund--whatever the amount. . . . **The funding source of KRA is solely and exclusively from private sources**.

Thompson, 710 S.W.2d at 857 (emphasis added).

In prohibiting the transfer, this Court emphasized its ruling that **all** the money was private. This Court, however, understood that not all special funds are entirely "private" or entirely "public" in nature – a number of funds commingle "public" and "private" monies. This Court wisely provided guidance on that issue, holding that "public" money can be transferred out of such "commingled" special funds so long as it can be differentiated from the "private" money in the fund:

> 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 447 (emphasis added).

A. Haydon Bridge Fails To Show That The Funds In the BRF Cannot Be Differentiated by Source.

The BRF became a "commingled" fund when it received its first General Fund appropriation in fiscal year 1998. At that time the BRF became fundamentally unlike the entirely "private" Special Fund at issue in *Armstrong*. Since fiscal year 1998 the BRF has received **$80.75 Million in public funds** from the General Fund.

Haydon Bridge admits that the BRF is a commingled fund. Nevertheless, Haydon Bridge contends that once funds are deposited into the BRF, they cannot be differentiated as "public" and "private:"

> [W]hile the source of the $19 million credits to the BRF is public funds, once those coal severance tax revenues are credited they

> become a commingled part of the BRF Trust and, by statute, can no longer be differentiated as either public or private funds.

[Brief, p. 22].

Haydon Bridge's contention fails for two reasons. First, the funds in the BRF can be differentiated by source. Mary Lassiter confirmed this fact in a detailed, easy-to-understand affidavit she submitted to the court below. [Supplemental T.R. 41-47, App. 3 to Appellants' Brief]. Ms. Lassiter also confirmed that there were sufficient public funds in the BRF at the time of the General Assembly's transfers to cover the transfers. [*Id.*].[3]

Haydon Bridge did not offer a shred of evidence rebutting Ms. Lassiter's affidavit. It presented no proof that the allegedly private funds cannot be differentiated from the public funds, and no proof that Ms. Lassiter's calculations are wrong. Haydon Bridge now characterizes Ms. Lassiter's affidavit as an unsupported "legal conclusion," and claims that it should be disregarded as such. [Brief, p. 24-25]. We disagree. One look at Ms. Lassiter's affidavit reveals that it contains factual conclusions based upon straightforward number-crunching. Ms. Lassiter, who is now State Budget Director, literally "shows her work" in her affidavit and the exhibits thereto. The affidavit is rock-solid, unrebutted proof.[4]

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[3] Ms. Lassiter's affidavit did not specifically address the transfers to Mines and Minerals. She focused specifically on the $5 million in transfers from the BRF to the General Fund. Nevertheless, Ms. Lassiter's affidavit confirms that there were sufficient public funds in the BRF to cover the $1,700,000 transfer to Mines and Minerals, as there was $30,268,919 in public funds in the BRF at the beginning of Fiscal Year 2003.

[4] It is somewhat curious that Haydon Bridge attacks Ms. Lassiter's affidavits as "legal conclusions" considering that Exhibit B to Haydon Bridge's brief is Exhibit A of Ms. Lassiter's Affidavit – a table that Ms. Lassiter prepared.

Second, no Kentucky statute prohibits differentiation of the funds in the BRF. Haydon Bridge claims that KRS 342.1223(a) proclaims that "there are no public funds in the BRF." That is absolutely false. KRS 342.1223(a) simply instructs the KWCFC to "[h]old, administer, invest, and reinvest the funds collected pursuant to KRS 342.122 . . . separate and apart from all 'state funds' or 'public funds' as defined in KRS Chapter 446." In other words, KRS 342.1223(a) establishes the BRF as an independent "trust or agency fund" that is separate and apart from all other state funds, such as the General Fund. The fact that the General Assembly provided the BRF with independence does not mean that it consists entirely of "private" funds. It simply means that the BRF is an independent, commingled trust fund.

Contrary to Haydon Bridge's claim, Kentucky statutes contemplate and expressly approve transfers of public monies from the BRF to the General Fund:

> 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.

KRS 48.315. Therefore, Haydon Bridge misleads when it claims that there is a statutory bar to differentiation of funds in the BRF.

If that were not enough, this Court has consistently rejected the very "logic" now proffered by Haydon Bridge – that commingled funds cannot be differentiated. In *Ross v. Gross*, 300 Ky. 337, 188 S.W.2d 475 (1945), certain county officials paid fees that they collected into the State Treasury. A certain percentage of those fees were allocated to pay the officials' salaries and expenses. The General Assembly tried to claim this money, asserting that once

the funds were deposited into the State Treasury, which was a "public fund," they were transformed into public money and were then under the control of the General Assembly. Kentucky's highest court disagreed, stating that such commingling in the State Treasury did not turn the funds into "public money:"

> [S]ince the money belonged to the appellees or the County, its payment into the State Treasury did not vest the State with title thereto or a right to its custody.

Id. at 477 (cited by *Thompson*, 710 S.W.2d at 858).

We respectfully submit that the street runs both ways – just as a deposit into the state treasury does not turn private funds into public funds, the deposit of public funds into a special fund does not turn them into private funds.

B. The BRF Cannot Be Compared To State Employee Retirement Systems.

In an effort to paint the BRF as entirely "private," Haydon Bridge equates it to retirement systems for state workers, such as the Kentucky Employees Retirement System ("KERS"). Haydon Bridge argues that because retirement systems receive money from the state, they are identical to the BRF, and because retirement system funds are untouchable in a budget crunch, the BRF is untouchable as well:

> Each and every one of those retirement systems holds monies the come from both public and private sources. Once a retirement system accepts monies from public or private sources, *Armstrong* teaches that those sources can no longer be differentiated.

[Brief, pp. 22-23] (emphasis omitted).

Haydon Bridge's comparison is out of line. Retirement systems such as KERS consist of income from three sources: (1) employee contributions, (2) employer contributions, and (3) interest earned on those contributions. *See*

Jones v. Board of Trustees of Kentucky Retirement Systems, 910 S.W.2d 710, 712 (Ky. 1995). While the Commonwealth indeed contributes money to retirement funds, it does so in its role as an ***employer***. Accordingly, in that particular instance, where the Commonwealth is fulfilling its contractual duty to fund its employees' retirement benefits, it makes what is deemed a "private" contribution. Where, however, the Commonwealth is appropriating general funds as a non-employer for "***public*** policy" reasons, the contribution is ***public*** in nature. Any similarity between the retirement systems and the BRF ended in 1998 when the BRF became a commingled fund with a truly "public" contribution. Haydon Bridge's attempt to equate the two is unfounded.

V. THE GENERAL ASSEMBLY DID NOT "PERPETRATE A FRAUD" OR ACT "SURREPTITIOUSLY."

Section V of Haydon Bridge's brief is long on rhetoric and short on substance. At its beginning, Haydon Bridge proclaims that "the facts of this case cry out for the application of Section 51." [Brief, p. 31]. Haydon Bridge then explains what it believes to be the "facts" implicating Section 51: namely, the suspension at issue allegedly caused a rise in workers compensation assessment rates. Haydon Bridge then summarily labels the rise in rates a "tax increase," and accuses the General Assembly of "perpetrating a fraud" and acting "surreptitiously." [*Id.*].

What Haydon Bridge (and the court below) fail to understand is that the only "fact" relevant to the application of Section 51 is whether the statutory change itself was temporary or permanent. If the change was temporary, Section 51 does not apply, no matter how distasteful the effect(s) of the statutory

change. Section 51 is not a "catch-all" provision that allows this Court to strike down legislation because of an unpopular effect. It simply holds that all permanent amendments to statutes must be republished in full. Since Haydon Bridge admits that the Budget Bill provisions at issue are temporary, Section 51 does not apply, no matter what the provisions' effect.

And as for the alleged "effect" of the suspension, it is undisputed that in October, 2001, the KWCFC Board raised the assessment rate from 9 percent to 11.5 percent for calendar year 2002. Haydon Bridge speculates that this rise in the rate was caused by the suspension of the $19 million appropriation:

> [The assessment rate] was 9.0% every year from 1996 through 2001. . . . The difference in 2001? Governor Patton had just canceled the $19 million BRF credit on September 7. In sum, there was no need for a rate increase absent the raid on the BRF.

[Brief, 33]. Haydon Bridge, however, offered ***no proof*** confirming this alleged causal link. It did not provide the lower court with minutes of the October, 2001 KWCFC Board meeting, nor a tape from that meeting, nor testimony from any KWCFC Board member confirming a causal link. The Governor and Budget Director, on the other hand, ***did*** submit the affidavit of Jon Nielsen, KWCFC's Executive Director at the time, in which he testified that he remembered that the KWCFC Board raised rates for 2002 because of "the loss of investment income, [BRF] investment value, and a forecasted decline in overall state revenues caused by the worsening economy." [Supplemental T.R. 49-50, App. 3 to Appellants' Brief]. Mr. Nielsen said that the "Board was also pessimistic about the future employment outlook, and was therefore pessimistic about KWCFC's future income stream." [*Id.*]. To the best of Mr. Nielsen's knowledge, "the Board

did not mention the loss of the $19 million coal severance appropriation when adopting the 11.5% rate at its meeting in October 2001." [*Id.*]. The only permissible conclusion from this unrebutted proof is that the loss of the $19 million appropriation did not cause the 2002 assessment rate increase.

Nevertheless, the Governor and Budget Director concede that the suspension of the $19 million appropriation likely had an effect on the assessment rates in 2003 and 2004. This does not, however, mean that the suspension of KRS 342.122(1)(c) violated Section 51 of the Constitution.

It is an unfortunate economic reality that someone feels pain whenever the General Assembly tightens Kentucky's fiscal belt. In *Armstrong*, teachers and state employees felt the pain of not receiving their statutorily-mandated raises. Likewise, if the General Assembly temporarily reduces appropriations to public universities, parents and students feel the pain in increased tuition and fees. Here, Kentucky's employers likely felt the pain of marginally higher workers' compensation assessment rates. This pain, however, does not make the action unconstitutional, nor does it trigger the publication requirement of Section 51. Kentucky's Constitution requires that someone feel the pain, as it demands a balanced budget. The Constitution charges the General Assembly with the tough task of deciding who will feel the pain. Making those difficult choices is not unconstitutional, nor does not constitute "fraud" or "surreptitious action." Voters unhappy with the General Assembly's choices can voice their displeasure at the ballot box.

VI. HAYDON BRIDGE FAILS TO SHOW THAT KRS 48.316 PROHIBITS THE SUSPENSIONS AT ISSUE.

The lower court also provided a statutory reason for invalidating the budget bill provisions at issue. It relied on KRS 48.316, which was enacted in 1984 and 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 concluded that KRS 48.316 provided the sole statutory authority for suspending and modifying 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 was enacted in its current form in 1990, and permits the General Assembly to suspend ***any*** 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.

Haydon Bridge now urges this Court to make the same mistake as the lower court. It contends that KRS 48.310(2) should be disregarded because KRS 48.316 is more "specific" than 48.310.

Haydon Bridge's argument fails. When analyzing seemingly incongruent statutes, a Kentucky court must follow three established rules of statutory construction. First, the court must ascertain the purpose of the General Assembly, and to give effect to the legislative purpose if it can be ascertained.

City of Bowling Green v. Board of Ed. of Bowling Green Independent School District, 443 S.W.2d 243, 247 (Ky. 1969). Second, conflicting Acts should be considered together and harmonized, if possible, so as to give proper effect and meaning to each of them. *Id.* Third, as between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand, the specific shall prevail over the general. *Id.*

Haydon Bridge wants this Court to skip over the first two rules and move immediately to the third. But it cannot. Here, the purpose of KRS 48.310(2) is unmistakable – the General Assembly is confirming and accepting its own constitutional power to suspend or modify ***any*** appropriation in a budget bill. The statute's intent is not only self-evident, it is confirmed in the Budget Bills since 1990, where many statutory provisions outside of KRS Chapters 12, 42, 56, 152, 177, or 341 were suspended. This Court is required to effectuate that purpose.

Moreover, this Court must try to harmonize KRS 48.310(2) with 48.316 and give meaning to both. That is easy to do. KRS 48.310(2) provides the Legislature the power to suspend ***any*** appropriation, and 48.316 simply makes clear that any suspension of "any provisions of KRS Chapters 12, 42, 56, 152, 177, or 341" is temporary in nature. They work in conjunction with each other to statutorily approve all temporary suspensions.

Haydon Bridge does not want this Court to harmonize the statutes. Instead, it wants this Court to hold that the specific not only "prevails over the general," it ***destroys*** the general. Haydon Bridge contends that when the

General Assembly passed 48.316 in 1984, it forever discarded its own authority to suspend appropriations outside of KRS Chapters 12, 42, 56, 152, 177, or 341.

This argument fails. Not only does it ignore the basic rules of statutory construction set forth above, it also ignores timing. KRS 48.310(2) was enacted in its current form in 1990 – six years after KRS 48.316. As Haydon Bridge correctly states in a prior section of its brief, "contradictory language is resolved by honoring the language of the more recent law." [Brief, p. 31]. *See also Butcher v. Adams*, 310 Ky. 205, 220 S.W.2d 398, 400 (1949)(where statutes appear to conflict, "the later statute controls.") Here, the more recent law is KRS 48.310(2), and therefore it controls. It provides statutory authority for the budget bill provisions at issue.

VII. THE BUDGET PROVISIONS AT ISSUE DO NOT VIOLATE SECTION 180 OF THE KENTUCKY CONSTITUTION.

Section 180 of the Kentucky Constitution prohibits any tax levied and collected for one purpose to be devoted to another purpose. It also makes clear that one must look to the statute establishing the tax to determine its purpose:

> **Every act enacted by the General Assembly**, and every ordinance and resolution passed by any county, city, town or municipal board or local legislative body, levying a tax, **shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose**.

Ky. Const. § 180 (emphasis added).

Haydon Bridge argues that KRS 342.122(1)(c) establishes that the purpose of Kentucky's Coal Severance Tax is to provide a $19 million annual appropriation to the BRF. Therefore, it argues that the suspension of the

appropriation, and placement of coal severance revenues in the General Fund, is a violation of Section 180.

This argument fails. Chapter 143 establishes Kentucky's Coal Severance Tax. It was enacted in 1972, and articulates three distinct purposes: (1) to fund resource recovery road projects, (2) to fund the Kentucky Coal Council, and (3) to supplement the General Fund. These are the ***only*** purposes of the tax:

> All tax levied by KRS 143.020 collected in excess of the amount required to be deposited to the transportation fund (road fund) or transferred to the Kentucky Coal Council shall be deposited by the Revenue Cabinet to the credit of the general fund.

KRS 143.090(4).[5]

The tax's third purpose – to provide revenue to the General Fund – is highly relevant here because it is black-letter Kentucky law that the General Assembly can spend General Fund revenues in any way it desires:

> [W]hen taxes have been levied for the General Fund they are available for appropriation for any proper state purpose.

Walton v. Carter, 337 S.W.2d 674, 677 (Ky. 1960). Consequently, KRS 342.122(1)(c), which requires a yearly transfer of $19 Million to the BRF, is an **appropriation** of general funds; it is not the purpose of the Coal Severance Tax.

Because KRS 143.090(4) defines the purpose of the Coal Severance Tax, Haydon Bridge is wrong in maintaining that the purpose lies in KRS 342.122(1)(c). First, Haydon Bridge ignores the fact that KRS 342.122(1)(c) took effect ***twenty-six years after*** the Coal Severance Tax was implemented. For

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[5] This statute was amended in 2006 to change "Kentucky Coal Council" to "Office of Energy Policy." The remainder of KRS 143.090(4) was not changed.

twenty-six years the tax was collected and used to fulfill its three stated purposes. And those three purposes did not change simply because the Legislature subsequently referred to the tax in KRS 342.122(1)(c). If the Legislature truly intended to make funding the BRF a stated purpose of the Coal Severance Tax, the Legislature could have easily revised Chapter 143 to reflect such intent. But it did not. Furthermore, if the Legislature repeals the $19 million appropriation in KRS 342.122(1)(c), the Coal Severance Tax will not disappear. It will continue to supplement the General Fund.

Second, KRS 42.4582, which funds the Local Government Economic Development Fund ("LGDEF") with "severance and processing taxes on coal," specifically recognizes that Coal Severance Tax revenues transferred to the development fund come directly from the General Fund:

> Moneys shall be **transferred from the general fund into this fund** according to the following schedule: Effective July 1, 1995, and thereafter an amount ***equal*** to fifty percent (50%) of the severance and processing taxes on coal collected annually, unless otherwise amended by the budget bill.

KRS 42.4582(2)(d) (emphasis added). This statute also specifically references the $19 Million transfer from the General Fund to the BRF, holding that the General Fund transfer to the BRF takes first priority:

> This quarterly calculation and transfer of funds pursuant to subsection (2)(d) of this section shall be made only after the quarterly installment of the annual nineteen million dollars ($19,000,000) allocation of coal severance tax revenues have been made to the BRF . . . as required by KRS 342.122.

KRS 42.4582(2).

Therefore, it is crystal clear that the Coal Severance Tax is not levied to fund the BRF or the LGDEF. It is intended to fulfill the three purposes explicitly

stated in Chapter 143, one of which is to provide revenue to the General Fund. So why does KRS 342.122(1)(c) refer to the Coal Severance Tax? The answer is simple. The LGDEF does not receive a static appropriation. Instead, it receives ***general funds*** in "an amount ***equal*** to fifty percent (50%) of the severance and processing taxes on coal collected annually," minus any money transferred to the BRF. *Id.* Thus, the Legislature referenced the Coal Severance Tax in KRS 342.122(1)(c) to maintain consistency with the LGDEF funding formula in KRS 42.4582. It did not reference the tax to set forth its purpose. The purpose of the Coal Severance Tax appears only in Chapter 143.

The bottom line remains: except for the two specific purposes listed in Chapter 143, the Coal Severance Tax was established to supplement the General Fund. The Legislature did not violate Section 180 by suspending the $19 Million appropriation, as the Coal Severance Tax was not designed to fund the BRF. Therefore, the lower court's rejection of Haydon Bridge's Section 180 argument should be affirmed.

CONCLUSION

The essence of Haydon Bridge's argument to this Court, and to the court below, is that the effects of the suspensions and modifications at issue are so egregious that they must be unconstitutional. Haydon Bridge, however, fails to point to a constitutional provision that has actually been violated. Section 51 does not apply because the suspensions were not permanent; Section 180 does not apply because the Coal Severance Tax was not enacted to fund the BRF. While the effects of the Budget Bill provisions may be distasteful, they were necessary and constitutional legislative actions taken to balance the budget.

The Governor and Budget Director respectfully request that this Court reverse the lower court's ruling concerning Section 51, and affirm its ruling concerning Section 180.

Respectfully submitted,

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