COMMONWEALTH OF KENTUCKY
SUPREME COURT

No. 2009-SC-000066-TG
(2009-CA-000219)

VIRGINIA G. FOX — APPELLANT

v.

TREY GRAYSON, ET AL. — APPELLEES

On Appeal From Franklin Circuit Court
Honorable Thomas D. Wingate
No. 08-CI-1426

BRIEF OF APPELLEE GOVERNOR STEVEN L. BESHEAR

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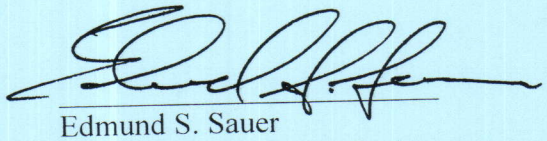
I hereby certify that copies of this brief were served upon the following individuals by first class mail, this 8th day of September, 2009: The Honorable Thomas D. Wingate, Judge, Franklin Circuit Court, 214 St. Clair St., Frankfort, KY 40601; Paul E. Salamanca, 279 Cassidy Ave., Lexington, KY 40502; Angela Evans, Office of the Attorney General, 700 Capitol Ave., Rm. 118, Frankfort, KY 40601; Dennis Taulbee, Council on Postsecondary Education, 1024 Capitol Center Dr., Ste. 320, Frankfort, KY 40601; Jack Conway, Attorney General of the Commonwealth of Kentucky, 700 Capitol Ave., Rm. 118, Frankfort, KY 40601. The undersigned certifies that Appellee Governor Beshear did not withdraw the record on appeal from the office of the clerk for the Franklin Circuit Court.



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STATEMENT CONCERNING ORAL ARGUMENT

The Court indicated in its order granting transfer, dated April 23, 2009, that oral argument would be heard in this case. Appellee Governor Steven L. Beshear has no objection to the Court hearing oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee Governor Steven L. Beshear agrees with Appellant Virginia Fox that the facts of this case are not in dispute. Because the case was decided on a motion to dismiss, the facts are taken as alleged in the complaint. *See* R1–R34 (complaint).[1] Governor Beshear offers the following Counterstatement of the Case to supplement the Statement provided by Fox.

For over one hundred fifty years, the General Assembly has had the express constitutional authority to create "[i]nferior State office[s], not specifically provided for in [the] Constitution," and to "prescribe[] by law" the "manner" in which individuals are "appointed" to those offices. Ky Const. § 93 (1891); Ky. Const. art. III, § 25 (1850). The statutes creating these inferior offices typically set forth the manner in which appointments are to be made, including whether legislative confirmation is required. If legislative confirmation is required, the statutes set forth the ***type*** of legislative confirmation needed—*i.e.*, whether only Senate confirmation is necessary, or whether bicameral confirmation, by both the Senate and the House of Representatives, is required.

The procedures governing both types of legislative confirmation are prescribed by KRS 11.160. Subsection (1) of KRS 11.160 provides the procedures applicable "[w]hen a statute specifically requires [only] Senate confirmation of an appointment." This provision is applicable to a number of boards and commissions, including appointments to the Parole Board, KRS 439.320(1), the Public Service Commission, KRS 278.050(1), the Kentucky Lottery Corporation, KRS 154A.030, the Registry of Election Finance,

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[1] Citations to the trial court record are designated as R__.

KRS 121.110, the Personnel Board, KRS 18A.050(4), and appointments to serve as Administrative Law Judges, KRS 342.230(3).

Subsection (2) of KRS 11.160 sets forth the procedures applicable "[w]hen a statute specifically requires Senate ***and*** House of Representatives confirmation." (Emphasis added). Appointments requiring bicameral confirmation pursuant to KRS 11.160(2) are comparatively fewer in number than those requiring only Senate consent, and include appointments to the Agricultural Development Board, KRS 248.707(2)(b), the Kentucky Board of Education, KRS 156.029(1), and the Mine Safety Review Commission, KRS 351.1041(2). Citizen appointments to the Council on Postsecondary Education also fall into this category, requiring confirmation "by the Senate and the House of Representatives" as provided by KRS 11.160(2). KRS 164.011(1).

Appellant's Appointment to the Council on Postsecondary Education

On July 13, 2007, Governor Ernie Fletcher appointed Appellant Virginia Fox to serve as a citizen member of the Council on Postsecondary Education. (R1, R8, R13–R15.) Because the General Assembly was not in session at the time of her appointment, Fox assumed the responsibilities of the position pending legislative confirmation during the next regular session of the General Assembly pursuant to KRS 11.160(2)(h). (R1, R8.)

Upon her appointment, Governor Fletcher submitted Fox's name and supporting documentation to the House of Representatives and the Senate as required by KRS 11.160(2)(a) and (c). In the letter of appointment, Governor Fletcher expressly

recognized that Fox had "been appointed to a position requiring Senate and House confirmation." (R8–R9, R17–R18.)

The next regular session of the General Assembly commenced on January 8, 2008, and allegedly concluded on April 15, 2008. (R9.) The House did not act on Fox's appointment to the Council during that legislative session. (R9.) Nevertheless, the Senate attempted to confirm Fox's appointment unilaterally (R9, R27–R28), in disregard of KRS 11.160(2)(f), which precludes the Senate from acting on such appointments unless the House has voted to confirm.

Because Fox was not confirmed by the House of Representatives during the 2008 regular session, the seat to which she was appointed became vacant by operation of law pursuant to KRS 11.160(2)(i). Fox was formally notified of this fact by letter dated April 22, 2008. (R2, R9, R29–R30.)

On June 6, 2008, Appellee Governor Beshear filled the vacancy on the Council created by Fox's departure by appointing Appellee Pam Miller to the position. (R2, R9, R31–R33.) Pursuant to KRS 11.160(2)(h) and KRS 164.011(1), Miller assumed the seat pending legislative confirmation at the 2009 legislative session. At that session, the House of Representatives voted to confirm Miller's appointment. *See* 2009 HR 47 (March 12, 2009). The Senate subsequently followed suit. *See* 2009 SR 192 (March 29, 2009). Accordingly, because Miller received bicameral confirmation, she is currently serving on the Council for a term expiring December 31, 2012. (R31–R33.)

The Present Lawsuit

On August 29, 2008, Fox filed this lawsuit in Franklin Circuit Court, claiming that she is "the rightful occupant" of the seat on the Council currently held by Miller. (R10.) Fox argues that the requirement of bicameral confirmation, contained in KRS 164.011(1) and KRS 11.160(2), violates Section 93 of the Kentucky Constitution because a 1992 amendment to that constitutional provision purportedly invalidates bicameral confirmation requirements. As amended, Section 93 provides that "[i]nferior State officers and members of boards and commissions, not specifically provided for in this Constitution, may be appointed or elected, in such manner as may be prescribed by law, which may include a requirement of consent by the Senate." According to Fox, because there is no mention of House consent in the 1992 amendment, statutory requirements of bicameral confirmation are now constitutionally prohibited.

On September 26, 2008, Appellees Governor Beshear and Pam Miller moved to dismiss the case, arguing that the 1992 amendment to Section 93 did not implicitly invalidate bicameral confirmation requirements. (R45, R67.) After briefing of the issues presented and a hearing on November 20, 2008, the court issued a twenty-four page Opinion and Order granting the motion to dismiss on January 6, 2009. (R117–R140.) According to the court, the "ordinary and common language" of the 1992 amendment precludes Fox's negative inference of a prohibition on bicameral confirmation. (R127.) But even if Fox had "offered a plausible alterative interpretation of Ky. Const. § 93," (R127), the court held that "other sources of ascertaining intent" also rebut her interpretation, including: (1) previous versions of Kentucky's constitution indicating a shift from constitutionally required and exclusive Senate confirmation (R129–R132); (2)

contemporaneous legislative constructions of the 1992 amendment establishing that it was not intended to prohibit bicameral confirmation requirements (R133–R134); and (3) judicial precedent interpreting Section 93 to authorize legislative confirmation requirements prescribed by law (R134–R137).

Fox filed a notice of appeal from this decision (R141), and subsequently moved to transfer the case directly to this Court. Governor Beshear did not oppose the motion to transfer. The Court granted transfer on April 23.

ARGUMENT

Appellant Virginia Fox concedes that, under existing statutory law, she is not entitled to Appellee Pam Miller's seat on the Council on Postsecondary Education because she (unlike Miller) was not confirmed by the House of Representatives as required by KRS 164.011(1) and KRS 11.160(2). Appellant's Br. 1. She contends, however, that she is nevertheless the rightful occupant of the seat because a 1992 amendment to Section 93 of the Kentucky Constitution implicitly invalidates bicameral confirmation requirements. Only Senate consent, Fox argues, can constitutionally be required of inferior state officers. As the Franklin Circuit Court concluded, Fox's inference of an implied prohibition on bicameral confirmation is too weak to overcome the strong presumption of constitutionality accorded legislative enactments. Neither the plain language nor the history of the 1992 amendment suggests that an implied prohibition on bicameral confirmation was intended by its framers.

Although older versions of Kentucky's Constitution expressly mandated exclusive Senate confirmation of inferior state officers, more recent versions, including Kentucky's present constitution, have granted the General Assembly the discretion to "prescribe[] by law" the "manner" in which inferior state officers are "appointed." This authority necessarily includes whether and what type of legislative confirmation is required. The 1992 amendment to Section 93 merely provides express textual support for the proposition that the "manner" prescribed by statute "may include" Senate confirmation. As numerous courts and legal authorities have recognized, the phrase "may include" is an expansive, non-restrictive phrase that rebuts inferences of exclusivity. Accordingly, the fact that appointment requirements "may include" Senate confirmation does not mean

that other appointment requirements duly "prescribed by law," such as bicameral confirmation, are now constitutionally prohibited.

Even if the language of the 1992 amendment were ambiguous, the ambiguity is removed by the fact that the body that drafted, passed, and proposed it—the 1992 General Assembly—is the very same body that contemporaneously enacted the bicameral confirmation framework that Fox seeks to invalidate, namely, KRS 11.160(2). The 1992 General Assembly also contemporaneously created two new boards and commissions, appointments to both of which require bicameral confirmation. It is inconceivable that the 1992 General Assembly would enact multiple statutes providing for and requiring bicameral confirmation, yet at the same legislative session draft, pass, and propose a constitutional amendment aimed at implicitly prohibiting that very requirement. Furthermore, despite Fox's speculation to the contrary, there is no reason to think that the citizens that ratified the 1992 amendment to Section 93 interpreted it any differently than their elected representatives.

For these reasons, more fully developed below, Governor Beshear respectfully requests that this Court affirm the well-reasoned decision of the Franklin Circuit Court.

I. Kentucky Law Accords Statutes A Strong Presumption Of Constitutionality And Disfavors Implied Constitutional Prohibitions.

Fox's challenge to the constitutionality of Kentucky's bicameral confirmation procedure must begin with the "long-established principle that a strong presumption exists in favor of [a] statute's constitutionality." *Stephens v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 624, 626 (Ky. 1995); *accord Kraus v. Ky. State Senate*, 872 S.W.2d 433, 438 (Ky. 1994) ("There is a strong presumption of constitutionality which is afforded any enactment of the General Assembly.") "When considering the

constitutionality of a statute, this Court draws all fair and reasonable inferences in favor of the statute's validity." *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006). "[A]ll presumptions and intendments are in favor of the constitutionality of statutes and, even in cases of reasonable doubt of their constitutionality, they should be upheld and the doubt resolved in favor of the voice of the people as expressed through their legislative department of government." *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968). Any alleged "violation of the Constitution must be ***clear, complete and unmistakable*** in order to find the law unconstitutional." *Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998) (emphasis added).

Constitutional challenges based on an ***implied*** constitutional theory, like Fox's here, require an even greater showing. As aptly explained by this Court's predecessor:

> Interpretations of Constitutions by rules of implication are most hazardous, and, if ever employed at all, it ought to be done in those instances ***only where the subject-matter and language leave no doubt that the intended meaning of the clause which may be under investigation may be reached in that way only***, and reached in that way with approximate certainty.

Cumberland Tel. & Tel. Co. v. City of Hickman, 111 S.W. 311, 313 (Ky. 1908) (emphasis added); *accord Commonwealth v. Howard*, 180 S.W.2d 415, 418 (Ky. 1944).[2] Fox's inference of an implied constitutional prohibition on bicameral confirmation is insufficient to meet this high standard.

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[2] Constitutional prohibitions by implication are particularly hazardous because state legislative authority is plenary, not constitutionally enumerated. Thus, the fact that one type of legislative power is specifically enumerated does not establish that another is necessarily prohibited, provided that it comports with other constitutional provisions, including separation of powers. *See, e.g., Idaho Press Club, Inc. v. State Legislature*, 132 P.3d 397, 399 (Idaho 2006) ("[T]here is no reason to believe that a [state] Constitutional provision enumerating powers of a [state legislature] was intended to be an exclusive list. The [state legislature] would inherently have powers that were not included in the list.").

II. The Kentucky Constitution Has Long Authorized The General Assembly To Prescribe By Statute The Manner Of Appointment Of Inferior State Officers, Including Legislative Confirmation Requirements.

To put the 1992 amendment to Section 93 in the proper context, it is helpful first to consider the constitutional history of legislative confirmation in Kentucky. Such a review indicates that, although previous versions of Kentucky's constitution conferred exclusive confirmation powers in the Senate, the two most recent constitutions have given the General Assembly the authority to prescribe by statute the "manner" of appointment, including whether and what type of legislative confirmation is required.

A. Previous Versions Of The Kentucky Constitution Indicate A Purposeful Departure From Mandatory and Exclusive Senate Confirmation Of Inferior State Officers.

Kentucky's first two constitutions provided—as a matter of state *constitutional law*—the appointment requirements for inferior state officers. Both the 1792 and 1799 constitutions expressly granted the governor the authority to appoint inferior state officers, and conferred upon the Senate the exclusive constitutional authority to confirm those appointments. The 1792 Constitution authorized the governor to "nominate, and ***by and with the advice and consent of the Senate***, appoint all officers, whose offices . . . shall be established by law, and whose appointments are not herein otherwise provided for." Ky. Const. art. II, § 8 (1792) (emphasis added). The 1799 Constitution included the same language, providing that the governor "shall nominate, and ***by and with the advice and consent of the Senate***, appoint all officers, whose offices . . . shall be established by law, and whose appointments are not herein otherwise provided for." Ky. Const. art. III, § 9 (1799) (emphasis added).

Kentucky's 1850 Constitution dramatically departed from this regime. Instead of prescribing the mode of confirmation ***in the constitution***, the framers of the 1850 Constitution opted for a more flexible framework in which appointment requirements for inferior state officers were prescribed ***by statute***. Accordingly, the 1850 Constitution provided that "inferior State officers, not specially provided for in this Constitution, may be appointed or elected ***in such manner as shall be prescribed by law***, for a term not exceeding four years." Ky. Const. art. III, § 25 (1850) (emphasis added). Unlike the first two state constitutions, the 1850 Constitution did not establish the appointment requirements for inferior state officers—instead, it left the "manner" of appointment to "be prescribed by law" by the General Assembly.

B. Kentucky's 1891 Constitution Maintains The Authority Of The General Assembly To Prescribe By Statute The Manner Of Appointment Of Inferior State Officers.

When the Constitutional Convention convened in 1890 to draft Kentucky's fourth and current constitution, the Convention opted to adhere to the approach adopted in 1850 regarding the appointment requirements of inferior state officers. The 1891 Constitution, like the 1850 Constitution, expressly provides that "[i]nferior state officers . . . may be appointed or elected, ***in such manner as may be prescribed by law***." Ky. Const. § 93 (1891) (emphasis added).[3]

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[3] When the 1890 Constitutional Convention intended to require legislative confirmation as a constitutional matter, and concentrate that power in the Senate, the convention did so in unmistakable terms. Section 209 of the 1891 Constitution (as originally ratified) specifically provided that "the Governor shall appoint, by and with the advice and consent of the Senate" the members of the Railroad Commission. IV *Proceedings & Debates in the Convention* 6045–46 (1890). This is in stark contrast to the broad and discretionary language of Section 93, which grants to the General Assembly the authority to "prescribe[] by law" the "manner" of appointment.

Importantly, the framers of Kentucky's 1891 Constitution considered language that would have returned the Commonwealth to the framework created by the 1792 and 1799 Constitutions, in which the manner of appointment was specifically dictated by the constitution and in which exclusive Senate confirmation of all inferior state officers was required. *See* IV *Official Report of the Proceedings & Debates in the Convention* 5728 (1890). That proposed language was rejected in favor of the broad language of Section 93, which specifically authorizes the General Assembly to provide by statute the "manner" of appointment of such officers. *Id.* at 5729.

In the wake of the adoption of Kentucky's 1891 constitution, the General Assembly enacted statutes prescribing the "manner" of appointment of inferior state officers pursuant to Section 93. This included statutory requirements of legislative confirmation. *See, e.g.*, 1893 Ky. Acts Ch. 202 § 11 (codified at Ky. Stat. § 3750) (specifying that "[u]nless otherwise provided, all persons appointed to an office by the Governor . . . shall hold office, subject to the advice and consent of the Senate."). In fact, in *Sewell v. Bennett*, 220 S.W. 517 (Ky. 1920), this Court's predecessor reaffirmed the constitutionality of Senate confirmation requirements contained in Ky. Stat. 3750, expressly recognizing that "[t]his power is conferred on the Legislature by section 93 of the Constitution." *Id.* at 519.

In recent years, the General Assembly has continued to prescribe by statute the "manner" of appointment of inferior state officers, including requirements of legislative confirmation. In 1990, the General Assembly first enacted KRS 11.160, which sets forth legislative confirmation procedures. *See* 1990 Ky. Acts Ch. 505 § 1. That same year, the General Assembly created two new boards and commissions and required bicameral

confirmation of appointments to those entities.[4] In 1992, the same year the amendment to Ky. Const. § 93 was adopted, the General Assembly created two additional boards and commissions requiring bicameral confirmation.[5] It also amended KRS 11.160, by adding subsection (2), to provide the procedures governing bicameral confirmation. *See* 1992 Ky. Acts Ch. 415 § 1. The framework contained in KRS 11.160 still sets forth the applicable procedures both for Senate and bicameral confirmation. *See supra*, at 1–2.

C. This Court Has Recognized The Constitutional Authority Of The General Assembly To Require Legislative Confirmation Of Inferior State Officers.

This Court's most recent and comprehensive consideration of legislative confirmation powers occurred in *Kraus v. Kentucky State Senate*, 872 S.W.2d 433 (Ky. 1994). In *Kraus*, an individual nominated to serve as an Administrative Law Judge, but not confirmed by the Senate as required by statute, filed suit challenging the constitutional authority of the General Assembly to require legislative confirmation of his appointment. He also claimed that to require "such consent would be a violation of the separation of powers provision of the Kentucky Constitution." *Id.* at 435.

This Court rejected both arguments. First, the Court reiterated that, even though the version of Section 93 applicable to the case (pre-1992 amendment) *did not* expressly authorize any form of legislative consent, the General Assembly was nevertheless

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[4] *See* 1990 Ky. Acts Ch. 476 Pt. II § 35 (creating the State Board for Elementary and Secondary Education, now called the State Board of Education and codified at KRS 156.029); 1990 Ky. Acts Ch. 476 Pt. II § 21 (creating the Council for Education Technology, initially codified at KRS 156.665).

[5] *See* 1992 Ky. Acts Ch. 103 § 3 (creating the Board of the Kentucky Long-Term Policy Research Center, now codified at KRS 7B.030(b)); 1992 Ky. Acts Ch. 10 § 3 (creating the Governor's Higher Education Nominating Committee, now called the Governor's Postsecondary Education Nominating Committee and codified at KRS 164.005(1)).

authorized to "prescribe[] by law" the "manner" of appointment, including requirements of legislative confirmation. As the Court explained, Section 93 in "general terms . . . permit[s] senate consent to any inferior state official ***that the General Assembly determined by legislative enactment should be subject to such senate consent.***" *Id.* at 437 (emphasis added). Second, the Court rejected the argument that legislative confirmation requirements violate separation of powers. Adhering to the "important distinction" between the executive branch's power to appoint, and the lesser power to confirm or reject an executive appointment, the Court held that legislative confirmation requirements "properly provided by appropriate statute" do not unconstitutionally intrude upon the executive's appointment powers. *Id.* at 436.

Even though *Kraus* involved an appointment requiring only Senate consent, its reasoning applies equally to legislative requirements of bicameral confirmation, which, as explained above, were in existence at the time of the *Kraus* decision. In fact, the Court's opinion in *Kraus* repeatedly recognizes the General Assembly's authority "[p]ursuant to Constitution § 93 [to] provide for executive appointments ***subject to Senate and/or House approval.***" *Id.* at 437 (emphasis added) (listing statutes requiring bicameral confirmation); *see also id.* at 436 (reiterating that *L.R.C. v. Brown* "left intact the ***power of the legislature*** itself to consent to the executive appointments where properly provided by appropriate statute") (emphasis added); *id.* ("Clearly, for more than the last one hundred years, the independent branches of government have recognized that ***the***

General Assembly has authority to confirm nominations from other branches of government.") (emphasis added).[6]

In sum, the framers of Kentucky's most recent constitutions have departed from a framework in which exclusive Senate confirmation is constitutionally required of all inferior state officers. Since 1850, the General Assembly has been authorized to "prescribe[] by law" the "manner" of appointment of such officers. As recognized by Kentucky courts, this authority, now contained in Section 93 of the Kentucky Constitution, includes the power to "prescribe[] by law" legislative confirmation requirements.

III. The 1992 Amendment To Section 93 Does Not Implicitly Invalidate Bicameral Confirmation Requirements For Inferior State Officers.

In 1992, during the litigation of the *Kraus* case discussed above, the General Assembly drafted, passed, and proposed an amendment to Section 93 of the Kentucky Constitution. *See* 1992 Ky. Acts Ch. 168 § 12. The people of the Commonwealth ratified the amendment on November 3, 1992, as one of a number of amendments ratified by the voters that day. The relevant portion of the amendment to Section 93 is noted in boldface and italics below:

> Inferior State officers and members of boards and commissions, not specifically provided for in this Constitution, may be appointed or elected, in such manner as may be prescribed by law, ***which may include a requirement of consent by the Senate,*** for a term not exceeding four years, and until their successors are appointed or elected and qualified.

Ky Const. § 93; 1992 Ky. Acts Ch. 168 § 12.

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[6] In the Franklin Circuit Court, Fox argued that the requirement of bicameral confirmation is a violation of separation of powers. (R10, R80–R81.) The trial court rejected this argument, relying primarily on *Sewell* and this Court's decision in *Kraus*. (R138.) Fox has abandoned this argument on appeal, as she did not assert it in her opening brief in this Court.

The emphasized language removed all doubt that the "manner" of appointing inferior officers to be "prescribed by law" "may include a requirement of consent by the Senate." This amendment was not necessary to authorize legislative confirmation requirements of inferior state officers because, since 1850, the General Assembly has had the constitutional authority to "prescribe[] by law" such requirements. *See Kraus*, 872 S.W.2d at 437; *Sewell*, 220 S.W. at 519. But at the time the amendment was proposed and adopted, *Kraus* was pending, so the question remained whether legislative confirmation provided by statute violated separation-of-powers principles. Presumably, the 1992 amendment was offered to prospectively settle that separation-of-powers question.

Relying on the maxim of statutory construction *expressio unius est exclusio alterius*, "meaning the express mention of one thing implies the exclusion of another (different) thing," *Steinfeld v. Jefferson County Fiscal Court*, 229 S.W.2d 319, 320–21 (Ky. 1950), Fox attempts to give the 1992 amendment an entirely new meaning. She claims that, because the amendment provides that appointment requirements "may include a requirement of consent by the Senate," it should be read as implicitly invalidating bicameral confirmation requirements.

Fox's inference of an implied constitutional prohibition on bicameral confirmation is misguided. The well-established objective in interpreting a constitutional provision is "to ascertain the intention of the framers of the Constitution and the people adopting it" so "that the plainly manifested purpose of those who created the Constitution, or its amendments, may be carried out." *Keck v. Manning*, 231 S.W.2d 604, 607 (Ky. 1950). Applying this standard in the present case, there is no indication that the

1992 amendment to Section 93 was intended to divest the General Assembly of its authority to require bicameral confirmation of inferior state officers. First, the plain and expansive language of the 1992 amendment rebuts any possible inference of an implied prohibition on bicameral confirmation. Second, even if the language of the amendment were ambiguous, statutes enacted contemporaneously with the 1992 amendment establish that the amendment was never intended to prohibit bicameral confirmation.

A. The Plain Language Of The 1992 Amendment Is Not Susceptible Of The Inferred Prohibition Advocated By Fox.

The plain and unambiguous language of the 1992 amendment to Section 93 does not prohibit bicameral confirmation requirements that are properly provided by statute. For over one hundred fifty years, the Kentucky Constitution has expressly authorized the General Assembly to "prescribe[] by law" the "manner" in which inferior state officers are "appointed." Ky Const. § 93 (1891); Ky. Const. art. III, § 25 (1850). As this Court recognized in *Kraus*, the General Assembly has properly exercised this power in providing, by statute, whether inferior officers are subject to legislative confirmation, including bicameral confirmation. 872 S.W.2d at 436–37.

The 1992 amendment to Section 93 does not withdraw from the General Assembly its authority to require bicameral confirmation of inferior state officers. It simply provides that the "manner" of appointment, which is to be "prescribed by law," "***may include*** a requirement of consent by the Senate." The use of the phrase "may include" is significant because it rebuts any possible inferences of limitation or exclusivity. The word "include" means "[t]o contain as part of something," and its participle "including" "typically indicates a partial list." *Black's Law Dictionary* 777 (8th ed. 2004). As a leading treatise on statutory construction explains, "[w]hen 'include'

is utilized, ***it is generally improper to conclude that entities not specifically enumerated are excluded***." 7A Norman J. Singer, *Sutherland Statutes & Statutory Construction* § 47.23 (7th ed. 2008) (emphasis added); *see also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 431–32 (2d ed. 1995) (noting that the term "including" "should not be used to introduce an exhaustive list, for it implies that the list is only partial").

Accordingly, the fact that Section 93 now expressly specifies that the "manner" of appointment "may include" Senate confirmation in no way establishes that the General Assembly is constitutionally prohibited from "prescrib[ing] by law" other appointment requirements in determining the "manner" of appointment, such as bicameral confirmation, that are otherwise consistent with separation of powers.

The impropriety of applying *expressio unius* to the expansive phrase "may include" was recently illustrated by the United States Supreme Court in *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), a case involving the Americans with Disabilities Act ("ADA"). Under the ADA, an employer can successfully defend against a failure-to-hire claim by establishing that the applicant did not meet the "qualification standards" for the position. 42 U.S.C. § 12113(a). The ADA provides that these "'qualification standards' ***may include*** a requirement that an individual shall not pose a direct threat to the health or safety of ***other individuals*** in the workplace." 42 U.S.C. § 12113(b) (emphasis added). The plaintiff in *Echazabal* challenged the validity of an administrative regulation defining "qualification standards" more broadly than the statute, to include not only the health or safety of ***other individuals***, but also "the health or safety of ***the individual [applicant]***." 29 C.F.R. § 1630.15(b)(2). Relying on *expressio unius*, the applicant argued that the statute implicitly prohibited qualification requirements relating

to the health or safety of the applicant himself because only the health of other individuals was expressly specified in the statute.

Justice Souter, writing for a unanimous Supreme Court, rejected the applicant's *expressio unius* argument, based largely on the fact that "language suggesting exclusiveness is missing" from the provision. *Id.* at 81. According to the Court, "[f]ar from supporting [the applicant's] position, ***the expansive phrasing of 'may include' points directly away from the sort of exclusive specification he claims.***" *Id.* at 80 (collecting additional authority for this proposition) (emphasis added).

This Court reached a similar result in *Cornelison v. Commonwealth*, 990 S.W.2d 609 (Ky. 1999). At issue in *Cornelison* was the proper interpretation of KRS 532.055(2)(a), which provides that "[e]vidence may be offered by the Commonwealth relevant to sentencing ***including*** [seven expressly listed types of evidence]." (Emphasis added.) The appellant, relying on *expressio unius*, argued that evidence of good time credits could not be admitted as evidence because it was not expressly enumerated by the statute. *Id.* at 610. This Court summarily rejected the appellant's *expressio unius* argument, holding that the "***use of the word 'including' leaves no doubt that the list is illustrative rather than exhaustive.***" *Id.* (emphasis added).

Similarly, the 1992 amendment at issue provides that the "manner" of appointment that is to be "prescribed by law" "may include" Senate confirmation. As *Echazabal* and *Cornelison* demonstrate, the framers' use of the phrase "may include" rebuts any inference that unenumerated requirements are now constitutionally prohibited.

Fox argues that the Court should apply *expressio unius*, and infer an implied prohibition on bicameral confirmation from the 1992 amendment, because Senate

consent is mentioned, House consent is not, and there is a "material difference" between House and Senate confirmation. Appellant's Br. 4. But *expressio unius* is not applied in such a cavalier fashion. *Expressio unius est exclusio alterius* "is a rule of construction, and not a rule of substantive law." *Union Light, Heat & Power Co. v. Louisville N. R. Co.*, 79 S.W.2d 199, 202 (Ky. 1935). The applicability of the maxim depends on the language of the provision at issue and, as *Echazabal* and *Cornelison* illustrate, *expressio unius* should not be applied where expansive language, such as "may include," is used. The use of such expansive language rebuts possible inferences of exclusivity.[7]

As the Franklin Circuit Court aptly pointed out, if the 1992 amendment to Section 93 had been intended "to revert back to the structure and framework expressed in our 1792 and 1799 constitutions," and invalidate existing and contemporaneously enacted bicameral confirmation requirements, the language of the 1992 amendment "would have clearly and unambiguously expressed the same." (R132.) But there is no indication in the text of the 1992 amendment that it was intended to invalidate existing bicameral confirmation requirements and divest the General Assembly of its authority to "prescribe[] by law" such confirmation requirements in the future.

The framers of Kentucky's constitution use language "advisedly and carefully," and "[w]hen the words used express a meaning clearly, distinctly and completely, ***there is no occasion to have recourse to implication or conjecture by which words are***

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[7] In the circuit court, Fox argued that use of the term "include" should not preclude application of *expressio unius* because the maxim is sometimes referred to as *inclusio unius est exclusio alterius*. (R80.) Whatever the title of the maxim, its substance is the same: If the language of the provision at issue indicates that an enumerated list is not intended to be exhaustive—*e.g.*, by the express use of the word "include" or "including"—application of *expressio unius* (or *inclusio unius*) is improper. *See, e.g.*, *Echazabal*, 536 U.S. at 80; *Cornelison*, 990 S.W.2d at 610.

interpolated." *Pardue v. Miller*, 206 S.W. 2d 75, 78 (Ky. 1947) (emphasis added). The expansive and non-restrictive meaning of the phrase "may include" is well established and should be given effect.

In sum, the Franklin Circuit Court correctly concluded that the language of Section 93, as amended in 1992, "is clear on its face." (R139.) Section 93 confers upon the General Assembly the authority to "prescribe[] by law" the appointment requirements for members of boards and commissions, including legislative confirmation. This Court's predecessor recognized that authority in *Sewell*, and this Court reaffirmed it in *Kraus*. The 1992 amendment, specifying that such requirements "may include" Senate confirmation, does not prohibit the General Assembly from specifying other appointment requirements, including bicameral confirmation, that are consistent with the principle of separation of powers. Although differently worded constitutional provisions from other jurisdictions—cited at great length by Fox—might preclude bicameral confirmation requirements, the plain language of the 1992 amendment to Section 93 of Kentucky's constitution does not do so.

B. Any Possible Ambiguity Surrounding The Intended Meaning Of The 1992 Amendment Is Removed By Multiple Contemporaneous Legislative Constructions.

To the extent that the 1992 amendment to Section 93 could be considered ambiguous, and thus arguably susceptible of Fox's negative inference, this Court should construe the amendment in conformity with the multiple contemporaneous legislative constructions of the amendment. These constructions uniformly indicate that the amendment was never intended to invalidate bicameral confirmation requirements.

1. Contemporaneous Legislative Constructions Are Entitled To Great Deference In Interpreting Ambiguous Constitutional Provisions.

As this Court's predecessor explained, contemporaneous legislative constructions are "entitled to great weight, because the persons who gave it are supposed to have been better able to determine the intention, not only by the ordinary rules of construction, but especially from knowing the circumstances to which it had relation." *Collins v. Henderson*, 74 Ky. 74, 92 (1874); *accord Shamburger v. Duncan*, 253 S.W.2d 388, 392 (Ky. 1952) (relying on contemporaneous legislative enactment to interpret ambiguous constitutional amendment because the enactment "may be said to express the views and reasoning which prevailed at the time of [the amendment's] adoption").

Contemporaneous legislative constructions of an ambiguous constitutional provision, when available, are accorded substantial deference under Kentucky law. *See, e.g.*, *Coleman v. Mulligan*, 28 S.W.2d 980, 981 (Ky. 1930) ("A contemporaneous legislative exposition of a constitutional provision is entitled to great deference.") (internal quotation marks omitted); *Hazelrigg v. Hazelrigg*, 183 S.W. 933, 936 (Ky. 1916) (recognizing that contemporaneous legislative constructions "should not be departed from unless clearly erroneous," even if the court "were of the opinion that another interpretation would have been more reasonable"); *Bd. of Educat. of Louisville v. Sea*, 181 S.W. 670, 673 (Ky. 1916) ("[W]hensoever the language of [the constitution] may be susceptible to a construction upholding an act of the Legislature, or to a construction which would render it invalid, it is the duty of the courts to adopt the former and to hold the act constitutional, rather than unconstitutional."); *Collins*, 74 Ky. at 92 (recognizing that a contemporaneous legislative construction "ought to be decisive of any doubt which might otherwise exist"). Moreover, contemporaneous legislative

constructions are especially persuasive if continually followed by the legislative and executive branches of government. *See, e.g.*, *Shamburger*, 253 S.W.2d at 392; *Hazelrigg*, 183 S.W. at 936.

2. Contemporaneous Legislative Constructions Uniformly Establish That The 1992 Amendment Was Not Intended To Implicitly Prohibit Bicameral Confirmation Requirements.

Multiple contemporaneous legislative constructions of the 1992 amendment to Section 93 demonstrate that the amendment was never intended to have the effect urged by Fox in this case. The 1992 amendment to Section 93 was drafted, passed, and proposed for ratification by the 1992 General Assembly. *See* 1992 Ky. Acts Ch. 168 § 12. That ***is the very same body that contemporaneously enacted KRS 11.160(2)***, the comprehensive procedural framework providing for bicameral confirmations. *See* 1992 Ky. Acts Ch. 415 § 1. The 1992 General Assembly also created two new boards and commissions at this same legislative session, appointments to ***both of which required (and still require) bicameral confirmation***. *See* 1992 Ky. Acts Ch. 103 § 3 (creating the Board of the Kentucky Long-Term Policy Research Center, now codified at KRS 7B.030(b)); 1992 Ky. Acts Ch. 10 § 3 (creating the Governor's Higher Education Nominating Committee, now called the Governor's Postsecondary Education Nominating Committee and codified at KRS 164.005(1)).

As these contemporaneous legislative actions unquestionably demonstrate, the 1992 General Assembly did not intend its proposed amendment to Section 93 to implicitly prohibit bicameral confirmation requirements. The General Assembly would not have drafted and proposed a constitutional amendment aimed at implicitly

invalidating the very legislative appointment procedures it contemporaneously enacted by statute.

To our knowledge, since the adoption of the 1992 amendment to Section 93 almost twenty years ago, neither the executive branch nor an executive branch appointee previously has challenged bicameral confirmation requirements. This executive acquiescence is perhaps best illustrated by Governor Fletcher, who appointed Fox to the Council and expressly conceded that her appointment required both House and Senate confirmation. (R18.) Moreover, in the years following the 1992 amendment, the General Assembly has continued to pass statutes requiring bicameral confirmation, including appointments to the Council on Postsecondary Education, 1997 Ky. Acts 1st ex s, Ch. 1, § 73, the Agricultural Development Board, 2000 Ky. Acts Ch. 530 § 4, the Mine Safety Review Commission, 2001 Ky. Acts Ch. 149 § 2, and the Education Professional Standards Board, 2001 Ky. Acts Ch. 137 § 7.

As these contemporaneous and continuous constructions indicate, the 1992 amendment to Section 93 was never intended to invalidate bicameral confirmation requirements properly prescribed by law.

3. Fox's Unfounded Speculation Regarding The Intent Of The People Is Insufficient To Overcome These Contemporaneous Legislative Constructions.

Fox argues that, despite the extraordinary deference traditionally accorded contemporaneous legislative constructions, these particular constructions are "not entitled to deference" because the people of Kentucky, who ratified the 1992 amendment, would have adopted her construction of the amendment, not the one adopted by the 1992 General Assembly. Appellant's Br. 16.

This argument amounts to nothing more than speculation. The ordinary meaning of the "may include" language used in the 1992 amendment rebuts Fox's inference of an implied prohibition on bicameral confirmation. Multiple contemporaneous legislative constructions uniformly establish that the General Assembly did not interpret the amendment to prohibit bicameral confirmation requirements. There is no reason to think that the people who ratified the amendment interpreted it any differently than their elected legislative representatives. As this Court recently pointed out in *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006), "the mere possibility that [constitutional] language could be interpreted in a particular way is insufficient to invalidate the plain language of a statute" that reflects the legislature's "reasonable interpretation" of the constitutional provision at issue. *Id.* at 180–81 (citing Kentucky authority for the proposition that constitutional "ambiguities are to be resolved in favor of the legislative interpretation").

The only alleged basis for Fox's speculation is the purported "overwhelming tradition" of Senate consent and the public's "intimate familiarity" with televised Senate confirmation hearings. Appellant's Br. 15–16. She argues that these factors would necessarily lead the public to adopt an interpretation of the amendment different than the one adopted by the General Assembly. But this argument ignores the fact that the General Assembly is a collection of Kentucky citizens, and its members are as familiar with the alleged "overwhelming tradition" of Senate consent and Senate confirmation hearings—if not more so—than the general public. If the "overwhelming tradition" and "intimate familiarity" of Senate consent would, as Fox argues, necessarily lead an individual to read the 1992 amendment to prohibit House confirmation requirements,

then why did the members of the General Assembly not adopt this construction? Fox's speculation is unfounded. As the Franklin Circuit Court concluded, Fox offers no reason to suggest that "the intent of the framers" of the 1992 amendment is not also "a fair reflection of the ratifiers' intent." (R129.)[8]

IV. Whether To Require Senate Or Bicameral Confirmation Of Inferior State Officers Is A Question To Be Decided By The General Assembly.

Whatever the rule may have been under previous Kentucky constitutions, and whatever the rule may be in other jurisdictions, Section 93 of Kentucky's current constitution grants the General Assembly the authority to prescribe by statute legislative confirmation requirements. The 1992 amendment to Section 93 did not divest the General Assembly of this authority. It simply provided one example of what those statutorily prescribed requirements "may include."

If the General Assembly wished to concentrate confirmation authority in the Senate, they can certainly do so. But they have not. In fact, during the 2009 legislative session, Senate President David Williams introduced a measure that would have repealed all existing bicameral confirmation requirements for inferior state officers and concentrated the power of confirmation in the Senate. *See* 2009 SB 168; *see also* 2009

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[8] Because contemporaneous legislative constructions uniformly establish that the 1992 amendment was not intended to prohibit bicameral confirmation requirements, application of *expressio unius* to subvert that intent would be improper. *Expressio unius* is applied "only as an aid in arriving at intention, and ***not to defeat it***." *Jefferson County v. Gray*, 249 S.W. 771, 772 (Ky. 1923) (emphasis added); *see also City of Lexington v. Edgerton*, 159 S.W.2d 1015, 1017 (Ky. 1941) (recognizing that *expressio unius* is "not to be applied if the intention of the act is clear"); *Gray*, 249 S.W. at 772 (refusing to apply *expressio unius* to statute where it would "repeal by implication" contemporaneous legislative enactment).

HB 120 (amended by Senate to include contents of SB 168). Although this measure passed the Senate, it did not pass the House of Representatives.[9]

The determination whether and what type of legislative confirmation is required for an appointment to an inferior state office is a question that Section 93 delegates to the judgment of the General Assembly.[10] As the Franklin Circuit Court correctly concluded, "[t]he resolution inevitably sought by [Fox] belongs to the political branches of our government." (R.139.) Fox's inference of an implied constitutional prohibition is far too tenuous to invalidate the "voice of the people as expressed through their legislative department of government." *Walters*, 435 S.W.2d at 467.

CONCLUSION

The language and history of the 1992 amendment to Section 93 establish that it does not prohibit bicameral confirmation requirements. Accordingly, this Court should affirm the well-reasoned decision of the Franklin Circuit Court.

Respectfully submitted,

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9 *See* Legislative Records Online, http://www.lrc.ky.gov/record/09RS/SB168.htm and http://www.lrc.ky.gov/record/09RS/HB120.htm (last visited Sept. 1, 2009).

10 Fox hypothesizes that the trial court's interpretation of Section 93 could allow the General Assembly to require only House confirmation of inferior state officers. Appellant's Br. 11. There has been no attempt by the General Assembly to confer onto the House exclusive confirmation authority. The question presented is whether the 1992 amendment *constitutionally requires* the concentration of legislative confirmation authority in the Senate. The lower court correctly answered that question in the negative.