COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2022-SC-0480-D
(CASE NO. 2020-CA-0726-MR)

BLUEGRASS TRUST FOR HISTORIC PRESERVATION — **APPELLANT**

V.

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT PLANNING COMMISSION, ET AL., — **APPELLEES**

BRIEF *AMICUS CURIAE* OF KENTUCKY RESOURCES COUNCIL, INC. AND NATIONAL TRUST FOR HISTORIC PRESERVATION

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CERTIFICATE OF SERVICE

I certify that this Brief was served by first class mail, postage prepaid, to: Jessica K. Winters, The Winters Law Group, LLC, 432 S. Broadway, Suite 2B, Lexington, KY 40508; William Lear and Nick Nicholson, Stoll Keenon Ogden, 300 W. Vine St., Suite 2100, Lexington, Kentucky 40507; Tracy Jones, LFUCG Legal Department, 200 E. Main St., 6th Floor, Lexington, Kentucky 40507; Honorable Thomas L. Travis, 120 North Limestone, Lexington, Kentucky 40507; Mr. Vincent Riggs, Clerk of the Fayette Circuit Court, 120 North Limestone, Lexington, Kentucky 40507; S. Chad Meredith, Solicitor General and Matthew F. Kuhn, Deputy Solicitor General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601, on this the 31st day of May, 2023.

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STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF *AMICUS CURIAE* BRIEF AND ISSUES TO BE RAISED

Amicus Curiae Kentucky Resources Council, Inc. and the National Trust for Historic Preservation ("*Amici*") urge this Court to reverse the *Opinion and Order Dismissing Appeal* rendered September 30, 2022, by the Kentucky Court of Appeals in No. 20-CA-0726-MR, *Bluegrass Trust for Historic Preservation v. Lexington Fayette Urban County Government Planning Commission et al*. and to determine that KRS § 100.3471 violates Kentucky Constitution Sections 2, 3, 27, 28, 29, 59, 111, 115, and 116.

This Brief *Amicus Curiae* asserts that the legislative imposition through KRS 100.3471 of a significant financial barrier to exercise of a constitutionally protected right to appellate review exceeds the limits of legislative power in Ky. Const. Section 29 and intrudes on the province of the judiciary in violation of Ky. Const. Sections 27 and 28. It offends constitutional constraints on special and local legislation under Ky. Const. Sec. 59 by selectively burdening a subset neither reasonably nor naturally defined - that of private citizens seeking to access civil appellate review in matters arising under only one chapter of the Kentucky Revised Statutes, while not applying universally to all of the objects or persons composing the class to which the act relates. The statute also offends Ky. Const. Section 2 protections against arbitrary government action and constitutional assurances under Ky. Const. Sec. 3 of equal protection of law regarding fundamental constitutional rights such as access to courts.

It is an egregiously punitive, and confiscatory measure intended to limit access to the Kentucky Court of Appeals, guaranteed by the Kentucky Constitution, by citizens challenging development approvals.

BACKGROUND

Through KRS 100.3471, the General Assembly acted to intentionally impede the exercise of a constitutionally protected right to an inexpensive appeal from the circuit court to the Court of Appeals, in order to cater to the interests of developers in appeals arising under KRS Chapter 100. The statute, as Judge Combs noted, "creates a whole new process for cases involving appeals from a zoning entity to a circuit court and ultimately to the Court of Appeals" and "empowers a circuit court with jurisdiction to determine whether its own decision may be worthy of appeal in arguable disregard of the mandate of Section 115 of the Kentucky Constitution . . ." 2022 Ky. App. LEXIS 87, at *12 (Ct. App. Sep. 30, 2022). **After** a circuit court has lost jurisdiction of a case by operation of the rules of this Court due to filing of a notice of appeal, KRS 100.3471(2) allows an appellee to file a motion before the circuit court to order the appellant "to post an appeal bond," which the circuit court is compelled to impose as a condition prerequisite to continuation of the appeal under pain of dismissal for nonpayment.

In addition to creating a new procedure, the statute directs the manner of circuit court review, directing that it determine if the appeal is "presumptively frivolous" – despite only a bare notice of appeal having been filed at that point – and requires the circuit court to consider, in determining the "presumptive" frivolity, whether the appeal is of a "ministerial or discretionary decision" and "whether or not there exists a reasoned interpretation supporting the appellant's position." KRS 100.3471(3)(b). A bond is required by the statute for "presumptively frivolous" appeals covering "all costs, economic loss, and damages that the appellee may suffer or incur" and attorney fees and court costs, up to $250,000. KRS 100.3471(3)(c). For appeals that the circuit court deems

not presumptively frivolous, a bond is **also** required, covering attorney fees and court costs and "interest payable on land acquisition and development loans,"[1] up to $100,000. KRS 100.3471(3)(d). The penalty for failing to post the bond within 15 days is mandatory dismissal of the appeal. KRS 100.3471(3)(f).

Once the appeal for which the bond was demanded becomes final, the statute purports to grant the appellee, even where the appellant has ***prevailed*** in the appeal, the right to recover through the circuit court all actual costs or damages up to the bond amount. Either the appellant or appellee may then move for yet another circuit court hearing on the "actual costs and damages to be paid to the appellee under the appeal bond." KRS 100.3471(4). Nothing in the statute limits recovery of costs or damages by the appellee to cases where the appellee has prevailed in the appeal, nor does the statute provide for a release of the bond in the event the appeal is successful.

KRS 100.3471(4) also selectively exempts from the requirement to post an appeal bond where the KRS Chapter 100 decision being appealed from involves a landfill and the appellant is a federal, state, or local government.

ARGUMENT

I. The Court of Appeals Erred In Construing and Applying Legislative Authority Under Kentucky Constitution Section 111(2) in Order to Allow Impairment of the Exercise of a Constitutional Right of an Inexpensive Appeal Under Section 115 of the Kentucky Constitution

KRS 100.3471 is contrary to the right to appeal guaranteed by Kentucky Constitution §115, which provides that "[i]n all cases, civil and criminal, there shall be

[1] The inclusion of "interest payable on land acquisition and development loans" as costs subject to the appeal bond in appeals deemed not presumptively frivolous by the circuit court, speaks volumes on the legislative purpose of the appeal bond to favor the interests of developers by financially burdening the exercise of appeal rights by those challenging development decisions under KRS Chapter 100.

allowed as a matter of right at least one appeal to another court....” and that “[p]rocedural rules shall provide for expeditious and inexpensive appeals.” Ky. Const. Sec. 115 (1976). Despite the irreconcilable inconsistency of a mandated imposition of an appeal bond of up to $100,000/250,000 for appeals from circuit court to the Court of Appeals for cases that began in the courts under KRS Chapter 100, with the constitutional guarantee of an expeditious and inexpensive appeal, the Court of Appeals upheld this selective and punitive legislative encroachment into the province of the Judiciary and on constitutional rights of litigants, relying on *Commonwealth v. Farmer*, 423 S.W.3d 690 (Ky. 2014).

Farmer held that the phrase “as provided by law” in “Section 111(2) [in the Kentucky Constitution] authorizes the legislature to prescribe the appellate jurisdiction of the Court of Appeals.” 423 S.W.3d at 692. In her reluctant concurrence in this case, Judge Combs invited this Court to consider the applicability and scope of *Farmer,* stating that “I would hope that the Supreme Court will grant discretionary review of this case (if it is sought) and re-examine its holding in *Farmer*. I would ask whether the language “to prescribe” our jurisdiction also encompasses the power to ‘proscribe’ it and thereby divest us of jurisdiction by transferring our appellate role to a circuit court under the unique circumstances set forth by KRS 100.3471.” Opinion and Order at 15.

The Court of Appeals below rejected the argument that KRS 100.3471 violates the constitutional separation of powers, finding that the enactment was within legislative authority pursuant to Ky. Const. Sec. 111(2). According to the Court, by providing in KRS 100.3471 that an appeal from circuit court to the Court of Appeals in a case arising under KRS Chapter 100 where an appeal bond is imposed “shall be dismissed” unless the appellant posts that bond, “KRS 100.3471 removes such an appeal from the Court of

Appeals' jurisdiction." Opinion and Order, p. 6.

The assertion of legislative power to ***proscribe*** the Court of Appeals appellate jurisdiction under KRS 100.3471 exceeds any power recognized in *Farmer,* and such an expansive reading of Section 111(2) cannot be reconciled with the express jurisdiction, rights and protections afforded such litigants by Ky. Const. Section 115. Ky. Const. Section 111 was enacted as part of the comprehensive reform of the Kentucky Courts of Justice, which also included concurrent ratification of Section 115, which provided "as a matter of right" for "at least one appeal to another court[.]" Section 115 provided but two exceptions – first, that the Commonwealth could not appeal a judgment of acquittal in a criminal case, other than for the purpose of securing a certification of law, and second, that the General Assembly "may prescribe that there shall be no appeal from that portion of a judgment dissolving a marriage."

By its plain language, Section 115 provides by law that there would be an appeal from one court to another "as a matter of right," and further provides that "procedural rules shall provide for expeditious and inexpensive appeals." The boundaries of legislative authority with respect to appeals falling within the scope of Section 115 was set *by that amendment and* is limited to prescribing whether a divorce judgment would be separately appealable. Nothing in Ky. Const. Sec. 115 empowers the General Assembly to proscribe or in any manner limit the exercise of the appeal so provided by imposing financial barriers or new procedural hurdles to such exercise; rather, the amendment constrains any rules of procedure by requiring that they make the appeal "expeditious and inexpensive." *Id.*[2]

[2] The Court of Appeals erred in suggesting that only one who was indigent could raise the issue of the financial burden imposed by the statute. Opinion and Order, p. 7. Such an

Here, the Court of Appeals' application of *Farmer* upholds a legislative proscription based on general authority over the appellate jurisdiction of the Court of Appeals under Ky. Const. Section 111, wholly ignoring that such general power was proposed and ratified as part of a larger package of constitutional provisions that together created a unified system of justice, and which also specifically included a defined constitutional right to at least one expeditious and inexpensive under Section 115 and an affirmation of the exclusive powers of this Court to adopt rules of appellate procedure under Section 116.

As noted by this Court in *Legislative Research Commission v. Fischer,* 366 S.W.3d 905, 913 (Ky. 2012): "It is a cardinal rule of construction that the different sections of the Constitution shall be construed as a whole so as to **harmonize** the various provisions and not to produce a **conflict** between them." (quoting *Wood v. Bd. of Educ. of Danville*, 412 S.W.2d 877, 879 (Ky. 1967)) (emphasis added). "Another rule of constitutional construction is to give effect to the intent of the framers of the instrument and of the people adopting it. The Constitution should not be construed so as to defeat the obvious intent of its framers if another interpretation may be adopted equally in accordance with the words and sense which will carry out the intent. The intent must be gathered both from the letter and the spirit of the document." *Id.* (quoting *Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957)).

Accordingly, the general powers of Section 111 may not be read in isolation and out of context, so as to allow the General Assembly to impose a substantial financial

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observation fails to recognize that the constitutional right created in Section 115 guarantees all appellants the right to one appeal to a higher court that is "inexpensive," and the financial burden imposed on all appeals falling under KRS 100.3471 violates that protection regardless of the economic resources or financial wherewithal of the appellant.

barrier and new procedural and substantive bar to access to what Ky. Const. Sec. 115 specifically mandates is to be an "inexpensive and expeditious" appeal of right. The Court of Appeals' application of *Farmer* also creates intractable conflicts with Ky. Const. Section 116, which vests authority for rules of practice and procedure for the court of justice with this Court. Such conflicts are avoided, and sections harmonized, by reading the general authority in Section 111 as yielding to the more specific mandates of Section 115 with respect to the "one appeal to another court."

Nothing in Ky. Const. Section 115 authorizes the General Assembly to constrain, burden, define, or limit by imposition of bond or otherwise, the **right** to "at least one appeal to another court." Section 115 defines the scope of appellate rights of litigants and the jurisdiction of the courts "ín all cases, civil and criminal," and does not admit to having that right constrained by legislative imposition of appeal bonds. Rather, Ky. Const. Section 115 constrains any rules of *procedure* that might impose financial obstacles to exercise of such an appeal, requiring that such "procedural rules shall provide for expeditious and inexpensive appeals."

The cursory analysis of the Court of Appeals did not speak to the irreconcilable conflict created by KRS 100.3471 with these absolute rights accorded in Section 115. *Amici* encourage this Court to recognize that the general authority recognized in *Farmer* to have been conferred in Section 111 to provide by law the appellate jurisdiction in the Court of Appeals must give way to the more specific protections in Section 115, concurrently proposed and ratified, of at least one inexpensive and expeditious appeal within the courts of justice. Construing Ky. Const. Section 111(2) to empower the General Assembly to impede or burden an unqualified right of appeal created

concurrently in Ky. Const. Section 115, and to create out of whole cloth new procedural barriers to appellate practice, is simply a bridge too far.

II. KRS 100.3471 Usurps this Court's Power in Ky. Const. Section 116 to Define Rules of Procedure and Practice In the Courts of Justice

Ky. Const. Section 116 provides **this** Court with exclusive authority "to prescribe rules governing its appellate jurisdiction . . . and rules of practice and procedure for the Court of Justice." *See Elk Horn Coal Corp. v. Cheyenne Res., Inc.,* 163 S.W.3d 408, 422 (Ky. 2005).[3] A constitutional violation of separation of powers therefore occurs when the legislature promulgates rules of practice and procedure for the Court of Justice. *See Id.* at 423 (statute assessing as additional damages a penalty equal to 10% of the superseded judgment on unsuccessful appellants); *O'Bryan v. Hedgespeth,* 892 S.W.2d 571, 578 (Ky. 1995) (statute authorizing introduction of evidence of collateral source payments at trial); *Commonwealth v. Reneer,* 734 S.W.2d 794, 796 (Ky. 1987) (statute providing for bifurcated trials in certain felony cases).

KRS 100.3471 not only erects costly barriers to both frivolous and non-frivolous appeals guaranteed by Ky. Const. Section 115, but it seeks to create a new procedural hurdle and substantive requirement prerequisite to exercise of that of-right appeal, and to revive circuit court jurisdiction both to set a bond after jurisdiction has transferred to the court of appeals, and over disposition of bond proceeds after the appeal has concluded. **After** the filing of a notice of appeal to the Court of Appeals, which this Court has acknowledged to divest that lower court of jurisdiction,[4] KRS 100.3471 creates in the

[3] While this Court criticized one aspect of the *Elk Horn* opinion regarding Ky. Const. Sec. 59 in *Calloway County Sheriffs Dep't v. Woodall,* 607 S.W.3d 557 (Ky. 2020), *Elk Horn* remains a significant precedent on this issue and regarding equal protection analysis.
[4] The filing of a notice of appeal, "with certain narrowly circumscribed exceptions" provided for in the Court's rules, divests the circuit court of jurisdiction over a case.

circuit court additional authority (and obligation, on demand) to conduct a post-appeal "hearing" on the mandatory imposition of an appeal bond. The statute purports to extend and reestablish circuit court jurisdiction over cases involving a select group of unfortunate appellants seeking appellate review of cases that came to the circuit court under KRS Chapter 100 *after* the appellate process has been initiated and, under this Court's rules, the circuit court has been divested of jurisdiction. By authorizing the circuit court to engage in such a bond-setting exercise and to hold such a proceeding, the statute interferes with RAP 1(A), RAP 2(A)(2), (A)(4).

As this Court stated in *Elk Horn Coal Corp.*, **"[e]xcept for matter of right appeals**, which are expressly provided for, the Kentucky Constitution undeniably delegates exclusively to [the Kentucky Supreme Court] the authority to adopt rules of practice and procedure for the Court of Justice and rules **governing our appellate jurisdiction."** 163 S.W.3d at 422 (emphasis in original). This case, involving an appeal from circuit court to the court of appeals, is that "matter of right appeal," and the authority of the General Assembly with respect to such appeals was constrained to matters of dissolution of marriage, and by providing that such procedural rules as might be developed could not interfere with the appeal being expeditious or inexpensive. That authority to establish procedural rules under Section 115 vests in the Supreme Court, and the legislative encroachment offends both constraints.

Regarding the preemptive imposition in KRS 100.3471 of what is both in intent and effect a financial penalty attendant to exercise of an of-right appeal, this Court in *Elk*

Young v. Richardson, 267 S.W.3d 690, 695 (Ky. App. 2008). The legislative creation of a new appeal bond procedure before the circuit court which is triggered on demand *after* the circuit court has lost jurisdiction under this Court's rules due to the filing of the notice of appeal, interferes significantly with the rules of practice and procedure developed by this Court for the orderly transfer of jurisdiction to the appellate court.

Horn noted that it had adopted rules adequate to deter frivolous appeals, including CR 73.02(4), which states:

> If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

Id. at 423-424 (citing CR 73.02).

Imposition of a requirement for an appeal bond as a procedural prerequisite to a civil appeal from a circuit court is a matter solely in the jurisdiction of this Supreme Court. Under the Rules of Appellate Procedure, there is no provision at all for an "appeal bond." The **only** provisions authorizing imposition of bonds are in Rules of Appellate Procedure Article XII, where this Court has provided that an appellant "may stay enforcement" of a judgment other than an injunction judgment pending appeal. RAP 63(A). This Court has never required a general "appeal bond" in its rules governing appellate jurisdiction, and KRS 100.3471 improperly interferes with the exclusive constitutional power and authority of this Court to regulate the practice and procedure of proceedings in the courts of the Commonwealth by creating and imposing such a bond as condition prerequisite to an of-right appeal from circuit court.

KRS 100.3471 interferes with the exclusive province of this Court under Ky. Const. Section 116 to prescribe the rules of practice and procedure in Kentucky's courts – a power confirmed and ratified at the same time as the "matter of right" appeal in Section 115 and the general authority of the legislature with respect to appellate jurisdiction under Section 111. Reading all three constitutional provisions in harmony, it is plain that KRS 100.3471 transcends legislative power by creating new procedural prerequisites for judicial appeals, new appeal bond requirements selectively invoked and selectively

applied where no judgment is sought to be stayed, new hearings at the circuit court level after jurisdiction has been transferred over the cause due to the filing of a notice of appeal, and new post-appeal proceedings to provide compensatory costs and damages from bonds even where the appellant has prevailed.

The appeal from a circuit court to the Court of Appeals is not a special statutory proceeding. It is the first judicial appeal from a lower to a higher court where the lower court has reviewed a governmental action pursuant to KRS 100.347. What general authority the legislature may have regarding the scope of appellate jurisdiction of the Court of Appeals pursuant to Ky. Const. Section 111, it cannot trump the specific constraints and protections created under Section 115 nor invade the province of this Court to establish rules of practice and procedure in the Courts of Justice.

III. KRS 100.3471 Offends Constitutional Assurances of Equal Protection of Law

The Court of Appeals reviewed the question of whether KRS 100.3471 violates the equal protection clauses of the "United States or the Kentucky Constitution" utilizing the "rational basis" test. Relying on the majority opinion in *Zuckerman v. Bevin,* 565 S.W.3d 580 (Ky. 2018), the Court of Appeals applied a "rational basis" standard in rejecting the equal protection challenge, suggesting that KRS 100.3471 was merely a measure affecting "economic policy." Opinion and Order at p. 7. In so doing, the Court of Appeals overlooked a basic distinction noted by this Court in *Elk Horn Coal Corp.* and noted with approval in *Zuckerman* – that the "rational basis" test is not appropriate where a legislative enactment infringes on "fundamental constitutional rights," as does KRS 100.3471. *Zuckerman, supra,* at 596.

The right to appellate review established in Ky. Const. Section 115 **is** a

fundamental constitutional right, and not merely a matter of "economic policy," and selectively impairing that right for *some* appellants in *most* cases arising out of one subset of civil appeals by imposing financial barriers on all such appeals on demand, implicates a higher level of scrutiny under *Zuckerman* than the "rational basis" test, even as the statute fails to satisfy even that most relaxed standard under the reasoning and holding of the *Elk Horn* decision. Like the statute in *Elk Horn*, KRS 100.3471 effectively allows frivolous (and non-frivolous) appeals from well-heeled private entities, and capriciously imposes its appeal penalty only on those private parties challenging certain actions by local zoning and planning commissions, and not all similarly situated appellants. Governmental appellants are excused, as are public or private appellants in zoning actions involving landfills.

This Court's equal protection discussion and analysis in holding unconstitutional the penalty provision of KRS 26A.300 in *Elk Horn* applies with equal force in this instance. Like the *Elk Horn* penalty provision, the imposition of a mandated appeal bond on demand deters all appeals, frivolous and not. Moreover, KRS 100.3471 intentionally burdens non-frivolous appeals, as demonstrated by the legislation's stated goal of eliminating them because the General Assembly has deemed such appeals to be "unnecessary." Like *Elk Horn,* the new procedure and mandated scope of review interfere with this Court's authority to prescribe the rules of appellate practice. As was the case in *Elk Horn,* it applies to a narrow subgroup within the class of civil litigants – i.e., private individuals seeking review of circuit court decisions in matters related to planning and zoning, and then arbitrarily exempts such cases involving landfills. The constitutional right to one appeal is not a matter of economic policy, as suggested by the

Court of Appeals, but is a fundamental right, the violation of which triggers the most exacting scrutiny. Under strong or weak light, however, the measure does not pass muster.[5]

That the law was crafted and intended to apply in a disparate manner to benefit those seeking zoning and other land use changes for development while punishing those who sought to invoke appeal rights, is plain from the emergency enactment clause of the law, which described such appeals as "unnecessary appeals of land use cases," and sought to "curb" them, imposing bonds of up to $100,000 even where the court determined the appeal to have merit. KRS 100.3471(3).[6] In such non-frivolous appeals, part of the appeal bond calculation is the interest on land acquisition and development loans, making clear whose interests the bond requirement was intended to advance and benefit. Applying the appropriate level of scrutiny to the blatant effort by the General Assembly to selectively constrain, delay, and price out of reach the constitutionally protected right to an "inexpensive" appeal, KRS 100.3471 does not pass equal protection muster.

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[5] Given the clear intent of KRS 100.3471 as expressed in the emergency enactment clause and in the types of costs subject to the bond, to interfere with the judicial process and constitutionally protected appeal rights in order favor the interests of the development community and to dissuade appeals by citizens, the importance of strict construction of the separation of powers doctrine as a bulwark against legislative encroachment to the detriment of the interests of the public, as discussed by this Court in the *Elk Horn* opinion at p. 422, has rarely been more evident.

[6] The constitutional protection against arbitrary government action assured under Ky. Const., Sec. 2, and the assurance of access to courts for injury preserved in Ky. Const. Sec. 14, is not cabined by the caveat that such rights and protections exist only where a majority of the General Assembly deems such protections and right of access to be "necessary." Nor can such power as is vested in the legislature under Section 111 with respect to appellate jurisdiction of the Courts of Appeals be selectively extended or impeded and burdened in order to advance the private interests of any constituency in avoiding judicial review of court decisions on land use disputes.

IV. *Calloway County* and the Cases Upon Which It Relies Support a Conclusion That KRS 100.3471 Violates Kentucky Constitution Section 59

In *Calloway Cty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 573 (Ky. 2020), this Court revisited the jurisprudence that has developed concerning Ky. Const. Sec. 59, and held that "constitutional challenges to legislation based on classification succeed or fail on the basis of equal protection analysis under Sections 1, 2, and 3 of the Kentucky Constitution[,]" whereas for "analysis under Sections 59 and 60, the appropriate test is whether the statute applies to a particular individual, object or locale." Rejecting the test as reflected in *Schoo v. Rose*, 270 S.W.2d 940 (Ky. 1954), the Court in *Calloway County* returned to what it identified as the "original test" for Section 59 following its enactment in 1891 – that "special legislation applies to particular places or persons as distinguished from classes of places or persons." *Id.* (citing *Greene v. Caldwell*, 186 S.W. 648, 654 (Ky. 1916); *Singleton v. Commonwealth*, 175 S.W. 372, 373 (Ky. 1915)).

Reviewing the cases decided in the aftermath of the 1891 constitutional convention as instructive in the application of the "original test" from Greene and Singleton, KRS 100.3471 **does** violate Ky. Const. Section 59 by enacting a special law selectively imposing on some individuals procedural and substantive burdens with respect to "the jurisdiction [and] the practice…of the courts of justice" that are not universally shared. For example, in *Stratman v. Commonwealth,* 125 S.W. 1094 (Ky. App. 1910), decided less than twenty years after the 1891 Constitutional Convention and at a time when both Judges Carroll and Nunn sat on the Kentucky Court of Appeals, the Court struck legislation that applied heavier penalties on a classified subset of businesses (barbershops) for sabbath day violations. What made the statute in Stratman "special legislation' – as explained by the Court only five years later in *Singleton* – was "that as a

general law had been enacted covering the subject of such labor as barbering on Sunday, it was not competent for the Legislature to single out for special legislation the business of barbering and fix a penalty for that character of labor different from the penalty provided for in the general law." *Singleton v. Commonwealth*, 175 S.W. at 374.

Here, as in *Stratman*, the legislature has passed special legislation which unjustly and unreasonably applies to and burdens the exercise of rights by certain individuals and not others. The appellate jurisdiction of the Court of Appeals over circuit court cases had already been defined, and then the access of a private civil litigant in a select type of cases was disparately burdened. Even if it were permissible that the statute singles out for dismissal of their appeal of a KRS Chapter 100 decision zoning decision those who cannot afford to pay a substantial bond, KRS 100.3471(4) also selectively exempts from the requirement to post an appeal bond where the decision being appealed from involves a landfill (special object) and the appellant is a federal, state, or local government (special persons).

Smith v. Board of Trustees of Shelby Graded School District, 171 Ky. 39, 44, 186 S.W. 927 (1916), decided contemporaneously with *Greene* and *Singleton*, is also instructive in its reasoning, wherein the Court noted that the "rule is universal that an act of the legislature is not local if its terms are applicable to all of the objects or things composing the class of objects or things to which the act relates; provided, the classification of such objects and things are not unreasonably and arbitrarily made." *Id.* at 930. Here, the terms of KRS 100.3471 do not apply to all of the objects or persons composing the class to which the act relates, for KRS 100.3471 imposes a mandatory appeal bond on *some* civil appeals but not all, and applies bond requirements to *some*

Chapter 100 appeals, but inexplicably not those involving landfills.

Under the *Greene, Singleton, and Stratman* analyses, Ky. Const. Section 59 prohibits special or local acts that regulate the practice and access of the courts with respect to certain individuals and businesses that are unreasonably and unnaturally singled out from within a larger and similarly situated class of litigants seeking appellate review.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated herein *Amici* respectfully urges that this Court invalidate KRS 100.3471 in its entirety as an unconstitutional measure in derogation of Ky. Constitution Sections 2, 3, 27, 28, 29, 111, 115, and 116.

Respectfully submitted,

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WORD COUNT CERTIFICATE

This is to certify that the above *Brief Amicus Curiae* of the Kentucky Resources Council, Inc. and the National Trust For Historic Preservation, complies with the word limit of RAP 15 since it does not exceed 5,250 words. Inclusive of the Cover, Statement of Points and Authorities, Argument, and Conclusion and Prayer for Relief, the Brief does not exceed 5,250 words, and is 4,977 words.

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