Supreme Court of Kentucky

CASE NO. 2024-SC-0095-DG

PAAMCO PRISMA, LLC, *et al.* — APPELLANTS

v.

On appeal from
Franklin Circuit Court No. 2021-CI-0348;
Court of Appeals No. 2022-CA-0350-MR

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PAAMCO PRISMA, LLC, *ET AL.*

Benjamin C. Fultz (#84398)
FULTZ MADDOX DICKENS PLC
101 South Fifth Street, 27th Floor
Louisville, KY 40202

Candice C. Wong (*pro hac vice pending*)
Morgan Kurst (*pro hac vice pending*)
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
801 17th Street NW
Washington, DC 20006

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

October 9, 2025

(Certificate of Service on Next Page)

CERTIFICATE OF SERVICE

In accordance with RAP 30(B), I hereby certify that on October 8, 2025, this Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of PAAMCO Prisma, LLC, *et al.*, was electronically filed through the Court's eFiling system, which will automatically generate and send a Notice of Electronic Filing to all eFilers associated with the case, along with a hyperlink to the electronic document, which transmission constitutes service of the filed document under CR-5, and by U.S. Mail to:

Clerk of Kentucky Court of Appeals
669 Chamberlain Avenue, Suite B
Frankfort, KY 40601

The Honorable Thomas Wingate
Franklin Circuit Court,
222 St. Clair St.,
Frankfort, KY 40601

The Honorable Phillip Shepherd
Franklin Circuit Court
222 St. Clair St., Frankfort, KY 40601

Justin D. Clark
John H. Heyburn (via Notice of Electronic Filing)
Daniel Grabowski (via Notice of Electronic Filing)
Aaron Silletto
Office of the Kentucky Attorney General
700 Capital Ave., Ste 118
Frankfort, KY 40601

Grahmn N. Morgan (via Notice of Electronic Filing)
Seth T. Church
DINSMORE & SHOHL LLP
100 W. Main St., Ste. 900
Lexington, KY 40507

Michael J. Garvey
Peter E. Kazanoff
David Elbaum
Sara A. Ricciardi
Alison M. Sher

SIMPSON THACHER & BARTLETT LLP
425 Lexington Ave.
New York, NY 10017

Jessica Corley
KING & SPALDING LLP
1180 Peachtree St. NE
Atlanta, GA 30309

Paul Alessio Mezzina
KING & SPALDING LLP
1700 Pennsylvania Avenue NW, Ste. 900
Washington, DC 20006

Brian Johnson
DICKINSON WRIGHT PLLC
300 W. Vine St., Ste. 1700, Lexington, KY 40507

Donald Kelly
Sean Williamson
WYATT, TARRANT & COMBS, LLP
500 West Jefferson St., Ste. 2800, Louisville, KY 40202

Brad S. Karp
Andrew J. Ehrlich
Brette Tannenbaum
David Friedman
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas, New York, NY 10019

Christopher D. Belelieu
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave., New York, NY 10166

Michael W. Oyler
FURMAN NILSEN & OYLER PLLC
2527 Nelson Miller Parkway, Ste. 101, Louisville, KY 40223

_/s/ *Benjamin C. Fultz*
Benjamin C. Fultz

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION 1

Turner v. Andrew, 413 S.W.3d 272 (Ky. 2013) 2

PURPOSE AND INTEREST OF *AMICUS CURIAE* 3

ARGUMENT 4

I. The Concept Of Corporate Separateness Is Longstanding, Black-Letter Law. ... 4

A. It is well-established that the debts, obligations, and liabilities of an LLC are solely the debts, obligations, and liabilities of the LLC, not of its members... 4

Burnet v. Clark, 287 U.S. 410 (1932) 4

Stephen B. Presser, *Piercing the Corporate Veil* (2024) 4

United States v. Bestfoods, 524 U.S. 51 (1998) 4

William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193 (1929) 5

Steven C. Alberty, *Limited Liability Companies: A Planning and Drafting Guide* (2003) 5

Charles Fassler, *Kentucky Limited Liability Company: Forms and Practice Manual* (2009) 5

Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds and O'Toole on Delaware Limited Liability Companies* (2d. ed. 2025) 5

6 Del. Code § 18-303(a) 5

Poore v. Fox Hollow Enters., No. C.A. 93A-09-005, 1994 WL 150872 (Del. Super. Ct. Mar. 29, 1994) 5

6 Del. Code § 18-303 5

6 Del. Code § 18-701 6

KRS 275.010(2) 6

KRS 275.150(1) 6

Pannell v. Shannon, 425 S.W.3d 58 (Ky. 2014) 6

Racing Investment Fund 2000, LLC v. Clay Ward Agency, Inc., 320 S.W.3d 654 (Ky. 2010) 6

Walter C. Tuthill & Denison H. Hatch, Jr., *Delaware Limited Liability Companies,* March 5, 1993 6

Turner v. Andrew, 413 S.W.3d 272 (Ky. 2013) 6

Schenley Distillers Corp. v. United States, 326 U.S. 432 (1946) 7

B. KRS's 2011 investments in limited liability entities confirmed and conformed to settled understandings of corporate separateness. 7

Walter C. Tuthill & Denison H. Hatch, Jr., *Delaware Limited Liability Companies*, March 5, 1993 8

Appellant's Opening Brief, *Daniel Boone Fund v. Commonwealth of Kentucky*, No. 2024-SC-0093-D 9

C. The court below turned principles of corporate separateness on their head by recasting the property of the Daniel Boone Fund as the property of KRS. ... 10

Turner v. Andrew, 413 S.W.3d 272 (Ky. 2013)..... 11

KRS 275.240..... 11

Scaife v. Perkins, No. 2018-CA-001559-MR, 2020 WL 864171 (Ky. Ct. App. Feb. 21, 2020) 11

Nu-Way Drywall Co. v. First Place Bank, No. 2011-CA-000242-MR, 2012 WL 2160193 (Ky. Ct. App. June 15, 2012)..... 11

Morgan v. Lanham, Nos. 2009-CA-001412-MR, 2009-CA-001588-MR, 2011 WL 918735 (Ky. Ct. App. Mar. 18, 2011) 11

Kingdom Energy Res., LLC v. Kahn, No. 2017-CA-001787-MR, 2018 WL 4042637 (Ky. Ct. App. Aug. 24, 2018) 13

Worster-Sims v. Tropicana Entm't, Inc., No. 13-1981 (RBK/AMD), 2014 U.S. Dist. LEXIS 141598 (D.N.J. Oct. 6, 2014)..... 13

Appellant's Opening Brief, *KKR & Co. Inc. v. Commonwealth of Kentucky*, No. 2024-SC-0094-D 14

II. The Decision Below Injects Uncertainty Into The Enforceability Of Indemnification Agreements And Confusion That Extends Well Beyond The Instant Case. 14

California Public Employees' Retirement System, 2023-2024 Annual Investment Report, https://www.calpers.ca.gov/documents/annual-investment-report-fy-2024/download?inline 15

CALPERS, Private Equity Program (PEP) Fund Performance Review, https://www.calpers.ca.gov/investments/about-investment-office/ 15

New York State Common Retirement Fund, Monthly Transaction Report, June 2025, https://www.osc.ny.gov/common-retirement-fund/resources/financial-reporting-and-asset-allocation 15

Pennsylvania Public School Employees' Retirement System, Year End Asset Listing, June 30, 2024, https://www.pa.gov/content/dam/copapwp-pagov/en/psers/documents/ 15

State of Wisconsin Investment Board, Schedule of Investments, December 31, 2024, https://www.swib.state.wi.us/_files/ugd/69fc6d_740c9666622748458d7bfadfa005f5d5.pdf..... 15

WYO. CONST. art. XVI, § 2 17
VA. CONST. art. X, § 9 17
WASH. CONST. art. VIII, § 5 17
MISS. CONST. art. XIV, § 258 17
CONCLUSION 18

INTRODUCTION

In the extraordinary ruling below, the Court of Appeals held that the "debt" and "credit" provisions of the Kentucky Constitution render void and unenforceable an indemnity obligation belonging not to the Kentucky Retirement System ("KRS"), but to a Delaware-registered LLC created and operated in accordance with Delaware law. Those constitutional limitations, however, certainly do not extend to obligations of the LLC centrally at issue, the Daniel Boone Fund LLC ("Boone Fund"), a standalone business entity. That is all the more clear where, as here, the LLC's organizational agreement ("LLC Agreement")—initially crafted by KRS and carefully negotiated between the parties—expressly specifies that any obligation of the LLC to indemnify the investment manager and its affiliates for claims arising from the manager's good faith performance shall derive "solely" from the assets of the LLC itself. Indeed, that same agreement makes plain that any indemnification "shall in no event" derive from the assets of KRS, a member of the LLC. This codification of core precepts of corporate separateness was the linchpin of the agreement—bargained for, thought through, and assiduously spelled out by sophisticated negotiating parties.

The court below laid waste to the unambiguous terms of that bargain. Years after the fact, the court deemed the promise of indemnification "solely" out of the Boone Fund to be void *ab initio* under the Kentucky Constitution and unenforceable. It effectively recast the Boone Fund as an arm of the Commonwealth based on KRS's status as a majority member of the LLC, and recast the assets and obligations of the Boone Fund as assets and obligations that would in some "practical" sense be shouldered by KRS and the Commonwealth. The court so held only by muddying and inverting core precepts of

corporate separateness. It is a first principle of corporate law that an LLC is legally distinct from its members, whether those members have a 9% or 19% or 99% equity stake. The assets of the LLC are assets of the LLC alone, just as any liabilities of the LLC are the LLC's alone. The Kentucky Constitution has no bearing on the LLC's duty to honor its Delaware-law-governed contractual obligations. Those obligations arise from standard language in a standard organizational agreement that codified standard principles of corporate separateness.

If left to stand, the decision below threatens to inject uncertainty into a host of similar contracts between private parties and other government entities, even potentially beyond the Commonwealth. The notion that the bedrock separation between LLC and member may simply be jettisoned in the face of "practical realities" like a state's majority equity stake or financial needs invites litigation and, more broadly, undermines reliance interests. Contracting parties doing business with the government will fear being ensnared in the Boone Fund's Catch-22—unable, according to the court below, to comply with contractual obligations without running afoul of the Kentucky Constitution, and grappling with contractual language deemed invalid in one state but not another.

This Court has the opportunity to correct course. It has said that "an LLC is not a legal coat that one slips on to protect the owner from liability but then discards or ignores altogether when it is time to pursue a damage claim." *Turner v. Andrew*, 413 S.W.3d 272, 276 (Ky. 2013). The Court should likewise be wary of allowing a party to a contract to avail itself of the various features and benefits of corporate separateness, only to claim that the carefully reticulated distinctions between LLC and member should be revisited. The

underlying corporate delineations should be enforced, the parties' bargained-for rights respected, and the Boone Fund permitted to uphold its contractual obligations.

PURPOSE AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

The Chamber files this brief in support of investment-manager Appellants to underscore the bedrock importance of principles of corporate separateness. Countless private parties, including members of the Chamber, conduct business, negotiate contracts, and bargain in the shadow of these principles, as did Prisma and KRS years ago when they formed the Boone Fund. Consistent with the well-established separation between a corporate entity and its members—and the recognition of that entity's distinct legal rights, obligations, powers, and privileges—the Boone Fund's LLC Agreement required indemnification to be paid "solely" out of assets of the Boone Fund. The decision below, however, broadly recast the assets and liabilities of the Boone Fund as assets and liabilities of KRS, its member, and thereby reasoned that the Boone Fund cannot honor its indemnification obligations without running afoul of the limitations the Kentucky Constitution imposes on KRS's "debt" and "credit." Respect for the corporate form, vital

to corporate law, necessarily means that the assets and liabilities of the Boone Fund are its own, not KRS's, and the contrary conclusion below threatens to undermine reliance interests in the Commonwealth and beyond.

ARGUMENT

I. The Concept Of Corporate Separateness Is Longstanding, Black-Letter Law.

A. It is well-established that the debts, obligations, and liabilities of an LLC are solely the debts, obligations, and liabilities of the LLC, not of its members.

The promise of a limited liability company, an LLC, combines key features of both corporations and partnerships. The LLC structure offers, on the one hand, the taxation flexibilities of a partnership, and on the other, the "limited liability" of a corporation to its owners. LLC members—owners of the entity in the same sense as shareholders are owners of the corporation—have availed themselves of the same advantages of corporate separateness: the basic separation between the legal interests and identity of the entity and of its owners. As the U.S. Supreme Court has said, a "corporation and its stockholders are generally to be treated as separate entities," *Burnet v. Clark*, 287 U.S. 410, 415 (1932), and "[i]t is now accepted as one of the first principles of American law that those who own shares in corporations … normally are not liable for the debts of their corporations," Stephen B. Presser, *Piercing the Corporate Veil*, § 1.1 (2024). So too with an LLC and its members who contribute capital to it. The corporate form limits the liability of members, shielding them from financial responsibility for the actions of the entity.

Corporate separateness is not only a "general principle of corporate law deeply 'ingrained in our economic and legal system,'" *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (*citing* William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through*

Subsidiary Corporations, 39 Yale L. J. 193 (1929)), but also the principal appeal of the LLC structure. "[M]ost LLCs are created *for the purpose* of obtaining limited liability." Steven C. Alberty, *Limited Liability Companies: A Planning and Drafting Guide* § 3.06(b)(2) (2003) (emphasis added); *see also* Charles Fassler, *Kentucky Limited Liability Company: Forms and Practice Manual*, § 1.7 (2009) ("It is this limited liability that makes an LLC such a valuable entity."); Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds and O'Toole on Delaware Limited Liability Companies*, § 11 (2d. ed. 2025) (protections "against liability typically rank among the foremost concerns for members and managers of a Delaware limited liability company"). Members receive immense benefits from the separation—chief among them, their insulation from the financial and legal risks and obligations of the entity.

Longstanding case law and statutes reflect and reinforce that ownership of an equity interest in a company is distinct from ownership of the assets of that company. Delaware law states, in no uncertain terms, that "[t]he debts, obligations and liabilities of a limited liability company … shall be solely the debts, obligations and liabilities of the limited liability company." 6 Del. Code § 18-303(a). Conversely, "no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company." *Id.*; *accord Poore v. Fox Hollow Enters.,* No. C.A. 93A-09-005, 1994 WL 150872, at *2 (Del. Super. Ct. Mar. 29, 1994). In fact, "a member or manager of an LLC cannot be held liable for the company's debts or obligations above his or her contribution to the company." *Poore*, 1994 WL 150872 at *2 (emphasis added (citing 6 Del. Code § 18-303)); *see also id.* (a "member usually contributes personal

property and has no interest in specific assets owned by the LLC"); 6 Del. Code § 18-701 ("A member has no interest in specific limited liability company property.").

Kentucky law echoes these core principles. State law makes clear that "[a] limited liability company is a legal entity distinct from its members," KRS 275.010(2), and that "no member, manager, employee, or agent of a limited liability company … shall be personally liable by reason of being a member, manager, employee, or agent of the limited liability company … in this or any other state, or on any other basis, for a debt, obligation, or liability of the limited liability company." KRS 275.150(1). To be sure, members reserve the freedom to contract around KRS 275.150(1) and personally take on a company's debts, obligations, and liabilities. But to do so, this Court has explained, would so fly in the face of the "statutory preference for maintaining an LLC member's limited liability"—and be so "'antithetical to the purpose of a limited liability company'"—that it can only be done through clear, unequivocal contractual language. *Pannell v. Shannon*, 425 S.W.3d 58, 66 (Ky. 2014) (quoting *Racing Investment Fund 2000, LLC v. Clay Ward Agency, Inc*., 320 S.W.3d 654, 659 (Ky. 2010)). After all, terms of indemnification are "among the most important and heavily negotiated provisions" of any LLC agreement. Walter C. Tuthill & Denison H. Hatch, Jr., *Delaware Limited Liability Companies,* March 5, 1993, at 3.

This Court has further made clear that the strong respect for corporate separateness principles persists even where an LLC has just one member. In *Turner v. Andrew*, 413 S.W.3d 272 (Ky. 2013), the Court chided the Court of Appeals for having "disregarded" the "LLC's separate entity status" by permitting the sole owner of the business, to advance a lost profits claim in his own name rather than the LLC's. *Id.* at 276. This Court explained

that "courts across the country addressing limited liability statutes similar to our own have uniformly recognized the separateness of a limited liability company from its members even where there is only one member," emphasizing that "[t]he LLC and its solitary member … are not legally interchangeable." *Id.* In other words, nothing about the single member's 100% ownership of the business altered or eroded the fundamental separation between the LLC and the member.

Of note, this Court in *Turner* underscored particular concerns with availing oneself of all the advantages of the corporate form, then downplaying that form when disadvantages materialized. As the Court explained, "an LLC is not a legal coat that one slips on to protect the owner from liability but then discards or ignores altogether when it is time to pursue a damage claim." *Id.*; *see also Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946) ("One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it."). The upshot is that no member can reap the benefits of corporate separateness, only to discard those distinctions when no longer to its advantage; respect for the corporate form disallows that gambit.

B. KRS's 2011 investments in limited liability entities confirmed and conformed to settled understandings of corporate separateness.

The investment policy pivot KRS made 14 years ago toward investing in fund-of-funds reflects a recognition of the benefits of corporate separateness. Faced with an array of options, the Commonwealth chose to use private-sector-managed limited liability entities that would open access to new and diversified investment opportunities. Specifically, the Commonwealth decided to engage investment managers, including

certain Appellants, to form investment funds organized as LLCs—LLCs in which KRS would invest its capital—with each manager strategically investing the capital of each LLC into broad hedge fund portfolios. Thus, the Commonwealth made a considered decision to avail itself of all the advantages of the corporate form—advantages including its amenability to manager-management and liability protection.

The parties then expressly codified and reticulated by contract those very features of the corporate form. As enshrined in the Delaware-law-governed LLC Agreement, the Commonwealth identified the members of the Boone Fund as KRS and the investment-fund manager, Prisma, with no other persons to be "admitted to the Company as a member without the prior written approval of KRS." PAAMCO/Prisma App'x 6 LLC Agreement at § 3.3; *see also id.* at § 3.1. Both those members would be insulated from the risks and obligations undertaken by the Boone Fund, which would be shouldered exclusively by the Boone Fund entity itself. Embracing the governing law on limited liability, the LLC Agreement provided that "[n]o member of the Company shall be liable for the debts, liabilities or obligations of the Company …. solely by reason of being a member of the Company." *See id.* at § 3.4. And while both KRS and the manager would make capital contributions to the company at the outset, neither member would "have a duty or obligation to contribute capital … for the benefit of any creditor" of the company. *Id.* at § 4.1. From the beginning, the Boone Fund was established as a legal entity in its own right, with its own interests, obligations, and responsibilities, and the parties recognized the separateness between the Boone Fund and its members.

As to the terms of indemnification—"among the most important and heavily negotiated provisions" of any LLC agreement, Tuthill & Hatch, Jr., at 3—the LLC

Agreement specified that the manager and its affiliates should be indemnified "*solely out of the Assets*" of the Boone Fund in the event of any "loss, liability and expense (including … expenses reasonably incurred in connection with … any claim, action, suit or proceeding …) … and other amounts reasonably paid" arising from the manager's good faith performance of its responsibilities to the LLC. *See* PAAMCO/Prisma App'x 6 LLC Agreement § 2.3(d) (emphasis added). The LLC Agreement, drawn from language that KRS's own representative had provided and recommended, then doubly distinguished KRS from the Boone Fund by specifying that the "indemnification provided in Section 2.3(d) shall *in no event* cause KRS to incur any liability" beyond its limited liability and that KRS should "have no obligation to contribute capital or to return distributions to pay for such indemnification." *Id.* at § 2.3(f) (emphasis added). It further spelled out—lest any doubts remained—that both "[t]he Company and Manager" expressly acknowledged that Kentucky law may be construed to prohibit KRS from being subject to personal indemnification obligations or making payments to the LLC for the purpose of indemnification.[1] *Id.* at §§ 2.3(e)(i)-(ii).

In short, as the court below acknowledged, "the Boone Fund's agreement … requires the indemnity to be paid from the Boone Fund's assets, not [KRS's]." PAAMCO/Prisma App'x 1 COA Op. 7. Corporate delineations undergirded the parties' bargain from the outset. The parties' clear intention and agreement was to keep the Boone

[1] The LLC Agreement also prohibited the LLC from drawing on KRS's capital contributions for indemnity payments. The Boone Fund's assets today—out of which it would pay indemnity—do not consist of any capital contributed by KRS and so any indemnity payment would not implicate that prohibition. All KRS contributions have been returned. *See* Appellant's Br., *Daniel Boone Fund v. Commonwealth of Kentucky*, No. 2024-SC-0093-D, at 4 n.9 (citing R. at 2779; R. at 3391, ¶ 51).

Fund's liabilities separate and distinct from those of its members and lay indemnification obligations squarely on the Boone Fund itself. And driving those considerations was an explicit recognition by the parties of possible limitations posed by Kentucky law on payment by KRS or of KRS's capital contribution, which led the parties to only further reinforce the distance of KRS from any indemnification obligations shouldered by the Boone Fund. The very provisions KRS bargained for, then, reaffirmed the corporate form in general and the legal separation of the Boone Fund and KRS in particular.

C. The court below turned principles of corporate separateness on their head by recasting the property of the Daniel Boone Fund as the property of KRS.

In the face of longstanding precepts of corporate separateness, and the explicit endorsement of those precepts in the LLC Agreement, the court below fundamentally collapsed the distinctions between LLC and member. The court acknowledged that the Boone Fund was a "legally distinct entity" from its members, including KRS. PAAMCO/Prisma App'x 1 COA Op. 43. The court further acknowledged that the indemnification clause differed from other clauses requiring indemnity to be paid by KRS in that it "requires the indemnity to be paid from the Boone Fund's assets, not Retirement's." *Id.* at 7, 42. Nonetheless, the court reasoned that the "practical reality" was that "the Boone Fund's assets are almost entirely derived from Retirement and remain needed assets of the Commonwealth," and that the Boone Fund's honoring of its indemnification obligations would therefore deprive KRS of funds KRS would otherwise receive and use to pay pension benefits. *Id*. at 42. This, in turn, the court reasoned, could require the Commonwealth's General Assembly to "tap the general fund to pay retirees[]," imposing a constitutional "debt" on future generations and pledging the "credit" of the

Commonwealth within the meaning of Sections 50 and 177 of the Kentucky Constitution. *Id.* at 42, 51.

That ruling turns well-established corporate delineations on their head. In treating the funds in the Boone Fund as if they were "state funds," the court relied on the fact that KRS contributed the vast majority of initial capital. *Id.* at 43. But the "practical reality" of KRS's large equity stake in the Daniel Boone Fund is wholly irrelevant. *Id.* at 42. Just as being a *sole* member of an LLC does not eviscerate the ingrained distinction between LLC and member, *see Turner*, 413 S.W.3d at 276, being a *majority* member of an LLC has no bearing on that distinction whatsoever. Whatever proportion of the LLC's capital KRS contributed—whether 9% or 19% or 99%—it does not alter the fundamental principle that the assets of the LLC are the LLC's alone, not its members'. This is no mere technicality, but a first principle of corporate governance. The distinction between property of LLC and member is enshrined in KRS 275.240, which provides that "[p]roperty transferred to or otherwise acquired by a limited liability company shall be the property of the limited liability company and not of the members individually." And the distinction has been reaffirmed by this Court on numerous occasions. *See Scaife v. Perkins*, No. 2018-CA-001559-MR, 2020 WL 864171, at *12 (Ky. Ct. App. Feb. 21, 2020) ("If … the property injured consisted of funds raised by the Appellees as members of [an] LLC, or the property of the club/LLC, it was not [the appellees'] property[.]") (internal citations omitted); *Nu-Way Drywall Co. v. First Place Bank*, No. 2011-CA-000242-MR, 2012 WL 2160193, at *3 (Ky. Ct. App. June 15, 2012) ("[E]ven as a member of the [LLC], he did not own the property as an individual."); *Morgan v. Lanham*, Nos. 2009-CA-001412-MR, 2009-CA-001588-MR, 2011 WL 918735, at *5 (Ky. Ct. App. Mar. 18, 2011) ("[P]roperty that is

validly transferred to a limited liability company …is the property of the limited liability company" and "not the property of either Morgan or Lanham, regardless of their status as LLC members."). Once the capital was contributed by KRS, those funds became assets of the LLC.

The other purported "practical reality" alluded to below—that of KRS's putative "need[]" for more funds—likewise does not and could not transform the LLC's assets into "needed *assets of the Commonwealth*." PAAMCO/Prisma App'x 1 COA Op. 42 (emphasis added). The court speculated that if the Boone Fund were to expend funds on indemnification, KRS could receive lower returns on its investment, which could leave KRS with less capital, which could leave KRS without funds that it needs to pay member benefits, which could require tapping into the Commonwealth's general fund. But that forecasted cascade of horribles has no bearing, again, on the basic distinction between LLC and member. Nothing about the possibility that the Boone Fund's assets might someday be redeemed and paid over to KRS changes the fact that the Boone Fund holds the property interest in those assets. Nor does the prospect that KRS might experience some downstream financial impact from a diminishment of the Boone Fund's assets transform those assets into KRS's; after all, virtually any move or measure by an LLC could theoretically lower returns on investment for members, and it cannot be that any uptick in that risk for KRS moves assets into its possession. Assets of the Boone Fund cannot simply be recast or reconceptualized as "substitute" assets of a member—any more than debts, obligations, and liabilities of the Boone Fund can be simply declared "substitute" debts, substitute obligations, and substitute liabilities of a member. To do so would erode the entire edifice of corporate distinctions.

Moreover, the current assets of the Boone Fund do not even include any of the capital contributed by KRS, the entirety of which has been returned. Should the Boone Fund honor its contractual obligations, it would be paying the indemnity out of investment returns generated by the entity itself. The Boone Fund is not asking KRS to contribute more capital, to return any prior distributions, or to otherwise pay the indemnity directly or indirectly, all of which would be precluded by the LLC Agreement.

Nor is the indemnification language in the LLC Agreement outside the mainstream. The LLC Agreement entitles Prisma to be indemnified for "any and all loss, liability and expense (including, without limitation, reasonable legal and expert witness fees and expenses) which Prisma incurred in connection with investigating, preparing for and/or defending against any claim, action, suit or proceeding, threatened or commenced … to the extent arising from the good faith performance by [Prisma]." PAAMCO/Prisma App'x 6 LLC Agreement § 2.3(d). The court below strained to suggest that the language was unusually broad because "it permits recovery of costs merely *connected to*" a breach of contract. PAAMCO/Prisma App'x 1 COA Op. 45-46 (emphasis added). Yet the "in connection with" language appropriately tethers indemnifiable expenses to those incurred in investigating, preparing, and defending against claims or other actions, and is commonplace in indemnification clauses. *See, e.g., Kingdom Energy Res., LLC v. Kahn*, No. 2017-CA-001787-MR, 2018 WL 4042637, at *3 (Ky. Ct. App. Aug. 24, 2018) (addressing indemnification language for attorney's fees incurred "in connection with, or arising out of, any breach of [contract]"); *Worster-Sims v. Tropicana Entm't, Inc.,* No. 13-1981 (RBK/AMD), 2014 U.S. Dist. LEXIS 141598, at *16-17, *28 (D.N.J. Oct. 6, 2014)

(addressing indemnification for claims "arising from, related to, or in connection with the performance of [the Tenant's] work").

At bottom, the indemnification obligation of the Boone Fund reflected standard breach-of-contract language in a standard organizational agreement that codified standard principles of corporate separateness. By the plain text of the LLC Agreement, any indemnity paid should derive "solely" from the assets of the LLC, and "shall in no event" derive from the assets of KRS. PAAMCO/Prisma App'x 6 LLC Agreement §§ 2.3(d), (f). The Court of Appeals' contrary reasoning presumed that indemnification will cause KRS to incur the very liability that the LLC Agreement specifically and painstakingly foreclosed. Whatever bearing the Commonwealth's constitutional limitations may or may not have on clauses requiring indemnity to be paid *by KRS itself*, they certainly cannot extend to a clause requiring indemnity to be paid *by an LLC* and expressly *prohibiting* payment by KRS. The court below found otherwise only by blurring the core distinctions of law between LLC and member and contravening the unequivocal terms of the bargain that KRS and Prisma struck.[2]

II. The Decision Below Injects Uncertainty Into The Enforceability Of Indemnification Agreements And Confusion That Extends Well Beyond The Instant Case.

The decision below is not only misguided. It also threatens ramifications for private parties that contract with the Commonwealth in particular, and with state and local governments in general, that cannot be easily cabined.

[2] The court similarly blurred corporate distinctions in its personal-jurisdiction analysis, conflating KKR with Prisma and other indirect subsidiaries of KKR. *See* Appellant's Br., *KKR & Co. Inc. v. Commonwealth of Kentucky*, No. 2024-SC-0094-D, at 12-13, 36-38.

Similar investment vehicles and legal entities to the Boone Fund abound, both in Kentucky and nationwide. Over the past two decades, as limited liability entities have proliferated in the United States, state governments, including Kentucky's, have increasingly structured their investment activities through private-sector-managed entities, including LLCs. State and local governments sponsored over 4,000 pension plans in 2022, and many of the country's largest pension funds are widely investing in limited liability entities, including LLCs. *See, e.g.*, California Public Employees' Retirement System, 2023-2024 Annual Investment Report, https://www.calpers.ca.gov/documents/annual-investment-report-fy-2024/download?inline; CALPERS, Private Equity Program (PEP) Fund Performance Review, https://www.calpers.ca.gov/investments/about-investment-office/investment-organization/pep-fund-performance (last visited Sept. 25, 2025); New York State Common Retirement Fund, Monthly Transaction Report, June 2025, https://www.osc.ny.gov/common-retirement-fund/resources/financial-reporting-and-asset-allocation; Pennsylvania Public School Employees' Retirement System, Year End Asset Listing, June 30, 2024, https://www.pa.gov/content/dam/copapwp-pagov/en/psers/documents/transparency/financial-reports/year-end-listing/fy2024%20-%20final%20asset%20listing.pdf; State of Wisconsin Investment Board, Schedule of Investments, December 31, 2024, https://www.swib.state.wi.us/_files/ugd/69fc6d_740c9666622748458d7bfadfa005f5d5.pdf. Through negotiated agreements analogous to the ones entered into by KRS, various states and municipalities have leveraged the private investment opportunities afforded by third-party managers.

The decision below, therefore, threatens to cast into confusion a wide array of analogous contractual arrangements with other government entities. Countless private parties make significant business decisions in reliance on carefully negotiated, bargained-for protections and promises, and the expectation that such contractual arrangements will be honored and enforced. The court below, however, not only deemed void *ab initio* a contractual provision years after the fact, but it did so based on a recharacterization of assets and obligations that *directly contravened* the parties' explicit understanding in the underlying LLC Agreement. If left uncorrected, the decision sends the message that the Commonwealth may not respect private parties' bargained-for rights, undermining reliance on contractual commitments.

The court, moreover, upended bedrock delineations of corporate separateness forming the basis of routine negotiations. The decision below suggests that the well-established separation between LLC and member may simply be jettisoned in the face of "practical realit[ies]" like a state's majority ownership interest or grave financial needs. PAAMCO/Prisma App'x 1 COA Op. 42. At minimum, the decision invites years of future litigation over the circumstances in which practical considerations—regarding, for instance, the magnitude of the state's ownership interest and dependency on the company—rise to a level significant enough to trump first principles of corporate governance.

As such, the decision has unsettling effects on numerous other pension and retirement plans administered by Kentucky agencies that make private investments using similar structures. Carefully drafted LLC agreements may risk being rendered unenforceable on similar rationales. And if there is a risk that courts may void

indemnification clauses whenever litigants can allege downstream financial impacts on the state, many private parties will question the wisdom of pursuing such agreements with public entities at all.

More broadly, the decision risks transforming every investment vehicle in which government entities have an ownership interest into arms of the state subject to additional constitutional strictures on their use of funds. Many other state constitutions impose parameters around states' ability to incur debt and pledge credit, similar to those in the Commonwealth's Constitution. *See, e.g.,* WYO. CONST. art. XVI, § 2 (regulating debt); VA. CONST. art. X, § 9 (regulating debt); WASH. CONST. art. VIII, § 5 (addressing credit); MISS. CONST. art. XIV, § 258 (addressing credit). In such states, the decision below provides parties who, over time, grow unhappy with their end of a bargain with a roadmap to unravel those contractual obligations. Other state limits on "debt" and "credit" could be wielded as cudgels against bargained-for contractual rights and interpreted to prohibit the enforcement of otherwise-clear, agreed-upon obligations. All this threatens to shake reliance interests and deter private parties from doing business with states.

The decision below also risks a proliferation of precisely the kind of untenable Catch-22 facing the Boone Fund: a binary choice of complying with either the Kentucky Constitution or Delaware law. Under the lower court's expansive reading of the Kentucky Constitution, the Boone Fund could only uphold its contractual indemnification obligations under Delaware law by running afoul of the Kentucky Constitution, and conversely, could only comport with Kentucky's constitutional limitations on debt and credit by flouting those same obligations. For parties that operate nationwide, this means a fraught legal terrain where a single provision of a contract may be enforceable in one state and not in

another, inviting forum struggles and difficult decisions for businesses about how to resolve competing legal obligations to different sovereigns.

This Court should correct course and head off the unsettling and potentially far-reaching effects of the precedent set by the Court of Appeals. By reaffirming the basic principles of corporate separateness that Kentucky law has long and repeatedly affirmed, and respecting the plain terms of the LLC Agreement, this Court should make clear that indemnification shall be paid solely out of the assets of Boone Fund, and shall not be paid out of the assets of its member, KRS.

CONCLUSION

For the foregoing reasons, this Court should declare that the indemnification provision in the Daniel Boone Fund LLC Agreement does not violate the Kentucky Constitution and, consistent with that holding, reverse the judgment of the Court of Appeals and remand for further proceedings.

Respectfully submitted,

/s/ *Benjamin C. Fultz*
Benjamin C. Fultz (#84398)
FULTZ MADDOX DICKENS PLC
101 South Fifth Street, 27th Floor
Louisville, KY 40202
Telephone: (502) 588-2016

Candice C. Wong (*pro hac vice pending*)
Morgan Kurst (*pro hac vice pending*)
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
801 17th Street NW
Washington, DC 20006
Telephone: (202) 639-7000

Counsel for Amicus Curiae the Chamber of Commerce of the United States

Dated: October 8, 2025

CERTIFICATION OF WORD LIMIT COMPLIANCE

This document complies with the word limit of RAP 34(B)(4) because, excluding all parts of the document exempted by RAP 15(D) and RAP 31(G)(5), this document contains 5,038 words.

/s/ *Benjamin C. Fultz*
Benjamin C. Fultz

Dated: October 8, 2025