COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2019-SC-000232

FRANKLIN CIRCUIT COURT, CASE NO. 17-CI-1348
HON. PHILLIP SHEPHERD, PRESIDING
and
COURT OF APPEALS OF KENTUCKY
CASE NOs. 2019-CA-000043-OA and 2019-CA-0079-OA (consolidated)

JEFFREY C. MAYBERRY, et al., **APPELLANTS**
Derivatively as members and Beneficiaries of Trust Funds on behalf of the KENTUCKY RETIREMENT SYSTEMS, and as Taxpayers on behalf of the Commonwealth of Kentucky

v.

HON. PHILLIP J. SHEPHERD **APPELLEE**

KKR & CO., L.P., et al. **APPELLEES/ REAL PARTIES IN INTEREST**

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Respectfully submitted,

Benjamin Beaton (KY 93960)
SQUIRE PATTON BOGGS (US) LLP
201 East Fourth Street, Suite 1900
Cincinnati, Ohio 45202
Telephone: (513) 361-1200
benjamin.beaton@squirepb.com
Counsel for Amicus Curiae The Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that copies of this brief were mailed **BY REGULAR U.S. MAIL** on this 12th day of June, 2019 to the following: to Clerk of the Franklin Circuit Court, 214 St. Clair Street, P. O. Box 378, Frankfort, Kentucky 40601; Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. Phillip J. Shepherd, Franklin Circuit Judge, 48th Judicial Circuit, 214 St. Clair Street, P. O. Box 378, Frankfort, Kentucky 40601; and **BY ELECTRONIC SERVICE** as specified pursuant to CR 5.02 to the persons further listed below.

Benjamin Beaton

STATEMENT OF POINTS AND AUTHORITIES

Page(s)

STATEMENT OF POINTS AND AUTHORITIES
(continued)

Page(s)

STATEMENT OF POINTS AND AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Just last year, this Court brought Kentucky's standing jurisprudence in line with the settled law of federal and other state courts, recognizing that fundamental separation-of-powers principles require the Commonwealth's courts to decide only justiciable cases in which the "plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Cabinet for Health & Family Servs. v. Sexton*, 566 S.W.3d 185, 196 (Ky. 2018). Here, admittedly *un*injured plaintiffs seek to upend the separation of powers and push Kentucky outside the mainstream by stepping into the shoes of state agencies, suing state-appointed contractors and officials, and inviting an inevitable torrent of unmanageable policy-focused litigation that would dissuade businesses and citizens from serving the Commonwealth.

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million U.S. businesses and professional organizations of every size, in every industry sector, and from every region of the country. In particular, many U.S. Chamber members are based in Kentucky, and many others conduct substantial business in the Commonwealth. These members have a significant interest in the sound development of Kentucky's standing law. The U.S. Chamber regularly advocates for the interests of the business community by participating as *amicus curiae* before this Court, other state courts, the Supreme Court of the United States, and

other federal courts in cases that involve issues of concern to U.S. business.

BACKGROUND

The plaintiffs in this case are individual pensioners who are entitled to defined-benefit pensions, who have suffered no diminution in those benefits or any other harm, but who nonetheless attempt to stand in the shoes of the Commonwealth to sue contractual advisers to the Kentucky Retirement System (KRS). This attenuated and unmanageable approach to lawyer-manufactured litigation is a far cry from the justiciable cases and controversies permitted under *Sexton*, 566 S.W.3d at 188; *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); and the Kentucky Constitution, §§ 109–112. Indeed, neither the plaintiffs nor the trial court identified *any* precedent from *any* jurisdiction allowing uninjured beneficiaries to cloak themselves in public authority and sue government contractors that offered advice and services regarding a public pension plan. The Court of Appeals properly and unanimously rejected this novel and shapeless lawsuit by concluding plaintiffs lacked standing.

This Court should affirm the ruling of the Court of Appeals. By adopting the *Lujan* Court's familiar three-pronged standing analysis, the *Sexton* decision moved Kentucky forward—ensuring that plaintiffs lacking a concrete and particularized injury could not drag all manner of businesses, officials, and policy disputes before Kentucky courts. 566 S.W.3d at 196. Adjudicating this non-dispute, however, threatens to take two steps backwards: litigation among uninjured parties would not only exceed the judiciary's properly limited role, but would also constrict the executive branch's responsibility and accountability for executing the law. That would only compound traditional standing

concerns with a lack of true adversity, concreteness, and judicially manageable standards. *See Lujan*, 504 U.S. at 574–577. Kentucky's executive branch and KRS itself—not these plaintiffs—are entrusted by the Commonwealth to manage pension plan assets and advisors. KRS has not invoked the courts' authority to redress any alleged injury. If this Court allows private plaintiffs to co-opt state authority based on an outlier theory of standing, Kentucky courts can expect no end of "derivative" public litigation that attracts adventurous legal claims, overloads dockets, creates uncertainty for those doing business with the state, and drives up the cost of investing in the Commonwealth.

ARGUMENT

I. THE CONSTITUTIONAL SEPARATION OF POWERS DOES NOT ALLOW UNINJURED PLAINTIFFS TO SUE ON THE COMMONWEALTH'S BEHALF.

In 2018, this Court "formally adopt[ed] the *Lujan* test as the constitutional standing doctrine in Kentucky as a predicate for bringing suit in Kentucky's courts." *Sexton*, 566 S.W.3d at 196. "[W]hether the litigant is entitled to have the court decide the merits of the dispute" requires, this Court held, that "he or she suffered or imminently will suffer an injury." *Id.* at 193. That injury must be both concrete and (most relevant here) "particularized," requiring a showing that the action injured plaintiff in a "personal" way. *Id.* at 196-98; *accord Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1548 (2016) (a "particularized" injury "must affect the plaintiff in a personal and individual way.") (quoting *Lujan*, 504 U.S. at 560 n.l). A dispute is "justiciable" only where the plaintiff has alleged a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Sexton*, 566 S.W.3d at 196 (citing *Allen*

v. Wright, 468 U.S. 737, 751 (1984)).[1] "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" and "must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent." *Id.*

This constitutional injury requirement preserves the separation of powers. It stands as "a safeguard against the overreach of judicial, legislative, and executive power," protecting against just the sort of judicial mission creep threatened in this case. *Id.* Courts have recognized that "convert[ing] the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" would transfer the executive's "most important constitutional duty [and] enable the courts . . . 'to assume a position of authority over the governmental acts of another and co-equal department', and to become 'virtually continuing monitors of the wisdom and soundness of Executive action.'" *Lujan*, 504 U.S. at 577 (quoting *Allen*, 468 U.S. at 760). To avoid that untenable position, standing doctrine "prevent[s] the judicial process from being used to usurp the powers of the political branches, and confines the federal courts to a properly judicial role." *Spokeo*, 136 S. Ct. at 1547 (internal quotations marks omitted); *see also id.* at 1552 (Thomas, J., concurring) ("standing doctrine keeps courts out of political disputes

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[1] The U.S. Supreme Court repeatedly has emphasized the distinctive nature of the plaintiff's interest in a justiciable controversy. For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1540. *See also, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) ("plaintiff must allege personal injury'"); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("distinct"); *Allen*, 468 U.S. at 751 ("personal"); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (plaintiff "personally has suffered some actual or threatened injury").

by denying private litigants the right to test the abstract legality of government action . . . [and thereby] preserv[ing] executive discretion").

These separation-of-powers principles are of practical and not merely academic importance. *See Lujan*, 504 U.S. at 560, 581 (standing requirements "serv[e] to identify those disputes which are appropriately resolved through the judicial process" and "preserv[e] the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome."). The constitutional constraints serve to ensure "the business of . . . courts" remains confined "to questions presented in an adversary context." *Massachusetts v. EPA*, 549 U.S. 497, 516–17 (2007). An appropriately adversarial presentation, situated in a concrete factual context, in turn "sharpens the presentations of issues upon which the court so largely depends for illumination." *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Valley Forge Christian College*, 454 U.S. at 473 (standing ensures the judicial process is not a mere "vehicle for the vindication of the value interests of concerned bystanders") (quotation marks omitted). Standing doctrine also serves to direct limited judicial resources to cases involving real rather than manufactured disputes and harms. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000).

Allowing private suits "on behalf of" public agencies would compound these separation-of-powers concerns. Standing decisions often involve private suits *against* the government.[2] Plaintiffs' invocation of the courts' authority "on behalf of" KRS, however,

[2] Such suits are frequently and non-controversially brought by associations like the ACLU, Sierra Club, or U.S. Chamber that sue the government on behalf of their injured members

does not dispute the extent of the political branches' authority; instead it *co-opts* that authority by suing private parties that have not been haled into court by the government. Standing is "substantially more difficult to establish" when, as here, "the plaintiff is not himself the object of the government action or inaction he challenges." *Lujan*, 506 U.S. at 562 (quotation marks omitted). This suit concerns the lawfulness of the executive branch's execution of the pension laws—yet the government is not litigating this case.

Redressing concrete injuries becomes harder still when the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Id.* (quoting *ASARCO Inc. v. Kadish,* 490 U.S. 605, 615 (1989) (op. of Kennedy, J.) (emphasis added)). Such litigation implicates "choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* The political accountability that lies at the heart of our tripartite system of government, *see generally* THE FEDERALIST No. 51, stands little chance where the electorate cannot be sure whether appointed officers, elected legislators, or individual litigants bear responsibility for weighty public issues like the pension crisis. *See* Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009) ("[A]s challenging as it is to hold the Executive Branch accountable, it would be far more difficult to constrain the prosecutorial discretion of a private party, if she too could bring suit to see that the law was obeyed."). Our Constitution, this Court has

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harmed by regulatory action or inaction. Those suits must satisfy the well-established three-prong inquiry for associational standing set forth in *Hunt v. Washington State Apple Advertising Commission*, which ensures an association's members have or will suffer a concrete and particularized injury. 432 U.S. 333, 343 (1977).

recognized, creates ample mechanisms besides "citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." *Sexton*, 566 S.W.3d at 197 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (quoting *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring))).

Plaintiffs, meanwhile, identify no authority supporting standing for private plaintiffs, lacking an actual and concrete interest in a dispute, suing on behalf of an absent public agency. As in *Sexton*, every plaintiff prosecuting this litigation "has not and will not suffer an 'injury' in this case." 566 S.W.3d at 197. Even duly elected state legislators who *do* wield constitutionally accountable authority, this Court has held, "do not have a sufficient personal stake in a dispute over the execution or constitutionality of a statute, even when the claim is that another branch of government is violating the separation of powers." *Beshear v. Bevin*, 498 S.W.3d 355, 383 (Ky. 2016) (requiring a "particularized, personal injury when individuals seek to bring a claim"). All the more so here: the Court of Appeals properly recognized that individual beneficiaries' "statutory rights do not extend to 'oversight' of the process by which their pension is funded, such as by asserting claims against KRS' financial advisors." Opinion at 15.

II. ADOPTING PLAINTIFFS' THEORY WOULD RENDER KENTUCKY AN OUTLIER DESTINATION FOR UNMANAGEABLE THIRD-PARTY LITIGATION.

Less than one year ago, this Court harmonized Kentucky's standing doctrine with that of the federal courts and other states. *Sexton*, 566 S.W.3d at 188. Plaintiffs' novel theory would undo that progress by violating the bedrock principle that a suit by an *uninjured* plaintiff does not present a "justiciable case or controversy." *See Lujan*, 504

U.S. at 573. If adopted, Kentucky would diverge from the uniform holdings of the federal courts and other states that pension-fund beneficiaries may not sue on behalf of the plan or its assets if their personal benefits are not implicated. "The individual members' right," the Court of Appeals recognized, "is only to the receipt of promised funds." Opinion at 15 (quotation marks omitted).

In other jurisdictions, where participants in defined-benefits-plans have not suffered an "injury" to their promised benefits, courts have consistently held that the participants lack constitutional standing to assert claims premised on the allegedly imprudent management of plan assets. The basic distinction lies between a non-cognizable *general* legal objection regarding the plan's management or assets, on the one hand, and a justiciable *specific* legal injury from the diminution of an individual plaintiff's benefits, on the other. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439–41 (1999) (beneficiaries under defined-benefit plan have an interest only in their defined benefits—not in the entirety of the plan's assets). This perfectly tracks the injury inquiry set forth in *Sexton* and *Lujan. Lujan*, 504 U.S. at 560–61; *Sexton*, 566 S.W.3d at 197.

The Sixth Circuit in *Duncan v. Muyzn*, for example, recently held that a member of a defined-benefits plan lacked standing to recover based on a claim that accounting errors had depleted plan assets, because that alleged error had not affected the member's defined-benefits. 885 F.3d 422, 427–28 (6th Cir. 2018). The court rejected the notion that defined-benefit plaintiffs would be harmed in a concrete and particularized way "*if* the Plan runs out of money and *if* the [the employer] refuses to make up the shortfall *while* Plaintiffs are

still receiving benefits from the Plan" as too conjectural and hypothetical to satisfy constitutional standing requirements. *Id.* at 428.

Likewise, in *Hill v. Vanderbilt Capital Advisors, LLC*, the court recognized that a participant in a state pension plan lacked standing to sue "on behalf of" the state against the third-party investment advisors to the state's pension fund, where the participant's defined benefits had not been harmed or even threatened by the allegedly imprudent investment advice and decisions. 834 F. Supp. 2d 1228, 1250 (D.N.M. 2011). *See also Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 608 (6th Cir. 2007) (participant in an ERISA-governed defined-benefits plan lacked standing because the only "injury" alleged to the participants—higher deductibles, co-payments, or other indirect contributions—was "neither concrete nor particularized, and is instead, arguably conjectural and hypothetical.").

Amicus is unaware of any decision—and plaintiffs cite none—holding that a uninjured participant in a state-run defined-benefits plan has constitutional standing to assert tort claims "on behalf of" the state against third parties.[3] Tellingly, on this point the Circuit Court identified only three decisions—*Sexton*, *Lujan*, and *Allen v. Wright*—all of which *reject* the plaintiff's standing. Order at 4–6. Courts in other states have consistently held that a participant in a defined-benefits plan cannot sidestep the constitutional gateway

[3] To be sure, the Supreme Court has upheld *qui tam* statutes that authorize certain private plaintiffs to pursue actions on behalf of the government under specific circumstances, including formal government oversight, determined to satisfy the constitutional injury-in-fact requirement. *Vermont Agency of Nat. Res. v. United States ex. rel. Stevens*, 529 U.S. 765, 773–74 (2000). Kentucky, however, has no *qui tam* statute and plaintiffs do not and cannot assert any such theory in this case.

by labeling claims as "derivative" or "representative." Instead, "[t]o bring a suit on [a benefit plan's] behalf in a representative capacity, the Plaintiffs must establish the same [constitutional standing] requirements that they would if suing as individuals." *Vanderbilt Capital Advisors, LLC*, 834 F. Supp. 2d at 1234, 1250 (holding plaintiffs had *not* alleged a constitutional injury-in-fact, even though plaintiffs' complaint contended that defendant's improper investment decisions might, in the future, lead to increased contributions, reduced services, tax increases, or increased risk of insolvency); *see also Glanton v. AdvancePCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006) ("We have no quarrel with [the] proposition [that ERISA beneficiaries may bring suits on behalf of the plan]—so long as plaintiffs otherwise meet the requirements for [constitutional] standing.").

If plaintiffs' contrary view were to prevail, a seemingly limitless number of Kentuckians could have standing (either as beneficiaries or as "taxpayers") to file claims against the Commonwealth's third-party contractors, purportedly on behalf of the state. Plaintiffs do not explain the limits of their no-injury "derivative" theory, but if accepted it is hard to identify what would prevent future individuals, claiming some as-yet-unidentified injury, from stepping uninvited into the shoes of any state agency perceived as insufficiently litigious. Under this expansive theory, University of Kentucky students might have standing to sue contractors over alleged breaches in construction contracts, or Medicaid recipients might have standing to sue hospitals in which they have never set foot over the adequacy of medical care. Neither plaintiffs nor the trial court have identified any limiting principle—precisely because no precedent adopts this fuzzy notion of public-pension standing in the first place. To embrace this expansive interpretation of

constitutional standing would convert Kentucky from the mainstream of constitutional standing jurisprudence into a haven for creative and attenuated "no-injury" lawsuits against third parties—only one year after this Court adopted the *Lujan* test.

III. ADOPTING PLAINTIFFS' THEORY OF NO-INJURY STANDING WOULD HARM BUSINESS AND DISCOURAGE INVESTMENT IN KENTUCKY.

Plaintiffs' end-run around the constitutional standing doctrine would have devastating effects for Kentucky enterprise. Such a ruling would hinder the ability of the Chamber's members and others to do business with or in Kentucky, given the threat of disruptive and unmanageable litigation brought "on behalf of" state agency counterparties. This would be disastrous for Kentucky's businesses, citizen leaders, and taxpayers—not to mention the government leaders in whose names (but not hands) suits may be filed.

Jettisoning the concrete personal injury requirement would remove critical restraints on the use of the judicial system. Enforcement actions typically must be initiated by governmental officials who are accountable to the public and who exercise prosecutorial discretion; private "enforcement," by contrast, tends to be lawyer-driven, removed from government resource constraints and supervision, and motivated by maximizing personal payouts rather than optimizing public policy.

The threat of expensive and invasive litigation brought by uninjured plaintiffs in the name of contractual counterparties would deter companies from doing business with the Commonwealth's governmental and non-governmental entities. It is hard to imagine all the ways in which the threat or commencement of "derivative" litigation against a state counterparty could disrupt the contractor's relationship with the state leadership and the

constituents to be served. The investment firms, consultants, and other contractors on whom state and local governments so often rely would face a major disincentive to partnering with Kentucky public agencies, not knowing whether uninjured taxpayers and contingency-fee lawyers might try to drag them into court—regardless of their performance for the public agency. As a consequence, the services and advice available to the Commonwealth's governmental and non-governmental entities would predictably suffer in price and availability.

The costs of defending (and insuring) against no-injury lawsuits, moreover, are ultimately borne by taxpayers, business customers, and employees. The rights of individual pension-fund members, for example, would be "adversely affected by subjecting the Plan and its fiduciaries to costly litigation brought by parties who have suffered no injury" from an "allegedly imprudent investment." *Harley v. Minn. Mining and Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002). "In an era of frequent litigation . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

Moreover, this litigation would amplify the voices of dissenting constituents or taxpayers who happen to win a race to the courthouse. That initial litigation could silence the voices of *non*-dissenting citizens who lack the means or motivation to seek their preferred policy in court rather than through the levers of representative government. On issues as complex and far-reaching as pension management, constituents would no doubt fall on both sides of most any question. To borrow from the legislator-plaintiff context, "individual legislators have not shown that they are representative of the entire body of the

General Assembly. They 'have not been authorized to represent their respective Houses . . . in this action.'" *Beshear v. Bevin*, 498 S.W.3d 355, 368 (Ky. 2016) (citing *Raines v. Byrd*, 521 U.S. 811, 829 (1997)). Unanimity is untenable—which is why we name and *entrust* trustees to manage funds on behalf of the members.

Indeed, the selection, weighting, maintenance, and—if necessary—litigation of particular investment strategies are quintessential management decisions entrusted to their discretion. Certainly these are not questions to be litigated by whichever set of members wins a race to the courthouse. *See Frierdich v. United States*, 985 F.2d 379, 382 (7th Cir. 1993) ("desirab[le] [to] confin[e] the right to sue to the person who has the greatest interest in the outcome of the suit, rather than allowing someone with a tenuous interest to gum up the works by suing also or instead."). When the allegedly injured agency declines to pursue litigation itself or through outside counsel, that should be the end of the matter. (At least until affected constituents or accountable leaders replace the trustees or change investment direction, as KRS indicates has happened here.) No one else can assert the particularized interest of the agency in court.

The limits of plaintiffs' theory are impossible to perceive at this juncture. No apparent principle limits the ability of any taxpayer (or beneficiary, or constituent, or advocate) to step into the shoes of an agency and file suit "on its behalf" against third parties. Op. Br. at 14–29. If government action injuring a plaintiff is no longer required, then courts would presumably be left to fashion from whole cloth a set of rules limiting (or at least managing) the uninjured plaintiffs purporting to act on behalf of other allegedly injured third parties. Unlike actual government litigants, of course, these plaintiffs will not

have the same incentives to minimize discovery, manage limited legal resources, avoid problematic estoppel or precedents, weigh competing public-policy priorities, or otherwise remain accountable to the electorate.

CONCLUSION

The U.S. Chamber respectfully urges this Court to affirm the decision below granting the writ of prohibition.

Date: June 12, 2019

Respectfully submitted,

Benjamin Beaton (KY Bar No. 93960)
SQUIRE PATTON BOGGS (US) LLP
201 E. Fourth Street, Suite 1900
Cincinnati, OH 45202
Telephone: (513) 361-1200
Facsimile: (513) 361-1201

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