COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2019-SC-520-D

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT WASTE MANAGEMENT DISTRICT, *et al.* **APPELLANTS**

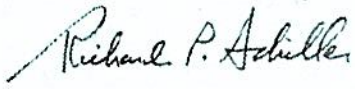
v.

ON APPEAL FROM
THE KENTUCKY COURT OF APPEALS
NOS. 18-CA-150; 18-CA-151; 18-CA-154;
18-CA-156, 18-CA-158; and 18-CA-160
FRANKLIN CIRCUIT COURT
CASE NO. 17-CI-327

JEFFERSON COUNTY LEAGUE OF CITIES, INC., *et al.* **APPELLEES**

BRIEF FOR APPELLANT, CITY OF BANCROFT

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify, pursuant to CR 76.20(6) and (7), that on July 8, 2020, ten (10) copies of this brief were served via U.S. Registered Mail upon the **Supreme Court Clerk, Supreme Court of Kentucky**, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601. I further certify that a true and accurate copy of the foregoing was served via First-Class U.S. Mail, postage prepaid, to the following: **Hon. Samuel P. Givens Jr., Clerk, Kentucky Court of Appeals**, 360 Democrat Drive, Frankfort, Kentucky 40601; **Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court**, 222 St. Clair Street, Frankfort, Kentucky 40601; **Peter F. Ervin, Jefferson County Attorney's Office**, 531 Court Place,

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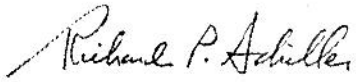

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STATEMENT CONCERNING ORAL ARGUMENT

The City of Bancroft (hereinafter "Bancroft") believes the Court can determine the issues on appeal from the record and written arguments of counsel. However, Bancroft has no objection to oral argument should the Court feel that the opportunity to question counsel would assist it in rendering a decision in this matter.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee Bancroft does not accept that the Statement of the Case, as presented by Appellants in their brief, is sufficient to provide this Court with a "summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal."[1] Therefore, Bancroft provides the following additional information for the Court that it "considers essential to a fair and adequate statement of the case."[2]

Solid waste management has historically been the province of state and local governments. In the leading federal legislation on the issue, Congress reiterated that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies..."[3] Based in part on this direction, the Kentucky General Assembly divided decision-making authority for solid waste management between counties and cities by passing what is now KRS Chapter 109. Although the General Assembly primarily vested decision-making authority in counties, it did contemplate that cities would also play a role in solid waste management by specifically allowing a county to delegate responsibility for solid waste management to a city,[4] and providing that, if a county did not develop a plan, cities within that county could develop plans of their own.[5]

Within KRS Chapter 109 the General Assembly also gave counties the ability to delegate solid waste management to a specialized entity by creating a "waste management district."[6] Such districts are run by a board of directors who must manage the district "in a

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[1] CR 76.12(4)(c)(iv).
[2] CR 76.12(4)(d)(iii).
[3] 42 U.S.C. §6901(a)(4).
[4] KRS 109.011(6).
[5] KRS 109.011(11).
[6] KRS 109.115(1) – (2).

manner adequate to protect the public health and consistent with [applicable] rules and regulations."[7]

Through HB 246, the General Assembly decided, as a matter of public policy, to alter the decision-making structure in KRS Chapter 109 to give cities in a county with a consolidated local government,[8] such as Bancroft, a greater voice in solid waste management. Important to the issues raised in this appeal, all of the legislative reforms from HB 246 relate to the powers of local-government units, not the substance of solid waste management. HB 246 shifts decision-making authority to cities in a county with a consolidated local government in four primary ways:

- HB 246 curtails the ability of a county or waste management district to "prohibit or otherwise restrict materials recovery by … any municipality located within the geographic area of the county or waste management district."[9]
- HB 246 removes the ability of a consolidated local government or waste management district to charge a city "any fee that is based, directly or indirectly, on the composition of the solid waste stream from that city if the solid waste stream is in conformity with state and federal law for the use of the solid waste management facility receiving the waste."[10]
- HB 246 directs that, in certain circumstances, the rules and regulations passed by the board of a waste management district "shall not be

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[7] KRS 109.120(1).

[8] A consolidated local government is where "[t]he governmental and corporate functions vested in any city of the first class… [are] consolidated with the governmental and corporate functions of the county containing the city." KRS 67C.010(1). At present, the only consolidated local government in the Commonwealth is Louisville Metro.

[9] 2017 Ky. Acts, ch. 105, §1(3)(g). **A copy of the Kentucky Acts version of HB 246 is included in the appendix as Tab 2.**

[10] 2017 Ky. Acts, ch. 105, §1(14). This section of HB 246 also limits the ability of a consolidated local government or waste management district to restrict a city's usage of "any solid waste management facility for the disposal of solid waste." 2017 Ky. Acts, ch. 105, §1(14).

enforceable within the boundaries of the city until approved by the legislative body of the city."[11]

- HB 246 gives cities the ability to opt out of the solid waste management plan adopted by a waste management district so long as the city complies with all applicable laws and regulations.[12]

In addition to giving cities in a county with a consolidated local government, such as Bancroft, more authority in solid waste management, HB 246 gives those cities more representation on the board of the waste management district. Specifically, HB 246 restructures the members of the applicable board such that the mayor, with the approval of the legislative body of the consolidated local government, appoints seven (7) members with enumerated qualifications to the board.[13] As an example, one of those members must be "submitted by the organization representing the largest amount of cities within the county" so long as that organization does not have state-wide membership.[14]

HB 246 took effect on March 21, 2017. Based on the fact that Louisville Metro is the only consolidated local government in the Commonwealth, Louisville Mayor Greg Fischer, Louisville Metro's waste management district (Louisville/Jefferson County Metro Government Waste Management District ("LMGWMD"), and a member of LMGWMD's Board brought suit in the Franklin Circuit Court to seek to invalidate HB 246.[15] These plaintiffs, appellants here, raised several arguments in this effort including that HB 246 (i) violates the Kentucky Constitution's special legislation provisions in Section 59 and 60; (ii) violates the Kentucky Constitution's separation of powers doctrine set forth in Sections

[11] 2017 Ky. Acts, ch. 105, §3(3).
[12] 2017 Ky. Acts, ch. 105 §4(2).
[13] 2017 Ky. Acts, ch. 105, §2(4).
[14] Id.
[15] R at 24 – 48.

27 and 28; and (iii) contains an invalid emergency clause under Section 55 of the Kentucky Constitution.[16] Once temporary injunctive relief was denied by the Circuit Court,[17] the parties filed cross-motions for summary judgment.

In ruling on those cross-motions, the Circuit Court partially invalidated HB 246.[18] First the Circuit Court applied the rule from Louisville/Jefferson County Metro Government v. O'Shea's-Baxter, LLC[19] to hold that HB 246 runs afoul of the special-legislation provisions of Sections 59 and 60 of the Kentucky Constitution.[20] In so holding, the Circuit Court first reasoned that the changes to LMGWMD's Board made by Section 2 of HB 246 related to the "organization or structure of a city or county government agency" and as such did not violate these constitutional provisions.[21] However the Circuit Court concluded that all other challenged provisions of HB 246 "deal with substantive issues of solid waste policy"[22] and thus violate of Sections 59 and 60 of the Kentucky Constitution as they "do not bear any rational relationship to the purpose [of] the statutes governing solid waste disposal."[23] Importantly, the Circuit Court made this decision by looking to preexisting statutes, and not HB 246, in order to determine the legislative purpose of the at-issue legislation.[24]

The Circuit Court also found that HB 246 violates Section 156A of the Kentucky Constitution..[25] In making this additional ruling, the Circuit Court held that HB 246 treated

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[16] R at 43 – 46.
[17] R at 400 – 404, 477.
[18] Tab 1, R at 875 – 883.
[19] 438 S.W.3d 379 (Ky. 2014).
[20] Tab 1, R at 883 – 884, 886.
[21] Id. at 883.
[22] Id.
[23] Id. at 884.
[24] Id.
[25] Id. at 884 – 885.

cities within the same class differently since "cities within Jefferson County are given the power to accept, reject, or deviate from the solid waste plan, while that power is withheld from similarly situated cities in other counties."[26]

After this ruling was issued, Bancroft, and the other Appellees here, appealed the Franklin Circuit Court's Order to the Court of Appeals. On appeal the Court analyzed the trial court's decision, *de novo*, and applied the two-part test set forth in Mannini v. McFarland,[27] to hold that each section of HB 246 met constitutional muster by meeting one, or both, of the prongs of the Mannini test.[28]

Appellants now challenge the soundness of the Court of Appeals' decision by seeking discretionary review of this Honorable Court.

ARGUMENT

I. HB 246 is not unconstitutional special legislation.

The Appellants implore the Court to reinstate the decision of the Circuit Court, which struck down HB 246 as unconstitutional special legislation under Sections 59 and 60 of the Kentucky Constitution because the bill only applies to a county with a consolidated local government – which at present is only Jefferson County/Louisville Metro.[29] However, "[a]law is not local or special merely because it does not relate to the whole state or to the general public."[30] As reiterated by the Court of Appeals in its decision below,[31] the Kentucky Supreme Court has "become 'greatly liberalized' in upholding the right of the legislature to classify local government entities," which means that the judiciary

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[26] Tab 1, R at 884 – 885.
[27] 172 S.W.2d 631, 632 (Ky. 1943).
[28] Tab 2, Opinion of the Kentucky Court of Appeals at p. 19 – 23.
[29] R at 882 – 887.
[30] Commonwealth v. Moyers, 272 S.W.2d 670, 673 (Ky. 1954).
[31] Tab 2, Opinion at p. 19.

must "be reluctan[t] to encroach upon the powers of the legislature, one of the three partners in Kentucky state government."[32]

The applicable test to determine whether HB 246 is constitutional under Sections 59 and 60 is that set out in Mannini v. McFarland – which was properly utilized and applied by the Court of Appeals, below.[33] This test asks whether the distinctions created by HB 246 "deal[] with the organization or incidents of government" *or* "bear[] a reasonable relation to the purpose of the act."[34] "If [HB 246] complies with **either requirement**, it is constitutional."[35] As will be shown below, HB 246 is constitutional under not just one, but both portions of the Mannini test. Therefore, the Court of Appeals' decision should be affirmed.

A. HB 246 relates to the "organization or incidents" of local government.

It is well established that legislation that relates to the "organizations or incidents" of local government is permissible under Sections 59 and 60, even if that legislation only applies to part of the Commonwealth. "When the subject matter is purely one of municipal government, it is clearly competent for the Legislature to classify it alone upon number and density of population, as the Constitution implies if does not expressly allow."[36] Two cases upholding laws related to the "organization or incidents" of local government underscore the General Assembly's substantial leeway in directing the operations of local government.

First, in the Bilyeu decision, this Court considered a statute that directed that "in counties containing a population of 600,000 or more, all officers of the county police force

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[32] Jefferson County Police Merit Bd. v. Bilyeu, 634 S.W.2d 414, 416 (Ky. 1982).
[33] 172 S.W.2d 631 (Ky. 1943); Tab 2, Opinion at p. 19 – 23.
[34] Bilyeu, 634 S.W.2d at 416 (*citing* Mannini, 172 S.W.2d at 632).
[35] Id. (emphasis added).
[36] Mannini, 172 S.W.2d at 633 (internal citation omitted); *see also* Jobe v. City of Erlanger, 383 S.W.2d 675, 676 (Ky. 1964).

above rank of captain are excluded from the county police merit system."[37] As the Court explained, "[i]n 1972, for reasons known only to the General Assembly, and solely on the basis of the numerical size of the county[,] certain officers were mandatorily eliminated from the merit system" – described by the Court as an "exercise of legislative fiat."[38] In upholding that statute, the Court noted that "[t]he establishment and maintenance of a county police force and the subsequent creation of a merit system are clearly government activities. The police force is part and parcel of the county government which created it, sustains it, and controls and nurtures it."[39] For this simple reason, the Supreme Court had "no difficultly in declaring that the subject matter [of the challenged statute] is governmental in nature and is constitutional under the first Mannini test."[40] Thus, Bilyeu holds that the General Assembly telling only certain counties how to operate is not unconstitutional special legislation because it "deals with the organization and incidents of government."[41]

Second and similarly, in Logan v. City of Louisville,[42] this Court's predecessor considered a statute implicating Louisville's ability to collect assessments for state-owned property. The applicable statute provided that, for cities of the first class only, "the state's property from which such collection might be made if privately owned, should pay its portion of the improvement cost."[43] In upholding this statute, the Court recognized that the

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[37] 634 S.W.2d at 414 – 15.
[38] Id. at 415.
[39] Id. at 416.
[40] Id.
[41] Id. This basic point is also reiterated in James v. Barry, 128 S.W. 1070, 1072 (Ky. 1910), which recognized that "[i]t has been held that it was not repugnant to these sections to enact that in counties containing cites of the first class for example certain officers should make reports not required of officers of the same kind in other counties, or that such first-named officers might have deputies or clerks not provided for all others not in that class."
[42] 142 S.W.2d 161 (Ky. 1940).
[43] Logan, 142 S.W.2d at 163.

General Assembly has "the right and the authority to enact different charters for each class of cities and to confer different governmental functions and powers upon each class, as well as the means and methods by which such rights might be exercised."[44] The Court therefore held that the statute "present[s] a question solely of local government of the class of city to which the statute is made applicable."[45] In this way, Logan stands for the proposition that the General Assembly can establish the "governmental functions and powers" of local government units without offending Sections 59 and 60 of the Kentucky Constitution.[46]

Judged by Bilyeu and Logan, HB 246 is not unconstitutional special legislation, as it concerns the "organization or incidents" of local government. While Appellants attempt to paint HB 246 with a more substantive brush, the plain language of HB 246 shows it relates exclusively to the operations of local government, namely how cities in a county with a consolidated local government, such as Bancroft, interact with that consolidated local government and the waste management district. **HB 246 in no way concerns how solid waste is substantively managed.** It does not, for example, specify standards or licensing requirements for solid waste management. Put simply, HB 246 is constitutional because it relates solely to the "who" of solid waste management and leaves the "what" of it alone.

HB 246, as summarized above, limits the ability of a county or waste management district to "prohibit or otherwise restrict materials recovery by … any municipality."[47] This

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[44] Id.
[45] Id. Although Logan addressed a statute that applied only to one class of cities, the Supreme Court has held that Mannini's test "extend[s] … to include all local government entities." Bilyeu, 634 S.W.2d at 416.
[46] *See* Id.
[47] 2017 Ky. Acts, ch. 105 §1(3)(g).

provision does not establish how solid waste is managed by specifying how "materials recovery" should be done, but instead concerns how cities interact with the county and the waste management district while managing solid waste. The same goes for the provisions of HB 246 that limit the applicability of a waste management district's rules or regulations and solid waste management plan with respect to cities.[48] These provisions do not dictate the content of those rules or regulations or the waste management plan, but simply modify the applicable decision-making structure. These parts of HB 246 concern who decides the content of the rules, regulations, and waste management plan.

The final challenged provision of HB 246 – Section 1(14) – is a prime example. This provision simply limits the ability of a consolidated local government or waste management district to assess a fee on a city based on "the composition of the solid waste stream of [a] city."[49] This provision says nothing about what "the composition of the solid waste stream" should be, but rather concerns whether a consolidated local government or waste management district can penalize a city for its "composition" of solid waste, whatever that composition may be.[50] Here again, HB 246 is only concerned with how the various parts of local government work together in a consolidated local government.

Yet, the Appellants would have the Court believe otherwise and instead follow the Circuit Court's analysis and decision. The Circuit Court reasoned that almost all of HB 246 "deal[s] with substantive issues of solid waste policy."[51] Substantive issues of solid waste policy, however, specify standards for solid waste management or dictate what must be done to appropriately manage solid waste, neither of which HB 246 does. The Circuit Court

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[48] 2017 Ky. Acts, ch. 105 §§3(3), 4(2).
[49] 2017 Ky. Acts, ch 105, §1(14).
[50] Id.
[51] Tab 1, R at 883.

nevertheless identified four provisions in HB 246 that, in its view, constitute "substantive issues of solid waste policy":

> [1] House Bill 246 purports to exempt local municipalities from regulation by the solid waste management district; [2] to grant a veto power to local municipalities over the county-wide solid waste plan; [3] to legislatively revoke solid waste regulations previously enacted; [4] and to enact different rules for collection of fees for residential property.[52]

Taking each of these four provisions in turn,[53] the first two provisions on which the Circuit Court relied – Sections 3(3) and 4(2) of HB 246 – unmistakably relate to the organization or incidents of local government. Both provisions, as discussed above, do not specify the content of the applicable solid-waste regulations or waste management plan. The substance of those regulations and waste management plan *are not changed* by HB 246. As the Circuit Court acknowledged, these provisions merely "exempt" cities from regulations if they so desire and give them a "veto" over a solid waste management plan within their boundaries. These are "who decides" questions, not substantive issues of solid waste policy. In this way HB 246 is legislation about the relationship between local-government units, and therefore, under Mannini, is constitutional legislation concerning "the organization or incidents" of local government.[54]

The third provision cited by the Circuit Court as a "substantive issue[] of solid waste policy" appears to be Section 1(3)(g) of HB 246, which states that a county or waste

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[52] Tab 1, R at 883 – 884.

[53] If the Court determines that some, but not all, of these four (4) provisions relate to the organization or incidents of local government, the Court should sever the remaining provisions under KRS 446.090, assuming those provisions alternatively do not satisfy the second iteration of the Mannini test.

[54] Mannini, 172 S.W.2d at 632; *also see* Logan, 142 S.W.2d at 163 (holding that the General Assembly has the authority "to confer different governmental functions and powers" on local governments).

management district in a county with a consolidated local government cannot "prohibit or otherwise restrict materials recovered by … any municipality located within the geographic area of the county or waste management district created to serve that county."[55] However, as quoted, this provision does not dictate how "materials recovery" is accomplished. Rather, Section 1(3)(g) relates solely to who gets to decide how "materials recovery" is done – either the municipality or the waste management district.

The final provision identified by the Circuit Court as a "substantive issue[] of solid waste policy" appears to be Section 1(14) of HB 246. The Circuit Court characterized this provision as "enact[ing] different rules for collection of fees for residential property…"[56] However Section 1(14) does not address residential property. Rather it merely limits the ability of a consolidated local government or waste management district to assess a fee on a city based upon "the composition of the solid waste stream of that city if the solid waste stream is in conformity with state and federal law for the use of the solid waste management facility receiving the waste."[57] This section of HB 246 does not specify what the required "composition of the solid waste stream" should be – which would be a "substantive issue[] of solid waste policy." Rather, Section 1(14) simply dictates how cities like Bancroft, the consolidated local government, and the waste management district interact when a city's solid waste stream complies with state and federal law.

Finally, comparing HB 246 alongside KRS Chapter 67C, which concerns the powers of a consolidated local government like Louisville Metro, is illustrative of how HB 246 is likewise legislation that permissively relates to "the organization or incidents" of

[55] 2017 Ky. Acts, ch. 105 §1(3)(g).
[56] Tab 1, R at 884.
[57] 2017 Ky. Acts, ch. 105, §1(14).

local government. Generally speaking, KRS Chapter 67C grants a consolidated local government the powers of both the county and the first-class city that combined create the consolidated local government.[58] Important for the purposes of this appeal, KRS Chapter 67C also grants a consolidated local government the power to "[c]ollect and dispose of garbage, junk, and other refuse, and regulate the collection and disposal of garbage, junk, or refuse by others."[59] HB 246, in certain respects, limits the operation of this provision.[60] If it is constitutional to authorize the creation of a consolidated local government and specify its powers with respect to the collection and disposal of "garbage, junk, or other refuse," as KRS Chapter 67C does, it logically follows that it is likewise constitutional to modify the powers of a consolidated local government with respect to solid waste management, as HB 246 does. Both equally relate to the "organization or incidents" of local government.[61]

B. HB 246 bears a reasonable relation to its purpose.

The Court also should affirm the Court of Appeals' decision and uphold HB 246 because its distinctions regarding cities in a county with a consolidated local government, such as Bancroft, bear a reasonable relation to its purpose. The General Assembly had a rational basis to conclude that HB 246 would solve a unique problem faced by cities, like Bancroft, which are located in a county with a consolidated local government.

The Supreme Court's recent decision in O'Shea's-Baxter demonstrates how to approach this issue. There, the plaintiffs sued to invalidate a statute regulating where alcohol could be sold in a city of the first class or in a city with a consolidated local

[58] KRS 67C.101(2)(a).
[59] KRS 67C.101(3)(l).
[60] *See, e.g.*, 2017 Ky. Acts, ch. 105 §1(14).
[61] Mannini, 172 S.W.2d at 632.

government.[62] In considering whether the statute bore a reasonable relation to its purpose, this Court first discerned the "apparent purpose" of the statue, which was "to limit the concentration of establishments with retail package licenses and retail drink licenses."[63] Then the Court asked whether there was a "rational basis for assuming that a concentration of retail drink licenses in a consolidated local government (Louisville Metro) will present different consequences than a similar concentration of licenses in other classes of Kentucky cities and urban governments."[64] Said another way, the Court asked whether there was a rational basis for treating Louisville Metro differently from the rest of the state on the issue addressed by the statute.[65]

Here the Appellants ask this Court to deviate from the analysis of O'Shea's-Baxter and instead follow the Circuit Court's improper process of analyzing the purpose of preexisting statutes governing solid waste management, while not making any attempts to discern the purpose of HB 246. As noted by the Court of Appeals, "the trial court... failed to consider the purpose of the amendments... when determining whether HB 246 complied with [the] same."[66] Because the Circuit Court did not properly analyze the purpose of HB 246 itself, its decision on this issue should not be reinstated, regardless of this Court's view on any other argument expressed herein.

The Circuit Court reasoned that HB 246 "does not bear any rational relationship to the purpose [of] the statutes governing solid waste disposal, *as set forth by the General Assembly in KRS 224.43 – 010(6).*"[67] The problem with this conclusion is that HB 246 did

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[62] 438 S.W.3d at 381.
[63] Id. at 384.
[64] Id.
[65] *See* Id.; *see also* Moyers, 272 S.W.2d at 673 (asking whether "facts reasonably differentiate a class or locality from the general public or the state at large").
[66] Tab 2, Opinion at p. 18.
[67] Tab 1, R at 884 (emphasis added).

not amend KRS 224.43 – 010.[68] The Circuit Court made an analogous error with respect to KRS Chapter 109, reasoning that "a plain reading of KRS Chapter 109 demonstrates that the purpose of the statute is to regionalize the planning function for solid waste disposal."[69] For this proposition, the Circuit Court cited provisions in KRS Chapter 109 that predated HB 246 and were not amended by it.[70] Consequently, in analyzing whether there is a rational basis for HB 246, the Circuit Court confusingly held that HB 246 does not advance the purpose of statutes that HB 246 did not even amend.

It has long been the rule that in determining whether a bill bears a reasonable relation to its purpose, the Court must look at the bill under consideration.[71] This procedure for analysis is the only logical way to make this determination, as it is illogical to try to ascertain the purpose of a bill by analyzing statutory provisions that the bill did not amend. Tellingly, the Circuit Court provided no justification for conducting its analysis the way it did.

Beyond this error in the basis for its analysis, the Circuit Court also improperly treated KRS Chapters 109 and 224.43 as straightjackets of legislative purpose. According to the Circuit Court, once the General Assembly has established how local governments should work together on solid waste management, the General Assembly cannot pass subsequent legislation that contradicts, or even modifies, the purpose expressed in the earlier legislation. The effect of the Circuit Court's ruling is to constitutionalize the legislative purpose of solid waste management for all time. But, as the Commonwealth's

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[68] *See* 2017 Ky. Acts, ch. 105.
[69] Tab 1, R at 884.
[70] Id. (*citing* KRS 109.01 §(5)(c), (6), and (11)).
[71] *See e.g.*, Mannini, 172 S.W.2d at 634 ("[T]he classification of fourth class cities set up in the statute has no reasonable relation to the purpose of the statute."); O'Shea's-Baxter, 438 S.W.3d at 384 ("The apparent purpose of [the challenged statute] is to limit the concentration of establishments with retail package licenses and retail drink licenses.").

public-policy body, the General Assembly can change its mind on public policy or modify prior legislation as it did with HB 246.[72] If the Court were to reinstate the Circuit Court's ruling on this point, it would serve to tie the General Assembly's hands in updating public policy to address new problems and new situations. Such an outcome is inadvisable and unsustainable.

Had the Circuit Court properly analyzed the purpose of HB 246 by looking at the substance of the bill itself through the lens of the O'Shea's-Baxter test, it likely would have come to a very different conclusion regarding its constitutionality, just as the Court of Appeals did. Several aspects of HB 246 inform this correct analysis. First, the provisions of HB 246 that the Circuit Court struck down as special legislation indisputably shift decision-making authority in solid waste management from the waste management district, consolidated local government, and county to cities. As discussed above, HB 246 gives cities within a consolidated local government a say-so on whether the regulations of the waste management district apply in each city.[73] Additionally, cities are allowed to opt out of the county-wide waste management plan under certain circumstances.[74] These two provisions, in particular, demonstrate the purpose of HB 246 to give cities in a county with a consolidated local government, like Bancroft, more of a voice in solid waste management.

This legislative purpose is confirmed by the parts of HB 246 that are not challenged by this appeal. Section 2 of HB 246 reorganizes the waste management board in a county with a consolidated local government to give cities more representation. For example, the

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[72] *See e.g.*, Morrison v. Carbide & Carbon Chemicals Corp., 129 S.W.2d 547, 549 (Ky. 1939) ("If a change in [public] policy is desired, application must be made to the Legislature...") (citation omitted)).
[73] 2017 Ky. Acts, ch. 105, §3(3).
[74] 2017 Ky. Acts, ch 105, §4(2).

board must now include "[o]ne (1) resident of the county submitted by the organization representing the largest amount of cities within the county which does not have statewide membership."[75] The emergency clause of HB 246 underscores that "the citizens of counties containing a consolidated local government will be better served by a reconstituted waste management district board that is more diverse and representative of and responsive to the populace."[76] Viewed together, HB 246's provisions point to a legislative purpose of giving cities in a county with a consolidated local government, such as Bancroft, a more meaningful role in solid waste management.

In light of this legislative purpose, the question becomes whether a rational basis exists for the General Assembly to apply HB 246 in a county with a consolidated local government, rather than statewide.[77] For the reasons that follow, the General Assembly had a rational basis to conclude that cities in a county with a consolidated local government need more guaranteed input into solid waste management than do other cities statewide. HB 246 reasonably recognizes that because of Louisville Metro's number of cities, size, population density, tax base, and urban character, Louisville Metro is better served by a unique governing structure for solid waste management focused on achieving the input of as many constituent cities possible. Indeed, the existence of an entire KRS chapter about the operation of a consolidated local government (Chapter 67C) demonstrates that there is a rational basis for treating cities in a consolidated local government differently.

Jefferson County has more cities in it – eighty-three (83) in total – than any other county in the Commonwealth.[78] In passing HB 246, it was rational for the General

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[75] 2017 Ky. Acts, ch. 105, §2(4)(c).
[76] 2017 Ky. Acts, ch. 105 §7.
[77] *See* O'Shea's-Baxter, 438 S.W.3d at 384.
[78] R at 609 – 17.

Assembly to conclude that, on average, cities in Jefferson County had less input into solid waste management than did cities in other counties across the Commonwealth. Compare, for example, the eighty-three (83) cities in Jefferson County to the single cities in Adair County (Columbia) or Allen County (Scottsville). Prior to HB 246, cities like Columbia and Scottsville, on average, naturally had much more input into solid waste management than did each of the eighty-three (83) cities in Jefferson County. For this reason, it would make little sense to apply HB 246's reforms in single-city counties like Adair County or Allen County. With only one city to consider, presumably Adair County and Allen County have appropriately tailored their solid waste management plan to suit the needs of those cities, such that Columbia or Scottsville would not need the opt-out provisions given by HB 246 to the eighty-three (83) cities within Jefferson County. The concerns faced by these eighty-three (83) cities, including Bancroft, are not the same concerns faced by other cities outside of Jefferson County. With Jefferson County being such an outlier with its number of cities compared to the other counties in the Commonwealth, there is a rational basis to apply HB 246 only to counties with consolidated local governments.

An alternative way to consider the question of if there is a rational basis for HB 246 is to consider why a city in Jefferson County might need more guaranteed input in solid waste removal than a city in a county without a consolidated local government. Under KRS Chapter 67C, Louisville Metro, as a consolidated local government, "possesses enhanced authority that is distinct from other municipalities."[79] As mentioned above, as a consolidated local government, Louisville Metro has the ability "[c]ollect," "dispose of,"

[79] Ky. Rest. Ass'n v. Louisville/Jefferson Cnty. Metro Gov't, 501 S.W.3d 425, 428 (Ky. 2016) (emphasis added).

and "regulate" "garbage, junk, and refuse."[80] This is in addition to those powers given to Louisville Metro under KRS Chapter 109 to manage solid waste or to create a waste management district for that purpose.[81] Also, Louisville Metro, as a consolidated local government, can "[l]evy and collect [property] taxes" and "[m]ake appropriations for [its] support."[82] This means that a consolidated local government like Louisville Metro can do more to manage solid waste, and with greater resources, than any other county or city in Kentucky.

Louisville Metro's unmatched authority in solid waste management, combined with its unparalleled tax base, could enable LMGWMD to adopt a waste management regulation that is especially costly for cities like Bancroft to implement. It would be much easier for Louisville Metro to implement this regulation in the Urban Services District (i.e. the old city of Louisville) than it would be for cities with more limited budgets to implement within their borders. Giving those cities additional input into such regulations (through the approval of the regulations by their legislative bodies) is a rational way to avoid saddling cities like Bancroft with regulations that they cannot afford. This scenario provides a rational basis for applying HB 246 only in a county with a consolidated local government.

In fact, this Court's predecessor previously recognized that Louisville's unique status can provide a rational basis for treating it differently. In Second Street Properties, Inc. v. Fiscal Court of Jefferson County,[83] a statute allowed cities and counties to create "tourist and convention commissions."[84] In counties not containing a city of the first class,

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[80] KRS 67C.101(3)(1).
[81] *See* KRS 67C.101(2)(a) (granting a consolidated local government the powers of both its predecessor city of the first class and county).
[82] KRS 67C.101(3)(a), (3)(c).
[83] 445 S.W.2d 709 (Ky. 1969).
[84] Id. at 711.

the statute allowed these commissions to use tax revenue for both "the promotion of convention and tourist activity" and for "recreational" purposes.[85] In Jefferson County, however, the commission could only use tax revenue for "the promotion of convention and tourist activity."[86] The old Court of Appeals upheld this statute because the General Assembly had a rational basis to enact it, as the Court explained:

> From a realistic standpoint, Jefferson County, containing the city of Louisville, is the principal convention center in the Commonwealth due to its size and facilities. The legislature could reasonably determine that the Commission's function there should be limited to the promotion of tourist and convention activity. It also may have considered that the recreational facilities in that area are sufficiently financed from other sources. On the other hand, the development of recreational facilities in less populated counties may have appeared equally essential for the attraction of tourists.[87]

In this way, Second Street Properties shows what the Appellants, and Circuit Court, here fail to recognize: Louisville Metro's unmatched size, unique character, and tax base can in fact provide a rational basis for treating cities in Kentucky's only consolidated local government differently. The Circuit Court's rationale for concluding otherwise should not be reinstated.

The Circuit Court did not consider any of the proffered reasons discussed above for why cities in a county with a consolidated local government are different when it comes to solid waste management. Instead, the Circuit Court reasoned "[i]f anything, the larger population and greater number of cities logically increases the importance of county-wide planning."[88] The Circuit Court also noted that "[u]nder this legislation, there could be eighty-seven (87) [sic] solid waste plans in effect in Jefferson County, and it is highly likely

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[85] Id. at 715.
[86] Id. at 715 – 716.
[87] Id.
[88] Tab 1, R at 886.

that those plans would ultimately impose policies that would be at cross-purposes for some important aspects of the plans."[89] And indeed the Appellants here reiterate these points in an attempt to convince the Court to reinstate the Circuit Court's decision. However, concerns like these are appropriately addressed by the General Assembly, not the reviewing court. As expressed by the Court of Appeals, citing to Bilyeu, "we do not decide the wisdom of the action of the General Assembly."[90] Rather the operative question is if the General Assembly had a rational basis to apply HB 246 only in a county with a consolidated local government. For the reasons stated above, the Court of Appeals' decision finding such a rational basis should be affirmed.

II. HB 246 does not violate Section 156a of the Constitution.

Below, the Court of Appeals properly recognized that "Kentucky courts have historically considered whether challenged legislation violates these three sections [59, 60, and 156a] in tandem" and found that HB 246 did not violate any of these three provisions.[91] Yet Appellants would have this honorable Court follow the Circuit Court's decision which summarily found that HB 246 violates Section 156a of the Kentucky Constitution.[92]

The Circuit Court's decision on this ground should not be reinstated. In pertinent part, Section 156a of the Kentucky Constitution states:

> The General Assembly may provide for the creation, alteration or boundaries, consolidation, merger, dissolution, government, functions, and officers of cities. The General Assembly shall create such classifications of cities as it deems necessary based on population, tax base, form of government, geography, or any other reasonable basis and enact legislation relating to the classifications. All legislation relating to cities of a certain

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[89] Id. at 886 – 87.
[90] Tab 2, Opinion at p. 19 – 20 (*citing* Bilyeu, 684 S.W.2d at 416).
[91] Tab 2, Opinion at p. 13, 26.
[92] Tab 1, R at 884 – 85.

> classification shall apply equally to all cities within the same classification.[93]

Section 156a is a relatively new provision that replaced Section 156, in part, in 1994. Section 156 previously created six (6) classifications of cities.[94] Section 156a, by contrast, gives the General Assembly general authority of classifying cities, which the General Assembly exercised to create a two-class system: first-class cities and home-rule cities.[95]

The Circuit Court relied upon the third sentence of Section 156a in ruling that HB 246 was unconstitutional under this provision. That sentence advises "[a]ll legislation relating to cities of a certain classification shall apply equally to all cities within that same classification."[96] The Circuit Court reasoned, and the Appellants here argue, that HB 246 treats the eighty-three (83) home-rule cities in Jefferson County, including Bancroft, differently from home-rule cities statewide, in violation this portion of Section 156a.[97] However, this conclusion is incorrect for three reasons.

First, the Circuit Court focused on one sentence of Section 156a, excluding the remainder of the provision. As quoted above, Section 156a also states that "[t]he General Assembly may provide for the creation, alteration of boundaries, consolidation, merger, dissolution, *government, functions,* and officers of cities."[98] Importantly, this sentence places no limits on the General Assembly's ability to legislate with respect to the "government" or "functions" of cities. Indeed the mention of the "government" and "functions" of cities in Section 15a constitutionally codifies the first part of the Mannini

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[93] Ky. Const. §156a.
[94] Ky. Const. §156 (1891).
[95] *See* KRS 81.005(1).
[96] Tab 1, R at 884 – 85.
[97] Id.
[98] Ky. Const. §156a (emphasis added).

test, discussed above, [99] which allows the General Assembly to legislate about "the organization or incidents" of local government.[100] As explained previously, HB 246 concerns the "government" and "functions" of cities by directing when cities in a county with a consolidated local government are the decision-maker with respect to solid waste management.[101]

Second, as noted by the Court of Appeals, Section 156a tracks the constitutional analysis under Sections 59 and 60. Thus, the fact that HB 246 is constitutional under Sections 59 and 60, again as discussed above,[102] means that HB 246 is likewise constitutional under Section 156a. Indeed this was the exact holding of the Court of Appeals, below.[103] Kentucky courts historically treated the predecessor to Section 156a – Section 156 – as part of the special-legislation analysis under Sections 59 and 60.[104] And, importantly, the prior Section 156 contained language that is analogous to the provision in Section 156a that the Circuit Court used to strike down HB 246 here.[105] Thus, the Court should follow the same analysis as the Court of Appeals and apply Section 156a as part of the special-legislation analysis under Sections 59 and 60 and come to the same conclusion – that HB 246 is valid under all three provisions.

Third, and finally, HB 246 is not "legislation relating to cities of a certain classification" so as to implicate Section 156a. Rather, HB 246 concerns both a

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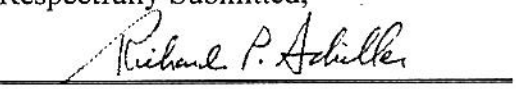
[99] *See* Section I(A), *supra*.
[100] Bilyeu, 643 S.W.2d at 416.
[101] *See* Section I(A), *supra*.
[102] *See* Section I, *supra*.
[103] Tab 2, Opinion at p. 26.
[104] *See e.g.*, Mannini, 172 S.W.2d at 632 ("In determining whether the Act in question is special legislation or local legislation we must consider section 156 in connection with sections 59 and 60.")
[105] Ky. Const. §156 (1891) ("The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.")

consolidated local government and the cities therein.[106] There is no constitutional problem with legislating about a consolidated local government and its cities. Indeed, the General Assembly has already adopted special rules for cities within a consolidated local government. For example, KRS 67C.111(3) provides different rules for the annexation of cities within a consolidated local government, and KRS 67C.111(2) restricts the incorporation of cities in a county containing consolidated local government. Like these two statutes, HB 246 concerns both a consolidated local government and cities within its borders and does not run afoul of Section 156a.

CONCLUSION

HB 246 is a legitimate exercise of legislative power. The judiciary has become "'greatly liberalized' in upholding the right of the legislature to classify local government entities" because of the judiciary's "reluctance to encroach upon the powers of the legislature, one of the three partners in Kentucky state government."[107] That deferential approach, which takes into account Kentucky's strict separation of powers doctrine, necessitates affirming the Court of Appeals' decision that HB 246 is constitutional.

Respectfully Submitted,



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[106] *See e.g.*, 2017 Ky. Acts, ch. 105, §1(14) (limiting the power of a consolidated local government).
[107] Bilyeu, 634 S.W.2d at 416.

APPENDIX

Tab 1: Circuit Court's Opinion and Order, December 28, 2017.[108]

Tab 2: Court of Appeals' Opinion, July 26, 2019.

Tab 3: House Bill 246.[109]

[108] R at 875 – 889.
[109] 2017 Ky. Acts, ch. 105.