Supreme Court of Kentucky

No. 2021-SC-518
(Consolidated with Nos. 2021-SC-519, -520, -522)

COMMONWEALTH OF KENTUCKY
ex rel. ATTORNEY GENERAL DANIEL CAMERON — *Appellant*

v. Court of Appeals, No. 2021-CA-1320;
Franklin Circuit Court, No. 21-CI-461

HOLLY M. JOHNSON, in her official capacity as Secretary of the Kentucky Finance and Administration Cabinet, *et al.* — *Appellees*

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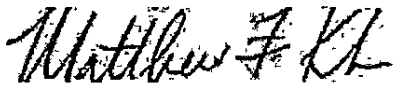

INTRODUCTION

This appeal challenges the constitutionality of 2021 House Bill 563, which creates a tax credit that encourages private donations for lower-income Kentucky students who in turn use the donations to pay for education-related expenses, including in some cases tuition at nonpublic schools. This Court should reverse the Franklin Circuit Court's judgment that HB 563 violates Sections 59 and 184 of the Kentucky Constitution.

STATEMENT CONCERNING ORAL ARGUMENT

The Court's order granting transfer stated that oral argument will be heard. The Commonwealth looks forward to addressing the Court.

STATEMENT OF POINTS & AUTHORITIES

STATEMENT OF THE CASE

This case is about the General Assembly's ability to help lower-income students in Kentucky have educational opportunities that their families could not otherwise afford. Dollars from the public fisc do not fund these opportunities; private donations do. The donors who make these contributions, it is true, can claim a tax credit on their state tax returns. But that is no different from donors who for decades have claimed tax deductions for charitable giving, including to private schools.

The Franklin Circuit Court permanently enjoined enforcement of this law for two reasons. First, the court found problematic the provision that allows private donations to pay for tuition at nonpublic schools if the student lives in a county with more than 90,000 residents. Because this part of the law does not apply statewide, the circuit court deemed it special or local legislation prohibited by Section 59 of the Constitution. But a population distinction like that in HB 563 has long been permissible under Section 59. Second, the circuit court held that the law violates Section 184 of the Constitution because it purportedly sends public dollars to private schools. This conclusion not only misconstrues Section 184 and the law in question, but it also casts doubt on other tax benefits for charitable giving. This Court should reverse.

* * *

Since at least 1970, Kentucky taxpayers have donated to nonprofit organizations, including to private schools, and claimed those donations as tax deductions. KRS 141.019(2); 26 U.S.C. § 170(a)(1) & (c)(2)(B).[1] For example, say a

[1] KRS 141.010(11) (1970); 26 U.S.C. § 170(c)(2)(B) (1970).

taxpayer makes a $1,000 donation to a private school. The taxpayer generally can deduct that donation from his or her gross income for income-tax purposes. Come April 15, that deduction can reduce the amount that the taxpayer owes the Commonwealth.

House Bill 563. The law challenged here operates much the same way. Under HB 563, a Kentucky taxpayer can make a donation to an "Account Granting Organization," or AGO for short. KRS 141.508, 141.502(1). That donation allows the taxpayer to claim a tax credit. KRS 141.508, 141.522. In general, a taxpayer can claim 95 percent of his or her donation to an AGO as a tax credit. KRS 141.522(3). So returning to the example above, if a taxpayer donates $1,000 to an AGO, the taxpayer generally can claim a $950 tax credit. Thus, like Kentucky's longstanding tax deduction for charitable giving, HB 563 allows donations that go to private schools to reduce a taxpayer's liability.

The AGO to which a taxpayer gives the private donation must be a 501(c)(3) nonprofit organization that uses the contribution to pay for educational expenses of Kentucky families. KRS 141.510(2)(b), 141.512(1). At least 90 cents of every dollar an AGO receives in donations go to this end. KRS 141.512(1). Kentucky students receive these donations through an "Education Opportunity Account," or EOA. KRS 141.502(4). Not every Kentucky student is eligible for an EOA. Only families with an annual income below an established threshold—about $85,000 for a family of four—are eligible. KRS 141.502(6), 141.506(3); Vol. 5, R. 629. And in general, AGOs must prioritize students from families with the lowest incomes. KRS 141.504(7)–(8). In this

way, HB 563 helps route private donations to the Kentucky students who need them most. This serves HB 563's stated purpose of "giv[ing] more flexibility and choices in education to Kentucky residents and . . . address[ing] disparities in educational opportunities available to students." KRS 141.500.

Kentucky students at public and non-public schools can use EOA funds for all manner of educational purposes. *See* KRS 141.502(6). For example, EOA funds can pay for tutoring, textbooks, a computer needed for school work, preparatory courses and fees for the SAT or ACT, and speech or audiology therapies. KRS 141.504(2)(a).

In some cases, EOA funds can pay for tuition at a nonpublic school. KRS 141.504(2)(b). This provision only applies if the student lives in a county with a population above 90,000 persons as determined by the 2010 Census, *id.*, which was the most recent census when the legislature passed HB 563.[2] The General Assembly justified this population distinction as warranted "because students in these counties have access to substantial existing nonpublic school infrastructure" and because "there is capacity in these counties to either grow existing tuition assistance programs or form new nonprofits from existing networks that can provide tuition assistance to students over the course of the pilot program." *Id.*

Two other parts of HB 563 bear mention. First, HB 563 is a "pilot program." *Id.* Unlike the typical statute, which remains in the KRS until the legislature amends or repeals it, HB 563 only applies for five taxable years—from 2021 through 2025. KRS

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2 *New Data Will Show How Racial & Ethnic Makeup of Neighborhoods Has Changed Since the 2010 Census*, U.S. Census Bureau (July 12, 2021), *available at* https://perma.cc/FYX4-S2ZV.

141.522(1)(a). As a pilot program, HB 563 requires the Department of Revenue to report its results to an interim legislative committee so that it can study whether to extend the law. KRS 141.524. Second, HB 563 sets a hard cap on the amount of private donations eligible for a tax credit. For each taxable year in which HB 563 is in effect, only $25 million in tax credits can be used—for $125 million in tax credits over five years. KRS 141.522(2).

This lawsuit. The Appellees sued to enjoin HB 563, claiming it impermissibly "redirects state revenues" to nonpublic schools. Vol. 1, R. 2. They brought four claims. Vol. 1, R. 3–4. First, they sued under Section 183 and *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). Vol. 1, R. 3, 19. Second, they claimed that HB 563 sends public dollars to nonpublic schools in violation of Section 184 of the Constitution. Vol. 1, R. 3, 19–20. Third, they claimed that HB 563 does not serve a public purpose in violation of Sections 3, 171, and 186 of the Constitution. Vol. 1, R. 3–4, 20–21. And fourth, they argued that HB 563 improperly delegates legislative power to AGOs. Vol. 1, R. 4, 21–22.

The Commonwealth intervened to defend HB 563, Vol. 3, R. 446–48, as did a parent and a great-grandparent of Kentucky students who would be eligible for EOA funds under HB 563, *id.*

The Appellees and the Intervenors cross-moved for summary judgment. In their motion for summary judgment, the Appellees tried to introduce a new claim—that HB 563 violates Section 59 of the Constitution by allowing EOA funds to pay for tuition at nonpublic schools only in counties with a population above 90,000 persons.

Vol. 5, R. 682–83. The circuit court allowed this last-minute amendment over the Intervenors' objections. Vol. 16, R. 2364–67.

The circuit court's decision. The Franklin Circuit Court, Judge Phillip Shepherd, granted summary judgment to the Appellees. Ex. 1 at 2, 26–28. The circuit court viewed HB 563 very differently from the General Assembly. The court ruled that "[t]here is nothing 'private' or 'charitable' about the funding of the AGOs . . . ." *Id.* at 7. Instead, "the legislature has essentially taken an account receivable to the Commonwealth of Kentucky, assigned it to these private AGO's, and forgiven the taxpayer's liability to the state." *Id.*

The circuit court invalidated HB 563 for two reasons. First, the court found that HB 563 is special or local legislation in violation of Section 59. *Id.* at 9–15. It determined that the "singling out of a few counties with populations of over 90,000 for the lucrative benefit of tuition assistance for private schools, to the exclusion of all other counties (even those with robust private school options for students), falls squarely within the prohibition of §59." *Id.* at 9. The court went a step further and found that the General Assembly lacked even a rational basis for imposing this population distinction. *Id.* at 10. The circuit court also refused to sever the population distinction to save HB 563. To do so, the court reasoned, would be a "radical step." *Id.* at 13.

The circuit court also found that HB 563 violates Section 184 of the Constitution. *Id.* at 15–18. On this count, the court mostly relied on the language in Section 184 that "no sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters." *Id.* at

15 (emphasis omitted) (citation omitted). HB 563, the court reasoned, "raises a sum of money for private education outside the system of common schools. That it does so through a tax credit rather than a direct appropriation is not relevant, applying the plain language of §184." *Id.*

The circuit court declined to resolve the Appellees' remaining claims. *Id.* at 18–26. Even though all parties agreed that further proof was unnecessary, Vol. 17, R. 2418–22, the circuit court found that there are "potential disputed issues of material fact," Ex. 1 at 2. The circuit court thus made the part of its opinion granting summary judgment final and appealable but "reserve[d] jurisdiction for further proceedings on all other claims." *Id.* at 28.

ARGUMENT

HB 563 comes to this Court with a "strong presumption of constitutionality." *Wynn v. Ibold, Inc.*, 969 S.W.2d 695, 696 (Ky. 1998). To enjoin it, the Appellees must show a constitutional violation that is "clear, complete and unmistakable." *Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998). And if there is any question about HB 563's constitutionality, the law gets the benefit of the doubt. *See*

Teco/Perry Cnty. Coal v. Feltner, 582 S.W.3d 42, 45 (Ky. 2019); *Musselman v. Commonwealth*, 705 S.W.2d 476, 477 (Ky. 1986).

HB 563 is constitutional. This lawsuit has already deprived Kentucky families of the benefit of HB 563 for nearly two of the five taxable years in which the law is in effect. The Court should reverse.

I. HB 563 does not violate Section 59 of the Constitution.[3]

The circuit court was wrong to find that a single provision in HB 563 is special or local legislation. That provision is KRS 141.504(2)(b), which allows qualifying Kentucky families who live in a county with more than 90,000 residents as determined by the 2010 Census to use EOA funds to pay for tuition at nonpublic schools. But a law that only applies in counties with a certain population is not local or special legislation. Even if the Court disagrees, it should sever any problematic provision.

1. This Court recently reset the field in Section 59 challenges by returning to the governing test "as understood in 1891." *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 566 (Ky. 2020). Under this test, a law violates Section 59 if it "applies to a particular individual, object or locale." *Id.* at 573. A law that applies statewide does not apply to a particular locale. *Id.* By contrast, a law that applies only in a named county is problematic. *Singleton v. Commonwealth*, 175 S.W. 372, 373 (Ky. 1915) ("[T]he Legislature could not, without violating [Section 59], enact a law for the punishment of a designated crime in Henry County."). Such a law "single[s] out" a "particular . . . locality." *See Cameron v. Beshear*, 628 S.W.3d 61, 77 (Ky. 2021). But what about a law, like HB 563,

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[3] The Commonwealth preserved this issue. Vol. 15, R. 2152–55, 2336–45.

that only applies in counties with a population above a certain threshold? Does such a law only apply to a particular place in violation of Section 59?[4]

The Court has not addressed this question in the wake of *Calloway County*. But this Court's predecessor long ago resolved it. Shortly after the adoption of our present Constitution, this Court's predecessor repeatedly upheld laws, like HB 563, that only applied in counties with a certain population. Take *Stone v. Wilson*, 39 S.W. 49 (Ky. 1897), *overruled on other grounds by Vaughn v. Knopf*, 895 S.W.2d 566 (Ky. 1995). This Court's recent decision in *Calloway County* held out *Wilson* as an early opinion that correctly stated the governing test for a Section 59 challenge. *Calloway Cnty.*, 607 S.W.3d at 567. The law at issue in *Wilson* only applied "in a county having a population of over forty thousand and under seventy-five thousand." 39 S.W. at 50 (citation omitted). This law, *Wilson* held, "was both authorized and required by the constitution." *Id.* at 51. So a decision that *Calloway County* cited as stating the proper test for a Section 59 challenge upheld a law that, like HB 563, only applied in counties with a specified population.

Wilson's holding is not an outlier. In *Winston v. Stone*, this Court's predecessor explained that "[t]he contention of appellants that the statute in question is not

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[4] At one point, *Calloway County* indicated that a law can be special or local by applying to particular places plural. 607 S.W.3d at 566. But follow-on cases have asked whether a law applies to a particular place singular. *See Cameron*, 628 S.W.3d at 78; *Cates v. Kroger*, 627 S.W.3d 864, 872 (Ky. 2021); *O'Bryan v. Zip Express*, 636 S.W.3d 457, 463 (Ky. 2021). Any question about this issue, however, need not be resolved here given that a law that applies to counties above a certain population does not apply to a particular place or even to particular places, as discussed below. In any event, focusing on whether a law applies to particular places but not others seems to be a classification issue—the domain of Sections 1, 2, and 3 of the Constitution. *See Calloway Cnty.*, 607 S.W.3d at 573.

constitutional, because it applies only to counties having a population in excess of 75,000, and is therefore in violation of, section 59 of the present constitution, cannot be sustained." 43 S.W. 397, 398 (Ky. 1897), *overruled on other grounds by Vaughn v. Knopf*, 895 S.W.2d 566 (Ky. 1995). And in *Commonwealth v. Chinn*, this Court's predecessor did not "doubt . . . the authority of the legislature to classify the other counties of the state, and to fix a salary for the respective county officers, as in this case; taking care to make it general, and not obnoxious to the several provisions of the constitution inhibiting special legislation." 31 S.W. 727, 728 (Ky. 1895). In 1935, this Court's predecessor summed things up this way: For "more than forty years," a "classification on the basis of the population of the county alone was not special or local legislation within the purview of section 59 of the Constitution." *Herald v. Talbott*, 88 S.W.2d 303, 305 (Ky. 1935); *see also Jefferson Cnty. Police Merit Bd. v. Bilyeu*, 634 S.W.2d 414, 414–17 (Ky. 1982) (upholding law that only applied "in counties containing a population of 600,000 or more").

Wilson and cases like it establish that Section 59 allows the General Assembly to legislate only in counties with a specified population. There is nothing special or local about such a law. *See* Laurance B. VanMeter, *Reconsideration of Kentucky's Prohibition of Special & Local Legislation*, 109 Ky. L.J. 523, 570 (2021) ("The statute, in *Wilson*, obviously involved a classification of counties, and thus was not within the prohibition

of Section 59."). And as *Calloway County* tells us, *Wilson* tracks the applicable test under Section 59. 607 S.W.3d at 567.

HB 563 thus does not apply to a particular place (or to particular places) in violation of Section 59. Instead, like the statute upheld in *Wilson*, KRS 141.504(2)(b) only applies in counties with a certain population. Put more simply, HB 563 merely involves a "classification of counties, and thus [is] not within the prohibition of Section 59." VanMeter, 109 Ky. L.J. at 570.

The circuit court rested its contrary conclusion on *University of Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010). Although *Pennybacker* did not apply the proper test for a Section 59 challenge, this Court later clarified that *Pennybacker* reached the "correct result." *Calloway Cnty.*, 607 S.W.3d at 573 n.19. But the statute in *Pennybacker* differed from HB 563 in at least one critical way. The legislature narrowly wrote the law in *Pennybacker* so that it applied to only one particular school—the statute could "only be read" that way. *Pennybacker*, 308 S.W.3d at 683. As the Court explained, there was a "sole institution" that "fit" the "description" set by statute. *Id.*; *accord Calloway Cnty.*, 607 S.W.3d at 573 n.19 (stating that the law in *Pennybacker* "had clearly been drafted to provide scholarships to a[] . . . pharmacy school at a private religious university"). HB 563 is not written that way. It does not apply to one particular school. It applies in all counties above a specified population.

The circuit court also found that the General Assembly lacked a rational basis for applying HB 563 only in counties with more than 90,000 residents. Ex. 1 at 10. It is true that Kentucky courts have applied some version of rational basis review when

applying Section 59. *See, e.g., Zuckerman v. Bevin*, 565 S.W.3d 580, 600 (Ky. 2018). But that is part of the "muddling" of constitutional provisions that *Calloway County* criticized. 607 S.W.3d at 567; *accord Cates v. Kroger*, 627 S.W.3d 864, 872 (Ky. 2021). In fact, this Court's recent Section 59 decisions have not applied rational basis review. *Calloway Cnty.*, 607 S.W.3d at 573; *Cates*, 627 S.W.3d at 872; *Cameron*, 628 S.W.3d at 77.

In any event, a rational basis exists for limiting the use of EOA funds for tuition at nonpublic schools to students in counties with a population above 90,000 persons. To satisfy the low bar of rational basis review, the General Assembly need not provide its reasoning for a classification. *Zuckerman*, 565 S.W.3d at 596. But the legislature showed its work here. It stated:

> [S]tudents in [counties with more than 90,000 residents] have access to substantial existing nonpublic school infrastructure and there is capacity in these counties to either grow existing tuition assistance programs or form new nonprofits from existing networks that can provide tuition assistance to students over the course of the pilot program. Pursuant to KRS 141.524, the General Assembly shall assess whether the purposes of the EOA program are being fulfilled.

KRS 141.504(2)(b). This justification readily satisfies rational basis review.

The circuit court disagreed by pointing out that counties with fewer than 90,000 residents also have "existing accredited private schools," the point being that KRS 141.504(2)(b) is allegedly underinclusive. Ex. 1 at 10. But that is not a problem under

rational basis review, which allows for "an imperfect fit between means and ends."[5] *See Zuckerman*, 565 S.W.3d at 596 (citation omitted).

2. HB 563 is not special or local legislation for the further reason that it is not the type of law with which Section 59 is concerned. The purpose of Section 59, this Court recently held, "is rooted in legislative efficiency." *Calloway Cnty.*, 607 S.W.3d at 570–71. Put differently, Section 59 "put an end" to the General Assembly passing a "proliferation" of laws addressing "exceedingly mundane and trivial matters unworthy of state legislative consideration." *Id.*; *accord* VanMeter, 109 Ky. L.J. at 577 (arguing that "[f]rom a high-level view" the test under Section 59 "emphasize[s] a legislative efficiency objective"). So, at bottom, Section 59 guards against "legislative inefficiency and wasted time" by the General Assembly. *Calloway Cnty.*, 607 S.W.3d at 570.

HB 563 is the definition of legislative efficiency. It is a "pilot program," not a regular part of the KRS. KRS 141.504(2)(b), 141.522(1)(a). It only applies for five taxable years. *Id.* It only allows a defined amount of tax credits. KRS 141.522(2). And it only applies to students who live in counties with a population above 90,000 persons. KRS 141.504(2)(b). Keeping with the pilot-project theme, HB 563 directs the General Assembly to study whether the law "fulfill[s]" its "purposes" and requires the

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[5] The circuit court also chided the legislature for allegedly including "generous income limits" in HB 563. Ex. 1 at 5–6. To the extent this was another means-ends criticism, the circuit court overlooked that, among first-time applicants for EOA funds, AGOs must prioritize those who have "the most demonstrated financial need." *See* KRS 141.504(8)(a). And if a student intends to use EOA funds for tuition at a nonpublic school, the "demonstrated financial need" of the student's parents must be considered. KRS 141.504(1)(a).

Department of Revenue to provide the Interim Joint Committee on Appropriations and Revenue with detailed information about the law's workings. KRS 141.524.

All this goes to show that applying KRS 141.504(2)(b) only in counties above a certain population is simply part of the pilot program. It will give the General Assembly real-world data to study the law to decide whether to make broader and continuing changes to Kentucky law. HB 563, then, is not an example of "legislative inefficiency" in which the General Assembly is legislating about "exceedingly mundane and trivial matters unworthy of state legislative consideration." *Calloway Cnty.*, 607 S.W.3d at 570–71. No, HB 563 is a model of legislative efficiency. It shows that the General Assembly is carefully considering an important public policy before legislating more broadly. That is good government, and it promotes Section 59's goal of legislative efficiency.

HB 563 is not the first time that the Commonwealth has approached an issue by testing a pilot project. Consider the way Kentucky's family courts came about. A task force created by the legislature initially recommended that this Court "establish by rule, a pilot project for the 1990–92 biennium with at least one urban and one rural location and that the General Assembly fund the project." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 681 (Ky. 1994). Using a pilot project to study the issue "reflect[ed] the practice" followed in three sister States. *Id.* This Court rejected various constitutional challenges to the family-court pilot program. It reasoned that "[t]he project is based on the *temporary* assignment of district and circuit judges as special judges to serve in a *temporary* capacity." *Id.* at 683 (emphasis added). And it blessed the judiciary and the General Assembly jointly "analyzing the methods to make a system of government

including the administration of judicial matters more effective." *Id.* at 686. This careful study of an important issue before effecting permanent change bore much fruit. It led to the Commonwealth's "move[] toward a unified family court, a court specializing in, and with jurisdiction to address, a broad array of legal problems confronting families." *Morgan v. Getter*, 441 S.W.3d 94, 105 (Ky. 2014) (citation omitted).

The General Assembly intends to use HB 563 in much the same way. It will enable the legislature to study based on actual data whether to make AGOs and EOAs a continuing part of the KRS. That the General Assembly chose to apply part of this pilot program to students in counties with a certain population does not violate Section 59. *See St. Luke Hosps., Inc. v. Commonwealth, Cabinet for Health & Fam. Servs., Office of Certificate of Need*, 254 S.W.3d 830, 832–34 (Ky. App. 2008) (rejecting special-legislation challenge (pre-*Calloway County*) to "pilot project" that applied to "one hospital in eastern Kentucky and one hospital in western Kentucky"); *see also Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1088–91 (Penn. 2003) (rejecting special-legislation challenge to education law that did not apply statewide); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 213–14 (Ohio 1999) (same).

3. Even if the Court finds that part of HB 563 violates Section 59, it should sever that provision and leave the rest of HB 563 intact. The circuit court rejected this scalpel-like approach and instead broadly enjoined KRS 141.500 through 141.524. Ex. 1 at 13–15; Ex. 2 at 4. This overbroad relief cannot stand.

HB 563 does not have a severability clause. But all that means is Kentucky's catch-all severability statute applies. KRS 446.090. The General Assembly "originally

created [this provision] in order to obviate the necessity of attaching a severability clause to each act as it is passed." *Martin v. Commonwealth*, 96 S.W.3d 38, 57–58 (Ky. 2003). It reflects the "well-established rule that portions of a statute which are constitutional ma[y] be upheld while other portions are eliminated as unconstitutional." *Ky. Mun. League v. Commonwealth Dep't of Lab.*, 530 S.W.2d 198, 200 (Ky. 1975).

Under Kentucky's severability statute, the Court can refuse to sever a problematic provision in three circumstances, only one of which could be relevant here. More specifically, severance is inappropriate where the constitutional parts of a law are "so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part." KRS 446.090.

In conducting a severability analysis, three points should be kept in mind. First, the severability statute focuses on the text of the challenged law and how it operates. Second, the word "apparent" in KRS 446.090 does significant work. If there is any uncertainty about whether the constitutional provisions are "so essentially and inseparably connected" to the problematic part, the Court should err on the side of severance. And third, in applying KRS 446.090, this Court's case law asks whether severing the unconstitutional provision prevents the law from serving its purpose. *See Puckett v. Miller*, 821 S.W.2d 791, 796 (Ky. 1991); *Ky. CATV Ass'n, Inc. v. City of Florence*, 520 S.W.3d 355, 364–65 (Ky. 2017).

Against this background, the Court should sever any problematic provision in HB 563. If the Court finds that KRS 141.504(2)(b) violates Section 59, it has at least

two options short of declaring HB 563 unconstitutional. Which option the Court chooses depends on what the Court finds to be the Section 59 issue.

Option One: If the Court finds that calculating a county's population based on the 2010 Census creates a Section 59 problem by selecting a group of counties, there is an easy remedy: sever the date qualification in KRS 141.504(2)(b). Under this option, the Court would need only to sever the word "2010." This one-word remedy would allow qualifying residents in any county with a population above 90,000 persons as of the most recent Census to use EOAs to pay for private-school tuition.

This narrow remedy follows from KRS 446.090. The General Assembly undoubtedly chose to use the 2010 Census because it was the most recent decennial census available at the time of passage. There can be no argument that using the 2010 Census, rather than the most recent Census, is irretrievably connected to the other parts of HB 563. The circuit court did not contest this contention; it simply chose not to address it.

Option Two: If the Court finds that applying KRS 141.504(2)(b) only in counties above a certain population is problematic under Section 59, the Court should simply sever the population distinction. Under this scenario, the Court would sever the following language from KRS 141.504(2)(b): "that are residents of counties with a population of ninety thousand (90,000) or more, as determined by the 2010 decennial

report of the United States Census Bureau." Doing so would mean qualifying students statewide could use EOA funds for tuition at nonpublic schools.

The Court of Appeals has endorsed such a remedy upon a finding that a provision is unconstitutional. It explained that where a statute is underinclusive, as the circuit court found here, two "remedial alternatives exist": "[A] court may either declare [the law] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend coverage of the statute to include those who are aggrieved by the exclusion." *Commonwealth v. Meyers*, 8 S.W.3d 58, 62 (Ky. App. 1999) (emphasis omitted) (citation omitted). Given these two options, the U.S. Supreme Court prefers extending a statute's coverage over wholesale invalidation. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020) (plurality op.). Thus, if the Court determines that KRS 141.504(2)(b) is impermissible because it only applies in counties with a certain population, the Court should simply sever the problematic language so that KRS 141.504(2)(b) applies statewide.

The court below viewed this remedy as "radical." Ex. 1 at 13. It gave two reasons for that. First, the circuit court focused on the close votes to pass HB 563 in the House of Representatives (48–47) and the Senate (21–15). *Id.* at 14. From these narrow margins, the circuit court inferred that "the most logical conclusion is that *any* material change in the bill would have jeopardized its passage." *Id.* at 15. But that is not how severability works. A tight legislative vote is not a license for the Judiciary to speculate about what may have prompted legislators to vote against a bill. The circuit court cited no precedent to justify its novel rationale. And, indeed, Kentucky

severability precedent has criticized such a free-ranging analysis of legislative history apart from the text of the relevant provision. *See Louisville/Jefferson Cnty. Metro. Gov't v. Metro Louisville Hospitality Coal., Inc.*, 297 S.W.3d 42, 45–46 (Ky. App. 2009).

Second, the court below refused to sever the population distinction in KRS 141.504(2)(b) because it saw the provision as "clearly central to the overall scheme of the Act." Ex. 1 at 14. The circuit court determined that this provision is "by far the most expensive item" in HB 563. *Id.* But the relevant question under KRS 446.090 is whether the rest of HB 563 is "so essentially and inseparably connected" to the population distinction that it is "apparent" that the General Assembly would not have otherwise passed HB 563.

This is a high bar, and the Appellees cannot meet it. The population distinction in KRS 141.504(2)(b) amounts to a mere 27 words of an 18-page bill. To state the obvious, HB 563 does much more than just allow private donations to fund tuition at a nonpublic school in counties with a given population. The bill also stands up an intricate scheme for AGOs and EOAs, KRS 141.502–.512, 141.516–.520; it creates tax credits and establishes rules governing them, KRS 141.514, 141.522; it provides a laundry list of education-related expenses other than tuition that EOA funds can cover, KRS 141.504(2); and it requires a legislative committee to study the results of the bill, KRS 141.524.

This is not to say that the population distinction is a trivial part of HB 563. As discussed above, it is consistent with HB 563 being a pilot program. But it is by no means "apparent" that the General Assembly would have balked at passing HB 563 if

the school-tuition provision merely applied statewide. Even with statewide tuition assistance, HB 563 can still ably serve its purpose of "giv[ing] more flexibility and choices in education to Kentucky residents and . . . address[ing] disparities in educational options available to students." KRS 141.500; *see Puckett*, 821 S.W.2d at 796 ("Severance of the [problematic] provision does not affect the intent of the legislative body in enacting the remainder of the order."). In reaching a contrary conclusion, the court below emphasized how "expensive" of a benefit KRS 141.504(2)(b) is. Ex. 1 at 14. The Commonwealth does not dispute that this provision will be important to many Kentucky families. But the other parts of the law matter too. And in any event, HB 563 sets a hard cap on the amount of tax credits that can be used each taxable year. KRS 141.522(2). So applying KRS 141.504(2)(b) statewide does not change the fiscal footprint of HB 563. With or without the population distinction, HB 563 can still serve its purpose of helping lower-income Kentucky families.[6]

II. HB 563 does not violate Section 184 of the Constitution.[7]

The circuit court found that HB 563 violates Section 184 of the Constitution because it allegedly sends public dollars to non-common schools without first submitting the issue to the voters. Vol. 1, R. 3. This argument misconstrues Section

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[6] The circuit court briefly suggested, Ex. 1 at 14, that severance is also inappropriate because "the remaining parts [of HB 563], standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly." *See* KRS 446.090. But severing the population distinction in KRS 141.504(2)(b) affects no other part of HB 563.

[7] The Commonwealth preserved this issue. Vol. 14, R. 1985–2012; Vol. 15, R. 2155–75, 2205–12.

184, which only prohibits (i) using public funds allocated to the Common School Fund for any other purpose and (ii) imposing a new tax specifically to benefit non-common schools without a vote of the people. HB 563 violates neither limitation. More to the point, Section 184 is not implicated merely by decreasing the tax burden of Kentuckians who donate to a nonprofit organization that in turn gives Kentucky students the means to obtain the education best suited to their needs. This conclusion reflects Section 184's text and history as well as case law interpreting it. A contrary result would call into question any tax benefit associated with charitable giving to nonpublic schools.

A. Section 184's text establishes its twin aims.

1. The best place to start in interpreting Section 184 is its text. That is where Kentucky courts look "first and foremost." *Westerfield v. Ward*, 599 S.W.3d 738, 747 (Ky. 2019) (citation omitted). "Where a constitutional provision is free from all ambiguity there is no room for interpretation or addition. It must be accepted by the courts as it reads." *Commonwealth v. Claycomb by and through Claycomb*, 566 S.W.3d 202, 215 (Ky. 2018) (citation omitted).

A plain reading of Section 184 reveals that it accomplishes three things. First, it establishes the Common School Fund. Ky. Const. § 184; *see* KRS 157.010. Second, Section 184 protects that fund. Its second sentence says: "The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise *for purposes of common school education*, shall be appropriated to the common schools, and to no other purpose." Ky. Const. § 184 (emphasis added). In other words, sums

produced specifically "for purposes of common school education" must be used for that purpose. And finally, Section 184's third sentence prohibits imposing new *taxes* to benefit education outside the common-school system without a majority vote: "No sum shall be raised or collected for education other than in common schools until the question of *taxation* is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such *taxation.*"[8] *Id.* (emphasis added).

A plain reading of Section 184 shows it prohibits two things: using money allocated to the Common School Fund for another purpose, and imposing a new tax to benefit education outside the common-school system without a majority vote. There is nothing in the text of Section 184 that prohibits the General Assembly from aiding non-common schools through other means. Yet the Court need not go that far to uphold HB 563. All it must hold is that Section 184 does not prohibit the General Assembly from decreasing a Kentuckian's tax burden for having donated to a nonprofit organization that then helps lower-income Kentucky students pursue the education best suited to them. The text of Section 184 nowhere contains such a restriction.

2. In concluding otherwise, the circuit court misinterpreted Section 184 in several key ways. The circuit court first found that the phrase "raised or collected" in the third sentence of Section 184 encompasses *decreasing* taxes. Ex. 1 at 15–18. But in normal conversation, no one would say that lowering taxes "raise[s] or collect[s]" public

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[8] The final part of Section 184 ensures that the taxes imposed for education before the 1891 Constitution remained in place until the General Assembly says otherwise. This part of Section 184 states: "Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law." *Id.*

funds. It does the opposite. The circuit court concluded otherwise by isolating "raised or collected" from the rest of the sentence. The clause "[n]o sum shall be raised or collected for education other than in common schools" is followed by the language "until the question of *taxation* is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of *such taxation.*" Ky. Const. § 184 (emphasis added). Not only that, the next clause of Section 184 similarly states, "Provided, The *tax* now imposed . . . . shall remain until changed by law." *Id.* (emphasis added). The repeated use of "taxation" or "tax"—three times in quick sequence—conveys that Section 184 only prohibits imposing new taxes on Kentuckians to pay for education outside the common schools. It does not prohibit, as HB 563 does, merely decreasing Kentuckians' tax burden. Any other conclusion would require finding that Section 184 requires the peculiar result of putting a tax decrease to a vote of the people. The circuit court admitted that its reading leads to this result. Ex. 1 at 15.

Second, relying on the second sentence of Section 184, the circuit court found that HB 563 impermissibly uses funds for non-common schools that were "produced by taxation or otherwise." Ex. 1 at 15–16. The circuit court homed in on the "or otherwise" part of this provision. *Id.* But the "or otherwise" language does not encompass a tax decrease. A phrase is to be interpreted by the company it keeps in the relevant provision. *Carson & Co. v. Shelton*, 107 S.W. 793, 793 (Ky. 1908). It is unreasonable to read the phrase "taxation or otherwise" to mean "taxation or a tax decrease." Put more directly, "taxation or otherwise" does not mean "taxation and the opposite of taxation." Even if the Court disagrees, HB 563's tax credits are not

"produced . . . for purposes of common school education," as Section 184 also requires. Rather, these donations were produced to "give more flexibility and choices in education to Kentucky residents and to address disparities in educational options available to students." KRS 141.500.

The circuit court's reading of Section 184 also introduces tension into the Constitution. It is well-established that "the various provisions of the Constitution relating to" a particular subject "should be construed together and if possible they should be harmonized." *Runyon v. Smith*, 212 S.W.2d 521, 522 (Ky. 1948). Under Section 170 of the Constitution, "[t]here shall be exempt from taxation . . . institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education . . . ." Ky. Const. § 170; *see City of Louisville v. Bd. of Trs. of Nazareth Literary & Benevolent Inst.*, 36 S.W. 994, 994 (Ky. 1896). It is incongruent to read Section 184 to prohibit decreasing the tax burden of those who make private-school education more available when Section 170 already pursues a similar end.

In sum, all that the plain text of Section 184 prohibits is using common-school funds for any other purpose and enacting a new tax to pay for non-common schools.

B. The history of Section 184 reflects its text.

In interpreting a constitutional provision, this Court also considers the history and the constitutional debates that led to the provision's adoption. *Calloway Cnty.*, 607 S.W.3d at 572–73. The history of Section 184 confirms what its text says.

1. Section 184's precursor.

Parts of Section 184 can be traced to 1836 when the federal government distributed to Kentucky its share of surplus revenue. Debates from 1849 Constitutional Convention at 880–81 (1849 Debates); Debates from 1890 Constitutional Convention at 4466–69 (1890 Debates); *Higgins v. Prater*, 14 S.W. 910, 911–12 (Ky. 1890). Of that surplus revenue, "Kentucky pledged . . . that she would set apart $850,000 of that money for common school purposes." 1849 Debates at 881; *see also* 1890 Debates at 4467–69; *Higgins*, 14 S.W. at 911–12. But the General Assembly took that money designated for common schools, used it for other things, and issued bonds to refund what it took, but then literally burned those bonds seemingly to absolve the Commonwealth from having to repay them. *See Higgins*, 14 S.W. at 911–12.

At the 1849 Convention, this injustice was front of mind for the Delegates. *See id.* at 912 ("The public mind was still excited in regard to the then recent invasion of the common-school fund."). So in proposing a new provision, they had three goals in mind: "First, [to] enjoin[] it on the legislature to establish and keep in existence a system of common schools throughout the state . . . ; 2nd, to secure the fund heretofore mentioned . . . ; 3rd, to prevent the legislature from diverting the interest which may become due on said fund to any other purpose than common schools." *See* 1849 Debates at 891.

Important here, the Delegates also warned of imposing new taxes for common-school education without input from the people. Delegate Hardin, for example, objected to raising the two-cent education tax approved by Kentuckians to three cents

without their input. *Id.* at 881–84. Delegate Machen shared similar concerns, *id.* at 895, as did Delegate C.A. Wickliffe, *id.* at 900–01. But Delegate Proctor tried to curb those fears: "[W]e do not propose to tax the people of Kentucky one dime. We merely propose to set apart and dedicate forever what has already been raised by a tax for that purpose, together with the fund which has heretofore been set apart by legislative enactment, for educational purposes." *Id.* at 888.

In the end, the Delegates settled on a provision that, relevant here, simply listed all the funds making up the Common School Fund and established its inviolability:

> The capital of the fund called and known as the "Common School Fund," consisting of [bonds, stock, interest, and money], together with any sum which may be hereafter raised in the State by taxation or otherwise for purposes of education, shall be held inviolate, for the purpose of sustaining a system of Common Schools. The interest and dividends of said funds, together with any sum which may be produced for that purpose by taxation or otherwise, may be appropriated in aid of Common Schools, but for no other purpose.

1850 Ky. Const., Art. XI, § 1.

As it turned out, just because the Common School Fund was declared "inviolate" and its sums were to be allocated only for common-school "purpose[s]" did not mean that the General Assembly could not aid non-common schools through a new tax. In *Higgins v. Prater*, this Court's predecessor confronted that very question—whether, under the above-quoted provision, "the legislature can constitutionally aid by taxation any educational institution whatever, other than common schools." 14 S.W. at 911. At issue in *Higgins* was the constitutionality of a property tax passed to raise and collect sums for the Agricultural & Mechanical College of Kentucky (what is now the University of Kentucky). *Id.* at 910. This Court's predecessor found it "plain" that such

a tax "is not expressly forbidden" by the 1850 Constitution. *Id.* at 911. The *Higgins* plaintiff, though, claimed that "[a]n implied prohibition" existed in the text. *Id.*

This Court's predecessor disagreed, reasoning:

> In our opinion, this article of the [1850] constitution, when all of it is considered, and especially when read in the light of its history, the mischief intended to be remedied, and the practical construction which has been given to it, does not forbid aid by the state to an educational institution other than a common school, if the legislature, in its wisdom, sees fit to extend it.

Id. at 912. The Court emphasized that "[t]he framers of [the 1850 Constitution], and the people, in adopting it, were moved, not by a fear of too much education, but of too little, by a future diversion of the school fund to other purposes." *Id. Higgins* reached this conclusion in December 1890, when the convention that led to our current Constitution was "now in session." *Id.* at 910. Thus, as our Framers debated what became Section 184, this Court's predecessor upheld a new tax designed to raise and collect money for a non-common school without submitting the issue to a vote of the people.

2. The development of Section 184.

The version of Section 184 introduced at the 1890 Convention read, in relevant part, very similarly to the adopted provision. *Compare* 1890 Debates at 4454, *with* Ky. Const. § 184. Delegate Jacobs, reporting on behalf of the Committee that drafted the language, conveyed that Section 184 did not prohibit aid to non-common schools, but that if the aid was to come from a new tax, the people must vote on it:

> [The proposed amendment] provides . . . if any effort is made or desired on the part of the State for a system of education different from that which is pursued in the common schools, a *tax* may be levied for that

> purpose, provided the question shall first be submitted to and approved by a majority of the legal voters. A majority of the Committee thought if we departed from our common school method of education, and which has prevailed in the State since 1838, and the taxes for which have always been heretofore levied by popular vote; first of two cents, and then some years afterwards of three cents, and then in 1867 of fifteen cents, making twenty cents in all, and the State desired to add to its system of education what we usually term higher education, that the *tax* to support higher education ought to be supported by a popular vote.

1890 Debates at 4457 (emphasis added). This statement demonstrates that Section 184 was, at least in part, a response to *Higgins*, which had just upheld a new tax for a non-common school without a popular vote. *See also id.* at 4474–77; *id.* at 4528–29. In fact, the third sentence of what became Section 184 prohibits exactly what *Higgins* allowed.

The circuit court viewed the constitutional debates very differently. It cited comments made by Delegate Beckner that allegedly showed a "fear that the General Assembly would find ways to circumvent the restrictions on the common school fund by taxation provisions." Ex. 1 at 17. Delegate Beckner's full remarks, however, evidence the opposite view. Throughout the 1890 Debates, Delegate Beckner championed allowing the General Assembly to fund non-common schools and was concerned that the failure of the proposed Section 184 to place the words "common school" before "education" in the clause "together with any sums which may be produced by taxation for purposes of education" would prohibit the General Assembly from providing aid to non-common schools. 1890 Debates at 4471–77. And Delegate Beckner succeeded in adding this language to the final provision. *Id.* at 4565–69. Delegate Beckner thus advocated for flexibility for the General Assembly in education

funding outside the common schools and, contrary to the circuit court's finding, was not afraid of that flexibility. *Id.* at 4472, 4477, 4570.

Delegates who helped create Section 184, like Delegate Jonson, felt that Delegate Beckner's criticisms of the proposed amendment were unfounded. But even Delegate Jonson did not dispute that general revenue could go to non-common schools. Delegate Jonson "d[id] not believe that . . . the effect of th[e] report[ed]" provision was to "prevent [the General Assembly] from appropriating the general revenue for the annual support of [certain non-common school] institutions [of education]." *Id.* at 4489; *see also id.* at 4534. Delegate Jacobs likewise stated that certain non-common schools "are not now, and never have been, supported by a tax levied expressly for their benefit." *Id.* at 4540. Instead; "[t]hey have always been supported by an appropriation from the ordinary revenues of the State, and th[e proposed amendment] in no way interferes with or concerns itself with these institutions[.]" *Id.* Delegate Jacobs perceived no conflict between requiring a vote on the imposition of a tax for non-common schools and appropriating funds to such institutions because "[t]he General Assembly, in levying the tax for the ordinary revenue of the State, does not specify the purposes for which it is to be used, and makes the appropriation for the support of these institutions directly from the revenues of the State, and no special tax is levied for the benefit of any of them." *Id.*

So the real concern of the Delegates, as Delegate Lassing noted, was "taxes that will accumulate mountain high on the people, who are already almost taxridden to death." *Id.* at 4505. In the words of Delegate Jonson: "[W]e do not want in this

Constitution to say to the people that any sum shall be irrevocably riveted upon their hand in the way of taxation of either one cent or one million of a dollar against the wishes of the masses of the people of Kentucky. That is what we say, and that is all we say, and all that we wanted to say, and all that we intend to be made to say . . . ." *Id.* at 4533; *see also id.* at 4534 ("The whole of it is that no special tax shall be gathered for [a] special purpose until the people themselves shall have ratified it by their popular suffrage."). And as Delegate Jacobs pointed out, this reflects Kentucky's historical approach to imposing taxes for education: "The taxes of two, three and fifteen cents for the benefit of the common schools, were submitted for approval to a vote of the people; and all we ask is, that this tax shall be approved by the people." *Id.* at 4542.

This discussion of what became Section 184 shows that the Delegates thought that only if the General Assembly tried to impose a new tax specifically for non-common schools would a vote of the people be necessary. And several Delegates did not hide from the fact that the General Assembly could continue to support non-common schools with general revenue, as it had long done. *See Higgins*, 14 S.W. at 912 ("Other institutions of an educational character, and which do not constitute a part of our common-school system, have for years been supported by general taxation.").

The Delegates were also careful to ensure that funds dedicated to the Common School Fund were not used for non-common schools. In the clause "together with any sum which may be produced by taxation or otherwise for purposes of common school education," the words "or otherwise" were added to make clear that "money raised by taxation for common school purposes shall be used for common school purposes, and

nothing else." 1890 Debates at 4568. Delegate Beckner felt that including those words would make clear that the money historically appropriated to common schools from general taxes on various institutions would continue to go to common schools. *Id.* at 4568–69, 4575. And the Delegates adopted this amendment. *Id.* at 4575.

The adopted version of Section 184, as reaffirmed by the Delegates' debates, reflects a dual intent: first, to ensure that money allocated for common schools in fact goes to common schools, and second, to prohibit imposing a new tax specifically for non-common schools without a vote of the people. But, as several Delegates acknowledged, these twin aims do not altogether prohibit aid to non-common schools.

3. Case law applying Section 184.

This brings us to the case law applying Section 184. That case law is not a model of clarity in certain respects. Some decisions hew closely to the text and history of Section 184. Other case law not so much. The Court should follow the former, not the latter. *See Calloway Cnty.*, 607 S.W.3d at 572. Yet even if the Court relies on case law that expands Section 184 beyond its plain meaning and history, not even the most wayward of those decisions requires invalidating HB 563.

1. Kentucky case law has long recognized Section 184's dual aims. Given the limited scope of these two restrictions, those decisions have accordingly affirmed that Section 184 allows public dollars to go to non-common schools—even directly.

The leading case is *Butler v. United Cerebral Palsy of Northern Ky., Inc.*, 352 S.W.2d 203 (Ky. 1961). There, this Court's predecessor, with Judge Palmore writing, considered a statute that "authorize[d] public aid to private institutions for the

education of 'exceptional children.'" *Id.* at 204. The relevant appropriation came "from the general fund," not from a specific tax levied for that purpose. *Id.* Thus, the statute in *Butler* took public dollars and sent them directly to non-common schools to educate "exceptional children." *Id.* at 205 (stating that "[t]he financial aid provided by this legislation goes directly to the school, but the ultimate beneficiary is the 'exceptional' child"); *see also Pennybacker*, 308 S.W.3d at 675 (characterizing *Butler* as "involving appropriations to nonpublic schools").

This Court's predecessor upheld these direct appropriations to nonpublic schools. Section 184, the Court held, "literally applies *only* to funds 'raised or collected' for education." *Butler*, 352 S.W.2d at 207 (emphasis added). That is to say, by its text, Section 184's third sentence only prohibits imposing new taxes to pay for non-common schools. Judge Palmore recognized that some case law had applied Section 184 more broadly. (More on that later.) But the Court characterized that other case law as "questionable" and wondered whether it was "really justified by the language" of Section 184. *Id.*

Although *Butler* criticized this other case law, the Court did not definitively resolve the tension. Instead, the Court focused on what the law at issue accomplished: it helped students who the common schools could not fully serve. As Judge Palmore put it: "We do not believe it was the intention of the delegates in adopting Const. §§ 184 and 186 to deny forever the possibility of special educational assistance to those who by no choice of their own are unsuited to the standard program and facilities of the common school system." *Id.* A contrary result, *Butler* warned, could cast doubt on

sending public funds to non-common schools like the "Kentucky Industries for the Blind (KRS 163.036), Mayo State Vocational School (KRS 163.090) and Northern Kentucky State Vocational School (KRS 163.100)." *Id.* Thus, *Butler* allows direct appropriations from the general fund to non-common schools to serve students whose needs are "unsuited" to the common schools. *See id.*

Butler is not alone in allowing public dollars to go to non-common schools—a point Judge Palmore recognized. *Id.* For example, the statute in *Hodgkin v. Board for Louisville & Jefferson County Children's Home* attempted to characterize two schools as common schools so that they could "share in the Common School Fund." 242 S.W.2d 1008, 1009 (Ky. 1951). The Court found this unconstitutional. *Id.* at 1010. But *Hodgkin* did not stop there. It explained that the legislature could in fact send public dollars to these non-common schools because "state aid to institutional schools of the character here involved is not within the scope of sections 183 to 186 of the Constitution." *Id.* It continued: "Specifically, these sections of the Constitution neither authorize appropriations of the Common School Fund to such schools, *nor do they bar the use of other state funds for such schools.*" *Id.* (emphasis added). As a result, *Hodgkin* would have allowed state funds to go to non-common schools. *Accord Jefferson Cnty. Bd. of Educ. v. Goheen*, 207 S.W.2d 567, 569–70 (Ky. 1947).

Aside from *Butler* and *Hodgkin*, Kentucky case law recognizes the twin aims of Section 184. A prime example is *Pollitt v. Lewis*, 108 S.W.2d 671 (Ky. 1937). There, a local school board created a junior college, which is a non-common school. *Id.* at 671. The local board of education did this by creating a private corporation to acquire land

and construct a building through the issuance of a bond. *Id.* at 671–72. The private corporation was then to lease the property to the board of education. *Id.* To fund this scheme, the local school board requested that the local legislative body levy a new tax, as allowed by a Kentucky statute. *Id.* at 672. *Pollitt* correctly found that this funding mechanism violates Section 184. That result followed from Section 184's plain text, which "can mean only what it says." *Id.* at 674. The legislature, *Pollitt* held, "may authorize the levying of all the taxes it wants to for common schools, but it cannot authorize the levy of a tax for education other than in common schools without a vote of the electorate." *Id.* But this ruling came with a caveat. *Pollitt* did not foreclose the local school board from funding the junior college through means other than a new tax: "We see no reason why the remainder of the act may not be valid and the provision for the levy of a tax be separable therefrom." *See id.*

Kentucky case law also recognizes Section 184's second goal of protecting the Common School Fund. For example, in *Miller v. Covington Development Authority*, the Court, with Justice Palmore again writing, considered a statute that allowed school districts to "release" for 25 years certain funds they receive from ad valorem taxes to support development projects. 539 S.W.2d 1, 3 (Ky. 1976). The Court determined that this scheme intruded on the Common School Fund. Section 184, it held, "has always been construed as meaning that money collected for the purposes of education in the common school system cannot be spent for any other purpose, public or not." *Id.* at 5.

In sum, *Butler* and *Hodgkin* show that Section 184's two prohibitions do not turn merely on whether state dollars go to non-common schools. Section 184 keys to

whether the Common School Fund is secure, as in *Miller*, and whether a new tax has been imposed to support non-common schools, as in *Pollitt*. HB 563 operates well within these bounds. It does not touch money in the Common School Fund, and it does not impose a new tax that sends public dollars to non-common schools. Instead, HB 563 simply decreases Kentuckians' tax bills for making a private donation that helps lower-income Kentucky students pursue an education best suited to their needs.

On top of that, HB 563 bears striking similarities to the law upheld in *Butler*. That law, Justice Palmore explained, "had the public welfare as its central aim" because "the ultimate beneficiary [wa]s the 'exceptional' child"—*i.e.*, children "who by no choice of their own are unsuited to the standard program and facilities of the common school system." *Butler*, 352 S.W.2d at 205–07. HB 563 does much the same. It grants children in the Commonwealth the ability to obtain the education that best suits them. *See* Vol. 14, R. 1961–64, 1965–68. Consistent with *Butler*, Section 184 does not prohibit the General Assembly from creating a program to come alongside these children.[9]

2. If *Butler* and *Hodgkin* were the universe of decisions applying Section 184, this would be an easy case. But, alas, other case law muddles the issue. And the circuit court relied on that other case law to broadly hold that "Kentucky has been undeviating in holding that public funds cannot be expended in support of private education." Ex. 1

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[9] In fact, in its most recent budget, the General Assembly included several appropriations that are consistent with *Butler*. 2022 Ky. Acts ch. 199 (House Bill 1), Part I.C.3.(7) (page 55, lines 11–18) (Kentucky School for the Blind and Kentucky School for the Deaf), Part I.J.5.(1)(a) (page 130, lines 8–9) (Craft Academy for Excellence in Science and Mathematics), Part I.J.10.(1)(a) (page 134, lines 18–19) (Gatton Academy of Mathematics and Science).

at 16. In making this sweeping pronouncement, the circuit court did not cite *Butler* or *Hodgkin*. It instead relied on three other decisions.

Two of these cases, however, are best read as simply affirming the twin aims of Section 184. The first is *Pollitt*, which as discussed above, invalidated a new tax that funded a non-common school. 108 S.W.2d at 674. Section 184 has always been understood to prohibit new taxes specific to non-common schools, and there can be no argument that HB 563 does that.[10] The circuit court also relied on *Sherrard v. Jefferson County Board of Education*, 171 S.W.2d 963 (Ky. 1942). The statute there required common schools to use their own funds to provide transportation for students attending private schools. *Id.* at 964. That is to say, the statute used dollars from the Common School Fund to pay for non-common schools. The challenger to the law argued—correctly—that the law "divert[s] the public school funds raised by taxation or otherwise for the purpose of common and public schools . . . to channels not intended by and contrary to the Constitution of Kentucky." *See id.* So *Sherrard* simply

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[10] Although the circuit court did not identify the part of *Pollitt* on which it relied, it perhaps cited *Pollitt*'s assertion that the 1890 Delegates "must have had in mind that they were placing a limitation upon legislative power to expend money for education other than in common schools." 108 S.W.2d at 672. But this passage is what Judge Palmore criticized in *Butler* as "questionable" given that Section 184 "literally applies only to funds 'raised or collected' for education." 352 S.W.2d at 207; *see also Pennybacker*, 308 S.W.3d at 675–76 (acknowledging this criticism). More importantly, because *Pollitt* simply invalidated a new tax imposed to support a non-common school, it extends the case well beyond its terms to cite it for a sweeping prohibition on any public aid going to non-common schools. This is evident from the door *Pollitt* left open to allow the local school board to fund the non-common school there by means other than a new tax. *See Pollitt*, 108 S.W.2d at 674.

affirms the inviolability of the Common School Fund.[11] Thus, neither *Pollitt* nor *Sherrard* is best read to broadly hold, as the circuit court did, that no public funds can go to non-common schools.

The third case that the circuit court relied on was *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983). The statute there "suppl[ied] textbooks to children in the state's nonpublic schools." *Id.* at 480. It did so by having a state agency purchase the textbooks after which a nonpublic school could become the "custodian" of those textbooks. *Id.* at 481–82. *Fannin* ruled this statute contrary to Section 184. The Court, however, did not rely on Section 184 alone. Instead, it grouped together *seven* constitutional provisions (including Section 184) to reason that a "fair reading" establishes that "money spent on education is to be spent exclusively in the public school system, except where the question of taxation for an educational purpose has been submitted to the voters and the majority of the votes cast at the election on the question shall be in favor of such taxation."[12] *Id.* at 482.

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11 *Sherrard* also discussed whether the law there could be upheld because it benefits children, not private schools. 171 S.W.2d at 966. *Sherrard* rejected this argument, *id.* at 966–68, but did so while considering a law that diverted dollars from the Common School Fund to non-common schools. And this aspect of *Sherrard* seems to apply Section 189 of our Constitution, *id.* at 966, which is not at issue here.

12 This combination of multiple distinct provisions sits uncomfortably next to *Calloway County*, which criticized grouping together only two provisions. 607 S.W.3d at 568–69.

In reaching this conclusion, *Fannin* quoted Section 184's text, but made no serious attempt to interpret it.[13] Nor did *Fannin* discuss the Delegates' debates.[14] *Fannin* did not even cite *Butler* or *Hodgkin*, both of which approved public dollars going to non-common schools. The *Fannin* dissent perfectly captured the majority's shortcomings. Under Section 184, the dissent explained, "[p]rivate school pupils may benefit from public funds for a public purpose as long as the source of the tax money is outside of those taxes specifically levied for public schools." *Id.* at 485 (Wintersheimer, J., dissenting). More to the point, the challenged statute did "not violate Section 184 of the Kentucky Constitution because the appropriated funds come from the general revenues of the state." *Id.* at 487. So unlike the majority, the dissent would have applied Section 184 in line with its text and history.

Fannin is poorly reasoned, top to bottom. It conflicts with the text of Section 184; it overlooks the history of Section 184; and its holding departs from *Butler* and *Hodgkin*. This Court has not hesitated to move away from decisions with problems like these. *See Calloway Cnty.*, 607 S.W.3d at 572 (collecting cases and holding that "our

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13 In fact, to the extent *Fannin* engaged with the text of Section 184, it acknowledged the argument that the provision only prohibits new taxes for non-common schools. *Fannin*, 655 S.W.2d at 484 ("The statute in question seeks to avoid Section 184 of the Kentucky Constitution ('no sum shall be raised or collected for education other than in common schools') by directing that the expenditure shall be from the general fund, rather than school taxes.").

14 One commentator had this to say about *Fannin*: "One could not, for example, turn to *Fannin* in an effort to discover the historical underpinnings of the Kentucky constitutional provisions it involved[.]" Jennifer DiGiovanni, *Justice Charles M. Leibson & the Revival of State Constitutional Law: A Microcosm of a Movement*, 86 Ky. L.J. 1009, 1024–25 (1998).

obligation as judges is to uphold Kentucky's constitution. We have done so in several opinions over the last few years, even when doing so overturned established precedent"). When interpreting the Constitution, "the meaning, purpose, and reach of the words used must be deduced from the intention they express considered in the light of the history that pertains to the subject." *Id.* (citation omitted).

Although *Fannin* remains on the books, in the time since, the Court has not applied it according to its broad terms. In fact, the last time the Court directly considered Section 184, it upheld a program in which public dollars made their way to non-common schools. This is further proof that *Fannin* is an aberration that this Court has already started walking back.

In *Neal v. Fiscal Court, Jefferson County*, the Court upheld a scheme in which a locality used public dollars to pay for transportation costs for students attending non-common schools. 986 S.W.2d 907 (Ky. 1999). The relevant law, consistent with Section 184, directed that these public funds come from the county's "general funds, and not out of any funds or taxes raised or levied for educational purposes." *Id.* at 908 (emphasis omitted) (citation omitted). Over the dissent of three justices who would have applied *Fannin* to invalidate this statute, *id.* at 916–17 (Stephens, J., dissenting), the Court held that the program "is a legal means of providing safe transportation of children who attend non-public schools," *id.* at 912.

This holding, which allows public dollars to aid private schools, creates tension with *Fannin*'s sweeping statement that the legislature "is constitutionally proscribed from providing aid to furnish a private education." 655 S.W.2d at 484. After all, *Neal*

expressly rejected the argument that publicly funding transportation for students in nonpublic schools "has the effect of unconstitutionally aiding private and parochial schools." *Neal*, 986 S.W.2d at 910. And *Neal* did not dispute that the public funds at issue would in fact benefit non-common schools. It still held that "[a]ny incidental benefits to private institutions educating the recipients of the transportation subsidy does not make the ordinance illegal." *Id.* at 912. *Neal* even favorably cited an out-of-state decision that allowed state funds *to pay for private-school education for lower-income students* as long as the funds first went to the children's parents. *Id.* at 911–12 (discussing *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998)). For these reasons, *Neal* is hard to reconcile with *Fannin*'s expansive language.

In short, the problems with *Fannin* go deep and are abiding. *Fannin* contradicts the text of Section 184. It overlooks its history. It conflicts with *Butler* and *Hodgkin* without so much as an acknowledgment. And in *Fannin*'s wake, this Court—over a dissent invoking *Fannin*—refused to apply it as broadly as the circuit court did. For these reasons, the Court should follow *Butler* and *Hodgkin* to hold that HB 563 does not violate Section 184.

3. Even if the Court is not willing to return entirely to *Butler* and *Hodgkin*, HB 563 survives scrutiny under *Fannin*. This is so for three primary reasons.

First, *Fannin* concerned a statute that appropriated public funds in the public fisc. *Fannin* returned to this point again and again. It specifically mentioned the appropriation that accompanied the challenged law, 655 S.W.2d at 481, and it talked repeatedly about how public money was being spent on education, *id.* at 482 ("[M]oney

spent on education is to be spent exclusively in the public school system"); *id.* ("The framers of the Constitution did not intend for the legislature to spend public money to support private schools by these devices."); *id.* 484 ("public money can be expended").

HB 563 does not spend public funds like the *Fannin* statute did. More specifically, HB 563 does not direct that public dollars in the State Treasury be used for non-common schools. That is because HB 563 only affects private funds that never make it to the State Treasury. HB 563 provides a tax credit for Kentuckians who donate *their own money* to a nonprofit organization. To extend *Fannin* to a tax-credit program requires concluding that when Kentuckians make a private donation to an AGO they are in fact spending public money on behalf of the State. Kentuckians would no doubt be surprised to learn that private giving under HB 563 is no different than legislators in Frankfort passing a budget. And the Framers of our Constitution, who "desired to curb the power of the General Assembly," *LRC by & through Prather v. Brown*, 664 S.W.2d 907, 912 (Ky. 1984), would surely be taken aback by the suggestion that a law passed by the General Assembly could somehow lay claim to private donations made for a beneficent purpose. All of this is to say that *Fannin*, which dealt with public spending in the classic sense, is miles removed from HB 563's tax credits.

No less than the U.S. Supreme Court agrees. It has recognized a "distinction between governmental expenditures and tax credits." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011). In considering a First Amendment challenge to Arizona's equivalent of HB 563, the Supreme Court held that "[w]hen Arizona taxpayers choose to contribute to STOs [*i.e.*, the Arizona version of AGOs], they spend

their own money, not money the State has collected from respondents or other taxpayers." *Id.* (emphasis added). Put more bluntly, "[p]rivate bank accounts cannot be equated with the Arizona state treasury." *Id.* at 144. The circuit court downplayed *Winn* because it held that the plaintiffs there lacked standing. Ex. 1 at 8–9. But distinguishing *Winn* on this basis does not minimize that the Supreme Court recognized what the circuit court refused to: a clear line between tax credits and government expenditures.

The second reason *Fannin* is distinguishable is that it essentially involved a direct appropriation to non-common schools. The law there expended public dollars to purchase textbooks for which nonpublic schools could become the custodian. 655 S.W.2d at 480–81. So while the law in *Fannin* did not directly send public dollars from the public fisc to nonpublic schools (like the statute upheld in *Butler* did), it got very close to that. As *Fannin* put it, the challenged law "directs the expenditure of public funds for educational purposes, *through nonpublic schools*." *Id.* at 484 (emphasis added).

HB 563 does nothing of the sort. Under the law, Kentuckians make private donations to nonprofits, not directly to nonpublic schools. KRS 141.508(4). Lower-income Kentucky families in turn choose where those private donations go. KRS 141.518(1). The State does not decide where these private donations end up, or for that matter the nonprofits to which Kentuckians donate in the first instance. In fact, under HB 563, EOA funds can pay tuition or fees at common schools if a student lives outside the district in which he or she attends public school. KRS 141.504(2)(a)1., 158.120(1). The point here is that, unlike the law in *Fannin*, HB 563 is nothing like a direct appropriation to a non-common school. HB 563 allows private donations to

nonprofit organizations of Kentuckians' choice that lower-income families then decide how to spend.

This distinction matters. In upholding the private-school transportation program in *Neal*, this Court was careful to emphasize that public dollars were not being sent directly to nonpublic schools. 986 S.W.2d at 911 ("[T]he transportation subsidy no longer provides that money shall be paid to any private or parochial school for transportation cost reimbursement."). And *Neal* was not the first post-*Fannin* decision to underscore this point. *Fiscal Ct. of Jefferson Cnty. v. Brady*, 885 S.W.2d 681, 685 (Ky. 1994) (finding a "fundamental difference between providing school transportation to nonpublic school children along with public school children through Fiscal Court appropriation to the board of education, and providing direct payment to selected eligible schools"). So it matters quite a bit that HB 563 does not send public dollars directly to nonpublic schools. Instead, the private donations at issue are filtered through the private choice of not only the Kentuckians who make the donations, but also the families who decide where the donations go.

The third and final reason for not extending *Fannin* to this case is the most obvious. To apply *Fannin* here is to call into question more generally the constitutionality of granting tax benefits for charitable giving. Since at least 1970, Kentuckians have been able to contribute to private schools and claim those donations as tax deductions. *See* KRS 141.019(2); 26 U.S.C. § 170(a)(1) & (c)(2)(B); KRS 141.010(11) (1970); 26 U.S.C. § 170(c)(2)(B) (1970). (Keep in mind that, unlike HB 563, such donations are made directly to private schools.) Under the circuit court's

reasoning, this longstanding tax deduction now runs headlong into Section 184 because, like HB 563, the deduction will—to quote the circuit court—"diminish the tax revenue received to defray the necessary expenses of government." Ex. 1 at 18. If HB 563 violates Section 184 by allowing, as the circuit court put it, a "favored group of taxpayers to re-direct the income taxes they owe the state . . . and thereby eliminate their income tax liability," *id.* at 7, so does a tax deduction for charitable giving. That is because "both credits and deductions ultimately reduce state revenues . . . ." *Kotterman v. Killian*, 972 P.2d 606, 612 (Ariz. 1999).[15]

The repercussions for tax deductions and charitable giving just scratch the surface of what the circuit court's ruling could upend. Under the circuit court's paradigm, various tax credits may also now conflict with Section 184. For example, KRS 141.069(2) grants a tax credit for "qualified tuition and related expenses" paid to attend a Kentucky college or university, public or private. Additionally, to encourage the provision of postsecondary education to employees, KRS 141.381(3) affords a tax credit if an employer pays an employee's tuition and other expenses at certain non-common schools. *See* Martin Finley, *Tax credit extension provides assurance for UPS, other*

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15 For reference, a supermajority of state appellate courts have rejected challenges to their respective EOA programs under their state constitutions. *Magee v. Boyd*, 175 So.3d 79, 119–38, 142–43 (Ala. 2015); *Kotterman*, 972 P.2d at 617–25; *Griffith v. Bower*, 747 N.E.2d 423, 425–27 (Ill. App. 2001); *Toney v. Bower*, 744 N.E.2d 351, 357–63 (Ill. App. 2001); *see also Gaddy v. Ga. Dep't of Revenue*, 802 S.E.2d 225, 229–33 (Ga. 2017) (dismissing challenge to EOA program for lack of standing); *McCall v. Scott*, 199 So.3d 359, 365–68 (Fla. App. 2016) (same); *Duncan v. State*, 102 A.3d 913, 925–28 (N.H. 2014) (same), *superseded by constitutional amendment as stated in Carrigan v. N.H. Dep't of Health & Hum. Servs.*, 262 A.3d 388, 392–95 (N.H. 2021); *Indep. Sch. Dist. No. 5 of Tulsa Cnty. v. Spry*, 292 P.3d 19, 19–20 (Okla. 2012) (similar); *cf. Winn*, 563 U.S. at 129–30 (dismissing First Amendment challenge to EOA program for lack of standing).

employers, Louisville Business First (May 13, 2015), *available at* https://perma.cc/6C9N-MA2Z. Moreover, KRS 151B.402(4) allows a tax credit for an employer that helps an employee obtain a high-school-equivalency diploma. Under the circuit court's holding, these tax credits would be suspect. Still worse, the circuit court's broad reading of Section 184 could perhaps cast doubt on longstanding general-fund appropriations made to non-common schools—a point Judge Palmore's *Butler* opinion recognized. *See Butler*, 352 S.W.2d at 207.

To be clear, these tax credits and appropriations do not violate Section 184. But under the circuit court's expansive holding, they may well. This Court recently told us that, in drafting statutes, the General Assembly does not "hide elephants in mouseholes." *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 791 (Ky. 2019) (citation omitted). The same must be true of the Delegates. Section 184's narrow text simply does not require the cascading consequences that the circuit court's ruling would bring about.

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For these reasons, the Court should reverse the circuit court's judgment that HB 563 violates Section 184 of the Constitution.

III. The Appellees' other claims fail.

The Appellees raise three other constitutional challenges to HB 563. Vol. 1, R. 19–22. The circuit court, however, denied summary judgment on them. Ex. 1 at 2, 18–28. The circuit court entered final judgment only as to the Appellees' claims under Sections 59 and 184 and stated it was retaining jurisdiction over the remaining claims

because it determined that issues of fact remained. *Id.* at 18–28; Ex. 2 at 1–2. If the Court determines that it can resolve these other claims now, it should reject them.[16]

A. HB 563 does not violate *Rose*.[17]

The Appellees believe that HB 563 violates Section 183 as applied by *Rose v. Council for Better Education*. Vol. 1, R. 19. Section 183 requires the General Assembly to "provide for an efficient system of common schools throughout the State."

The Appellees' *Rose* claim fails for any number of reasons. For starters, because of the circuit court's permanent injunction, HB 563 has yet to take effect. So how can we know what impact, if any, the law will have on the efficiency of our "system of common schools throughout the State"? This claim is far from being ripe. *See W.B. v. Commonwealth, Cabinet for Health & Fam. Servs.*, 388 S.W.3d 108, 115–17 (Ky. 2012). Indeed, *Rose* itself was decided based on the "*present* system of common schools in Kentucky," not how that system might look if a new law took effect. 790 S.W.2d at 189 (emphasis added); *see also id.* at 213.

Even still, the Appellees' *Rose* claim fails. *Rose* is about public spending on public schools. *Rose* is not implicated by a program that does not involve any public spending and does not even change common-school funding. On top of that, there is no evidence to suggest that the General Assembly will someday offset the tax credits

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16 If the Court is inclined this way, it may be well-served by supplemental briefing about the Appellees' remaining claims. Because of how the circuit court approached this case, the Commonwealth has naturally focused its brief on Sections 59 and 184, which left too little room to fully discuss the other claims.

17 The Commonwealth preserved this issue. Vol. 14, R. 1978–84, 1992–2001; Vol. 15, R. 2142–52, 2155–63, 2208–12.

allowed by HB 563 with a cut in common-school funding. The bottom line is that the General Assembly can fulfill its duties under *Rose* while also adopting a pilot program that helps lower-income children pursue an education outside the common schools; the two are not mutually exclusive.

B. HB 563 is justified by a public purpose.[18]

The Appellees also allege that HB 563 lacks a public purpose in violation of Sections 3, 171, and 186 of the Constitution. Section 3 states that "no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services." Ky. Const. § 3. Section 171 provides that "[t]axes shall be levied and collected for public purposes only . . . ." Ky. Const. § 171. And Section 186 prohibits the use of the Common School Fund for non-common-school purposes. Ky. Const. § 186.

As discussed above, HB 563 does not send public money to non-common schools. Nor does it, to quote Section 171, involve "[t]axes . . . levied and collected." In any event, HB 563 serves the public purpose of allowing lower-income children to obtain the education best suited to their needs. *See Nichols v. Henry*, 191 S.W.2d 930, 933–35 (Ky. 1945) (rejecting challenge under Sections 3 and 171 to law that used public funds to provide transportation for students at non-common schools); *Neal*, 986 S.W.2d at 910–13 (same); *Butler*, 352 S.W.2d at 205–07 (rejecting challenge under Sections 3 and 171 to statute that benefitted non-common schools by funding "special

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18 The Commonwealth preserved this issue. Vol. 14, R. 2012–14; Vol. 15, R. 2166–69, 2212–13.

educational assistance to those who by no choice of their own are unsuited to the standard program and facilities of the common school system").

C. HB 563 does not violate the nondelegation doctrine.[19]

The Appellees' final claim invokes the nondelegation doctrine, which they ground in Sections 2 and 29 of the Constitution. Vol. 1, R. 21–22. The nondelegation doctrine rests on the principle that because the Constitution vests legislative authority in the General Assembly, that body, and not some other person or entity, should carry out that authority. *Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 681–83 (Ky. 2019). But the nondelegation doctrine is no barrier if the General Assembly has created "protecti[ons] against unnecessary and uncontrolled discretionary power." *Id.* at 683 (cleaned up); *accord Beshear v. Acree*, 615 S.W.3d 780, 809–12 (Ky. 2020).

The Appellees claim that AGOs have "unfettered discretion over how education services are provided and how funds are distributed." Vol. 1, R. 22. But AGOs do not exercise legislative power so as to invoke the nondelegation doctrine. *See Ky. Ass'n of Realtors, Inc. v. Musselman*, 817 S.W.2d 213, 215–17 (Ky. 1991). They are simply "intermediary organizations" that "[r]eceive[] contributions, allocate[] funds, and administer[] EOAs." KRS 141.502(1). Even if the Court disagrees, HB 563 carefully establishes the parameters for AGOs on the things that matter. Among many other things, HB 563 specifies which students are eligible for EOAs, the amount of funds for which they are eligible, and the order of priority in which funds are

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[19] The Commonwealth preserved this issue. Vol. 14, R. 2014–17; Vol. 15, R. 2170–72, 2213.

distributed. KRS 141.502(6), .504, .506, .508, .510, .512, .516, .518. As a result, HB 563's many guardrails overcome any nondelegation issue.

CONCLUSION

The Court should reverse the Franklin Circuit Court's judgment.

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