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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*

REPLY BRIEF OF THE COMMONWEALTH OF KENTUCKY

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ARGUMENT

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

The Appellees give away the game in their Section 59 argument. They do not contest that Section 59 allows the General Assembly to apply legislation only in counties above a certain population. Instead, they press the narrower argument (at 31) that HB 563 is unconstitutional because the tuition-assistance program is tied to a county's population as of the 2010 Census, which creates a "closed group" of eight counties. The Appellees thus concede that the tuition-assistance program would be constitutional under Section 59 if the population limitation was tied to the most recent Census, because that would allow other counties to participate in the program in the future if their populations grow enough. Indeed, the Appellees' favored case law cites a decision to that effect. *Harlan Cnty. v. Brock*, 55 S.W.2d 49, 51 (Ky. 1932) (citing *Campbell v. City of Indianapolis*, 57 N.E. 920 (Ind. 1900)).

If the Appellees have identified a constitutional flaw in HB 563 (they have not), they have teed up the easiest case for severance imaginable. To remedy the alleged defect, all the Court needs to do is sever the word "2010" from KRS 141.504(2)(b). This one-word remedy would mean that the tuition-assistance program applies in counties with a population above 90,000 persons according to the most recent Census. As the Appellees concede (at 2–3), this would mean that under the 2020 Census residents in an additional county (Madison) can participate in the program.

There can be no argument that Kentucky's severability statute prevents this simple remedy. More to the point, it is by no means "apparent" that the rest of HB 563

is so "essentially and inseparably connected" to the single word "2010" that the General Assembly would not have passed the law if that word was missing. *See* KRS 446.090. The Appellees' only rebuttal is to suggest (at 40) that the General Assembly voted down this variation before passing HB 563. That is wrong as a factual matter. The legislature never disapproved an amendment to HB 563 with the word "2010" missing. Even still, Kentucky's severability statute does not focus on legislative history, but on the statutory text. *See* KRS 446.090. The Appellees do not even try to argue that the word "2010" is somehow so connected to the larger statute that the entire law must fall.

The Appellees are also wrong that tying the tuition-assistance program to the 2010 Census violates Section 59. "Classifications based upon time or existing conditions frequently have been upheld" against special-legislation challenges. *Butler v. United Cerebral Palsy of N. Ky., Inc.*, 352 S.W.2d 203, 206 (Ky. 1961). The only case the Appellees cite in arguing otherwise is *Harlan County v. Brock*. But *Harlan County* harkens back to the now-overruled *Schoo* test.[1] *Compare* 55 S.W.2d at 50 (discussing whether law was based on "reasonable distinctions"), *with Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 566 (Ky. 2020) (noting that *Schoo* turned in part on whether there were "distinctive and natural reasons inducing and supporting the classification" (citation omitted)). The relevant question after *Calloway County* is simply "whether the statute applies to a particular individual, object or locale." 607 S.W.3d at 573. Because HB 563 distinguishes based on county population, it does not apply to a particular locale.

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[1] *Harlan County* is also distinguishable because the statute there was not a time-limited pilot project. This distinction matters. Commw. Br. at 12–14.

Commw. Br. at 7–10. The Appellees counter (at 31–32) that HB 563 is no different than if the legislature had singled out eight counties by name. *Calloway County*, however, foresaw this very criticism of its test and adopted it anyway. 607 S.W.3d at 573.

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

The Appellees agree (at 11–12) that the operative question under Section 184 is whether HB 563 qualifies as a "question of taxation" that must be "submitted to the legal voters." It does not. This clause of Section 184 (the taxation clause, for short) simply prohibits imposing a new tax specifically to fund non-common schools. It does not prohibit granting a tax credit—*i.e.*, lowering taxes—to encourage Kentuckians to donate to nonprofit organizations that help lower-income students pursue the education best suited to their needs. Text, history, and precedent confirm as much.

1. Start with the text. As understood when our Constitution was adopted, "taxation" means the "[a]ct of laying a tax, or of imposing taxes, as on the subjects of a state, by government, or on the members of a corporation or company, by the proper authority; the raising of revenue by the imposition of compulsory contributions; also, a system of so raising revenue." *Webster's New International Dictionary of the English Language Based on the International Dictionary of 1890 and 1900*, 2118 (1923). Another founding-era dictionary similarly defines "taxation" as "[t]he imposition of a tax; the act or process of imposing and levying a pecuniary charge or enforced contribution, ratable, or proportioned to value or some other standard, upon persons or property, by or on behalf of a government or one of its divisions or agencies, for the purpose of providing revenue for the maintenance and expenses of government." Henry Campbell

Black, *A Dictionary of Law*, 1154 (1891); *see Westerfield v. Ward*, 599 S.W.3d 738, 749 n.29 (Ky. 2019) (looking to founding-era dictionary). "[T]axation" in Section 184 thus connotes requiring a financial contribution to the government.

The term does not encompass a tax credit that lowers a Kentuckian's tax bill. The Appellees counter (at 12–13) that the word "taxation" includes "all tax questions." They cite no dictionary definition for this proposition. Nor do they grapple with the fact that their broad reading of "taxation" requires the counterintuitive result of submitting a tax decrease to the voters before it can take effect. Surely Section 184 does not hem in the General Assembly from lowering taxes without first asking the people for approval. Suffice it to say that Kentuckians would be surprised to learn that in this circumstance the General Assembly must ask their permission before lowering taxes.

It helps to consider this argument in a familiar historical context. Everyone is (or should be) familiar with the American colonists' rallying cry against the British crown of "No taxation without representation." When the colonists voiced their frustrations about "taxation," no one was concerned about the crown lowering taxes without first asking. Obviously, the colonists were concerned about taxes being imposed without having a say. So too here.

All the Appellees cite to the contrary (at 13) are two cases. But those cases, which do not even cite Section 184, concern Section 171's uniformity clause. *See Preston v. Johnson Cnty. Fiscal Ct.*, 27 S.W.3d 790, 794 (Ky. 2000); *Genex/London, Inc. v. Ky. Bd. of Tax Appeals*, 622 S.W.2d 499, 503–04 (Ky. 1981). And to say that Section 171 could

account for tax credits when considering whether taxes are uniform has no bearing on whether tax credits qualify as "taxation" subject to voter approval under Section 184.

The Appellees focus (at 13) on the word "raised" in Section 184. In their view, HB 563 "raise[s]" a sum for non-common schools by encouraging private donations to AGOs. The term "raise" cannot bear such enormous weight. More specifically, the Appellees' boundless interpretation unmoors the word from the context in which it is used. *See Bee Spring Lumber Co. v. Pucossi*, 943 S.W.2d 622, 624 (Ky. 1997) (stating that court is "obliged" to interpret text "in context"). The taxation clause uses the word "raised" in the context of "taxation." The text twice makes that clear. To "raise[]" money in the context of "taxation" means to bring in—*i.e.*, raise—money for the public fisc through a tax. "[R]aise[]" as used in Section 184 is thus synonymous with "to collect; levy." *Webster's*, *supra*, at 1765. Stated differently, to "raise revenue" means "[t]o levy a tax, as a means of collecting revenue; to . . . collect." Black, *supra*, at 998.

The Appellees believe (at 13 n.13) that reading "raised" this way robs the accompanying term "collected" of any meaning. But raising money and collecting money in the context of taxation simply refer to two sides of the same coin—the government side (raising) and the taxpayer side (collecting). If anything, the use of both "raised" and "collected" reinforces that the taxation clause focuses on imposing taxes, not decreasing them. In any event, the surplusage canon should only be applied "if possible." *Hampton v. Commonwealth*, 78 S.W.2d 748, 750 (Ky. 1934). More fundamentally, this interpretative principle is not a license to ignore the context in which a term is used. *See Wilkins v. Bax*, 262 S.W.2d 663, 664 (Ky. 1953).

2. The history of Section 184 confirms what its text says. The Appellees acknowledge (at 27–28) that the taxation clause was a response to *Higgins v. Prater*, 14 S.W. 910 (Ky. 1890), which (in the Appellees' words) "approved *a tax* to support what is now the University of Kentucky." (emphasis added). The Appellees thus admit that the impetus behind Section 184's taxation clause was a new tax specifically to support a non-common school. And the Appellees have not identified a single exchange during the Debates in which a Delegate thought Section 184's taxation clause would prohibit lowering taxes. That is because when the Delegates discussed the issue, they invariably mentioned higher taxes. *See* Debates from 1890 Constitutional Convention at 4457, 4505, 4533, 4534, 4540, 4542.

The Appellees otherwise misconstrue the Delegates' comments:

- The Appellees mention (at 27–28) Delegate Nunn's statements, but he confirmed that the taxation clause stemmed from *Higgins v. Prater*. *Id.* at 4574. And the very remark from Delegate Nunn that the Appellees quote discusses the legislature "levying . . . [a] tax." *Id.*
- The discussion by Delegate Jacobs on which the Appellees rely (at 28) highlights the Delegates' desire to limit tax increases specifically to pay for non-common schools. *Id.* at 4457 (stating that a "tax to support higher education" should be "supported by a popular vote").
- The comments by President Clay cited by the Appellees (at 28) simply involved him determining that a proposed amendment prohibiting new common-school

taxes without a popular vote could be considered for debate because it was different from the amendment that was previously discussed. *Id.* at 4569.

- The Appellees point (at 28) to Delegate Amos's remarks, but they confirm the Commonwealth's position: "[Y]ou can *collect tax* for [common schools], but not for [non-common schools]—only upon . . . a vote of the people." *Id.* at 2436 (emphasis added).
- The Appellees cast Delegate Beckner (at 29) as "a staunch opponent of state support for private education." As evidence, they cite a single sentence from the Debates, which merely conveys that private schools cannot educate everyone. *Id.* at 4462. In actuality, Delegate Beckner called himself a "friend of the private schools" in advocating for a tax exemption for private schools. *Id.* at 2376–77. And later in the Debates, he voiced concern that Section 184 could be read to prohibit all funding for non-common schools, *id.* at 4472, but his fellow Delegates stated that was not the case, *id.* at 4489, 4534, 4540. At bottom, Delegate Beckner favored giving the General Assembly flexibility in this regard. *Id.* at 4472 ("In my report, the common school fund is made inviolate, and no moneys belonging to it can ever be diverted to any other purpose; but it does not hamper the future in the development of a system of education that will give our people the advantages enjoyed in other Commonwealths."), 4548 ("Nobody believed that this body would come here, and restrict the power of the people to provide for the education of their children.").

- As for Delegate Jonson, the Appellees imply (at 29) that he opposed state support for non-common schools. But Delegate Jonson stated that the new Constitution would not cut off existing state support for several non-common schools. *Id.* at 4489, 4533–34.

3. The Appellees' chief authority is *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983), which they read (at 17) to stand for the sweeping proposition that any law "designed to benefit private education, even in a very limited way" violates Section 184. Consider what this means. A recent report calculates that "[s]tudents in nonpublic schools now represent more than 15% of the state's student body"—nearly 100,000 students in total.[2] In the Appellees' view, Section 184 completely walls off these students from any state support, even if it is "very limited."

The Appellees do not dispute that their broad reading of *Fannin* creates tension with *Butler* and *Hodgkin v. Board for Louisville & Jefferson County Children's Home*, 242 S.W.2d 1008 (Ky. 1951). The Appellees wave away this conflict by arguing (at 21) that *Butler* and *Hodgkin* are a "narrow welfare exception" to Section 184. But the better view is that *Butler* and *Hodgkin*, which predate *Fannin* and which *Fannin* failed to even cite, correctly reflect the text and history of Section 184. Commw. Br. at 30–34. Even on the view that *Butler* and *Hodgkin* serve as a "welfare exception" to *Fannin*, HB 563 survives scrutiny, given that the law simply helps Kentucky schoolchildren from lower-income families obtain the education best suited to their needs.

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[2] Gary W. Houchens, *Why Kentucky education policy should be about funding students, not systems: Opinion*, Courier Journal (Aug. 15, 2022), https://perma.cc/98FG-65VL.

The Appellees also argue (at 16, 18) that this Court affirmed *Fannin* in *University of Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010). But *Pennybacker* made clear that "appropriations to private schools can be constitutional." *Id.* at 675 (citing *Butler*). In any event, *Pennybacker* was a Section 189 case, *id.* at 671, and the Appellees disclaim (at 25 n.23) making a Section 189 argument here. With good reason. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020). More importantly, *Pennybacker* expressly declined to rule on the applicability of Section 184. 308 S.W.3d at 673 & n.2.

4. The Appellees cannot escape the repercussions of their argument. If Section 184 prohibits the General Assembly from creating the tax credits at issue here, it likewise violates Section 184 to grant a tax deduction for charitable giving to nonpublic schools, which Kentucky has done since at least 1970. Commw. Br. at 42–43. The Appellees' theory of Section 184 also casts doubt on other tax-credit schemes and even longstanding state support to non-common schools. *Id.* at 34 n.9, 43–44.

The Appellees try their best to explain how Kentucky's tax deduction for charitable giving to private schools is constitutional under their view of Section 184. They urge (at 23–24) that a tax deduction is permissible because it is only a "modest incentive[] for private giving," whereas HB 563 provides an "exceptionally generous" tax benefit to taxpayers. But what in the text or history of Section 184 draws a distinction between modest and less modest tax benefits? And if such a distinction exists, would HB 563 be constitutional if the tax credits it granted were less advantageous? If so, how much less advantageous?

Still worse, the Appellees' argument is internally inconsistent. On the one hand, they say (at 17) that Section 184 invalidates any law "designed to benefit private education, even in a very limited way." Yet, on the other hand, they argue (at 23) that Kentucky's tax deduction for charitable giving, which plainly benefits private education, is acceptable because it is only a "modest" tax benefit. The Appellees cannot have it both ways. Either Section 184 invalidates any and all laws that provide a tax benefit for supporting private education, or it does not.

One final point: The Appellees characterize HB 563 (at 23) as "the functional equivalent of a government expenditure program." (citation omitted). But the private dollars that make their way to lower-income schoolchildren under HB 563 never enter into the Commonwealth's coffers. Yet by the Appellees' telling, these private dollars in the pockets of Kentuckians are no different than public dollars in the public fisc. It cannot be true that Section 184 empowers the General Assembly to lay claim to Kentuckians' private funds before they are ever owed as taxes.[3]

CONCLUSION

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

Respectfully submitted by,

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[3] If the Court wishes to address the Appellees' further claims at this stage, the Commonwealth reiterates its view that supplemental briefing may be worthwhile.