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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, *et al.* — *Appellants*

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*

BRIEF OF APPELLEES COUNCIL FOR BETTER EDUCATION, FRANKFORT INDEPENDENT SCHOOL BOARD, WARREN COUNTY SCHOOL BOARD, MICHELLE GRIMES JONES, KATHERINE WALKER-PAYNE AND CHRIS RASHEED

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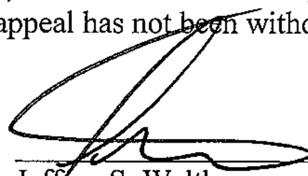

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STATEMENT CONCERNING ORAL ARGUMENT

The Court's order granting transfer stated that oral argument will be heard. The Appellees believe that oral argument will be helpful to the Court in deciding the important constitutional issues presented and appreciate the opportunity to be heard.

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May it please the Court:

COUNTERSTATEMENT OF THE CASE

"[E]ducation is a fundamental right in Kentucky," "essential to the welfare of the citizens of the Commonwealth," and "perhaps the most important function of state and local governments." *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190, 206 (Ky. 1989) (internal citation and quotations omitted). The General Assembly is "duty bound, to create and maintain a system of common schools" that fulfills this obligation and provides every child "an equal opportunity to have an adequate education." *Id.* at 208, 211.

To protect the common schools, the education provisions of the Constitution strictly limit the circumstances when public funds can be used to aid private schools. Even indirect support, such as loaning books to private school students, is prohibited. *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983). In particular, Section 184 of the Constitution requires voter approval of any taxation measure by the General Assembly to raise sums for education other than in the common schools.

This case arose because the General Assembly passed House Bill 563 ("HB 563"),[1] which raises $125 million, over a five-year period, through a taxation measure to fund primarily private schools without the voter approval required by Section 184. HB 563 also offers educational options only to certain students in violation of the prohibition against special legislation in Section 59 and the non-discrimination mandate of Section 183. And HB 563 violates the non-delegation requirements of Section 29, and the public purpose requirement of Section 171. The Circuit Court correctly held that HB 563 was

[1] 2021 Ky. Acts Ch. 167, §§ 5–19, codified at KRS 141.500 – 141.528 (H.B. 563).

unconstitutional. This Court should affirm.

The EOA Program. HB 563[2] establishes "Account Granting Organizations" ("AGOs") to serve as "intermediary organizations" through which the Commonwealth will make tax levies available to pay for certain educational expenses. KRS 141.502(1)(b). The educational expenses AGOs may fund include online learning programs, tutoring, textbooks, curriculum materials, education-related technology, summer school and after-school programs, career and technical education, educational services and therapies, school uniforms, transportation, and public-school tuition and fees. KRS 141.504(2)(a). Because public schools generally provide these services for free, private education providers are the primary intended recipients of these funds.[3]

AGOs may also fund private school tuition and fees, but only for students "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." KRS 141.504(2)(b). By tying this classification to the 2010 Census, the General Assembly limited the students eligible for private school tuition payments to the residents of an unchanging list of eight specific counties: Boone, Campbell, Daviess, Fayette, Hardin, Jefferson, Kenton, and Warren.[4] The 2020 Census confirms that Madison

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[2] Sections 1-4 of HB 563 amend various sections of the Kentucky Revised Statutes and were not challenged in this action. Sections 5-19 of HB 563 create the Education Opportunity Account ("EOA") Program at issue here.

[3] To offer a few examples, all of the following are provided for free in the common schools: textbooks, programs, and other instructional materials, KRS 157.100 *et seq.*; dual credit scholarships, KRS 164.786; summer learning programs, KRS 157.077; career and technical education, KRS 157.072; and special education services, physical therapy, occupational therapy, counseling, medical services, and mobility services, KRS 157.200 *et seq.*

[4] U.S. Department of Commerce, *Kentucky: 2010, Summary Population and Housing Characteristics*, 38–40 (Nov. 2012), https://bit.ly/3OPn0hA.

County's population now exceeds 90,000.[5] Yet students in Madison County are excluded from the private tuition benefit provided by the Program, as is every other student residing in the 112 remaining Kentucky counties, regardless of the number of private schools in their county.

Lack of Oversight for AGOs and Private Schools. Although each AGO must be certified by the Commonwealth, certification simply requires proof of incorporated non-profit status and a description of how the AGO plans to function. KRS 141.510(1)-(2). AGO administrators are not required to have any experience or expertise in education programs, pass background checks, avoid conflicts of interest, or be free of past involvement in financial fraud.

AGOs have unfettered discretion to decide which of the approved educational services they fund, subject only to the requirements that they report the services they will fund, the selection criteria they use, and that they fund at least $200,000 in services every year from two or more providers for at least 50 students a year. KRS 141.510. AGOs are not required to evaluate the quality of education they fund. Nor are AGOs required to remove schools from the Program if they fail to deliver an adequate education. Although the Department of Revenue may audit AGOs as a condition of recertification, Revenue must certify AGOs that meet the minimal statutory requirements, which do nothing to ensure the quality of the education funded. *Id.*

The Program encourages AGOs to pay private schools directly. KRS 141.518(1)(b). But AGOs may not require any private school "to alter its creed, practices, admissions policy, or curriculum," even if they discriminate against students based on

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[5] United States Census Bureau, *Kentucky: 2020 Census* (Aug. 25, 2021), https://bit.ly/3OZo8Q1.

disability, religion, sexual orientation, gender identity, or other protected characteristics. KRS 141.520(4). The private schools that will receive tax-credit funding through AGOs have selective admissions criteria and many discriminate on several bases. Ex. 2 (showing private schools in the eight targeted counties are selective; reserve the right to reject or give preference to applicants based on their past academic performance, admissions or standardized test scores, or disciplinary history; and frequently discriminate against students on the basis of religion, disability, sex, sexual orientation, gender identity, or family status).

Nor are the private schools that will be funded through AGOs subject to additional oversight by the Commonwealth. The Department of Education has no authority to evaluate either AGOs or the private schools they fund. And the funded private schools need not be accredited, meet state curriculum requirements, employ certified teachers, demonstrate fiscal soundness, demonstrate student achievement, or meet education quality standards of any kind. By contrast, school board members must meet stringent qualifications and continue to satisfy training, financial, and ethics standards,[6] and the common schools and their employees are extensively regulated by the Commonwealth and the Department of Education.[7]

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[6] *See, e.g.*, KRS 160.180.

[7] For example, Kentucky law sets clear student learning goals and outcomes, KRS 158.645, 158.6451(1); tasks the Department of Education with creating a common curriculum and course of study, KRS 156.160; sets minimum graduation requirements, *id.* at (1)(d); requires a medical inspection, vision examination, and dental examination for all students, *id.* at (1)(h)-(j); employs a statewide assessment program, KRS 158.6453(3)(a); mandates public reporting on school performance, *id.* at (17); mandates end-of-course exams in core content courses, KRS 158.860; requires students pass a financial literacy course, KRS 158.1411(1), and civics test, KRS 158.141(1); mandates public schools provide cardiopulmonary resuscitation training, KRS 158.302(2), and information on how to register to vote and use a ballot, KRS 158.6450(2); establishes an

The Program, by its express terms, bars oversight of private school operations. The Program cannot "limit the independence or autonomy of an education service provider or [] make the actions of an education service provider the actions of the state government," KRS 141.520(1), and may not allow any additional regulation of private schools by the state or county school districts. KRS 141.520(2). And by virtue of the

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accountability system that classifies districts by performance, as well as rigorous intervention plans for low-achieving districts, KRS 158.6455(3)-(5); requires all public school teachers to be certified by the Education Professional Standards Board, KRS 161.020(1)(a), 161.030(1); creates performance criteria and a personnel evaluation system for teachers, KRS 156.557(3)-(4); prohibits the use of textbooks unless they were approved by the State Textbook Commission, KRS 156.445(1); provides that "exceptional" students have a right to an appropriate and quality education in the public schools, KRS 157.195, that each exceptional student will have an individual education plan, KRS 157.196(2), and that public schools must either provide a special education program for exceptional students or pay for an appropriate education in another school, KRS 157.230; requires districts to demonstrate fiscal soundness through public reports, KRS 156.200, 156.250, 157.060, and extensive auditing, KRS 156.265(2), 157.061; directs public schools to establish a library in every building, KRS 158.102(1), and employ a librarian to manage those libraries, *id.* at (2)(a); requires districts to provide training on active shooter situations, KRS 156.095(7)(a), and adopt emergency plans for fire, severe weather, or building lockdown, KRS 158.162(2)(a), 158.164(2); requires schools to display of a copy of the Bill of Rights, KRS 158.194, the national motto of the United States, KRS 158.195(1)(a), and the state child abuse and federal child trafficking hotline numbers, KRS 156.095(g); protects the privacy of student education records, KRS 160.705(1); creates credential requirements for the food service director at each school, KRS 158.852(2)(a), and directs the Board of Education to set minimum nutritional standards for all foods and beverages sold outside of the national breakfast and lunch programs, KRS 158.854(1); mandates that the Board promulgate regulations for the sanitary and protective construction of public school buildings, classrooms, toilets, and physical equipment, KRS 156.160(1)(g), and requires the chief state school officer to approve of all plans for new public school buildings, KRS 162.060; creates suicide prevention awareness programs for all secondary students, KRS 156.095(b); establishes maximum academic class sizes for every grade, KRS 157.360(5)(a); mandates that each local board of education formulate a code of conduct that prohibits bullying, KRS 158.148(5)(c); requires due process before students are suspended, KRS 158.150(5); mandates that public schools be open to every child residing in the district who satisfies the age requirement, KRS 158.030(1), 159.070; obligates districts to employ at least one counselor in each school, KRS 158.4416(3)(a), and to develop a plan for implementing a trauma-informed approach to counseling, *id.* at (5); directs local boards of education to adopt a recycling plan for their school buildings, KRS 160.294(1); and requires districts to undergo an annual school security assessment, KRS 158.4410(7).

discretion AGOs have to decide what educational services they will fund and in what schools, even students that reside in the eight select counties and obtain admission to a private school may still not obtain any support through the Program.[8]

The $125 Million in AGO Funding. The AGOs are funded with up to $25 million a year for a total of $125 million over five years. KRS 141.522(1)–(2). The Commonwealth raises these sums through an unusual tax credit scheme that rewards taxpayers on an almost dollar-for-dollar basis for their AGO contributions. The tax credit scheme is unlike any other Kentucky tax benefit in its operation, the taxpayer value it provides, and the limited group of private schools funded through the Program.

Taxpayers seeking a credit under the Program must first seek approval from the Department of Revenue. KRS 141.508. Such applications are "funded on a first-come, first-served basis" so long as tax credit funds remain for the Program. KRS 141.508(3). Once preapproved, the taxpayer must contribute the amounts promised to an AGO, which in turn notifies the Commonwealth of the contribution. KRS 141.508(5). The Commonwealth then provides the taxpayer with a Tax Credit Allocation Letter, which the taxpayer uses to offset the taxpayer's state tax obligation. KRS 141.514(1)(c).

The Program provides exceptionally valuable tax credits. Unlike a traditional charitable tax deduction that provides a tax deduction worth a small proportion of a taxpayer's actual charitable contribution, HB 563 reimburses taxpayers who contribute to AGOs with a nearly dollar-for-dollar tax credit. Individuals, corporations, and other business entities may receive a 95 to 97 percent tax credit for AGO contributions, up to

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[8] The Program requires AGOs to prioritize grants to students and their siblings who received a grant in the prior academic year. KRS 141.504(7). For other applicants, AGOs are to prioritize grants based on "financial need." *Id.* at (1)(a).

$1 million each year. KRS 141.522(3)–(4); *see also* KRS 141.502(7). When taxpayers contribute marketable securities to AGOs instead of cash, they not only receive the tax credits but also avoid paying capital gains tax on any accrued gains for the underlying securities. KRS 141.502(2). The result is to permit taxpayers to make a net profit by contributing to AGOs, *see infra* at 13-14, so long as they accede to the scheme to raise money for private education through the Commonwealth's taxing powers.

AGO Expenditures. Once AGOs are funded through these tax credit expenditures, they decide which of the pre-approved educational services they will fund and for which schools, subject to the requirement that private school tuition payments not exceed the actual tuition and fees charged by a school. KRS 141.504. AGOs can fund private school tuition and fees only for students who reside in the eight selected counties and whose families have incomes at or below 175 percent of the federal free and reduced lunch eligibility limit, or approximately $85,000 for a family of four. KRS 141.502(6). Once in the Program, students remain eligible until their household income exceeds $121,000 per year—nearly two and a half times Kentucky's median household income of $52,238.[9] KRS 141.506(3). AGOs may fund the other educational services listed in the statute for any student in Kentucky who meets these same household income limitations. AGOs may also retain up to ten percent of the money received through the HB 563 tax-credit funding scheme. KRS 141.512(6)(b).

HB 563's Enactment. HB 563 arrived at the Governor's desk by a razor-thin margin, passing the House by a 48-47 vote.[10] The Governor promptly vetoed the

[9] *See* United States Census Bureau, *Kentucky Quick Facts* (July 1, 2021), https://bit.ly/3Q2V9eT.
[10] Ky. Gen. Assembly, Legis. Rec., 2021 Reg. Sess., H.B. 563, https://bit.ly/3bceprK.

legislation. The General Assembly then overrode the Governor's veto to enact HB 563. Despite its creation of a new private apparatus for delivering education in Kentucky, and its novel use of state tax credits to fund private education, the General Assembly never afforded the voters of the Commonwealth an opportunity to consider or approve HB 563.

Proceedings Below. HB 563 went into effect on June 29, 2021. Shortly thereafter the Council for Better Education, Inc., a non-profit organization of school districts and school officials dedicated to enforcing Kentucky's constitutional commitment to its students and common schools, alongside the Warren County and Frankfort Independent School Boards and several parents of children in the common schools[11] (collectively, "Plaintiffs"), challenged the constitutionality of the Program in Franklin Circuit Court. Vol. 1, R. 5–7 ¶¶ 13–19. Plaintiffs charged that the Program violates Sections 2, 3, 29, 59, 171, 183, 184, and 186 of the Constitution and sought to enjoin its implementation.[12] *Id.* at R. 1–24; Vol. 16, R. 2313–17.

Based on their roles in implementing the Program, Plaintiffs named as defendants in their official capacities the Secretary of the Kentucky Finance and Administration Cabinet and the Commissioner of the Kentucky Department of Revenue. Vol. 1, R. 8 ¶¶ 20–21. The Attorney General, on behalf of the Commonwealth, intervened to defend HB 563. Vol. 3, R. 446–48. Two parents who hope to receive AGO Program benefits,

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[11] The parent-plaintiffs are Michelle Grimes Jones, Katherine Walker-Payne, and Chris Rasheed.

[12] The Plaintiffs amended their complaint to raise the special legislation claim under Section 59 of the Constitution after raising the issue in briefing and at argument. Both the Commonwealth and Intervenors had the opportunity to respond to the Section 29 claim, Vol. 16, R. 2364–67, as evidenced by the Commonwealth's position below that if the motion to amend were allowed, the Court should "deem the parties' motion for summary judgment to have been filed with respect to the amended complaint." Vol. 16, R. 2344-45. There was no error in allowing the Complaint to be amended to raise a claim on which all had been heard.

Akia McNeary and Nancy Deaton, were also permitted to intervene as defendants. *Id.*

After briefing and oral arguments, the Circuit Court partially granted Plaintiffs' motion for summary judgment and permanently enjoined the Program. Ex. 1 at 26-28. The Court held that the Program violates the plain language of Section 184 because it "raises a sum of money for private education outside the system of common schools" without the voters' approval, Ex. 1 at 15-16, and that the Program violates Section 59 by "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)." *Id.* at 9.

As to the Section 184 claim, the Court explained "while this legislation does not collect taxes for private education, it most certainly 'raises' the sums of money that fund the AGOs, through application of the income tax law." *Id.* at 16. The Program "simply allows . . . taxpayers to re-direct the income taxes they owe the state to private AGOs, and thereby eliminate their income tax liability." *Id.* at 7. The "legislature has essentially taken an account receivable to the Commonwealth of Kentucky, assigned it to these private AGOs, and forgiven the taxpayer's liability to the state." *Id.* Because the Program "most certainly 'raises' the sums of money that fund the AGO's," which in turn fund private educational services outside the common schools, the Circuit Court concluded it violates Section 184 absent voter approval. *Id.* at 16.

The Court also ruled that the Program's contrived and unchangeable geographic designation of the counties whose residents would be eligible for private school tuition "cannot withstand even the most minimal scrutiny" under Section 59:

> There is simply no rational basis to exclude counties like Franklin County, Nelson County, and many others with a strong existing base of private

> schools from the tuition assistance program. If the legislature had wanted to limit tuition assistance to counties with existing accredited private schools, it would have been simple to do so. Instead, the legislature chose an arbitrary and discriminatory geographical classification (tied to population, not existing private school options) that excludes most counties, and families, from the most lucrative benefit of the legislation.

Id. at 10. In addition to violating Section 59, the Court explained that this discrimination in educational offerings conflicts with Section 183, as interpreted by *Rose*. *Id.* at 12 ("One of the primary constitutional violations found by the Supreme Court in *Rose*, was the geographic disparities in educational opportunities."). Striking down the Program under Section 59 avoids, at least partially, the constitutional conflict with Section 183. *Id.* The Court declined to sever the unconstitutional geographic limitation from the Program, concluding that: "[T]uition assistance for this favored group of students and families in large urban areas [was] integral to the overall scheme of the statute," which passed the General Assembly by a "razor thin vote." *Id.* at 13-14.

The Circuit Court granted summary judgment in Plaintiffs' favor, declaring the Program unconstitutional under Section 184 and Section 59 of the Constitution and permanently enjoining it. *Id.* at 26-27. The Court declined to resolve Plaintiffs' remaining claims, finding that genuine issues of material facts precluded summary judgment and required denial of the remainder of the parties' summary judgment motions. *Id.* at 27–28.

This appeal followed. Vol. 17, R. 2476-2480; 2521-2561. All parties agree that this case is of great and immediate public importance and moved to transfer the appeal to this Court, which granted the motions.

ARGUMENT

This Court should affirm the ruling below on any one of five different grounds. First, HB 563 raises millions of dollars for private schooling without voter approval in

violation of Section 184. Second, HB 563 violates Section 59's prohibition against local and special legislation. Third, HB 563 discriminates among students in the educational opportunities it affords in violation of Section 183. Fourth, HB 563 violates basic non-delegation requirements in violation of Section 29 of the Constitution. Fifth, HB 563 levies taxes to fund private educational interests in violation of Section 171's public purpose requirement. Any one of these grounds is sufficient to affirm the injunction against the unconstitutional Program.

The Circuit Court reached only the first two of these issues. But all five were raised below and each provides an independent basis for affirmance. *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009): *Fischer v. Fisher*, 197 S.W.3d 98, 102-03 (Ky. 2006).

I. HB 563 Violates Section 184 of the Constitution By Raising Sums for Private Schools Without Voter Approval

The Circuit Court correctly held that the Program violates "the plain language of the Kentucky Constitution" because it "raises a sum of money for private education outside the system of common schools" without the voters' approval. Ex. 1 at 15.

Section 184 takes three steps to advance the overall objectives of the Constitution's education provisions. First, Section 184 creates and protects a common school fund by requiring that certain monies be "held inviolate" for the common schools and specifying that whenever "any sum" is produced by "taxation or otherwise for purposes of common school education," it must be used to support the common schools. Second, Section 184 requires voter approval of sums "raised" or "collected" through "taxation" "for education" outside the "common schools." And third, Section 184 preserves pre-existing taxes for public education institutions outside the common schools

that the State was funding at the time of 1890 Constitutional Convention, as an exception to this voter approval requirement.

The Commonwealth largely agrees as to what the first and third parts of Section 184 mean, but disagrees with Appellees as to the second. The Commonwealth says that part of Section 184 "only prohibits imposing new taxes on Kentuckians to pay for education outside the common schools," AG Br. at 22, and maintains the provision's history and relevant caselaw support that narrow view. But the text, caselaw, and history are all to the contrary.

A. Section 184 Requires Voter Approval Before Any "Sum" May Be "Raised or Collected for Education Other Than in Common Schools"

The Program is unconstitutional based on the plain language of Section 184. In relevant part, Section 184 reads as follows:

> The interest and dividends of said [common school] 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. ***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...***

(Emphasis added). The first sentence ensures sums produced for the common schools are used only for the common schools. The second, bolded sentence prevents the legislature from "rais[ing]" or "collect[ing]" any sum for "education other than in common schools until the question of taxation" is approved by the voters.

The protection afforded to school funding by Section 184 sweeps broadly to include any "sum" either "raised" or "collected" through taxation. The $125 million in tax credits that the Program uses to fund AGOs is a "sum" of money under Section 184. And the "question of taxation" that must be submitted to the voters encompasses all tax

questions including the generous tax credit primarily for private schools at issue here. Courts treat the use of the tax code to generate tax credits as a question of taxation under the Constitution. *See generally Preston v. Johnson Cnty. Fiscal Ct.*, 27 S.W.3d 790 (Ky. 2000) (recognizing that Section 171's restrictions as to taxation apply to tax credits); *Genex/London, Inc. v. Ky. Bd. of Tax Appeals*, 622 S.W.2d 499 (Ky. 1981) (same).

The Circuit Court correctly concluded that HB 563's tax-credit funding scheme "raises" the $125 million sum "that fund[s] the AGOs, through application of the income tax law." Ex. 1 at 16. It is common sense that if one family donates $1,200 University of Kentucky basketball tickets to a school auction and another family wins them for $1,100, the first family was "raising" funds for the school. So too here, as the Circuit Court held, when the state offers a tax benefit in an amount equal to if not exceeding a taxpayer's contribution to an AGO if, and only if, the taxpayer contributes to the AGO, the state "most certainly 'raises' the sums of money that fund the AGOs, through application of the income tax law." *Id.*; *cf.* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "raise" to encompass money that is procured from a wide variety of sources and means).[13]

HB 563's tax credit scheme stands in a class by itself. The unparalleled value it provides taxpayers makes all the more apparent that HB 563 "raises" sums for private education within the meaning of Section 184. As *Amici* Kentucky Center for Economic Policy *et al.* point out, HB 563 is "unique" among "Kentucky tax expenditure programs," because "the entire (or virtually the entire) cost of the program is covered through the tax

[13] The word "raise" in Section 184 must be given a different scope and import than the word "collect" in the same sentence. *See Pearce v. Univ. of Louisville*, 448 S.W.3d 746, 749 (Ky. 2014) ("effect must be given, if possible, to every word, clause, and sentence of a statute") (citations omitted); *Hampton v. Commonwealth*, 78 S.W.2d 748, 750 (Ky. 1934) (use of two different words in a statute "indicate[s] that the Legislature intended that the statute should have a more comprehensive application").

system, leaving virtually no element of taxpayer commitment or investment to the program." KCEP Br. at 9. A taxpayer who directs $1,000 to the Program has at least $950 of their taxes forgiven, KRS 141.522, and $970 or more of those taxes forgiven if the taxpayer contributes for more than one year. KRS 141.522(4). The taxpayer may also claim the payment to the AGO as a charitable deduction, lopping off "as much as 42 percent of the remaining taxpayer cost" and shrinking the costs to a taxpayer for each $1,000 directed to the Program to less than $18. KCEP Br. at 10. And because the Program allows taxpayers to contribute marketable securities to AGOs and earn a tax credit based on the market value of the securities at the time of contribution without paying capital gains tax, the Commonwealth is "paying a substantial bounty to the taxpayer for serving as a conduit for funding" the state's private school funding scheme. *Id.* at 11.[14]

The Commonwealth offers two responses to these points. First, the Commonwealth suggests that HB 563 should simply be viewed as a measure to decrease "the tax burden of Kentuckians." AG Br. at 20. That is like saying a bank makes loans only to reduce the financial needs of its customers. The Program cannot be evaluated without considering *why* the Commonwealth is granting these unique tax credits—namely, to raise funds for the AGOs to pay for private education. HB 563 establishes not

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[14] The KCEP *amici* offer the apt example of a taxpayer who, instead of "contributing $1,000 in cash, contributed $1,000 of Microsoft stock which the taxpayer had originally purchased for $200." On top of the $982 in tax reductions the taxpayer would reap, the "taxpayer would also avoid as much as $230 in federal (at the top rate of 23.8 percent) and state (rate of 5%)" in capital gains taxes bringing their total tax savings to $1,212. . . in exchange for a $1,000 payment to an AGO." KCEP Br. at 11. There is nothing charitable about taking advantage of a tax credit that makes the taxpayer better off than they were before they made the payment the Commonwealth requests.

just a tax credit but an entire apparatus for the very purpose of raising millions to pay primarily, if not exclusively, for private school tuition and services. "The funding for this program is 100% raised from the state's levying of the income tax. . . . The legislation simply allows this favored group of taxpayers to re-direct the income taxes they owe the state to private AGOs and thereby eliminate their income tax liability." Ex. 1 at 6. "[T]he legislature has essentially taken an account receivable to the Commonwealth of Kentucky, assigned it to these private AGOs, and forgiven the taxpayer's liability to the state." *Id.*

The Commonwealth also contends that the use of the word "tax" in the final proviso of Section 184 somehow limits the reach of the word "taxation" in the prior sentence to mean that Section 184 only applies to new tax increases, and not to the diversion of taxes to private schools through the AGO tax credit funding mechanism. But the exception for then-existing taxes imposed for the benefit of specific public education institutions merely sets out a specific, limited departure from the general rule that questions of taxation to raise sums for education outside the common schools must be approved by voters. This highly specific and limited exception for specific public institutions does not define the scope of Section 184's general restriction on the General Assembly's ability to raise money for private education. *See* 1A Sutherland Statutory Construction § 20:22 (7th ed.) ("Where the legislature has made specific exemptions, the courts must presume no others were intended.").

That funds raised by HB 563 cannot be used for private education without voter approval follows as well from the use of the word "taxation" in the first part of Section 184. This Court has recognized that Section 184 protects not just taxes specifically raised

for public education, but public funds from any source. *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 678–79 (Ky. 2010) (recognizing that virtually all taxes go into the general fund and that they are subject to Section 184 even though they are not specifically "raised or levied for educational purposes"). Just as "identical words used in different parts of the same act are intended to have the same meaning," *Woods v. Commonwealth,* 142 S.W.3d 24, 41 (Ky. 2004), it makes no sense to read the first part of Section 184 to refer broadly to all funds raised through taxation and then read the second part of Section 184 to use the word taxation to mean only a specific type of tax increase. In fact, the use of the "raised or collected" language in the second part appears, if anything, to broaden the taxation amounts governed by the second part.

Because HB 563 "raises" millions through "taxation" for "education other than in the common schools," the Circuit Court correctly held that it violates Section 184. This Court need go no further to affirm the ruling below. *Gillis v. Yount*, 748 S.W.2d 357, 360 (Ky. 1988) ("We have no power to ignore the plain meaning of the Constitution.").

B. This Court Has Consistently Construed Section 184 Broadly to Protect the Common Schools and Prevent Measures That Aid Private Schools Absent Voter Approval

The ruling below adheres to this Court's precedents, which have consistently read Section 184 broadly to protect the common schools.

Fannin, 655 S.W.2d 480, is the leading case. In *Fannin,* this Court struck down a state law that appropriated funds to the Library Department to purchase textbooks approved by the State Textbook Commission, which private schools could then requisition for their students, with the proviso that those funds were not to be drawn from any common school funds. The Court held that the law violated several different provisions of the Constitution, including the education provisions. If the

Commonwealth's view were correct that Section 184 protects only the common school fund and prohibits imposing new taxes earmarked for private schools, this Court would have come to the opposite result.

But that is not what this Court ruled. Instead, the Court carefully considered the seven detailed provisions of the Constitution addressing education issues, particularly the second part of Section 184, and concluded that:

> A fair reading of these seven sections of the constitution compels the conclusion 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.

Fannin, 655 S.W.2d at 482 (citation omitted). Because the textbook loan statute was indisputably designed to benefit private education, even in a very limited way, this Court held the statute violated Section 184. "Section 184 . . . provides that public money can be expended for education other than in common schools when a majority of the legal voters approve the expenditure by public referendum. If the legislature thinks the people of Kentucky want this change, they should place the matter on the ballot." *Id* at 484.[15]

The *Fannin* Court looked to the substance of what the statute did, finding the legislature's efforts to obscure the aid it provided to private schools through "a series of devices," did "more to point up the constitutional problems than to avoid them." *Id.* at

[15] The Commonwealth suggests that *Fannin's* approach of reading the education provisions together is somehow at odds with *Calloway Cnty. Sheriff's Dep't. v. Woodall,* 607 S.W.3d 557 (Ky. 2020). AG Br. at 36 n.12. Not so. Nothing in *Calloway* disturbs the well-settled approach that the constitutional provisions "must be read as a whole and in context with other parts of the law." *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005); *see also Owen v. Univ. of Ky.*, 486 S.W.3d 266, 270 (Ky. 2016) ("the words of the text are of paramount concern, and what they convey, in their context, is what the text means.").

482. In particular, the Court found the effort to use general appropriations, rather than appropriations from a school fund, could not avoid the reach of Section 184 as such general appropriations are "no less public money from public taxes." The Framers "did not intend for the legislature to spend public money to support private schools by these devices." *Id.* at 482. And the Court rejected the effort to cast the statute as a general welfare measure because the only purpose for providing textbooks was educational. *Id.*

Fannin is not an outlier that may be disregarded as the Commonwealth erroneously suggests. AG Br. at 38. *Fannin's* interpretation of Section 184 has been repeatedly relied on by this Court. In *Pennybacker*, this Court relied on *Fannin*'s recognition that "the Kentucky Constitution is unyielding as to where public funds can be used for educational purposes" in determining whether a particular appropriation was permissible. 308 S.W.3d at 674-75. And this Court twice relied on *Fannin* in its decisions demarcating the precise circumstances in which it is permissible for the government to support transportation for students who attend private schools. *See Fiscal Ct. of Jefferson Cnty. v. Brady*, 885 S.W.2d 681, 686 (Ky. 1994) (recognizing that "*Fannin* holds that private school instruction cannot be publicly aided" and ruling that direct payments to private schools to fund student transport were unconstitutional); *Neal v. Fiscal Ct.*, 986 S.W.2d 907, 909 (Ky. 1999) (holding *Fannin* did not apply to subsidies to transportation entity that served a public welfare need rather than an educational need).[16]

Fannin's interpretation of Section 184 to broadly prohibit schemes that transfer tax resources away from the common schools without voter approval is consistent with

[16] Indeed, *Fannin* has been hailed as "the seed of the contemporary Kentucky constitutional law approach" by the late Justice Donald C. Wintersheimer. *State Constitutional Law*, 20 N. Ky. L. Rev. 591, 592 (1993).

this Court's earlier decisions, especially *Miller v. Covington Development Authority*, 539 S.W.2d 1 (Ky. 1976). In *Miller* this Court considered whether Section 184 allowed a statute that authorized school districts to give up potential future tax revenue to local development authorities in the hopes of revitalizing their local economies. *Id.* There, as here, the tax had not been collected—in fact, the disputed revenue did not even yet exist—and defenders of the law urged that Section 184 did not apply because the money was never collected in the first place and may not materialize. *Id.* But this Court rejected that notion. It held the scheme unconstitutional, impossible to square with the "stubborn fact" that Section 184 "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 (emphasis added); *see also Pollitt v. Lewis*, 108 S.W.2d 671, 674 (Ky. 1937) (recognizing Section 184's command that "'[n]o sum shall be raised or collected for education other than in common schools' can mean only what it says"); *Sherrard v. Jefferson Cnty. Bd. of Educ.*, 171 S.W.2d 963, 967 (Ky. 1942).

Fannin's understanding that Section 184 sweeps broadly to preserve for the common schools all funding raised "by taxation or otherwise" is also reflected throughout this Court's rulings. In *Pollitt,* the Court held that the Constitution's education provisions collectively restrict the "legislative power to expend money for education other than in common schools" and are not limited to circumstances where sums are expressly raised for the common schools. 108 S.W.2d at 672. And *Pennybacker* recognized that because education is "a firmly entrenched part of the 'general operations of state government,'" and because modern budgeting supports all educational programs from general fund monies, the Constitution prohibits use of any state funds for private education. 308

S.W.3d at 678-79. Likewise, in *Fannin* and *Miller* this Court applied Section 184's restrictions to programs that did not involve appropriations from the common school fund. The program in *Fannin* merely loaned textbooks to private school students and provided no funding to the schools at all. 655 S.W.2d at 484. And *Miller* involved a scheme where local districts would forego potential future *ad valorem* revenue—money that not only was never collected but whose precise amount was speculative. 539 S.W.2d at 5.

The Commonwealth urges this Court to cast aside this precedent and replace it with a radically narrower view of Section 184's protections premised on *Butler v. United Cerebral Palsy of Northern Kentucky, Inc.*, 352 S.W.2d 203 (Ky. 1961), and *Hodgkin v. Board for Louisville & Jefferson County Children's Home,* 242 S.W.2d 1008 (Ky. 1951). AG Br. at 30. But those two cases cannot do the work the Commonwealth suggests.

Both *Butler* and *Hodgkin* concerned whether funding could be provided to schools approved by the Board of Education to meet the needs of students who could not be educated in the common schools. *Butler* involved state approved private schools for exceptional children who were "not within the normal range of those whom the common school may be equipped to serve." 352 S.W.2d at 205. *Hodgkin* involved education provided in state homes for children who were state wards requiring special care and services. 242 S.W.2d at 1010. In both cases the Court found the services in question were "primarily a welfare rather than an educational measure," *Butler*, 352 S.W.2d at 207, fulfilling a need "that is of a general benefit to the state." *Hodgkin*, 242 S.W.2d at 1010. And in each case the Court concluded that Section 184 did not prevent the state from meeting that general welfare need for students who could not be educated in the common

schools.[17]

The narrow welfare exception of *Butler* and *Hodgkin* cannot be stretched to justify sweeping support for private education generally, let alone the full payment of private school tuition that HB 563 provides. HB 563 does not target exceptional students, incapable of being adequately educated in the public schools. Instead, it finances private "education service providers" "for the purpose of educating" any student in Kentucky within the generous income limits, KRS 141.504(2)(a), and for students residing in the eight select counties, HB 563 even pays for private school tuition. KRS 141.504(1). That is an "educational measure" by any definition, not a welfare measure, and falls squarely within Section 184's general prohibition against the government "providing aid to furnish a private education." *Fannin*, 655 S.W.2d at 484.[18]

C. Looking Past the Form of the Program (the AGO Tax Credit "Devices") to Its Substance (a Program to Pay for Private Education) Demonstrates That the Program Violates Section 184

Both the text and caselaw construing Section 184 establish that it prohibits, without voter approval, a taxation measure to raise up to $125 million to fund private education services including private school tuition. The sheer sums of money involved and the reality that most of those funds will pay for private school tuition and expenses, which can only be considered educational purposes, compel the conclusion that the law must be struck down, once one "look[s] through the form of the statute to the substance of what it does." *Commonwealth v. O'Harrah,* 262 S.W.2d 385, 389 (Ky. 1953).

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[17] Neither *Butler* nor *Hodgkin* addressed a question of taxation under Section 184. Thus, neither provides any support for the Commonwealth's novel, narrow view that the second part of Section 184 applies only to new taxes to fund private schools. AG Br. at 30.

[18] Indeed as the Circuit Court recognized, the fact that the other (albeit minimal) expenses that HB 563 pays for include public education services only confirms that the statute can only be considered an educational measure. Ex. 1 at 15-16.

In *Gillis* this Court struck down a law that taxed unmined coal at a nominal rate lower than the usual tax on real property. 748 S.W.2d 357. The Secretary of the Revenue Cabinet "candidly conceded that the legislative purpose behind a one mil rate is to create a *de facto* exemption"—a withholding of the state's taxing power—but nevertheless urged the Court to uphold the tax as good policy. *Gillis,* at 359. Following *Fannin,* the Court rejected these arguments and refused to allow the Constitution to be "circumvented," even if doing so was arguably "in the public interest." *Id.* at 360. In substance, as Judge Wintersheimer opined in his concurrence, the lower tax was "not truly a tax" at all, but an exemption subject to the constitutional strictures. *Id.* at 366 (Wintersheimer, J., concurring).[19]

The same is true here. HB 563 is in substance a $125 million program to fund private education. The unique features of the tax credit mechanism for funding the Program, including the rich bounty afforded to taxpayer contributors, the statutory restrictions that ensure Program funds will flow primarily to private schools, and the state-created administrative structure, make clear that HB 563 is "in all meaningful

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[19] Courts in other jurisdictions have likewise invalidated tax benefits that run afoul of constitutional requirements—even ones that delivered only modest taxpayer benefits in comparison to HB 563. *See, e.g., Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (affirming district court injunction against Virginia state and county laws that closed all public schools in Prince Edward County, Virginia, and provided tuition assistance and up to 25% tax credits to parents of children attending private schools); *Curchin v. Mo. Indus. Dev. Bd.*, 722 S.W.2d 930 (Mo. 1987) (striking down a statute that allowed a state development authority to encourage investment by providing a 100% state tax credit to bond holders against any losses on revenue bonds the authority issued, finding that the tax credit constituted lending of public credit in violation of the state constitution to the same extent as if the state had made an outright payment); *Opinion of the Justs.*, 514 N.E.2d 353 (Mass. 1987) (invalidating a tax deduction worth up to $1,500 for dependent educational expenses incurred in either public or nonprofit private primary and secondary schools, because the tax benefit was a "grant, appropriation or use of public money" under constitutional prohibition on state aid to private schools).

respects, the functional equivalent of a government expenditure program." KCEP Br. at 1. To put the point in *Fannin*'s terms, all these "devices," do rather "more to point up the constitutional problems than to avoid them." *See Fannin*, 655 S.W.2d at 482.

In contrast to most other charitable giving tax benefits, which provide modest incentives for private giving, HB 563 raises sums by providing a dollar-for-dollar (or more, *see supra* at 14 & n.14) tax credit. The amount the government has earmarked for the HB 563 credit is functionally identical to what it would spend on an outright appropriation. As the Circuit Court noted, funding for the Program "is 100% raised from the state's levying of the income tax" and is "completely dependent on the coercive power of the state to collect that tax." Ex. 1 at 7.

Because of this feature, the taxpayers who contribute to the Program are not "donors" in any meaningful sense. They are mere conduits for the sums that the Commonwealth seeks to raise for private schools. Nor do the taxpayers have discretion over which schools or students they wish to fund. If I give $100 to a church, I can choose my own church or at least one from the same religion or denomination. Or if I want to give more of my income to charity generally, I can choose whether to fund the Red Cross or the food bank. But under HB 563 the AGOs will make this decision, not the taxpayers.

Unlike a typical tax benefit,[20] HB 563 specifies the exact amount it seeks to raise for the Program. The General Assembly set aside a sum of $25 million per year in taxes

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[20] *See generally* Commonwealth of Kentucky Office of the State Budget Director, *Tax Expenditure Analysis, Fiscal Years 2022-24* (Nov. 30, 2021) (detailing all of the state's tax expenditures), *available at* https://bit.ly/3bf3WM7. For example, charitable contribution deductions are limited to a percentage of adjusted gross income, but there is no aggregate limit. *Id.* at 39, citing 26 U.S.C. § 170(a)(1). And the Postsecondary Education Tuition tax credit provides "a credit equal to 25 percent of the amount of the federal Hope Scholarship and the lifetime learning credit" with no aggregate limit. *Id.* at 45, citing KRS 141.069.

that it will forego collecting, much as it would with a direct appropriation. And it ensured that not a penny more will be spent on the Program by imposing the unusual requirement that taxpayers obtain "preapproval" of their tax credits and its prioritization of how tax credits will be allocated against available funding. *See supra* at 6.

Finally, HB 563 "does much more than just allow private donations to fund tuition" at private schools; it sets up an "intricate scheme" for funding private education. AG Br. at 18. Although the Intervenor Appellants contend that the AGOs could have arisen absent HB 563, Intervenor Br. at 45, the fact is that the AGOs did not and, indeed, do not exist even now.[21] And because the statute allows AGOs to capture 10% of the $125 million raised under the Program for administrative expenses, HB 563's "scheme" uses state action and support to ensure AGOs will be created and funded. This state-created feature does not exist in other Kentucky tax benefit programs. The government may incentivize donations to the Red Cross, but it does not bring the Red Cross into being via an "elaborate system of privatizing the allocation of [] tax credits." Ex. 1 at 4.

No other tax benefit in Kentucky has *all* of these features. Consequently, striking down the Program would not jeopardize other taxation measures. AG Br. at 43; Intervenor Br. at 28. Not one of the tax benefits the Appellants invoke are designed to evade the requirements of the education provisions and serve an unconstitutional purpose. Not one provides the exceptionally generous, more than one-to-one potential payout to

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[21] Public reports reflect that AGOs have not yet opened in Kentucky. EdChoice Kentucky, *Parents,* https://edchoiceky.com/parents (describing creation of AGOs as "under development" under the FAQ "When will the EOA program be available in Kentucky?").

taxpayers.[22] Not one creates the type of administrative apparatus that HB 563 does to raise sums for private education. And not one reflects all three of these unique features of HB 563's tax funding scheme that make it "functionally indistinguishable" from a direct government expenditure. KCEP Br. at 15.[23]

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[22] For example, the Attorney General invokes KRS 141.069. AG Br. at 43. But that higher education tax credit provides a modest subsidy of no more than $1,000; it does not pay for the student's entire cost of attendance. And KRS 141.381 reimburses only fifty percent of the actual costs incurred by businesses that assist their employees with certain higher education expenses.

[23] The Appellants rely on cases from foreign jurisdictions as support for their view that HB 563 is constitutional. But the question is not whether HB 563 would violate other states' constitutions or the federal constitution, "but whether it satisfies the much more detailed and explicit proscriptions of the Kentucky Constitution." *Fannin*, 655 S.W.2d at 483. And the Kentucky Constitution's language and interpreting caselaw are entirely distinct from the jurisdictions Appellants invoke. In Arizona, for example, the state supreme court upheld a tax credit funded school voucher program against challenge under a constitutional provision that prohibits "appropriations" of "public money or property." *Kotterman v. Killian*, 972 P.2d 606, 617-20 (Ariz. 1999). The Alabama Supreme Court did the same, based on a constitutional proscription on "appropriations" or money "appropriated to" private schools. *Magee v. Boyd*, 175 So.3d 79, 91-92 (Ala. 2015). In Georgia, the Constitution only prohibits taking money "from the public treasury" to fund certain private schools. *Gaddy v. Ga. Dep't of Revenue*, 802 S.E.2d 225, 228 (Ga. 2017). The Illinois Constitution says the government may not "mak[e] any appropriation or pay[] from any public fund" to religious private schools. *Toney v. Bower*, 744 N.E.2d 351, 357 (Ill. App. Ct. 2001), *appeal denied*, 754 N.E.2d 1293 (Ill. 2001). And the Florida constitution provides that "[n]o revenue. . . shall ever be taken from the public treasury" to be given to religious schools. *McCall v. Scott*, 199 So.3d 359, 370 (Fla. Dist. Ct. App. 2016). Section 184 concerns not just "public funds" or "appropriations" but any "sums" that are "raised or collected" by "taxation or otherwise." And unlike the Illinois, Georgia and Florida Constitutions, the Kentucky Constitution prohibits funding all private schools, not just private religious schools, because the Framers were concerned about both church-state separation (which is addressed separately in Section 189 and is not at issue in this case) and protecting support for the common schools.

The U.S. Supreme Court's decision in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 142–43 (2011), is even less relevant. There the Court considered the narrow question of whether a taxpayer had standing under federal standing principles to challenge a tax credit scheme under the Establishment Clause. 563 U.S. at 139. As the Circuit Court recognized, the standing of Plaintiffs to bring such claims like the ones in this case "was definitively decided in *Rose v. Council for Better Education*." Ex. 1 at 8 (citation omitted).

D. The Debates of the Constitutional Convention Confirm That Section 184 "Means That Any Proposition for Education Outside of the Common Schools Shall Be Submitted to the People"

Both the text of Section 184 and the caselaw compel the conclusion that HB 563 is unconstitutional. That should be the end of the matter. It is only proper to resort to historical evidence such as the debates of the Constitutional Convention where the language of the Constitution itself "leaves the meaning in doubt." *Commonwealth v. Ky. Jockey Club*, 38 S.W.2d 987, 993 (Ky. 1931). But the history of Section 184 and of the education provisions fully support this Court's broad interpretation of Section 184, rather than Appellants' narrow view.

First, consider the circumstances leading up to the Constitutional Convention. As this Court explained in *Agricultural & Mechanical College v. Hager*, at that time the "cause of public education had suffered at the hands of some of the previous Legislatures," and funds allocated to education had been diverted from their intended purposes, including to private schools, or otherwise mismanaged. 87 S.W. 1125, 1127 (Ky. 1905). This occurred despite the Court's attempts to "jealously" guard the common school fund. *Bd. of Educ. of City of Covington v. Bd. of Trs. of Pub. Libr. of City of Covington*, 68 S.W. 10, 13 (Ky. 1902) (citing pre-1891 caselaw interpreting the education provisions). And it occurred despite language in the pre-1891 version of Section 184 that contained language similar to the present-day first part of Section 184—but not the second part requiring voter approval of all "sums" "raised or collected" for non-common schools.

To avoid past mistakes, and "desiring to be rid of those evils which had hampered, and, indeed, threatened, our whole system of state education, the convention sought to give the [common school] system stability, to make impossible the recurrence

of the conditions just alluded to." *Hager,* 87 S.W. at 1127. In amending the education provisions of the Constitution, the Framers sought to place education funds "forever beyond the reach of any other use," and prevent the state from "embark[ing] in any further partnership educational enterprises, at least until the matter had been first approved by the people." *Id.*

Accordingly, the Convention debates centered on how to better protect and expand public education. Proposals allowing affirmative state support for private schools were, if not unthinkable, certainly not verbalized by any delegate. In fact, to the extent the delegates debated state support to private schools at all, those debates centered on whether the state should remove tax exemptions for private schools now that the common schools were established. *See, e.g.*, Kentucky Constitutional Convention, *Official Report of Proceedings and Debates* at 2436-37 (1890) ("1890 Debates").

The delegates vigorously debated whether to adopt Section 184's third sentence—not because of any disagreement that private school aid should be prohibited, but because its broad language would have the collateral impact of restricting state support to *public* education institutions the State was already funding. While the Convention was already underway, this Court's predecessor decided *Higgins v. Prater*, 14 S.W. 910, 910 (Ky. 1890), which approved a tax to support what is now the University of Kentucky, a public institution "under [state] control." *Higgins* interpreted the predecessor to Section 184 which did not yet include the current language providing that "no sums" may be "raised or collected" to aid non-common schools.

In discussing the proposal to add Section 184's third sentence, Delegate Nunn noted the language was necessary given the Court's 1890 *Higgins* decision, because

otherwise the door would be open to the legislature to fund not just the college, but "any other institution in the State of Kentucky that it sees proper." 1890 Debates at 4574. Delegate Beckner opposed the addition, arguing that its broad language would also restrict funding for the Agricultural and Mechanical College (now known as the University of Kentucky). *Id.* at 4472.

The Convention delegates understood that Section 184's prohibition means precisely what it says. Delegate Jacobs read the language to mean that "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...." *Id.* at 4457. Convention President Clay said it "means that any proposition for education outside of common schools shall be submitted to the people." *Id.* at 4569. Delegate Beckner saw the addition as aimed at the Agricultural and Mechanical College but said that it "certainly embraces the other institutions which are for educational purposes" and prohibits government support of them too. *Id.* at 4472. And Delegate Amos understood the text to "draw the distinction between common and private schools: say that you can collect tax for one, but not for the other." *Id.* at 2436.

The portions of the 1890 Debates cited by the Attorney General are not to the contrary. Delegate Beckner was concerned with expanding *public* education, especially public higher education. *Id.* at 4469 ("The leading passion of my life has been to do what I could to improve the quality of our common schools.... If there was any particular question that moved me to desire a seat in this honorable body, it was that of popular education."); *see also id.* at 4477 ("we ought to leave as much freedom as possible in the

development of that part of the *governmental system* which will so deeply and seriously affect the weal or woe of the people who come after us.") (emphasis added). And, far from championing "flexibility" to allow the Commonwealth to fund all education "outside the common schools," AG Br. at 27-28, Judge Beckner was a staunch opponent of state support for private education. 1890 Debates at 4462 ("Private schools must, from their nature, be limited in number and attendance, whilst the education that the country needs should be universal, and should embrace all the children.").

Similarly, Delegate Jonson's goal in supporting the proposed addition to Section 184 was "to grant to every child in this Commonwealth education in our common schools" and to "make it impossibility that that shall be wrested from them now or hereafter." *Id.* at 4533. He was concerned that siphoning support to *public* higher education would strain limited state resources; his statements cannot be read as an endorsement of funding private schools, as HB 563 does. And Delegate Jacobs supported the initial changes to Section 184—without the exception for higher education funding—because he thought the exception for higher education was implied without the need for the specific exemption that was ultimately added. But he did not endorse private school funding. Whatever their reasons for supporting or opposing higher education funding, the delegates ultimately reached a compromise that contains the broad prohibition on raising or collecting sums through "taxation" for non-common schools but preserves in the final part of Section 184, the exception for the existing tax for the Agricultural and Mechanical College.

* * *

The sum of the matter is this: HB 563 raises sums for education and directs those

sums to private schools without voter approval. It is unconstitutional under Section 184. The strained readings Appellants urge cannot be squared with the text of Section 184, its history, and its interpreting caselaw. Nor can the General Assembly circumvent the Constitution by raising those sums using the state's taxing power rather than by direct appropriations to private schools. This sort of legislative mischief is just what the Framers sought to guard against with Section 184's broad language prohibiting aid to non-common schools.

The Commonwealth's position has no limiting principle: "[i]f the conditions prescribed by this act can be validly imposed, the door is open for the imposition of others more onerous." *O'Harrah*, 262 S.W.2d 385 at 389–90 (citations and quotation marks omitted.) If this Court approves HB 563, nothing will prevent the General Assembly from expanding the Program or creating others like it. The General Assembly will be free to support schools that do not welcome all students, favor those who have the financial and social capital to navigate what is effectively a voucher system and fund a private education system with no safeguards at all. That result cannot be what the Framers envisioned 130 years ago. If the General Assembly believes this sort of drastic change is desirable, the proper course is to amend the Constitution or "place the matter on the ballot." *Fannin*, 655 S.W.2d at 484.

II. HB 563 Violates Section 59 of the Constitution By Providing Special Educational Options to Students in Eight Particular Counties

The Circuit Court correctly concluded that HB 563 contains a second constitutional defect that provides a separate ground for invalidating the law: it creates different educational options for students in eight designated counties in the Commonwealth and thus is impermissible special or local legislation prohibited by

Section 59 of the Constitution.

The most significant expense funded through the tax credit program created by HB 563 is the payment of tuition and fees for students to attend nonpublic schools. KRS 141.504(2). This benefit, however, is available only to "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.*" KRS 141.504(2)(b) (emphasis added). By specifying that the private school tuition benefit applies only to those counties that had the requisite population *in the 2010 Census report*, HB 563 is expressly limited to a closed group of eight counties: Boone, Campbell, Daviess, Fayette, Hardin, Jefferson, Kenton, and Warren. Such a static limitation that no other county can ever meet is a straightforward violation of Section 59 of the Constitution.

A. Section 59 Prohibits Legislation Limited to "Particular Persons"

This Court has made clear that "local or special legislation" prohibited by Section 59 is legislation that applies only to "particular places or particular persons." *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 572 (Ky. 2020); *see also Singleton v. Commonwealth*, 175 S.W. 372, 373 (Ky. 1915) ("The purpose of section 59 of the Constitution was to prevent the Legislature from enacting legislation that would be applicable only to particular localities or particular persons or things as distinguished from other localities or persons or things throughout the state."). Here, HB 563's private school tuition benefit is expressly applicable only to students in "particular localities," namely the eight counties that had a population of at least 90,000 in the 2010 Census report. Had the words "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" in KRS 141.504(2)(b) been replaced with "residents of Boone, Campbell, Daviess, Fayette, Hardin, Jefferson, Kenton, and Warren County," the statute would remain exactly the same. Only those eight counties had the requisite population in the 2010 Census and only those counties' residents can ever be eligible for this benefit.

This Court addressed an identical situation in *Harlan County v. Brock*, 55 S.W.2d 49 (Ky. 1932). There, the law in question applied only to "judicial districts composed of two counties and having a population of 100,000 or more *according to the federal census of 1930*." *Id.* at 50 (emphasis added). This Court held that because the population threshold was tied to a particular census at a fixed point in time and thus could never include "other districts which may in the future, or indeed at the time the act in question was passed, have attained the requisite population," the law was an impermissible special or local act in violation of Section 59. *Id.* As the Court explained:

> This classification can in no event apply except to the situation disclosed by the federal census of 1930. It permits no changes, though the other judicial districts composed of two counties may by the passage of time become equal in population or even pass that of the twenty-sixth judicial district. Where classification is so static as this, it is not based on reasonable distinctions, but is essentially arbitrary; thus rendering the act based upon it special or local.

Id.

The Court went on to note that its decision was in accord with an unbroken line of decisions from other states in which population distinctions tied to a specific census were held to be unconstitutional special or local acts. *Id.* at 50-52 (citing decisions from seven state supreme courts); *see also Martin v. Tollefson*, 163 P.2d 594 (Wash. 1945) (holding that classification limited to cities having between 100,000 and 150,000 inhabitants as of the 1940 Census was special or local legislation because it identified Spokane and

Tacoma as clearly and specifically as if they had been named).[24] As the *Harlan County* Court concluded:

> [i]t may be thus succinctly expressed: Where a classification is based on population according to a specific census, federal or state, an act based upon such classification is a local or special act and not a general one, and, where constitutional provisions as to special or local acts, such as we have in this state, are involved, such an act violates such provisions.

55 S.W.2d at 50.

Such laws violate Section 59 because they apply only to "particular places or persons." *Calloway*, 607 S.W.3d at 567. Illustrating the point, in *Pennybacker* this Court struck down as impermissible special legislation a statute that effectively limited a pharmacy scholarship program to students who opted to attend one particular school. 308 S.W.3d at 682-83. Because the statute could "only be read as funding scholarships for students attending the planned UC Pharmacy School" and foreclosed students attending any other pharmacy school from obtaining a scholarship under the program, the law was "special legislation in contravention of Section 59 of the Kentucky Constitution." *Id.* at 683; *see also Calloway*, at 573 n.19 (recognizing that the law at issue in *Pennybacker* was correctly invalidated under Section 59 because it applied to a "particular object").[25]

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[24] Other states continue to consistently adhere to this principle. *See, e.g.*, *Montgomery Cnty. Comm'n v. Hobbie*, 368 So.2d 264 (Ala. 1979); *State ex rel. White v. Bd. of Comm'rs of Wyandotte Cnty.*, 39 P.2d 286 (Kan. 1934); *City of Oakland v. McCraw*, 126 S.W.3d 29 (Tenn. Ct. App. 2003), *appeal denied* (Tenn. 2003); *see also* 2 Sutherland Statutory Construction § 40:7 & n.12 (8th ed.) ("Acts limited to a particular census are a form of identification and are invalid, as no subsequent population changes enable other communities to come within their qualifications.") (collecting cases).

[25] Notably, the law in *Pennybacker*, just like HB 563, did not identify the location by name but rather by description, stating that the scholarship could be used by pharmacy students "at a private four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county." 308 S.W.3d at 671. But only one pharmacy school could meet that definition, and the law was therefore invalid under Section 59 as it applied only to a particular place.

In reaching its decision in *Harlan County*, the Court squarely rejected the precise argument that the Commonwealth makes here: that HB 563 merely contains a "classification" of counties based on population, which is permissible. AG Br. at 8-10. As the Court explained, this argument "loses sight, however, of the fact that the classification here employed is not based generally on population but on a population *at a fixed time and according to a specific and specified census*." *Harlan County*, 55 S.W.2d at 50 (emphasis added). None of the cases relied on by the Commonwealth involve the type of population classification used in HB 563—one tied to a specific census and thus creating an unchanging identifiable group of particular localities. When this type of static geographic limitation is included, the law "is a special or local one" and is therefore "invalid and void" under Section 59. *Id.* at 52.

B. The Static Limitation in HB 563 is Arbitrary and Unconstitutional

The Commonwealth also contends that HB 563 is valid because "a rational basis exists" for limiting the private school benefit to students in eight particular counties. AG Br. at 11. But under Section 59 all special and local acts are prohibited, whatever the rationale for those laws may be. In any event, as the Court explained in *Harlan County*, a population limitation tied to a specific census is the very definition of "arbitrary" because it creates a "static" group with no possibility of admitting new members that have satisfied or will satisfy the criteria in the future. 55 S.W.2d at 50. Such a limitation therefore cannot be justified by any proffered rationale for the *population threshold* because, as the Circuit Court illustrated in detail, by definition the closed group created by HB 563 will not include any counties that had achieved or will achieve the population threshold other than the eight counties on the 2010 Census report. Ex. 1 at 11-12; *see also*

Harlan County, 55 S.W.2d at 50 ("The classification is not made to apply to other districts which may in the future, or indeed at the time the act in question was passed, have attained the requisite population....Where classification is so static as this, it is not based on reasonable distinctions, but is essentially arbitrary.").

Moreover, as the Circuit Court recognized, the unreasonableness of this provision is demonstrated by the fact that HB 563 utilizes the geographic limitation to determine eligibility for an *educational* benefit. Geographic discrimination in educational offerings is specifically *disfavored* under the Constitution, as this Court found in *Rose*:

> [A]lthough by accident of birth and residence, a student lives in a poor, financially deprived area, he or she is still entitled to the same educational opportunities that those children in the wealthier districts obtain. What principle could be more fair, more just, and more importantly, what would be more consistent with the purpose of Section 183 and the common school system it spawned?

790 S.W.2d at 207; *see also* Section III, *infra*. The General Assembly's constitutional obligation to "provide an efficient system of common schools" under Section 183 of the Constitution includes an obligation to provide "equal educational opportunities" to Kentucky children "regardless of place of residence." *Rose*, 790 S.W.2d at 212. In light of these principles embodied in the Constitution, creating a system that is purposely and expressly designed to provide *unequal* educational opportunities to Kentucky children based specifically on their place of residence does not promote a legitimate state interest.

C. Whatever the Public Policy View is of HB 563, the Program Must Comply with the Constitution

In addition, the Commonwealth contends that HB 563 should be upheld because the purpose of Section 59 is purportedly "legislative efficiency" and "HB 563 is the definition of legislative efficiency." AG Br. 12-14. It is open to debate whether creating a tax-credit funding scheme designed to redirect sums to private schools achieves

"legislative efficiencies." But more to the point, such public policy appeals are not relevant here. There is simply no support for the notion that the Court can overlook a constitutional violation in the name of "legislative efficiency" or because the Program is a temporary "pilot project." Section 59 makes clear that "where a general law can be made applicable, no special law shall be enacted." Ky. Const. § 59, subsection 29. This constitutional prohibition "prevent[s] the Legislature from enacting legislation that would be applicable only to particular localities or particular persons or things." *Singleton*, 175 S.W. at 373. HB 563 violates Section 59 by creating a private school tuition benefit "applicable only to particular localities," namely the eight counties that had populations of 90,000 or more in the 2010 Census report. HB 563 is unconstitutional regardless of how much efficiency it achieves. *See, e.g., Pennybacker*, 308 S.W.3d at 685 ("however well-intentioned the Pharmacy Scholarship Program legislation may have been, as written KRS 164.7901 is unconstitutional and cannot be implemented"); *see also Rose*, 790 S.W.2d at 190 (The Court's role is to "dutifully appl[y] the constitutional test...We do no more, nor may we do any less.").

D. The Section 59 Flaw in HB 563 Cannot Be Cured Through Severance

Finally, the Commonwealth contends that the Circuit Court erred by invalidating the Program[26] under Section 59 rather than rewriting the statute to provide the private

[26] The Circuit Court reiterated that Sections 1-4 of HB 563, which did not concern the EOA program and were not challenged were unaffected by its invalidation of the EOA Program. Vol. 17, R. 2471-75. The Circuit Court held that "the unconstitutional provisions of Section 7(b)(2) of the Act, limiting private tuition assistance to students who reside in counties with a population of over 90,000," were not severable from the remaining portions of Sections 5-17 of the Act. *Id.* "[T]he private school tuition assistance is "integral to the overall scheme" of funding that is provided in Sections 5-17 of the Act, [and] is not severable from the other portions of the Act that were being challenged in this lawsuit." *Id.*

school tuition benefit statewide or to a larger group of counties. The Circuit Court correctly concluded that rewriting the statute in this manner was improper.

The Commonwealth acknowledges that the General Assembly did not include a severability clause in HB 563, AG Br. at 14, but argues that revising the law in the manner it has proposed is consistent with KRS 446.090, which provides that if one part of a statute is unconstitutional, the remaining parts may be upheld:

> [U]nless the remaining parts 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, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.

Id. Contrary to the Commonwealth's contention, it is apparent that the limitation on the scope of the private school tuition benefit was an integral and essential component of the law that cannot be severed.

While the Commonwealth refers to the unconstitutional county limitation as "a mere 27 words of an 18-page bill," AG Br. at 18, it ignores the critical role this provision plays in the statute. As the Circuit Court pointed out, the private school tuition benefit is "by far the most expensive item" in the Program. Ex. 1 at 14. Thus, unsurprisingly, the benefit is *purposefully* limited in the statute. KRS 141.504(2) is the portion of the statute that governs how EOA funds may be used, and the General Assembly made clear in this provision that EOA funds were not to be used for any purpose other than those specifically identified in subsection (a) of this provision. *See* KRS 141.504(2)(a) (stating EOA funds "shall only be used" as specified therein). But rather than simply include tuition and fees at nonpublic schools in the list of educational expenses set forth in KRS 141.504(2)(a), the statute instead states that EOA funds "shall ***only*** be used" to pay for

private school tuition and fees "***permitted by paragraph (b)*** of this subsection." KRS 141.504(2)(a) (emphases added). Paragraph (b) of the subsection is the provision that expressly limits the private school tuition benefit to eight specific counties in Kentucky. Thus, it is apparent from the text of the statute that the General Assembly did *not* intend to have the private school tuition benefit available statewide or to any other expanded group of localities. Rather, it was "only" to be available in the eight counties specified in KRS 141.504(2)(b).

"The seminal duty of a court in construing a statute is to effectuate the intent of the legislature." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). HB 563 clearly evidences the General Assembly's intent to limit the scope of the private school tuition benefit to eight specific counties and not to provide a statewide benefit. The Commonwealth's proposal disregards legislative intent and instead seeks to rewrite the statute contrary to that expressed intent. The Circuit Court correctly concluded that it "cannot take th[is] radical step." Ex. 1 at 13; *Burrow v. Kapfhammer*, 145 S.W.2d 1067, 1072 (Ky. 1940) ("[T]he legislature had expressly said that the statute should *not* apply to that class, and the court had no power or authority to legislate contrary to such express legislative provisions."); *Bd. of Educ. of Woodford Cnty. v. Bd. of Educ. of Midway Indep. Graded Common Sch. Dist.*, 94 S.W.2d 687, 691 (Ky. 1936) ("It is urged, however, that, if this exception makes the act unconstitutional, the exception should be disregarded, and the act held valid, as operating uniformly throughout the state. The answer to this is that the court has no lawmaking power, and cannot extend a statute over territory from which it is excluded by the general assembly."); *Pennybacker*, 308 S.W.3d at 684 ("Because our first guiding principle in statutory construction is to ascertain and

effectuate legislative intent, there is no legal basis for excising subsection (1).").

In arguing that the Court should expand the scope of the private school benefit, the Commonwealth relies on *Commonwealth v. Meyers*, 8 S.W.3d 58 (Ky. App. 1999), AG Br. at 17, but that case only further illustrates the error of the Commonwealth's position. In *Meyers*, this Court concluded that severing an unconstitutional classification in a criminal statute and expanding benefits to a larger group better comported with legislative intent, both as expressed in the statute *and* as shown by subsequent legislation in which the General Assembly had expanded the benefit to a broader group. 8 S.W.3d at 62-63. Here, subsequent legislative activity[27] demonstrates the General Assembly's intent *not* to expand the private school tuition benefit. House Bill 9, enacted earlier this year, initially sought to include a provision that would expand the private school tuition benefit statewide if the geographic limitation was determined to be unconstitutional—but that provision was deleted from the bill before passage. *Compare* Ex. 3 § 17 *with* 2022 Ky. Acts Ch. 213 (H.B. 9), 2022 Gen. Assembly Reg. Sess., https://bit.ly/3zgVYtK.

Moreover, even if there were any ambiguity as to whether the geographic limitation on the private school tuition benefit was an essential and inseparable component of the bill, that is quickly dispelled by examining the legislative history of HB 563. As the Circuit Court pointed out, HB 563 passed by a razor-thin margin and thus "the most logical conclusion is that *any* material change in the bill would have

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[27] In *Meyers*, this Court specifically noted that a subsequent legislative amendment was a "valid consideration" in the severability analysis. *Id.* at 62; *see also Carey v. Donohue*, 240 U.S. 430, 436-37 (1916) (failed amendment in subsequent legislation demonstrated Congressional intent to reject proposed statutory construction and the Court is "not at liberty to supply by construction what Congress has clearly shown its intention to omit"); *Great N. Ry. Co. v. United States*, 315 U.S. 262, 277 (1942) ("It is settled that subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.") (citation omitted).

jeopardized its passage." Ex. 1 at 14-15. To sever only the reference to counties with populations of at least 90,000 as of the 2010 Census would require this Court to do what the legislature expressly and repeatedly declined to do.

House Floor Amendment 2 to HB 563, which would have added statewide private school tuition funding, was defeated on March 11, 2021. Ex. 4. HB 563 was then amended to permit private school funding for students residing in counties with populations of 150,000 or more (currently Jefferson, Fayette, and Kenton) with no limitation based on any census report. Ex. 5. HB 563 was passed with this amendment and sent to the Senate. Ky. Gen. Assembly, Legis. Rec., 2021 Reg. Sess., H.B. 563, https://bit.ly/3bceprK In the Senate, two amendments were proposed that would have expanded the private school benefit statewide while a third proposed amendment sought to apply the private school benefit to any county with a population of at least 90,000 with no reference to any particular census. Exs. 6-8. The Senate Committee Substitute lowered the population to 90,000 and included the reference to the 2010 Census Bureau Report. Ex. 9. Only after that was done did HB 563 pass the Senate on March 16, 2021. Ky. Gen. Assembly, Legis. Rec., 2021 Reg. Sess., H.B. 563, https://bit.ly/3bceprK. When presented to the House of Representatives, Senate Committee Substitute 1 passed the House by only one vote on March 16, 2021. *Id.* The legislative history clearly demonstrates that the legislature rejected attempts to provide private school tuition funding throughout the Commonwealth. Both of the "options" for severance proposed by the Commonwealth, AG Br. at 16-17, were considered and rejected during the legislative debates, leaving no doubt as to the General Assembly's intent that the private school tuition benefit *not* be expanded beyond the eight counties specified in HB 563.

Given that the House and the Senate considered and rejected *multiple* amendments that attempted to create a statewide private school tuition benefit, the Commonwealth cannot credibly assert that "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." AG Br. at 18-19. Both the text of HB 563 and the legislative history make clear that the geographic limitation on the private school tuition benefit was an essential component of the legislation such that "it is apparent that the General Assembly would not have enacted the remaining parts" without this provision. KRS 446.090. Accordingly, the Circuit Court correctly rejected the Commonwealth's request to sever KRS 141.504(2)(b) and properly invalidated the Program as unconstitutional under Section 59.

III. HB 563 is Contrary on Its Face to the Requirements of *Rose v. Council for Better Education*

In *Rose,* the Court found that the Commonwealth's constitutional obligation to provide an "efficient" common school system under Section 183 mandated a system that includes the "twin attributes of uniformity and equality." 790 S.W.2d 186, 207.

To comply with Section 183, the General Assembly must deliver a uniform education through the state system and must provide education equitably to Kentucky's students, regardless of where they live, their economic station, or their family status. *Id.* at 211-12. Being "ever mindful of the immeasurable worth of education to our state and its citizens," *id.* at 189, *Rose* was rooted in the principle that the Commonwealth cannot discriminate against students based on their county of residence, their family background, or other arbitrary circumstances in the provision of education:

> Each child, *every child,* in this Commonwealth must be provided with an

> equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education.

Id. at 211. Under Section 183, "[t]he boys of the humble mountain home stand equally high with those from the mansions of the city." *Id.* at 206 (citation omitted).

The Program violates *Rose's* foundational principles of equality and uniformity. "The system of common schools must provide equal educational opportunities for all students in the Commonwealth [and] [t]he system must be equal to and for all students." *Id.* at 208. Kentucky's highest court has repeatedly restated and expounded upon these principles. *Major v. Cayce*, a decision that occurred "very close in time to the adoption of the present Constitution" recognized the constitutional prohibition of an educational practice that "impairs the equal benefit" to all students. *Id.* at 206 (quoting *Major v. Cayce*, 33 S.W. 93, 94-95 (Ky. 1895)). In *Commonwealth ex rel. Baxter v. Burnett*, 35 S.W.2d 857, 859 (Ky. 1931), the Court again reiterated that Section 183 required "equality of advantage for the school children of the state as a whole." *Wooley v. Spalding* involved discrimination between two schools within a district that was designed to "reduce and substantially eliminate the enrollment of pupils" at the disfavored school. 293 S.W.2d 563, 564 (Ky. 1956). The Court rejected the discriminatory policy, and yet again declared that education must be delivered "without discrimination as between different sections of a district or a county." *Id.* at 565. Such discrimination "constitutes a violation of both the spirit and intent of section 183 of our State Constitution." *Id.*

The Program engages in strikingly similar discrimination to the practices prohibited by Section 183. HB 563 creates a two-tiered school system not available to all Kentucky students and not substantially uniform throughout the state. It is open only to

families in certain counties, with certain income levels, with certain religious affiliations, with certain family configurations, to non-disabled students, and to those who meet private school admission standards. KRS 141.502(6); 141.504(2)(b); 141.520(1), (4). It allows some students to receive private tuition funding based on where they live, while excluding others simply because they do not reside in the selected counties. And it excludes as well even those students within those counties who will be denied admission to private school (and thus HB 563 tuition support) based on their religion, disability status, or LGBTQ status. For all these reasons, as the Circuit Court correctly found, the Program would "exacerbate the inequality and increase the disparity in educational opportunities available to all children." Ex. 1 at 25.

Section 183 prohibits such discrimination in educational offerings. Under the Constitution, the opportunity for education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Rose,* 790 S.W.2d at 190 (quoting *Brown v. Bd of Educ.,* 347 U.S. 483, 493 (1954)). The Framers were adamant that the state-supported educational system had to be open and free to all. As one Framer put it, the Constitution envisioned a "system of practical equality in which the children of the rich and poor meet upon a perfect level and the only superiority is that of the mind." *Id.* at 205 (quoting 1890 Debates at 4460). HB 563, on its face, violates the letter and spirit of the constitutional duties discussed in *Rose* because it deliberately and expressly requires and countenances discrimination against Kentucky students based on where they live and who they are in the provision of educational benefits. Such a program is

unconstitutional under Section 183.[28]

IV. HB 563 Unconstitutionally Delegates the General Assembly's Obligation to Provide Students With an Education to Private AGO Intermediaries

There is yet another fundamental problem with the Program. Under *Rose*, the duty to provide Kentucky children with an educational system that meets the constitutional standards "is solely the responsibility of the General Assembly." 790 S.W.2d at 193; *see also id.* at 204, 216. The Program delegates that responsibility to private AGOs with no safeguards as to the type or quality of education they will fund. For that reason as well, HB 563 is unconstitutional.

Rose recognized that if the General Assembly delegates its educational obligations it "must provide a mechanism to assure that the ultimate control remains with the General Assembly" and that local boards of education fulfill their delegated responsibilities efficiently. *Id.* at 216. And in the wake of *Rose*, this Court has repeatedly parsed the circumstances under which such delegations are permissible. *See Bd. of Educ. of Boone Cnty. v. Bushee*, 889 S.W.2d 809, 812 (Ky. 1994) (explaining that the state fulfills its responsibility by ensuring "accountability of funds" and "the objectives as to learning capacities" are fulfilled); *Beshear v. Bevin*, 575 S.W.3d 673, 683 (Ky. 2019) (finding temporary reorganization of educational units constitutional given General Assembly controls "at the front and back ends" of the process); *Williams v. Ky. Dep't. of Educ.*, 113 S.W.3d 145, 152-53 (Ky. 2003) (explaining that the Department "substantially micromanage[s]" local districts in their conduct of schools and recognizing

[28] The Circuit Court did not reach Appellees' additional constitutional claim based on Section 183 relating to whether the Commonwealth may, consistent with its obligation under Section 183, fund a parallel system of private schools that that undermines and harms the common school system. Appellee agrees that this claim involves factual issues that are not yet ripe for resolution.

that the "statutory relationship [between the two was] devised [] to ensure the accomplishment of [the General Assembly's] constitutional duty to provide for an efficient system of common schools.").

Here, rather than delegating its educational obligations to local school districts that operate subject to extensive statutory controls, the General Assembly delegates those obligations to private AGOs that will operate without any controls whatsoever as to the type or quality of education they fund. Nothing in HB 563 prevents an AGO from funding a private school that only teaches creationism, that teaches that sexual orientation or gender identity are morally reprehensible, or that teaches students nothing at all.

Nor is there anything in HB 563 which requires AGOs to remove private schools from the Program if they fail to provide a promised education or discriminate against students, or that even allows families to seek redress for such failings. To the contrary, HB 563 affirmatively prevents such oversight, *see* KRS 141.520(1)–(2) (prohibiting any state oversight that "limit[s] the independence or autonomy of an education service provider"), and affirmatively protects private school choices as to admissions and services provided even on bases that are discriminatory, *see id.* at (4) (prohibiting AGO's from requiring that any school "alter its creed, practices, admissions policy or curriculum").

In this regard, HB 563 is far worse and far less defensible than the types of legislative delegations that this Court has found to be impermissible. *See Legislative Rsch. Comm'n ex rel. Prather v. Brown*, 664 S.W.2d 907, 915 (Ky. 1984) (striking down the General Assembly's delegation of legislative authority to the Legislative Research Commission as impermissible); *Bd. of Trs. of the Judicial Form Ret. Sys.*, 132 S.W.3d

770, 785 (Ky. 2004) (striking down statute as impermissible delegation that failed "to give sufficient guidance of its meaning"); *Fawbush v. Bond*, 613 S.W.2d 414, 415 (Ky. 1981) (delegation to review redistricting plan impermissible where statute "provided no criteria for review"); *Flying J Travel Plaza v. Commonwealth*, 928 S.W.2d 344, 350 (Ky. 1966) (delegation to Transportation Cabinet impermissible that failed to give adequate guidance regarding sign management).

That the delegation here is to private AGOs unaccountable in any way for the quality of educational services they provide makes the constitutional defect all the more glaring: "If there is one essential characteristic inherent in legislative power, it is that such power must be exercised by an elected representative or representatives of the people, and not by a person, persons or agency created or designated by those representatives." *Miller*, 539 S.W.2d at 4; *see also Baughn v. Gorrell & Riley*, 224 S.W.2d 436, 438 (Ky. 1949); *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997). The General Assembly's obligation to provide an education for the children of Kentucky is far too fundamental and far reaching to be shuffled off to private entities that are unaccountable in any way for the quality of educational services they provide.

V. HB 563 Unconstitutionally Levies Tax Dollars to Fund a Subset of Private Selective Schools in Violation of Section 171 of the Constitution

There is one more independent constitutional flaw with HB 563. Section 171 of the Constitution requires that "[t]axes shall be levied and collected for public purposes only." The Program runs afoul of this constitutional safeguard by redirecting taxes levied and owed to the state to fund AGOs that will pay for private schools that do not serve the public or a valid public purpose under Section 171.

Section 171 differs in scope from Section 184 and reaches both the collection and levying of taxes. Thus, even if the Court were to break with its prior precedents and read Section 184 narrowly as the Commonwealth proposes, the AGO Program would still need to meet Section 171's demand that taxes be "levied . . . for public purposes only." And that it cannot do.

The tax credits used to fund the Program were levied when those income tax obligations were imposed under KRS 141.020, or 141.040 and 141.0401. A "levy" refers to the point in time that taxes are imposed by law upon a particular taxpayer and a particular class of property. *Cf. City of Paducah v. Bd. of Educ. of Paducah*, 158 S.W.2d 615, 617-18 (Ky. 1942) ("the board of commissioners properly refused to levy a tax at a rate which would if, fully collected, produce more revenue than was necessary"); *Levy,* BLACK'S LAW DICTIONARY (11th ed. 2019) ("[t]he imposition of a fine or tax; the fine or tax so imposed."). If those taxes had not been levied, there would be no tax credit for taxpayers to obtain, and no source of funding for the Program.

The private schools those tax levies will fund are empowered to choose the students they will serve, and they do not serve all students. Funding selective private schools fulfills no public purpose under Section 171. "Nonpublic schools are open to selected people in the state," and therefore a state program that levies taxes to aid non-public schools fails to fulfill "a public purpose." *Fannin*, 655 S.W.2d at 482. That is so even where, unlike here, the state aid is far less substantial and far more indirect in nature than the millions in full-scale private school tuition payments that the Program authorizes. *Id.* (textbook loans to students attending private schools violated Section

171).[29]

That the private schools set to receive this public support both can, and will, discriminate against students is clear. Section 15 of HB 563 specifically provides that the Program may not "limit the independence" of private schools or require them to alter their "creed, practices, admissions policy or curriculum" to participate. KRS 141.520(1), (4). And the private schools that operate in the counties selected by HB 563 almost universally discriminate in admissions, not only based on prior academic performance basis but in many cases on more the troubling bases of disability, sexual orientation, religion, family status and gender identity. Ex. 2.

The Commonwealth asserts that HB 563 serves the public purpose of "allowing lower-income children to obtain the education best suited to their needs." AG Br. at 46. And the Intervenors argue that education generally is a public purpose. Intervenor Br. at 42. But the Program aids private schools without guaranteeing any student that they will be admitted to a school "best suited to their needs" or that the schools will provide an education that meets the common school standards, or any standard at all. More to the point, whatever educational benefit the Program may provide "is constitutionally impermissible because of the manner in which it" works: by funding an arbitrary, selective and discriminatory subset of private schools. *Fannin*, 655 S.W.2d at 484. Funding private schools open only to some is not a public purpose under Section 171.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling below.

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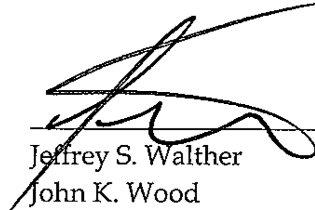
[29] Reaching a similar result, in *Barker v. Crum*, 198 S.W. 211 (Ky. 1917), this Court's predecessor invalidated a scholarship program that paid for the tuition and board of only a narrow subset of college students under Section 3 of the Constitution.

Respectfully Submitted,



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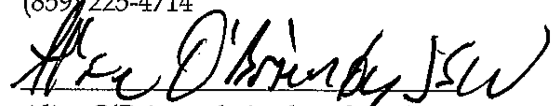

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