SUPREME COURT OF KENTUCKY
FILE NO. 2019-SC-000520-D

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

v.

ON REVIEW FROM COURT OF APPEALS
NOS. 18-CA-000150, 18-CA-000151, 18-CA-000154,
18-CA-000156, 18-CA-000158 AND 18-CA-000160
FRANKLIN CIRCUIT COURT
NO. 17-CI-00327

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

BRIEF OF APPELLANTS

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via U.S. mail on the following: Hon. Phillip J. Shepherd, Circuit Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601; R. Kenyon Meyer, J. Tanner Watkins, Young-Eun Park, Dinsmore & Shohl, LLP, 101 S. 5th Street, Suite 2500, Louisville, KY 40202; John G. Horne, II, Daniel C. Cleveland, J. Michael West, Energy & Environment Cabinet, 300 Sower Boulevard, Third Floor, Frankfort, KY 40601; John P. Singler, Carrie D. Risert, Singler & Ritsert, 209 Old Harrods Creek Road, Suite 100, Louisville, KY 40223; Fin Cato, Cato & Cato, 2905 Breckenridge Lane, Suite 3, Louisville, KY 40220; Schuyler J. Olt, City of Jeffersontown, 10416 Watterson Trail, Louisville, KY 40229; J. Matthew Carney, Carey & Niemi, One Riverfront Plaza, 401 West Main Street, Suite 2000, Louisville, KY 40202; Tom Fitzgerald, Kentucky Resource Counsel, P.O. Box 1070, Frankfort, KY 40602; Culver V. Halliday, Adam C. Reeves, Stoll Keenon Ogden PLLC, 500 West Jefferson Street, Suite 2000, Louisville, KY 40202; Brian W. Hodge, 9408 Dawson Hill Road, Louisville, KY 40299; Denise M. Helline, Celebrezze & Helline, The Normandy Building, 101 North Seventh Street, Louisville, KY 40202; Charles W. Jobson, 6006 Brownsboro Park Blvd., Suite C, Louisville, KY 40207; Richard P. Schiller, Terri E. Boroughs, Schiller Barnes Maloney, PLLC, 1600 One Riverfront Plaza, 401 West Main Street, Louisville, KY 40202; Barry Dunn, Office of

Attorney General, 700 Capitol Avenue, Frankfort, KY 40601; Charles J. Otten, John T. McGarvey, Morgan & Pottinger, P.S.C., 401 S. Fourth Street, Suite 1200, Louisville, KY 40202; James G. Hodge, 9904 Wynbrooke Place, Louisville, KY 40241; Samuel (Chip) Hayward, Adams, Hayward & Welsh, 1009 South Fourth Street, Louisville, KY 40203; and Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, on this the 13 day of May, 2020.

Peter F. Ervin

INTRODUCTION

This is an appeal from the Court of Appeals decision reversing the judgment of the Franklin Circuit Court which found that House Bill 246 of the 2017 Acts of the General Assembly violates §§ 59, 60 and 156a of the Kentucky Constitution. The Court of Appeals should be reversed and the judgment should be reinstated on the grounds that the legislation is patently offensive to the Kentucky Constitution.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees believe that the exchange of oral argument will assist the Court in its consideration and analysis of this appeal.

STATEMENT OF POINTS AND AUTHORITIES

Introduction

This brief is submitted by counsel, on behalf of Appellants, Louisville/Jefferson County Metro Government Waste Management District (hereinafter referred to as "LMGWMD" or "District"), Bob Schindler, Chairman of the LMGWMD Board, and Greg Fischer, Mayor of Louisville Metro Government. This appeal challenges the constitutionality of KRS Chapters 109 and 224 as amended in House Bill 246 (hereinafter referred to as "HB 246" or the "Act"). The trial court correctly found that the Act which limits the authority of the District because it is situated in a consolidated local government; and which enhances the authority of the Appellees, to the exclusion of other cities of equal class because they lie in a consolidated local government, is repugnant to the Kentucky Constitution in the following ways:

1. Ky. Const. §59 and §60 in that it amends a general law so that its amendments apply only in Jefferson County without a substantial and reasonable justification for doing so; and

2. Ky. Const. § 156a in that it amends a general law to give home rule cities in Jefferson County authority which does not "apply equally to all cities within that same classification."[1]

Relying on a nebulous standard, the Court of Appeals reversed the trial court with circular reasoning and minimal analysis. The court concluded that an Act amending general legislation so as to provide for the diminution of authority in one county differently from all 119 other counties, was merely "governmental in nature," and not special and local legislation prohibited by Ky. Const. §§ 59, 60 and 156a. It likewise concluded that the

[1] The trial court Opinion and Order is attached as Appendix 2.

augmentation of the power of home rule cities in one county differently from home rule cities in all other 119 counties was merely "governmental in nature" and not unconstitutional. Nowhere in the opinion is "governmental in nature" defined or explained.[2] It begs the question, what legislation concerning the powers of local government isn't governmental in nature?

The Appellees have the burden to show substantial and reasonable justification for the offensive classification. They have not and cannot meet this burden. The Franklin Circuit Court judgment is sound and should be reinstated.

Statement of the Case

KRS Chapter 109 was enacted as a general law applicable to all counties in Kentucky in 1978. The statute gives counties and waste management districts the power to own, operate, and regulate solid waste management facilities. Prior to HB 246, KRS 109.041 applied equally to all Kentucky cities and gave counties, not cities, the power to regulate solid waste management within their borders.

KRS Chapter 109 resulted from a special session of the General Assembly in response to growing concern over the management and disposal of solid waste in Kentucky. It contained an extensive recitation of its findings, purpose and intent in KRS 109.011, including:

> (5) That as a result of the conditions described in the foregoing findings, problems of solid waste collection, management, and treatment, and resource recovery activities in connection therewith have become a matter of statewide concern necessitating action by the General Assembly to:

[2] The Court of Appeals decision is attached as Appendix 1.

(a) Enable responsible planning and management agencies to be created to define solid waste management requirements, with all of the foregoing subject to regulation by the Natural Resources and Environmental Protection Cabinet;

(b) Assist those units of government primarily responsible for the management of solid waste and the acquisition, financing and operation of facilities to dispose of solid waste to fulfill their functions in a responsible and proper manner with primary emphasis on the ***regionalization of these functions***; and

(c) ***Reduce the amount of solid waste generated and disposed of in Kentucky***; .... (Appellants' emphasis)

Other solid waste management legislation and history are significant in contemplation of the rationale for the amendments contained in HB 246. In 1991, then Governor Wallace Wilkinson declared a "state of emergency" in the Commonwealth in relationship to the management of Kentucky's solid waste. In response, the General Assembly created a "Solid Waste Management Legislative Task Force." KRS 224.43-070. In KRS 224.43-010, "Policy and purpose; priorities for solid waste management practices; findings related to solid waste management plans," the legislature again recounted specific findings and purposes for the handling of solid waste in Kentucky, including:

> The General Assembly finds that ***counties and waste management districts***, when enabled by complete and accurate information relating to the municipal solid waste collection and management practices within the solid waste management area, ***are in the best position to make plans for municipal solid waste collection services for its citizens***. The General Assembly also finds that assistance from the cabinet, combined with state financial incentives, can aid counties and waste management districts with implementing solid waste management plans. (Appellants' emphasis)

The District was created pursuant to the enabling legislation contained in KRS 109.115. It was created as a non-taxing waste management district in 1990. The District has county authority under KRS 109.041 as follows:

> It is hereby determined and declared that in the implementation, acquisition, financing, and maintenance of solid waste management

> facilities, and in the enforcement of their use, counties will be performing state functions duly delegated to them for the public welfare. In such regard, the right of counties to condemn land necessary for the acquisition of solid waste management facilities pursuant to the Eminent Domain Act of Kentucky and to exercise the police power in respect thereto is confirmed. Any county may contract with third parties for the management by public or private means of solid waste within the county.

Since its creation 30 years ago, the District has acted in compliance with its statutory authority to consolidate/regionalize all solid waste management within the boundaries of Jefferson County, whether the waste was generated within the then first-class city of Louisville, lesser-classed cities, or unincorporated areas of Jefferson County.

In 2003, pursuant to KRS Chapter 67C, the governments of the City of Louisville and County of Jefferson were merged into a *consolidated local government*. Pursuant to KRS 67C.113, this consolidation of local governments had no effect on the Districts authority to continue the consolidated city/county functions it already had been performing successfully for 13 years.[3]

In 2014, in compliance with its statutorily mandated directive "to reduce the amount of solid waste generated," the District passed a regulation[4] prohibiting the collection of yard waste in plastic bags. This minor change provides a major environmental impact: yard waste collected in plastic bags goes to the landfill, whereas yard waste collected in paper bags may be processed for reuse at a composting facility.

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[3] KRS 67C.113 provides: All taxing districts, fire protection districts, sanitation districts, water districts, and any other special taxing or service districts of any kind existing upon the successful passage of the question to consolidate a city of the first class and its county shall continue in existence unless dissolved in the manner prescribed by law and shall continue to exercise all the powers and functions permitted by the Constitution and the general laws of the Commonwealth of Kentucky.

[4] The Regulation is attached as Appendix 3.

On March 21, 2017, and pursuant to its *emergency* clause, HB 246 became law with the signature of Governor Bevin. With the exception of Section 5[5] of the Act, the Amendments are expressly limited in their application to "counties containing a consolidated local government," in other words, Jefferson County. In brief, below are the changes wrought by HB 246:

- Section 1. prohibit the District from regulating solid waste from any municipality located in the geographic area of the District and prohibit the District from regulating municipal waste haulers and charging fees;
- Section 2. create a new Board with two new positions mandating that the mayor appoint to the District board a member "submitted by the organization representing the largest amount of cities within the county which does not have statewide membership [Jefferson County League of Cities]," and, he shall appoint a member "submitted by the association representing the largest number of waste management entities operating within the county [National Waste and Recycling Association]."[6]
- Section 3. repeal all regulations of the Board during the preceding 5-year management plan, unless reenacted by the new Board. Excludes Board rules and regulations from enforcement in cities, unless approved by the city.
- Section 4. authorize municipalities to opt out of the District's solid waste management plan.
- Section 6. abolish the current District Board.
- Section 7. stated purpose and declaration of an emergency.[7]

At a more granular level, HB 246 strips the District of specific tools needed to effectively manage solid waste in the region. To start, the measure prohibits the District

[5] Section 5 of the Act amends the statute as it relates to the responsibility of individual property owners. This section of the Act is a general law with state-wide application. This section is not part of the constitutional challenge here.

[6] The trial court found that this section of the amended statue relates to the organization and structure of local government. No appeal was taken from this finding.

[7] HB 246 is attached as Appendix 4.

board, commonly referred to as the "109 Board," from charging any of the approximately 83 cities within the county a fee based upon the composition of the city's solid waste stream:

> The consolidated local government or waste management district shall not charge a city within the county containing the consolidated local government . . . any fee that is based, directly or indirectly, on the composition of the solid waste stream of that city if the solid waste stream of that city is in conformity with state and federal law for the use of the solid waste management facility receiving the waste. [HB 246 Sec. 1(14)]

No other county in the state is subject to such a restriction.

In addition, HB 246 prohibits the enforcement of regulations adopted by the 109 Board within a city inside the county containing a consolidated local government until the legislative body of the city approves the regulations:

> These rules and regulations shall not be enforceable within the boundaries of the city until approved by the legislative body of the city.

HB 246 additionally allows municipalities within a consolidated local government, but not any other cities in Kentucky, to, by ordinance, specifically opt out of the District's solid waste management plan. Thus, only the approximately 83 cities inside Jefferson County can opt out of their county solid waste management plan - no other city in any other county in the state is given that same authority.

HB 246 also declares vacant all seats on the board of directors for waste management districts within a county containing a consolidated local government (in application, only the 109 Board in Jefferson County), and changes the composition of the board. HB 246 also sets term limits only for the 109 board in Jefferson County. The composition of the boards in all other counties remains as it was prior to HB 246.

HB 246 further provides for a sunset of rules and regulations enacted after the adoption of the most recent solid waste management plan on August 31, 2017, or when a new solid waste management plan is approved by the department. No other county's solid waste regulations would sunset in this manner. Significantly the only District regulation repealed by this section is the plastic bag ban.

In sum, HB 246 amends KRS Chapters 109 and 224, that once applied equally to all cities and counties in the state, to treat consolidated local governments (Jefferson County) and the approximately 83 cities located inside Jefferson County differently than all other cities and counties in the rest of the state. The only stated reason for treating counties containing a consolidated local government differently than all other counties in the state is, according to the legislation, that "the citizens of counties containing a consolidated local government will be better served by a reconstituted waste management district board that is more diverse and representative and responsive to the populace . . . ." HB 246, Sec. 7. No other purpose or legislative history were made of record in the action.

Standard of Review

Appellate courts review a trial court's summary judgment ruling de novo. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010).

Argument

The Act creates a sweeping, and as demonstrated below, nonsensical, increase in the authority of municipalities in Jefferson County, to the exclusion of cities of equal classes in all 119 other counties in the Commonwealth while at the same time pulling the teeth of regionalized waste management in Jefferson County. These uneven changes have

the effect of dismantling the District's authority and frustrating the intent of KRS Chapter 109 by splintering the District's regionalized solid waste management plan. The changes in HB 246 are not only illogical in relationship to the extensive legislative findings set out in KRS Chapters 109 and 224, they are constitutionally prohibited. The Franklin Circuit Court judgment is sound and should be reinstated because the Act is undeniably special and local legislation which: 1) does not relate to the organization or structure of local government; and 2) lacks any substantial and reasonable basis for the classification singling out the District and Appellants.

I. The Act Constitutes Special and Local Legislation Prohibited By §§ 59 and 60 of The Kentucky Constitution.

With passage of KRS Chapter 109 nearly 42 years ago, the General Assembly enacted state-wide general legislation enabling the creation of solid waste management districts. Because it created the districts, the General Assembly has the absolute authority to uniformly limit the powers of waste districts. But that is not what HB 246 does. Instead, it plays favorites. The Act singles out and discriminates against only Jefferson County by emasculating the District's authority, and it singles out and favors only Jefferson County municipalities (to the exclusion of all other Kentucky municipalities of equal classes) through augmentation of their authority.

The act is repugnant to Ky. Const. §59 and §60, in that it is special and local legislation. Ky. Const. §59 provides, in pertinent part: "[W]here a general law can be made applicable, no special law shall be enacted." §59 is complimented by Ky. Const. §60 which provides: "The General Assembly shall not indirectly enact any special or local act by the repeal in part of a general act, or by exempting from the operation of a general act any city, town, district or county;... The purpose of §§ 59 and 60 is to ensure that all laws based

upon a certain subject shall be applied and operate equally on all individuals and corporations. *See, City of Louisville v. Kuntz*, 104 Ky. 584, 47 S.W. 592 (Ky. 1898).

The Act is *special* legislation prohibited by § 59 because it amends a general act so as to discriminate specifically against the District and simultaneously favor Appellants. The Act contains *local* legislation prohibited by § 60 because it specifically targets the District for application of the Act. Because the Act limits by geographic location the application of the decades-old statute of general application, the statute is undeniably *local* legislation. The Act destroys equal application of the law on all individuals and corporations.

The Act's classification of "all" consolidated local governments is merely a ruse for discrimination against the District directly and only. The courts have long recognized the distinctive relationship necessary to avoid application of §§ 59 and 60. The court's analysis in *Mannini v. McFarland*, 294 Ky. 837, 172 S.W.2d 631, 632 (Ky. 1943) is instructive in distinguishing the necessary relationship between the purpose of the statute and its classification. The court reasoned:

> In construing sections 59 and 60 this court said in Safety Building & Loan Co. v. Ecklar, 106 Ky. 115, 50 S.W. 50, 51: "We assert it to be elementary that the true test whether a law is a general one, in the constitutional sense, is not alone that it applies equally to all in a class,--though that is also necessary,--but, in addition, there must be distinctive and natural reasons inducing and supporting the classification. A law does not escape the constitutional inhibition against being a special law merely because it applies to all of a class arbitrarily and unreasonably defined." *Id.*

For more than a century now, it has been the law of the Commonwealth that numbers alone provide an insufficient constitutional basis for classification. "[W]here the subject is one of general application throughout the state, and has been so treated in a

general scheme of legislation, distinctions favorable or unfavorable to particular localities, and rested alone upon numbers and density of population, are invidious, and therefore offensive to the letter and spirit of the Constitution." *James v. Barry*, 138 Ky. 656, 128 S.W. 1070, 1072 (Ky. 1910); followed in, *United Dry Forces v. Lewis*, 619 S.W.2d 489, 491 (Ky. 1981). The amendments of HB 246 fall squarely within the prohibition of this firmly established century-old legal standard.

The general scheme of legislation in Chapters 109 and 224 with general application throughout the state for 42 years, was amended to apply only in Louisville/Jefferson County. While the legislative history is lacking, Appellees have argued that the size of Jefferson County containing more individual home rule cities than other counties provides a rational for it to be treated differently than other counties in the Commonwealth. As Commissioner Stanley so succinctly and eloquently put it: "The 'bigness' of Louisville does not, in our opinion, afford a reasonable difference or a ground for the special legislation." *City of Louisville v. Klusmeyer*, 324 S.W.2d 831, 834 (Ky. 1959).

In substance, HB 246 takes an established statutory scheme generally applicable to all counties/waste districts and creates two new sub-classes. On the one hand, there is a new sub-class of Waste Management District, the one operating within Jefferson County. On the other hand, there is a new super-class of home rule city, those incorporated in Jefferson County. These substrata of classes, taken from a natural/general class to create unnatural classes, have long been prohibited by the constitutional limitations of §§ 59, 60 and 156a:

> It is generally established in this and other jurisdictions to which our investigation has extended that in order for a law to be general in its

> constitutional sense it must meet the following requirements: (1) It must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification. (Citations omitted.)
>
> The second requirement is as essential as the first. **The Legislature can not take what may be termed a natural class of persons, split that class in two and then arbitrarily designate the dissevered factions of the original unit as two classes and thereupon enact different rules for the government of each.** It is equally well established that the classification must be based upon some reasonable and substantial difference in kind, situation or circumstance which bears a proper relation to the purpose of the Statute. Citing, Ried v. Robertson, 304 Ky. 509, 200 S.W.2d 900, 12 Am.Jur. page 156, Section 482, Constitutional Law. (Appellants' emphasis)

Schoo v. Rose, 270 S.W.2d 940, 941 (Ky. 1954) (citations omitted)

HB 246 purports to do exactly what is prohibited by *Schoo's* conclusion. It takes the general classification of Waste Management Districts and splits it into two, the one in Jefferson County and all others across the state. Then without any rational basis, the statute arbitrarily establishes different powers for the two dissevered groups. In like manner, the Act creates a new classification of home rule cities, those incorporated in a consolidated local government, and without a rational basis, arbitrarily establishes new powers for them. There is no reasonable and substantial difference in kind for this division and redistribution of powers. The Court of Appeals should be reversed and the judgment of the trial court should be reinstated.

II. The Act Does Not Satisfy Any Exception to The §§ 59 and 60 Prohibitions.

Because the Act is unconstitutional on its face, the only relevant question is whether the Act satisfies either permissible exception to the constitutional prohibition. There are two exceptions to the rules prohibiting special or local legislation. In *Louisville/Jefferson County Metro Government v. O'Shea's-Baxter,* 438 S.W.3d 379 (Ky. 2014) this Court articulated the standard:

> [a] legislative classification according to population and its density, and according to the division of cities into classes, will be constitutional under the frame work of Sections 59 and 60 only if (1) the act relates to the organization and structure of a city or county government or (2) the classification bears 'a reasonable relation to the purpose of the Act.' *Id*, at. 383. Quoting, *Mannini v. McFarland*, 294 Ky. 837, 172 S.W.2d 631, 632 (Ky. 1943).
> *O'Shea's-Baxter*, at 383.

The Act fails to satisfy either exception.

A. The Act Does Not Relate To The Organization or Structure of Local Government.

None of those sections of HB 246 that are challenged in this appeal deal with the organization and structure of city or county government. The preamble to HB 246 states that it is "AN ACT relating to solid waste management and declaring an emergency." If the Act dealt with the organization and structure of a consolidated local government, it would come in the form of amendment to KRS Chapter 67C and not by way of amendment to a general law. But the legislature made no effort to amend any of the powers granted to the consolidated local government in its enabling/charter legislation, KRS Chapter 67C. The court in *Mannini* found it significant that the unconstitutional amended statute there, "now appears not in the charter of fourth-class cities, but in the chapter dealing with alcoholic beverages [a general law]." *Mannini*, p. 631. (Appellants' emphasis) Appellees mistakenly relied on *Logan v. City of Louisville*, 142 S.W.2d 161 (Ky. 1940) below to argue that the legislature can amend local governmental powers without offending §§ 59 and 60 of the Constitution. But *Logan* proves the Appellants' point. The legislation there dealt specifically with the charter of first-class cities, the enabling act, which is understandably the organization and structure of government. This is not the case here where the amendment is to a general law.

HB 246 does not deal with the organization and structure of city or county government. Reference to organization implies legislation that would enable the creation of a form of government, whereas, structure implies creation of the components of a government. A prime, and in this case controlling, example of acts relating to the organization or structure of local government is found in HB 246 Sec. 2. In this section, the General Assembly directly adjusts the composition of the Board. It organizes the creation of the board by providing for the mayoral appointment of a set number of members, and it establishes the structure of the board by identifying membership qualifications and terms of service. The trial court found and concluded that this section plainly relates to the organization and structure of local government. No appeal was taken from this conclusion.

The Appellees' argument below that all sections of HB 246 merely relate to the structure and organization of local government is simply not true. HB 246 Sec. 2 changes in Board composition notwithstanding, the Act makes substantive changes in the authority of the Board to act. Taking away the authority of the Board to regulate solid waste generated by cities within the District is substantive and has nothing to do with the District's organization or structure. Prohibiting the Board from licensing and regulating solid waste haulers within the District is substantive and has nothing to do with the District's structure or organization. Granting cities veto power over Board regulations is substantive and has nothing to do with either the organization or structure of the District or the cities within.

Appellees seek to avoid the *O'Shea's-Baxter* holding that the Act must relate to the "organization or *structure*" of local government in an effort to meet the exception. Instead,

Appellants want to rely on an earlier expression contained in *Jefferson County Police Merit Bd. v. Bilyeu*, 634 S.W.2d 414, 416 (Ky. 1982), which states the exception as one of "organization or *incidents*" of local government or is "governmental in nature." The Court's reasoning in *Bilyeu* is more conclusive than analytical. Its restatement of the *Mannini* standard as "governmental in nature," glosses over the holding in *Mannini*. In *Mannini*, the standard was articulated as:

> [A] classification according to population and its density, and according to the division of cities into classes, is not a natural and logical classification and cannot be sustained unless the act pertains to ***the organization or government of cities and towns or is incident thereto***, or unless the classification has a reasonable relation to the purpose of the Act. *Mannini*, p. 632. (Appellants' emphasis.)

The highlighted first prong of the test obviously relates to the organizing, as in chartering legislation of local governments, not the amendment of general laws. Mannini makes this clear in its reliance on *James v. Barry* as the "best considered case," when quoting:

> But where the subject is one of general application throughout the state, and has been so treated in a general scheme of legislation, distinctions favorable or unfavorable to particular localities, and rested alone upon numbers and density of population, are invidious to the letter and spirit of the Constitution. *Mannini*, p. 633.

Whether *Bilyeu* is an anomaly or an undeveloped expression of the law, it results in an ambiguous standard to follow. It is apparent that the law progressed in expression to that in *O'Shea's-Baxter* because almost any law relating to local government, no matter how invidious, could be argued to be governmental in nature. Unfortunately, the Court of Appeals bit on the *Bilyeu* phrase "governmental in nature," to the exclusion of the standard enunciated in *O'Shea's-Baxter* throughout its opinion.

B. There is No Substantial and Reasonable Basis For The Act's Discriminatory and Biased Classifications.

The second exception to §§ 59 and 60 prohibitions has no application either. The Act's *classification* for consolidated local governments *bears no reasonable relation to the purpose of the Act.* In fact, considered in relationship to the lengthy stated purposes of Chapters 109 and 224, it is nonsensical.

The General Assembly enacted KRS Chapter 109 for the expressed purpose of regionalizing solid waste management. The legislature reiterated its intention that counties or waste districts should have the authority over the management of solid waste in its amendments to KRS Chapter 224 in 1991. In direct subversion of these stated purposes, HB 246 decentralizes and splinters the regionalization of waste management into as many as 83 different management areas in Jefferson County alone. In a county where the need for regionalization would seem the greatest, nothing could be more irrational in relationship to the express purposes of Chapter 109 than to localize waste management to each municipality in Jefferson County. HB 246 irrationally undoes the fundamental intent of KRS Chapter 109. The new and limited classification begs for an answer to the question, why.

Apparently relying on the argument of Appellees, the Court of Appeals applied the *equal protection* (least restrictive) standard to determine whether there may be a rational basis for the challenged legislation. But this is not the question in a challenge brought under §§ 59 and 60 of the Kentucky Constitution. The question that must be answered here is whether there is a substantial and justifiable reason for the *classification* established in the Act. The Constitution demands it. *See*, *Tabler v. Wallace*, 704 S.W.2d 179, 185-186 (Ky. 1985). No natural, distinctive, substantial nor justifiable reason for the classifications have

been proved. Demonstrating a lack of understanding of the issue, the Court of Appeals criticized the trial court, finding:

> We first note that while the trial initially cited the correct standard from O'Shea's-Baxter as espoused in *Mannini*, as well as its predecessors and progeny, it failed to consider the purpose of the amendments-KRS 109.041, KRS 109.115, KRS 109.120, KRS 224.43-340, and KRS 109.310-when determining whether HB 246 complied with same. Instead, the trial court looked to KRS 224.43-010(6), KRS 109.011(5), KRS 109.011(6), and KRS 109.011(11) in its determination of whether the classification in HB 246 "has a reasonable relation to the purpose of the Act." Citing, *Mannini*, 172 S.W.2d at 632. [Opinion at p. 18]

The Appellees and the Court of Appeals both misconceive the rational basis standard to be applied. In an effort to recast the standard into a "can't-lose" metric for them below, the Appellees argued the question is "whether HB 246 bears a 'reasonable relation' to its purpose."[8] Following this argument, and without analysis, the Court of Appeals was satisfied to conclude, "It is also apparent from reading the amendments and the title of the statute being amended that the amendments 'bear a reasonable relation to the purpose of the Act' as required under the second prong of the *Mannini* test."[9] This conclusion misses the point of *Mannini* and its progeny. The question is not whether the amendments bear a reasonable relationship to the Act, the question is whether the *classification* bears a reasonable relationship to the Act. This relationship must be "substantially more than merely a theoretical basis for a distinction." *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 468 (Ky. 1998).

Appellees' briefs below criticized the trial court's reliance on the history and purpose of the statute being amended. They argued that court made "straightjackets" of

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[8] See, page 4 of each Reply Brief filed below by National Waste & Recycling Association, Kentucky Chapter, Commonwealth and Secretary Snavely, and Jefferson County League of Cities.

[9] Opinion, p. 21.

the original statute's legislative purpose to extent that it "constitutionalize[d] the legislative purpose of solid waste management for all time."[10]

The argument that the court should ignore statutory purpose before the amendment is a red herring. The classification created by HB 246 must be viewed in light of the statute as amended and not in relation to the amendments standing alone. Viewing the amendment in a vacuum would not allow the court to understand the invidious nature of the classification. The court must appreciate the underlying statutory purpose to determine whether a new classification created by an amendment to that statutory scheme is reasonable. Consideration of the original statutory history and purpose that has for 40 years had a general application, is necessary to determine whether the Act as amended is in fact special legislation. Without understanding the statute's purpose before amendment, there would be no baseline from which to measure the Acts relationship to classification – no Act would be subject to challenge. HB 246 does not stand alone; *it is an amendment to a general statute* and its validity must be evaluated in that broader context. The trial court did not set out to constitutionalize the legislative purpose of solid waste for all time, rather, it concluded that to change that general purpose, the legislature must do so with general application and not discriminately. As suggested earlier, what the Creator giveth, he may take away, but under our constitution, he must do so with an even hand.

Searching for some justification for the classification, Appellees argue that the substantive authority to charge fees, control waste streams, license haulers, adopt or opt out of regulations which was taken from the District and given to Jefferson County cities

[10] Brief of Appellant below, National Waste & Recycling Association, Kentucky Chapter, p. 14, and appearing at about the same place in most of the other briefs filed for Appellants below.

is merely giving a voice to the cities. They argue they need this voice more than Covington in Kenton County or Paducah in McCracken County.

The attempted correlation between the transfer of powers and necessity of voice is misguided. Sec. 7 of the Act is the single expression of the purpose of the bill and provides: "the citizens of counties containing a consolidated local government will be better served by a reconstituted waste management district board that is more diverse and representative and responsive to the populace . . . ." This purpose is completely satisfied by Sec. 2 of the bill providing for a reconstituted board. Sec. 2 fulfills the stated purpose from its beginning to its limited end. Appellees' efforts to shoehorn the other sections of the Act into its singular purpose are untenable.

The burden of satisfying constitutional scrutiny is on the party claiming validity of the Act. This burden alignment is clearly set out in *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 468 (Ky. 1998), holding: "When asserting the validity of a classification, the burden is on the party claiming the validity of the classification to show that there is a valid nexus between the classification and the purpose for which the statute in question was drafted. There must be substantially more than merely a theoretical basis for a distinction. Rather, there must be a firm basis in reality."

The operative question is not subject to analysis under the simple equal protection standard discussed in *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 413 (Ky. 2005), as relied on by the Court of Appeals. The equal protection standard asks merely whether "there is any reasonably conceivable state of facts that could provide a

rational basis for the classification." The reasonably conceivable standard does not satisfy §§ 59 and 60 scrutiny. *Tabler v. Wallace*, at, 185-186.

The court's analysis in *Mannini v. McFarland*, 294 Ky. 837, 172 S.W.2d 631, 632 (Ky. 1943) is instructive in distinguishing the necessary relationship between the purpose of the statute and its classification. The court reasoned:

> In construing sections 59 and 60 this court said in Safety Building & Loan Co. v. Ecklar, 106 Ky. 115, 50 S.W. 50, 51: "We assert it to be elementary that the true test whether a law is a general one, in the constitutional sense, is not alone that it applies equally to all in a class,-- though that is also necessary,--but, in addition, there must be distinctive and natural reasons inducing and supporting the classification. A law does not escape the constitutional inhibition against being a special law merely because it applies to all of a class arbitrarily and unreasonably defined." *Id.*

The Court is urged to consider the question in the context of the *Louisville/Jefferson County Metro Government v. O'Shea's-Baxter, LLC*, 438 S.W.3d 379, 383 (Ky. 2014). In that case there was no doubt as to a rational basis for the legislation. In relationship to a social and economic statute relating to control over the sale of alcoholic beverages, it is more than reasonably conceivable that the state has a legitimate interest in limiting the number and concentration of liquor outlets. But under a Ky. Const. §§ 59 and 60 analysis, that was not the question and the statute was stricken down despite its apparent rationale. Because the question was what is the justification for limiting application of the legitimate state interest to Louisville; what is the justification for the classification? The court could find no justification for the classification and declared it unconstitutional. *Id.* The same is true for the matter before this court.

In the case *sub judice*, there is no distinctive and natural reason for the classification. The rationales offered for the legislation below do not provide a rationale

for the legislation's classification. Appellees relied on *Kentucky Restaurant Assoc. v. Louisville/Jefferson County Metro Gov't.*, 501 S.W.3d 425 (Ky. 2016), which reliance is misplaced. They argued that this case demonstrates a unique authority granted to a consolidated local government which satisfies a rational basis for the Act's disparate treatment of the District. The Appellees rely on dicta in the case which acknowledges:

> In addition, Louisville Metro is categorized by statute as a first-class city and, in the year 2000, was afforded by statute a special privilege of consolidating its government with that of the county to form one body for governing the entire county. KRS 67C. 101. The General Assembly determined that Louisville Metro is "sufficiently different from those found in other cities to necessitate this grant of authority and *complete* home rule." KRS 83.410(4) (emphasis added). Therefore, Louisville Metro possesses enhanced authority that is distinct from other municipalities. Yet, the sovereignty of the state still rules supreme. *Id.*, at 427.

The statute addressed by the Court there, KRS 83.410(4), was enacted in 1972. It predates KRS Chapter 109 which was enacted in 1978. The statute empowered Louisville to the same degree before the 2003 merger into a consolidated local government as it was after the 2003 merger. Neither merger nor the 48 year old authority of Louisville can form a rational basis for the Act's discrimination against the Appellants.

There is yet another substantive reason why Jefferson County municipalities location within a consolidated local government cannot form a rationale for the Act's discriminatory application. Merger had no effect on either the District's authority or home rule city authority. In KRS 67C.111(1), the legislature provided:

> All cities other than those of the first class located within the territory of the consolidated local government, upon the successful passage of the question to consolidate a city of the first class and its county, shall remain incorporated unless dissolved in accordance with KRS 81.094 and shall continue to exercise all powers and perform the functions permitted

> by the Constitution and general laws of the Commonwealth of Kentucky applicable to the cities of the class to which they have been assigned.

The very article permitting merger, expressly reserved all existing powers in other municipalities located in the consolidated local government. Similarly, the District's authority was expressly reserved in KRS 67C.113. Merger cannot be the rational basis for granting additional authority to the Defendant cities here.

The creative arguments that the transfer of power in Jefferson County is necessary to give its municipalities a voice or equalize them with other municipalities in the state or avoid the power of a consolidated local government have no foundation and are impermissible guesses at a rationale. In *Tabler v. Wallace*, 704 S.W.2d 179, 185-186 (Ky. 1985), a case discussing the application of § 59, the Supreme Court found and concluded:

> One defendant conceded that the justifications offered were self-contradictory, but argued that their contradictory nature was immaterial so long as one or the other of the reasons is not irrational. The creative abilities of lawyers suggesting possible reasons after the fact does not suffice to provide the kind of justification that is required for special legislation to be valid under Section 59 of the Kentucky Constitution.
>
> Defense counsel's arguments throughout have been to the effect that any reason however imaginative that could have existed requires us to uphold otherwise discriminatory legislation. On the contrary, there must be a substantial and justifiable reason apparent from legislative history, from the statute's title, preamble or subject matter, or from some other authoritative source. *Id.*

The Appellants fail to identify any reliable source for their conjecture of a reason to justify the classification. The limits of the plain language of Sec. 7 of the Act do not allow for the inclusion of the Act's new classification and division of power beyond reconstitution of the District Board. It is not enough for the Appellees to imagine what may be the justification for the discriminate classification, there must be a substantial and

justifiable reason apparent from a history, title, preamble or subject matter or authoritative source. Here there is none.

The status of Jefferson County as a consolidated local government bears no rational relationship to the amendments contained in HB 246. Whether a solid waste management district is operating in a consolidated local government or includes multiple counties makes no difference in its ability to fulfill the requirements of the general law.

HB 246 is special and local legislation which is unconstitutional as a matter of law.

III. The Act Unconstitutionally Creates Disparate Treatment Among Cities of the Same Class

Kentucky Constitution Section 156a states in part that "All legislation relating to cities of a certain classification shall apply equally to all cities within that same classification." Relying on *Mannini*, the Court of Appeals dismissed any substantive or separate treatment of the constitutional challenge under § 156a. Essentially the Court of Appeals concluded that § 156a was of no independent effect. This result is not permitted under Kentucky law. It is seminal law in Kentucky that laws are to be construed, "if possible, so that no part of it is meaningless or ineffectual." *Stevenson ex. rel. Stevenson v. Anthem Cas. Ins. Group*, 15 S.W.3d 720, 724 (Ky. 2000) (internal citations omitted).

In Kentucky, cities were until recently divided into six separate classes based upon population. In 2014, House Bill 331 abolished the six-tier classification system and replaced it with a two-class system: First Class (Louisville) and Home Rule cities (all cities other than Louisville). Louisville's current first-class status stems from its structure as a consolidated local government.

In this case, HB 246 treats the approximately 83 home rule classified cities located within Jefferson County differently than all other home rule cities. Home rule cities within Jefferson County cannot be charged a fee based upon the composition of their waste streams and can avoid complying with any rules or regulations promulgated by the waste management district until the legislative body of that city approves such rules, if ever. If a solid waste management district in a county other than Jefferson County enacted a ban on plastic yard waste bags, it could enforce that ban on all cities located within the district. In Jefferson County that same ban could not be enforced except in cities that approve of the ban. In Jefferson County alone, cities may opt-out of the District's plan altogether. These distinctions are not based on population or any other city characteristics. Cities within Jefferson County have a wide range of populations from approximately 115 residents in Hickory Hills to over 26,000 residents in Jeffersontown. Similarly, the city of Madisonville in Hopkins County has over 19,000 residents and Columbus in Hickman County has 160 residents, yet while both are alike, they are subject to different requirements than similarly populated cities within Jefferson County.

House Bill 246 is similar to KRS 81.195, which was found to be unconstitutional by Kentucky's then highest Court. *Corbin v. Roaden*, 453 S.W.2d 603, 603 (Ky. 1970). KRS 81.190[11] was enacted in 1893 and is the general statute governing annexation by cities of the third class.[12] *Id.* In 1954, KRS 81.195 was enacted and also governed annexation, but only where the annexation involved a city of the third class located in two or more

[11] KRS 81.190 was later repealed.

[12] As of January 1, 2015, Kentucky's former classification system for cities, which contained six classes, changed to two classes: First Class (Louisville) and Home Rule cities (all other cities). House Bill 331 (2014).

counties. *Id.* In that case, KRS 81.195 required that the question of annexation be submitted to the voters living in the area proposed for annexation. In contrast, KRS 81.190 did not allow for a referendum by the affected voters relating to annexation by all other cities of the third class. *Id.* Citing Kentucky Constitution sections 156,[13] the court found that "KRS 81.195 does not so much as purport to apply equally to all cities of the third class, but is restricted expressly to those located in two or more counties. It conflicts at first blush with the requirement of Const. §156 that all cities of the same class 'shall possess the same powers and be subject to the same restrictions.'"

Similarly, HB 246 on its face applies differently to home rule cities located in Jefferson County and home rule cities located outside of Jefferson County. Home rule cities inside Jefferson County, regardless of population or any other characteristic, have the right to avoid compliance with regulations, avoid payment of fees or opt-out of the plan altogether. Home rule cities outside of Jefferson County have no such power. Like KRS 81.195, HB 246 does not apply equally to all home rule cities and is unconstitutional in violation of Ky. Const. §156a.

While there is no rational explanation of how home rule cities in Jefferson County are different from home rule cities in the other 119 counties, the argument that their location makes them unique is belied by simple reference to KRS 67C.111. There the General Assembly provided in subsection (1) that:

> All cities other than those of the first class located within the territory of the consolidated local government, ..., shall continue to exercise

[13] Ky. Const. §156 was repealed in 1994 and replaced by Ky. Const. §156a and 156b. The former §156 read "all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." The current §156a states, "All legislation relating to cities of a certain classification shall apply equally to all cities within the same classification."

> all powers and perform the functions permitted by the Constitution and general laws of the Commonwealth of Kentucky applicable to the cities of the class to which they have been assigned.

There is only one, unqualified, "home rule" classification of cities in Kentucky. The obvious purpose of HB 331 was to equalize all cities under the home rule classification, first class cities excepted. There is no subcategory for cities located within a consolidated local government. In short, because the legislature has already determined that creation of the consolidated local government does not alter municipal function or authority and it does not alter district function or authority, the Defendants have failed to demonstrate any rational reason for the discrimination against the district or the augmentation of municipal authority in Jefferson County. HB 246 is unconstitutional as a matter of law.

The Act does not apply equally to all cities within the same classification. Sec. 156a must be read in harmony with Sections 59 and 60,[14] so that even if a classification were made in relationship to the organization or structure of government, it would have to do so equally among the class. HB 246 does not satisfy this requirement of equality.

Conclusion

On its face and as applied, HB 246 unconstitutionally discriminates against the Appellants in violation of Ky. Const. §§59 and 60, and it unconstitutionally augments the authority of cities located in Jefferson County in violation of Ky. Const. §156a. No permissible exception to the unconstitutional classification applies. Wherefore, the Court of Appeals should be reversed and the Franklin Circuit Court judgment finding that HB

[14] *Lewis v. Jackson Energy Coop Corp.*, 189 S.W.3d 87, 91 (Ky. 2005)

246 (Sec. 2 excepted) is unconstitutional and unenforceable as a matter of law, should be affirmed.

Respectfully submitted,

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APPENDIX

1. Court of Appeals Opinion
2. Franklin Circuit Court Opinion and Order
3. Regulation
4. HB 246