COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 21-CI-00461

COUNCIL FOR BETTER EDUCATION, INC., *et al.* **PLAINTIFFS**

v.

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

and

THE COMMONWEALTH OF KENTUCKY *ex rel.* Attorney General Daniel Cameron, *et al.* and AKIA McNEARY and NANCY DEATON **INTERVENING DEFENDANTS**

OPINION AND ORDER

This action is before the Court on *Cross-Motions for Summary Judgment* under CR 56. The Plaintiffs are the Council for Better Education, Inc. (a non-profit entity composed of various school districts and school officials who promote public education), the Warren County and Frankfort Independent Boards of Education, and several parents of public school students.[1] Plaintiffs seek declaratory and injunctive relief on their claims that House Bill 563, as enacted by the 2021 General Assembly, violates §§3, 59, 171, 183, 184 and 186 of the Kentucky Constitution. Secretary Holly Johnson of the Finance and Administration Cabinet, and Commissioner Thomas Miller of the Department of Revenue, who are charged with administering House Bill 563, are the nominal defendants. The Attorney General has intervened to defend the constitutionality of the challenged legislation, and the Court has granted the motion of various parents and guardians of school children who seek to obtain financial assistance from the Bill, to intervene as Defendants.

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[1] Plaintiffs will be collectively referred to as "CBE" or "the Council".

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CBE has filed a *Motion for Summary Judgment*, and the Attorney General and Intervening Defendants have filed cross-motions. The Court conducted oral arguments on September 16, 2021, and the case is now submitted to the Court for decision.

After careful consideration of the record, the Court **GRANTS** *Summary Judgment* under CR 56 on the Plaintiffs' claims that House Bill 563 violates §59 and §184 of the Kentucky Constitution. The Court finds that there are potential disputed issues of material fact on the Plaintiffs' claims under §3, §171, §183 and §186 of the Kentucky Constitution, and therefore **DENIES** the *Motions for Summary Judgment* on those claims. Likewise, the Court **DENIES** the *Motions for Summary Judgment* of the Attorney General and the Intervening Defendants on the defenses they have asserted. The reasons for the Court's rulings are set forth more fully below.

FACTUAL AND LEGAL BACKGROUND

House Bill 563 was enacted by the 2021 General Assembly to provide greater options for school children in Kentucky to obtain educational services, including financial assistance to pay tuition to private schools (for those children who reside in designated geographic areas with a population over 90,000). The stated goal of the legislation is "to give more flexibility and choices in education to Kentucky residents and to address disparities in educational opportunities to students."[2] The legislation provides financial assistance in the form of Education Opportunity Accounts (EOAs), funded by tax credits, to families with children in both the public schools (the "common schools" required by the Kentucky Constitution) and private schools. It provides for financial assistance to pay for supplemental educational programs such as test preparation, tutoring, computer hardware and software, and other educational services to supplement the educational opportunities available to all children in the common schools, and to children enrolled

[2] 2021 Ky. Acts ch. 167, Section 5.

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in private schools. The legislation, in some circumstances, provides for financial assistance for public school students to pay out-of-district tuition to attend another public school district as a non-resident student. The portions of the legislation that allow public school students to transfer, without penalty, from their district of residence to another public school district where they do not reside, have not been challenged and are not at issue here.[3]

The private school tuition assistance that is a key component of the legislation has strict geographic limitations on its availability. It provides that "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, shall be permitted to use funds received through the EOA program for tuition and fees to attend nonpublic schools…"[4] The stated justification for this geographic limitation on private school tuition assistance is that "students in these counties have access to substantial existing nonpublic school infrastructure and there is capacity in these counties to either grow existing tuition assistance programs or form new nonprofits from existing networks that can provide tuition assistance to students over the course of the pilot program."[5] The legislation then references Section 17 of the Act, which calls for future evaluations of the program to assess its effectiveness and scope.[6] Of course, *all* legislation is subject to revision with each annual session of the General Assembly, and so the promise of future re-evaluation under Section 17 cannot cure any constitutional defects in the legislation as enacted.

At the Court's request, the parties reviewed the publicly available data concerning private schools that are currently operating in Kentucky, and they filed a *Stipulation* on September 28, 2021 that includes an *Exhibit* listing these schools. For example, in Franklin County (population

[3] 2021 Ky. Acts ch. 167, Sections 1-4.
[4] 2021 Ky. Acts ch. 167, Section 7(2)(b).
[5] *Id.*
[6] *Id.*

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49,285), there are three schools (Frankfort Christian Academy, Good Shepherd School, and Capital Day School) that are available to families who seek a private education option. All three Franklin County private schools are excluded from the private school tuition assistance provisions of this Act.[7]

The stated reason for the population-based classification is to ensure eligible counties have "substantial nonpublic school infrastructure" and that those existing private schools have capacity "to grow existing tuition assistance programs".[8] Hardin County, with a population of 105,000 has only three (3) existing non-public schools, while neighboring Nelson County, with a population of 43,437, has five (5) existing non-public schools. Yet tuition assistance is provided in the bill for students in Hardin County, but not for students in Nelson County.

The legislation establishes a relatively elaborate system of privatizing the allocation of the tax credits to privately operated "account granting organizations" (or "AGOs") that are approved by the Department of Revenue (DOR). These AGOs accept funding from taxpayers, who, in turn will receive a virtual dollar-for-dollar credit on their income tax liability to the Commonwealth of Kentucky.[9] Thus, the taxpayers (both individuals and business entities) who make a $10,000 payment to an approved AGO will receive almost $10,000 credit on their income tax liability. In essence, the Commonwealth simply forgives the income tax liability it is owed by the taxpayer, in exchange for the taxpayer's funding of a private AGO. The tax debt to the Commonwealth is extinguished to the extent of the credit. The tax revenue of the Commonwealth is diminished by the amount of the payments to the AGO. The amount of income taxes collected for the general

[7] Stipulation, 9/28/21, Exhibit A.
[8] 2021 Ky. Acts ch. 167, Section 7(2)(b).
[9] The tax credit is limited to "ninety-five (95%) of the total contributions made to an AGO, except as provided in subsection (4) of this section." The tax credit is also capped at one million dollars. 2021 Ky. Acts ch. 167, Section 16(3). However, subsection (4) provides that the tax credit can be made over four (4) years and carried forward, in which case the allowable credit is increased to ninety-seven (97%) percent for each tax year. *Id.*

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obligations of government will be diminished by $125 million over the five tax years covered in the legislation.[10] The AGOs, in turn, will distribute the money received from the tax credits to students and families in the form of Educational Opportunity Accounts (EOAs). The families of these students can spend the tax credit money on approved educational expenditures for the purposes set forth in the bill.

The Department of Revenue may audit AGOs for compliance with the tax provisions of the Act, apparently state expense.[11] But under Section 15(4) of the legislation, "[a]n education service provider shall not be required to alter its creed, practices, admissions policy, or curriculum in order to accept payments from an EOA." Accordingly, the funds can be paid to schools that exclude children with learning disabilities, and educational providers can discriminate on any basis they choose, and still receive EOA funds. It appears education providers are exempt from all of the safeguards and accountability measures that the legislature has enacted that apply to public schools.

The legislation is designed to assist low and moderate-income families in obtaining private educational services, but the generous income limits of the Act provide for subsidies to families in the high-income category. The income limits for participation are found in the statute's definition of "eligible student."[12] That definition ties eligibility to income levels calculated based on requirements for participation in the free and reduced school lunch program funded by the U.S. Department of Agriculture. Eligibility is capped at "175% of the amount of household income necessary to establish eligibility for reduced-price meals based on size of household" under the

[10] To the extent that the Taxpayer makes a payment to the AGO in the "form of marketable securities", the Taxpayer could receive the additional tax benefit of avoidance of capital gains taxes, which foreseeably could allow the Taxpayer to receive not just a dollar-for-dollar credit on his income tax, but to receive *more than* a dollar of tax benefits for each dollar paid to the AGO. *See* 2021 Ky. Acts ch. 167, Section 9(4)(b).
[11] 2021 Ky. Acts, ch. 167, Section 13.
[12] 2021 Ky. Acts ch. 167, Section 6(6).

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U.S.D.A. guidelines for the school nutrition program.[13] Applying this standard, a family of four, with income of $85,793.00 in annual income, will qualify for these subsidies for private educational services, including the payment of private school tuition for students who live in the geographic areas designated for such aid.[14] Once a student is initially accepted into the EOA program, the legislation then allows for continued eligibility for benefits for families with income of up to $122,562.00 (250% of the amount of household income necessary to establish eligibility for reduced-price meals under U.S.D.A. guidelines).[15]

By contrast, the median household income in Kentucky in 2019 was $50,589.00.[16] Thus, under the provisions of this legislation, non-EOA families with the median household annual income of under $50,589.00 will be paying income taxes on all of their income and paying all the educational expenses of their children, while families with incomes up to $122,562.00 will receive private tuition subsidies, paid for by tax credits to the funders of the AGOs (who are allowed to opt out of income taxes to the extent of their payments to the AGOs).

The "donor" taxpayers who take advantage of this tax credit are taxpayers who, by definition, are unwilling to make charitable donations to support the laudable goals of this legislation. Rather, these taxpayers are engaging in a tax transaction: they are paying the funds (which they already owe in tax liability to the state) to private AGOs, in exchange for a tax credit

[13] HB 563, Section 6(6)(a). For more information on the guidelines used in the legislation to determine aid eligibility also *See*: Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. 7,732 (Feb. 1, 2021); Child Nutrition Programs: Income Eligibility Guidelines, 86 Fed. Reg. 12, 594 (Mar. 4, 2021); https://www.govinfo/content/pkg/FR-2021-03-04/pdf/2021-004452.pdf (The eligibility levels referenced in the statute, based on U.S.D.A eligibility for reduced lunch program is $49,025 (130% of federal poverty guidelines from *Federal Register*); the eligibility for private school tuition is keyed to that figure: 175% of $49,025 = $85,792; 250% of $49,025 = $122,562).

[14] The counties with populations exceeding 90,000 include: Jefferson, Fayette, Kenton, Boone, Warren, Hardin, Daviess, and Campbell. *See Exhibit A to Stipulation* of 09/28/2021.

[15] 2021 Ky. Acts ch. 167, Section 8(3). *See also* Section 14(3)(b); AN ACT relating to education, H.B. 563, 21 Reg. Sess. (Ky. 2021); Kentucky QuickFacts, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/KY/PST045219 (last visited Oct. 7, 2021).

[16] QuickFacts Kentucky, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/KY/INC110219.

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that eliminates their income tax liability to the extent of the payment. This tax transaction cannot accurately be characterized as a "donation."

Under current (and prior) law, all taxpayers can make donations to non-profit charitable educational programs, and to any other charity, and to deduct all such donations from their gross income. In contrast, the taxpayers who will participate in this *tax credit* program are, by definition, taxpayers who are unwilling to make such donations for the standard deduction available to all taxpayers. The taxpayers who will fund this program will pay the money they already owe to the Commonwealth in income taxes to private AGOs, in *lieu* of paying their tax liability. In establishing this program, 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.

While the Attorney General and Intervenors repeatedly refer to this re-assignment of tax liability from the government to a private AGO as a "donation" of "private funds", this description of the funding mechanism mischaracterizes the true nature of the transaction. The funding for this program is 100% raised from the state's levying of the income tax. This funding is completely dependent on the coercive power of the state to collect that 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. There is nothing "private" or "charitable" about the funding of the AGOs, and this funding mechanism is not a "donation" in any meaningful sense of that word that connotes a voluntary contribution of personal or business income. These taxpayers are not donating their own money to AGOs; they are taking the money they owe to the state in income taxes, and re-directing it to the AGOs, as authorized by this legislation. This distinction is

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critical in applying the provisions of the Kentucky Constitution that govern taxation, and funding of "an efficient system of common schools." Ky. Constitution, §§171, 183, 184 and 186.

The Attorney General and Intervenors rely heavily on the U.S. Supreme Court decision of *Arizona Christian School Tuition Organization v. Winn,* 563 U.S. 125, 131 S. Ct. 1436, 179 L. Ed. 2d 523 (2011), which dismissed an establishment clause challenge to the Arizona tuition tax credit program on the basis of standing. The Supreme Court never reached the merits of the establishment clause challenge to the Arizona statute, and dismissed the case on the grounds that the taxpayers who brought the suit lacked the standing to sue. The Supreme Court found that it was purely speculative that the tuition subsidies would adversely impact any individual taxpayer. The Plaintiffs could not show a nexus between the challenged statute and any alleged non-speculative injury they would suffer, and thus they failed to meet the required minimum basis for taxpayer standing under the doctrine of *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). None of the issues that form the basis for the establishment clause challenge to the Arizona statute are present in this case. Here, the Plaintiffs seek enforcement of the unique provisions of the Kentucky Constitution that govern taxation and education, which govern the legislature's power to shape tax and education policy in the Commonwealth. The standing of Plaintiffs like these to bring such claims was definitively decided in *Rose v. Council for Better Education,* 790 S.W.2d 186, 202 (Ky. 1989).[17] Additionally, the language from the *Winn* case concerning whether the Arizona tax credit is a private donation, or a public tax expenditure under Arizona law, has no applicability to this case. The Supreme Court's characterization of the Arizona statute is based on Arizona law and is limited to its relevance to determining standing to sue under Article III of the

[17] "If the system is not efficient, the local school board's duty is to make every effort to remedy that situation. Included in that responsibility is the filing of this lawsuit. The local school board and the Council have a judicially recognizable interest in a system of efficient common schools, and we so recognize and declare."

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U.S. Constitution in an establishment clause challenge. *Winn* did not address the merits of the statute in any way that is relevant to the Kentucky Constitutional provisions before this Court.

DISCUSSION

I. THE ACT'S GEOGRAPHIC LIMITATION ON PRIVATE SCHOOL TUITION ASSISTANCE VIOLATES SECTIONS 59 OF THE KENTUCKY CONSTITUTION, AND THOSE PROVISIONS ARE NOT SEVERABLE FROM THE ACT'S REMAINING PROVISIONS.

A. The Act's Geographic Limitations Constitute Special Legislation in Violation of Section 59 Because They Benefit Only Particular Locales.

The Kentucky Supreme Court has recently refined the proper analysis of §59 claims to specify that "for analysis under Sections 59 and 60, the appropriate test is whether the statute applies to a particular individual, object or locale." *Calloway County Sheriff's Department v. Woodall,* 607 S.W.3d 557, 573 (Ky. 2020). Previously, §59 was applied more broadly by the Kentucky Supreme Court to prohibit any classifications that the courts found to be arbitrary or discriminatory. The Court in *Calloway County Sheriff's Department* held that §59 review should be more narrowly focused on whether the legislation is discriminatory in the more limited sense of singling out a particular individual, object, or geographic location, for either disadvantageous or favorable treatment. Here, the singling out of a few counties with populations of over 90,000 for the lucrative benefit of tuition assistance for private schools, to the exclusion of all other counties (even those with robust private school options for students), falls squarely within the prohibition of §59.

There is no doubt that the private school tuition assistance provisions of the legislation apply only to a very limited *locale*, defined by the Act as counties with a population of over 90,000. This limits private school tuition assistance to only eight (8) counties, notwithstanding the fact that many other counties have accredited private schools that will be arbitrarily excluded from the program for no rational reason.

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The Attorney General and Intervenors have attempted to characterize the population based restrictions of Section 7(2)(b) as a reasonable classification designed to enhance the efficient implementation of the Act by limiting the tuition assistance program to geographic areas where there are existing private school options. This rationale does not withstand even the most minimal scrutiny. 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. As the Kentucky Supreme Court has explained, §59 was adopted to "prevent special privileges, favoritism and discrimination and to assure equality under the law." *Kentucky Harlan Coal Co. v. Holmes,* 872 S.W.2d 446, 452 (Ky. 1994). The classification contained in this Act violates those principles.

The classification drawn by the legislation in this Act is virtually identical to the geographic classification struck down by the Kentucky Supreme Court in *University of the Cumberlands v. Pennybacker,* 308 S.W.3d 668 (Ky. 2008). There the legislature created a pharmacy tuition assistance program and limited its application to students attending "an accredited school of pharmacy at a private four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county in the Commonwealth." *Id.* at 684. The Kentucky Supreme Court struck down the legislation because of its discrimination against students who attended pharmacy schools outside the favored geographic area. As the Court explained, "the General Assembly failed to treat equally all members of the pharmacy student class. Only those

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pharmacy students enrolled or accepted for enrollment at the planned UC Pharmacy School could take advantage of this lucrative scholarship program. *This is precisely the type of special privilege and favoritism that Section 59 condemns." Id.* at 685 (emphasis supplied). Here, the classification was drawn based on an arbitrary population limit that has the effect of greatly limiting the geographic availability of the "lucrative scholarship program"; in *Pennybacker* the classification was based on location of a main campus "in an Appalachian Regional Commission county". But the geographic limit is the same, as is the limitation to a particular object (conferring a tuition benefit on a limited class of students, to the exclusion of similarly situated students).

In the *Calloway County Sheriff's Department* case, the Supreme Court specifically re-affirmed that *Pennybacker* was correctly decided.[18] Here, the result must be the same. Section 7(2)(b) of this Act arbitrarily limits the tuition assistance provision of the Act to a geographic area encompassing only eight (8) counties, arbitrarily excluding students and families in 112 other counties from this "lucrative benefit" with no rational basis.

To illustrate the arbitrary geographic discrimination codified in this statute, families with children enrolled in private school in Hardin County are eligible, but families with children enrolled in private schools next door in Nelson County are excluded. Families with children enrolled in private schools in Fayette County are included, but families with children enrolled in the Frankfort Christian Academy, Good Shepherd School, or Capital Day School in nearby Franklin County are excluded. In fact, under the legislation as passed, the absurd situation could arise that a family that resides in Frankfort would be denied tuition assistance to send their child to Lexington Sayre School solely because they "are residents of [a county] with a population of [fewer than 90,000 people]." A family that lives in Woodford County would likewise be denied

[18] *Calloway County Sheriff's Department, supra* 607 S.W.3d at 573, f.n. 19.

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EOA private school tuition assistance if they enrolled their children in private schools in neighboring Fayette County because they are not residents of Fayette County.[19]

This form of geographical and object-based discrimination is prohibited by §59 of the Kentucky Constitution. As the Supreme Court stated in *Pennybacker,* "[t]hus, however well intentioned the [tuition assistance] legislation may have been, as written, [the statute] is unconstitutional and cannot be implemented." *Id.* at 685.

B. The Act's Geographic Limitations Create Discriminatory Treatment in Educational Opportunities That Violate Rose v. Council for Better Education.

Moreover, this Court is mindful that it must decide the §59 challenge in this case in the context of the underlying constitutional requirement to provide adequate and equal educational opportunities for all children under §183, as required in *Rose v. Council for Better Education,* 790 S.W.2d 185 (Ky. 1989). One of the primary constitutional violations found by the Supreme Court in *Rose*, was the geographic disparities in educational opportunities. In this case, even *if* the funding of a private school tuition with tax credits could pass constitutional muster, the blatant geographic discrimination that limits such educational opportunity to children in the eight most populous counties of Kentucky cannot withstand even the most minimal constitutional scrutiny. As the Supreme Court found in *Rose,* "Kentucky's children, simply because of their place of residence, are offered a virtual hodgepodge of educational opportunities." *Id.* at 198. This form of geographic discrimination is prohibited under §59, and the discriminatory impact of this legislation is exacerbated because it arises in the context of government action to fund educational services. *Rose* established that the legislature cannot discriminate in the funding of public schools under §183; even if the legislature can fund private schools (a proposition that is vigorously contested in

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[19] 2021 Ky. Acts ch. 167, Section 7(2)(b).

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this case), it certainly cannot provide for funding that discriminates against private school students and families based on their place of residence consistent with §59 of the Kentucky Constitution. The Court, in applying §59 in the context of legislation to create educational opportunities for all Kentucky children, must ensure that its interpretation of the special legislation prohibitions of §59 are applied consistently with the requirements of adequacy and equity which govern state aid to education. By striking down the statute under §59, the Court avoids the potential constitutional conflict under §183, at least on the issue of the geographic limitation on private school tuition assistance.

C. The Act's Geographic Discrimination Cannot be Severed from the Remainder of the Act's Provisions, Which Cannot Stand Alone Without the Unconstitutional Limitations.

The Attorney General and Intervenors have argued that the Court should employ the severability statute, KRS 446.090, to strike down the unconstitutional geographical limitation of Section 7(b)(2) and re-write the statute to make the tuition assistance provisions of the statute available statewide. The Court must reject this invitation. KRS 446.090 provides that:

> if any part of the statute be held unconstitutional the remaining parts shall remain in force*…unless 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.*
>
> (Emphasis supplied).

The Court cannot take the radical step of re-writing the statute in the manner suggested by the Attorney General and the Intervenors. The legislative record is abundantly clear that the tuition assistance for this favored group of students and families in large urban areas, is integral to the overall scheme of the statute. Of the approved educational expenditures that are identified in

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Section 7 of the Act, this private school tuition for students in the eight most populous counties in Kentucky set forth in Section 7(2)(b) is by far the most expensive item. It is clearly central to the overall scheme of the Act. The Attorney General and Intervenors suggest that the Court extend this lucrative benefit by judicial fiat to the rest of the state, rather than using the severability doctrine to simply eliminate this lucrative benefit. This illustrates that the private tuition feature of the legislation is central to the bill, and the Court cannot re-write the legislation to cure this constitutional defect. As the former Court of Appeals held in rejecting the severability doctrine in similar circumstances, "[t]o remove only Section 4 would be like taking out the motor of an automobile which leaves the machine of no use. We are quite sure that these other provisions would not have been enacted without Section 4; hence they too must fail." *Engle v. Bonnie,* 204 S.W.2d 963, 965 (Ky. 1947). Here, the Court is also quite sure that the other provisions of this legislation would not have been enacted without the tuition assistance for private schools in the eight most populous counties, nor would it have been enacted if the private school tuition assistance provisions had been extended statewide. Here, as in *McGuffey v. Hall,* 557 S.W.2d 401 (Ky. 1977), "the portions of §10 we have held invalid are so essential to that section as a whole that the remainder of the section could not stand without them. Hence §10 is invalid in its entirety." *Id.* at 416. The same principle applies to this case.

This Act was approved on final passage in the House of Representatives by the razor thin vote of 48-47.[20] With this one vote margin for passage, this Court cannot presume that the bill would have passed without the unconstitutional section limiting private school tuition assistance to the eight (8) designated urban counties, nor can it presume the bill would have passed if that lucrative benefit was extended beyond the eight (8) counties.

[20] Legislative Record, 3/16/21, *See https://apps.legislature.ky.gove/record/21rs/hb563.html.*

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In view of the one vote plurality vote (48-47) on the final passage in the House of Representatives on House Bill 563, and the close vote in the Senate (21-15), the most logical conclusion is that *any* material change in the bill would have jeopardized its passage. Accordingly, the severability provisions of KRS 446.090 cannot be applied to save the legislation. The Court finds that this legislation would not have passed without the unconstitutional provisions. In these circumstances, "it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part"[21], and thus the Court cannot sever the remaining parts of the bill from the unconstitutional parts.

II. THE ACT VIOLATES §184 OF THE KENTUCKY CONSTITUTION WHICH PROVIDES "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."

§184 of the Kentucky Constitution provides that "no sum shall be ***raised or collected*** for education other than in common schools until the question of taxation is submitted to the legal voters."[22] Here, applying the plain language of the Kentucky Constitution, the income tax credit at issue raises a sum of money for private education outside the system of common schools. That it does so through a tax credit rather than a direct appropriation is not relevant, applying the plain language of §184. The "question of taxation"—in this case, the income tax credit—must be "submitted to the legal voters" before it can take effect.

Further, §184 also prohibits the legislature from allocating "any sum produced *by taxation or otherwise* for purposes of common school education" to any purpose other than "the common schools, and to no other purpose." Here, it is apparent that the money produced by the tax credits is designed, in part, for "common school education" in the form of payment of out-of-district

[21] KRS 446.090.
[22] Emphasis supplied.

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tuition for nonresident public school students, and many other private educational services for public school students, as set forth in Section 7 of the Act. Under the plain language of §184, such sums "shall be appropriated to the common schools, and to no other purpose." Accordingly, the allocation of the funding created by these tax credits to private school students is in violation of §184. Here, it is apparent that the money funding this program is produced by taxation through the creation of a tax credit. But even if the funding is somehow characterized as not being directly the result of the tax law, the prohibition of §184 extends to all funding of education "by taxation *or otherwise*". Accordingly, any such legislation is subject to a referendum of the voters before it can become effective.

The case law in Kentucky has been undeviating in holding that public funds cannot be expended in support of private education. *See e.g. Pollitt v. Lewis,* 269 Ky. 680, 108 S.W.2d 671 (1937); *Sherrard v. Jefferson County Board of Education,* 171 S.W.2d 963 (Ky. 1942); *Fannin v. Williams,* 655 S.W.2d 4880 (Ky. 1983). The question presented here is whether the use of the taxation innovation employed in this case—the use of a tax credit—can circumvent the plain requirements of §184 that require for a voter referendum before the state can "raise or collect" any sum for education other than in the common schools.

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. Moreover, the applicable provision of §184 requiring a voter referendum is not limited to collection of taxes. It states "**No sum** shall be **raised _or_ collected** for education other than in the common schools until the question of taxation has been submitted to the legal voters…" The Court can see no principled basis to hold that this term does not encompass the tax credit which raises the sums that fund the program.

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Can the constitutional requirement for a referendum of the voters be evaded through the mechanism of funding this program from a tax credit rather than by a direct appropriation of tax dollars? The Kentucky Supreme Court has long insisted that compliance with our fundamental law cannot be evaded by elevating form over substance. The law in Kentucky is well established that "[c]onstitutional provisions, whether operating by way of grant of limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant of limitation. In appraising the validity of the statute we must look through the form of the statue to the substance of what it does. The courts may not countenance an evasion or even an unintentional avoidance of our fundamental law." *Commonwealth v. O'Harrah,* 252 S.W.2d 385, 389 (Ky. 1953). The Constitutional Debates discussed the fear that the General Assembly would find ways to circumvent the restrictions on the common school fund by taxation provisions:

> The Chairman, in section two, says that "the interest in dividends of the common school fund, together with any sums which may be produced by taxation for purposes of education, shall be appropriated to the common schools, and to no other purpose"; and then, as if still afraid that the General Assembly may not be sufficiently restricted, these words are added: "No sum shall be raised or collected for education except in the common schools, until the question of taxation is submitted to the legal voters, and a majority of the votes cast in favor of taxation." When carefully examined, it will be seen that this clause conflicts with the one immediately preceding it. If any sum raised by taxation is to be appropriated to common schools, and to no other purpose, how is it consistent to say in the next breath that a sum may be raised by taxation for education, and yet not be used in aid of the common schools?
>
> 2 Debates Constitutional Convention 1890 4471 (1890) (remarks of Mr. Beckner).

This tax credit requires legislation to amend the income tax statute and is thus subject to the requirements of §184. There is no question that every dollar raised to fund the AGOs is raised

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by the tax credits which must be authorized and approved by the Department of Revenue, and which will diminish the tax revenue received to defray the necessary expenses of government. The use of the disjunctive, “raised **or** collected”, demonstrates that it applies to the tax credit. Even though that money, owed to the state, is not *collected,* by the Department of Revenue, it is *raised* by the tax laws by virtue of the tax credits extended to taxpayers in exchange for their funding of the AGOs. Accordingly, this tax credit must be approved by the legal voters before it can take effect under the plain language of §184. *See Sherrard v. Jefferson County Board of Education, supra.*

III. THE LEGISLATION RAISES IMPORTANT QUESTIONS CONCERNING UNIFORMITY AND EQUALITY OF TAXATION UNDER §3 AND §171 THAT CANNOT BE RESOLVED ON SUMMARY JUDGMENT.

The Kentucky Constitution’s extensive provisions governing taxation are based on the underlying principles of *uniformity* and *equality* in taxation. These principles are set forth clearly in §171, which provides, in part:

> The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. *Taxes shall be levied and collected for public purposes only and shall be uniform* upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and ***all taxes*** *shall be levied and collected by general laws*.
>
> (Emphasis supplied).

These principles of public purpose, uniformity and equality were explained during the constitutional debates by Mr. P.P. Johnston, the chair of the Convention’s Committee of Revenue and Taxation:

> A certain amount of money must be raised to meet the expenses of the State. If the burden is borne equally by all, it rests lightly on all …
>
> The only way to distribute the burdens of government justly is to let the weight of taxation rest equally on all. If all pay a just proportion, the burden

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will be light ….
I am for broadening the basis of taxation and taking less out of your Pockets [to defray the expense of government].

2 Debates Constitutional Convention 1890 2382 (1890) (remarks of Mr. Johnston).

Under the funding scheme for the AGOs and EOAs set forth in this bill, the income tax is *levied* by the state, but the tax liability is *collected* by a private AGO (through Department of Revenue approved "donations" that qualify for tax credits) for distribution to families of children receiving education in private schools and from private educational service providers. The legislation essentially gives certain favored taxpayers the ability to opt out of the income tax, in exchange for paying the amount of their tax liability to the private entities designated by the legislature. While the purpose of this tax break is laudable, the means employed by the legislature raise profound questions under the taxation provisions of the Kentucky Constitution.

§171 of the Kentucky Constitution also requires that all taxes "shall be levied and collected by general laws." It is difficult to see how a tax credit that allows a select group of favored taxpayers to completely opt out of their income tax obligations, can be considered to be "a general law."

Likewise, §171 provides that "[t]axes shall be levied and collected for public purposes only." It is difficult to see how the levying of the income tax, to the extent it is diverted through a tax credit to private education expenses, can be considered to be "for public purposes only." The concern for the public purpose clause is heightened by the Kentucky Supreme Court's decision in *Fannin v. Williams,* 655 S.W.2d 480 (Ky. 1983), where the Supreme Court invalidated a statute providing for the distribution of books to private schools through the Department of Libraries. There, the Kentucky Supreme Court invalidated the law, and noted "[t]he statute in question seeks

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to evade constitutional limitations by a series of devices, which do more to point up the constitutional problems than to avoid them." *Id.* at 482.

The factual record on these questions is not yet developed. There are no affidavits or depositions that shed light on the practical questions of how this legislation will be implemented and whether it runs afoul of these constitutional limitations. There is no expert testimony that explains the impact, if any, of this legislation on the overall funding of the common schools, the SEEK funding formula, or the oversight and regulation of the tax credits (if any) to ensure compliance with constitutional restrictions. In the absence of a more extensive record, the Court believes that summary judgment cannot be granted on the issues arising under §171, or §3, which prohibits payment of public money "to any man or set of men, except in consideration of public services." While the Attorney General and the Intervenors respond to these arguments by asserting that the funds at issue are private donations, not public money, that characterization of the tax credits is a disputed issue of fact and law, which cannot be decided in the absence of additional factual proof and legal arguments.

Regardless of whether the funding is labeled "public" or "private", there can be no dispute that these *sums* are being *raised* through the taxing power of the Commonwealth, and thus are subject to the referendum requirements of §184. But whether they also run afoul of §§3 and 171 cannot be properly determined on the record presently before the Court.

As the Kentucky Supreme Court held in *Fannin v. Williams. supra,* "[o]ne can argue, quite reasonably, that this statute (and any statute) furthering education is of public benefit, whether selective or not. Unfortunately, this approach begs the question, because the Constitution establishes a public school system and limits spending money for education to spending it in public schools." 655 S.W.2d at 484. In this case, we have the question of whether a tax credit is the

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functional equivalent of an appropriation of tax dollars. In *Fannin,* the Court held that this question must be answered by looking to the substance of the legislation, not the form. *Id.* Is this tax credit the functional equivalent of an appropriation of tax dollars? The Court must also address the question of whether the tax credit set forth in House Bill 563 meets the constitutional requirements of being "levied and collected by general laws."

While the Defendants and Intervenors argue that the funding of the AGOs is limited to private funds that are exempt from these requirements, the Court believes that determination is a disputed area that requires further proof. Here, the question is whether this legislation, in substance, operates as an evasion of the constitutional limitations of §§3 and 171 of the Kentucky Constitution, which prohibit the expenditure of public funds on private schools. The Court believes those issues are disputed, and thus require a more fully developed record.

IV. THE LEGISLATION RAISES IMPORTANT QUESTIONS CONCERNING THE REQUIREMENT OF §183 OF THE KENTUCKY CONSTITUTION AND §186, AS APPLIED IN *ROSE V. COUNCIL FOR BETTER EDUCATION,* FOR "ADEQUATE AND EQUITABLE" FUNDING OF THE COMMON SCHOOLS, WHICH CANNOT BE RESOLVED ON SUMMARY JUDGMENT.

This legislation presents important questions under §183 of the Kentucky Constitution, most significantly, whether it is consistent with the mandatory duty of the Kentucky General Assembly to provide for "an efficient system of common schools" that is adequately and equitably funded, as required in *Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989). There, the Kentucky Supreme Court found systemic violations of §183 based on its finding that "Kentucky's primary and secondary education is inadequate and is lacking in uniformity." *Id.* at 198. The fundamental ruling at the heart of *Rose* is:

> 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

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> 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 (emphasis in the original).

The question presented here is whether the funding of a parallel system of private educational services, that will serve the needs of a few select children, in both public and private schools, to the exclusion of the vast majority of both public and private school children in the Commonwealth, is consistent with the obligation to provide for "an efficient system of common schools" and whether it meets the obligation adopted in *Rose* to provide that opportunity for an adequate education for *every child.* Likewise, §186 of the Kentucky Constitution provides that "[a]ll funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose." Here, there is a dispute over whether the tax credits that fund the AGOs should be considered as part of the school fund within the meaning of §186, and are thereby limited to the sole purpose of maintenance of the public schools.

The Constitutional Debates were clear that the intent of §186 was to ensure that funds the legislature designated for education would be held inviolate for the common schools. Likewise, §184 provides that "[t]he interest and dividends of said fund together with any sum which may be produced *by taxation or otherwise* for the purposes of common school education *shall be held inviolate for the purposes of common school education*." (emphasis supplied). The Constitutional Debates shed great light on the purpose of these provisions:

> "I am not afraid to trust the Legislature, but if we are going to guarantee funds to educational purposes, let us guarantee all of them. The old Constitution says "or otherwise," which includes the tax on billiard-tables, playing cards, etc., all of which is secured by the Constitution. If we are going to make the school fund sacred by Constitutional provision, let us make it all sacred. Why leave out the words "or otherwise," and say only by taxation, when there is so considerable a fund from other sources that goes to common school purposes? If we are going to guarantee its integrity, so that the

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> General Assembly shall never disturb it, or appropriate it to any other purpose, let us do it. We have now in the section, as it stands, that guarantee. I do not want the common school fund taken for the purposes of normal schools. I do not want any of it taken for any college or any other thing, except the common schools. Will not the people of the State have the advantage of every dollar of it? It is a sacred fund, and held so by our fathers in the Constitution of 1849, and we are here guaranteeing its inviolability, that it shall not be diverted for any other purposes, and I say let us provide that all of it shall be held so.

2 Debates Constitutional Convention 1890, 4575 (1890) (remarks of Mr. Beckner)

The legislation is clear that both public and private school students are eligible for assistance through EOAs that are administered by AGOs. 2021 Ky. Acts ch. 167, Section 7. Public school students can use EOA funding to pay nonresident tuition to attend a public school outside their district, or to pay for other private educational services identified in the Act (e.g., tutoring, test preparation, computers, and other approved services). This raises the specter of a two tiered system of public school financing, with one small group of students obtaining the benefits of funding through EOAs, and the rest of the children remaining completely dependent on the funding allocated to the common schools from the legislature and the local school boards. Such a two tiered funding system raises serious questions about compliance with §183, as interpreted and applied in *Rose.*

A system of subsidizing private educational opportunities for a small group of students has the potential to exacerbate inequality in educational funding, and to undermine the required uniformity in educational opportunity that was mandated in *Rose.* While the proof may show that this system would merely supplement a fully adequate state system, as contemplated by *Rose*[23], the proof could also show that the additional financial assistance provided by AGOs to a few select

[23] *Id.* at 211-12.

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children is simply a stop gap measure to address a systemic inadequacy in the funding and operation of the common schools.

Rose provided that *supplemental* efforts to enhance education are allowed (even encouraged), so long as *all children* are provided the basic right to an adequate education, as defined in *Rose*.[24] Whether the state has met this critical threshold is a question that is not resolved on the record before this Court. If the state fails to reach this threshold, then efforts to enhance the educational opportunities for a small portion of children, in public and private schools, raise questions of adequacy and equity under *Rose*.

Certainly the provisions of the legislation that extend EOA funding through AGOs to a select group of public school students could potentially conflict with the mandate of *Rose* that "common schools shall be substantially uniform throughout the state"; that "common schools shall provide equal educational opportunities to all Kentucky children regardless of place of residence or economic circumstances"; and that "all children in Kentucky have a constitutional right to an adequate education" which includes a broad range of educational goals specifically identified in the *Rose* opinion.[25]

The Attorney General and Intervenors have argued that the allocation of tax credits to fund this program has not diminished the funding appropriated to the common schools, and thus it raises no issue with regard to the legislature's constitutional duty to fund "an efficient system of common schools." The Attorney General and Intervenors maintain that this program is wholly outside the parameters of the public school system in terms of funding and administration, and so it does not

[24] *Id. (*"Section 183 requires the General Assembly to establish a system of common schools that provides an equal opportunity for children to have an adequate education. In no way does this constitutional requirement act as a limitation on the General Assembly's power to create local school entities and to grant to those entities the authority to supplement the state system").
[25] *Id*. at 212-13.

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implicate the requirements of §183. At this point, no evidence has been taken on this issue, and the Court is obligated to construe the facts alleged in the Complaint in the light most favorable to the Plaintiffs on this issue. Accordingly, this issue cannot be resolved on summary judgment.

The record contains no discovery, no depositions, and no expert testimony to establish whether this legislation is consistent with the constitutional requirements for "an efficient system of common schools." Although the parties have made reference to SEEK[26] funding for the public school system, there is no record to establish whether this legislation will have an adverse impact on SEEK funding for public schools, either now or in the future. This Court does not dispute that many students and their families, both in public and private schools, could greatly benefit from the financial assistance provided for in this legislation. Yet, the very fact that so many children need additional educational assistance, beyond what is presently funded and appropriated for the public schools, is an indication that we, as a state, may well be falling short of the constitutional mandate of "an efficient system of common schools" as defined in the *Rose* case.

To the extent that is the problem being addressed by this legislation, the Constitution requires a solution that does not exacerbate the inequality and increase the disparity in educational opportunities available to all children. On this issue, neither the Plaintiff, the Defendants or Intervenors have submitted convincing proof that establishes that there are no disputed issues of material fact. Accordingly, it would be inappropriate to enter summary judgment on the Plaintiff's claims, or the Attorney General's and the Intervenors' defenses, on the issues arising under §183 of the Kentucky Constitution.

[26] SEEK is an acronym for Supporting Educational Excellence in Kentucky, the funding formula appropriated by the legislature for public schools, and administered by the Kentucky Department of Education. *See https://education.ky.gov.*

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As the Kentucky Supreme Court held in *Fannin v. Williams, supra,* "[o]ne can argue, quite reasonably, that this statute (and any statute) furthering education is of public benefit, whether selective or not. Unfortunately, this approach begs the question, because the Constitution establishes a public school system and limits spending money for education to spending it in public schools." 655 S.W.2d at 484. In this case, we have the question of whether a tax credit is the functional equivalent of an appropriation of tax dollars. In *Fannin,* the Court held that this question must be answered by looking to the substance of the legislation, not the form. *Id.* Is this tax credit the functional equivalent of an appropriation of tax dollars?

The financial impact, if any, of this legislation on the legislature's funding of the common schools under the SEEK formula is unclear based on this record. The amount of tax credits allocated by the legislature to fund this program, $25 million per year for five years (for a total of $125 million), is modest compared to the multi-billion dollar funding of the common schools over the same time period. Yet, if it is constitutional to allocate $25 million in tax credits per year, it is hard to see how it would be unconstitutional to allocate $250 million. At what point does the legislative funding of a private educational services program (including private school tuition) adversely impact the available funds for the common schools and undermine the constitutional obligation of the legislature to adequately fund the common schools under §183 and *Rose*? Those questions are not addressed in this record, but the Court needs additional information before ruling on whether this legislation violates §§183 and 186 of the Kentucky Constitution.

CONCLUSION

For the reasons stated above, **IT IS ORDERED AND ADJUDGED:**

1. The Plaintiffs' *Motion for Summary Judgment*, to declare that House Bill 563, as codified in 2021 Ky. Acts ch. 167, is in violation of §59 of the Kentucky Constitution,

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is **GRANTED,** and the Court so finds and declares pursuant to KRS 418.040 and CR 57.

2. The Court further finds and declares pursuant to KRS 418.040 and CR 57, that House Bill 563 violates §184 of the Kentucky Constitution by taking "sum[s] which are produced by taxation or otherwise for purpose of common school education" and allocating them to private Account Granting Organizations for purposes outside the common schools. The Court further finds and declares that, pursuant to §184 of the Kentucky Constitution, the $25 million in funds annually generated by the tax credit cannot "be collected for education other than in common schools until the question of taxation has been submitted to the legal voters." Accordingly, the tax credit created by this legislation must be approved by "the legal voters" before it can take effect.
3. The Plaintiffs' motion for injunctive relief under CR 65 is **GRANTED** and the Defendants Secretary Holly Johnson and Commissioner Thomas Miller, and their agents, employees, the Department of Revenue, and all persons acting in concert with them, are hereby **PERMANENTLY ENJOINED** from enforcing the provisions of House Bill 563 as codified at 2021 Ky. Acts, ch. 167. Accordingly, the Defendants shall not approve the creation or operation of any Account Granting Organizations, the establishment of any Educational Opportunity Accounts, or the granting of any tax credits to fund such organizations and accounts under this legislation.
4. In all other respects, the *Motions for Summary Judgment* filed by the Plaintiffs, the Attorney General, and the Intervenors are **DENIED** without prejudice, in that the Court finds that there are disputed issues of material fact and the Court finds that additional factual discovery, legal argument, and potentially a trial on the merits, will be necessary

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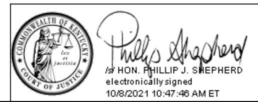
to resolve the remaining claims for relief and defenses asserted by the parties. *See Steelvest, Inc v. Scansteel Service Center,* 908 S.W.2d 104 (Ky. 1995).

5. The Court finds that the portions of this ruling set forth in paragraphs 1-3 above, granting *Summary Judgment* on the claims under §§59 and 184 of the Kentucky Constitution, and granting injunctive relief based on those findings, are **FINAL AND APPEALABLE** and there is no just cause for delay in the entry of this Order.
6. On all other claims, the Court finds that further discovery, legal argument, and fact finding is necessary to adjudicate those claims and so the Court's finality endorsement applies only to the claims and relief under §§59 and 184, and the Court reserves jurisdiction for further proceedings on all other claims.

SO ORDERED, this 8th day of October, 2021.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

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