I. Introduction and Purpose of Amicus Brief[1]

House Bill 246 gives eighty-three "home rule" cities located inside Jefferson County special powers to disrupt the comprehensive system of solid waste planning and waste management prescribed by the Kentucky General Assembly that, prior to the bill becoming law, applied equally and by general law to every other city in Kentucky of the same class. The purpose of this Brief is to provide background to this honorable Court regarding the legislative purpose in the solid waste planning requirements of KRS Chapters 109 and 224 as amended in 1991 and to provide additional legal analysis of the constitutional issues at play. The Court of Appeals and Appellees mistakenly believe that this Court's analysis of whether changes wrought by HB 246 violate Kentucky Constitution Sections 59 and 60 need not consider the purpose of the laws sought to be amended. In truth, whether the classifications created by HB 246 for one of 120 counties are arbitrary and constitute impermissible special or local legislation can only be determined in the context of the laws sought to be amended and dismantled in part. A statute of general effect previously applicable to all counties and cities without exception has been selectively amended, and the history and purpose of the underlying statutory framework disrupted by HB 246 must be understood in order to inform the Court's review. To that end, KRC provides this additional context and further support for the Appellants' argument that HB 246 is unconstitutional under Ky. Const. §156a.

ARGUMENT

[1] The Kentucky Resources Council is a non-profit 501(c)(3) organization. It was not compensated by any third party to write this brief and this brief was written solely by staff and volunteers.

I. The Classifications Created In House Bill 246 Are Arbitrary And Run Counter To The Intent of Senate Bill 2 (1991) And Requirements Of KRS Chapter 224.43 With Respect To Statewide Comprehensive Solid Waste Planning

In considering the constitutionality of HB 246, it is important for the Court to understand the historical context of the statutory scheme it seeks to amend. Thirty years ago, the state of solid waste management in Kentucky was so dire that "the Commonwealth had declared an environmental state of emergency because of the deplorable effects caused by the ineffectiveness of its then-current waste disposal program." *Eastern Kentucky Resources v. Fiscal Court of Magoffin County*, 127 F.3d 532, 534-535 (6th Cir. 1997). In response, then-Governor Wallace Wilkinson convened an extraordinary legislative session in 1991 to address Kentucky's garbage problems. *Id.*, at 534. These included poor collection practices, open dumping, environmental hazards, concerns that citizens were producing too much garbage, and concerns that the state was running out of places to put it. *Id.*

Senate Bill 2, enacted during that legislative session in 1991, has three primary elements:

> First, local planning areas are required to offer universal refuse collection as part of the Commonwealth's goal to reduce—if not eliminate—illegal dumping, and to provide Kentuckians with maximum access to collection services. It is the duty of the local planning area to dispose of garbage generated within the area. This can be done by hosting a landfill, or by marketing local garbage outside of the area. Second, the plan contains a prospective element. SB 2 mandates the implementation of various recycling programs in order to reduce the amount of refuse generated per person, as well as to stem the flow of refuse streaming into the Commonwealth's landfills. One of the bill's goals is to reduce by 25% the amount of municipal solid waste generated by Kentuckians by 1997. Third, the legislature imposes upon local governments the duty to plan ahead to assure that adequate disposal capacity exists for waste generated within the Commonwealth, and to account for all available landfill capacity in the Commonwealth.

Id. at 535.

The requirement that local solid waste management areas be established and that these areas be responsible for writing and implementing a solid waste management plan for the county or multi-county solid waste management areas is the linchpin of Kentucky's solid waste program:

> The purpose of these planning areas are to develop and implement area-wide solid waste management plans. The plans are to include among other requirements: a description of the solid waste disposal site; the recycling and composting facilities available in the area; projections on the area's population growth and waste disposal needs for five, ten, and twenty years, respectively; specific provisions to assure that adequate capacity exists for municipal solid waste generated in the area for a ten year period; and a plan to clean up open dumps in the local planning area.

Id.

While local governments are responsible for planning, the Kentucky Energy and Environment Cabinet also plays a significant role in solid waste planning and management in Kentucky.

> The Cabinet is the official planning and management agency of the Commonwealth's solid waste program. It is the duty of the Cabinet to develop a statewide solid waste reduction and management plan. It is primarily responsible for coordinating the solid waste planning and management activities of waste management areas, and for approving waste management facilities. It is the responsibility of the Cabinet to review applications for permits to construct or substantially expand existing municipal solid waste facilities. The Cabinet reviews applications for those permits for consistency with area solid waste management plans. The Cabinet is also authorized to establish standards for the disposal of solid waste in landfills and incinerators, and to require compliance with those standards when issuing permits.

Id.

The arbitrary and destructive nature of the arbitrary classification created by HB 246 can only truly be appreciated when one reviews the policy and purpose of the solid waste planning requirements established by SB 2. Reprinted in full below,

comprehensive planning to assure proper management of solid waste through recycling, reduction, and safe disposal of wastes is key:

> 224.43-010 Policy and purpose -- Priorities for solid waste management practices -- Findings relating to solid waste management plans.
>
> (1) It is hereby declared to be the policy of this Commonwealth and the purpose of this chapter to provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment.
>
> (2) It is the policy of the Commonwealth to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities in the Commonwealth through reduction in the amount of waste generated, reuse of solid waste, waste recycling or yard waste composting, and resource recovery, and to encourage a regional approach to solid waste management.
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> (3) It is the policy of the Commonwealth that municipal solid waste disposal facilities that ceased accepting waste before July 1, 1992, undergo proper closure, characterization, and corrective action.
>
> (4) It is the policy of the Commonwealth that a comprehensive and integrated waste management system to handle solid waste is to be fostered. State policies and funding assistance shall reflect a preference for projects and practices consistent with the policies and goals established by this section and the following: (a) Education of the citizens of the Commonwealth regarding proper disposal of waste; (b) Collection and proper disposal of all of solid waste for proper management; (c) Elimination of illegal dumps throughout the Commonwealth; and (d) Abatement of litter on state and county rights-of-way.
>
> (5) It is the policy of the Commonwealth that existing illegal open dumps be eliminated and that new open dumps be prevented.
>
> (6) 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.

> (7) The General Assembly finds that the goal of reducing the amount of solid waste disposed of in municipal solid waste disposal facilities cannot be achieved without first identifying the amount of municipal solid waste generated statewide per capita, including the waste now disposed of in open dumps, and providing incentives for the elimination of existing open dumps and the prevention of new open dumps.

When viewed through the prism of legislative purpose and statewide policy, the distortions created by HB 246 become apparent. HB 246 frustrates the foundation on which solid waste management planning in Kentucky is built by granting 83 home rule cities within Jefferson County the authority to unilaterally refuse to comply with or participate in the solid waste management plan developed by the Louisville/Jefferson County Waste Management District ("District"). Section 1 of HB 246 prohibits the District from regulating solid waste from any of the 83 cities located within Jefferson County, from regulating the municipal solid waste haulers in those cities, and from charging fees to those cities based upon the composition of the solid waste stream. Section 3 makes the regulations promulgated by the District unenforceable in the 83 cities located within Jefferson County unless approved by the city, giving only those 83 cities a veto power over applicability of solid waste management regulations.

And perhaps of greatest concern, Section 4 authorizes any of these 83 cities to decide by ordinance to opt out of the district's solid waste management plan, without imposing any specific duty on that city to prepare a plan for how waste will be managed within that city. The language of KRS 224.43-340(2) allowing the opt out, does not contain language specifically requiring that city to develop its own plan, such as is required in KRS 224.43-340(4) for cities under KRS 224.43-315.

Reviewing HB 246 against the policy and purposes of the statutes it amended, reflects the inconsistency of the amendments with those policies and purposes, and the arbitrary nature of the classification.

First, allowing each of the 83 cities to decide whether to be part of the solid waste planning area, or to opt out with no obligation to prepare a separate solid waste management plan for that city, thwarts the policy of KRS 224.43-010(1) and purpose of KRS Chapter 224.43 to "provide for the management of solid waste, including reduction, collection, transportation, and disposal in a manner that will protect the public health and welfare, prevent the spread of disease and creation of nuisances, conserve our natural resources, and enhance the beauty and quality of our environment." With no clear obligation on the part of an "opt-out" city in Jefferson County to develop its own solid waste management plan for review and approval by the Cabinet, there is no assurance that solid waste will be properly managed by and within that city.

Second, removing a city within Jefferson County from the solid waste plan developed by the Waste Management District thwarts the "policy of the Commonwealth to limit and reduce the amount of solid waste disposed in municipal solid waste disposal facilities" reflected in KRS 224.43-010(2) by allowing each city to decide whether to participate in the plan requirements for "reduction in the amount of waste generated, reuse of solid waste, waste recycling or yard waste composting, and resource recovery[.]" Allowing unilateral opt-outs by 83 individual cities within Jefferson County also runs contrary to the legislative policy and purpose "to encourage a regional approach to solid waste management." *Id.*

Third, allowing each of 83 cities in Jefferson County to opt out of the district-wide comprehensive solid waste plan violates KRS 224.43-010(4) by thwarting "the policy of the Commonwealth that a comprehensive and integrated waste management system to handle solid waste is to be fostered." HB 246 does not merely "balkanize" solid waste planning within Jefferson County, as noted by the trial court, it arbitrarily exempts 83 home rule cities from any obligation to engage **in** solid waste planning. By doing so, HB 246 does great violence to the fabric of SB 2 and to proper solid waste planning.

Fourth, the selective carve-out for 83 home rule cities in one of 120 counties from the obligation to participate in county or solid waste management district plans is contrary to the policy of the General Assembly that counties or groups of counties should undertake and control solid waste planning. KRS 224.43-010(6) provides that:

> 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.

A "waste management district" is defined in KRS 109.012(16) as any county or group of counties electing to form under the provisions of KRS 109.115. Allowing each of 83 cities in Jefferson County to determine whether to participate in the District-developed plan, or to engage in any waste planning at all, is contrary to the expressed intent of the General Assembly that counties or groups of counties should be the entities responsible for developing and implementing solid waste plans.

In sum, the classification created by HB 246 of home rules cities within and home rule cities outside of Jefferson County with respect to participating in solid waste plans

developed by counties or waste management districts, or to opt out with no clear obligation to plan for the city after opting out, is not merely arbitrary, but is anathema to all that the General Assembly sought to do for the Commonwealth with respect to comprehensive solid waste planning.

As section II(B) of the Appellants' Brief correctly points out, the Court of Appeals' finding that HB 246 is constitutional because it bears a reasonable relationship to *its own* stated purpose is not the proper standard of review. Instead the question is whether there is a substantial and justifiable reason for the *classification* established by the Act. HB 246 must be read in light of the statute it seeks to amend to avoid the arbitrary results described above. The result is that there is no reasonable justification for the classification and even more problematic, the classification obfuscates instead of falls in line with the purpose and functioning of the statutory scheme it seeks to amend. HB 246 is, in every sense of the phrase, special and local legislation.

II. The Requirements of Ky. Const. Sec. 156a Are Independent Of Those in Ky. Const. Secs. 59 and 60, and HB 246 Fails To Satisfy Sec. 156a

Prior to enactment of HB 246, KRS Chapters 224.43 and 109 were general laws governing solid waste planning statewide and applied equally to all cities and counties in Kentucky. HB 246 amended this long-standing general legislative mandate by according 83 home rule classified cities located within Jefferson County a special dispensation to exempt themselves from complying with certain provisions of Kentucky's comprehensive solid waste management program, while requiring all other cities of the home rule class to comply with the law's original provisions.

This disparate treatment of some home rule cities relative to others of the same class plainly violates Const. §156a on its face. Yet the Court of Appeals, applying an

erroneous interpretation of section 156a and with little analysis, found HB 246 constitutional because its amendments were "governmental in nature."

Ky. Const. §156a states that "[a]ll legislation relating to cities of a certain classification shall apply equally to all cities within the same classification." On its face, section 156a prohibits the General Assembly from creating a law that gives 83 cities in the home rule class powers that no other city in the home rule class has. Kentucky courts have struck down numerous pieces of legislation that attempt, like HB 246, to treat cities within the same class differently, and the Court of Appeals erred in failing to follow precedent on this point.

In *Atherton v. Fox*, an act required all voters living in counties containing a city of the first class to register in order to vote. 54 S.W.2d 11, 12 (Ky. App. 1932). The act further created government functions and powers to carry out the act, such as administrative machinery, powers of taxation, and the creation of a county board of registration commissioners. *Id.* At that time, Louisville was the only city of the first class and thus the act required voters in three sixth-class cities inside Jefferson County and outside the then-city limits of Louisville to register prior to exercising their right to vote. *Id.* Citizens of all other sixth class cities in Kentucky outside of Jefferson County were not subject to the same requirements. *Id.* The act was challenged as being in violation of both Section 59 and 156[2] of the Kentucky Constitution and the court held that the act violated both provisions because it "requires registration of voters in three cities of the sixth class, while there is no law at present requiring registration in the other sixth class cities of the

[2] Ky. Const. §156 is the former version of the current Ky. Const. §156a. *Brief of the Appellant* at p.24, n.13.

state." The law was struck down because it violated Const. §156's mandate that cities of the same class must have the same powers and be subject to the same restrictions.

In *Taylor Mill v. Covington*, this Court also struck down an act under section 156 that, like HB 246, created different rules for cities of the same class. 575 S.W.2d 159 (Ky. 1978). In *Taylor Mill*, the act at issue was KRS 81.145, which allowed voters residing in a territory annexed by a second class city, located in a county where both a city of the second and third class were located, to petition the county clerk to place a referendum on the ballot that would void the annexation with 75% voter approval. *Id.* at 159-60. In practice, Covington was the only city to which the act applied. *Id.* The act thus prescribed different annexation rules for second class cities located within a county containing a city of the third class from all other second class cities.

After Covington enacted an ordinance annexing an area and 75% of the authorized voters in that area rejected the ordinance, an action was filed questioning the constitutionality of KRS 81.145. *Id.* In upholding the trial court's finding that the act was unconstitutional, the Court stated, "[t]he clear import of KRS 81.145 is to place a restriction upon the annexation power of certain cities of the second class, or more properly upon one such city, not placed upon the other cities within that class. This plainly violates Section 156 of the constitution." *Id.*

These cases are in accord with *Corbin v. Roaden*, cited by Appellants, which struck down a statute under Const. §156 prescribing different annexation rules for third class cities located in two or more counties. *Corbin v. Roaden*, 453 S.W.2d 603, 603 (Ky. 1970).

Despite this line of cases, Court of Appeals summarily dismissed the argument that HB 246 violates Section 156a, misunderstanding that there are two distinct constitutional issues at play here. First, is whether the Louisville/Jefferson County Metro Government, in its own class, can be treated differently than all other cities. As stated in the Circuit Court's opinion and not disputed by the parties, the proper test for determining whether the legislature can treat *entire* classes of cities differently from each other is espoused in *Mannini v. McFarland*. 172 Sw.2d 631 (Ky. 1943). The Court of Appeals misconstrued Appellees' argument under Section 156a, which questions not whether HB 246 can treat Louisville differently than other metro governments, but whether the General Assembly can treat all <u>home rule</u> cities in Jefferson County differently than all other cities of the same classification elsewhere in the state. The Court of Appeals cited no case and failed to address this argument in the context of Section 156a's unambiguous mandate that legislation apply equally to all cities of the same classification. The plain language of section 156a requires a different result.

The Court of Appeals, citing no authority, and ignoring language in *Mannini* to the contrary, conflated Section 156a with Sections 59 and 60 of the Kentucky Constitution, stating that "[t]he analysis required under [section 156] is akin to the first prong of the *Mannini* test." *Opinion* at p. 25. The Court of Appeals reasoned that because the *Mannini* Court stated that it must consider section 156 in determining whether legislation was special or local under sections 59 and 60, that all it needed to do was to determine if the legislation was "governmental in nature." The Court missed the point of the *Mannini* analysis, which was to the permissibility of a law that treats all cities in the same class equally, but differently from all other classes of cities. In announcing the principle in

relation to the latter, which construes sections 59 and 60, and not 156, the *Mannini* Court quoted *Safety Building & Loan Co. v. Ecklar*:

> 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. (emphasis added)

Safety Bldg. & Loan Co. v. Ecklar, 50 S.W. 50 (Ky. 1899).

This court in a recent opinion analyzing Section 59 and 60 cited to *Ecklar* and a variety of other cases in reiterating this rule, stating "[o]ur case law has long recognized a simple, two-part test for determining whether a law constitutes general legislation in its constitutional sense: (1) equal application to all in a class, and (2) distinctive and natural reasons inducing and supporting the classification." *Zuckerman v. Bevin*, 565 S.W.3d 580, 600 (Ky. 2018).

Thus, it is not that an analysis of 156a is akin to the first prong of the *Mannini* test, as the Court of Appeals espoused, but rather it is an analysis of 156a of whether the legislation "applies equally to all in a class," which is required *before* even proceeding to additional analysis under sections 59 and 60.

This is further supported by *Mannini's* reliance on *City of Louisville v. Kuntz*, which stated,

> In order to lift an act affecting particular classes of cities or towns from the category of local or special laws it is necessary that *it 'be applicable to all members of the class to which it relates*, and must be directed to the existence and regulation of municipal powers and to matters of local government.' (emphasis added)

City of Louisville v. Kuntiz, 47 S.W. 592, 593 (Ky. 1898).

The issue *Mannini* addresses is whether a law that applies equally to all in a class is *per se* constitutional under the former section 156, or what is now section 156a. *Mannini* found that merely applying the law to all cities of the same class was not the only question, and that additional analysis in the context of sections 59 and 60 was required to ensure that a legitimate reason existed for applying the law solely to a certain class of city.

The Court of Appeals' reliance on *Mannini* in analyzing the classifications under Const. §156a is misplaced because the issue here is not whether a law that applies *to all cities of the same class* is unconstitutional. The issue here is whether a law that applies ***unequally*** *to cities within the same class* is constitutional. Notably, *Taylor Mill* and *Corbin v. Roaden* were decided after *Mannini* and neither take the position that an analysis under Const. §156 is akin to the first prong of *Mannini*. Instead, these cases recognize that classifications that treat cities of the same class differently are repugnant to the Constitution under Section 156.

HB 246 treats the approximately 83 Home Rule classified cities located within Jefferson County differently than all other home rule cities in Kentucky by giving them special powers. These powers, exempting these cities from paying fees to which all other cities are subject, giving them the power to choose whether rules and regulations promulgated by the waste management district apply to them, or allowing these select home rule cities to opt out of a solid waste management plan altogether, are **not** accorded all home rule cities in the Commonwealth equally. No other home rule class city in Kentucky is given these powers and HB 246 is thus on its face unconstitutional under Const. §156a.

III. HB 246 is Not “Governmental in Nature” and Is Unconstitutional Under Ky. Const. §§ 59 and 60.

Finally, the Court of Appeals’ conclusion that HB 246 passes muster under Ky. Const. Sections 59 and 60 since it is “governmental in nature” is unsupported in constitutional jurisprudence. HB 246 substantively amended a statewide fabric of comprehensive and generally applicable solid waste planning by selectively transferring power from one Waste Management District and giving it to 83 home rule class cities located within Jefferson County. The Act does not relate to the organization or structure of the Louisville Metro government or the governments of the 83 home rule class cities located within Jefferson County.

The selective carve out for up to 83 cities in Jefferson County from solid waste planning bore no reasonable relationship to the policies and purposes of KRS Chapters 109 and 224.43. The purpose of SB 2 was to create a systematic approach to solid waste management in Kentucky and to substantially reduce the amount of garbage being placed in landfills. HB 246 grants Jefferson County’s home rule cities the power to avoid the obligations that all other home rule cities have to comply with the management plans adopted by the counties or waste districts in which they are located. HB 246’s stated purpose, announced in section 7 of that Act is solely that “the citizens of counties containing a consolidated local government will be better served by a reconstituted waste management board that is more diverse and representative of and responsive to the populace . . . .” That purpose neither explains or justifies the significant changes wrought in the sections of HB 246 other than the section reconstituting the waste board composition. The distinctions drawn in HB 246 were wholly unrelated to, and in fact contrary to, the policies and purposes of the laws that they amended.

HB 246, if it stands, will set back the progress Kentucky has made in the decades since enactment of SB 2, doing great damage to the comprehensive statutory scheme it amends and the environmental protection goals it abrogates.

CONCLUSION

By treating 83 home rule cities within Jefferson County differently from all other home rule class cities, HB 246 is unconstitutional under Const. §156a. It is also special and local legislation under Const. §§59 and 60 since the provisions at issue are unrelated to the organization and structure of government and have no reasonable relationship to either the purpose of HB 246 itself or to the coordinated and comprehensive solid waste planning policies and purposes set out in the statutes HB 246 amended. From every angle, HB 246 is unconstitutional and should be struck down.

For these reasons and those outlined in the *Brief of Appellant,* Amicus Curiae Kentucky Resources Council respectfully urges this honorable Court to reverse the Opinion of the Court of Appeals and to determine that House Bill 246 is violative of Sections 59, 60, and 156a of the Kentucky Constitution.

Respectfully Submitted,

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