



Filed: 2023-CA-0093 06/05/2023

Kate R. Morgan, Clerk
Kentucky Court of Appeals

Kentucky Court of Appeals

Case No. 2023-CA-0093-MR

DANIEL CAMERON, ATTORNEY GENERAL
on behalf of the COMMONWEALTH OF KENTUCKY

Appellant

v.

On Appeal from
Franklin Circuit Court
No. 22-CI-00560

CORNEAGEN, INC., *et al.*

Appellees

BRIEF FOR THE ATTORNEY GENERAL

MATTHEW F. KUHN (No. 94241)
Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118

ALEXANDER Y. MAGERA (No. 97708)
Assistant Solicitor General

Frankfort, Kentucky 40601
(502) 696-5300

Counsel for Attorney General Cameron

Certificate of Service

I certify that a copy of this brief was served by U.S. mail on June 5, 2023, upon David M. Dirr, Mark D. Guilfoyle, and Emma R. Gripshover, Dressman Benzinger LaVelle psc, 109 E. Fourth St., Covington, Kentucky 41011; Jonathan D. Goldberg, Jan M. West, Goldberg Simpson LLC, Norton Commons, 9301 Dayflower St., Prospect, Kentucky 40059; Wesley W. Duke, Cabinet for Health and Family Services, 275 E. Main St., 5W-B, Frankfort, Kentucky 40621; Clerk, Franklin Circuit Court, 222 St. Clair St., Frankfort, Kentucky 40601. I further certify that the record was returned before the filing of this brief.

/s/ Alexander Magera

INTRODUCTION

Rational-basis review does not “authorize the judiciary to sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations.” *Zuckerman v. Bevin*, 565 S.W.3d 580, 596 (Ky. 2018) (citation omitted). But that is exactly what the Franklin Circuit Court did here. It did not matter that the law at issue, KRS 311.1939, is one of the many iterations of the long-accepted prohibition on the for-profit market for human body parts.

The Franklin Circuit Court also misapplied Kentucky’s special-legislation test. A law that can apply to any member of a group with particular features is not special legislation. Rather, it is class legislation that, at best, warrants equal-protection review under the rational-basis test.

Once the proper legal principles are applied in adjudging the constitutionality of KRS 311.1939, it becomes clear that the statute is constitutional.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument will help the Court in its examination of the binding precedent that the trial court simply failed to apply.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTIONi

Zuckerman v. Bevin, 565 S.W.3d 580 (Ky. 2018)i

 KRS 311.1939i

STATEMENT CONCERNING ORAL ARGUMENTi

STATEMENT OF THE CASE1

 42 U.S.C. § 274e.....1

 Ala. Code § 22-19-1751

 Alaska Stat. § 13.52.2331

 Ariz. Rev. Stat. § 36-854.....1

 Ark. Code Ann. § 20-17-1216.....1

 Cal. Penal Code § 367f.....1

 Colo. Rev. Stat. § 15-19-2161

 Conn. Gen. Stat. § 19a-2881

 Del. Code Ann. tit. 11, § 1333.....1

 D.C. Code § 7-1501.011

 Fla. Stat. Ann. § 873.011

 Ga. Code Ann. § 16-12-1601

 Haw. Rev. Stat. § 327-161

 Idaho Code § 39-3417.....1

 720 Ill. Comp. Stat. 5/12-201

 Ind. Code § 35-46-5-11

 Iowa Code § 142C.10.....1

 Kan. Stat. Ann. § 65-32351

 La. Stat. Ann. § 14:101.1.....1

 Md. Code. Ann., Est. & Trusts § 4-5131

 Mich. Comp. Laws § 333.10116.....1

 Minn. Stat. § 145.422.....1

APPELLANT'S BRIEF

000003 of 000036

Miss. Code Ann. § 41-39-131 1

Mo. Rev. Stat. § 194.275..... 1

Mont. Code Ann. § 72-17-302..... 1

Neb. Rev. Stat. § 71-4839..... 1

Nev. Rev. Stat. § 201.460 1

N.H. Rev. Stat. Ann. § 291-A:16..... 1

N.J. Stat. Ann. § 2C:22- 1

N.M. Stat. Ann. § 24-6B-16 1

N.Y. Pub. Health Law § 4307..... 1

N.C. Gen. Stat. § 130A-412.18..... 1

N.D. Cent. Code § 23-06.6-15..... 1

Ohio Rev. Code Ann. § 2108.18..... 1

Okla. Stat. Ann. tit. 63, § 2200.16A 1

Or. Rev. Stat. § 97.981 1

35 Pa. Stat. Ann. § 10025 1

R.I. Gen. Laws § 23-18.6.1-16..... 1

S.C. Code Ann. § 44-43-10 1

S.D. Codified Laws § 34-26-63..... 1

Tenn. Code Ann. § 68-30-401 1

Tex. Penal Code Ann. § 48.02..... 1

Utah Code Ann. § 26-28-116..... 1

Vt. Stat. Ann. tit. 9A, § 2-108 1

Va. Code Ann. § 32.1-291.16..... 1

Wash. Rev. Code § 68.64.150 1

W. Va. Code § 16-19-16 1

Wis. Stat. § 146.345 1

Wyo. Stat. Ann. § 35-5-215 1

Flynn v. Holder, 684 F.3d 852 (9th Cir. 2012) 1, 2

KRS 311.1939*passim*

KRS 311.19113

Calloway Cnty. Sheriff's Dep't v. Woodall, 607 S.W.3d 557 (Ky. 2020)4

Commonwealth ex rel. Stumbo v. Crutchfield, 157 S.W.3d 621 (Ky. 2005).....4

KRS 15.020.....7

KRS 15.090.....7

ARGUMENT.....8

KRS 311.19398

I. There is a strong presumption that health and welfare legislation is constitutional......9

Posey v. Commonwealth, 185 S.W.3d 170 (Ky. 2006).....9

Walters v. Bindner, 435 S.W.2d 464 (Ky. 1968)9

Owens v. Clemons, 408 S.W.2d 642 (Ky. 1966)9

Robinson v. Commonwealth, 212 S.W.3d 100 (Ky. 2006).....9

O'Bryan v. Zip Express, 636 S.W.3d 457 (Ky. 2021)10

Stephens v. State Farm Mut. Auto. Ins. Co., 894 S.W.2d 624 (Ky. 1995).....10

Williams v. Commonwealth, 213 S.W.3d 671 (Ky. 2006).....10

II. KRS 311.1939 is not special legislation......10

Calloway Cnty. Sheriff's Dep't v. Woodall, 607 S.W.3d 557 (Ky. 2020) 10–12

Cameron v. Beshear, 628 S.W.3d 61 (Ky. 2021).....10

KRS 311.1939*passim*

Univ. of Cumberlands v. Pennybacker, 308 S.W.3d 668 (Ky. 2010) 11, 14

Commonwealth v. McCoun, 313 S.W.2d 585 (Ky. 1958)..... 11, 13

Dep't of Conservation v. Sowders, 244 S.W.2d 464 (Ky. 1951).....11

Bentley v. Commonwealth ex rel. State Bd. of Dental Examiners, 239 S.W.2d 991 (Ky. 1951).....11

Reid v. Robertson, 200 S.W.2d 900 (Ky. 1947)11

O'Bryan v. Zip Express, 636 S.W.3d 457 (Ky. 2021)12

Cates v. Kroger, 627 S.W.3d 864 (Ky. 2021)..... 12, 16

Laurance B. VanMeter, *Reconsideration of Kentucky’s Prohibition of Special and Local Legislation*, 109 Ky. L. J. 523 (2021)12

III. KRS 311.1939 survives rational-basis review......16

KRS 311.1939*passim*

Bloyer v. Commonwealth, 647 S.W.3d 219 (Ky. 2022)16, 22, 23

Zuckerman v. Bevin, 565 S.W.3d 580 (Ky. 2018) 16, 22, 23, 25

Seum v. Bevin, 584 S.W.3d 771 (Ky. App. 2019).....17

Coleman v. Smith, 405 S.W.3d 487 (Ky. App. 2012).....17

Commonwealth v. Brown, 911 S.W.2d 279 (Ky. 1995).....17

Pigeons’ Roost, Inc. v. Commonwealth, 10 S.W.3d 133 (Ky. App. 1999) 17, 20

O’Bryan v. Zip Express, 636 S.W.3d 457 (Ky. 2021) 18, 27

Praete v. Commonwealth, 722 S.W.2d 602 (Ky. App. 1987)..... 18, 19

Calloway Cnty. Sheriff’s Dep’t v. Woodall, 607 S.W.3d 557 (Ky. 2020) 19, 21

Associated Indus. of Ky. v. Commonwealth, 912 S.W.2d 947 (Ky. 1995).....19

Commonwealth Revenue Cabinet v. Cope, 875 S.W.2d 87 (Ky. 1994).....20

Commonwealth v. Louisville Atlantis Cmty./ Adapt, Inc., 971 S.W.2d 810 (Ky. App. 1997)20

Dep’t of Revenue v. Spalding Laundry & Dry Cleaning Co., 436 S.W.2d 522 (Ky. 1968)20

Popplewell’s Alligator Dock No. 1, Inc. v. Revenue Cabinet, 133 S.W.3d 456 (Ky. 2004)21

Children’s Psychiatric Hosp. of N. Ky., Inc. v. Revenue Cabinet, 989 S.W.2d 583 (Ky. 1999).....22

Yeoman v. Commonwealth, Health Policy Bd., 983 S.W.2d 459 (Ky. 1998).....22

Moore v. Ward, 377 S.W.2d 881 (Ky. 1964)..... 22, 24

Hunter v. Commonwealth, 587 S.W.3d 298 (Ky. 2019).....24

Teco/Perry Cnty. Coal v. Feltner, 582 S.W.3d 42 (Ky. 2019)25

Holbrook v. Lexmark Int’l Grp., Inc., 65 S.W.3d 908 (Ky. 2001)25

Cornelison v. Commonwealth, 52 S.W.3d 570 (Ky. 2001)26

Lewis v. Jackson Energy Co-op. Corp., 189 S.W.3d 87 (Ky. 2005)26

Cnty. of Harlan v. Appalachian Reg'l Healthcare, Inc., 85 S.W.3d 607 (Ky. 2002).....26

Ky. Milk Mktg. & Antimonopoly Comm'n v. Kroger Co., 691 SW.2d 893 (Ky. 1985)27

Thornton v. Commonwealth, 421 S.W.3d 372 (Ky. 2013).....27

Beshear v. Acree, 615 S.W.3d 780 (Ky. 2020)27

CONCLUSION.....27

WORD-COUNT CERTIFICATE29

APPENDIX30

STATEMENT OF THE CASE

Prohibitions on the for-profit human-body market

Prohibitions on the for-profit human-body market have never really raised eyebrows. The federal government bans much of the practice, 42 U.S.C. § 274e(a), as does almost every State.¹ These prohibitions reflect a legitimate societal worry about the effects of such a market.

For one, there are particular “policy concerns.” *Flynn v. Holder*, 684 F.3d 852, 860–62 (9th Cir. 2012) (finding multiple rational bases for a legislative “distinction between body material that is compensable and body material that is not”). Prohibitions on the for-profit human-body market prevent the

¹ Ala. Code § 22-19-175; Alaska Stat. § 13.52.233; Ariz. Rev. Stat. § 36-854; Ark. Code Ann. § 20-17-1216; Cal. Penal Code § 367f; Colo. Rev. Stat. § 15-19-216; Conn. Gen. Stat. § 19a-288; Del. Code Ann. tit. 11, § 1333; D.C. Code § 7-1501.01; Fla. Stat. Ann. § 873.01; Ga. Code Ann. § 16-12-160; Haw. Rev. Stat. § 327-16; Idaho Code § 39-3417; 720 Ill. Comp. Stat. 5/12-20; Ind. Code § 35-46-5-1; Iowa Code § 142C.10; Kan. Stat. Ann. § 65-3235; La. Stat. Ann. § 14:101.1; Md. Code. Ann., Est. & Trusts § 4-513; Mich. Comp. Laws § 333.10116; Minn. Stat. § 145.422; Miss. Code Ann. § 41-39-131; Mo. Rev. Stat. § 194.275; Mont. Code Ann. § 72-17-302; Neb. Rev. Stat. § 71-4839; Nev. Rev. Stat. § 201.460; N.H. Rev. Stat. Ann. § 291-A:16; N.J. Stat. Ann. § 2C:22-2; N.M. Stat. Ann. § 24-6B-16; N.Y. Pub. Health Law § 4307; N.C. Gen. Stat. § 130A-412.18; N.D. Cent. Code § 23-06.6-15; Ohio Rev. Code Ann. § 2108.18; Okla. Stat. Ann. tit. 63, § 2200.16A; Or. Rev. Stat. § 97.981; 35 Pa. Stat. Ann. § 10025; R.I. Gen. Laws § 23-18.6.1-16; S.C. Code Ann. § 44-43-10; S.D. Codified Laws § 34-26-63; Tenn. Code Ann. § 68-30-401; Tex. Penal Code Ann. § 48.02; Utah Code Ann. § 26-28-116; Vt. Stat. Ann. tit. 9A, § 2-108; Va. Code Ann. § 32.1-291.16; Wash. Rev. Code § 68.64.150; W. Va. Code § 16-19-16; Wis. Stat. § 146.345; Wyo. Stat. Ann. § 35-5-215.

exploitation of the poor: If the donors of human-body parts or tissue “could be paid, rich patients or the medical industry might induce poor people to sell their organs, even when the transplant would create excessive medical risk, pain, or disability for the donor.” *Id.* at 860. From the perspective of the patient, deriving profit from the human body creates a “concern[] that every last cent could be extracted from sick patients needful of transplants.” *Id.* Moreover, “[t]he existing commerce in organs extracted by force or fraud by organ thieves might be stimulated by paying for donations.” *Id.* (footnote omitted). Finally, “[c]ompensation to donors might also degrade the quality of the organ supply, by inducing potential donors to lie about their medical histories in order to make their organs marketable.” *Id.*

There are also rational “philosophical concerns” that justify prohibiting the creation of a for-profit human-body-parts market. *Id.* “People tend to have an instinctive revulsion at denial of bodily integrity, particularly removal of flesh from a human being for use by another, and most particularly ‘commodification’ of such conduct, that is, the sale of one’s bodily tissue.” *Id.* at 861.

No doubt, there are counterarguments in favor of allowing some aspects of a for-profit market for human body parts. “But these policy and philosophical choices are for [the legislature] to make, not [the judiciary].” *Id.* at 861–62.

2021 amendments to KRS 311.1939

In 2021, the General Assembly addressed what it viewed as pressing

problems with KRS 311.1939, a statute first enacted in 2010.

To start, the legislature amended KRS 311.1939(1) to further restrict the for-profit human-body market. That statute now provides that “a person shall not, for valuable consideration, knowingly purchase, sell, transfer, or offer to purchase, sell, or transfer a part² for transplantation or therapy” from either a living or dead person. No longer do these prohibitions apply only after death. *Compare* KRS 311.1939(1) (2021), *with* KRS 311.1939(1) (2010). Second, the General Assembly created KRS 311.1939(2): “A for-profit entity shall not engage, directly or indirectly, in the procurement, transfer, or distribution of any human eye, cornea, eye tissue, corneal tissue, or portions of eyes.” But under KRS 311.1939(4), “[a] nonprofit entity may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part.” Here, the General Assembly preserved the availability of certain human-body-part or tissue substitutes for those who need them by allowing entities with no financial incentive to continue their work providing them.

In line with all the reasons for prohibiting a for-profit human-body market, one of the goals of KRS 311.1939 is to “preserve[] the nonprofit nature of

² “Part” has always “mean[t] an organ, an eye, or tissue of a human being.” KRS 311.1911(18).

human eye tissue donations.” TR 29. But why the ocular field specifically? Then-Senator Alvarado apprised the General Assembly of a developing “movement for companies to privatize ocular tissue donations in states around the country.” *Id.* In his view, these “[p]rivatization efforts have led to scandal and some decreases in reimbursements to nonprofit eye banks in these states.” *Id.* Allowing this “movement” to take place in Kentucky, he urged, could jeopardize the “current donation system” that “works very well.” *Id.*

Consider the impact that commercialization movement could have on the Eye Bank of Kentucky (“EBK”). EBK is a nonprofit member institution of the Eye Bank Association of America (“EBAA”), a national nonprofit organization that collectively represents every American nonprofit eye bank that obtains, medically evaluates, and distributes ocular tissue for transplant research and education. TR 278–79.³ According to EBK, the decades-long efforts of these institutions have produced a “strong partnership between physicians and professional eye bank personnel’ [that has] create[ed] a ‘surfeit of high-quality corneal tissue

³ The Attorney General draws information about EBK and the relevant market from EBK’s amicus brief below. Because rational-basis review governs here, the Court is not constrained by the normal evidentiary strictures, but must only ask whether any “reasonably conceivable” state of facts could provide a rational basis for the classification. *Calloway Cnty. Sheriff’s Dep’t v. Woodall*, 607 S.W.3d 557, 564 (Ky. 2020) (citation omitted). EBK’s amicus brief provides numerous rational bases for the challenged law. If mere “rational speculation” can provide a rational basis, *Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621, 624 (Ky. 2005) (citation omitted), EBK’s amicus brief certainly suffices.

on demand.” TR 280 (citation omitted).

As EBK tells it, the nonprofit eye bank “model has been enormously successful—tissue donations [have] steadily increased over the last five decades and the United States recovers a surplus of tissue that is regularly exported to other countries in need across the world.” TR 280–81, 290 (“The EBK, as part of the national network of nonprofit eye banks, is fully capable of providing any tissue or service that CorneaGen offers.”). But it’s not just quantity that matters. On the quality side, according to EBK, nonprofit “eye banks have been at the forefront of new practices” and “have innovated and improved cornea practice.” TR 290–92 (discussing the technological advancements that recipients can utilize through nonprofit eye banks). EBK attributes this success, in part, to “the EBAA founding members’ chief goal [of] ensur[ing] that ocular tissue would remain free of commercialization, and with the understanding that human tissue is not a commodity that should be casually bought and sold.” TR 32, 281.

Then-Senator Alvarado and Dr. Woodford Van Meter, a professor of ophthalmology at UK and a volunteer with the Kentucky Lions Eye Bank and the EBAA, provided their views about the pitfalls of allowing a for-profit eye bank to operate in Kentucky. To start, “bereaved families gain comfort from loved ones’ tissues and organs going [to] somebody in need.” TR 29. “There is no substitute for a donor cornea. A donor cornea is a very special gift that comes from someone who has died and allowed their cornea to be used as a gift of sight

for a patient with corneal blindness.” TR 30. “The public views eye and tissue donation as a selfless gift from donor to recipient.” TR 31.

In fact, “[a] broad[] study noted that 71% of donor families that had already donated would have objected to those donations if a business operating on a for-profit basis was involved.” TR 31, 287. Indeed, “[i]n 2018, the World Health Organization . . . endorsed the Global Alliance’s Barcelona Principles, one of which was rejecting the commercialization of donated tissue.” TR 32. That’s because “[t]he idea of profiting from the selfless act of a cornea donation is an affront to the morals and standards of everyday people.” TR 33. So “[i]f eye banks are permitted to sell tissue, make a profit, and pay shareholders with revenue from donated tissue, then public trust in organ and tissue donation will be lost, donations and transplants will decline, and visually impaired individuals may not receive the transplants they need.” TR 31.

Further evidencing the near-universal agreement of the need for restrictions on the for-profit human-body market, and particularly on for-profit eye banks, the 2021 amendments to KRS 311.1939 passed 34-1-1 in the Senate and 94-0 in the House and became law after signature by the Governor.

The instant lawsuit.

When the General Assembly amended KRS 311.1939 in 2021, no one really batted an eye. Not even the Appellees. They waited over a year before seeking to have a law that they claim seriously harms them declared unconstitutional.

When the Appellees finally filed suit, they claimed that KRS 311.1939 constitutes special legislation under Sections 59 and 60 of the Kentucky Constitution and that it unconstitutionally differentiates under Sections 2 and 3 between (1) for- and nonprofit entities in the human-body realm and (2) for-profit entities engaged in the conduct KRS 311.1939(2) prohibits versus for-profit entities not engaged in that prohibited conduct. TR 17–19, 209–15.

The Appellees sued two state officials and a state agency. TR 1–3. Under KRS 15.020, Attorney General Cameron entered his appearance in the Franklin Circuit Court and filed a brief to defend the constitutionality of KRS 311.1939. TR 197–98, 524–39. Eventually, the Appellees moved for summary judgment, TR 248–49, which the Franklin Circuit Court granted, permanently enjoining the enforcement of KRS 311.1939. Tab 1 at 19–20. Under KRS 15.090, Attorney General Cameron appealed that decision.⁴ TR 731–34.

⁴ CorneaGen suggested in its prehearing papers that the Attorney General could not appeal from the judgment below because he simply filed a brief in defense of the law, rather than intervene as a defendant. That contention overlooks KRS 15.090, which the Attorney General specifically cited in his notice of appeal. TR 731. That statute states that “[t]he Attorney General may prosecute an appeal, without security, in any case from which an appeal will lie whenever, in his judgment, the interest of the Commonwealth demands it.” KRS 15.090. The Attorney General did nothing more than follow KRS 15.090 in filing his notice of appeal. There was no need for the Attorney General to intervene as a party while this case was proceeding in circuit court, given that the named defendants defended the challenged law below. The Attorney General did not learn until January 25, 2023 that they did not intend to appeal from the judgment below. This case shows that KRS 15.090 serves as a backstop where a named party refuses to appeal a decision invalidating a Kentucky law. The Attorney General is

ARGUMENT

KRS 311.1939 is a common-sense bill that has garnered almost universal support. It is an uncontroversial continuation of prohibiting certain aspects of the for-profit market for human body parts. Yet the Franklin Circuit Court nevertheless found that KRS 311.1939 violates possibly the easiest forms of constitutional scrutiny a law must survive to remain valid—rational-basis review and the special-legislation test.

Beginning with the latter, KRS 311.1939 is not special legislation. The Appellees believe it is because, right now, the law applies to only two entities. But that is not a feature of the law; rather, it is a feature of the market. If other for-profit entities start doing what CorneaGen and Aurion Biotech currently do, KRS 311.1939 would apply to them as well. That being the case, it is impossible to characterize the statute as special legislation.

Rather, KRS 311.1939 establishes classifications, which are governed by Kentucky's equal-protection principles. Everyone agrees that rational-basis review is the applicable standard here. For all of the reasons already stated, KRS 311.1939 easily survives rational-basis review. This also means that the law is not

simultaneously moving to supplement the record with his office's emails with the named defendants showing their refusal to appeal.

arbitrary legislation in violation of Section 2 of the Kentucky Constitution, since the same analysis applies in making that determination.

Although people can disagree about whether KRS 311.1939 is good policy, it is a valid, constitutional exercise of the General Assembly's legislative prerogative.

I. There is a strong presumption that health and welfare legislation is constitutional.

“[T]he legislature’s power to pass laws, especially laws in the interest of public safety and welfare, is an essential attribute of government.” *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006). And the legislature’s powers in this respect are not narrow. The General Assembly “has a broad discretion to determine for itself what is harmful to health and morals or what is inimical to public welfare.” *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky. 1968). That remains true even if a court believes the policy chosen by the General Assembly is contrary to the public interest, *Owens v. Clemons*, 408 S.W.2d 642, 645 (Ky. 1966), because courts are not the moral authority of the Commonwealth with the right to substitute their own views of public policy in place of the legislature’s, *Robinson v. Commonwealth*, 212 S.W.3d 100, 106 (Ky. 2006).

In light of this legislative responsibility, laws passed by the General Assembly “carry a strong presumption of constitutionality,” and “[d]oubts regarding constitutionality must be resolved in favor of upholding the law.” *O’Bryan v.*

Zip Express, 636 S.W.3d 457, 461 (Ky. 2021) (citations omitted). Importantly, “[t]he one who questions the validity of an act bears the burden to sustain such contention.” *Stephens v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 624, 626 (Ky. 1995). This is especially true when, like here, the challenger makes a facial challenge to a statute, “the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid.” *Williams v. Commonwealth*, 213 S.W.3d 671, 681 (Ky. 2006) (citation omitted).

II. KRS 311.1939 is not special legislation.⁵

In *Calloway County Sheriff's Department v. Woodall*, the Supreme Court held that a statute constitutes special legislation only if it “applies to a particular individual, object or locale.” 607 S.W.3d 557, 573 (Ky. 2020); accord *Cameron v. Beshear*, 628 S.W.3d 61, 77 (Ky. 2021) (“The legislature did not identify or single out any particular person, business, school, locality or entity to which the 2021 legislation would apply. Instead, the legislation applies statewide.”).

This test is easy enough to state. It is also easy enough to apply here. Put simply, KRS 311.1939 is constitutional class legislation, not impermissible special legislation.

⁵ This argument is preserved. TR 528–33.

1. When *Woodall* spoke of special legislation applying “to a particular individual, object or locale,” it meant that the statute could by its terms only ever apply to one or a few particular entities and no one else. This is made clear by the cases favorably cited in *Woodall* and the statutes enacted by the General Assembly in the late 1800s that prompted the Delegates to Kentucky’s 1890–91 Constitutional Convention to enact Kentucky’s special-legislation provisions.

Consider first the cases. In *University of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683–85 (Ky. 2010), the Supreme Court struck down a statute that could only ever apply to one school (more on that later). Similarly, in *Commonwealth v. McCoun*, 313 S.W.2d 585, 587, 589 (Ky. 1958), Kentucky’s highest court invalidated a statute that could only ever allow just two individuals to sue the Commonwealth for a particular amount of money. In *Department of Conservation v. Sowers*, 244 S.W.2d 464, 465, 467 (Ky. 1951), Kentucky’s highest court likewise found unconstitutional a statute that could only ever allow a single widow to sue the Commonwealth. In *Bentley v. Commonwealth ex rel. State Board of Dental Examiners*, 239 S.W.2d 991, 992–93 (Ky. 1951), Kentucky’s highest court struck down a statute that could only ever allow a single dentist to practice dentistry without a license. Finally, in *Reid v. Robertson*, 200 S.W.2d 900, 901, 903 (Ky. 1947), Kentucky’s highest court invalidated a statute that could only ever allow a single veterinarian to obtain a license.

In all of these cases, the General Assembly passed a statute that, by its terms, could never apply to any other person or entity than the one named or described in the statute, even if another person or entity shared the exact same characteristics as the named or described entity. In this way, special legislation (only ever applying to one or several particular entities) is distinguished from class legislation (applying to any entity that shares the features described in the statute), with class legislation being “properly considered under” Kentucky’s equal-protection doctrine only. *O’Bryan*, 636 S.W.3d at 463; *Cates v. Kroger*, 627 S.W.3d 864, 872 (Ky. 2021).

This concept is reinforced by the statutes that led to the creation of Sections 59 and 60. In the late 1800s, the General Assembly became bogged down with “laws address[ing] exceedingly mundane and trivial matters unworthy of state legislative consideration” that led to “legislative inefficiency and wasted time.” *Woodall*, 607 S.W.3d at 570–71. These laws always could only ever apply to the one or several entities named within them. Laurance B. VanMeter, *Reconsideration of Kentucky’s Prohibition of Special and Local Legislation*, 109 Ky. L. J. 523, 583–91 (2021) (Appendices A and B listing examples of laws considered to be special legislation).

KRS 311.1939 is not special legislation because it applies statewide to all for-profit entities that engage in its prohibited acts. It does not apply to only one or several particular entities. Rather, any for-profit entity that attempts to engage

in the prohibited acts will violate the statute. So KRS 311.1939 is typical class legislation that invokes equal-protection, not special-legislation, review.

2. In thinking otherwise, both the Appellees and the trial court make the same mistake. They conclude that because “CorneaGen is the only for-profit entity with an ongoing business that will be prohibited under the challenged legislation,” Tab 1 at 16; TR 209, KRS 311.1939 constitutes prohibited special legislation. But Section 59 is not concerned with to whom the statute is *actually* applied but rather to whom it *can be* applied. This is made clear by the decisions cited above.

Take *McCoun*. Kentucky’s highest court correctly found “a joint resolution authorizing Mrs. Emma McCoun and Mrs. Orene Swango Davis to sue the Commonwealth . . . for \$15,000 each for damages for personal injuries” to be special legislation. *McCoun*, 313 S.W.2d at 587. That’s because that statute could never apply to anyone other than the two individuals named in the statute. The *McCoun* Court made clear, however, that a statute allowing anyone to sue the Commonwealth for up to \$5,000 would be a constitutional “general law.” *Id.* at 588. It did not matter that the statute may apply to only a particular individual at a particular time—one individual who wants to sue the Commonwealth for \$5,000, for example. Rather, the statute would allow anyone at any time to sue the Commonwealth for \$5,000, which made it general legislation, regardless of anyone ever actually taking advantage of the law.

This is exactly why KRS 311.1939 is constitutional general legislation. The statute prohibits any for-profit company from taking certain acts. It does not matter that there is currently only one or two for-profit companies that fit the mold right now. If, for example, a nonprofit eye bank becomes a for-profit company, it will be prohibited from acting in the same way that CorneaGen and Aurion Biotech are prohibited from acting. Or if another for-profit company wishing to engage in the actions that KRS 311.1939 prohibits is created, it will also be prohibited from engaging in such actions. Because the class established by the statute is “open” in that way, it is not unconstitutional special legislation.

Pennybacker tracks this distinction, contrary to the trial court’s and Appellees’ reasoning. *Pennybacker* took the challenged statute at face value for its proclamation “to establish a scholarship program . . . at a private four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county in the Commonwealth.” *Pennybacker*, 308 S.W.3d at 683 (emphasis added) (citation omitted). In other words, the General Assembly passed a statute that could “*only be read* as funding scholarships for students attending” one particular school. *Id.* (emphasis added). But if the statute would have established a scholarship program that could, at any point, be taken advantage of by *any* institution with the features outlined in the statute, the statute would not constitute unconstitutional special legislation, despite there being only one such institution at the time of the statute’s creation.

In sum, KRS 311.1939 prohibits any for-profit entity from acting in the ways proscribed by the statute. That open class prevents the statute from being characterized as unconstitutional special legislation. Indeed, the Appellees essentially recognize this by admitting that the “language” of KRS 311.1939 “may on the surface appear to apply to a class of persons.” TR 209; *see also* Tab 1 at 16 (“All parties agree that, on its face, KRS 311.1939 does not apply to CorneaGen by name.”).

To be sure, testimony at the legislative-committee hearing on the 2021 KRS 311.1939 amendments mentioned CorneaGen by name. But that does not render the resulting legislation unconstitutional. The General Assembly does not have to wait until multiple individuals or entities cause what it views as problems before addressing those problems with legislation that applies to all entities or individuals with similar features as the mentioned one. It is not the example triggering the need for the statute that matters, but rather the application of the statute to all those with the particular features outlined in it. Even though only one or two entities may trigger the creation of a statute, so long as the statute applies to any entity with the same features as those entities, that statute is not unconstitutional special legislation.⁶

⁶ Despite grounding its special-legislation holding in the application of KRS 311.1939 to CorneaGen, Tab 1 at 8–9, 12–13, 16–18, the trial court made a passing statement that “the statute applies . . . to a particular object (corneal tissue transplants and donation),” Tab 1 at 12. But just like the field of “workers

III. KRS 311.1939 survives rational-basis review.⁷

Everyone agrees that rational-basis review applies to determine the constitutionality of the two classes created by KRS 311.1939 with which the Appellees take issue. TR 210, 549; Tab 1 at 11. That’s because no one disputes that “[w]e utilize the rational basis test to decide equal protection claims which do not involve a suspect class or interfere with fundamental rights,” *Bloyer v. Commonwealth*, 647 S.W.3d 219, 226 (Ky. 2022), and that neither are involved here because KRS 311.1939 is properly characterized as “a statute that ‘merely affects social or economic policy,’” *Zuckerman*, 565 S.W.3d at 595 (citation omitted).

The Appellees do not like that the statute allows nonprofit entities to do certain things that for-profit entities are prohibited from doing in the human-body realm. But as outlined above, prohibitions on for-profit involvement in the human-body realm have always existed, and there are plenty of rational reasons for having them. The Appellees also do not like that the statute places prohibitions on the ocular market specifically. But this is a line-drawing issue that the General Assembly gets to resolve. And as articulated above, good reasons exist for the prohibitions in specifically the ocular realm.

compensation,” *see Cates*, 627 S.W.3d at 872, the field of “corneal tissue transplants and donation” is a legislative classification (possibly two), not a particular object as defined in *Woodall*.

⁷ This argument is preserved. TR 534–39.

These same rationales justify rejecting the Appellees' Section 2 arbitrariness argument, given that they ground that argument on the same bases as their equal-protection argument. TR 18–19, 199–200, 208–15, 540–41, 547–53. There is therefore no substantive difference between the analysis employed for upholding the constitutionality of KRS 311.1939 on equal-protection grounds versus Section 2 arbitrariness grounds, which is why the trial court combined its analyses on those two claims. Tab 1 at 3, 7–8, 13–16, 19. The rules applied and the reasons for upholding KRS 311.1939 as constitutional are the same. *See, e.g., Seum v. Bevin*, 584 S.W.3d 771, 775–76 (Ky. App. 2019) (outlining the same rules for evaluating Section 2 arbitrariness claims as rational-basis review).⁸ Employing that analysis here leads to the conclusion that nothing about KRS 311.1939 is irrational.

1. Stated in its simplest form, a particular classification is constitutional “so long as it rationally relates to a legitimate state objective.” *O’Byran*, 636

⁸ Indeed, Section 2 only comes into play “where no other section of the Kentucky constitution provides direct relief.” *Coleman v. Smith*, 405 S.W.3d 487, 497 n.8 (Ky. App. 2012). In other words, Section 2 is “rarely applied” because it simply serves as a backstop for rational-basis review when no other section of the Kentucky Constitution applies. *Commonwealth v. Brown*, 911 S.W.2d 279, 281 (Ky. 1995) (citation omitted). Here though, Kentucky’s equal-protection doctrine governs, so a separate Section 2 analysis is unnecessary. In any event, rational-basis review is no different as between Kentucky’s equal-protection doctrine and Section 2. *See Pigeons’ Roost, Inc. v. Commonwealth*, 10 S.W.3d 133, 135 (Ky. App. 1999) (“Section 2 of the Kentucky Constitution prohibits the arbitrary exercise of power by state government. In order to pass constitutional muster, a statute must be rationally related to a legitimate state objective.” (footnote omitted)).

S.W.3d at 461 (citation omitted). In applying this analysis, the Court “consider[s] only whether the statute’s treatment of [a particular class] is so unrelated to the achievement of any legitimate purpose that [it] can only conclude that the legislature’s actions were irrational.” *Praete v. Commonwealth*, 722 S.W.2d 602, 603 (Ky. App. 1987). “Courts in this Commonwealth have recognized for half a century that when a ‘legislative body acts in a purported policy-making or law-making function . . . the concept of what is ‘arbitrary’ is much more narrowly constricted.” *O’Bryan*, 636 S.W.3d 462 (citation omitted). “Such an action is only ‘arbitrary if there is no rational connection between that action and the purpose for which the body’s power to act exists. Where the existence of such rational connection is “fairly debatable” the action will not be disturbed by a court.” *Id.* at 462–63 (citation omitted).

To start, the trial court correctly recognized that “Kentucky’s interest in encouraging organ and tissue donation is a legitimate one,” which is “a proposition that no one disputes” in this case. Tab 1 at 15. So the only question is whether prohibiting for-profit entities in the human-body realm from acting in that realm, and specifically in the ocular field, is “so unrelated to the achievement of any legitimate purpose that we can only conclude that the legislature’s actions were irrational.” *Praete*, 722 S.W.2d at 603. As previously outlined, Statement of the Case (“Statement”) 1–6, it is not.

Keep in mind that “a person challenging a law upon equal protection grounds under the rational basis test has a very difficult task because a law must be upheld if any reasonably conceivable state of facts could provide a rational basis for the classification.” *Woodall*, 607 S.W.3d at 564 (cleaned up). “[T]he General Assembly need not articulate its reasons for enacting the statute, and this is particularly true where the legislature must necessarily engage in a process of line drawing.” *Id.* (citation omitted). “Accordingly, [o]ur General Assembly . . . has great latitude to enact legislation that may appear to affect similarly situated people differently.” *Id.* (citation omitted)

2. Kentucky courts have recognized that the General Assembly can rationally classify between for-profit and nonprofit entities. Profit motive justified the differentiation in treatment between compensated and uncompensated lobbying in *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 955–56 (Ky. 1995). Because “private enterprise has as its sole or overriding purpose the return of a profit to the owners whether they be the proprietors, partners or shareholders,” “profit motive” justified imposing a tax on “private industry pensioners” that was not imposed on “governmental pensioners.” *Commonwealth Revenue Cabinet v. Cope*, 875 S.W.2d 87, 88, 91 (Ky. 1994). And ensuring that “receipts actually benefit charitable works” justified limitations on profits derived from and the “commercialization” of the charitable-gaming industry. *Commonwealth v. Louisville Atlantis Cmty./Adapt, Inc.*, 971 S.W.2d 810, 816, 820 (Ky. App. 1997); *Pigeons’*

Roost, 10 S.W.3d at 135 (“Keeping charitable gaming from becoming commercial, preventing participation by criminals, and preventing the diversion of funds from legitimate charitable purposes are all legitimate state objectives.” (citation omitted)).

Treating certain industries and actors within certain industries more favorably than others has also been deemed constitutional. Exempting a category of industrial manufacturing equipment from taxation was deemed to be “entirely reasonable” because the General Assembly has the discretion “to conclude that the development of manufacturing plants would have a greater beneficial impact on the state economy than the development of other industries.” *Dep’t of Revenue v. Spalding Laundry & Dry Cleaning Co.*, 436 S.W.2d 522, 524 (Ky. 1968) (“[I]t is peculiarly a matter of legislative selection . . . to determine what type of industry will best promote the general welfare.”). So too was “a tax exemption for transactions relating to industrial-type commercial vessels and vessels conveying persons for hire, but not vessels used for pleasure or recreational purposes” found to be constitutional because the former could rationally be seen as being better for the economy. *Popplewell’s Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 467 (Ky. 2004).

As outlined above, these considerations are magnified when considering the effect of for-profit entities in the human-body realm on the availability and quality of ocular parts and human-body materials in general. It was not irrational

for the General Assembly to conclude that introducing profit motive into these realms could lead to the exploitation of the poor and the sick, increases in the cost of human-body substitutes, and the degradation of the human body and the quality and quantity of human-body substitutes. Statement at 1–6. The General Assembly was presented with what it viewed as a problem—for-profit entities harming the fields of ocular and human-body materials donation. So the General Assembly removed that for-profit motive in those fields. That decision was rationally related to the legitimate end of preserving the quality and quantity of ocular and human-body-material substitutes.

3. Nothing said by the trial court or the Appellees in this litigation changes that bottom. Consider four points in this respect.

First, the Appellees and trial court have used the fact that Kentucky requires a “reasonable basis” and “substantial and justifiable reason” for classifications to suggest that some heightened form of rational-basis review applies. TR 210; Tab 1 at 11. That misunderstands the state of play. Although Kentucky’s standard uses different language, it is the same old rational-basis standard. *Woodall* confirms as much. 607 S.W.3d at 568–69. As do many other cases. *See, e.g., Zuckerman*, 565 S.W.3d at 597 n.21 (noting that Kentucky’s erroneous heightened rational-basis standard is a creature of the conflation of Kentucky’s equal-protection and special-legislation analyses).

Not utilizing a heightened standard conforms with the longstanding view that Kentucky’s equal-protection analysis tracks the analogous federal standard, which does not contain any sort of heightened rational-basis review. *Children’s Psychiatric Hosp. of N. Ky., Inc. v. Revenue Cabinet*, 989 S.W.2d 583, 587 (Ky. 1999) (“The same standards apply in creating classifications under the Kentucky Constitution . . . as those under the Fourteenth Amendment to the United States Constitution.”). It also tracks more with how Kentucky courts untainted by the conflation have historically articulated rational basis review. *See, e.g., Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 470 (Ky. 1998) (“[T]he essence of our decision in this matter is that the legislature is not required to be fair or even reasonable It is simply barred from behaving irrationally or arbitrarily.”).

Second, the Appellees spent a considerable amount of time below criticizing Dr. Van Meter’s legislative-committee testimony, presumably in an attempt to meet their burden “to establish that the statutory distinction is without a rational basis.” *Bloyer*, 647 S.W.3d at 226 (citation omitted). But no matter how the Appellees attempt to characterize Dr. Van Meter’s testimony, they simply cannot refute the rationality of his overarching point—for-profit entities in the human-body and ocular realms can have a negative effect on the quality and quantity of human-body and ocular substitutes. Statement at 1–6. It is not enough for the Appellees to simply proffer some evidence that they believe refutes the effects

of the law because “[a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” *Zuckerman*, 565 S.W.3d at 596 (citation omitted); *Moore v. Ward*, 377 S.W.2d 881, 883 (Ky. 1964) (“The court may not examine the validity of reasons which impelled the legislature to act, nor may it reappraise those reasons.”). Rather, the Appellees must show the total irrationality in even entertaining the thought that banning for-profit entities from acting in the human body and ocular realms could have a positive impact on the availability and quality of human body and ocular substitutes. This is something that the Appellees simply cannot do.

Which brings us to the third point. Any suggestion by the Appellees or the trial court that the record even needs to support the General Assembly’s justifications is wrong. “A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Zuckerman*, 565 S.W.3d at 596 (citation omitted) (“A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification.” (citation omitted)). So a party “mischaracterizes and misconstrues the rational basis test” when that party “attempt[s] to shift the burden to the Commonwealth to prove that” the classification is rational. *Bloyer*, 647 S.W.3d at 226.

In the same vein, the trial court’s speculative assertions do not come close to establishing irrationality. When the trial court commented about the alleged

blurring of lines between for-profit and nonprofit “providers of medical services,” nonprofit “scandals,” and nonprofit Open Records Act violations, Tab 1 at 14–15, 19, it engaged in the exact opposite analysis it should have. The trial court should have simply asked whether it is rational to think that profit motive could taint the human-body and ocular realms. That is the proper way to conduct rational-basis review. *Moore*, 377 S.W.2d at 883.

Fourth, the Appellees and the trial court criticized the purported under-inclusivity of KRS 311.1939 (not covering as many areas or entities as it purportedly should) and its purported over-inclusivity (covering too many areas or entities than it should). But a statute “does not violate the equal protection clause merely because the classifications made by the statutes are imperfect.” *Hunter v. Commonwealth*, 587 S.W.3d 298, 304 (Ky. 2019). This sort of line-drawing criticism, also evident in the trial court’s suggestion of what it views as a better way to regulate this realm, Tab 1 at 15, has been consistently rejected by Kentucky courts.

Creating legislation to solve a particular problem “inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.” *Teco/Perry Cnty. Coal v. Feltner*, 582 S.W.3d 42, 48 (Ky. 2019) (cleaned up). So “courts are compelled under rational-basis review to accept a legislature’s

generalizations even when there is an imperfect fit between means and ends.” *Zuckerman*, 565 S.W.3d at 596 (citation omitted). “A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.” *Id.*; *Holbrook v. Lexmark Int’l Grp., Inc.*, 65 S.W.3d 908, 915 (Ky. 2001) (“By itself, the fact that a legislative classification is underinclusive will not render it unconstitutionally arbitrary. The legislature is free to choose to remedy only part of a problem. Furthermore, it may ‘select one phase of a field and apply a remedy there, neglecting the others.’” (citations omitted)).

Here, the problem perceived and addressed by the General Assembly was for-profit ocular industry entities undercutting the availability and quality of ocular substitutes because of for-profit effects on the human-body donation realm in general. With respect to the for-profit ocular industry in particular, the General Assembly was faced with what it viewed as an immediate and pressing issue. Statement at 1–6. So there is a rational basis for the prohibitions in KRS 311.1939 particular to the for-profit ocular industry. *See, e.g., Cornelison v. Commonwealth*, 52 S.W.3d 570, 573–74 (Ky. 2001) (refusing to strike down a statute as unconstitutionally violating equal protection because it was underinclusive in treating second-time DUI offenders differently from first and third-time offenders).

Over-inclusivity, on the other hand, is not at issue here. It was suggested below that the text of the statute prevents entities like UPS or FedEx from acting. But KRS 311.1939 was in effect for some time before the Appellees challenged it, and there is no indication in the record that those entities raised concerns because of the statute. Even still, the best reading of KRS 311.1939 is that it only applies to entities or individuals actually engaged in the ocular-realm business, not to the third parties like UPS and FedEx. In KRS 311.1939(4), the General Assembly carved out nonprofit entities like EBK. For such nonprofits to continue their work, they obviously need to work with for-profit companies at all stages of serving patients. Thus, the statute read as a whole refutes the contrary position. *See Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005) (“The statute must be read as a whole and in context with other parts of the law.”). And the contrary position would undermine the General Assembly’s creation of an exception for nonprofit entities. *See Cnty. of Harlan v. Appalachian Reg’l Healthcare, Inc.*, 85 S.W.3d 607, 611 (Ky. 2002) (“In interpreting a statute, this Court must be guided by the intent of the legislature in enacting the law.”). Even still, this Court need only address the application of KRS 311.1939 to entities like CorneaGen and Aurion Biotech—actors that are actually in the ocular-realm business.

Both the trial court and the Appellees rely on cases like *Kentucky Milk Marketing & Antimonopoly Commission v. Kroger Co.*, 691 SW.2d 893 (Ky. 1985), for

heady statements that “[w]hatever is contrary to democratic ideals, customs and maxims is arbitrary.” *Id.* at 899. Recent decisions pull back on that expansive articulation of judicial power in favor of rational-basis review. *See, e.g., Thornton v. Commonwealth*, 421 S.W.3d 372, 379 (Ky. 2013) (characterizing *Milk Marketing* as “offer[ing] a rather expansive interpretation of Section 2” that the Supreme Court “m[ight] not entirely endorse”); *Beshear v. Acree*, 615 S.W.3d 780, 818–19 (Ky. 2020) (rejecting reliance on *Milk Marketing* because that decision “involved no health and safety regulations” and instead employing traditional rational-basis review to analyze a Section 2 challenge); *O’ Bryan*, 636 S.W.3d at 462–63 (employing traditional rational-basis review to examine a Section 2 challenge).

At bottom, the Appellees want this Court to act as a superlegislature. The Court should leave the job of legislating to the General Assembly.

CONCLUSION

The Court should reverse.

Respectfully submitted,

/s/ Alexander Y. Magera

MATTHEW F. KUHN (No. 94241)

Solicitor General

ALEXANDER Y. MAGERA (No. 97708)

Assistant Solicitor General

Office of the Attorney General

700 Capital Avenue, Suite 118

Frankfort, Kentucky 40601

(502) 696-5300

Counsel for Attorney General Cameron

WORD-COUNT CERTIFICATE

This Appellant Brief complies with the word limit of 8,750 under RAP 31(G)(2)(a) because, excluding the parts of the response exempted by RAP 31(G)(5) and 15(D), this document contains 7,532 words.

/s/ Alexander Y. Magera

APPENDIX

1. Op. & Order of the Franklin Circuit Court granting summary judgment in favor of Appellees. TR 710–30.



Filed: 2023-CA-0093 06/05/2023

Kate R. Morgan, Clerk
Kentucky Court of Appeals

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION No. 22-CI-00560

CORNEAGEN, INC., et al.**PLAINTIFFS**

v.

OPINION AND ORDER

**KENTUCKY CABINET FOR HEALTH
AND FAMILY SERVICES, et al.
OFFICE OF THE INSPECTOR GENERAL**

DEFENDANTS

This matter is before the Court on CorneaGen, Inc., (“CorneaGen”), Aurion Biotech, Inc. (“Aurion”), and Edward Holland, M.D.’s (“Dr. Holland”) (collectively, “Plaintiffs”) Motion for Summary Judgment and Permanent Injunctive Relief. The Plaintiffs engage in corneal transplants, and related medical research and services that are providing research and treatment for corneal disease which currently impacts over 12 million people worldwide. (Complaint pg. 4, ll. 11). Plaintiff Dr. Edward Holland is a resident of Boone County who is a practicing ophthalmologist, and Professor of Ophthalmology at the University of Cincinnati, Director of Cornea Services at the Cincinnati Eye Institute. Plaintiff CorneaGen, Inc. is a for-profit corporation that operates eye tissue labs that are inspected by the FDA and accredited by the Eye Bank Association of America *Id.* at ll. 11. Aurion Biotech, Inc. is a for-profit company that spun off from CorneaGen that is developing a platform for regenerative therapies for the restoration of eyesight. *Id.* at pg. 5, ll. 23. These plaintiffs challenge a statute passed by the 2021 General Assembly that purports to outlaw for-profit organizations from “procurement, transfer, or distribution of any human eye, cornea, eye tissue, corneal tissue, or portions of eyes.” 2021 Ky. Acts, ch. 49, Section 1.

The Defendants in this matter, Kentucky Cabinet for Health and Family Services, (“The Cabinet”), Eric Friedlander, Secretary for The Cabinet, in his official capacity (“Friedlander”), and Adam Mather, Inspector General, in his official capacity (“Mather”), submitted a Response in opposition to Plaintiffs’ Motion for Summary Judgment and Permanent Injunctive Relief. The Court granted The Eye Bank of Kentucky (“EBK”) leave to file an *Amicus Curiae* Brief in support of Defendants. EBK is a non-profit corporation affiliated with the University of Kentucky and the University of Louisville, that is presently the sole non-profit provider of these services in the Commonwealth. Likewise, by Agreed Order entered on August 8, 2022, the Attorney General was allowed to enter an appearance as *Amicus Curiae*, and the Attorney general filed a brief in support of the constitutionality of the statute.

Upon completion of briefing, the Court heard an Oral Argument on the matter on Monday, October 10, 2022. Upon review of the parties’ briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS** Plaintiffs’ Motion for Summary Judgment and Permanent Injunctive Relief.

STATEMENT OF FACTS

On July 15, 2022, Plaintiffs filed a Complaint for Preliminary and Permanent Injunctive Relief and for Declaratory Judgment, arguing that Senate Bill 12 (“SB 12”) is an unconstitutional law that amended KRS 311.1939 to prohibit for-profit entities from engaging, directly or indirectly, in the procurement, transfer, or distribution of any human eye, cornea, eye tissue, corneal tissue, or portions of eyes while leaving non-profit entities untouched. Plaintiffs now seek summary judgment and request that the Court find SB 12 unconstitutional in violation of Sections 2, 3, 59, and 60 of the Kentucky Constitution. SB 12, passed during the 2021 General Assembly, amended KRS 311.1939 as follows:

- (1) Except as otherwise provided in subsection (4) [(2)] of this section, a person **shall not, [that] for valuable consideration, knowingly purchase, [purchases] sell, transfer, or offer to purchase, sell, or transfer [or sells] a part for transplantation or therapy if removal of a part from an individual has occurred, is intended to occur, or after the individual's death.**
- (2) **A for-profit entity shall not engage, directly or indirectly, in the procurement, transfer, or distribution of any human eye, cornea, eye tissue, corneal tissue, or portions of eyes.**
- (3) **A person who knowingly violates any of the provisions in this section shall be imprisoned in the penitentiary for not less than one (1) nor more than five (5) years or be fined not more than fifty thousand dollars (\$50,000), or both.**
- (4) [(2)] **A non-profit entity [person] may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation, or disposal of a part.**

Plaintiffs contend that SB 12 violates multiple sections of the Constitution. They first argue that SB 12 is in violation of Sections 2 and 3 of the Constitution because it arbitrarily discriminates against CorneaGen and Aurion for no legitimate government purpose. Next, Plaintiffs claim that SB 12 serves as special legislation under Sections 59 and 60 because it singles out CorneaGen, the only for-profit company existing in the state engaged in this corneal transplants, and restricts the for-profit company from providing corneal tissue to ophthalmologists and patients in Kentucky. Likewise, Plaintiffs argue that there is no rational basis to single out one discrete form of organ or tissue donation (corneal transplants) to ban for-profit entities, and that such a classification violates equal protection and constitutes special legislation. Plaintiffs argue that if such a ban is a valid exercise of police power, rather than an attempt to create a monopoly for the existing non-profit eye bank, the ban would apply to all organ and tissue donations, not just corneal tissue.

I. CorneaGen

The three Plaintiffs involved in this case are CorneaGen, Aurion, and Dr. Holland. CorneaGen is a for-profit company with the goal of improving the treatment of corneal disease

and eliminating corneal blindness by 2040. Throughout Kentucky and other states, CorneaGen engages in the procurement, transfer, and distribution of corneal tissue obtained from cornea donors. CorneaGen originated as a non-profit eye bank, but it changed its status to for-profit in 2016 to enable it to raise investor capital to enhance its ability to succeed in the market and achieve its goal of eliminating corneal blindness. CorneaGen contends that, although it is considered a for-profit company, approximately 40% of its owners and investors are non-profit eye banks with aligned missions and goals. (Complaint, pg. 4, ll. 15). Through its investor capital, CorneaGen claims to have developed cutting-edge products and an eye tissue delivery system that other eye banks, including the EBK, cannot offer. Because of SB 12, CorneaGen has ceased providing processed eye tissue to Dr. Holland, and Aurion no longer works with ophthalmologists in Kentucky so as not to be subject to criminal liability under the amended KRS 311.1939.

II. Aurion

The second Plaintiff, Aurion, is a for-profit company that spun off from CorneaGen in 2022. Aurion’s primary goal is to develop regenerative therapies that restore sight to those suffering from partial to total vision loss and corneal endothelial disease. To achieve this goal, Aurion must use its patented technology. The technology, which requires a donor cornea supplied by CorneaGen, allows ophthalmologists to perform significantly more corneal transplants more efficiently. Aurion plans to conduct a clinical trial at St. Elizabeth Healthcare in Edgewood, Kentucky to receive FDA approval in order to perform these patented treatments; however, KRS 311.1939 prevents a clinical trial from going forward in Kentucky due to the company’s for-profit status.

III. Dr. Holland

The final Plaintiff, Dr. Holland, provides corneal transplants in Northern Kentucky and is the Chairman of the Medical Advisory Board of both CorneaGen and Aurion. Dr. Holland specializes in cornea blindness, specifically patients who have injuries or severe medical problems that scar the surface of the eye. To treat cornea blindness, Dr. Holland transplants specialized surface cells of the eye from a relative or deceased donor onto the patient's cornea. Prior to the passing of SB 12, these cornea transplants were performed with CorneaGen tissue. According to Dr. Holland, he is now unable to perform this specialized cornea surgery in Kentucky because he cannot utilize CorneaGen tissue.

IV. The Eye Bank of Kentucky

The EBK is a nonprofit organization that was formed in 2016 following the merger of the University of Kentucky Lions Eye Bank of Lexington, the University of Louisville Lions Eye Bank, and the Kentucky Lions Eye Foundation. The EBK specializes in promoting eye, organ, and tissue donation for the purpose of restoring sight through corneal transplants. The EBK, as *amicus curiae*, filed a brief in this matter in support of SB 12 and in opposition to Plaintiffs' Motion for Summary Judgment and Injunctive Relief. They contend that SB 12 was enacted to protect the public trust in eye tissue donation and transplantation; it was not enacted to target CorneaGen and eliminate their economic competition. Additionally, the EBK argues that SB 12 passes constitutional muster because it meets the rational basis test, as Kentucky has a legitimate interest in ensuring ethical procurement and distribution of human tissue.

It must be noted that EBK chose to participate in this action only as *amicus curiae*. Accordingly, it is merely offering its legal opinion to the Court, without any factual basis that has been tested in discovery, and without any testimony under oath and subject to cross-examination.

While the Court accepts its brief at face value, it is also mindful that the EBK brief and arguments present absolutely no factual basis for the Court to find that there is any significant difference between the operation of non-profit entities and for-profit entities in this field.

The issue before this Court is the constitutionality of SB 12 under Sections 2, 3, 59, and 60 of the Kentucky Constitution.

ANALYSIS

I. Standard of Review

Summary Judgment is appropriate when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.01.

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to affirmatively show that there is a genuine issue of material fact for trial. *Jones v. Abner*, 335 S.W.3d 471, 475 (Ky. Ct. App. 2011). The movant should not succeed unless it has shown “with such clarity that there is no room left for controversy.” *Steelvest, Inc. v. Scansteel Service Ctr.*, 807 S.W. 2d 476, 482 (Ky. 1991). “The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.” *Welch v. Am. Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor, and summary

judgment should only be granted when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest*, 807 S.W. 2d at 480.

The Court recognizes that the summary judgment is a device that should be used with caution and is not a substitute for trial. “[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Jones v. Abner*, 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

II. SB 12 Violates Sections 2, 3, 59, and 60 of the Kentucky Constitution

In this action, the Court is faced with the issue of whether SB 12, which amended KRS 311.1939, is unconstitutional under Sections 2, 3, 59, and 60 of the Kentucky Constitution -- due process, equal protection, and local or special legislation. The Court believes that SB 12 is clearly in violation of each of the four Sections of the Kentucky Constitution.

As to the due process and equal protection claims, Plaintiffs contend that SB 12 violates Section 2 of the Kentucky Constitution because it is an unjust and arbitrary law that criminalizes a for-profit entity’s involvement in eye restoring treatments in Kentucky, while permitting the exact same treatments for non-profits. Next, Plaintiffs contend that Section 3 of the Kentucky Constitution is violated because, for no legitimate reason, the Bill treats for-profit and non-profit entities engaged in providing corneal tissue to Kentucky ophthalmologists differently. Plaintiffs point to Sections (1), (2), and (4) of KRS 311.1939 as violating equal protection. Sections (1) and (4) of the statute prohibit any person from purchasing, selling, transferring, or offering to purchase, sell, or transfer any human tissue or organ, unless it is a non-profit entity. Section (2) of the statute

specifically bars a for-profit entity from engaging in the procurement, transfer, or distribution of a human eye, cornea, eye tissue, corneal tissue, or portions of eyes.

The Court agrees with Plaintiffs that SB 12 is both an arbitrary government action and discriminates against for-profit entities for no legitimate reason. Defendants and the EBK try to craft an argument that there is a rational basis for allowing only non-profit entities to distribute eye tissue in Kentucky, such as ensuring ethical procurement and distribution of human tissue while promoting public trust in the donation system. To defend the General Assembly’s legitimate interest behind passing SB 12, the EBK states that, “limiting this practice to non-profit entities not only promotes access and transparency while minimizing costs to Kentuckians, but also reflects empirical data concerning donor discomfort with entities profiting from the altruistic gifts of their bodies.”

Neither the EBK nor Defendants have supported the above position with any proof whatsoever. This stated rationale for the legislation, and the discrimination against for-profit entities, is pure speculation unsupported by any data, objective evidence, or experience that demonstrates non-profit entities are better equipped to provide these medical services. Moreover, if “access and transparency” are the concern, the providers of these services—both for-profit and non-profit—are subject to regulatory oversight by the state Cabinet for Health and Family Services and the Board of Medical Licensure. Such concerns can easily be addressed through licensure and regulation, or through legislation that treats similarly situated providers equally rather than discriminating against for-profit entities without any factual basis for the differing regulations.

Turning to their claim that SB 12 violates Sections 59 and 60 of the Kentucky Constitution, Plaintiffs contend that SB 12 was enacted to keep “CorneaGen out of Kentucky.” They argue that the Bill’s purpose was to protect the interests of Kentucky’s sole eye bank, the EBK. Plaintiffs’

base their argument on the testimony of Dr. Woodford Van Meter before the House Health and Family Services Committee on March 4, 2021. According to the record, Dr. Van Meter, who serves as the corporate and medical director of the EBK, testified:

There is one full-service, for-profit eye bank in the United States, CorneaGen, based on Seattle, Washington. We would like to keep for-profit eye banks out of Kentucky.”

Plaintiffs argue that this testimony clearly points toward special legislation because CorneaGen is mentioned specifically. Defendants, however, defend SB 12, arguing that, on its face, the statute is generally applicable because CorneaGen is not mentioned by name. Defendants further argue that, although CorneaGen is the only for-profit eye bank in Kentucky currently, if others came along, they would be treated the same as CorneaGen under the amended KRS 311.1939. Given that CorneaGen is the only for-profit eye tissue entity, the Court agrees with Plaintiffs that SB 12 is special legislation and therefore unconstitutional under Sections 59 and 60 of the Kentucky Constitution.

a. Section 2 of the Kentucky Constitution

Section 2 of the Kentucky Constitution provides that “[a]bsolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority.” KY. CONST. § 2. “Section 2 of the Constitution is a curb on the legislative as well as on any other public body or public office in the assertion or attempted exercise of political power.” *Sanitation Dist. No. 1 of Jeff. Co. v. City of Louisville*, 213 S.W.2d 995, 1000 (Ky. 1948). In applying Section 2, the Kentucky Supreme Court has held that “[w]hatever is contrary to democratic ideals, customs and maxims is arbitrary.” *Kentucky Milk Marketing v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985). “Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary.” *Id.*

[Section 2] has been interpreted to mean that a legislature, or a body acting under legislative authority, may not, ‘under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupation or impose unreasonable or unnecessary restrictions on them. The regulation of a lawful business is dependent upon some reasonable necessity for the protection of health, safety, morality or other phase of the general welfare...’ An exercise of executive authority to promulgate regulations ‘must have a substantial basis and cannot be made a mere pretext for actions that do not come within its scope.’

Motor Vehicle Commission v. Hertz Corp., 767 S.W.2d 1, 2-3 (Ky. Ct. App. 1989) (internal citations omitted).

b. Section 3 of the Kentucky Constitution

Section 3 of the Kentucky Constitution states:

All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution, and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration, or amendment.

KY. CONST. § 3. Finally, in relevant part, the Fourteenth Amendment of the United States Constitution provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Under the United States and Kentucky constitutions, equal protection guarantees to “keep[] governmental decision makers from treating differently persons who are in all relevant respects alike.” *Vision Mining, Inc v. Gardner*, 364 S.W.3d 455, 465 (Ky. 2011) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). The level of scrutiny applied to an equal protection challenge is

dependent on the classification at issue. *Id.* The three (3) possible levels of judicial review are (1) strict scrutiny; (2) intermediate scrutiny; and (3) rational basis.

Here, it is undisputed that the appropriate level of judicial review is rational basis. Thus, the “[l]egislative distinctions between persons...must bear a rational relationship to a legitimate state end.” *Chapman v. Gorman*, 839 S.W.2d 232, 239 (Ky. 1992). “The one who questions the validity of an act bears the burden to sustain such contention.” *Stephens v. State Farm Mutual Automobile Insurance Company*, 894 S.W.2d 624, 626 (Ky. 1995) (citing *Manning v. Sims*, 213 S.W.2d 577 (Ky. 1948); *Revenue Cabinet v. Estate of Marshall*, 746 S.W.2d 408, 413 (Ky. Ct. App. 1988)). The rational basis standard generally favors the government and “[a] person challenging a law upon equal protection grounds under the rational basis test has a very difficult task because a law must be upheld if...any reasonably conceivable state of facts...could provide a rational basis for the classification.” *Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621, 624 (Ky. 2005) (citing *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980)).

Thus, in order to comply with state and federal equal protection requirements, the classification must be rationally related to a legitimate state interest, and to comply with Kentucky’s equal protection requirements, the classification must be supported by a “reasonable basis” or a “substantial and justifiable reason.” *Teco/Perry County Coal v. Feltner*, 582 S.W.3d 42, 46 (Ky. 2019) (citing *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 42 (Ky. 2009)). A law under the rational basis test must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *Teco/Perry County Coal*, 582 S.W.3d at 47.

c. Sections 59 and 60 of the Kentucky Constitution

The prohibition of special legislation is found in Section 59 of the Kentucky Constitution, which provides, in relevant part, “where a general law can be made applicable, no special law shall be enacted.” KY. CONST. § 59. Section 60 of the Kentucky Constitution acts in conjunction with Section 59 and provides, in relevant part, “[t]he 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...” KY. CONST. § 60. Under the *Calloway County* test for Section 59, local or special legislation, according to the well-known meaning of the words, applies exclusively to particular places or particular persons. *Calloway County Sheriff’s Department v. Woodall*, 607 S.W.3d 557, 572 (2020). The appropriate test is whether the statute applies to a particular individual, object, or locale. *Id.* at 573. Here, the statute applies to a particular individual (CorneaGen), and to a particular object (corneal tissue transplants and donation).

In *University of Cumberlands v. Pennybacker*, the General Assembly passed a bill providing scholarship opportunities to Kentucky pharmacy students attending an accredited four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county in the Commonwealth and become certified pharmacists in the Commonwealth. 308 S.W.3d 668, 672 (Ky. 2010). After reading the statute in its entirety, it is clear that the requirements to receive the scholarship could only be met by students attending the University of Cumberlands. *Id.* at 684. The Court held that the Bill violated Section 59 of the Kentucky Constitution because “the sole institution which would fit that description is [University of Cumberlands].” *Id.* at 683. The General Assembly’s failure to treat equally all members of the pharmacy student class was “precisely the type of special privilege and favoritism that section

59 condemns.” *Id.* at 685. While the *Pennybacker* court applied the previous special legislation test under *Schoo*, *Calloway County* held that the Court reached the correct result because the statute applied to a particular object. *Calloway County Sheriff’s Department*, 607 S.W.3d at 573 n.19. While the University of the Cumberland was not explicitly named in the legislation, the classification was drawn so narrowly that it was the only institution that was eligible under the bill. Likewise in this case, although CorneaGen is not explicitly named in the bill, the classification is drawn in a manner that it is the only company that is prohibited from engaging in business under this legislation.

d. Analysis

It is clearly stated in Kentucky law that the presumption of constitutionality of a statute is axiomatic. *Kentucky Milk Marketing and Antimonopoly Com’n v. Kroger Co.*, 691 S.W.2d 893 (1985) (citing *Walters v. Binder, Ky.*, 435 S.W.2d 464 (1968)). The Court holds that SB 12 clearly violates Sections 2, 3, 59, and 60 of the Kentucky Constitution and the presumption of constitutionality has been overcome.

Above, the Court discusses the purpose of Sections 2 and 3 of the Kentucky Constitution. Section 2 is a curb on the legislature as well as on any other public body or public officer in the assertion or attempted exercise of political power. *Kentucky Milk Marketing*, 691 S.W.2d at 899 (citing *Sanitation Dist. No. 1 v. City of Louisville*, 308 Ky. 368, 213 S.W.2d 995 (1948)). Whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary. *Kentucky Milk Marketing*, 691 S.W.2d at 899. Here, KRS 311.1939 criminalizes for-profit entities engaging in the procurement, distribution, or transfer of human eye tissue, while specifically giving non-profit entities the go-ahead to participate in the same business. Legislative authority, may not, ‘under the guise of protecting the public, arbitrarily interfere with private

business or prohibit lawful occupation or impose unreasonable or unnecessary restrictions on them. *Motor Vehicle Commission*, 767 S.W.2d at 2-3. The Court believes that the language of the statute infringes upon a for-profit’s rights to conduct business in the state of Kentucky. In effect, the statute prohibits Plaintiffs from their entire business, i.e., distributing eye tissue and improving treatment to those with corneal blindness, thereby causing Plaintiffs severe harm. If the actions taken are for reasons so insubstantial or the resulting consequences are so unjust as to cause a hardship, judicial power may be interposed to protect the rights of those adversely affected. *Id.* (citing *Wells v. Board of Education of Mercer County, Ky.*, 289 S.W.2d 492, 494 (1956)).

Pursuant to *Pritchett v. Marshall, Ky.*, Section 2 is broad enough to embrace the traditional concepts of both due process of law and equal protection of law. 375 S.W.2d 253, 258 (1963). However, the Court will discuss equal protection as SB 12 violates Section 3 of the Kentucky Constitution as well.

As previously stated, the purpose of Section 3 of the Kentucky Constitution is to prevent the government from treating persons alike differently. *Vision Mining*, 364 S.W.3d at 465 (quoting *Nordlinger*, 505 U.S. at 10). In this action, Plaintiffs allege that, by allowing only a non-profit entity to engage in the procurement, transfer, or distribution of the human eye, the government is treating differently a for-profit entity participating in the identical business. Additionally, Plaintiffs argue that the General Assembly does not have a rational basis for this classification. The Court agrees entirely.

In the current business environment for medical services, the line between “for profit” and “not for profit” providers of medical services has been blurred, if not completely obliterated. Moreover, the argument that non-profits are superior at gaining public trust is contradicted by scandals involving churches, universities, charitable foundations, college athletics, and other non-

profits that have been plagued by the same human greed and abuses of power that plague all human enterprises, including for-profit entities. The defenders of this legislation have not pointed to any specific instances in the record where any person, or the public at large, has expressed any hesitancy to donate tissue to a for-profit entities because of its legal status. To the extent that corneal tissue donation and transplants may be subject to special concerns of transparency and accountability, there has been no showing that non-profit entities differ from for-profit entities in any meaningful way.

Moreover, both for-profit and non-profit entities are subject to licensure, regulation and oversight by the Board of Medical Licensure, the State Board of Health, and the Division of Licensure and Regulation under KRS Chapter 216B. These well-established regulatory agencies possess all the regulatory tools necessary to address such problems, without discrimination between for-profit and non-profit entities. The Court holds that SB 12 is unconstitutional as to both Sections 2 and 3 of the Kentucky Constitution.

The Court does not accept the argument by Defendants and the EBK that public policy supports excluding for-profit eye banks so as not to lose the public's trust in organ and tissue donation. They claim that Kentucky's interest in encouraging organ and tissue donation is a legitimate one, a proposition that no one disputes. However, the proposition that the operation of for-profit entities in this area of medical services would somehow discourage organ and tissue donation is completely unsupported in the record, or in any medical literature that has been cited by the Defendants. Nowhere in the record have Defendants demonstrated that the public refrains from donating human organs or tissue when a for-profit entity is involved. In fact, for all the record shows, the converse may be true: people may be more inclined to donate tissue to for-profit entities if they believe for-profits will be more effective at eradicating eye disease. The record here

demonstrates that CorneaGen also started out as a non-profit, but converted to for-profit status in order to attract investment capital that would enable it to develop new technology and innovations in eye care that are impossible to fund with the non-profit business model.

Defendants have given no other valid basis as to why Kentucky has a legitimate interest in discrimination between non-profit and for-profit entities. Although the rational basis standard supports upholding a statute if the legislature has a reasonably conceivable basis for the classification, the Court holds here that Defendants' reasoning is wholly arbitrary and completely speculative, and therefore, SB 12 is unconstitutional under Section 3 of the Kentucky Constitution.

Now, the Court will turn to its analysis of SB 12 as to Sections 59 and 60 of the Kentucky Constitution. Sections 59 and 60 were enacted to prevent individuals, places, or in this case, entities, from being specifically targeted by a statute. The recent *Calloway County* test is whether the statute applies to a particular individual, object, or locale. 607 S.W.3d at 573.

In support of its argument that SB 12 is special legislation, Plaintiffs rely on *Calloway County*. The Court in that case altered the existing test for special legislation, and held that it applies exclusively to particular places or particular persons. *Id.* at 572. Thus, under Sections 59 and 60, the statute is unconstitutional if it applies to a particular individual, object, or locale. *Id.* at 573. All parties agree that, on its face, KRS 311.1939 does not apply to CorneaGen by name. However, it is undisputed that CorneaGen is the only for-profit entity with an ongoing business that will be prohibited under the challenged legislation. Plaintiffs contend that the statute applies to a particular individual because it prohibits a sole "for-profit entity" from engaging, directly or indirectly, in the procurement, transfer, or distribution of any human eye, cornea, eye tissue, corneal tissue, or portions of eyes. KRS 311.1939(2).

It is undisputed that CorneaGen is the only for-profit entity in Kentucky in the business of selling and distributing eye tissue. There can be no doubt CorneaGen is specifically targeted under this statute. Defendants argue that the statute does not meet the *Calloway County* test for special legislation because it applies, at least theoretically, statewide to all for-profit entities, not CorneaGen in particular. This argument ignores the undisputed fact that CorneaGen is the only such entity in existence.

Moreover, the *Calloway County* case specifically affirmed the longstanding rule that legislation does not need to explicitly name the target of its discrimination in order to run afoul of the constitutional prohibition against special legislation. In *Calloway County*, the Court re-affirmed *University of Cumberland v. Pennybacker*, 308 S.W.3d 668, 672 (Ky. 2010), which struck down a classification that was so narrowly drawn it only applied to one university. Likewise, in this case, CorneaGen is not specifically named, and yet it is undisputed that it is the only entity to which the legislation applies.

The Court agrees with Plaintiffs that the statute violates Sections 59 and 60 of the Kentucky Constitution because the record demonstrates that SB 12 applies only to a particular company, i.e., CorneaGen and its spinoff Aurion. Although the language of the statute contains no specific references to CorneaGen or Aurion, it's clear, based on the circumstances around the passing of SB 12, that the legislative intent of the Bill was to keep CorneaGen from doing business in Kentucky, thereby protecting the EBK. The Court rejects Defendants' argument that the statute will apply to other for-profits in Kentucky involved in the sale, purchase procurement, transfer, or distribution of eye parts. This argument is entirely theoretical and divorced from the existing reality that only CorneaGen is impacted.

At the time SB 12 was passed, CorneaGen was and continues to be the only for-profit in Kentucky to which KRS 311.1939 applies. No party has disputed the testimony by Dr. Van Meter that “there is [only] one full-service, for-profit eye bank in the United States, CorneaGen”. It is clear that SB 12 was intended to apply exclusively to CorneaGen. There is no rational basis to amend the language of KRS 311.1939 other than to assure that for-profit companies who distribute eye tissue, i.e., CorneaGen, will not be able to conduct business in Kentucky. In its Brief, the EBK admits that Dr. Van Meter “only referenced CorneaGen in his testimony because it is the only for-profit eye bank in existence.” Because CorneaGen is the only for-profit eye bank in existence, it is clear that SB 12 targets CorneaGen in particular, making the law special legislation and therefore unconstitutional.

The Attorney General objects to the Plaintiff’s argument on “legislative intent”, and claims that the testimony of Dr. Van Meter should not be considered as proof of the intent of the legislature. The Attorney General has confused legislative purpose or “intent” with legislative “motive”. Legislative “motive”, or the reasons individual legislators vote for a bill, is outside the scope of judicial scrutiny. However, legislative “intent”, or the *goals* that the Legislature seeks to achieve, must be considered by Courts in a special legislation challenge. *See* A. Bickel, *The Least Dangerous Branch*, pp. 202-210 (1962). While courts are prohibited from inquiring into legislative “motive”, they frequently must discern the General Assembly’s “intent” in order to resolve a legal dispute. *See e.g., Atlantic Coastline R. Co. v. Commonwealth*, 193 S.W.2d 749 (Ky. 1946). Here, the Attorney General is correct that the motive of legislators in voting for this bill, is beyond the scope of judicial review. The determination of legislative “intent” is another matter. In this case, there is no need to resort to the tools of statutory construction, or to consider the testimony of Dr. Van Meter, in determining legislative “intent.” Dr. Van Meter’s testimony cited by Plaintiffs

merely restates the obvious: the purpose and intent of this legislation is to prohibit for-profit entities from operating in Kentucky. It is undisputed that the result of this legislation is to protect EBK from competition from for-profit entities, and the record is also undisputed that CorneaGen is the only such provider in existence in Kentucky. The legislation is unambiguous, and on its face, it explicitly discriminates against for-profit entities in the field of corneal and eye tissue. The intent of the Legislature is plain: to criminalize for-profit companies from engaging in business in this medical field. The question is: what rational basis supports this flagrant discrimination?

Here, the defenders of SB 12 have utterly failed to identify any legitimate purpose of the legislation. Moreover, the record demonstrates that the impact of the legislation will be to create a monopoly in this field, and to shield EBK from any competition. They have suggested that the ban on for-profits might address public concerns with transparency and accountability. But they have not identified any problem, existing or predicted, with the transparency or accountability of the sole existing for-profit provider of these services. Moreover, non-profit entities, including the Universities with which EBK is affiliated, have long histories of obstructing and denying public access to their records in violation of the Open Records Act. *University of Kentucky v. Kernel Press, Inc.*, 620 S.W.3d 43 (2021); *University of Kentucky v. Courier-Journal & Louisville Times Company*, 830 S.W.2d 373 (1992); *Cape Publications, Inc., v. University of Louisville Foundation, Inc.*, 260, S.W.3d 818 (2008).

SB 12 directly violates Sections 2, 3, 59, and 60 of the Kentucky Constitution and is therefore unconstitutional and void. KY. CONST. Section 26 (“all laws contrary. . . to this Constitution, shall be void”). Thus, SB 12 is **PERMANENTLY ENJOINED**.

CONCLUSION

WHEREFORE, Plaintiffs' Motion for Summary Judgment and Permanent Injunctive Relief is **GRANTED**. KRS 311.1939, as amended by SB 12, is unconstitutional under Sections 2, 3, 59, and 60 of the Kentucky Constitution. The Cabinet is hereby precluded from enforcing KRS 311.1939.

SO ORDERED this 28th day of December, 2022.



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

Distribution:

David M. Dirr

Mark D. Guilfoyle

Emma R. Gripshover

Dressman Benzinger LaVelle psc

109 East Fourth Street

Covington, KY 41011

(859) 341-1881

ddirr@dbllaw.com

mguilfoyle@dbllaw.com

egripshover@dbllaw.com

Heather L. Becker

Aaron J. Silletto

Office of the Attorney General

700 Capital Avenue, Suite 118

Frankfort, KY 40601

heather.becker@ky.gov

aaron.silletto@ky.gov

Wesley W. Duke

General Counsel

Cabinet for Health and Family Services

275 E. Main Street, 5W-B

Frankfort, KY 40621

wesleyw.duke@ky.gov

Mickey T. Webster

Thomas E. Travis

Wyatt, Tarrant & Combs, LLP
250 West Main Street, Suite 1600
Lexington, KY 40507
mwebster@wyattfirm.com
ttravis@wyattfirm.com

72836F48-3469-4E7E-89F9-8434E196CD10 : 000021 of 000021

OG : 000021 of 000021



Filed: 2023-CA-0093 06/05/2023

Kate R. Morgan, Clerk
Kentucky Court of Appeals

KENTUCKY COURT OF APPEALS
No. 2023-CA-0093

DANIEL CAMERON, ATTORNEY GENERAL APPELLANT
on behalf of the COMMONWEALTH OF KENTUCKY

v. On appeal from Franklin Circuit Court
No. 22-CI-00560

CORNEAGEN, INC., *et al.* APPELLEES

MOTION TO SUPPLEMENT THE RECORD

Under RAP 25(D)(3), Appellant Attorney General Daniel Cameron moves to supplement the record with email correspondence between counsel for the Attorney General and counsel for the other government parties in this case. That email correspondence is attached as Exhibit 1.

1. On December 28, 2022, the Franklin Circuit Court entered the final and appealable opinion and order that prompted this appeal. Shortly thereafter, counsel for the Attorney General emailed counsel for the other government parties to inquire whether they planned to appeal. Shortly before the appeal deadline expired, counsel for those other government parties informed the Attorney General that they would not appeal from the decision below.

2. Because none of the existing parties planned to appeal, and because the decision below found a law to be unconstitutional, the Attorney General exercised his authority to appeal under KRS 15.090. That provision empowers the Attorney General to “prosecute an appeal, without security, in any case from

which an appeal will lie whenever, in his judgment, the interest of the Commonwealth demands it.” The Attorney General primarily utilizes his KRS 15.090 authority in cases like this one where he concludes an appeal should be taken but no existing party intends to appeal.

3. After the Attorney General took this appeal under KRS 15.090, several Appellees suggested in their supplemental prehearing statement that they dispute the Attorney General’s authority to take this appeal. They raised this issue after the record below was closed. As a result, the Attorney General had no opportunity to include his email correspondence in the record below.

4. To allow the Court to fully consider this issue, the Attorney General respectfully moves to supplement the record so that his email correspondence with counsel for the non-appealing government parties can be considered. This email correspondence is discussed in the Attorney General’s opening brief, and it provides context for why the Attorney General exercised his authority under KRS 15.090.

5. The Attorney General’s ability to take an appeal under KRS 15.090 is an important issue. In fact, without an appeal by the Attorney General, the decision below, which invalidated a duly enacted Kentucky law, would not have been challenged on appeal. So that the Court has all the relevant information before it, and because the Attorney General did not have an opportunity to

include this correspondence in the record below, the Court should grant the Attorney General’s motion to supplement the record.

Respectfully submitted,

/s/ Alexander Y. Magera

MATTHEW F. KUHN (No. 94241)

Solicitor General

ALEXANDER Y. MAGERA (No. 97708)

Assistant Solicitor General

Office of the Attorney General

700 Capital Avenue, Suite 118

Frankfort, Kentucky 40601

(502) 696-5300

MOTION

000003 of 000004

CERTIFICATE OF SERVICE

I certify that a copy of this motion was served by U.S. mail on June 5, 2023, upon David M. Dirr, Mark D. Guilfoyle, and Emma R. Gripshover, Dressman Benzinger LaVelle psc, 109 E. Fourth St., Covington, Kentucky 41011; Jonathan D. Goldberg, Jan M. West, Goldberg Simpson LLC, Norton Commons, 9301 Dayflower St., Prospect, Kentucky 40059; Wesley W. Duke, Cabinet for Health and Family Services, 275 E. Main St., 5W-B, Frankfort, Kentucky 40621; Clerk, Franklin Circuit Court, 222 St. Clair St., Frankfort, Kentucky 40601. I further certify that the record was returned prior to the filing of this motion.

/s/ Alexander Y. Magera



Filed: 2023-CA-0093 06/05/2023

Kate R. Morgan, Clerk
Kentucky Court of Appeals

Exhibit 1

Kuhn, Matt F (KYOAG)

From: Kuhn, Matt F (KYOAG)
Sent: Wednesday, January 25, 2023 9:54 AM
To: Duke, Wesley W (CHFS OLS)
Subject: RE: CorneaGen v. CHFS

Wesley,

I very much appreciate the heads up. Because we think the interests of the Commonwealth necessitate an appeal to defend this duly enacted law, we'll proceed with filing our own notice of appeal.

I should be at my desk most of the day, except during lunch, if you still want to discuss. Thanks again for talking with me on Monday.

Best,

Matt

Matthew F. Kuhn
Solicitor General
Office of Attorney General Daniel Cameron
Matt.Kuhn@ky.gov
(502) 696-5300

From: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Sent: Wednesday, January 25, 2023 8:18 AM
To: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Subject: RE: CorneaGen v. CHFS

Matt,

Since my morning has really filled up and I probably cannot call until after 10 I wanted to go ahead and shoot you an email. We have decided not to pursue and appeal in this case. I will follow up with a call later today. Apologies for not getting back to you yesterday.

Wes.

From: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Sent: Tuesday, January 24, 2023 8:41 PM
To: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Subject: RE: CorneaGen v. CHFS

Sounds good. I should be at my desk all morning.

Matthew F. Kuhn
Solicitor General
Office of Attorney General Daniel Cameron
Matt.Kuhn@ky.gov

(502) 696-5300

From: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Sent: Tuesday, January 24, 2023 8:40 PM
To: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Subject: Re: CorneaGen v. CHFS

Matt,

I will give you a call tomorrow morning to follow up.

Get [Outlook for iOS](#)

From: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Sent: Tuesday, January 24, 2023 8:31:13 PM
To: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Subject: RE: CorneaGen v. CHFS

Hi Wesley,

Just following up on this. Thanks for talking yesterday. From our call, my memory is you anticipated CHFS would make a decision on whether to appeal by COB today. As I mentioned, we would be happy to work with you in prosecuting an appeal. Please let me know given the upcoming appeal deadline.

Thanks. Happy to get on a call again if it's helpful.

Best,

Matt

Matthew F. Kuhn
Solicitor General
Office of Attorney General Daniel Cameron
Matt.Kuhn@ky.gov
(502) 696-5300

From: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Sent: Friday, January 20, 2023 2:08 PM
To: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Subject: RE: CorneaGen v. CHFS

That works.

From: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Sent: Friday, January 20, 2023 2:06 PM
To: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Subject: RE: CorneaGen v. CHFS

Sure. How about Monday morning—say at 11am? If that works, call my direct line at (502) 696-5447. I'm also available between 9 and 10am.

Have a nice weekend.

Matthew F. Kuhn
Solicitor General
Office of Attorney General Daniel Cameron
Matt.Kuhn@ky.gov
(502) 696-5300

From: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Sent: Friday, January 20, 2023 1:06 PM
To: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Subject: RE: CorneaGen v. CHFS

Matt,

Do you have any time on Monday to discuss?

From: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Sent: Thursday, January 19, 2023 3:48 PM
To: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Subject: RE: CorneaGen v. CHFS

Wesley,

Any update on this? Happy to talk if it's helpful.

Best,

Matt

Matthew F. Kuhn
Solicitor General
Office of Attorney General Daniel Cameron
Matt.Kuhn@ky.gov
(502) 696-5300

From: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Sent: Wednesday, January 4, 2023 11:41 AM
To: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Subject: RE: CorneaGen v. CHFS

Matt,

We are still taking a look right now. I will be in touch asap. Thanks for following up.

From: Kuhn, Matt F (KYOAG) <Matt.Kuhn@ky.gov>
Sent: Wednesday, January 4, 2023 11:30 AM
To: Duke, Wesley W (CHFS OLS) <WesleyW.Duke@ky.gov>
Subject: CorneaGen v. CHFS

Wesley,

I hope you're well.

Our trial team forwarded me Judge Shepherd's decision in CorneaGen v. CHFS. I'm beginning to review the opinion now. Has CHFS made a decision about whether it will appeal?

Thanks. Happy to talk about this one, if it's helpful.

Best,

Matt

Matthew F. Kuhn
Solicitor General
Office of Attorney General Daniel Cameron
Matt.Kuhn@ky.gov
(502) 696-5300