Supreme Court of Kentucky

NO. 2011-SC-000658

COURT OF APPEALS CASE NO. 2010-CA-001830

JEFFERSON COUNTY BOARD OF EDUCATION — **APPELLANT**

v.

On appeal from Jefferson Circuit Court
Civil Action No. 10-CI-004174

CHRIS FELL, AS FATHER AND NEXT FRIEND OF L.F., ET AL — **APPELLEE**

AMICI CURIAE BRIEF OF THE LOUISVILLE URBAN LEAGUE KENTUCKY COMMISSION ON HUMAN RIGHTS AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE – LOUISVILLE BRANCH

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CERTIFICATE OF SERVICE

It is hereby certified that on January 17, 2012, a copy of this Motion for Leave to File *Amici Curiae* Brief *Instanter* was served via U.S. Mail on Hon. Irv Maze, Jefferson Circuit Court Judge, 700 W. Jefferson St., Louisville, KY 40202; Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Teddy B. Gordon, Attorney at Law, 807 West Market Street, Louisville, KY 40202; Byron Edward Leet, Lisa Catherine DeJaco, Anne R. MacLean, Wyatt, Tarrant & Combs, LLP, 2800 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202-2898; J. Bruce Miller, Norma C. Miller, Waterfront Plaza, 20th Floor, 325 W. Main Street, Louisville, KY 40202; Sheila P. Hiestand, Hughes & Coleman, 9300 Shelbyville Rd., Suite 110, Louisville, KY 40202.

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INTRODUCTION

While this appeal presents a question of statutory interpretation and can be decided based on the well-reasoned arguments of the Jefferson County Board of Education, *amici curiae* submit this brief because the decision below ignores the historical background of KRS 159.070, which demonstrates a discriminatory motive by the 1976 General Assembly in enacting the statute. By adopting the view that KRS 159.070 imposes a strict neighborhood schools policy that requires the Board to send students to the schools nearest to their homes, the Court of Appeals jettisoned basic principles of statutory interpretation, usurped the authority of the Board, and placed KRS 159.070 in direct conflict with the Equal Protection Clause of the Fourteenth Amendment – all of which could have been avoided by adopting the reading urged by the Board, which is consistent with the statute's language and preserves its constitutionality.[1]

[1] *Amici* believe that the historical background of KRS 159.070 is properly before this Court. The Court of Appeals spent substantial time at oral argument and in its opinion discussing the history of KRS 159.070 and the legislative intent of the General Assembly in enacting, reenacting, and amending the statute. *See, e.g.*, *Fell v. Jefferson County Bd. of Educ.*, No. 2010-CA-001830-MR, 2011 WL 4502673, at *5-6 (Ky. App. Sept. 30, 2011).

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BACKGROUND

The pre-decree era. For generations, the Kentucky General Assembly, through the passage of statutes to prevent integrated schools, relegated African-Americans to poor, ill-equipped schools that stamped them with a badge of racial inferiority and second-class citizenship. In 1904, the General Assembly passed KRS 158.020, which made it unlawful "for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction...."[2] This Court's predecessor, based on unfounded concerns of racial "interbreeding" and potential "breach[es]...[to] the purity of racial blood," upheld the constitutionality of this statute, which remained the law until repealed by the General Assembly some twelve years after *Brown v. Board of Education* (*Brown I*).[3]

After *Brown I*, the separate school districts in Jefferson County – the Independent Louisville School District and the Jefferson County School District – took minor steps to integrate their schools.[4] The Louisville School District later achieved biracial populations in its schools – not because of the effectiveness of its policy – but because of an influx of African-Americans into the district, and the withdrawal of white students from the district to attend private schools.[5] By 1972, a number of the district's schools remained racially identifiable, with some schools having virtually all white or African-American student

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[2] 1904 KY. ACTS p. 181, ch. 85. 1904 KY. ACTS p. 181, ch. 85 was later codified as KRS 158.020. *See Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 510 F.2d 1358, 1361 (6th Cir. 1974) (citing KRS 158.020 (repealed)) (*Newburg Area II*).

[3] *Berea College v. Commonwealth*, 123 Ky. 209, 94 S.W. 623, 625-26 (Ky. 1906), *aff'd*, 211 U.S. 45 (1908); *Brown v. Bd. of Educ. of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1954); 1966 KY. ACTS ch. 184, § 8 (repealing KRS 158.020).

[4] *See Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 756 (W.D. Ky. 1999) (*Hampton I*).

[5] *Id.* at 757 n.4.

populations.[6]

The Jefferson County School District lagged behind its city counterpart in integrating its schools. For example, 56% of all African-American elementary students were assigned to three of the 74 elementary schools in the county – all three of which were in predominantly African-American neighborhoods.[7] The county did not provide a high school that primarily served African-American students; instead, the county arranged for its African-American students to attend Central High School, a 95% African-American school operated by the Louisville School District.[8]

The litigation to desegregate. Dissatisfied with the slow progress of school integration, a group of parents and civil rights organizations sued to enforce the school districts' compliance with *Brown I* in federal district court – some 20 years after that decision.[9] Significantly, in denying the plaintiffs' request that the two school districts comply with *Brown I*, the district court found that "[t]he attendance areas tracked neighborhood lines; the demographics of each neighborhood shaped the racial composition of the schools."[10] The district court concluded that the presence of racially identifiable schools "had their genesis in white flight, neighborhood housing patterns and socioeconomic factors; not de jure acts or failures to act."[11] On appeal, the Sixth Circuit disagreed.

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[6] *Id.* at 757 n.5 (noting that six high schools, nine middle schools, and 40 elementary schools had student populations of 63% or more of one racial group).

[7] *Id.* at 757.

[8] *See supra* note 5; *see also Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, Ky.*, 489 F.2d 925, 927 (6th Cir. 1973) (*Newburg Area I*), *vacated and remanded by* 418 U.S. 918 (1974), *modified*, 510 F.2d at 1358.

[9] *Hampton I*, 72 F. Supp. 2d at 757.

[10] *Id.* at 759.

[11] *Id.*

In reversing the district court, the Sixth Circuit found that several of the schools in both districts were either racially identifiable or "rapidly becoming racially identifiable."[12] The Sixth Circuit further held that "[d]emographic changes did not excuse the [Jefferson County] board from its duty to eliminate the vestiges of segregation."[13] Because demographic changes did not absolve the districts of their constitutional duty to operate an unitary school district, the Sixth Circuit specifically found that "[g]eographic zoning assignment is not a permissible method for a school board to employ in dismantling the dual system and eliminating all vestiges of state-imposed segregation...."[14] The vestiges of state-imposed segregation "made it impossible for...[a] geographic student assignment plan to work effectively."[15] In other words, "[a] neighborhood school plan merely perpetuated the racial identity of many schools."[16]

The Sixth Circuit's decision was vacated by the U.S. Supreme Court in light of *Milliken v. Bradley*, but later reinstated with minimal modifications.[17] In response to the Sixth Circuit's decision, the Kentucky State Board of Education ordered the merger of the Jefferson County and Louisville school districts, effective April 1, 1975.[18] And on remand, the district court formulated a desegregation decree to take effect for the 1975-1976 academic year.[19]

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[12] *Newburg Area I*, 489 F.2d at 928, 930.
[13] *Hampton I*, 72 F. Supp. 2d at 760.
[14] *Newburg Area I*, 489 F.2d at 931.
[15] *Hampton I*, 72 F. Supp. 2d at 761.
[16] *Id.*
[17] *Newburg Area II*, 510 F.2d at 1359 (citing *Milliken v. Bradley,* 418 U.S. 717 (1974)).
[18] *Hampton I*, 72 F. Supp. 2d at 762.
[19] *Id.*

The General Assembly reacts. Opposition to the decree and the Sixth Circuit's decision from white parents in the newly merged school district was swift and historically significant for the time. The district court's decree required, among other things, redrawing geographic attendance zones and assigning students to schools outside their neighborhood.[20] More than 90% – even higher than the national average – of white parents opposed implementing the court's decree.[21] Capitalizing on white opposition to the Sixth Circuit's decision, the 1974 General Assembly passed H.R. 29 – 84 to 8 in the House and 26 to 9 in the Senate – a resolution urging the adoption of an anti-busing amendment to the federal constitution.[22]

But the General Assembly was not done. In 1976, in response to the district court's desegregation decree, the General Assembly approved H.B. 193, which amended KRS 159.070 to provide in part that:

> Within the appropriate school district attendance area, parents or legal guardians shall be permitted to **enroll for attendance** their children in the public schools nearest their home.[23]

In *Newburg Area Council, Inc. v. Board. of Education of Jefferson County, Ky.* (*Newburg Area III*), the Sixth Circuit held the amended KRS 159.070 unconstitutional as applied to

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[20] *Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 814-15 (2007) (Breyer, J., dissenting).

[21] *See* G. Orfield & E. Frankenberg, *Experiencing Integration in Louisville: How Parents and Students See the Gains and Challenges*, Poverty & Race Research Action Council, 9 (Jan. 2011), *available at* http://prrac.org/pdf/LOUISVILLE_finalV3_12711.pdf (last visited Jan. 13, 2012).

[22] Associated Press, *House adopts anti-busing resolution*, THE COURIER-JOURNAL, Feb. 9, 1974, at A1, A12; *see also* Bill Billiter, *Anti-busing measure voted*, THE COURIER-JOURNAL, Mar. 2, 1974, at A1, A16; William Bradford, *House is Asked to Back Amendment to Ban Busing*, KENTUCKY NEW ERA (Hopkinsville, Ky.), Jan. 26, 1974, at p. 14.

[23] 1976 KY. ACTS p. 158-159, ch. 79 (emphasis added).

Jefferson County.[24] In so holding, the Sixth Circuit found that the statute "conflict[ed] with [the district court's] desegregation plan issued July 30, 1975, which was and is a plan necessary to dismantle an unconstitutional school system and to create a system compatible with the guarantees of the Fourteenth Amendment...."[25] Thus, the panel "agree[d] with the holding of the district court that the provision is unconstitutional as applied to Jefferson County, Kentucky, in that it would operate to frustrate this court's mandates to eradicate state imposed segregation in the Jefferson County school system."[26]

But the Sixth Circuit also held that the statute remained presumably valid elsewhere in Kentucky, and reserved the question of whether the statute was facially valid.[27] After the Sixth Circuit's decision in *Newburg Area III*, a federal district court refused to enforce KRS 159.070 in a case challenging the constitutionality of a desegregation decree in Fayette County.[28] In that case, a group of parents also alleged that the busing of their children to schools outside their neighborhoods violated KRS 159.070.[29] Relying principally on *Newburg Area III*, the district court refused to enforce the statute and suggested that the statute conflicted with the desegregation of Fayette County schools.[30]

In *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), this Court invalidated every education statute in Kentucky, including KRS 159.070. In response, the General Assembly reenacted KRS 159.070 as a part of the Kentucky

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[24] 583 F.2d 827 (6th Cir. 1978).
[25] *Id.* at 828.
[26] *Id.* at 829.
[27] *Id.*
[28] *Joslin v. Bd. of Educ. of Fayette County, Ky.*, 585 F. Supp. 37 (E.D. Ky. 1983).
[29] *Id.* at 42.
[30] *Id.*

Education Reform Act ("KERA"). In so doing, the General Assembly deleted "for attendance" from the statute:

> Within the appropriate school district attendance area, parents or legal guardians shall be permitted to enroll [~~for attendance~~] their children in the public schools nearest their home.[31]

The language of the statute has been the same ever since.

Post-reenactment developments. In 2000, the district court declared Jefferson County to be in full unitary status and terminated its supervision of the 1975 desegregation decree.[32] In reaching this conclusion, the district court noted that if Jefferson County went to a strict neighborhood schools policy, originally the purpose of KRS 159.070, racially identifiable schools would reemerge.[33] This scenario is likely to occur under a strict neighborhood schools policy because "Jefferson County seems to be racially concentrated in the same places it was twenty-five years ago."[34]

Census data supports the district court's conclusion. According to the 2010 census, western Jefferson County has a residential population of 79.6% African-Americans and 17.4% whites.[35] Eastern Jefferson County, on the other hand, is 90.8% white, and has a population of only 4.7% African-Americans. Only southern Jefferson County displays any

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[31] 1990 KY. ACTS p. 1247, ch. 476; *see also Fell*, 2011 WL 4502673, at *6.

[32] *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000) (*Hampton II*). In 1978, the district court had previously held that Jefferson County had reached "provisional" unitary status and terminated active supervision of the decree. The district court, however, retained jurisdiction to consider any challenges to changes made to the desegregation plan by the Board. *See Hampton I*, 72 F. Supp. 2d at 765-76.

[33] *Hampton II*, 102 F. Supp. 2d at 371 n.29.

[34] *Id.* at 372 n.31.

[35] This census data was complied using the U.S. Census Bureau's "American Factfinder 2" online database. The Jefferson County population data reflects the Bureau's statistics as measured by the Jefferson County East Census County Division, the Jefferson County West Census County Division, and the Jefferson County South Census County Division. *See* http://factfinder2.census.gov (last visited Jan. 13, 2012).

kind of significant residential diversity, as the area contains a population of 56.1% white and 34.6% African-American residents.

Faced with Jefferson County's segregated residential patterns, the Board voluntarily adopted racial guidelines to maintain integration as part of its 2001 student assignment plan.[36] That plan, after being upheld in the district court, was held unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment by a plurality of the U.S. Supreme Court in *Parents Involved*.[37] While a majority of the U.S. Supreme Court recognized that the prevention of racially identifiable schools is a compelling state interest, a plurality of the Court held that the plan was not sufficiently narrowly tailored to meet that compelling state interest.[38]

Afterwards, the Board adopted a new student assignment plan for the 2010-2011 academic year. The Appellees, a group of parents of students in the Jefferson County school system, now challenge the Board's plan under KRS 159.070. A majority of the Court of Appeals held the Board's plan in violation of KRS 159.070 in an opinion that gives short shrift to the historical background of the statute and the demographic reality now facing the Board.

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[36] *Parents Involved*, 551 U.S. at 716.

[37] *See, e.g., McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *rev'd*, *Parents Involved*, 551 U.S. at 716.

[38] *Parents Involved*, 551 U.S. at 788, 797 (Kennedy, J., concurring) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."); *see also id.* at 843 (Breyer, J., dissenting) ("I am not surprised that Justice Kennedy finds that, a district may consider it a compelling interest to achieve a diverse student population, including a *racially* diverse population.") (emphasis in original and internal punctuation omitted). Justice Breyer's dissenting opinion was joined by Justices Souter, Ginsburg, and Stevens. *See id.* at 803.

ARGUMENT

I. The Court of Appeals' interpretation of KRS 159.070 places the constitutionality of the statute in serious doubt.

In *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), Justice Brandeis observed that it was settled law that courts should interpret statutes in a manner that avoids constitutional questions. *See id.* at 348 n.8 (collecting cases). Justice Brandeis observed that courts should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Id.* at 348. The rule is equally well settled under Kentucky law. *See Louisville/Jefferson County Metro Gov't v. TDC Group, LLC*, 283 S.W.3d 657, 660 (Ky. 2009).

The Court of Appeals brushed aside this longstanding rule in favor of a policy analysis that rests on untested speculation and conjecture. The majority held – without any consideration of the General Assembly's motive or the statute's historical background – that KRS 159.070 mandates neighborhood schools. The critical flaw in the majority's analysis, however, is its failure to give adequate weight to the Sixth Circuit's holding in *Newburg Area III* and the General Assembly's motive in amending KRS 159.070 in 1976: to thwart the effectiveness of the 1975 desegregation decree. This motive is discriminatory and rendered the statute facially invalid under the Equal Protection Clause of the Fourteenth Amendment then, and if this Court adopts the Court of Appeals' reasoning, renders it facially invalid under that clause now.[39]

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[39] The Court of Appeals held that Jefferson County is no longer exempt from KRS 159.070 because the desegregation decree is no longer in effect. *See Fell*, at *8. But since the district court criticized the use of a strict neighborhood schools policy in *Hampton II*, it is likely that the district court would have reached a different conclusion if such a policy was imposed. *See Hampton II*, 102 F. Supp. 2d at 372 n.31. Indeed, the district court, after dissolving the desegregation decree, approved of a student assignment plan that did not

A. The Court of Appeals' interpretation of KRS 159.070 is unconstitutional under *Newburg Area III* and U.S. Supreme Court precedent.

In *Washington v. Davis*, 426 U.S. 229 (1976), the U.S. Supreme Court expressly held that facially neutral statutes are unconstitutional under the Equal Protection Clause when they reflect the legislature's discriminatory motive. *Id.* at 239. While disproportionate impact is relevant, "it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." *Id.* at 242. Although the Supreme Court recognized in *Village of Arlington Heights v. Metro Housing Development Corp.*, 429 U.S. 252 (1977), that "some contrary indications may be drawn from some of our cases," the Court made clear that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights*, 429 U.S. at 264-65.

In *Arlington Heights*, the Supreme Court identified three ways to show that a facially neutral statute proceeds from the legislature's discriminatory motive. One of those ways is to analyze "[t]he historical background of the decision...particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267 (citing *Lane v. Wilson*, 307 U.S. 268 (1939); *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964)). And as the Supreme Court has found, the passage of a statute to abrogate a desegregation decree falls squarely within this category of cases. *E.g.*, *Griffin*, 377 U.S. at 218.

To find that the historical background of KRS 159.070 demonstrates a discriminatory motive on the part of the General Assembly, and is thus unconstitutional if construed to require a strict neighborhood schools policy, this Court need look no further

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assign students to schools nearest their homes in *McFarland*. *See McFarland*, 330 F. Supp. 2d at 842-43.

than *Newburg Area III*. *Newburg Area III* undoubtedly establishes that the General Assembly had the impermissible motive to abrogate the 1975 desegregation decree. The Sixth Circuit's decision could not be any clearer. As the Sixth Circuit explained, KRS 159.070 was intended by the General Assembly to "impede[ ] the mandates of the Sixth Circuit to eliminate racially identifiable schools in Jefferson County...." *Newburg Area III*, 583 F.2d at 828. Racially identifiable schools were tied directly to segregated housing patterns in Jefferson County. *See Hampton I*, 72 F. Supp. 2d at 759 ("[T]he demographics of each neighborhood shaped the racial composition of the schools."); *see also id.* at 760-61 (noting that the Sixth Circuit made clear that a neighborhood schools plan in Jefferson County would "perpetuate[ ] the racial identity of many schools."). In short, KRS 159.070 was intended by the General Assembly to maintain an unconstitutional system of segregated neighborhood schools through the use of segregated residential patterns.

The passage of KRS 159.070, moreover, came at a time of intense opposition by the General Assembly to the desegregation decree and federal court decisions, which culminated in the passage of a House resolution denouncing court-ordered busing to integrate schools. The combination of the Sixth Circuit's holding in *Newburg Area III* and the General Assembly's hostility toward the desegregation decree and federal court decisions, as demonstrated by H.R. 29, shows that the General Assembly intended to employ its arsenal of statutory enactments and resolutions to assail the 1975 desegregation decree and maintain segregated schools. KRS 159.070 was one of those weapons. The historical background showing the discriminatory motive of the General Assembly in enacting KRS 159.070 made the statute unconstitutional then, as the Sixth Circuit found,

and if the majority's reading imposing a strict neighborhood schools system is adopted, then it remains so now.

The Sixth Circuit further explained that its holding was limited to Jefferson County; it specifically reserved the question of whether the statute was facially invalid under the Equal Protection Clause. *See Newburg Area III*, 583 F.2d at 829. Had the Sixth Circuit done so, it could have easily concluded that KRS 159.070 – due to its strict imposition of a neighborhood schools policy in the face of a desegregation decree – was facially invalid under the Equal Protection Clause, and thus, unenforceable as a matter of law. Such a result would have had ample support under U.S. Supreme Court jurisprudence. *See Griffin*, 377 U.S. at 231-33 (holding county ordinance facially invalid under the Equal Protection Clause where its historical background demonstrated a discriminatory motive to limit the effectiveness of a desegregation decree); *see also Lane*, 307 U.S. at 275 (holding statute facially invalid because it had the discriminatory motive of abrogating a court decision finding a previous "grandfather immunity" statute unconstitutional). Thus, when KRS 159.070 is viewed through the lens of history and precedent, the only construction of the statute that preserves its constitutionality is the one urged by the Board.

B. The 1990 reenactment and amendment of KRS 159.070 did not remove the discriminatory taint from the statute's original enactment.

The majority's decision is correct in one limited aspect: no legislative history exists that outlines the General Assembly's reasons for reenacting and amending KRS 159.070. *See Fell*, at *6. "[B]ecause discriminatory intent does tend to persist through time," the failure of the General Assembly to engage in a deliberative reconsideration of the statute during its 1990 reenactment and amendment, is fatal to the statute's

constitutionality under the Equal Protection Clause. *United States v. Fordice*, 505 U.S. 717, 747 (1992) (Thomas, J., concurring); *cf. Palmer v. Thompson*, 403 U.S. 217, 225 (1971) ("If the law is struck for [a discriminatory motive], it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.").

The U.S. Supreme Court has not definitively held that the discriminatory taint can be removed from a facially neutral statute adopted with a discriminatory motive. In fact, the Supreme Court expressly left the question open in *Hunter v. Underwood*, 471 U.S. 222 (1985). *See Hunter*, 471 U.S. at 233; *see also Cotton v. Fordice*, 157 F.3d 388, 391 n.7 (5th Cir. 1998) (commenting that the Supreme Court left the question open in *Hunter*).

But the Fifth and Eleventh Circuits have addressed the question and held that the discriminatory taint can be removed from a facially neutral statute by amendment or reenactment, but only if done through a "deliberative process" evidencing a non-discriminatory intent for the reenactment or amendment. *Cotton*, 157 F.3d at 392; *see also Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1224 (11th Cir. 2005) ("The [*Cotton*] court emphasized the deliberative process through which the provision had twice been amended…."). This deliberative process requires the legislature to engage in some review of the statute's purpose before its reenactment and amendment to remove the discriminatory taint associated with the statute's original enactment. *See Cotton*, 157 F.3d at 391 (describing the legislature's amendment of a felon disenfranchisement scheme to remove scheme's original purpose to discriminate against African-Americans); *see also Johnson*, 405 F.3d at 1221 (same).

The wholesale reenactment and amendment of KRS 159.070 did nothing to remove the discriminatory taint that attached to the statute at its original 1976 enactment. The

General Assembly provided no indication that its 1990 reenactment and amendment of KRS 159.070 was to "remove[ ] the discriminatory taint associated with the original version." *Cotton*, 157 F.3d at 391. In other words, if the majority's interpretation is indeed correct, and the deletion of "for attendance" merely eliminated a redundancy, then the 1990 reenactment and amendment does not negate the 1976 intent to restore schools segregated by residential patterns. In light of this historical picture, the General Assembly's motives for enacting KRS 159.070 remain "traceable to the original tainted policy...." *Knight v. State of Ala.*, 14 F.3d 1534, 1550 (11th Cir. 1994) (quotations omitted). And since the General Assembly did not engage in any "deliberative process" to remove the discriminatory taint from its original enactment, the statute, despite its 1990 reenactment and amendment, still retains an impermissible motive under the Equal Protection Clause and the Court of Appeals' interpretation favoring strict neighborhood schools.[40]

C. The Court of Appeals' interpretation of the statute cannot represent the General Assembly's intent in reenacting and amending KRS 159.070 in light of *Newburg Area III* if the statute is presumed constitutional.

The majority decision below is equally unsupported by logic. The majority proposes that the General Assembly reenacted and amended KRS 159.070 in 1990 with the intent to impose a strict neighborhood schools framework – a framework that would lead to the reemergence of racially identifiable schools, as was struck down by the Sixth Circuit in *Newburg Area III*. A neighborhood schools policy adopted with discriminatory

[40] The Court of Appeals pointed – without any citation to authority – to the supposed benefits of neighborhood schools. *See Fell*, at *9. On this basis, the statute could be justified by intervening, racially neutral reasons. The Supreme Court in *Hunter*, however, rejected the notion that court interpretations of a statute could remove the statute's discriminatory taint. *See Hunter*, 471 U.S. at 231-32.

motives, such as KRS 159.070 here, is patently unconstitutional under the Equal Protection Clause. *See Griffin*, 377 U.S. at 218; *Newburg Area III*, 583 F.2d at 827.

In reenacting and amending KRS 159.070 in 1990, however, the General Assembly presumably was aware that the statute could not be interpreted to impose a strict neighborhood schools policy under *Newburg Area III*. *See Dutton v. Wolpoff and Abramson*, 5 F.3d 649, 655 (3d Cir. 1993) (noting that when a legislature "reenacts legislation, it incorporates existing administrative and judicial interpretations of the statute into its reenactment."). Indeed, the desegregation decree was still in effect at the time of the statute's reenactment and amendment in 1990. Thus, it would have made no sense for the General Assembly to reenact and amend KRS 159.070 to impose a strict neighborhood schools policy – therefore, ignoring the desegregation decree – when *Newburg Area III* had already held that same reason constitutionally impermissible. If anything, the reenactment and amendment of the statute was to *comply* with the dictates of *Newburg Area III*, not supersede them. Accordingly, neither history nor logic supports the reading of KRS 159.070 adopted by the majority of the Court of Appeals.

CONCLUSION

Because the Board of Education's interpretation of KRS 159.070 preserves its constitutionality, is in accordance with the statutory language, and the Court of Appeals' interpretation renders the statute unconstitutional, this Court can avoid injecting constitutional infirmities into KRS 159.070 by adopting the Board's interpretation. For these reasons, the Court of Appeals should be reversed, and the Circuit Court's judgment reinstated.

Respectfully submitted,

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