SUPREME COURT OF KENTUCKY
CASE NOS. 2024-SC-0022/2024-SC-0024

COMMONWEALTH OF KENTUCKY, *EX REL*
ATTORNEY GENERAL RUSSELL COLEMAN,
and GUS LAFONTAINE, APPELLANTS

v.

COUNCIL FOR BETTER EDUCATION, INC., *ET AL.* APPELLEES

# ***AMICUS CURIAE* BRIEF OF THE BLUEGRASS INSTITUTE FOR PUBLIC POLICY SOLUTIONS**

Appeal from Franklin Circuit Court (Hon. Phillip J. Shepard)
Civil Action No. 23-CI-00020

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## CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2024, this *Amicus Curiae Brief* was electronically filed with the Clerk of the Supreme Court of Kentucky via Courtnet, and was served via First Class mail on Paul E. Salamanca, 279 Cassidy Ave., Lexington, KY 40502 (also served by email); Byron E. Leet, Mitzi D. Wyrick, and Sean G. Williamson, Wyatt, Tarrant & Combs, LLP, 400 West Market St., Ste. 2000, Louisville, KY 40202 (also served by email); Donald J. Haas and Todd G. Allen, Kentucky Department of Education, 300 Sower Blvd., 5th Floor, Frankfort, KY 40601 (also served by email); Matthew F. Kuhn, John H. Heyburn, and Sarah N. Christensen, Office of the Attorney General, 700 Capital Ave., Ste. 118, Frankfort, KY 40601 (also served by email); Honorable Phillip J. Shepard, Franklin Circuit Court, 222 St. Clair Street, Frankfort, KY 40601; Kentucky Court of Appeals, Attn: Clerk, 669 Chamberlain Blvd., Suite B, Frankfort, KY 40601. The *Amicus Curiae* did not withdraw the record on appeal.

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## STATEMENT OF POINTS AND AUTHORITIES

## INTRODUCTION AND PURPOSE OF BRIEF

The Franklin Circuit Court's analysis put the cart before the horse by focusing on whether charter schools are "common schools." The Bluegrass Institute agrees with the Appellants that charter schools are common schools, but that is—at best—a secondary consideration that the Court need not reach. The primary question is, instead, whether the General Assembly appropriated a constitutionally restricted source of funding to charter schools. If the General Assembly did not, then HB 9 does not violate the Kentucky Constitution, regardless of whether charter schools are common schools. The purpose of this brief is to explain these points, and to offer the Court an alternative path to upholding HB 9 that avoids the need to resolve the charter-schools-as-common-schools question.

Under Section 184 of the Constitution, there are two sources of funds that can be used for nothing but common schools: (1) the School Fund and income derived from the School Fund; and (2) sums specifically raised for common-school education. There is no such restriction, however, on the use of money from the Commonwealth's General Fund. In other words, the General Fund can be appropriated to common schools and non-common schools alike, just as it can be appropriated for any number of other uses, like healthcare, transportation, or economic development. Thus, the first question here is how charter schools are funded under HB 9, not whether they are common schools. It becomes necessary to determine whether they are common schools only if

the General Assembly is funding them from a source that is limited to common schools. And that is not the case.

Nothing in the record suggests that charter schools will receive funds that are limited to common schools. On the existing record, the Court must presume that only *General Fund* dollars will be used for charter schools. This is dispositive.

The plain language of the Constitution, along with its history and practical application since 1891, all show that the General Fund can be appropriated for educational purposes regardless of whether the recipient is a common school or non-common school. To the extent any caselaw from this Court or its predecessor has been inconsistent with the Constitution's plain text and history, now is the time to set the record straight.

The bottom line is that nothing in the Constitution prohibits HB 9's funding of charter schools. Far from being prohibited, measures like HB 9 help the Commonwealth meet its constitutional obligation to "provide for an efficient system of common schools throughout the State." Ky. Const. § 183.

## ARGUMENT

### I. The primary question is not whether charter schools are common schools, but how they are funded.

The first step in understanding the issues here is to understand the difference between public money that can be appropriated *only* for common schools and public money that has no such restriction.

Public money in Kentucky is held in a variety of "funds." One example is the Road Fund. *See* KRS 47.010. Another is the General Fund, which is the largest fund. *See id.* And there is also the School Fund.[1]

In two separate sections, the Constitution defines—in very specific and limited terms—the scope of the School Fund. Specifically, Sections 184 and 188 of the Constitution define the School Fund as being made up of: (1) a bond for $1,327,000; (2) $73,500 of stock in the Bank of Kentucky, and its proceeds; and (3) a bond in the amount of "[s]o much of any moneys as may be received by the Commonwealth from the United States, under the recent [*i.e.*, 1891] act of Congress refunding the direct tax." Section 184 then limits the use of these funds, requiring that the School Fund—and the interest and dividends it produces—be used only for common schools.

As one might expect from a century-old provision tied to limited, then-existing sources of funds, the "School Fund" definition retains little meaning today. Indeed, by 1932, this Court's predecessor observed that "[a]s a matter of fact, the funds represented by the bonds referred to in sections 184 and 188 of the Constitution do not exist, since the principal has been spent by the state."

[1] Significantly, the term "school fund" has two definitions—one provided by the Constitution, *see* Ky. Const. §§ 184, 188, and a broader one provided by statute, *see* KRS 157.010. This Brief refers to the constitutionally mandated fund as the "School Fund." The Constitution's definition of the School Fund is the only definition that matters here because the General Assembly is obviously free to vary or contradict the statutory meaning of "school fund" through ordinary legislation like HB 9. *See, e.g.*, *Commonwealth v. Fletcher*, 163 S.W.3d 852, 868 (Ky. 2005).

*Talbott v. State Bd. of Educ.*, 52 S.W.2d 727, 729 (Ky. 1932). It is not clear whether *Talbott* was also referring to the stock in the Bank of Kentucky and its proceeds, but it appears that stock has been sold in any event. *See* KRS 42.555(2); *see also Commonwealth ex rel. Cameron v. Johnson*, 658 S.W.3d 25, 35 n.9 (Ky. 2022) (referring to the "then-existing" stock in the Bank of Kentucky as part of the constitutional School Fund in 1890). To the extent the proceeds of such sale are still held by the Commonwealth, it would be incumbent on the Plaintiffs-Appellees to trace those proceeds to any spending on charter schools under HB 9. And the Plaintiffs-Appellees have not done that. Thus, it appears that the constitutional limitation on the use of the School Fund has no practical implication here.

But there still exists one other pot of money that is constitutionally limited to use for common schools. Section 184 also provides that "any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose." This means that if a tax—or other public revenue-raising measure—is imposed for the *specific purpose* of common-school education, then the money raised by that measure can be used only for common schools.[2] This applies not

[2] When the Constitution was adopted in 1891, it was common for State taxes to be imposed and earmarked from the outset for specific purposes. *See, e.g.*, *Higgins v. Prater*, 14 S.W. 910 (Ky. 1890) (upholding a State-imposed tax for the benefit of the Agricultural and Mechanical College). Today, however, it is much more common for taxes and other public revenue to be credited to the General Fund for appropriation by the General Assembly to whatever uses it deems necessary. *See* KRS 47.010(1).

just taxes imposed by the General Assembly, but also those imposed by local governments. *See Miller v. Covington Dev. Auth.*, 539 S.W.2d 1, 5 (Ky. 1976).

This latter pot of money currently comprises a part of public-school funding under the SEEK formula. The SEEK formula—created in the wake of *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989)—guarantees a base level of funding for each school district through a combination of local taxes and State appropriations. *See* KRS 157.330–.440. The mix of State and local funding fluctuates for each school district based on the amount of local tax dollars raised by the district.

The local share of SEEK funding comes from property taxes imposed by the board of education of each school district. *See* KRS 160.460, 160.470, 157.440. It amounts to a minimum of $0.30 for every $100 of taxable property in the district. KRS 160.470(9)(a). On top of that local funding, the State chips in whatever remaining amount is needed to bring the district's funding up to the guaranteed base level.

Because the local portion of SEEK funding comes from taxes specifically imposed for common-school education, Section 184 prohibits that portion from being used for any purpose other than funding the common schools. The State portion of SEEK funding, on the other hand, comes from the General Fund, which means those funds are not subject to the same common-schools-only restriction. *See* 2024 Ky. HB 6 at 51–52, *available at* https://apps.legislature.ky.gov/recorddocuments/bill/24RS/hb6/bill.pdf (2024

biennial budget bill). SEEK funding is thus comprised of both restricted funds—*i.e.*, those that can be used only for common schools—and unrestricted funds that have no such limitation and therefore can be appropriated for common schools and non-common schools alike.

Under HB 9, charter schools will receive money from SEEK funding. *See* KRS 160.1596. But *even if* the Court were to determine that charter schools are not common schools, the commingling of restricted and unrestricted money in SEEK funding would not be fatal to HB 9. Quite the contrary. Under well-established legal principles, it is presumed that when restricted and unrestricted funds are commingled, the restricted funds are deemed preserved and not used for disallowed expenditures unless the amount of such expenditures exceeds the amount of *unrestricted* funds. *See, e.g.*, *Farmers' Bank of White Plains v. Bailey*, 297 S.W. 938, 940 (Ky. 1927) (citation omitted). Thus, as long as a school district's SEEK funds include enough unrestricted General Fund dollars to cover whatever amount the district would have to transfer to charter schools under HB 9, the Court must presume that those dollars—rather than the constitutionally restricted local tax dollars—are being used for charter schools. The additional presumption in favor of a law's constitutionality bolsters this reasoning. *See Delahanty v. Commonwealth*, 558 S.W.3d 489, 506 (Ky. App. 2018) (citations omitted). In other words, the constitutionality of HB 9 is supported by a presumption on top of a presumption.

Significantly, the record in this case provides no basis to overcome either presumption. The record shows no reason to believe that anything other than General Fund dollars would be used for charter schools under HB 9. The Plaintiffs-Appellees have presented no evidence to rebut the presumption that non-restricted General Fund dollars will be used for charter schools. Nor is it likely that they could if they tried. It is difficult to imagine that charter schools would ever consume so much of a district's SEEK allocation as to devour the entire General Fund portion of the allocation.[3]

The key point here is that General Fund dollars can be used to fund charter schools regardless of whether they are considered common schools, and there is no reason to believe that anything other than General Fund dollars would fund charter schools under HB 9. But the Franklin Circuit Court erroneously assumed that—absent a public referendum—there could be *no spending* of any kind for education unless it goes to common schools. *See*

[3] This raises an important point about the available remedies in this appeal. Even if the Court concludes that charter schools are not common schools *and also* concludes that there is a basis to believe that constitutionally restricted funds might go to charter schools, it still cannot affirm the Franklin Circuit Court. Rather, the proper course would be to remand the case for fact-finding as to whether—and to what extent—HB 9 would fund charter schools with money that is limited to common schools. And even if further development of the record shows that such funds will, in fact, be allocated to charter schools under HB 9, the remedy is not to declare HB 9 unconstitutional and enjoin its operation altogether. Instead, the proper remedy would be to partially enjoin the operation of HB 9 solely to the extent that it allows charter schools to receive funds restricted for common schools. Thus, there is no set of circumstances where it is appropriate to enjoin the operation of HB 9 in its entirety.

*Council for Better Educ., Inc. v. Glass*, No. 23-CI-00020, Slip op. at 10–12 (Franklin Cir. Ct. Dec. 11, 2023) ("Opinion Below"). The plain language of the Constitution, and the history of its adoption and practical application, all make clear that General Fund appropriations can be used to support educational endeavors no matter whether they are common schools.

## II. Nothing in the Constitution's text prohibits the General Assembly from funding charter schools out of the General Fund.

The Constitution's plain text easily demonstrates that the General Assembly may appropriate money out of the General Fund to support educational endeavors in common schools and non-common schools alike.

Start with the base proposition that the General Assembly has plenary authority to appropriate the Commonwealth's money as it sees fit. *See* Ky. Const. § 230. Of course, there are a few exceptions to this. For example, gas-tax revenue can be spent only on highways. *See id.* And Section 189 expressly limits the General Assembly's ability to appropriate "any fund"—not just the School Fund—to religious schools. But other than Section 189, there is no provision that limits the General Assembly's authority to appropriate money out of the *General Fund* for educational purposes—whether in common schools or not. Nevertheless, the Franklin Circuit Court found such limitations in Sections 184 and 186. *See* Opinion Below at 10–12. That is demonstrably wrong.

Section 184, broken into four operative provisions, states:

> [(1)] The bond of the Commonwealth issued in favor of the Board of Education for the sum of one million three hundred and twenty-seven thousand dollars shall constitute one bond of the Commonwealth in favor of the Board of Education, and this bond and the seventy-three thousand five hundred dollars of the stock in the Bank of Kentucky, held by the Board of Education, and its proceeds, shall be held inviolate for the purpose of sustaining the system of common schools. [(2)] The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose. [(3)] No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation: [(4)] Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law.

This provision does four primary things: (1) it creates a School Fund that "shall be held inviolate"; (2) it limits certain appropriations by requiring "[t]he interest and dividends" of the common School Fund, plus any other sums "which may be produced by taxation or otherwise *for purposes of common school education*" to be "appropriated to the common schools, and to no other purpose"; (3) it protects against over-taxation by ensuring "[n]o sum shall be raised or collected" for non-common-school educational purposes absent a referendum; and, (4), it exempts the tax levied on behalf of the Agricultural and Mechanical College (now the University of Kentucky), and other then-existing educational taxes, from requiring a referendum to remain on the books.

The only limitation in Section 184 on the General Assembly's appropriation power is in the second clause. And by its plain terms, that clause only limits the ability to appropriate money from two sources: the interest and dividends from the School Fund, and money raised "for purposes of common school education." It does not, in any sense, constrain the General Assembly's ability to appropriate non-earmarked *General Fund* dollars. Thus, the second clause does not prohibit money in the General Fund from being appropriated for *any* educational purpose.

The Franklin Circuit Court failed to appreciate this distinction between General Fund appropriations, which *are not* affected by Section 184, and appropriations from the School Fund and from revenue raised specifically for common schools, which *are* limited by Section 184. The Franklin Circuit Court read the second clause of Section 184 as a limitation on *all* non-common-school educational spending, no matter from what source. *See* Opinion Below at 2, 11. That reading is simply inconsistent with the plain language of that clause, which places no restrictions whatsoever on appropriations from the General Fund.

The Franklin Circuit Court also pointed to the third clause in Section 184, *see id.* at 10–12, but that clause provides no more support for its decision than the second. The third clause does not even pertain to appropriations. Instead, it is a limitation on the ability to impose taxes. It states, "[n]o sum shall be raised or collected …." It *does not* state that no sum shall be spent or

appropriated. This matters. Bills that raise revenue and bills that make appropriations are conceptually distinct, and the Constitution treats them as such. *See* Ky. Const. §§ 46 (requiring appropriation bills to receive the votes of a majority of all members elected to each House of the legislature), 47 (requiring bills raising revenue to originate in the House of Representatives), 55 (allowing appropriation bills to take effect sooner than other bills), 88 (allowing the Governor to line-item veto appropriation bills), 230 (addressing appropriations); *see also Commonwealth ex rel. Dep't of Rev. v. N. Atl. Op. Co.*, No. 2008-CA-000304-MR, 2009 WL 792727, at *2 (Mar. 27, 2009) (holding that appropriations and revenue are "two distinct subjects").

Properly understood, then, the third clause is merely a taxpayer-protection provision that limits new ways of raising revenue but says nothing about appropriations. Construing this clause to restrict appropriations ignores its plain language and reads new words into the Constitution. Moreover, such a construction is nonsensical given that the immediately preceding clause expressly addresses appropriations. The framers of the Constitution clearly knew how to place limits on education appropriations; that they chose no restrictions other than those in the second clause is a choice that must be respected.

The Franklin Circuit Court also relied on Section 186. *See* Opinion Below at 11–12. That is plainly incorrect. On its face, Section 186 limits appropriations from only the School Fund, not the General Fund.

### III. That the Constitution permits General Fund appropriations for educational programs regardless of whether they are common schools is also supported by historical evidence.

Historical evidence also shows that General Fund appropriations can be used without regard to the common-versus-non-common-school dichotomy. The Education Provisions of the Constitution—*i.e.*, Sections 183 through 189—were the subject of a heated, two-day debate in the 1890–1891 Constitutional Convention. The most relevant portions of that debate discuss what this Court must answer today: Can the legislature appropriate money from the General Fund without regard to the recipient's status as a common- or non-common school? The debate reveals the original understanding was a resounding "yes."

In light of the then-recent decision in *Higgins v. Prater*, 14 S.W. 910 (1890), which allowed a tax to be imposed for the benefit of the Agricultural & Mechanical College, many delegates to the Convention worried that an already over-taxed public might be inundated with even more education-related taxes. So the first draft of Section 184 expressly limited the ability to impose education-related taxes for non-common schools. It provided:

> The interest and dividends of said fund, together with any sums which may be produced by taxation for purposes of education, shall be appropriated to the common schools and to no other purpose. No sum shall be raised or collected for education, except in the common schools, until the question of taxation is submitted to the legal voters, and a majority of the votes cast in favor of such taxation.

Debates of the Constitutional Convention of 1890 at 4454 ("Debates"); *see also* Debates at 4528 (discussing the purpose of that section).

Delegate Beckner, an education advocate, objected to this draft. Because *Higgins* held that institutions like the Agricultural & Mechanical College and the Institute for the Education of the Blind were not part of the common-school system, *see Higgins*, 14 S.W. at 912, Beckner believed the draft would preclude public funding for such non-common-school educational efforts. Debates at 4471. He and Delegate Bronston specifically expressed concern about public funding for the School for the Blind, the School for the Deaf, and other educational programs. *E.g.*, Debates at 4476; Debates at 4494. These objections, however, were based on the same misunderstanding as the Franklin Circuit Court's reasoning in this case. That is, Beckner and Bronston conflated the concepts of taxation and appropriation and assumed that since the draft limited the ability to impose taxes for non-common schools, it likewise limited the ability to appropriate public money for such institutions.

Other delegates pointed out this error. Delegate Jonson, the President of the Education Committee, explained that there was "nothing in [the draft] … which prevents [the legislature] … from appropriating the general revenue for the annual support of these [non-common-school educational] institutions." Debates at 4489. Later, in response to accusations that the draft would defund the Agricultural & Mechanical College, he stated, "Why, gentlemen, that is not the purpose of this Committee's report at all. The whole of it is that no special tax shall be gathered for this special purpose until the people themselves shall have ratified it by their popular suffrage." *Id.* at 4534. To further distinguish

between taxation and appropriation, Jonson stated, "I am not here proposing to saddle upon my people one solitary mill of taxation without their consent. That is the principle involved in this report. That is the only principle involved in it." *Id.* at 4535. And he further underscored that "[t]hese [non-common-school] institutions are not now, and never have been, *supported by a tax levied expressly for their benefit* … [, rather] [t]hey have always been supported by *an appropriation from the ordinary revenues of the State*, and this in no way interferes with, or concerns itself with, these institutions …." *Id.* at 4540 (emphases added).

Delegate Harris similarly observed that the language "provides that no tax in addition to that now levied by law shall hereafter be made by the State, either for common school purposes or for anything else—for colleges, common schools or normal schools, or for other educational purposes at all …. In other words, that seeks to put a stop and a limit upon the extent of taxation in aid of education in any way, except upon a vote of the people." Debates at 4569.

Most delegates agreed that Kentuckians should be able to appropriate to non-common public education. So Delegate Beckner suggested some tweaks to the language to "guarantee[] the integrity of the common school fund for common school purposes, *and not restrict[] the power of the General Assembly to provide for other necessary institutions connected with popular education*." *Id.* at 4565 (emphasis added). These changes were largely adopted and incorporated into the final draft. *Id.* at 4569.

Ultimately, these discussions reveal three important points about the original understanding of the Education Provisions. First, the framers understood the distinction between taxation and appropriation. Second, they understood Section 184, in part, as a taxpayer-protection measure against over-taxation. And third, they understood that Section 184 leaves the General Assembly with discretion to make General Fund appropriations to educational programs without regard to whether the recipient is a common school.

In addition to these points, historical practice is also revealing. From the time of the Constitution's adoption, the legislature has routinely appropriated General Fund dollars to a wide variety of educational programs that cannot possibly be considered common schools if the Franklin Circuit Court's reasoning is correct.

In 1894, for example, the General Assembly appropriated "out of the general revenue of the State" $16,568.70 "[f]or the benefit of the [Kentucky School for the Deaf] …." 1894 Ky. Acts 117–18. Moreover, it recognized an institution for children with intellectual disabilities and required the newly created board of that institute to "cause all State appropriations to be used as directed by law," *id.* at 97—thus clearly envisioning future appropriations. Significantly, these educational programs do not satisfy the Franklin Circuit Court's definition of a common school.

Appropriations to such non-traditional educational programs only accelerated through the twentieth and twenty-first centuries. The present

budget, for instance, provides General Fund appropriations for many educational programs that simply cannot be considered common schools under the Franklin Circuit Court's reasoning. These include:

- Bluegrass and Appalachian Youth Challenge Academies;
- Kentucky Schools for the Blind and Deaf;
- Craft and Gatton Academies;
- Model Laboratory School;
- Governor's Scholars Program;
- Governor's School for the Arts;
- Governor's School for Entrepreneurs; and
- Kentucky Adult Learner Program;

*See* 2024 HB 6 at 9, 13, 67, 72, 73, 155, 158, 163, 182, *available at* https://apps.legislature.ky.gov/recorddocuments/bill/24RS/hb6/bill.pdf.

These beloved and beneficial programs—and many others like them—receive millions of dollars of General Fund appropriations. But if the Franklin Circuit Court is correct, the only principled conclusion is that public funding for these programs is unconstitutional and therefore must cease.[4]

In fact, if the Franklin Circuit Court is correct, that means the General Assembly has been unconstitutionally funding non-common schools since the adoption of the Constitution. That, of course, is not the case. But to avoid that result, at least one of two things must be true: Either these types of non-traditional educational programs are part of the common-school system, or else

[4] And one should not forget about the magnet school programs in various school districts across the Commonwealth. Those programs do not receive direct appropriations from the General Assembly, but they are funded with public dollars nonetheless. It is hard to imagine how they could satisfy the definition of a "common school" as applied by the Franklin Circuit Court.

the Constitution permits General Fund appropriations for educational programs regardless of whether they are common or non-common schools. Under either proposition, the Franklin Circuit Court's decision must be reversed. If the former is true, then there is no basis to say that charter schools are not also part of the common-school system. And if the latter is true, there is no basis to say that HB 9 unconstitutionally funds charter schools. But the bottom line here is that the Court need not address the common-school-versus-non-common-school issue because the latter proposition is unequivocally true. That is, General Fund appropriations can be used to support educational programs without regard to whether the recipient is a common school.

## IV. This Court's predecessor wrongly departed from the plain language and original understanding of the Education Provisions, and that error should now be corrected.

Unfortunately, this Court's predecessor eventually lost sight of the original understanding of the Education Provisions. Starting with *Agricultural & Mechanical College v. Hager*, 87 S.W. 1125 (Ky. 1905), this Court's predecessor embarked on a confusing, atextual odyssey that wrongly took the Commonwealth's jurisprudence far afield from the plain meaning and original understanding of the Education Provisions.

In *Agricultural & Mechanical College*, the Court conflated the concepts of taxation and appropriation, holding that a limitation on the ability to impose a tax for a particular purpose necessarily entails a limitation on the ability to appropriate money for the same purpose. *Id.* at 1129. This Court's predecessor

perpetuated this flawed reasoning in subsequent years,[5] holding multiple times that Section 184 restricts all appropriations to non-common schools. *See, e.g.*, *Pollitt v. Lewis*, 108 S.W.2d 671, 672 (Ky. 1937); *Talbott v. Ky. State Bd. of Educ.*, 52 S.W.2d 727 (1932).

The Court later corrected course when it stated that Sections 184 and 186 neither authorize appropriations of the School Fund to schools outside the common school system "*nor do they bar the use of other state funds for such schools*." *Hodgkin v. Bd. for Louisville & Jefferson Cnty. Children's Home*, 242 S.W.2d 1008, 1010 (Ky. 1951) (emphasis added). And a few years later, the Court observed that it "is questionable" whether the Constitution's text justified the reasoning of cases like *Pollitt* and *Talbott*. *Butler v. United Cerebral Palsy of N. Ky., Inc.*, 352 S.W.2d 203, 207 (Ky. 1961). To put it mildly, that is an understatement. The reasoning of those cases is not just questionable, but unjustifiable. But that reasoning nevertheless persists in the Commonwealth's jurisprudence. This Court should set the record straight by expressly acknowledging that General Fund appropriations can be used for common schools and non-common schools alike.

[5] *Commonwealth ex rel. Cameron v. Johnson*, 658 S.W.3d 25 (Ky. 2022), is not akin to those cases—or this one. Rather than addressing *appropriations* to schools, *Cameron* addresses a tax credit created to *raise* funds for non-common schools. *See id.* at 38.

## V. Charter schools are an important part of maintaining an efficient system of common schools in the modern era.

Not only is the General Assembly permitted to fund charter schools with General Fund appropriations, but one could even argue that it is functionally *compelled* to do so. Section 183 of the Constitution requires the General Assembly to "provide for an efficient system of common schools throughout the State." The benefits of charter schools are so well-documented and profound that they are arguably essential to having an "efficient system of common schools" in the modern era.

Numerous studies detail the wide-ranging benefits of charter schools. For example, a study by the Center for Research on Education Outcomes at Stanford University concludes that "the typical charter school student in our national sample had reading and math gains that outpaced their peers in the traditional public schools." *See* Margaret E. Raymond, *et al.*, Center for Research on Education Outcomes, *As a Matter of Fact: The National Charter School Study III 2023* at 5 (last updated June 19, 2023), *available at* https://ncss3.stanford.edu/wp-content/uploads/2023/06/Credo-NCSS3-Report.pdf.

Similarly, a study of Boston's charter schools by Joshua Angrist—a Nobel Prize-winning MIT professor—concludes that charter schools "significantly increase SAT scores," and that "[c]harter attendance also increases the probability that students pass the score thresholds for high-stakes exams required for high school graduation and boosts the likelihood that students qualify for an exam-based public college scholarship." Joshua D.

Angrist, *et al.*, *Stand and Deliver: Effects of Boston's Charter High Schools on College Preparation, Entry, and Choice*, 34 J. Labor Econ. 275, 306 (2016). He also found that "charter high schools seem to be highly effective for subgroups that are often difficult to serve, including boys, special education students, and students with low achievement at high school entry." *Id.* at 306–07.

Significantly, these benefits are not limited to the students who attend charter schools. Professor John Garen from the University of Kentucky, for instance, recently published a study concluding that school choice and charter school programs have a positive influence on a State's *entire* educational system. *See generally* John Garen, *Enhancing Economic Freedom Via School Choice and Competition: Have State Laws Been Enabling Enough to Generate Broad-based Effects?*, 82 Am. J. Econ. & Sociology 289 (2023), *available at* https://doi.org/10.1111/ajes.12515.

If Kentucky is going to maintain an efficient system of public education into the future, the General Assembly must have the freedom to choose from the full range of education policy options. It should especially be able to appropriate General Fund dollars to efforts—like charter schools—that are successful elsewhere. Section 183 arguably compels this. And no other part of the Constitution prohibits it.

## CONCLUSION

The Court should reverse the Franklin Circuit Court's judgment. HB 9 does not violate the Kentucky Constitution.

Dated: August 16, 2024

Respectfully submitted,

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## WORD-COUNT CERTIFICATE

This document complies with the word limit of RAP 34(B)(4) because, excluding the parts of the document exempted by RAP 15, this document contains 5,149 words.

*/s/ S. Chad Meredith*
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