Supreme Court of Kentucky

No. 2024-SC-0022

COMMONWEALTH OF KENTUCKY, *ex rel.* ATTORNEY GENERAL RUSSELL COLEMAN — *Appellant*

v.

On Appeal from
Franklin Circuit Court
No. 23-CI-00020

Kentucky Court of Appeals
No. 2024-CA-0051

COUNCIL FOR BETTER EDUCATION, INC., *et al.* — *Appellees*

BRIEF FOR THE COMMONWEALTH OF KENTUCKY

MATTHEW F. KUHN (No. 94241)
Solicitor General
JOHN H. HEYBURN (No. 100756)
Principal Deputy Solicitor General
SARAH N. CHRISTENSEN (No. 100580)
Assistant Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
Matt.Kuhn@ky.gov
Jack.Heyburn@ky.gov
Sarah.Christensen@ky.gov

Counsel for the Commonwealth of Kentucky

Certificate of Service

I certify that a copy of this brief was served on August 5, 2024 by U.S. mail on: Byron E. Leet, Mitzi D. Wyrick, Sean G. Williamson, Wyatt, Tarrant & Combs, LLP, 400 West Market Street, Suite 2000, Louisville, Kentucky 40202 (also served via email); Todd G. Allen, Donald J. Haas, Kentucky Department of Education, 300 Sower Boulevard, Fifth Floor, Frankfort, Kentucky 40601 (also served via email); Paul E. Salamanca, 279 Cassidy Avenue, Lexington, Kentucky 40502 (also served via email); Clerk, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601; and Clerk, Kentucky Court of Appeals, 669 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40601. The record on appeal has been returned.

Matthew F. Kuhn

INTRODUCTION

For over three decades, States across the country have incorporated charter schools into their public school systems. These public charter schools "benefit parents, teachers, and community members by creating new, innovative, and more flexible ways of educating all children within the public school system." KRS 160.1591(2). In 2017, the General Assembly passed Kentucky's public charter school law. And in 2022, the General Assembly overhauled the law and funded public charter schools. This suit followed, with the plaintiffs claiming that Kentucky's public charter school law violates the Kentucky Constitution. The Franklin Circuit Court agreed mainly because it concluded that public charter schools are not common schools under our Constitution. This Court should reverse. It is well within the General Assembly's authority to use public charter schools to achieve an efficient system of common schools throughout the State.

STATEMENT CONCERNING ORAL ARGUMENT

Because this case concerns the constitutionality of a duly enacted statute designed to improve public education in Kentucky, the Commonwealth submits that oral argument is warranted.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In 1991, Minnesota became the first State to allow public charter schools. *What is a Charter School?*, National Charter School Resource Center, https://perma.cc/4E3B-XWM8. More than 30 years later, the North Star State finds itself in good company. Now, 45 States plus the District of Columbia allow public charter schools. *Id.* During the 2021–2022 school year, about 3.7 million public school students, or seven percent of all such students, attended a public charter school. *Public Charter School Enrollment*, National Center for Education Statistics (May 2023), https://perma.cc/2V5L-9FPR.

For decades, Kentucky families were on the outside looking in. Kentucky's legislature began changing that in 2017 when it authorized public charter schools. 2017 Ky. Acts ch. 102. But that law did not provide funding for such schools. The legislature followed through in 2022 by passing House Bill 9, which updated the 2017 law and funded public charter schools. 2022 Ky. Acts ch. 213. In taking these steps, the legislature was clear about its goals. Kentucky's public charter school law seeks to "benefit parents, teachers, and community members by creating new, innovative, and more flexible ways of educating all children within the public school system and by advancing a renewed commitment to the mission, goals, and diversity of public education." KRS 160.1591(2).

In broad strokes, the public charter schools authorized by HB 9 operate as follows. An application to open such a school can be submitted by "teachers,

parents, school administrators, community residents, public organizations, non-profit organizations, or a combination thereof." KRS 160.1593(1). This application goes to an "authorizer," which is often a local school board. KRS 160.1590(15). HB 9 specifies that an application must identify, among other things, how the public charter school is "likely to improve the achievement of traditionally underperforming students, serve the needs of students with individualized education programs, or provide students with career readiness education opportunities." KRS 160.1593(3)(c)2. In other words, the application process under HB 9 focuses on those Kentucky public school students most in need of additional or specialized instruction.

An authorizer then reviews the application for compliance with objective criteria. *Id.* at (3)(f), (7). The authorizer is "encouraged to give preference to applications that demonstrate the intent, capacity, and capability to provide comprehensive learning experiences to . . . [s]tudents identified by the applicants as at risk of academic failure," "[s]tudents with special needs as identified in their individualized education program," and "[s]tudents who seek career readiness education opportunities." *Id.* at (2). After completing a "thorough review process," which includes "in-person interviews with the application group," an opportunity for public comment, and providing "a detailed analysis of the

application," the authorizer can "[a]pprove or deny [the] charter application." KRS 160.1594(3).

If an application is approved, the applicant and the authorizer enter into a charter contract that "identifies the roles, powers, responsibilities, and performance expectations for each party." KRS 160.1590(4). HB 9 is clear that the authorizer shall "[m]onitor the performance and compliance of public charter schools according to the terms of the charter contract." KRS 160.1594(1)(g).

Kentucky families benefit from a public charter school's built-in flexibility to pursue its educational mission consistent with its charter contract. KRS 160.1592(1). But HB 9 makes clear that public charter schools "are part of the state's system of public education." *Id.*; *see* KRS 160.1590(14)(e), (f). Students at public charter schools are subject to the same performance standards and participate in the same assessments as students in other public schools. *See* KRS 160.1592(3)(e)–(g). Like other public schools, public charter schools must "[c]omply with open records and open meetings requirements under KRS Chapter 61." *Id.* at (3)(k). And public charter schools are subject to "the same health, safety, civil rights, and disability rights requirements as are applied to all public schools." KRS 160.1592(1). In addition, public charter schools participate in the

per-pupil budgeting that governs other public schools in Kentucky. KRS 160.1596(5), (6).

That brings us to this lawsuit. Led by the Council for Better Education, three plaintiffs (together, CBE) sued in the Franklin Circuit Court to challenge HB 9. Vol. I, R. 1–102. Their complaint alleged six counts, all claiming that HB 9 violates the Kentucky Constitution. After this suit was filed, the Commonwealth intervened through the Attorney General to defend HB 9. Vol. II, R. 176–207; Tab 2. Gus LaFontaine, a Kentuckian who submitted an application to establish a public charter school in Madison County, also intervened. Vol. III, R. 366–96; Tab 3.

After the parties briefed cross-motions for summary judgment, the circuit court declared HB 9 unconstitutional and entered a permanent injunction prohibiting its enforcement. Tab 1. In the main, the court concluded that public charter schools do not qualify as "common schools" under Section 183 of the Constitution. *Id.* at 3–10. In the court's view, "[t]here is no way to stretch the definition of 'common schools' so broadly that it would include such privately owned and operated schools that are exempt from the statutes and administrative regulations governing public school education." *Id.* at 10. Based mostly on this same line of reasoning, the circuit court determined that HB 9 also violates Sections 184 and 186 of the Constitution. *Id.* at 10–12. The circuit court did not reach CBE's other claims.

The Commonwealth timely appealed, Vol. V, R. 615–30, and asked for transfer to this Court, which was granted with CBE's agreement. The Court also granted LaFontaine's transfer motion. *Lafontaine v. Council for Better Educ., Inc.*, No. 2024-SC-0024 (Ky.).

ARGUMENT

A constitutional challenge is no ordinary lawsuit. It asks the judiciary to invalidate as unconstitutional a law duly passed by a coordinate branch of government—a branch made up of members who each swore to uphold the Kentucky Constitution. Ky. Const. § 228. Make no mistake, this Court is the final arbiter of the meaning of the Constitution. Ky. Const. §§ 109, 110. Only this Court has the "high [] duty to 'say what the law is.'" *Gasaway v. Commonwealth*, 671 S.W.3d 298, 328 (Ky. 2023) (citation omitted). But the Court should invalidate the work of the General Assembly only if there is a constitutional violation that is "clear, complete and unmistakable." *Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998). If there is any question about the law's constitutionality, the law gets the benefit of the doubt. *Teco/Perry Cnty. Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019); *Musselman v. Commonwealth*, 705 S.W.2d 476, 477 (Ky. 1986).

Although the Commonwealth respectfully disputes the circuit court's bottom-line holding, the circuit court was no doubt correct that the question here is not "whether the charter schools envisioned by HB 9 are good or bad." Tab 1 at

10. That policy question has already been answered by the General Assembly. It determined that public charter schools will in fact benefit Kentucky's families. KRS 160.1591(1)–(2). That call was the General Assembly's to make. *Cameron v. Beshear* (*Cameron*), 628 S.W.3d 61, 75 (Ky. 2021) ("As we have noted time and again, so many times that we need not provide citation, the General Assembly establishes the public policy of the Commonwealth."). The only question before the Court is whether HB 9 comports with the Kentucky Constitution.

On that legal question, the circuit court got it wrong. Its core holding was that public charter schools are not "common schools" under the Kentucky Constitution. Tab 1 at 10–13. But public charter schools can be nothing other than common schools. For this simple reason, HB 9 is constitutional under Sections 183, 184, and 186 of the Constitution. The Court should accordingly reverse the judgment below. And if it reaches CBE's other claims, the Court should enter judgment for the Commonwealth and LaFontaine.

I. HB 9 accords with Section 183 of the Constitution.[1]

Section 183 of the Constitution provides that "[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." As written, Section 183 imposes a positive duty on the General Assembly; it is not written as a negative prohibition against

[1] The Commonwealth preserved this argument below. Vol. III, R. 409–19.

particular legislation by the General Assembly. More to the point, Section 183 empowers, and indeed requires, the General Assembly to pass legislation to accomplish a specific end—"an efficient system of common schools throughout the State." By its text, Section 183 does not limit the options available to the General Assembly in pursuit of that end.

This foundational point is unmistakable in this Court's caselaw. Shortly after Section 183 was ratified, this Court's predecessor emphasized that "the Legislature was left a free hand as to the details of management and government" related to the "establishment and maintenance of an efficient system of common schools." *City of Louisville v. Commonwealth* (*City of Louisville*), 121 S.W. 411, 412 (Ky. 1909); *accord Elliott v. Garner*, 130 S.W. 997, 998 (Ky. 1910); *City of Louisville v. Bd. of Educ. of Louisville (Bd. of Educ. of Louisville*), 195 S.W.2d 291, 293 (Ky. 1946). The Court reiterated this point in *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989). *Rose* held that Section 183 imposes a "duty to enact legislation to provide for an efficient system of common schools throughout the state." *Id.* at 189. Or put more directly, "it is the obligation, the sole obligation, of the General Assembly to provide for a system of common schools in Kentucky." *Id.* at 205. So *Rose* confirms that Section 183 is about empowering the General Assembly

to act, not about limiting the legislature's menu of options to secure "an efficient system of common schools throughout the State."

The circuit court viewed Section 183 differently. It held that the General Assembly cannot pursue an "efficient system of common schools throughout the State" by legislating in certain ways. In the circuit court's view, Section 183 contains two negative prohibitions. First, according to the circuit court, the General Assembly cannot pursue an "efficient system of common schools throughout the State" by utilizing schools that are otherwise public if they employ an admissions lottery when student demand exceeds a school's capacity. Tab 1 at 3–8. And second, the court held that the General Assembly violates Section 183 by approving public schools that are not overseen day to day by a local school board. *Id.* at 8–10. The circuit court was wrong on both points, and none of its other criticisms of HB 9 establish a constitutional violation.

A. A common school can use an admissions lottery if student demand exceeds a school's capacity.

The circuit court held that the public charter schools created by HB 9 are not common schools because they can use an admissions lottery and thus fail to "take all comers." *Id.* at 6.

1. To see why this holding is wrong, start with the text of Section 183—specifically the term "common schools." Although the Kentucky Constitution does not define the term, it equates common schools with public schools.

Compare Ky. Const. §§ 183, 184 (discussing common schools), *with* Ky. Const. § 186 (stating that "[a]ll funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth"). This Court's caselaw likewise equates the two. *Fannin v. Williams*, 655 S.W.2d 480, 481 (Ky. 1983) (Common school "is a term synonymous with 'public' school."); *Sherrard v. Jefferson Cnty. Bd. of Educ.*, 171 S.W.2d 963, 966 (Ky. 1942) ("[I]t is well settled that the words 'common schools' as used in the Constitution mean 'public' or 'free' schools maintained by the State at public expense, as distinguished from any private, parochial or sectarian school."). As this Court recently summarized, the term "common schools" has "always been understood to encompass" an "elementary school or secondary school of the state supported in whole or in part by public taxation."[2] *Commonwealth ex rel. Cameron v. Johnson* (*Johnson*), 658 S.W.3d 25, 36 n.10 (Ky. 2022) (citation omitted); *accord Pollitt v. Lewis*, 108 S.W.2d 671, 673 (Ky. 1937) (stating that this is the "settled construction" of the term).

Judged by this standard, public charter schools readily qualify as common schools. Under HB 9, a public charter school is a "public body corporate and

[2] As the circuit court noted, Kentucky's statutes have long defined "common schools." Tab 1 at 5. The current statute is KRS 158.030(1). When our Constitution was adopted, this statute's predecessor defined a "common school" as a school taught by a "qualified teacher" for a specified time at which "every child residing in the district, between the ages of six and twenty years, has had the privilege of attending, whether contributing toward defraying its expenses or not." Ky. Stat. 4364-2.

politic, exercising public power." KRS 160.1590(14)(a); *accord* KRS 160.1592(3)(p) (stating that a public charter school is a "public body"); KRS 160.1597(4) (stating that public charter schools perform "essential public purposes and governmental purposes of this state"). Elsewhere, HB 9 reiterates that a public charter school is "part of the state's system of public education," KRS 160.1592(1), and "shall have police powers to the same extent and under the same requirements as a local school district," KRS 160.1597(5). Like other public entities, a public charter school must comply with the Open Records Act and the Open Meetings Act. KRS 160.1592(3)(k) ("A public charter school shall . . . [c]omply with open records and open meeting requirements under KRS Chapter 61."). And the governing body of a public charter school—its board of directors—is made up of individuals who are "officers" under state law. *Id.* at (4). Those board members are subject to "remov[al] from office" under state law, *id.*, and "shall take an oath of office" under state law, KRS 160.1596(1)(a).

To be sure, public charter schools can make the classroom experience different in some regards from other public schools. KRS 160.1592(1). But public charter schools share many key characteristics with other public schools. A public charter school must hire "only qualified teachers to provide student instruction." *Id.* at (3)(d); *see also* KRS 160.1590(16) (defining "qualified teacher" as a "person certified by the Educational Professional Standards Board" under state law). Those qualified teachers participate in the state retirement system just like

teachers in other public schools. KRS 161.141(2). A public charter school must "[d]esign its education program to meet or exceed the student performance standards adopted by the Kentucky Board of Education." KRS 160.1592(3)(f). It must "[p]rovide instructional time that is at least equivalent to the student instructional year specified" in state law. *Id.* at (3)(m). And students at a public charter school must participate in "required state assessment of student performance" under state law. *Id.* at (3)(g). Plus, a public charter school must provide a "food program for students that, at a minimum, provides free or reduced-price meals to students identified as qualifying for such meals under federal guidelines." *Id.* at (3)(r). In short, across metric after metric, public charter schools operate just like other public schools.[3]

2. The circuit court did not meaningfully dispute any of the above.[4] Instead, it focused on HB 9's allowance of an admissions lottery if student demand

[3] If the Court concludes that public charter schools are public schools, it would join a host of other state high courts that have so held. *Drummond ex rel. State v. Okla. Statewide Virtual Charter Sch. Bd.*, --- P.3d ---, 2024 WL 3155937, at *7 (Okla. June 25, 2024); *City of Woonsocket v. RISE Prep Mayoral Acad.*, 251 A.3d 495, 501 (R.I. 2021); *Araujo v. Bryant*, 283 So.3d 73, 81 (Miss. 2019); *Iberville Par. Sch. Bd. v. La. State Bd. of Elementary & Secondary Educ.*, 248 So.3d 299, 310 (La. 2018); *Cal. Charter Schs. Ass'n v. Los Angeles Unified Sch. Dist.*, 345 P.3d 911, 914 (Cal. 2015); *In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.*, 753 A.2d 687, 689 (N.J. 2000); *Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208, 218 (Mich. 1997).

[4] At most, the circuit court quibbled with whether public charter schools are always subject to the Open Records Act and Open Meetings Act. Tab 1 at 7 (saying this is "far from clear" in at least some circumstances). HB 9, however,

to attend a public charter school exceeds available space. Tab 1 at 5. In the circuit court's view, public charter schools can "impose enrollment caps limiting their enrollment to a number of children who will ensure ease of instruction through small class sizes." *Id.* (emphasis omitted). The circuit court worried that HB 9 "appears to allow charter schools to adopt admissions policies that—explicitly or implicitly—favor families that are affluent, well educated, well connected, and academically (or athletically) gifted and talented." *Id.* This line of thinking suffers from three overarching flaws.

First, the circuit court could not be more wrong that HB 9 "appears" to allow admission policies that favor the "affluent, well educated, well connected, and academically (or athletically) gifted and talented." Quite the contrary. Such an admissions policy would *violate* HB 9. KRS 160.1592(3)(q) (directing that students must be "accepted in a public charter school without regard to ethnicity, national origin, religion, sex, income level, disabling condition, proficiency in the English language, or academic or athletic ability"). HB 9 could not be clearer that an admissions lottery must be "competently conducted, equitable, randomized, transparent, impartial, and in accordance with [the] targeted student population and service community as identified in KRS 160.1593(3)." *Id.* And if that's not

leaves no doubt that Kentucky's transparency laws apply. KRS 160.1592(3)(k), (11)(a).

enough, HB 9 requires the Kentucky Board of Education to "promulgate administrative regulations to guide student application, lottery, and enrollment in public charter schools." KRS 160.1591(6). So HB 9 guards against exactly what concerned the circuit court.

If HB 9 favors any public school students, it is those most in need of specialized or additional instruction. Indeed, that is the point of public charter schools: to "[i]ncrease high-quality educational opportunities within the public education system for all students, especially those at risk of academic failure." KRS160.1591(2)(e). For this reason, a charter school application "shall include" an explanation of how the public charter school "is likely to improve the achievement of traditionally underperforming students, serve the needs of students with individualized education programs, or provide students with career readiness educational opportunities." KRS 160.1593(3)(c)2. And in reviewing a charter school application, an authorizer is "encouraged to give preference" to an application that serves these ends. KRS 160.1594(2). Beyond that, HB 9 allows an "enrollment preference for students who meet federal eligibility requirements for free or reduced-price meals and students who attend persistently low-achieving noncharter public schools." KRS 160.1591(5)(e). As these parts of HB 9 make clear, the common thread in the law is "[c]los[ing] achievement gaps for low-performing groups of public school students." *Id.* at (2)(c). In fact, despite the circuit court's worries about the admissions lottery, that feature of HB 9 operates

as a failsafe to keep the law focused on the students most in need of specialized or additional assistance.

This leads to the second problem with the circuit court's holding that HB 9's mere allowance of an admissions lottery makes it unconstitutional. Despite the circuit court's contrary view, the goal of HB 9 is for every Kentucky parent who desires to send his or her child to a public charter school to be able to do so. KRS 160.1591(3). Under HB 9, a "student" is defined as "*any* child who is eligible for attendance in a public school in Kentucky." KRS 160.1590(18) (emphasis added). As a result, public charter schools must accept "all comers" (to quote the circuit court). But like any other public school, there will not be unlimited desks at any one public charter school. If and only if student demand exceeds the seats available at a given public charter school "shall [the school] select students through a randomized and transparent lottery." KRS 160.1591(5)(f); *accord* KRS 160.1592(3)(q) (noting that an admissions lottery is allowed "if capacity is insufficient to enroll all students who wish to attend the school"). Thus, a public charter school must accept "all comers" but can utilize a randomized and transparent lottery only if student demand exceeds capacity.

The right protected by Section 183 is not a right to attend whatever public school a parent or child desires no matter the school's capacity. To quote Section 183, it requires an "efficient system of common schools throughout the State." Although the circuit court cited several Section 183 cases (discussed below), it

identified no caselaw even implying that having a randomized and transparent admissions lottery if student demand exceeds capacity at a given school makes an otherwise public school nonpublic. No such caselaw exists.

More generally, the mere possibility of using an admissions lottery does not transform public charter schools into noncommon schools. If anything, the use of an admissions lottery shows that public charter schools in fact contribute to an "efficient system of common schools throughout the State." That student demand exceeds seats available at a particular public charter school is proof positive that parents *want their children to attend that school.* If an admissions lottery is needed under HB 9, then a surplus of Kentucky parents has decided that a public charter school is the best way to educate their children. By providing an educational experience that Kentucky's parents seek out for their children, public charter schools promote Section 183's goal of an "efficient system of common schools throughout the State."

The circuit court's contrary conclusion cannot be right. Under our constitutional system, we presume that parents know best for their children, especially when it comes to education. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("[I]t is the natural duty of the parent to give his children education suitable to their station in life."). The circuit court came very close to indulging the opposite presumption. It found that too many parents seeking out a particular type of

public education renders that educational option beyond the General Assembly's authority to provide. To state this proposition is to refute it.

The third problem with the circuit court's reasoning is that it would upset the longstanding status quo. If the circuit court were right that a publicly funded school must always admit "all comers" despite its capacity, then its decision casts doubt on many state-funded primary and secondary schools in Kentucky. Kentucky has long authorized—and funded with state dollars—primary and secondary schools that do not accept every student who might wish to attend. Under this Court's caselaw, this longstanding practice bears directly on the meaning of "common schools." Indeed, this Court's predecessor held that a practice "continued without interruption for a very long period is entitled to controlling weight" in constitutional interpretation. *Grantz v. Grauman*, 302 S.W.2d 364, 367 (Ky. 1957). In the educational context in particular, a "long and unquestioned construction" of a constitutional provision "does have[] *great weight* in resolving any doubt that the words themselves may have left as to the meaning" of the provision. *Agric. & Mech. Coll. v. Hager*, 87 S.W. 1125, 1128–29 (Ky. 1905) (emphasis added).

Kentucky law has long allowed publicly funded elementary or secondary schools that focus on particular students. In this regard, consider the Kentucky School for the Deaf, which serves "students who are deaf and hard of hearing," and the Kentucky School for the Blind, which serves students "who are blind or

visually impaired." KRS 167.015(2). Both schools are under the control of the Kentucky Board of Education. *Id.* at (1). Both receive a state appropriation. *See* 2024 Ky. Acts ch. 175, § 1, Part I.C.3.(7). And both predate our Constitution. *About Us*, Kentucky School for the Blind, https://perma.cc/ALW2-UW2E ("On February 5, 1842, the Kentucky Institution for the Blind was chartered with an appropriation of $10,000."); JoAnn Hamm, *History of Kentucky School for the Deaf*, https://perma.cc/RWM9-LWY2 (noting that the General Assembly created what became the Kentucky School for the Deaf in April 1823). The longstanding existence of these two schools contradicts the circuit court's conclusion that "public schools in the common school system are required to enroll *all* children." Tab 1 at 5.

As to enrollment caps with admissions lotteries, other Kentucky public schools use them too. Magnet schools are one example. *See* 704 KAR 3:285 § 1(23). Both Jefferson County and Fayette County have robust magnet programs. *Magnet Schools & Programs*, Fayette County Public Schools, https://perma.cc/3ANF-Z8Y8; *Magnet Program*, Jefferson County Public Schools, https://perma.cc/65FS-22EB. Like public charter schools, these magnet schools require applications from students. And like public charter schools, seats at magnet schools are limited, and a lottery process can be utilized if demand exceeds capacity. *School Choice Catalog, Magnet Schools and Programs*, Fayette County Public Schools, at 5, 7, 8, 25, 27, https://perma.cc/29XH-EY52 (noting

magnet schools that use an admissions lottery); *Frequently Asked Questions About Magnet Program Wait Lists*, Jefferson County Public Schools, at 1, https://perma.cc/U3ZU-3UFY ("When more applicants qualify for a magnet program than there are seats to accommodate them, a random selection lottery is used to fill the available seats and create a wait list for the program.").

Magnet schools are not the only publicly funded secondary schools in Kentucky that limit who attends. The Gatton Academy at Western Kentucky University and the Craft Academy at Morehead State University do as well. They both target academically gifted high school students. *The Gatton Academy*, Western Kentucky University, https://perma.cc/8JY8-RYJ5; *Craft Academy*, Morehead State University, https://perma.cc/ZU9N-R3Q4. Important here, the Gatton Academy and the Craft Academy do not enroll all children who wish to attend. The Gatton Academy only "admits approximately 95 Kentucky sophomores, half of selection male and half of selection female, based on standardized test scores, their GPA, responses to essay questions, personal interviews, extracurricular activities and recommendations." *About the Gatton Academy*, Western Kentucky University, https://perma.cc/WF4Q-43G6. The Craft Academy likewise has "a limited number of available spots" for rising high school juniors, with selection based on similar criteria as the Gatton Academy. *Apply to the Craft Academy*, Morehead State University, https://perma.cc/K2DW-4F6X. And both

schools are supported by state dollars. 2024 Ky. Acts ch. 175, § 1, Part I.J.5.(1)(a) & Part I.J.10.(1)(a).

All these examples make a simple point: The circuit court's reasoning about the admissions lottery allowed by HB 9 calls into question the constitutionality of many well-established and well-known Kentucky schools. These schools share key traits with public charter schools—they limit which students may attend and some use an admissions lottery. These public schools' mere existence cuts against the circuit court's far-reaching holding that every common school must "enroll *all* children" without respect to capacity. Tab 1 at 5. Not only that, these schools inform the meaning of "common schools" under Section 183. *See Grantz*, 302 S.W.2d at 367; *Hager*, 87 S.W. at 1128–29.

B. A common school need not be subject to plenary oversight by a local school board.

The circuit court also held that public charter schools are not common schools because they are "exempt from the control of the elected school board." Tab 1 at 9 (emphasis omitted). But a local-control requirement is nowhere found in the text of the Constitution, nor do this Court's precedents require it. And in any event, public charter schools operate under the ultimate control of the General Assembly, and a government body or official serves as the authorizer with ongoing oversight responsibility.

1. The place to start in determining whether the Constitution requires local control is with the constitutional text. Section 183 provides that "[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." This provision lacks any requirement that common schools be subject to day-to-day management by local school boards. Instead, as written, the Constitution vests the General Assembly, and it alone, with the responsibility for establishing an efficient system of common schools throughout the State.

Precedent confirms what the constitutional text says. As summarized above, *supra* Part I.A, this Court has long recognized the General Assembly's discretion in establishing a system of common schools. As this Court's predecessor put it, "Section 183 of the Constitution is as *broad as it is possible* to frame an authority to the legislature to deal with the common schools in *any way it should desire*." *Bd. of Ed. of Louisville*, 195 S.W.2d at 293 (emphasis added); *accord City of Louisville*, 121 S.W. at 412 (similar). And in its landmark *Rose* decision, this Court underscored that "the *sole responsibility* for providing the system of common schools lies with the General Assembly." 790 S.W.2d at 216.

This discretion necessarily includes the ability to decide who oversees a common school. Time and again, the Court has affirmed that "the Legislature must necessarily have the discretion of choosing its own agencies, and conferring upon them the powers deemed by it necessary to accomplish" its "constitutional

mandate to provide an efficient system of common schools." *Prowse v. Bd. of Educ. for Christian Cnty.*, 120 S.W. 307, 309 (Ky. 1909); *see also Yanero v. Davis*, 65 S.W.3d 510, 526 (Ky. 2001); *Rose*, 790 S.W.2d at 216. The "agencies" on which the General Assembly has relied have included local boards of education, the Kentucky Board of Education, *Yanero*, 65 S.W.3d at 526–27, and (long ago) trustees, *Collins v. Henderson*, 74 Ky. 74, 77 (Ky. 1874). That the General Assembly has the power to change who oversees the common schools is by design. As one of the framers of the Constitution observed, the education provisions should not "tie[] the hands of future generations" by directing "that they shall do nothing beyond those things which our ancestors, or those of the present day, have done." 3 Official Report of the Proceedings and Debates in the Convention 4570 (1890).

It follows that the Constitution does not mandate a particular structure of delegated control of common schools. Indeed, "the Constitution does not provide for the creation of local boards of education." *Yanero*, 65 S.W.3d at 526. Rather, school districts and local boards of education "are creatures of the Legislature and the Legislature has the power to alter them or even to do away with them entirely." *Bd. of Educ. of Kenton Cnty. v. Mescher*, 220 S.W.2d 1016, 1019 (Ky. 1949); *accord Bd. of Educ. of Fayette Cnty. v. Bd. of Educ. of Lexington Indep. Sch. Dist.*, 250 S.W.2d 1017, 1019 (Ky. 1952). How the General Assembly chooses "to provide an efficient system of common schools," including the agencies it uses to manage these schools, is "purely a matter of legislative discretion." *Elliott*, 130

S.W. at 998. So although CBE prefers a prior iteration of Kentucky's system of common schools, it has no right to "demand that it shall remain unchanged." *Id.* That decision rests with the General Assembly.

2. The circuit court read a local-control requirement into Section 183 based on this Court's caselaw. Tab 1 at 8–10. Citing a line of cases beginning with *Collins* (referred to by the circuit court as *Bush v. Henderson*), the circuit court exhumed an old, since-repealed statutory requirement that common schools be "under the control of trustees elected under th[e] [school] laws.'" *Id.* at 8 (citing *Collins*, 74 Ky. at 82–83). But *Collins* and its progeny do not establish a constitutional requirement of oversight by trustees. If they did, the current statute defining common schools would itself be unlawful. KRS 158.030(1) (not mentioning trustees). Rather, *Collins* is mostly a product of its era. After all, it was decided under the 1850 Constitution. And it is best read to hold that schools that met the then-applicable statutory requirements, including trustee control, "should be deemed a common school." *Collins*, 74 Ky. at 83. Put differently, under *Collins*, satisfying the General Assembly's then-definition of a common school was a sufficient condition to satisfy the 1850 Constitution.

Follow-on caselaw reinforces *Collins*'s narrow holding. Eighty years ago, this Court's predecessor called *Collins* an "older and frequently quoted case[]." *Dodge v. Jefferson Cnty. Bd. of Educ.*, 181 S.W.2d 406, 407–08 (Ky. 1944). *Collins*, the Court continued, "has been *considerably liberalized*" "as [the] years went by" even

though its holding as "applied to the facts of the case [was] sound." *Id.* at 408 (emphasis added). As the Court observed, "[i]t too[k] some time to pass from the custom, or duty placed on trustees." *Id.* In other words, the Court in *Dodge* confined *Collins* to its facts. If *Collins* had little persuasive force in 1944 when *Dodge* was decided, even more so 80 years later in 2024. The circuit court was therefore wrong to resurrect *Collins*'s anachronistic discussion of trustees under the 1850 Constitution.

The other cases that the circuit court cited fare no better. Two of them reference *Collins*'s outdated discussion of trustees, while the third appears to mention *Collins* without naming it. More importantly, none of them hold that local control of common schools is a constitutional prerequisite. They each stand for narrower propositions. Take each in turn.

Pollitt. The circuit court itself recognized that *Pollitt* invalidated an attempt "to fund a junior college with tax dollars." Tab 1 at 8. Local control was not an issue in *Pollitt*, given that there "the board of education of the city of Ashland ha[d] determined to organize and maintain a junior college *in that city*." *Pollitt*, 108 S.W.2d at 671 (emphasis added). If anything, *Pollitt* works against the circuit court's reasoning by stating that the "settled construction" of common schools is "an elementary and/or secondary school of the Commonwealth supported in whole or in part by public taxation." *Id.* at 673 (citation omitted).

Sherrard. Local control wasn't an issue in *Sherrard* either. The law there "provid[ed] for the transportation of school children attending schools other than public schools." *Sherrard*, 171 S.W.2d at 964 (citation omitted). A Jefferson County resident sued his local school board seeking to declare the law unconstitutional. *Id.* Although *Sherrard* quoted *Collins* (as quoted in *Pollitt*), *Sherrard* also stated that "it is well settled that the words 'common schools' as used in the Constitution mean 'public' or 'free' schools maintained by the State at public expense, as distinguished from any private, parochial or sectarian school." *Id.* at 966. This "well settled" definition includes no mention of local control.

Underwood. The circuit court's final favored case was *Underwood v. Wood*, 19 S.W. 405 (Ky. 1892), which the court said involved a school that "has a very striking resemblance to the charter schools contemplated by HB 9." Tab 1 at 9. A closer look at *Underwood*, however, dispels such a comparison. It concerned a private school created by a "philanthropic man" that was "erected at his own expense, and on his own land." 19 S.W. at 406. The teachers at the school "taught under a special contract" with the philanthropist. *Id.* Merely describing the private school in *Underwood* shows how different it was from the public charter schools here. Beyond that, the actual holding in *Underwood* is hard to pin down. Although *Underwood* discussed the particulars of the school there, it ultimately said that "[t]he *sole question*, it seems to us, in this case arises as to the power of a court of equity to grant relief by way of injunction in such a case." *Id.* at 407

(emphasis added). Taking *Underwood* at its word, the case is more about judicial power related to injunctions than about the meaning of "common schools."

3. Although the General Assembly need not grant plenary local oversight of common schools, the legislature must at least "assure that the ultimate control remains with the General Assembly." *See Rose*, 790 S.W.2d at 216. It has done that and more here.

In passing HB 9, the General Assembly directed that public charter schools are accountable to it and the public as public bodies. By statute, a public charter school is "a public body . . . exercising public power." KRS 160.1590(14)(a). It is "part of the state's system of public education," KRS 160.1592(1), and "shall have police powers to the same extent and under the same requirements as a local school district," KRS 160.1597(5). As public bodies that exist only through state law, the General Assembly necessarily retains the ability to amend, or even repeal, Kentucky's public charter school law going forward. Ky. Const. § 29. Indeed, in passing HB 9, the General Assembly not only provided public funding for public charter schools, KRS 160.1596(3)–(15), it also overhauled the public charter school law that it had passed just five years earlier. All this makes clear that the General Assembly remains very much in the driver's seat in overseeing public charter schools.

Public charter schools are also accountable in many respects to their authorizer, as HB 9 makes clear. KRS 160.1593; KRS 160.1594. The General

Assembly mandated that an authorizer be a locally elected body or official. KRS 160.1590(15). In fact, outside of a consolidated local government or urban county government, the authorizer is always a local school board (*i.e.*, exactly who the circuit court thought should be involved). *Id.* And the authorizer under HB 9 has real power. A public charter school and its authorizer must agree to a detailed set of academic, financial, and student-achievement plans and objectives. KRS 160.1596(1)(c)2. If approved, a public charter school is subject to ongoing oversight from the authorizer, which must "[m]onitor the performance and compliance of" the school "according to the terms of the charter contract." KRS 160.1594(1)(g). If the school does not live up to the charter contract or otherwise "threatens the health and safety of the students," the authorizer can decline to renew the charter contract or even "take immediate action to revoke" it.[5] KRS 160.1598(6), (7); KRS 160.1594(1)(h).

In sum, although public charter schools are not under the day-to-day thumb of a local school board, they are public bodies subject to ultimate oversight by the General Assembly with ongoing oversight by a locally elected body or official.

[5] As noted above, the General Assembly provided even more accountability in HB 9 by requiring the Kentucky Board of Education to "promulgate administrative regulations to guide student application, lottery, and enrollment in public charter schools." KRS 160.1591(6).

One final point here. If the Court agrees with the circuit court that a common school must be under the day-to-day control of a local school board, it will likely cast doubt on other established Kentucky schools. For example, the Kentucky School for the Blind and the Kentucky School for the Deaf are overseen by the Kentucky Board of Education. KRS 167.015(1). A public university participates in overseeing the Gatton Academy and the Craft Academy. *See* KRS 158.140(3)(a). And the Model Laboratory School at Eastern Kentucky University is "a university-operated public school under the governance of the Eastern Kentucky board of regents that is separate from any school district." KRS 164.380(2)(a). If the circuit court's local-control requirement fells public charter schools, then these other schools might be next given this Court's duty to "maintain stability and consistency in the law." *Gasaway*, 671 S.W.3d at 328. This reality cuts against adopting the circuit court's expansive reasoning about local control. *Grantz*, 302 S.W.2d at 367; *Hager*, 87 S.W. at 1128–29.

C. The circuit court's remaining concerns do not bear on HB 9's constitutionality.

Throughout its decision, the circuit court expressed concern about (i) the differences between public charter schools and other public schools, (ii) the former's exemption from certain laws and regulations, and (iii) the hypothetical misuse of public funds by an education service provider working with a public

charter school. Tab 1 at 3, 7–10. None of these criticisms affect the constitutionality of public charter schools.

1. The circuit court objected to certain differences between public charter schools and other public schools, even going so far as to criticize the General Assembly for creating "*two* separate and unequal systems of education." *Id.* at 3. Putting aside the circuit court's charged language (which has no basis), Kentucky's Constitution does not require a system of copycat schools. And longstanding practice shows that the General Assembly has wide latitude to authorize innovative public schools and programs that differ in important respects from other public schools. Put simply, because no child is the same, an "efficient system of common schools through the State" necessarily entails a system that can meet each unique child where he or she is.

To be sure, the General Assembly must ensure that Kentucky's common schools constitute a "substantially uniform system [with] equal school facilities without discrimination as between different sections of a district or a county." *Rose*, 790 S.W.2d at 207 (quoting *Wooley v. Spalding*, 293 S.W.2d 563, 565 (Ky. 1956)). But that does not mean that each *school* in the *system* needs to be a carbon copy of all the others. *Id.* ("Uniformity does not require equal classification." (quoting *Wooley*, 293 S.W.2d at 565)). Rather, the Constitution simply requires that "[t]he system must be . . . 'substantially uniform[]' with respect to the state *as a whole*." *Id.* at 208 (emphasis added). As discussed above, *supra* Part I.A, the

General Assembly meticulously subjected public charter schools to many of the core requirements of other public schools, thus ensuring that public charter schools fit comfortably within the existing system of common schools. In addition, HB 9 authorizes public charter schools statewide.[6]

No doubt, public charter schools are different from other public schools in some ways. One goal of public charter schools is to help "creat[e] new, innovative, and more flexible ways of educating all children within the public school system" while "advancing a renewed commitment to the mission, goals, and diversity of public education." KRS 160.1591(2). That charter schools are unique in some respects does not make them unconstitutional. In fact, in *Johnson*, this Court reaffirmed longstanding precedent holding that public dollars can be used to support students "who the local school board conceded were unsuited to the regular public school." 658 S.W.3d at 36 n.11 (citing *Butler v. United Cerebral Palsy of N. Ky., Inc.*, 352 S.W.2d 203, 205 (Ky. 1961)). As Judge Palmore held in the referenced well-settled case, "[w]e do not believe it was the intention of the delegates in adopting Const. §§ 184 and 186 to deny forever the possibility of special educational assistance to those who by no choice of their own are unsuited to the standard program and facilities of the common school system." *Butler*, 352 S.W.2d at 207.

[6] The pilot project created by HB 9 is discussed in Part III.

Longstanding practice confirms that specialized public schools and programs do not violate the Constitution's substantial-uniformity requirement for the system as a whole. For example, long before the General Assembly authorized public charter schools, the Jefferson County Public Schools "offer[ed] students the choice of numerous and varied specialized schools and programs." *McFarland v. Jefferson Cnty. Pub. Schs.*, 330 F. Supp. 2d 834, 843 (W.D. Ky. 2004), *rev'd on other grounds by Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). Included in those options were "[n]on-traditional magnet schools" that "offer specialized programs and curricula," "traditional [magnet] schools that offer regular curriculum in a particular school environment," "magnet programs" that "are small, specialized programs within a regular school," "optional programs" that "are small, specialized programs with unique characteristics," and "[m]agnet career academies . . . that offer programs focusing on a specific technical career." *Id.*

This variety in educational options continues today. *Supra* Part I.A. To give an idea of scope, there are 39 magnet and specialized school programs in Fayette County and 59 in Jefferson County, each with a "specific theme and focus" geared toward "provid[ing] a specialized learning environment" through "unique, schoolwide curricula." *Magnet Program*, Jefferson County Public Schools, https://perma.cc/65FS-22EB; *Magnet School & Programs*, Fayette County Public Schools, https://perma.cc/UHZ2-32J2. These include, among many others, the

School for the Creative and Performing Acts (or SCAPA), which is one of several "gifted and talented school[s]" in Lexington and requires students to "audition" in one of nine areas, including "ballet, band, contemporary dance, literary arts, drama, piano, strings, visual art, and vocal music," "for admittance into the school." *About Our School*, SCAPA at Bluegrass, https://perma.cc/SR9Z-Q4VY. Also included is the W.E.B. DuBois High Academy, an all-male school that focuses on "an Afrocentric, multicultural curriculum." *High School Choices*, Jefferson County Public Schools, https://perma.cc/XV8P-ZU6S.

If the circuit court were right that a public school's unique qualities raise constitutional concerns, then a host of magnet and specialty schools now educating Kentucky children are at risk going forward. That cannot be right. Substantial uniformity does not require clone schools from Pikeville to Paducah. To impose such a requirement would disserve Kentucky's families. It is a virtue of our Commonwealth that our students vary widely in their interests, passions, and skills. An "efficient system of common schools throughout the State" is one that can educate each of them. Public charter schools, the General Assembly found, will help accomplish that.

2. Relatedly, the circuit court objected to public charter schools being "exempt from 'all statutes and administrative regulations applicable to the state board, a local school district, or a school.'" Tab 1 at 10 (quoting KRS 160.1592(1)). But as just discussed, absolute uniformity across every public

school is not the constitutional standard. Even still, public charter schools are not unique in being exempt from certain statutes and administrative regulations.

Any school district can request a waiver from most of Kentucky's regulations for common schools. KRS 156.160(2)(a)–(c). The General Assembly has also established pathways for other, more specific waivers. For example, school districts may request "waivers from the requirements of a student instructional year" if they "wish to adopt innovative instructional calendars." KRS 158.070(4)(a). And a principal through a superintendent can seek to use textbooks that have not "been recommended and listed on the state multiple list by the State Textbook Commission." KRS 156.445(1), (2). These are but a sample of the waiver provisions in Kentucky's education statutes. Others include: KRS 160.294(2) (discussing an "exempt[ion] from the requirement to establish a recycling program"); KRS 159.030 (discussing "[e]xemptions from compulsory attendance"); and KRS 158.854(1) ("A school shall follow the minimum [nutritional] standards specified in the administrative regulation unless a waiver has been requested by the school district for the school from the Kentucky Board of Education.").

Together with these specific waiver provisions, the General Assembly has authorized an entire class of school districts called "districts of innovation," KRS 156.108, 160.107, which are "exempted from certain administrative regulations and statutory provisions" and "from local board of education policies," KRS

156.108(1)(a), (c). The waiver of these requirements "provide[s] flexibility . . . for school administrators, teachers, and staff to meet the diverse needs of students." *Id.* at (2). And it is intended to allow these innovation districts to "re-think[] what a school might look like, [and] redesign student learning in an effort to engage and motivate more students and increase the numbers of those who are college- and career-ready." *Districts of Innovation*, Kentucky Department of Education (May 12, 2023), https://perma.cc/D82G-ACBE.

The similarities between districts of innovation and public charter schools are striking. Similar to districts of innovation, the General Assembly determined that charter schools will "creat[e] new, innovative, and more flexible ways of educating all children within the public school system," KRS 160.1591(2), and will "[r]educ[e] achievement gaps" and "help reduce socioeconomic, racial, and ethnic achievement gaps," KRS 160.1591(1)(a), (c). Both types of schools endeavor to close performance and achievement gaps by providing flexible and innovative ways of educating students. And the waiver of certain statutory and regulatory requirements is essential to accomplishing these goals.

3. The circuit court also speculated about the potential misuse of state funds by educational service providers that work with public charter schools. Tab 1 at 7. Specifically, the court worried that "private equity investors" could "takeover [a] charter school" and "drain[] [it] of tax-dollar-funded resources needed to educate children." *Id.* The circuit court's hypothetical concerns,

however, are more of a policy issue to be considered by the General Assembly. The Attorney General could also investigate any financial mismanagement as appropriate. *See, e.g.*, KRS 15.715(6).

Even still, the circuit court's worries are irrelevant to the legal question before the Court. CBE brought a facial challenge to HB 9. And the circuit court facially enjoined enforcement of HB 9. Tab 1 at 13. This ups the stakes. A facial constitutional challenge is the "most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Commonwealth v. Claycomb*, 566 S.W.3d 202, 210 (Ky. 2018) (citation omitted). Under this "no set of circumstances" standard, the circuit court's speculation about a hypothetical edge case involving private equity investors cannot sustain a facial challenge. The U.S. Supreme Court just reminded us that "focus[ing] on hypothetical scenarios where [a statute] might raise constitutional concerns" is an "error" in a facial challenge that leaves a court "slaying a straw man." *United States v. Rahimi*, 144 S. Ct. 1889, 1903 (2024). At best, the circuit court's speculation could lead to a future as-applied challenge to HB 9. But that is not the challenge CBE brought. Nor does it reflect the relief that the circuit court granted.

Even setting that aside, the circuit court's concerns about financial malfeasance overlook the robust guardrails that HB 9 establishes regarding education service providers. The law prohibits public charter schools from

"[c]ontract[ing] with an education service provider" unless the board of directors "retains oversight and authority over the school." KRS 160.1592(3)(p)3. Education service providers must also "provide a monthly detailed budget to the board," *id.* at (11)(b), and they are subject to the Open Records Act "for records associated with the charter school contract" if the contract amount exceeds $10,000,[7] *id.* at (12)(b); *see also id.* at (3)(l) (providing more purchasing protections). Beyond that, HB 9 restricts potential conflicts of interests between a member of a charter school board of directors and an education service provider.[8] *Id.* at (7)(c).

The circuit court worried about an education service provider "draining" taxpayer-funded resources from a public charter school "in the event of sale or default." Tab 1 at 7. To be clear, HB 9 is designed for public charter schools to thrive. It also contains corrective processes if a public charter school needs to

[7] The circuit court simply overlooked this part of HB 9 in suggesting that it is "far from clear" that education service providers need to comply with Kentucky's Open Records Act. Tab 1 at 7.

[8] Administrative regulations provide additional safeguards regarding education service providers. All contracts with an education service provider must "be approved by the authorizer prior to execution." 701 KAR 8:020 § 5(9). Any contact, moreover, must include specified provisions, including that "payments to the charter school [] be made to an account controlled by the charter school board of directors, not the education service provider," *id.* § 5(9)(e), that "all instructional materials, furnishings, and equipment purchased or developed with charter school funds be the property of the charter school, not the education service provider," *id.* § 5(9)(f), and that it provide "for the disposition of assets upon closure in accordance with" applicable state laws and regulations, *id.* § 5(9)(l).

adapt or improve. KRS 160.1596(1)(c)9., 160.1598(1)–(2). That aside, the circuit court was wrong about what can happen if a particular public charter school closes its doors. The law has a failsafe for that very scenario that the circuit court simply overlooked. HB 9 directs that "[i]f a public charter school closes for any reason, the assets of the school shall be distributed first to satisfy outstanding payroll obligations for employees of the school, then to the creditors of the school, then to the district of location or authorizing districts if authorized by a collaborative of local boards of education." KRS 160.1596(15). In other words, HB 9 is abundantly clear that there can be no run on a school's assets if it closes. HB 9 also provides express direction on how to minimize the disruption for students and their families in the event of a closure. KRS 160.1598(11).

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In sum, public charter schools are common schools in every sense of the term. That HB 9 allows an admissions lottery and does not require plenary local control does not change this fact. Nor do the circuit court's other concerns about innovation, statutory and regulatory waivers, and financial oversight carry constitutional weight. Section 183 vests the General Assembly with wide discretion to achieve an "efficient system of common schools throughout the State." The General Assembly exercised that discretion in passing HB 9, and Kentucky's courts lack license to superintend that constitutionally vested discretion.

II. HB 9 does not violate Sections 184 and 186 of the Kentucky Constitution.[9]

Although the decision below focused on Section 183, it also found that HB 9 violates Sections 184 and 186 of the Constitution. Tab 1 at 10–12. Neither provision can carry the day.

A. Consider Section 184 first. In relevant part, it states: "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 votes cast at said election shall be in favor of such taxation." The circuit court found that HB 9 violates this provision simply because public charter schools are not common schools. Tab 1 at 10–11. But that conclusion fails for the reasons explained above in Part I.

The circuit also invoked this Court's recent Section 184 decision in *Johnson*. But *Johnson* did not involve classifying schools as common or not. Indeed, there was no question in *Johnson* that the law there at least implicated noncommon schools. 658 S.W.3d at 37 (noting that the funds at issue could go "to nonpublic school tuition"), 40 (explaining that a taxpayer could donate money to be used at a "private or parochial primary or secondary school"). The Section 184 issue in *Johnson* was whether the law raised and collected public funds for such schools.

[9] The Commonwealth preserved this argument below. Vol. III, R. 402–39.

The most *Johnson* said about what constitutes a "common school" is its recognition (quoted above) that the term "common schools" has "always been understood to encompass" "an elementary or secondary school of the state supported in whole or in part by public taxation." *Id.* at 36 n.10 (citation omitted). As documented at length in Part I, public charter schools so qualify.

B. On to Section 186. The violation there, the circuit court found, "is even more clear." Tab 1 at 11. Not so. Section 186 states:

> All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.

The circuit court found a violation of Section 186 for largely the same reasons it found violations of Sections 183 and 184. In its view, "[t]o take tax dollars to support these privately owned and operated charter schools is flatly inconsistent with the mandate of Section 186 of the Ky. Constitution." Tab 1 at 11–12. What's been said above in Part I refutes the notion that public charter schools are really private schools. They are in fact public schools, so funding their operations is a "use for public school purposes" within the meaning of Section 186.

In its Section 186 discussion, the circuit court made the further point that "[t]he legislature cannot do *indirectly* what the Constitution prohibits it from doing *directly*." *Id.* at 12. The Commonwealth has no quarrel with that proposition as

far as it goes. Nor does the Commonwealth dispute that the Court should "look through the form of the statute to the substance of what it does." *Johnson*, 658 S.W.3d at 37 (citation omitted). But applying that functional analysis to HB 9 only confirms that public charter schools are public schools. Across 35 pages of statutory text in HB 9, the legislature meticulously integrated public charter schools into our system of public education. At the risk of being repetitive of Part I, public charter schools must (among other things):

- Be taught by only certified teachers. KRS 160.1590(16); KRS 160.1592(3)(d).
- Be open to "any child who is eligible for attendance in a public school in Kentucky." *See* KRS 160.1590(18).
- Meet compulsory attendance requirements under state law. KRS 160.1592(3)(c).
- "Design its education programs to meet or exceed the student performance standards adopted by the Kentucky Department of Education." KRS 160.1592(3)(f).
- "Ensure students' participation in required state assessment of student performance, as required under KRS 158.6453." KRS 160.1592(3)(g).
- "Provide instructional time that is at least equivalent to the student instructional year specified in KRS 158.070." KRS 160.1592(3)(m).
- Comply with Kentucky's transparency laws. KRS 160.1592(3)(k).
- Provide free or reduced school lunches. KRS 160.1592(3)(r).

Taken together, all these complementary parts of HB 9 lead to only one conclusion: public charter schools are public schools under Section 186. Any other

conclusion second-guesses the General Assembly's sole authority to pursue an efficient system of common schools throughout the State.

One final point about Section 186. As quoted above, it requires the General Assembly to pass a general law "prescrib[ing] the manner of the distribution of the public school fund among the school districts." In its decision, the circuit court italicized the words "among the school districts" from Section 186 while discussing the provision. Tab 1 at 11. But the circuit court never explained why it believed this part of Section 186 was violated. Despite this lack of analysis, the Commonwealth points out that HB 9 in fact distributes public dollars "among the school districts." Under the law, a public charter school is a part of its resident school district. KRS 160.1596(3) ("For the purposes of local and state funding, a public charter school shall serve as a school of the district of location."); *see also* KRS 160.1590(7) (defining "district of location" as "the public school district in which a public charter school is physically located"). And HB 9 directs that public dollars go to the district of location, which then distributes the funds to a resident public charter school. KRS 160.1596(6)–(11). For these reasons, HB 9 complies with Section 186 to the letter.[10] CBE may counter by disputing the legislature's

[10] Although the circuit court did not cite it, CBE has relied on *Hodgkin v. Board for Louisville & Jefferson County Children's Home* for the proposition that "a common school cannot exist without a common school district." 242 S.W.2d 1008, 1010 (Ky. 1951). But by law, public charter schools are part of a common school district. KRS 160.1596(3). In any event, *Hodgkin* did not hold that other public bodies cannot receive public funds to pursue education. As this Court just pointed

decision to include a public charter school as part of its resident school district. But the caselaw cited above forecloses this line of argument. *Supra* Parts I.A., I.B.

III. If the Court reaches CBE's other claims, it should reject them.[11]

Because the circuit court found HB 9 unconstitutional under Sections 183, 184, and 186, it did not reach CBE's other claims. *See* Tab 1 at 13. Thus, if the Court concludes (as it should) that HB 9 complies with these sections of the Constitution, the question becomes what to do with CBE's unresolved claims. The Court has two options.

On the one hand, it could remand the unresolved claims to the circuit court to resolve in the first instance. This route accords with the fact that, as Kentucky's court of last resort, this Court is one of "review, not of first view." *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). On the other hand, the Court could reject the additional claims and enter judgment for the Commonwealth and LaFontaine. This Court would be well within its rights to address the remaining claims, especially if CBE raises them as an alternative basis to affirm the

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out, *Hodgkin* "[u]nsurprisingly" "found no bar to appropriating state funds to an institution operated by local government units for the public purpose of education, benefitting the state." *Johnson*, 658 S.W.3d at 36 n.11. Indeed, according to *Johnson*, *Hodgkin* "upheld an appropriation to a public institution, essentially what was then known as a reform school, operated by Louisville and Jefferson County." *Id.* (emphasis omitted).

[11] Although the circuit court did not reach these issues, the Commonwealth preserved its arguments below. Vol. III, R. 402–39.

circuit court's judgment. *Commonwealth v. Jackson*, 529 S.W.3d 739, 745 (Ky. 2017) (rejecting as "unpersuasive" alternative grounds for affirming the judgment below); *Baciomiculo, LLC v. Nick Bohanon, LLC*, 498 S.W.3d 790, 793 (Ky. App. 2016) (similar). Resolving this case once and for all carries benefits for Kentucky families. Most notably, it would allow public charter schools to open their doors to Kentucky children without fear of a renewed injunction based on CBE's other claims.

Given these two options, and to streamline matters, the Commonwealth addresses CBE's other claims. For the reasons below, none of the claims is a winner.

A. Sections 3 and 171 of the Constitution

In its complaint, CBE alleged that sending public dollars to public charter schools violates Sections 3 and 171 of the Constitution. Vol. 1, R. 16. Section 3 states that "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." Ky. Const. § 3. Section 171 provides that "[t]axes shall be levied and collected for public purposes only . . . ." Ky. Const. § 171. CBE's contention is that HB 9 does not perform a "public service[]" or serve a "public purpose[]" in violation of these two constitutional sections.

This argument lacks merit. Educating Kentucky's children is a quintessential public purpose and public service. *Univ. of Cumberlands v. Pennybacker*, 308

S.W.3d 668, 674–75 (Ky. 2010) (citing *Fannin*, 655 S.W.2d at 484); *accord Nichols v. Henry*, 191 S.W.2d 930, 934 (Ky. 1945) ("[I]t cannot be said with any reason or consistency that tax legislation to provide our school children with safe transportation is not tax legislation for a public purpose."). And as detailed above, HB 9 serves that public purpose by integrating public charter schools into Kentucky's system of common schools.

B. Sections 180 and 181 of the Constitution

CBE next claims that HB 9 violates Sections 180 and 181 of the Constitution. Vol. I, R. 16–17. Its theory appears to be that HB 9 contravenes these provisions by requiring a local board of education to transfer a portion of its tax revenue to a public charter school within its district.

Section 180 states that "[e]very act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose." And Section 181 provides in relevant part: "The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes." By its terms, neither constitutional section governs taxes levied by a local board of education. Even if the Court disagrees, HB 9 violates neither provision.

Consider first whether Sections 180 and 181 apply to taxes levied by a local school board. Both sections apply to a "county, city, [or] town." A local school board is none of the above. Section 180 also applies to a "municipal board or local legislative body," and Section 181 additionally covers "other municipal corporation[s]." Although colloquially deemed a local body, a local board of education does not qualify here either because education is a state issue. As this Court has held, a local board of education is "an agency of *state government*." *Yanero*, 65 S.W.3d at 527 (emphasis added). And "education is not a subject pertaining alone, or pertaining essentially, to a municipal corporation." *City of Louisville*, 121 S.W. at 411. The bottom line is that as to the common schools, "the Legislature was left a free hand . . . as [to] the matter of levying taxes. It was therefore competent for the Legislature to have laid all the taxes for that purpose directly" or "to levy part directly and provide for the raising of the residue through other agencies which it established." *Id.* at 412. As a result, neither Section 180 nor Section 181 applies to taxes levied by a local school board.

This conclusion, it is true, does not fully answer CBE's Section 180 challenge, given that the provision also requires acts of the General Assembly not to levy and collect a tax for one purpose but "devote[] [it] to another purpose." The simple answer to this concern is that public charter schools are common schools, as explained above. So money raised for common schools is not devoted to another purpose by going to public charter schools. Even so, the vast majority of

public funds sent to common schools comes from the Commonwealth's general fund. Such dollars are collected not for public education specifically but for "state government purposes" more generally. *Pennybacker*, 308 S.W.3d at 678–79; *see also* KRS 47.010(1) (stating, with exceptions not relevant here, that "all state revenue shall be credited to the general fund"); KRS 157.330(1) (stating that SEEK dollars "consist[] of appropriations for distribution to districts"). That aside, CBE has not identified any Kentucky statute that collects money for an educational purpose that does not encompass providing funds to a common school like public charter schools.

C. Sections 2 and 29 of the Constitution

CBE also alleged below that HB 9 unlawfully delegates legislative power in violation of Sections 2 and 29 of the Constitution. Vol. I, R. 18–19. This claim fails largely for the reasons already discussed.

Because the Constitution vests legislative authority in the General Assembly, Kentucky's nondelegation doctrine directs that the legislature, and not some other person or entity, should exercise that authority. *Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 681–83 (Ky. 2019). But the nondelegation doctrine is no bar if the General Assembly has created "protecti[ons] against unnecessary and uncontrolled discretionary power." *Id.* at 683 (cleaned up); *accord Beshear v. Acree*, 615 S.W.3d 780, 809–12 (Ky. 2020).

CBE's assertion that a public charter school's board of directors possesses unfettered discretion goes nowhere. As discussed above, guardrail after guardrail is built into HB 9. To recap: Board members swear an oath under state law. They are subject to removal under state law. They are subject to oversight by the authorizer—a government official or body. The classroom experience builds in further accountability. Certified teachers are a must. The compulsory-attendance requirements of state law must be followed. State performance measures apply. And state tests must be taken. All these measures hem in the discretion of a public charter school's board of directors, thus bringing HB 9 well within the bounds of Kentucky's nondelegation doctrine.

D. Section 59 of the Constitution

CBE lastly claimed below that the pilot project created by HB 9 constitutes special or local legislation that violates Section 59 of the Constitution. Vol. I, R. 17–18. That contention fails for at least two reasons. But even if the Court disagrees, the remedy is to sever the pilot project from HB 9.

1. Start with a quick summary of the pilot program. The General Assembly established it "to study the impact of public charter schools within the common school system." KRS 160.15911(1). In general, the pilot project required two authorizers, by July 1, 2023, to "solicit, review, and approve at least one (1) charter application . . . within the authorizer's jurisdiction that serves as an urban academy." *Id.* at (3). One authorizer was to be a "school board of a county school

district located in a county with a consolidated local government." *Id.* at (2)(a). The other was to be "the board of regents of Northern Kentucky University." *Id.* at (2)(b). But HB 9 gave NKU's board of regents discretion to decline to become an authorizer, *id.*, at which point "a collective of metropolitan school boards . . . located in a county that contains four (4) or more local school districts shall become a substitute pilot project authorizer," *id.* at (4)(a). If that contingency occurs, the collective must "solicit, review, and approve at least one (1) charter application within the authorizer's jurisdiction that serves as an urban academy" by July 1, 2024. *Id.* at 4(c).

To state the obvious, the initial deadlines in the pilot program are now past. And HB 9 provides no direction about what to do if, as here, a judicial injunction prevents standing up the pilot program by the statutorily required deadlines. So there's a reasonable argument that CBE's challenge to the pilot program has become moot. *See Beshear v. Goodwood Brewing Co., LLC*, 635 S.W.3d 788, 797 (Ky. 2021) ("Our courts have long recognized that a moot case is one which seeks to get a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy." (cleaned up) (citation omitted)).

2. Even if CBE's claim remains live, HB 9 does not violate Section 59. Under *Calloway County Sheriff's Department v. Woodall*, "the appropriate test is whether the statute applies to a particular individual, object or locale." 607

S.W.3d 557, 573 (Ky. 2020). Below, CBE claimed that the pilot program's focus on two allegedly "particular" authorizers implicates *Woodall*. Even assuming that's correct,[12] HB 9's pilot program is not special legislation for two reasons.

First, although the pilot program is narrowly drawn, HB 9's charter school program applies statewide. An appropriate authorizer can approve a charter application anywhere in the Commonwealth. KRS 160.1590(15)(a). And local school boards throughout the Commonwealth can collaborate to jointly authorize a public charter school. KRS 160.1590(15)(b). Thus, what HB 9's pilot program required is otherwise allowed anywhere in Kentucky. This keeps HB 9 consistent with *Woodall*. *Cameron*, 628 S.W.3d at 77 (finding no Section 59 violation because "the legislation applies statewide").

Second, the pilot program is not special or local legislation because it is not the type of law to which Section 59 applies. That constitutional section, *Woodall* held, "is rooted in legislative efficiency." 607 S.W.3d at 570–71. Put differently, Section 59 was ratified to "put an end" to the General Assembly passing

[12] As written, HB 9 singled out NKU's board of regents. KRS 160.15911(2)(b). But the NKU board exercised its option to decline to become an authorizer in the pilot project. *NKU Board of Regents Will Let Deadline Pass on Option to Authorize Charter School*, Northern Kentucky University (Dec. 13, 2022), https://perma.cc/T7CU-SPJS. And the rest of the pilot program applies to an open class consistent with *Woodall*. The Commonwealth notes that the Court will soon hear oral argument in a matter that implicates this very issue. *Coleman v. Jefferson Cnty. Bd. of Educ.*, No. 2023-SC-0498 (Ky.) (oral argument scheduled for Aug. 14, 2024).

a "proliferation" of laws addressing "exceedingly mundane and trivial matters unworthy of state legislative consideration." *Id.*; *accord* Laurance B. VanMeter, *Reconsideration of Kentucky's Prohibition of Special & Local Legislation*, 109 Ky. L.J. 523, 577 (2021) (explaining that "[f]rom a high-level view" the test under Section 59 "emphasize[s] a legislative efficiency objective"). So at bottom, Section 59 guards against "legislative inefficiency and wasted time" by the General Assembly. *Woodall*, 607 S.W.3d at 570.

HB 9's pilot program is nothing like the inefficient laws that prompted Section 59. Instead, because the pilot program facilitates real-time review and oversight by the General Assembly, it is a model of legislative efficiency. More to the point, the legislature did not pass HB 9 and then forget about it. The pilot project is a time-limited demonstration "to study the impact of public charter schools within the common school system." KRS 160.15911(1). To accomplish that end, HB 9 required each authorizer in the pilot program, for each year the pilot program is in force, to "submit an annual report" to a legislative committee. *Id.* at (5). That is to say, the pilot program was designed to give the General Assembly real-world feedback over a short time horizon to consider HB 9's efficacy. That is good government, and it promotes Section 59's goal of legislative efficiency.

HB 9 is not the first time the Commonwealth has approached a policy issue by testing a pilot project. That's how Kentucky's family courts came about.

A task force created by the legislature recommended that this Court "establish by rule, a pilot project for the 1990–92 biennium with at least one urban and one rural location and that the General Assembly fund the project." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 681 (Ky. 1994). This Court rejected various constitutional challenges to the family-court pilot program. It reasoned that "[t]he project is based on the *temporary* assignment of district and circuit judges as special judges to serve in a *temporary* capacity." *Id.* at 683 (emphasis added). And it blessed the judiciary and the General Assembly jointly "analyzing the methods to make a system of government including the administration of judicial matters more effective." *Id.* at 686. This careful study of an important issue bore fruit. It led to the Commonwealth's "move[] toward a unified family court, a court specializing in, and with jurisdiction to address, a broad array of legal problems confronting families." *Morgan v. Getter*, 441 S.W.3d 94, 105 (Ky. 2014) (citation omitted); *see also St. Luke Hosps., Inc. v. Commonwealth, Cabinet for Health & Fam. Servs., Office of Certificate of Need*, 254 S.W.3d 830, 832, 834 (Ky. App. 2008) (rejecting a pre-

Woodall special-legislation challenge to a "pilot project" that applied to "one hospital in eastern Kentucky and one hospital in western Kentucky").

3. If the Court finds that HB 9's pilot project violates Section 59, the should simply sever the pilot program from the larger statute, rather than affirm the judgment below.

In Kentucky, the "well-established rule [is] that portions of a statute which are constitutional ma[y] be upheld while other portions are eliminated as unconstitutional." *Ky. Mun. League v. Commonwealth Dep't of Lab.*, 530 S.W.2d 198, 200 (Ky. 1975). Although Kentucky has a catch-all severability statute, KRS 446.090, HB 9 has its own severability clause. It states:

> If any provision of this Act or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

2022 Ky. Acts ch. 213, § 16.

Under HB 9's severability clause, the question is whether the rest of HB 9 "can be given effect" without the pilot program. It can. The pilot program is encompassed in a single section of HB 9. KRS 15.1911. With or without that section, the rest of the statute can operate as written. In fact, independent of the pilot program, HB 9 empowers "any authorizer [to] authorize an unlimited number of public charter schools." KRS 160.1591(3). HB 9's pilot program is therefore plainly severable from the remainder of the law.

CONCLUSION

The Court should reverse the judgment below and allow Kentucky families to finally benefit from public charter schools.

Respectfully submitted,

RUSSELL COLEMAN
Attorney General of Kentucky

MATTHEW F. KUHN (No. 94241)
Solicitor General
JOHN H. HEYBURN (No. 100756)
Principal Deputy Solicitor General
SARAH N. CHRISTENSEN (No. 100580)
Assistant Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Matt.Kuhn@ky.gov
Jack.Heyburn@ky.gov
Sarah.Christensen@ky.gov
(502) 696-5300

Counsel for the Commonwealth of Kentucky

WORD-COUNT CERTIFICATE

This brief complies with the word limit of RAP 31(G)(3)(a) because, excluding the parts of the brief exempted by RAP 15(D) and 31(G)(5), this brief contains 12,572 words.