Tendered

FILED

NOV 21 2024

CLERK
SUPREME COURT

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

Court of Appeals
No. 2024-CA-0051

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

REPLY 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.Cohen@ky.gov

Counsel for the Commonwealth of Kentucky

Certificate of Service

I certify that a copy of this brief was served on November 4, 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, 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 The record on appeal was not withdrawn.

Matthew F. Kuhn

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

In a typical challenge to the constitutionality of a Kentucky statute, the parties debate whether the statute as written violates the Kentucky Constitution. This case is different. CBE's constitutional arguments depend on mischaracterizing House Bill 9—on making the law something it's not. According to CBE, the public charter schools authorized by HB 9 can serve only the affluent, can utilize an admissions lottery to accomplish this goal, and can do so without accountability. But under HB 9's clear terms, public charter schools are to target those students who are most in need, can use an admissions lottery only when student demand exceeds available desks, and are accountable to a local body or official, to parents, and ultimately to the Kentucky General Assembly. The Court should correct CBE's mischaracterizations and uphold HB 9.

I. Public charter schools are common schools.

Since the Kentucky Constitution was ratified, the General Assembly has had the responsibility to "provide for an efficient system of common schools throughout the State." Ky. Const. § 183. In passing HB 9 to provide for and fund public charter schools, the General Assembly acted on this constitutional mandate. Although HB 9 seeks to improve on the status quo, the current system of common schools is succeeding in many ways. But given the overriding

importance of public education, the General Assembly appropriately recognized that there is always room for improvement.

For example, for the 2023–2024 school year, only 35 percent of students at the high school level in Jefferson County scored proficient or distinguished in reading. Katrina Nickell & Sam Draut, *Kentucky test data shows improvement in some areas, JCPS reading and math scores slightly decline*, WDRB.com (Oct. 4, 2024), https://perma.cc/7ZF8-EPQ4. These students' math scores were no better: Only 26 percent scored proficient or distinguished in math. And almost half of them (49 percent) scored at the lowest level for math. *Id.* An amicus brief submitted by a former high school teacher of the year in JCPS explains well how HB 9 endeavors to improve these outcomes. In his view, HB 9 "would provide additional educational alternatives that would enhance academic performance for those students [in Jefferson County] struggling in the present system; particularly students of color and financially challenged families." Jones Amicus at 7.

For this simple reason, CBE could not be more wrong (at 2) to label HB 9 an "assault" on the common-school system. No doubt, HB 9 seeks to improve upon our current system of public education. But the General Assembly's continuing efforts in this regard follow from *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989). To fail to act is what *Rose* prohibits. When it comes to public education in Kentucky, the status quo should never be good enough.

A. Public charter schools are open to all comers and endeavor to serve those students most in need.

CBE first argues (at 20) that public charter schools "are not open to all students." That assertion is untenable. "[A]ny child who is eligible for attendance in a public school in Kentucky" can attend a public charter school. *See* KRS 160.1590(18). No common school can accept an unlimited number of students. After all, any given common school has only so many desks. And some of our common schools in Kentucky—primarily magnet schools—already utilize an admissions lottery. COK Op. Br. at 16–19.

CBE counters (at 20–21, 42) that a hypothetical public charter school might choose to admit only affluent students or discourage students with special needs or English-language learners from attending. CBE bases this speculation on the provision in HB 9 allowing a public charter school to select a "targeted student population and the community the school hopes to serve." KRS 160.1593(3)(a). But CBE's assertion requires ignoring other parts of HB 9. It is a cardinal rule of statutory interpretation that a statute "must be read as a whole." *Richardson v. Louisville/Jefferson Cnty. Metro Gov't*, 260 S.W.3d 777, 779 (Ky. 2008). Providing a superior education to those Kentucky students who are most in need is written into the DNA of public charter schools. KRS 160.1591(1)(c), (2)(c), (2)(e), (5)(e); KRS 160.1593(3)(b), (3)(c)2, (3)(v); KRS 160.1594(2), (7)(c). CBE cannot plausibly argue that one part of HB 9 allows one thing while multiple

other parts of the same law foreclose such action. Read as a whole, HB 9 is about helping those students who are most in need. CBE is therefore correct to acknowledge (at 4) that "[t]he stated purpose of the charter schools funded under HB 9 is to reduce socioeconomic, racial, and ethnic achievement gaps."

In effect, CBE is arguing that public charter schools are not common schools because a hypothetical public charter school might try to violate the statute's clear terms. Speculation about unlawful activity is not a reason to declare HB 9 unconstitutional. If CBE's speculation ever comes to pass, which is doubtful given HB 9's unambiguous language, there are several ways to ensure HB 9 is followed. Aside from the enforcement mechanisms built into HB 9 (discussed below), the Attorney General can bring an action to ensure that HB 9 is followed to the letter. *See Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016) ("[T]he Attorney General has not only the power to bring suit when he believes the public's legal or constitutional interests are under threat, but appears to have even the duty to do so.").

Like the circuit court, CBE makes much (at 20) of the fact that public charter schools can utilize an admissions lottery. But they can do so only if the number of students seeking to attend a public charter school exceeds the school's capacity. KRS 160.1592(3)(q). That is to say, an admissions lottery is an option only if an abundance of parents want their children to attend a public charter school. Such a surplus is not evidence of unconstitutionality. It shows that HB 9

in fact helps "provide for an efficient system of common schools" under Section 183.

CBE notes (at 20) that HB 9 allows an admissions lottery to account for the "targeted student population and service community." KRS 160.1592(3)(q). But CBE just needs to read further in the statute. The very same provision contains a failsafe that the admissions lottery must be done "without regard to ethnicity, national origin, religion, sex, income level, disabling condition, proficiency in the English language, or academic or athletic ability." *Id.* And if that weren't enough, HB 9's nondiscrimination provision reiterates the same point. *Id.* at (15) ("A public charter school shall not discriminate against any student, employee, or any other person on the basis of ethnicity, religion, national origin, sex, disability, special needs, athletic ability, academic ability, or any other ground that would be unlawful if done by a public school."). So CBE's suggestion that a public charter school might use an admissions lottery as a backdoor way to serve the well-to-do is at odds with HB 9.

CBE does not dispute that some common schools in Kentucky—primarily magnet schools—already use an admissions lottery to determine who may attend. COK Op. Br. at 17–18, 30–31. Instead, CBE responds (at 37) that for a student who is denied admission to a magnet school, "the common school district remains responsible for educating that child." Of course, the same is true for a student who cannot attend a public charter school because of too many

students wishing to attend. All in all, CBE cannot distinguish public charter schools from common schools like duPont Manual High School in Louisville and the School for the Creative and Performing Arts (or SCAPA) in Lexington.

B. The Constitution does not require control by local school boards.

CBE asserts (at 25–29) that every common school must be controlled by a locally elected school board. But CBE does not point to any language in the Constitution that requires control by local school boards. This inability to root its argument in the Constitution's text matters, given that the educational provisions in the Constitution (Sections 183 through 189) are very specific. Yet those provisions *do not even mention* local school boards. That's why this Court recognized that "the Constitution does not provide for the creation of local boards of education." *Yanero v. Davis*, 65 S.W.3d 510, 526 (Ky. 2001). And it's why this Court's predecessor held that "school districts are creatures of the legislature, and the legislature has the power under section 183 of the Constitution, to alter them or even do away with them entirely." *Bd. of Educ. of Fayette Cnty. v. Bd. of Educ. of Lexington Indep. Sch. Dist.*, 250 S.W.2d 1017, 1019 (Ky. 1952). If the Constitution does not provide for local school boards, it cannot require that every common school be overseen by such a board.

With the constitutional text and caselaw so clearly against it, CBE retreats to caselaw discussing the old trustee system for overseeing common schools. It primarily cites *Sherrard v. Jefferson County Board of Education* for the proposition that

a common school was "taught in a district laid out by authority of the school laws, under the control of trustees elected under those laws, by a teacher qualified according to law to teach." 171 S.W.2d 963, 966 (Ky. 1942) (quoting *Pollitt v. Lewis*, 108 S.W.2d 671, 673 (Ky. 1937)). But this sentence does not require local control as a constitutional matter. In fact, the sentence describes the "control of trustees." Yet trustees haven't been used in Kentucky for some time. LaFontaine Op. Br. at 20–21. So if the "control" discussed in *Sherrard* is constitutionally mandated, Kentucky's school laws have long been unconstitutional.

Sherrard and the cases on which it relies are best understood as discussing the statute that previously defined a common school. Indeed, that's how *Sherrard* described the sentence on which CBE places so much weight. 171 S.W.2d at 966 ("If we look to the legislation on this subject prior to the adoption of the present constitution . . . ." (quoting *Pollitt*, 108 S.W.2d at 673)). Moreover, local control of common schools was not a contested issue in *Sherrard* or *Pollitt*. COK Op. Br. at 23–24. *Sherrard* and *Pollitt* also relied heavily on *Collins v. Henderson*, 74 Ky. 74 (Ky. 1874). But *Collins* arose under Kentucky's prior constitution, and later caselaw confined the decision to its facts. *Dodge v. Jefferson Cnty. Bd. of Educ.*, 181 S.W.2d 406, 408 (Ky. 1944) ("Th[e *Collins*] opinion, as years went by, has been considerably liberalized though it may be conceded that the principles announced and applied to the facts of the case are sound."), ("It too[k] some time to pass from the custom, or duty placed on trustees . . . .").

Even though local control by a school board is not constitutionally mandated, HB 9 requires substantial local involvement and oversight. Outside of a consolidated local government or urban county government (at present, everywhere except Jefferson and Fayette counties), an "authorizer" of a public charter school is a local school board or collection of such boards. KRS 160.1590(15)(a), (b). And in Jefferson County and Fayette County, the authorizer is the mayor or chief executive officer, respectively. *Id.* at (15)(c), (d). So HB 9 always requires meaningful local involvement. CBE downplays this local collaboration by pointing out (at 7) that for some school districts (those with an enrollment of 7,500 or fewer students) a charter application "shall include a memorandum of understanding with the district of location endorsing the application." KRS 160.1593(3)(f)3. But all this provision shows is that in smaller school districts HB 9 requires additional local buy-in.[1]

Public charter schools are not authorities unto themselves. HB 9 builds in real oversight. All public charter schools must comply with a charter contract,

[1] CBE uses this local-support provision to argue (at 42) that HB 9 violates the substantial-uniformity aspect of *Rose* by offering larger school districts a benefit that smaller school districts lack. But this argument gives away CBE's case, for it acknowledges that public charter schools are in fact desirable to Kentucky parents. That aside, the Commonwealth has already explained why HB 9 does not create substantial-uniformity problems. COK Op. Br. at 28–33.

and the local authorizer must oversee compliance with it.[2] KRS 160.1594(1)(g). A charter contract exhaustively describes the duties of a public charter school. KRS 160.1596(1)(c)–(e). The local authorizer can decline to renew the charter contract or even "take immediate action to revoke" it in specified circumstances. KRS 160.1598(6), (7); KRS 160.1594(1)(h). Parents and students also hold public charter schools accountable. If a given public charter school is not cutting it, parents will not send their children to the school. And parents are empowered to keep tabs on what's happening at public charter schools. At least two parents must serve on a public charter school's board of directors. KRS 160.1592(7)(b). All directors are subject to removal under state law. *Id.* at (4). And public charter schools are subject to the Open Records Act and the Open Meetings Act. *Id.* at (3)(k).

CBE's assertion (at 27) that there is no mechanism to enforce the charter contract during its term is simply incorrect. HB 9 provides that the authorizer and the public charter school "shall" establish a process for the authorizer "to provide *ongoing* oversight, including a process to conduct annual site visits." KRS 160.1596(1)(c)6 (emphasis added). The school and the authorizer also must establish "[t]he process and criteria the authorizer will use to *annually monitor* and

[2] CBE notes (at 12) that an authorizer receives a specified amount of funds "as an authorizer fee." KRS 160.1596(10)(a). This provision drives home that the authorizer has a time-consuming oversight role to play.

evaluate the overall academic, operating, and fiscal conditions of the public charter school, including the process the authorizer will use to oversee the correction of any deficiencies found in the annual review." *Id.* (1)(c)8 (emphasis added); *accord* KRS 160.1592(3)(o). Indeed, a local authorizer is not doing its job if it fails to "[m]onitor the performance and compliance of public charter schools according to the terms of the charter contract." KRS 160.1594(1)(g). Under HB 9, every charter contract must detail "[t]he specific commitments of the public charter school authorizer relating to its obligations to oversee, monitor the progress of, and supervise the public charter schools." KRS 160.1596(1)(c)7.

Despite all the oversight mechanisms in HB 9, CBE speculates that public funds might be misused by public charter schools. As evidence, it collects (at 27 n.18) news stories of bad actors at public charter schools not following the applicable state law. Make no mistake, HB 9 is meant to be followed—the same as any other Kentucky statute. The real metric of the success of public charter schools, however, is not news coverage about what CBE appropriately calls (at 27) "fraudsters and other bad actors." The best indicator is that nearly every other state in the country has chosen to allow public charter schools. COK Op. Br. at 1. As the amicus who is a former JCPS high school teacher of the year reports, the "academic benefits" of public charter schools "in urban areas, and for underrepresented populations in particular, has been demonstrated repeatedly in the states that have adopted public charter schools." Jones Amicus at 6.

C. Public charter schools are part of their local school districts.

CBE takes issue (at 38) with the General Assembly integrating public charter schools into the existing system of school districts by statute. But doing so is the General Assembly's prerogative. "The common school system of this state is defined by statute . . . ." *Agric. & Mech. Coll. v. Hager*, 87 S.W. 1125, 1126 (Ky. 1905). Given that the Constitution requires the General Assembly to "provide for an efficient system of common schools," Ky. Const. § 183, it follows that the legislature can alter the common-school system as it deems appropriate as long as it remains faithful to *Rose*. Indeed, as noted above, this Court's predecessor held that "school districts are creatures of the legislature, and the legislature has the power under section 183 of the Constitution, to alter them or even do away with them entirely." *Bd. of Educ. of Fayette Cnty.*, 250 S.W.2d at 1019; *accord* COK Op. Br. at 7 (collecting other caselaw for this point). Thus, the General Assembly necessarily has the authority to alter school districts by statute to include public charter schools.

To be clear, public charter schools are common schools for reasons beyond the General Assembly simply saying so in statute. The Kentucky Board of Education is quite wrong to characterize (at 3) the Commonwealth's position as "whatever the General Assembly says is a common school[] must therefore be a common school." The General Assembly took great care in integrating public charter schools into the existing system. Across metric after metric, public

charter schools are just like other common schools. They are open to all students. *See* KRS 160.1590(18). They are taught by certified teachers. KRS 160.1592(3)(d); KRS 160.1590(16). They must follow Kentucky's compulsory-attendance laws and are subject to the same instructional-time requirements. KRS 160.1592(3)(c), (3)(m). They must meet the same "student performance standards" as other common schools. *Id.* at (3)(f). And students must take the same assessment tests. *Id.* at (3)(g). In short, the General Assembly did not simply assert that public charter schools are common schools and move on. It went to great lengths to build them into the existing system of common schools.

CBE is quick to point out (at 3) that public charter schools are exempt from state law in some respects. That is true. KRS 160.1592(1). But that is by design. HB 9 gives public charter schools the flexibility to design learning experiences that target those students who are most in need. The Kentucky Constitution is not a straightjacket that requires a system of copycat schools across the state. It requires "an efficient system of common schools throughout the State." Ky. Const. § 183. An "efficient system" not only allows for, but *needs*, different approaches to learning to meet students where they are. The diversity of our students demands an equally diverse system of public education—as Kentucky's existing system of magnet schools and districts of innovation shows. COK Op. Br. at 28–33.

II. The proposed constitutional amendment is not evidence that HB 9 is unconstitutional.

At the end of its brief, CBE argues (at 53–54) that the proposed constitutional amendment that Kentucky voters will vote on in the 2024 elections is evidence of the "General Assembly's perception that HB 9 cannot survive a test of its constitutionality without the passage of Amendment 2."[3] CBE's implication that the General Assembly acted in bad faith by passing HB 9 overlooks first principles about how the legislative branch operates. The legislators who passed HB 9 all swore an oath to "support" Kentucky's Constitution. Ky. Const. § 228. To accept CBE's suggestion is to conclude that those legislators violated their oath of office by passing a law that they knew is unconstitutional. This Court, however, must presume that HB 9 is constitutional. *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 661 (Ky. 2023). And it must presume that the General Assembly acted in good faith by passing HB 9. *See Taylor v. Beckham*, 56 S.W. 177, 181 (Ky. 1900).

Even setting those presumptions aside, CBE's timing doesn't add up. The General Assembly first authorized public charter schools in 2017—a full seven years before it placed the constitutional amendment on the ballot. 2017 Ky. Acts ch. 102. And it passed HB 9 two legislative sessions before submitting the

[3] The Commonwealth notes that it is filing this brief the day before election day, so the outcome of this vote is not yet known.

constitutional amendment to the people. 2022 Ky. Acts ch. 213. Given these gaps, the better view is that the constitutional referendum responds to this Court's late 2022 decision in *Commonwealth ex rel. Cameron v. Johnson*, 658 S.W.3d 25 (Ky. 2022). In fact, that decision invited the General Assembly to allow the people to vote to constitutionally authorize the law at issue. *Id.* at 39 ("[I]f the legislature thinks the people of Kentucky want this change, [it] should place the matter on the ballot." (citation omitted)). The law invalidated in *Johnson* is altogether unlike HB 9. No one in *Johnson* disputed that the law allowed money to go to noncommon schools. *See id.* at 37, 40. If anything, *Johnson* supports the constitutionality of HB 9 by defining common schools in a way that encompasses public charter schools. *Id.* at 36 n.10 ("The term has always been understood to encompass" "an elementary or secondary school of the state supported in whole or in part by public taxation." (citation omitted)).

At bottom, whether Kentucky voters approve or disapprove the proposed constitutional amendment does not change the ultimate result here. With or without the proposed amendment being added to the Constitution, HB 9 is perfectly constitutional. If the proposed amendment succeeds, the parties can debate the effect of the new language, as CBE notes (at 54). If the proposed amendment fails, this Court's task does not change at all. The effect of a failed constitutional amendment would be that no new language is added to the Constitution. So the Court's task would be the same: to interpret the existing language in the

Constitution to decide whether HB 9 accords with it. *See Bone Shirt v. Hazeltine*, 700 N.W.2d 746, 753 n.5 (S.D. 2005) ("Under our system of government, law is not made by defeating bills or proposed constitutional amendments." (citation omitted)).

CONCLUSION

The Court should reverse and uphold Kentucky's public-charter-school law.

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.Cohen@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)(b) because, excluding the parts of the brief exempted by RAP 15(D) and 31(G)(5), this brief contains 3,611 words.

Matthew J. K.