COMMONWEALTH OF KENTUCK
SUPREME COURT OF KENTUCKY
CASE NO. 2024-SC-0022

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

v. Court of Appeals, Case No. 2024-CA-0051
Franklin Circuit Court, Case No. 23-CI-00020

COUNCIL FOR BETTER EDUCATION, INC., et al. — APPELLEES

BRIEF OF APPELLEES COUNCIL FOR BETTER EDUCATION, INC., JEFFERSON COUNTY BOARD OF EDUCATION, AND DAYTON INDEPENDENT BOARD OF EDUCATION[1]

Byron E. Leet
bleet@wyattfirm.com

Mitzi D. Wyrick
mitziwyrick@wyattfirm.com

Sean G. Williamson
swilliamson@wyattfirm.com

Wyatt, Tarrant & Combs, LLP
400 West Market Street, Suite 2000
Louisville, Kentucky 40202
502.589.5235

Counsel for Appellees Council for Better Education, Inc., Jefferson County Board of Education, and Dayton Independent Board of Education

(*certificate of service follows on next page*)

[1] Other than the case information appearing on the cover page, this Brief is identical to Appellees' Brief filed in the related appeal of Gus LaFontaine (No. 2024-SC-0024).

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2024, this Brief for Appellees was filed with the Clerk of Court using the e-filing system, which will transmit notice of electronic filing to counsel of record, and was served via email upon the following: Matthew F. Kuhn, John H. Heyburn, Sarah N. Christensen, Office of Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601; Paul E. Salamanca, 279 Cassidy Avenue, Lexington, Kentucky 40502; and Donald J. Hass and Todd G. Allen, Kentucky Department of Education, 300 Sower Boulevard, Fifth Floor, Frankfort, Kentucky 40601. I further certify that this Brief was served via U.S. mail, postage prepaid, upon the following: Clerk, Court of Appeals, 669 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40602; and Hon. Phillip J. Shepherd, Franklin Circuit Court, 222 St. Claire Street, Frankfort, Kentucky 40601. Appellees certify that they have not withdrawn the record on appeal.

/s/ Sean G. Williamson
Sean G. Williamson

INTRODUCTION

During the 2022 regular session, the General Assembly enacted House Bill 9 ("HB 9"), codified at KRS 160.1590–160.1599, creating for the first time in this state's history a scheme to funnel taxpayer money to charter schools. HB 9 diverts state and local revenue from public school districts under the control and oversight of locally elected school officials to privately operated charter school boards with no accountability to the voters who paid the taxes in the first place. Not only do charter schools lack any electoral accountability, they are not obligated to educate any and all students with the public dollars they receive. Instead, charter schools pick and choose students according to their own defined target populations. In this case, the Court must decide whether HB 9's funding of these new charter schools, without any voter approval, is consistent with the protections afforded to "common schools" by the Education Provisions and other terms of the Kentucky Constitution. Appellees submit that HB 9 is unconstitutional.

STATEMENT CONCERNING ORAL ARUMENT

The constitutional questions presented in the Attorney General's appeal (No. 2024-SC-0022) and the appeal of Gus LaFontaine (No. 2024-SC-0024) are of profound importance to Kentucky's system of common schools and, therefore, warrant oral argument. Because those related appeals arise from the same circuit court action and raised identical issues, Appellees further request that the Court consolidate the two appeals for oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

1. The Protection of Common School Funding by Kentucky Courts

"[E]ducation is a fundamental right in Kentucky." *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 206 (Ky. 1989). It is "essential to the welfare of the citizens of the Commonwealth, *id.*, and "*perhaps the most important function of state and local governments*," *id.* at 190 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added)). The Kentucky Constitution of 1891 guarantees the people this fundamental right to education by obligating the General Assembly to "provide for an efficient system of common schools throughout the State." Ky. Const. § 183.

The framers understood that over time the General Assembly might buckle to private interests and other passing political pressures seeking to chip away at the foundations of the common schools and their financial support. To prevent the erosion of Kentucky system of universal public education, they designed the Education Provisions of the Constitution, Ky. Const. §§ 183–189, to protect the common schools and their funding from future legislative manipulation. Among those protections is Section 184, which mandates that "[n]o sum shall be raised or collected for education *other than in common schools* until the question of taxation is submitted to the legal voters" *Id.* § 184 (emphasis added). Section 186 further provides that "[a]ll 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*." *Id.* § 186 (emphasis added). The Education Provisions ensure that the state cannot "embark in *any further partnership educational enterprises*,

at least until the matter had been first approved by the people." *Agricultural & Mech. Coll. v. Hager*, 87 S.W. 1125, 1127 (Ky. 1905) (emphasis added).

The history of Kentucky law demonstrates the wisdom of the framers as the General Assembly has repeatedly, and unsuccessfully, attempted to depart from its obligations to the common schools, which our courts have long understood to mean "'school[s] taught *in a district* laid out by authority of the school laws, under the control of trustees *elected* under those laws.'" *Sherrard v. Jefferson Cnty. Bd. of Educ.*, 171 S.W.2d 963, 966 (Ky. 1942) (quoting *Pollitt v. Lewis*, 108 S.W.2d 671, 673 (Ky. 1937)) (emphasis added). The General Assembly has authorized boards of education to spend common school funds on junior colleges, *Pollitt*, 108 S.W.2d at 674; it has tried to purchase textbooks for private schools, *Fannin v. Williams*, 655 S.W.2d 480, 484 (Ky. 1983); and it has offered to reimburse taxpayers for contribution to private schools with a nearly dollar-for-dollar tax credit, *Commonwealth ex rel. Cameron v. Johnson*, 658 S.W.3d 25, 37–41 (Ky. 2022). But Kentucky courts have always been the bulwark of the Constitution, defending the common schools against those unconstitutional attacks.

2. House Bill 9—the Latest Attack on Kentucky's Common Schools

Enacted in the 2022 regular session, House Bill 9 ("HB 9"), codified at KRS 160.1590–160.1599, is the latest legislative assault on common schools. HB 9 is an unconstitutional funding scheme that explicitly appropriates state funds and even redirects local tax revenue to support a system of charter schools autonomous from Kentucky's common schools. Although the statutory framework for charter schools has existed in Kentucky since 2017, the General Assembly never previously chose to spend public money on them. That changed on April 13, 2022, when the Kentucky House of Representatives and Senate narrowly passed HB 9, "AN ACT relating to educational

opportunities and making an appropriation therefor," overriding the Governor's veto with votes of 52-46 and 22-15, respectively.[2] HB 9 amends the existing charter school statutes to include a mechanism to fund charter schools by diverting public dollars from local school districts. *See* KRS 160.1596.

a. The Autonomy of Charter Schools from the Common School System

The General Assembly has labelled charter schools "part of the state's system of public education." KRS 160.1592(1). This label, however, is nothing more than a thin disguise to allow privately controlled schools to operate at the expense of the taxpayers. HB 9's charter schools discard the traditional structure and public accountability of Kentucky's common schools, including meaningful oversight by the locally elected school officials responsible for levying tax dollars from local voters to support their community's common schools. Charter schools are "exempt from all statutes and administrative regulations applicable to the state board, a local school district, or a school," except for "the same health, safety, civil rights, and disability rights requirements as are applied to all public schools." *Id.* Otherwise, charter schools adhere to their own separate statutory scheme in KRS 160.1560 to 160.1599 and 161.141. *Id.*

A charter school must be governed by an "independent board of directors," not elected by the taxpayers within the local public school district, but instead selected by a procedure the proposed charter school operator deems appropriate in its own application. KRS 160.1590(5), (14)(c). This independent board of directors must include at least two parents of students attending the charter school, who, in turn, may receive an enrollment

[2] *See* House Bill 9, 2022 Ky. Acts ch. 213, https://apps.legislature.ky.gov/law/acts/22RS/documents/0213.pdf.

preference to facilitate their attendance. KRS 160.1591(5)(d), 160.1592(7)(b). Each charter school board of directors is granted "autonomy over decisions, including but not limited to matters concerning finance, personnel, scheduling, curriculum, and instruction." KRS 160.1590(14)(b).[3] The charter school board is described as the "*final authority* over policy and operational decisions." KRS 160.1597(6) (emphasis added). A charter school board of directors may even choose to partner with a private "education service provider" for "educational design, implementation, or comprehensive management," effectively outsourcing the provision of nominal public education to a private, and potentially for-profit, entity. KRS 160.1590(8), 160.1592(3)(p)(3).

b. HB 9's Illusory Claim to Reducing the Achievement Gap

The stated purpose of the charter schools funded under HB 9 is to reduce socioeconomic, racial, and ethnic achievement gaps, KRS 160.1591(1)(c), but this is a mere suggestion—not a mandate. The potential "authorizers" of charter schools (which, as discussed below, have no real power in this process) are "*encouraged to give preference* to applications that demonstrate the intent, capacity, and capability to provide comprehensive learning experiences to: (a) Students identified by the applicants as at risk of academic failure; (b) Students with special needs as identified in their individualized education program as defined in KRS 158.281; and (c) Students who seek career readiness education opportunities." KRS 160.1594(2) (emphasis added). Nothing in HB 9 requires charter schools to offer any specific programs or opportunities aimed at reducing achievement gaps or permits an authorizer to deny an application because the

[3] *See* KRS 160.1592(10) ("The board of directors shall be responsible for the operation of its public charter school, including but not limited to preparation of a budget, contracting for services, school curriculum, and personnel matters.").

proposed charter school fails to target the categories of students listed above. Likewise, charter schools are permitted to give an enrollment preference for students who qualify for free or reduced price meals and students who attend persistently low-achieving public schools, KRS 160.1591(5)(e), but they are in no way obligated to do so. Nor are charter schools otherwise required to enroll students affected by achievement gaps. Instead, the charter may define, for itself, "the targeted student population and the community the school hopes to serve." KRS 160.1593(3)(a).

Contrary to the stated purpose of creating "high-quality" charter schools to reduce achievement gaps, the General Assembly chose to impose only minimal education standards on charter schools. The high school course offerings of charter schools must simply meet the minimum required under KRS 156.160 for high school graduation. KRS 160.1592(3)(e). Charter schools are directed to design education programs that need be no more rigorous than the student performance standards adopted by the State Board. KRS 160.1592(3)(f). Charter school students need not participate in any increased level of performance assessment or instructional time beyond that applicable to their common-school counterparts. KRS 160.1592(3)(g), (m).

c. The Process for Establishing Charter Schools

Under HB 9, any "authorizer" may authorize "an unlimited number of public charter schools" beginning with the 2022-23 academic year. KRS 160.1591(3). HB 9 defines an "authorizer" to include a local school board of a local school district, which can approve charter applications within the boundaries of its district, and a collaborative of local school boards that forms to set up a regional charter school located in the area managed and controlled by those school boards. KRS 160.1590(15)(a)–(b). Upon

submitting written notice of intent to serve as an authorizer, the mayor of a consolidated local government or the chief executive officer of an urban-county government shall also be considered a charter school authorizer within their respective counties, *i.e.*, Jefferson County and Fayette County. KRS 160.1590(15)(c)–(d).

An application to establish a charter school may be submitted to an authorizer by teachers, parents, school administrators, community residents, public organizations, nonprofit organizations, or any combination of the foregoing. KRS 160.1593(1). Nothing in HB 9 precludes a for-profit entity from setting up what is, in practice, a non-profit subsidiary merely for purposes of organizing charter schools.

The charter school's targeted student population is not limited by the nonresident pupil policy adopted by the local public school district, including that district's decision not to allow nonresident pupil enrollment under KRS 158.120(1). Instead, the charter school's application must describe its own resident and nonresident enrollment policies. KRS 160.1593(3)(a). Thus, a charter school established in Jefferson County, or any other school district that generally declines to enroll out-of-district students, may enroll nonresident students and still draw its funding to educate them from the state and local revenues of a local public school district whose elected officials have expressly declined to use taxpayer dollars for that same purpose.[4]

An applicant must submit the proposed governance structure of the charter school, including the initial board of directors, the methods of appointment or election of the board of directors, and the organizational structure of the school with lines of authority and reporting. KRS 160.1593(3)(e). One of those required lines of reporting that must

[4] Jefferson County Board Policy 09.1222, Nonresident Students, TR 155.

be explained is how the charter school board of directors will interact with "any external organizations that will play a role in managing the school," *i.e.*, the private education service provider actually running the day-to-day operations of the charter school. *Id.*; *see* KRS 160.1590(8). A charter school using a private education service provider for "educational program implementation and comprehensive management" must include additional background information on the private operator and a "term sheet" containing the basic provisions of the private service contract. KRS 160.1593(4).

An applicant must plan to recruit at least 100 students *unless* the application is focused on serving special needs, at-risk students, or students seeking career readiness. KRS 160.1593(3)(f)(2). Contrary to Appellants' assertions, this provision is yet another indication that HB 9 does *not* require charter schools to enroll only the most vulnerable groups of students. If the charter school's capacity is insufficient to enroll all students who wish to attend, it is directed to conduct a random admissions lottery, but even this purportedly random lottery must be conducted "in accordance with targeted student population and service community" chosen by the charter school. KRS 160.1592(3)(q). The local public school district is prohibited from assigning any student for enrollment in a charter school. KRS 160.1592(4).

If the proposed charter school is located in a public school district with total school enrollment of 7,500 or less, the application must include a memorandum of understanding with the district of location endorsing the application. KRS 160.1593(3)(f)(3). No memorandum of understanding demonstrating the local public school district's endorsement of the proposed charter school is required if enrollment in the district of location exceeds 7,500. *Id.* In the 2020-21 school year

(which is the most recent data set available), only 16 of the 171 school districts in Kentucky had enrollments greater than 7,500 students: Boone, Bullitt, Christian, Daviess, Fayette, Hardin, Jefferson, Jessamine, Kenton, Laurel, Madison, Oldham, Pike, Pulaski, Scott, and Warren.[5] In addition, no memorandum of understanding is required if the application seeks to establish an urban academy within a county where the total enrollment of all independent public school districts is greater than 7,500. KRS 160.1593(3)(f)(3). Based on the same 2020-21 school year data, only the collective enrollment of the four independent school districts in Kenton County meets that definition.[6] The local school districts subject to this exemption may be compelled to authorize a charter school without their consent.

As authorizers, the local public school districts must establish annual timelines to "solicit, invite, accept, and evaluate applications." KRS 160.1594(1)(c). HB 9 establishes a low bar for charter school operators seeking approval. An authorizer *must* approve a charter school application if it finds that the application contains all of the required components, the application has the ability to operate the charter school in an "educationally and fiscally sound manner," and approval will likely improve student learning and achievement and further the purposes of KRS 160.1592. KRS 160.1594(7). Authorizers are directed to deny applications if they fail to meet the requirements of

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[5] *See* Kentucky Department of Education, Student and Enrollment Data During the 2020-21 and 2022-23 School Years, July Report for Cumulative SY2020-21 Data ("SY2020-21 Enrollment Data"), https://education.ky.gov/districts/enrol/Pages/COVID-19.aspx.

[6] Kenton County contains four independent school districts: Beechwood, Covington, Erlanger, and Ludlow. *See* SY2020-21 Enrollment Data, *supra* note 5.

KRS 160.1593 and 160.1594, or if the proposed charter school is "wholly or partly under the control or direction of any religious denomination." KRS 160.1594(1)(e).

If an authorizer identifies deficiencies in the application, it must allow the applicant a reasonable time to submit additional material or amendments, including allowing the applicant to request a sixty-day extension to seek technical assistance in curing deficiencies from the Kentucky Department of Education ("KDE") and Kentucky Board of Education (the "State Board"). *Id.*; *see* KRS 160.1595(1). Unless the applicant seeks such an extension, the authorizer must approve or deny the charter school application within sixty days of its filing. KRS 160.1594(5). HB 9 creates a presumption of approval in favor of charter schools. Any failure to act on a charter school application within sixty days of the application submission deadline is "deemed an approval by the authorizer." KRS 160.1594(6).

Approved charter school applications must be submitted to the KDE. KRS 160.1594(9). An applicant may appeal the authorizer's denial of a charter school application to the State Board. KRS 160.1595(2)(b). The State Board will overturn the authorizer's denial of the application and remand for approval merely upon finding that "the authorizer's decision was contrary to the best interest of the students or community and the application satisfies the statutory requirements." KRS 160.1595(2)(c)(3). HB 9's appeal process presumes that the State Board is more capable of determining whether a charter school is in the "best interests of the students or community" than the local board of education elected by the local community and responsible for levying and using that community's tax dollars. A charter school resulting from a successful appeal to the State Board must be jointly overseen by the local authorizer and State Board for at least the

first five years, and until the authorizer, State Board, and charter school agree that charter oversight may be provided solely by the local authorizer. KRS 160.1595(2)(c)(4).

Once an application receives final approval, the authorizer must enter into a charter contract with the independent board of the charter school addressing, among other things, the rights and duties of each party and funding which cannot be less than HB 9's prescribed formula. KRS 160.1596. Although HB 9 suggests that an authorizer will "[m]onitor the performance and compliance" of a charter school according to the charter contract, KRS 160.1594(1)(g), an authorizer has no leverage in negotiating the terms of the charter contract which cannot be "contradictory" to the extreme autonomy that HB 9 grants to the charter school's independent board. KRS 160.1596(1)(c)(11). If a charter school applicant disagrees with an authorizer's insistence on a particular term in the charter contract, the applicant may appeal the inclusion of that term to the State Board, claiming the "unilateral imposition of conditions." KRS 160.1595(2)(b). Certain terms, including enrollment caps and operational requirements that place "undue constraints" on the charter school, are deemed unilaterally imposed conditions. KRS 160.1596(1)(c)(11).

Throughout the charter contract's term, the charter school may frequently pursue changes to its provisions. At least twice per year, the authorizer must consider the charter school's proposed amendments to the charter contract. KRS 160.1592(20). HB 9 does not grant the authorizer this same luxury of periodically proposing amendments that the charter school is obligated to consider. If the authorizer declines a proposed amendment during the term of the charter contract, the charter school may immediately go over the head of the authorizer by appealing to the State Board. *Id.*

Moreover, the authorizer has no ability to enforce the charter contract or statutory requirements until the charter school comes up for renewal, which generally occurs at five-year intervals. KRS 160.1597(1), 160.1598(1). It is only at this late stage that HB 9 suggests that the authorizer may decline to renew a charter school if it "persistently failed" to correct material violations of its charter contract or the applicable statute after receiving fair and specific notice from the authorizer. KRS 160.1598(6)(a). The sole basis for an authorizer taking immediate action to revoke a charter contract is if "a violation threatens the health and safety of the students." KRS 160.1598(7). In the event of a nonrenewal or revocation, the charter school may appeal the authorizer's decision to the State Board. KRS 160.1595(2)(b). As the foregoing provisions demonstrate, the term "authorizer" as used in HB 9 is a misnomer, particularly for the largest school districts in the state which can have a charter school imposed upon them without any agreement or authorization whatsoever.

d. The Funding of Charter Schools by Diverting State and Local Tax Dollars from Common School Districts

A charter school draws its revenue from the state and local funding of the local public school district in which it is located, regardless of whether that school district serves as the authorizer. The school district is required to transfer to the charter school the amount that is proportional to the charter school's enrollment or average daily attendance in comparison with the overall district qualifying numbers for: Support Education Excellence in Kentucky ("SEEK") funds related to students' attendance and enrollment allocated to the district of location, at-risk students, exceptional children, and home and hospital instruction; any add-on or funding factors in the state budget; and any add-on or funding factors provided for by the KDE. KRS 160.1596(6)(a). Unless the

school district provides transportation to charter school students, it must also transfer state transportation funding to the charter school on a proportionate per pupil transported basis. KRS 160.1596(6)(c). The school district must provide the charter school, on a proportionate per pupil basis, with education funds allocated to the school district under KRS 157.440(1)(a) and (2)(a) or pursuant to any federal statute, as well as "[a]ll taxes and payments in lieu of taxes transferred to the district of location or levied and collected by the district of location." KRS 160.1596(6)(b). HB 9 even has a catchall provision requiring the school district to send the charter school "a proportionate per pupil share of any state moneys not otherwise identified in this section that is received by the school district of location." KRS 160.1596(13).

The authorizer may retain up to 3% of the funds allocated for transfer to the charter school as an authorizer fee. KRS 160.1596(10)(a). Of course, in the case of a public school district acting as an authorizer, this purported fee is made up of the school district's own funding which it would have retained absent a charter school. If the authorizer of the charter school does not include the local board of education, then the authorizer fee must be transferred from the school district to the authorizer, such as the mayor of a consolidated local government or the chief executive officer of an urban-county government. KRS 160.1596(10)(b). And if the State Board requires an authorizer to approve a charter school on appeal, the State Board receives 25% of the authorizer fee for the duration of its joint oversight of the charter school. KRS 160.1596(10)(c).

These funds must be transferred to the charter school throughout the school year according to a schedule established by the State Board. KRS 160.1596(11). The scheduled transfer dates must be within thirty days of the state disbursement of funds to

the school district. *Id.* If the public school district fails to transfer the funds as scheduled, for every five days late, it incurs a fine in an amount not less than 5% of the total funds per funding period to be transferred. *Id.* Those fines are then sent to the charter school affected by the delay. *Id.*

e. Charter School Pilot Project in Jefferson County and Northern Kentucky

HB 9 singles out Jefferson, Kenton, and Campbell Counties for participation in the Kentucky Public Charter School Pilot Project (the "Pilot Project"). The Pilot Project requires the creation of two charter schools, known as urban academies,[7] one in a county with a consolidated local government (Jefferson County) and another in a county containing four or more local school districts (Campbell and Kenton Counties). KRS 160.15911(2). These urban academies must be approved for a charter contract with a five-year term. KRS 160.15911(3), (4)(c). These obligatory authorizers under the Pilot Project must submit an annual report on the urban academies to the Interim Joint Committee on Education and the Interim Joint Committee on Appropriations and Revenue. KRS 160.15911(5). At the end of the initial charter contract term, the Pilot Project authorizers must renew the urban academies like any other charter school. KRS 160.15911(7).

The Jefferson County Board of Education (the "Jefferson County Board") must serve as the authorizer for the urban academy within the boundaries of its school district. KRS 160.15911(2). HB 9 directed that by July 1, 2023, the Jefferson County Board *must*

[7] An "urban academy" is a charter school that includes an enrollment preference for students who live in close proximity to the school as defined by the charter contract. KRS 160.1590(19).

solicit, review, and approve at least one charter school application. KRS 160.15911(3). To comply with HB 9, the Jefferson County Board released guidance on charter school applications, conducted a technical assistance information session, and set a timeline for the application process. The Jefferson County Board set January 23, 2023, as the deadline for charter school applications, but none were submitted. HB 9 makes no provision for how the Jefferson County Board should satisfy its obligations under the Pilot Project in the event no charter school application was filed.

HB 9 gave the Board of Regents of Northern Kentucky University (the "NKU Board") the option to authorize the urban academy in Campbell or Kenton County if it adopted a resolution by January 1, 2023, confirming its status as Pilot Project authorizer. The NKU Board, however, declined to participate in the Pilot Project. On December 13, 2022, the NKU Board held a special meeting during which its chair "shared his concerns that the language in HB 9 is not workable as it sits today," and the Board chose not to adopt a resolution to become a Pilot Project authorizer.[8]

In the absence of the NKU Board, HB 9 directs that a collective of metropolitan school boards composed of two members from each local board of a district within a county containing four or more school districts shall become a substitute Pilot Project authorizer. KRS 160.15911(4)(a)–(c). The Dayton Independent Board of Education (the "Dayton Independent Board") is compelled to participate in any such collective for Campbell County. Had HB 9 not been enjoined by the circuit court, the statute would

[8] Minutes of December 13, 2022 Special Meeting of NKU Board, TR 157 https://inside.nku.edu/content/dam/President/docs/Agenda-and-Minutes/2022/BOR%20Minutes%20-December%2013,%202022%20-%20Special%20Meeting.pdf.

have required this collective to solicit, review, and approve at least one charter school for Northern Kentucky by July 1, 2024. KRS 160.15911(4)(c).

3. Procedural History

On January 6, 2023, the Council for Better Education, Inc. ("CBE"),[9] the Jefferson County Board, and the Dayton Independent Board[10] filed suit in Franklin Circuit Court challenging HB 9 under Sections 2, 3, 29, 59, 171, 180, 181, 183, 184, and 186 of the Kentucky Constitution.[11] TR 1–102. The challenge sought declaratory and injunctive relief against the KDE Commissioner, as well as the State Board and its Chair, all of whom were charged with implementing HB 9. *Id.* The Attorney General intervened to defend HB 9—followed by Gus LaFontaine, a private school operator who submitted an application with the Madison County Board of Education to open a K–8 charter school. TR 205–07, 395–95. Mr. LaFontaine hopes to gain financially from HB 9's new funding scheme. He wanted to operate a charter school years earlier, but

[9] CBE is a nonprofit corporation that represents Kentucky's 171 public school districts to ensure full implementation of Kentucky's constitutional commitment to its students and common schools. Compl. ¶ 13, TR 1–102.

[10] The Jefferson County Board operates 165 public schools in Jefferson County, and the Dayton Independent Board operates two public schools in Campbell County. Both boards are targeted by the Pilot Project established in HB 9 and will otherwise be harmed by the diversion of public revenues under HB 9 and the requirement to fund and authorize charter schools over which they have no meaningful oversight or control. Compl. ¶¶ 14–15, TR 1–102.

[11] Although the circuit court did not address Appellees' claims under Sections 2, 3, 29, 59, 171, 180, and 181, those arguments were presented below, bolster the circuit court's judgment, and constitute additional grounds for affirmance. *See Brown v. Barkley*, 628 S.W.2d 616, 619 (Ky. 1982).

decided to wait for a "funding mechanism."[12] Mr. LaFontaine's stated intention is to use the common school funds he might receive through HB 9 to expand his private school from 100 student to "upwards of 1000 children." TR 383. If he is successful in drawing 900 more students away from the Madison County Public School District, that would be a nearly 8% decrease in Madison County's student enrollment, resulting in a corresponding decrease to the district's per pupil funding.[13]

The parties submitted the case to the Franklin Circuit Court on cross-motions for summary judgment. TR 121–71, 397–595. On December 11, 2023, the Franklin Circuit Court entered an Opinion and Order granting CBE, the Jefferson County Board, and the Dayton Independent Board's motion for summary judgment and denying the motions for summary judgment filed by the Attorney General and Mr. LaFontaine. Dec. 11, 2023 Opinion and Order ("Op."), p. 13, TR 599–612, attached as App. 1. The trial court declared HB 9 unconstitutional under Sections 183, 184, and 186 of the Kentucky Constitution because HB 9's charter schools are not "common schools" constitutionally qualified to receive public support. *Id.* at 7. Nor does HB 9 properly distribute educational funds among the school districts as Section 186 requires. *Id.* at 11–12. The trial court permanently enjoined the implementation of HB 9 and distribution or expenditure any tax dollars for charter schools under the statute. *Id.* at 13.

The Attorney General filed a Notice of Appeal on behalf of the Commonwealth on January 9, 2024. The next day, on January 10, Mr. LaFontaine filed his Notice of

[12] Valarie Honeycutt Spears, *Madison County educator files charter school application. It could be first in Kentucky*, LEXINGTON HERALD-LEADER (Jan. 27, 2023), TR 160–62.

[13] Based on the 2020-21 school year data, 11,436 students were enrolled in the Madison County Public Schools. *See* SY2020-21 Enrollment Data, *supra* note 5.

Appeal. Appellants then moved to transfer their appeals to this Court, a request with which Appellees CBE, the Jefferson County Board, and the Dayton Independent Board agreed. On April 18, 2024, this Court granted transfer in both appeals.

ARGUMENT

I. HB 9 VIOLATES SECTION 184 OF THE CONSTITUTION BY DIVERTING TAXPAYER DOLLARS TO CHARTER SCHOOLS OUTSIDE THE COMMON SCHOOL SYSTEM WITHOUT VOTER APPROVAL.

This Court should affirm the circuit court's ruling that HB 9 violates Section 184 of the Constitution by "collect[ing] and expend[ing] tax dollars for schools that are not 'common schools'" without first submitting the question to the voters. Op. 11. Section 184, which safeguards the public funding of the common schools, states:

> The interest and dividends of said [common school] fund, together with *any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose. No sum shall be raised or collected for education other than in common schools* until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation: Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law.

Ky. Const. § 184 (emphasis added). Shortly after the adoption of Section 184, Kentucky's highest court recognized that "the text of the section shows clearly that the intention was *to prohibit the collection of any taxes to any extent for educational purposes other than common schools*, without the consent of a majority of the people." *Brown v. Bd. of Educ. of Newport*, 57 S.W. 612, 613 (Ky. 1900) (emphasis added). In *Pollitt v. Lewis*, 108 S.W.2d at 672, the court clarified that Section 184 also applies to expenditures: "[I]t is equally clear that the framers of the Constitution must have had in

mind that they were placing *a limitation upon legislative power to expend money for education other than in common schools*." (emphasis added).[14]

In *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 678 (Ky. 2010), this Court acknowledged that Kentucky's fiscal practices have changed dramatically since the adoption of the 1891 Constitution. The state no longer levies and collects taxes for specific educational institutions. *Id.* With few exceptions, "all state revenue shall be credited to the general fund." *Id.* (quoting KRS 47.010). But "all revenue raised or taxes levied by the Commonwealth may fairly be said to have been collected for state government purposes and one leading purpose is indisputably public education." *Id.* To prevent the legislature from using the General Fund to abrogate the limitations imposed by the Constitution, *Pennybacker* held that the Education Provisions, including Section 184, apply not just to taxes specifically for public education, but to all public funds from any source.[15] *Id.* at 678–79.

Section 184 ensures that public funds dedicated to the support of the common schools shall be appropriated to those common schools by stating, "[t]he interest and

[14] *See Hager*, 87 S.W. at 1129 ("Appropriations of public funds and levying taxes to raise funds for the same end rest upon the same principle. If an object cannot have a tax levied for it, if deemed necessary by the proper power, then no appropriation of public money can be made to it. Where the Constitution forbids the levying of a tax for a given purpose, it must be held that it also withholds the power of making appropriations for that purpose . . . .").

[15] Appellants' amicus, the Bluegrass Institute, argues that the Court should affirm HB 9 by overruling at least 100 years of binding precedent, including *Hager*, *Pollitt*, *Pennybacker*, and *Johnson*, to instead hold that the General Assembly may fund charter schools with money from the General Fund without implicating the Constitution's limitations. Bluegrass Institute Br. 8–18. The fact that the Bluegrass Institute believes such extreme action is necessary to save HB 9 should give this Court all the more confidence in the correctness of the circuit court's ruling declaring the charter school statute unconstitutional.

dividends of said [common school] fund, together with *any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools*." Ky. Const. § 184 (emphasis added). Moreover, Section 184 prohibits new schemes to publicly fund education outside the common schools without first securing the approval of the voters: "*No sum shall be raised or collected for education other than in common schools* until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation . . . ." *Id.* (emphasis added).

Appellants do not dispute that HB 9 redirects state and local revenues from local public school districts to charter schools. *See* KRS 160.1596(6), (13). Nor do they dispute that the General Assembly never submitted HB 9 to the voters for their approval. Therefore, this Court must resolve whether the HB 9's charter schools fall within the meaning of "common schools" as used in the Constitution. If charter schools are not "common schools," HB 9 is unconstitutional under Section 184. The text of the Constitution, this Court's precedent, and the evidence of the framers' intentions all indicate that charter schools are not "common schools."

A. HB 9's Charter Schools Are Not "Common Schools" Under the Kentucky Constitution.

1. The text—there is nothing "common" about charter schools.

In ruling that HB 9 violates Section 184, the circuit court began with a "simple question" concerning the plain language of the constitutional text:

> [I]s the term "common schools" malleable enough to include two separate and unequal systems of education? *One*, the common schools that are governed by the state board of education and elected local boards in which all schools are subject to the laws and regulations duly enacted by law; and *another*, charter schools, that are governed by private entities that are

> exempt from those laws and regulations even though funded with tax dollars.

Op. 3. The circuit court concluded that "the obvious distinction between these two forms of schools is totally inconsistent with the use of the term 'common' as a modifier of 'schools.'" *Id.* Indeed, "[t]he whole purpose of 'charter schools' is to establish an alternative system of education that is exempt from the requirements of the 'common schools.'" *Id.* HB 9's charter schools cannot be squared with the constitutional text.

Charter schools are not "common" in any sense of the word. First, charters cannot be considered part of a system of "common schools" when the existing public schools are subject to one set of statutes and regulations, and charter schools are "exempt from all statutes and administrative regulations applicable to the state board, a local school district, or a school." KRS 160.1592(1). The purpose of HB 9 is to establish charter schools as an entirely separate category of schools not governed by the same body of law that all existing "common schools" share.

Second, charter schools are not "common" because they are not open to all students. HB 9 allows each charter school to craft its own selective student population. As part of its application, a proposed charter school must describe its "targeted student population and the community the school hopes to serve." KRS 160.1593(3)(a). Even a charter school's admission lottery is to be conducted "in accordance with targeted student population and service community as identified in KRS 160.1593(3)." KRS 160.1592(3)(q). Appellants extensively criticize the circuit court for its conclusions regarding these charter school admission lotteries, but they never explain how a charter school can conduct a truly "randomized" lottery when the entire lottery process is subject to the charter school's "targeted student population." *Id.* For example, nothing prevents

a charter school from choosing as its "targeted student population" those children living in a select neighborhoods or zip codes, which also happen to be the most affluent. And, as the circuit court recognized, this not-so-randomized lottery will not even be triggered unless the charter school receives more applicants than it can enroll. Op. 6 (citing KRS 160.1592(3)(q). In contrast, a "common school" district operated by the elected school officials is available to every potential student residing within its district boundaries.

Charter schools as defined by HB 9, both categorically and individually, are not "common." As a general category, the legislature has designed charter schools as a new species of schools distinct from the existing "common" schools and governed by a different set of rules. And a charter school individually is not "common" because, unlike the school district from which it draws funding, the charter school can define, for itself, the students it wishes to serve while the "common school" district accepts everyone.

2. HB 9's charter schools are inconsistent with binding precedent defining "common schools" under the Kentucky Constitution.

More than eighty years ago, Kentucky's highest court said "there is *no longer any room for controversy or dispute* as to the meaning of [common schools], . . . 'a common school was a school 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.'" *Sherrard*, 171 S.W.2d at 966 (emphasis added) (quoting *Pollitt*, 108 S.W.2d at 673). Despite the court's declaration in *Sherrard*, the Appellants dispute the indisputable because HB 9's charter schools cannot qualify as common schools under this definition.

Sherrard reaffirmed the definition of common schools articulated in *Pollitt v. Lewis*, 108 S.W.2d at 672, a decision in which the court expressly set out to discern the

"definite meaning" of the term "common schools" as the drafters of the Constitution understood it. In *Pollitt*, the board of education of the city of Ashland had chosen to organize and maintain a junior college as permitted by recent legislation. *Id.* at 671. A taxpayer sought to enjoin the project as a violation of Section 184. *Id.* The *Pollitt* court emphasized that it was "construing and not constructing" the Constitution. *Id.* at 672. "If the term 'common schools' had a definite meaning in the minds of the draftsmen of the Constitution, it is our duty to give it effect." *Id.* The court reasoned that the "very wording" of Section 184 "imports that there are schools of a character different from common schools." *Id.* at 672. The *Pollitt* court reviewed the debates of the convention and noted the importance of *Collins v. Henderson*, 11 Bush 74 (Ky. 1874), in the minds of the framers. *Pollitt*, 108 S.W.2d at 673.

Interpreting the 1850 Constitution, *Collins*, like *Pollitt*, defined "a common school [as] a school 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."[16] 11 Bush at 82–83. The *Collins* court reached this conclusion based, in part, on the legislation surrounding the adoption of the 1850 Constitution. *Id.* Many legislators at the time had also participated in the constitutional convention, and thus their enactments served as evidence of the meaning of common schools. *Id.* The *Collins* court rejected the idea urged by the Appellants that the legislature had unchecked power to define the common schools, noting that "[e]very attempt made in the convention [of the 1850

[16] Contrary to the Attorney General's claim, *Dodge v. Jefferson County Board of Education*, 181 S.W.2d 406, 181 S.W.2d 406 (Ky. 1944), does not undermine the *Collins* decision's emphasis on elected school officials as an essential element of the common schools. *Dodge* concerned whether an *elected* school board could join with a fiscal court to establish a recreation center for school-age children. *Id.* at 407.

Constitution] to introduce such phrases as 'a general system of education,' or 'to effect the objects of general education,' was defeated, no doubt because such expressions would have made the objects to which the [school] fund might be applied too uncertain." *Id.* at 94. Rather, the framers of the 1850 Constitution—like those of the 1891 Constitution—referred to the "common schools" intending that term, as they well understood it, "should be engrafted in the constitution and be thereby *relieved from the mutations incident to uncontrolled legislative action*." *Id.* at 94. (emphasis added). As *Pollitt* explains, this definition of "common schools" from *Collins* requiring, among other things, *control by elected school officers within a local school district*, remained in force after the adoption of Section 184 in the 1891 Constitution. *Pollitt*, 108 S.W.2d at 673–74.

Rather than respect *Pollitt* as binding authority from Kentucky's highest court defining "common schools" under the Constitution, Appellants wish to return to the days before *Rose v. Council for Better Education, Inc.*, 790 S.W.2d at 186, and resurrect a line of cases suggesting that courts must defer entirely to the General Assembly in matters of education funding. The Attorney General has contended that, "[a]s the statutory definition of 'common school' has changed over time, the Supreme Court's definition of 'common schools' in Section 183 of the Constitution also has changed." TR 417. According to the Attorney General, the General Assembly "could . . . if it so chose, abolish every local school district, every local school board, and the Kentucky Department of Education, and instead *contract with private persons to operate and manage the common school system* on its behalf." TR 544 (emphasis added).

Appellants' argument for an evolving definition of "common schools," subject only to the whim of the legislature, directly contradicts recognized principles of

constitutional interpretation and threatens to negate the Constitution's basic educational guarantees. As the Supreme Court has emphasized, "'the words employed [by the Kentucky Constitution] should be given the meaning and significance that they possessed at the time they were employed, and the one that the delegates of the convention that framed the instrument, and the people who voted their approval of it, intended to express and impart.'" *Commonwealth v. Claycomb ex rel. Claycomb*, 566 S.W.3d 202, 215 (Ky. 2018) (quoting *City of Lexington v. Thompson*, 61 S.W.2d 1092, 1096 (Ky. 1933)). Put another way, "what the Constitution meant when adopted it continues to mean." *Runyon v. Smith*, 212 S.W.2d 521, 524 (Ky. 1948). "Neither the *ipse dixit* of th[e] court nor the pronouncements of the Legislature can make an institution a part of the common school system contrary to the mandate of the Constitution." *Pollitt*, 108 S.W.2d at 674.

In urging this Court not to "second-guess" the legislature (Att'y Gen. Br. 39–40), the Appellants rely on the same decisions the General Assembly raised more than thirty years ago in *Rose* to argue that it "ha[d] sole and exclusive authority to determine whether the system of common schools is constitutionally 'efficient' and that a Court may not substitute its judgment for that of the General Assembly." *Rose*, 790 S.W.2d at 208–09. The Supreme Court, however, rejected the General Assembly's bid to define its obligations to the common schools stating that, "[t]o avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty. *To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable*." *Id.* at 209 (emphasis added). Indeed, Dr. Kern Alexander, who Mr. LaFontaine quotes, described

the *Rose* decision as invalidating the very concept of unimpeachable legislative autonomy now invoked by Appellants:

> This [*Rose*] ruling constituted one of the most comprehensive interventions by a state judiciary into the realm of legislative policymaking for education. Because education is considered to be among the most important functions of state government, this case, *invalidating 153 years of legislation and legislative autonomy*, portends a marked and significant change in the way public schools are governed. *The power of the legislature, which had been considered virtually omnipotent in matters of educational finance prior to the Kentucky case, fell to judicial intervention*. This decision, as well as other similar school finance and taxation cases, laid the foundation for *greater judicial scrutiny and intervention in the future*.

Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 Harv. J. on Legis. 341, 342 (1991) (footnotes omitted) (emphasis added). This Court knows the deplorable state of the common schools before the *Rose* litigation asked the judiciary to hold the legislature accountable to its constitutional obligations. Appellants' suggestion that we return to the days when the legislature policed itself is unfaithful to this Court's constitutional duty and perhaps the worst thing that could happen to the common schools and the children they serve.

i. HB 9's charter schools are not common schools because they are controlled by unelected boards not accountable to the local taxpayers whose money they will spend.

As *Pollitt* recognized, meaningful control by school officials accountable to the voters of a school district is an essential characteristic of common schools under Section 184.[17] 108 S.W.2d at 673 ("[A] common school was a school taught *in a district*

[17] The members of boards of education of the common schools must be elected by the voters according to "general election laws." KRS 160.240. "In independent school districts, the members of the school board shall be elected from the district at large. In county school districts, members shall be elected from divisions." KRS 160.210(1).

laid out by authority of the school laws [and] under the control of trustees *elected* under those laws . . . ." (emphasis added)). This is an element that HB 9's charter schools plainly lack. Charter schools are autonomous from the local public boards of education and school districts for all matters, including "finance, personnel, scheduling, curriculum, and instruction." KRS 160.1590(14)(b). They have "independent board[s] of directors," not elected by the voters within the school district, but instead selected according to their own charter school application. KRS 160.1590(5), (14)(c).

Oversight of charter schools by local public school boards is illusory. If the mayor of Louisville or Lexington chooses to authorize a charter school, KRS 160.1590(15), HB 9 excludes the public school board from any role in overseeing the charter school. The 16 largest school districts in the state, as well as districts in counties where the total enrollment of all independent public school districts is greater than 7,500, can be compelled by the State Board to serve as a charter school authorizer, regardless of whether the local school district endorses the charter application. KRS 160.1593(3)(f)(3), 160.1595(2)(c)(3).

Once the charter application is approved, or ordered to be approved, the elected public school board has no leverage to negotiate meaningful oversight terms in the charter contract. The charter school may appeal any term insisted upon by the authorizing public school board as an "undue constraint[]," "unilaterally imposed condition[]," or a term that contradicts the charter school's autonomy guaranteed by the statute. KRS 160.1595(2)(b), 160.1596(1)(c)(11). After the charter contract is executed, the public school board must consider the charter school's proposed amendments twice a year, and any rejected amendment is again appealable. KRS 160.1592(20).

The public school board is deprived of any ability to enforce the charter contract or statutory requirements until the charter school asks to be renewed after completing a five-year term. KRS 160.1597(1), 160.1598(1). A public school board cannot revoke a charter contract during its term unless the charter school endangers the "health and safety of the students." KRS 160.1598(7). Mr. LaFontaine asserts that it is of no consequence that a public school board cannot enforce a charter contract during its term. He contends that "[n]o sensible administrator, teacher, or parent aware of an impending five-year (or three-year) horizon would fail to take seriously 'fair and specific notice from the authorizer' of an identified violation." LaFontaine Br. 25. But all charter operators may not be as "sensible" as Mr. LaFontaine hopes. The lack of public accountability fostered by charter school statutes, like HB 9, has made the operation of charter schools an attractive target for fraudsters and other bad actors seeking to gain easy access to public dollars.[18] Fraud and malfeasance are more difficult to detect and stop when local school officials have no meaningful oversight or enforcement authority.

[18] *See, e.g.*, Esteban Candelaria, *The state auditor says an NM charter school funneled public funds their foundation and paid their founders more*, Albuquerque Journal (Dec. 28, 2022), https://www.abqjournal.com/2560513/the-state-auditor-says-an-nm-charter-school-funneled-public-funds-through-their-foundation-and-pay-their-founders-more.html; Morgan Mitchell, *Memphis charter school leaders indicted after nearly $400K redirected, misused*, WREG.com (Jul. 6, 2022), https://wreg.com/news/local/state-memphis-charter-school-leaders-stole-400k/#:~:text=The%20Shelby%20County%20Grand%20Jury,count%20of%20theft%20over%20%242%2C500; Judith Retana, *Audit: NC charter school falsified records to get $400k in state funding*, CBS17.com (Apr. 27, 2022), https://www.cbs17.com/news/north-carolina-news/audit-nc-charter-school-falsified-records-to-get-400k-in-federal-funding/; Garfield Hylton, *Ex-Florida charter school president who stole $389,000 found guilty of theft, fraud*, Orlando Sentinel (Mar. 25, 2022), https://www.orlandosentinel.com/news/florida/os-ne-former-florida-charter-school-president-guilty-embezzlement-wire-fraud-20220325-mtksof3tpfhg7d5ae76gcaefem-story.html; *see also Another Day Another Charter School Scandal*, Network for Public (continued…)

Appellants argue that control by school officials accountable to the local voters has nothing to do with being a Kentucky common school. And yet, the very decisions they cite demonstrate Kentucky's long tradition of *electing* local officials to run the common schools. *Prowse v. Board of Education for Christian County*, 120 S.W. 307, 308 (Ky. 1909), upheld the General Assembly's decision to shift local control of the certain common schools from *elected* trustees to *elected* county boards of education. Similarly, *Elliot v. Garner*, 130 S.W. 997, 997–98 (Ky. 1910), concerned an *election* to establish a graded school within a district under the control of *elected* trustees. *City of Louisville v. Commonwealth*, 121 S.W. 411, 411–12 (Ky. 1909), arose from an action to compel *elected* city officials to levy a tax presented by the *elected* board of education "having control of the public schools." In *City of Louisville v. Board of Education of Louisville*, 195 S.W.2d 291, 291–92 (Ky. 1946), the court considered whether bonds issued to support the common schools under the control of Louisville's *elected* independent board of education were obligations of the school board or the *elected* board of aldermen which acted as the tax-levying authority. Two decisions cited by the Appellants concern nothing more than the transfer of geographic territory from an *elected* county board of education to an *elected* independent board of education. *Bd. of Educ. of Kenton Cnty. v. Mescher*, 220 S.W.2d 1016, 1017 (Ky. 1949); *Bd. of Educ. of Fayette Cnty. v. Bd. of Educ. of Lexington Indep. Sch. Dist.*, 250 S.W.2d 1017, 1019 (Ky. 1952).

(…continued)

Education (last visited Oct. 1, 2024), https://networkforpubliceducation.org/charter-scandals/ (collecting hundreds of news stories of charter school malfeasance, embezzlement, and fraud).

Appellants praise charter schools because they purportedly allow parents to "vote with their feet." LaFontaine Br. 11. But "common schools" as used in the Kentucky Constitution have always allowed people to *vote with their ballots*. In that way, all taxpayers, not just the parents of school children, can hold school officials accountable for their performance and spending though elections. HB 9's charter schools do not respect this constitutional tradition of electoral accountability and, therefore, they are not "common schools" within the meaning of the Constitution.

Appellants see no problem in depriving local voters within a school district of any ability to hold charter school operators accountable. Nor do they see any problem with enacting HB 9's fundamental changes to education funding without submitting the matter to statewide voter referendum as Section 184 requires. The case law cited by Appellants proves the wisdom of *Pollitt* in announcing that a common school must be under the control of the *elected* trustees. 108 S.W.2d at 673 (emphasis added). Those decisions show the continuity over time of elected local officials' involvement in the governance of Kentucky common schools. Because charter schools operate autonomously from the elected local boards of education, and are otherwise wholly unaccountable to the voters within the local school district, they are *not* common schools under Section 184. Instead, as is the case with Mr. LaFontaine's school, charter schools are essentially private schools freed from the necessity of complying with laws and regulations applicable to common schools. HB 9 unconstitutionally diverts public funds to support such private schools outside the common school system.

ii. HB 9's charter schools are not common schools because they are not within common school districts.

HB 9's charter schools also cannot be considered "common schools" within the meaning of the Constitution because they are not, in any practical sense, "taught in a district."[19] *Pollitt*, 108 S.W.2d at 673. "The whole tenor of the constitutional and statutory provisions of Kentucky with regard to schools is that in order for there to be a common school there must be a common school district." *Hodgkin v. Bd. for Louisville & Jefferson Cnty. Children's Home*, 242 S.W.2d 1008, 1010 (Ky. 1951); *see Bd. of Regents of Ky. Cmty. & Tech. Coll. Sys. v. Farrell*, 443 S.W.3d 12, 20 (Ky. App. 2014) ("[A] school operated by the State Board of Education cannot be a 'common school' because a common school cannot exist without a common school district.").

Charter schools are islands unto themselves operated by unelected, independent boards. The essential point of the charter school legislation is to set up a new form of school apart from the common schools under the management of the traditional school district. Accordingly, the General Assembly has "exempt[ed charter schools] from all statutes and administrative regulations applicable to the state board, *a local school district*, or a school." KRS 160.1592(1) (emphasis added). In an unconvincing effort to satisfy Section 186 of the Constitution, which requires the General Assembly to "prescribe the manner of the distribution of the public school fund *among the school districts*," Ky. Const. § 186 (emphasis added), HB 9 states that a "charter school shall serve as a school of the district of location," but only "[f]or the purposes of local and state funding," not for governance as would be the case with a common school,

[19] The common schools exist within the structure of county and independent school districts. KRS 160.010, 160.020.

KRS 160.1596(3). Appellants argue that this lip service to charter schools being part of the school district only to take a cut of the district's funds is enough to satisfy the Constitution. But this device to evade Sections 184 and 186 "do[es] more to point up the constitutional problems than to avoid them." *See Fannin*, 655 S.W.2d at 482. If charter schools were actually common schools, there would be no need for such a statement. Otherwise, the charter schools would be part of their school districts for *every* purpose.

In the court below, Mr. LaFontaine suggested that any requirement that common schools be part of a school district should be dismissed because the Constitution "barely mentions districts." TR 450. He failed, however, to direct the circuit court to the canon of constitutional interpretation stating that words infrequently used in a foundational text have no meaning. This Court has counseled to the contrary: "'Neither legislatures nor courts have the right to add or *take from* the simple words and meaning of the constitution.'" *Claycomb*, 566 S.W.3d at 215 (emphasis added) (quoting *Jefferson Cnty. ex rel. Grauman v. Jefferson Cnty. Fiscal Court*, 117 S.W.2d 918, 924 (Ky. 1938)).

Now, before this Court, Mr. LaFontaine contends that "'among the school districts' is a geographic concept, not a political one." LaFontaine Br. 28. The thrust of Mr. LaFontaine's argument is again that the term "school districts" as specifically referenced in the Constitution means nothing. Countywide school districts exist in every county in the state. *See* KRS 160.010 ("Each county in this state constitutes a county school district . . . ."). Thus, under Mr. LaFontaine's (incorrect) interpretation of "school districts" as a mere geographic unit, the General Assembly distributes funds "among the school districts" as long as those funds are directed within the geographic boundaries of the state. Mr. LaFontaine's reading of "school districts" as geography, and nothing more,

further leads to the inexplicable result that every private school in the state would also be a school *within* a school district. But private schools, like charter schools, are not within a school district because they are not subject to the control and oversight of the school district. Without a school district, a charter school cannot be a common school under the Kentucky Constitution.

iii. The General Assembly's labelling of charter schools as "part of the state's system of public education" does not make them common schools under the Constitution.

The General Assembly cannot avoid complying with Section 184 by stamping charter schools with a label contradicted by the substance of the statute. Appellants expect the Court to believe the legislature's proclamation that a "charter school shall be part of the state's system of public education," but nevertheless is "exempt from all statutes and administrative regulations applicable to the state board, a local school district, or a school." KRS 160.1592(1). Kentucky courts do not accept at face value the characterizations of the legislature, particularly when they are as fallacious as those contained in HB 9. Rather, "[i]n appraising the validity of the statute [the Court] must look through the form of the statute to the substance of what it does." *Commonwealth v. O'Harrah*, 262 S.W.2d 385, 389 (Ky. 1953). "Neither the *ipse dixit* of this court nor the pronouncements of the Legislature can make an institution a part of the common school system contrary to the mandate of the Constitution." *Pollitt*, 108 S.W.2d at 674.

Unfortunately, HB 9 is the latest in a series of efforts by the General Assembly to sidestep Section 184's mandate that public funds spent on education must be used for the common schools, unless the voters approve otherwise. In *Fannin*, the legislature attempted, without success, to support private education by directing the department of libraries, rather than public school officials, to purchase textbooks for private school

students using money from the General Fund. 655 S.W.2d at 482. But these "devices" to evade Section 184 "d[id] more to point up the constitutional problems than to avoid them," and this Court halted the state's plan to pay for private school textbooks. *Id.*

Most recently, this Court struck down another funding scheme designed to subsidize private school tuition and expenses. *Johnson*, 658 S.W.3d at 28–29. That statute granted a nearly dollar-for-dollar tax credit in exchange for contributions to private schools, similarly called "education service providers." *Id.* In HB 9, the private "education service providers" have returned. Only this time the legislature is requiring local public school districts to funnel the state and local tax revenues to independent charter school boards, which act as middlemen and then outsource "educational design, implementation, or comprehensive management" to private "education service providers." KRS 160.1590(8), 160.1592(3)(p)(3). This case is a variant of *Johnson*: rather than recharacterize public money as private money, HB 9 recharacterizes private education as public, common school education.

The legislative acrobatics of the General Assembly are astonishing, particularly when compliance with Section 184 requires nothing more than voter approval. "If the legislature thinks the people of Kentucky want [to fund education outside the common schools], [it] should place the matter on the ballot." *Fannin*, 655 S.W.2d at 484. But "[w]e cannot sell the people of Kentucky a mule and call it a horse, even if we believe the public needs a mule." *Id.* HB 9 is the legislature again calling a "mule" (charter schools) a "horse" (common schools) to avoid voter scrutiny. And the statute violates Section 184 by diverting public funds, without voter approval, to charter schools operated separately from the common schools.

3. Charter schools are inconsistent with the framers' understanding of "common schools."

Appellants laud charter schools because, in theory, they will lead to education in Kentucky operating like a private market, but the framers understood the "common schools" protected by the Constitution to be a public good. The idea that the term "common schools" could encompass a separate system of state-funded charter schools would have been unthinkable for the framers. Indeed, Delegate Jacobs read the proposed language of Section 184 to mean that "if any effort is made or desired on the part of the State for a system of education different from that which is pursued in the common schools, a tax may be levied for that purpose, provided the question shall first be submitted to and approved by a majority of the legal voters." Kentucky Constitutional Convention, *Official Report of Proceedings and Debates*, at 4457 (1890) (hereinafter "1890 Debates"). Delegate Jonson explained that his goal in supporting Section 184 was "to grant every child in this Commonwealth education in our common schools" and to "make it impossibility that that shall be wrested from them now or hereafter." *Id.* at 4533. The Attorney General cites Delegate Beckner as purported support for shoehorning charter schools into the term "common schools." Delegate Beckner, however, would be appalled to know that his name is being used to advance the privatization of state-supported education. To the contrary, Delegate Beckner proclaimed that "[p]rivate schools must, from their nature, be limited in number and attendance, whilst the education that the country needs should be universal, and should embrace all children." *Id.* at 4462.

Both before and after the 1891 Constitution, Kentucky courts have strictly prohibited private, unaccountable operators, like charter school boards, from subverting

duly elected school officials in the management of the common schools. *See Halbert v. Sparks*, 9 Bush 259, 262 (Ky. 1872) (striking down an act that "devoted a portion of the school-fund to the payment of teachers not acting under the control or supervision of the officers of the common-schools, but who taught under contracts made with a private individual"); *Underwood v. Wood*, 19 S.W. 405, 406 (Ky. 1892) (striking down an act that applied the school fund to a private school in which "[common school] trustees ha[d] no voice in the selection of the teachers"). HB 9's privatization of state-supported education in the hands of unelected operators, without any voter approval, is antithetical to the framers' understanding of "common schools."

B. Holding that HB 9's Charter Schools Are Not Common Schools Does Not Imperil the Funding of Other Public Educational Institutions.

Desperate to save HB 9, Appellants employ a baseless scare tactic. They assert this Court's ruling that charter schools are not common schools within the meaning of Section 184 would endanger the public funding of various other public educational institutions. *See, e.g.*, Att'y Gen. Br. 27. Not only are none of those other institutions challenged in this case, Appellants are wrong about the consequences of a ruling that HB 9 violates Section 184.

The public funding of each of the institutions purportedly threatened by an adverse ruling for HB 9 is protected by the safe harbor of Section 184's closing proviso. In the 1905 decision in *Hager*, 87 S.W. at 1126, the court considered whether Section 184 allowed for state appropriations to the Agricultural and Mechanical College, now the University of Kentucky. The *Hager* court determined that the College fell outside the common school system:

> The common school system of this state is defined by statute (chapter 113, p. 1524, Ky. St. 1903). It is *a uniform series of district schools, each local*

> *in its district, but all of general or equal grade throughout the state*, varying only according to the population of the districts, and whether the districts have or not adopted the graded or high school system in addition. They afford free tuition for certain parts of the year to all resident children within the statutory age. They are sustained, in the main, by the income provided by section 184 of the Constitution, by certain taxes levied directly for their benefit, and certain fines and forfeitures. They may be aided, however, by local taxation in addition. *Neither the Agricultural and Mechanical College, nor any other institution, is now or was then comprised within the system.* No part of the appropriation now in question was derived from the bonds, stock, and income mentioned in section 184 of the Constitution, and inviolably set apart for the common schools. Nor was the question of this appropriation submitted to or passed upon by the voters of the state. If it is upheld, it is because it has been made under a power vested in, or, rather, not withheld from, the Legislature by the Constitution, the evidence of which is to be found within the proviso above quoted.

Id. (emphasis added). Section 184, however, contains an express exception in its closing proviso, which states: "Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law." Based on the closing proviso, the *Hager* court concluded that Section 184 posed no impediment to the legislature's funding of the College, the Kentucky School for the Blind, and the Kentucky School for the Deaf, and numerous other institutions whose history of state support predates the Constitution. *Id.* at 1127.

Moreover, in upholding the state funding of a new system of normal schools, *Marsee v. Hager*, 101 S.W. 882, 883–84 (Ky. 1907), clarified that the protection of Section 184's closing proviso extends not only to the list of institutions in the *Hager* case, but to "the kind of educational interests" traditionally funded by the state, such as postsecondary education more generally. *See also James v. State University*, 114 S.W. 767, 769–71 (Ky. 1908) (holding that an act changing the name of the Agricultural and Mechanical College to "State University" and separating its normal school department did not remove those institutions from the protection of Sections 184's proviso). Thus,

the Western Kentucky University's Gatton Academy, Morehead State University's Craft Academy, and Eastern Kentucky University's Model Laboratory School, which offer duel high school and college credit, as well as practicum opportunities for college students, are not in danger of losing public support simply because HB 9 is unconstitutional. *See, e.g.*, *Bradley v. Jefferson County Public Schools*, 88 F.4th 1190, 1194 (6th Cir. 2023) ("Kentucky law treats [the] Craft [Academy] as a "postsecondary" school because it delivers "a college-level course of study" on a college campus . . . .").

The districts of innovation and magnet schools referenced by the Attorney General are under no threat of challenge whatsoever. These are merely programs within the existing common schools which, unlike HB 9's charter schools, abide by the constitutional tradition of meaningful oversight by school officials elected within a local public school district. What is more, unlike a charter school which selects its "targeted student population," if a student in a common school district is unable to participate in a magnet program, the common school district remains responsible for educating that child.

HB 9's charter schools are precisely the sort of *new* "partnership educational enterprise" prohibited by Section 184 unless the voters first approve. *Hager*, 125 S.W. at 1127. The Attorney General concedes that the concept of charter schools did not even existed until the 1970s. TR 404. And it was not until 1991 that Minnesota became the first state to allow charter schools. Att'y Gen. Br. 1. Charter schools were entirely foreign to Kentucky law until 2017 when their statutory structure was enacted without an funding mechanism. *Id.* It took until HB 9 in 2022 for the General Assembly to attempt to spend any public money on charter schools. *Id.* Without any history of public support

in Kentucky, charter schools cannot claim the benefits of Section 184's closing proviso, making HB 9 unconstitutional.

II. HB 9 DIVERTS EDUCATION FUNDS TO CHARTER SCHOOLS IN VIOLATION OF SECTION 186 OF THE CONSTITUTION AND THE PUBLIC PURPOSE RESTRICTIONS OF SECTIONS 3 AND 171.

A. HB 9 Unconstitutionally Fails to Distribute Public School Funds "Among the School Districts."

Under Section 186 of the Constitution, "[a]ll 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*." Ky. Const. § 186 (emphasis added). HB 9 violates Section 186 because it does not distribute public schools funds "among the school districts."

HB 9 instead employs a nominal reference to the "charter school . . . serv[ing] as a school of the district of location" only "[f]or the purposes of local and state funding" to launder public school money to the independent charter school board. KRS 160.1596(3). The local board of education has no say whatsoever in how the charter school spends the nominally district funds, despite the fact that "the management of funds that are distributed at the district level is most effectively addressed by a body consisting of representatives from the entire district." *Bd. of Educ. of Boone Cnty. v. Bushee*, 889 S.W.2d 809, 814 (Ky. 1994). HB 9 also improperly allows the mayors of Louisville or Lexington to receive these school district funds in the form of authorizer fees, even though an authorizer has no meaningful ability to enforce a charter contract or the statutory requirements. KRS 160.1596(10)(b).

Finally, for the reasons explained above, Mr. LaFontaine's faulty claim that "school districts" in the Constitution means nothing more than geography, as opposed to a reference to control and oversight by elected school officials within the school district, renders this portion of the text superfluous and is therefore incorrect.

B. HB 9 Unconstitutionally Uses Public School Funds for a Private Purpose.

HB 9's complex system of transfers also violates Section 186's requirement that school funds be used "for public school purposes." Ky. Const. § 186. This public purpose requirement runs throughout the Kentucky Constitution. Section 171 commands: "Taxes shall be levied and collected for public purposes only." *Id.* § 171. And Section 3 of the Constitution prohibits the payment of public money "to any man or set of men, except in consideration of public services." *Id.* § 3.

HB 9's charter schools operate apart from the common school system and are not public schools in any meaningful sense. The charter schools are governed by unaccountable, independent boards of directors that are expressly permitted to outsource the comprehensive management of the charter school to private school operators, known as "education service providers." KRS 160.1590(8), 160.1592(3)(p)(3). Neither the authorizer nor the State Board has any mechanism for ensuring that the charter school complies with its charter contract or the applicable statutes during the contract term. KRS 160.1597(1), 160.1598(1). HB 9's use of school funds does not advance a public school purpose, but instead funds private school operators while stamping them with a "public" label. Privately operated schools do not serve a public school purpose, and certainly not a "common school" purpose, for which the funds diverted by HB 9 must be dedicated. *See Fannin*, 665 S.W.3d at 484. This lack of a public school purpose brings

HB 9 into conflict with Section 186, as well as the public purpose provisions of Sections 3 and 171 of the Constitution.

III. HB 9 VIOLATES THE GENERAL ASSEMBLY'S DUTY UNDER SECTION 183 OF THE CONSTITUTION TO PROVIDE FOR AN EFFICIENT SYSTEM OF COMMON SCHOOLS.

By enacting HB 9, the General Assembly violated its duty under Section 183 of the Constitution to "provide for an efficient system of common schools throughout the State." Ky. Const. § 183. HB 9 is inconsistent with an adequately funded, substantially uniform system of common schools throughout the entire state. *Rose*, 790 S.W.2d at 211. In asserting that the General Assembly should be permitted to do whatever it pleases with common school funds, Appellants rely on the *Rose* decision's approval of "strong, centralized control (by the state) of the system of common schools." 790 S.W.2d at 207. But HB 9's charter schools run contrary to the principle of centralized state control. The intent of HB 9 is not to support a uniform system of common schools, but instead to create numerous competing independent charter schools of greater variety and see which ones survive in a crowded marketplace. *See* TR 451.

A. HB 9's Decentralized Charter Schools Are Not Monitored by the State to Prevent Waste, Duplication, and Mismanagement.

The *decentralization* underlying HB 9 is accomplished by discarding any meaningful state control of charter schools by the State Board or the local boards of education. Far from being supervised by the state on a "continuing basis" to ensure "there is no waste, no duplication, [and] no mismanagement, at any level," *Rose*, 790 S.W.2d at 211, the independent boards of charter schools are given broad exemption "from all statutes and administrative regulations applicable to the state board, a local school district, or a school," KRS 160.1592(1). Charter schools set their own curriculum.

KRS 160.1590(14)(b), 160.1592(3)(e). They hire their own teachers and staff. KRS 160.1590(14)(b). The charter schools may even outsource virtually all of their responsibilities to private "education service providers" that do not merely supply discrete services but instead take over "educational design, implementation, or comprehensive management." KRS 160.1590(8), 160.1592(3)(p)(3). The General Assembly cannot shift the duty to provide adequate common school education to Kentucky's children to anyone else and certainly not to unaccountable private actors. *Rose*, 790 S.W.2d at 211.

Section 183 requires that the "[e]ducation of children [within the common schools] should be supervised by the State." *Id.* at 206. Although it is *hoped* that the charter schools will operate consistently with the terms of their charter contract and applicable statutes, the General Assembly failed to afford the authorizer or the State Board a mechanism to enforce the charter contract or statutory requirements until the charter school asks to be renewed after completing a five-year term. KRS 160.1597(1), 160.1598(1). Cutting charter schools loose from state oversight for five years and praying for a positive result cannot be what the *Rose* court envisioned when it directed the General Assembly to continuously monitor the common school system. These unsupervised charter schools are ripe for the very sort of waste, duplication, and mismanagement that Section 183 and *Rose* prohibit. That, of course, has been the experience of other states which have decided to divert public money to charter schools.[20]

[20] *See supra* note 18.

B. HB 9 Violates Section 183 by Disregarding Substantial Uniformity Across the Entire State.

HB 9 targets the largest school districts in the state as the laboratories for this charter school experiment. The local boards of education in districts with 7,500 students or less have the option of vetoing a proposed charter school by refusing to endorse it in a memorandum of understanding, which is a required element of the charter school's application in such districts. KRS 160.1593(3)(f)(3). But, if charter schools will be a boon to Kentucky education, why should students in less populated, likely rural, school districts not have the same level of access to charter schools as their urban-dwelling counterparts? The *Rose* decision emphasized that, in the common schools, "'[t]he boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, *but all stand upon one level.*" 790 S.W.2d at 206 (citation omitted). Under HB 9, however, rural and urban school children do not "stand upon one level" when it comes to accessing charter schools. HB 9 is inconsistent with substantial uniformity because even the option to establish or attend a charter school is limited based on location.

HB 9, however, does not only discriminate between urban and rural communities. As discussed above, the statute also permits a charter school to discriminate among students within a particular community by selecting its own "targeted student population." KRS 160.1593(3)(a). This "targeted student population" controls even when the charter school is supposed to conduct a "randomized" enrollment lottery. KRS 160.1592(3)(q). Charter schools are inconsistent with substantial uniformity because they can pick and choose their students, and everyone else is relegated to the existing "common schools" which the General Assembly apparently does not consider adequate.

Charter schools are also known to undertake informal strategies—which are neither permitted nor feasible in common schools—to control the character of their student populations. Because charter schools are structured like private entities, and in fact may have connections to for-profit businesses (*i.e.*, education service providers), they have incentives to discourage applications from students with special needs or those for whom English is a second language because such students are more expensive to educate.[21] By employing "no-excuses" behavioral expectations and disciplinary policies, charter schools also encourage underperforming students—often from disadvantaged backgrounds or belonging to racial minorities—to return to the public school district.[22] The NAACP has repeatedly called for a moratorium on charter schools because of the negative impact of such schools on the Black community and their tendency to exacerbate racial segregation and racial isolation.[23] Contrary to Section 183, HB 9's charter schools promote disparities among the different regions of the state and among individual students.

C. HB 9 Violates Section 183 by Favoring Charter Schools to the Detriment of Students Who Remain in the Common Schools.

Rose interprets Section 183 to mean that "[a]ll schools and children stand upon one level in their entitlement to equal state support." 790 S.W.2d at 206. The Constitution prohibits "any practice which 'impairs the equal benefit of the common-

[21] *See* Helen F. Ladd, *How Charter Schools Undermine Good Education Policy*, National Education Policy Center, p. 8 (Nov. 2022), https://nepc.colorado.edu/sites/default/files/publications/PM%20Ladd_0.pdf.

[22] *Id.*

[23] *Id.* at 9–11.

school system' to all students." *Id.* (quoting *Major v. Cayce*, 33 S.W. 93, 95 (Ky. 1895)). In *Wooley v. Spalding*, 293 S.W.2d 563, 564 (Ky. 1956), the Court considered a school board's pattern of discrimination designed to "reduce and substantially eliminate the enrollment of pupils" at a disfavored high school within its district. The Court held that such discrimination violates "both the spirit and intent of section 183 of our State Constitution," and it declared that education must be delivered "without discrimination as between different sections of a district or county." *Id.* at 564–65.

HB 9 impermissibly favors charter schools to the detriment of students who remain in the common schools operated by the local boards of education. This discrimination is most clearly shown by the penalties imposed by the General Assembly should a charter school not timely receive its transfer of public revenue from the local school district. A school district's failure to transfer its funds to a charter school shall, for every five-days late, result in a fine of at least 5% of the total funds to be transferred during that period. KRS 160.1596(11). This is not a punishment for the school officials who neglected to effect a timely transfer. It is instead a punishment imposed on all the children who continue to attend the common schools of the public school district. HB 9 slashes the education funding of those children every five days a charter school does not receive its promised public money and then sends those additional funds to the charter school without consideration of actual financial need.

Charter schools create significant planning difficulties for public school districts. Given the unpredictable flow of students into and out of charter schools, elected school

district officials cannot effectively plan for teacher, program, and facility needs.[24] The common school districts remain responsible for providing seats to all students who opt out of, or are forced out of, charter schools. Another major factor in the uncertainty faced by common school districts is the frequency of charter school closures. One study found that "[b]etween 1999 and 2017, over 867,000 students were displaced when their charter school closed."[25] It is impossible for public school districts to effectively plan in the face of this massive student turnover.

Moreover, by funding charter schools, in many instances without the consent of the local school board, HB 9 inhibits the ability of the public school districts to meet their fixed costs as student enrollment declines. Compl. ¶ 44, TR 1–102. Having fewer students to educate does not mean that a particular school or district can make a dollar-for-dollar cut to its budget. *Id.* There is no difference between the electricity needed to heat, cool, or light an existing school building for 450, as opposed to 500, students. *Id.* Each child the General Assembly encourages to leave the common schools for charter schools leaves behind fewer resources for those students who remain.

Mr. LaFontaine's proposed charter school is a prime example of the financial hardship that HB 9 imposes on public school districts. He concedes that "a school's fixed costs do not vary much with enrollment." TR 454. And yet, Mr. LaFontaine's goal is to

[24] Ladd, *supra* note 21, at 6.

[25] Carol Burris & Ryan Pfleger, *Broken Promises: An Analysis of Charter School Closures from 1999–2017*, Network for Public Education, p. 6, https://networkforpubliceducation.org/wp-content/uploads/2020/08/Broken-Promises-PDF.pdf.

draw away nearly 8% of Madison County's student enrollment to his own school. But just like Mr. LaFontaine's private school, the Madison County Public School District has fixed costs that do not vary with enrollment, and the school district's loss of state support resulting from Mr. LaFontaine's growing student population will be borne by those students remaining in the common schools.

This defunding of the common schools is compounded by the fact that HB 9 permits an *unlimited* number of charter schools. KRS 160.1591(3). Mr. LaFontaine is potentially one of many private school operators who see HB 9 as their ticket to expansion at the expense of the common schools. According to Mr. LaFontaine, 25,000 students attend charter schools in Missouri; Tennessee and Indiana each have 40,000 students in charter schools; Illinois has 60,000 students in charter schools; and, in Ohio, 120,000 students attend charter schools. LaFontaine Br. 1–2. If this level of student attrition is what Kentucky common schools can anticipate under HB 9's regime, there will be more schools, but fewer resources for students, contrary to Section 183 and *Rose*.

IV. HB 9 VIOLATES THE SEPARATION OF POWERS AND PROHIBITION ON THE EXERCISE OF ARBITRARY POWER.

For many of the same reasons that HB 9 is contrary to Section 183, the statute violates the constitutional separation of powers and prohibition on the exercise of arbitrary power. The legislature "may not in any degree abdicate its power." *Bloemer v. Turner*, 137 S.W.2d 387, 390 (Ky. 1940). It has "no right to deputize to others the power to perform its governing functions." *Id.* at 391 (citation omitted). Nor may the legislature exercise arbitrary power that is "contrary to democratic ideals, customs, and maxims," that is "unjust and unequal," or that "exceeds the reasonable and legitimate

interests of the people." *Ky. Milk Mktg. & Antimonopoly Comm'n v. Kroger Co.,* 691 S.W.2d 893, 899–900 (Ky. 1985).

HB 9 improperly delegates the "most important function" of providing state-supported education to boards of directors operating outside the supervision of the state government and local school officials. This doctrine preventing improper delegation of government power "protect[s] against unnecessary and uncontrolled discretionary power." *Miller v. Covington Dev. Auth.,* 539 S.W.2d 1, 5 n.9 (Ky. 1976). Delegations of legislative authority by the General Assembly must be accompanied by "standards controlling the exercise of administrative discretion." *Legislative Research Comm'n ex rel. Prather v. Brown,* 664 S.W.2d 907, 915 (Ky. 1984). Even where the legislature delegates authority over education to *public* school districts—which are directly accountable to the voters—that delegation is subject to strict standards, and the General Assembly "must provide a mechanism to assure that the ultimate control remains with the General Assembly, and assure that those local school districts also exercise the delegated duties in an efficient manner." *Rose*, 790 S.W.2d. at 216 (emphasis added).

Here, HB 9 gives unfettered discretion to charter school boards of directors to manage and control the charter schools and even contract out their responsibilities to private "education service providers." HB 9 establishes only priorities, but not standards for the exercise of discretion. *See Board of Trustees of Judicial Form Retirement Systems. v. Att'y General,* 132 S.W.3d 770, 782–85 (Ky. 2003). And there is no mechanism for enforcing those minimal statutory priorities or the charter contract during its term.

V. HB 9 VIOLATES SECTIONS 180 AND 181 OF THE CONSTITUTION BY COMPELLING LOCAL PUBLIC SCHOOL DISTRICTS TO TRANSFER LOCAL TAX REVENUE TO CHARTER SCHOOLS.

A. HB 9 Violates Section 180 by Redirecting to Charter Schools Local Tax Revenue Levied and Collected for Common Schools.

Section 180 of the Constitution provides: "Every 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*." (emphasis added). Section 180 is yet another constitutional protection invoked by the courts to "jealously . . . guard[] the fund set apart for the maintenance of the common schools." *Bd. of Educ. of City of Covington v. Bd. of Trustees of Pub. Library of City of Covington*, 68 S.W. 10, 13 (Ky. 1902). Local revenues levied and collected to support the common schools must be devoted exclusively to the benefit of the common schools and to no other purpose, even if the diverted use has "some educational benefits." *Bd. of Educ. of Spencer Cnty. v. Spencer Cnty., Levee, Flood Control & Drainage Dist. No. 1*, 230 S.W.2d 81, 83 (Ky. 1950). "The test is, what constitutes an educational purpose within the meaning of Section 184 of the Constitution [*i.e.*, the common schools], rather than whether an activity might be beneficial to education." *Id.* To that end, courts have blocked the diversion of local funds collected to support the common schools from being used for a flood wall benefiting the children in the district, *id.*, a public library open to school children and the general public, *Bd. of Educ. of City of Covington*, 68 S.W. at 12–23, and public street improvements, *City of Louisville v. Leatherman*, 35 S.W.625, 626 (Ky. 1896).

HB 9 violates Section 180 by compelling the transfer, on a proportionate per pupil basis, of all local tax revenue and payments in lieu of taxes received by a local public school district for purposes of common school education to any charter school within its borders. KRS 160.1596(6)(b). In its amicus curiae brief, the Kentucky Center for Economic Policy ("KyPolicy") explains that a much of the local revenue levied by common school districts goes above and beyond what is required by the SEEK formula, KRS 160.470(9)(a). KyPolicy Br. 11–13. The voluntary local taxes paid to support the community's common schools cannot be rededicated to another purpose by the General Assembly. This transfer of local common school revenue is mandated by HB 9, despite the charter schools operating outside the common school system, independent of the local school district and its elected officials who levied the local taxes. *See* KRS 160.460(1) ("All school taxes shall be levied by the board of education of each school district."). The constitutional defect under Section 180 is exacerbated by the fact that charter schools are permitted to adopt nonresident pupil policies different from the local school district. KRS 160.1593(3)(a). Therefore, a local tax levied by the public school district specifically to educate the children within that district may be used for the benefit of out-of-district students at a charter school.

B. HB 9 Compels Local Taxation in Violation of Section 181.

HB 9 also violates Section 181 of the Constitution, which states that "[t]he 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." HB 9 requires that charter schools be authorized and funded with local revenues "without the exercise of any

discretion on the part of duly constituted local authorities." *Reid v. Allinder*, 504 S.W.2d 706, 707 (Ky. 1974). Even if it is *against* the will of local boards of education, HB 9 demands that charter schools be established and funded with local tax revenues in Jefferson County and Northern Kentucky under its Pilot Project. KRS 160.15911(2). It further grants the State Board authority to override the decision of any local school board not to authorize a charter school in the 16 largest school districts in the state, as well as any district in a county where the total enrollment of all independent public school districts is greater than 7,500, thereby accomplishing the same unconstitutionally compelled local taxation. KRS 160.1593(3)(f)(3).

VI. HB 9'S PILOT PROJECT IS LOCAL OR SPECIAL LEGISLATION IN VIOLATION OF SECTION 59 OF THE CONSTITUTION.

A. The Pilot Project Unconstitutionally Targets Jefferson, Campbell, and Kenton Counties.

The Pilot Project established by HB 9 violates the prohibition on local or special legislation in Section 59 of the Constitution. In pertinent part, Section 59 states: "The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely . . . Twenty-fifth: To provide for the management of common schools." The test under Section 59 is simply whether "the statute applies to a particular individual, object or locale." *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 573 (Ky. 2020). "[T]he primary purpose of [Section 59] is to 'prevent special privileges, favoritism and discrimination and to assure equality under the law.'" *Pennybacker*, 308 S.W.3d at 685 (citation omitted).

HB 9's Pilot Project all but specifically names Jefferson, Campbell, and Kenton Counties as the targets of its mandatory charter school program. The statute requires the approval of two urban academy charter schools, one "in a county with a consolidated

local government" (Jefferson County) and an another "within any county containing four (4) or more local school districts" (Campbell County or Kenton County). KRS 160.15911(2). The compressed timeframe for approving the urban academies further demonstrates the legislature's intent to create a closed class directed at those particular counties. *See* KRS 160.15911(3), (4).

HB 9's targeting of Jefferson, Campbell, and Kenton Counties is akin to the Pharmacy Scholarship Program struck down by this Court in *Pennybacker*, 308 S.W.3d at 682–85. There, the General Assembly established "a scholarship program to provide eligible Kentucky students the opportunity to attend an accredited school of pharmacy at a private four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county in the Commonwealth." *Id.* at 682 (quoting KRS 164.7901(1)). The law in *Pennybacker*, just like HB 9, did not identify the location by name but rather by description. *Id.* at 671. The Court concluded that "the sole institution which would fit that description" was the planned pharmacy school at the University of the Cumberlands. *Id.* at 683. However, because only one pharmacy school could meet the definition in *Pennybacker*, the law applied only to a particular place and was therefore invalid under Section 59. *Id.* at 684–85. The same result applies to HB 9's targeted Pilot Project: the statute is unconstitutional under Section 59.

The Attorney General contends that, because HB 9 permitted charter schools to be established anywhere in the state, it cannot be local or special legislation in violation of Section 59. That argument obscures the point entirely. It make no differs that HB 9 *permitted* charter schools in any location; the Pilot Project is local or special legislation because it *required* charters in only three targeted counties.

B. There Is No Pilot-Project Exception to the Constitution.

Contrary to Appellants' assertions, there is no "pilot project" exception to the Kentucky Constitution. Local and special legislation is local and special legislation even if it is time-limited or an experiment. *Kuprion v. Fitzgerald*, 888 S.W.2d 679 (Ky. 1994), is not to the contrary. Although the Kentucky Supreme Court approved the use of family courts as a pilot project in *Kuprion*, the Court did not consider whether a pilot project establishing family courts violated Section 59 or constituted local or special legislation. Instead, *Kuprion* involved a separation of powers challenge to a task force creating family courts in certain jurisdictions. In contrast, Section 59 unequivocally prohibits local or special legislation concerning the "management of common schools."

C. The Pilot Project Is Not Severable from HB 9.

Appellants argue that if the Pilot Project is found to be special legislation, KRS 160.15911 should simply be severed from the bill.[26] But HB 9 may not have passed without the Pilot Project provisions. Appellants claim that there is no basis for such an argument because unlike HB 563, at issue in *Johnson*, HB 9 "did not pass the Legislature 'by a narrow margin.'" LaFontaine Br. 33. Appellants are wrong.

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[26] It is indeed ironic that Mr. LaFontaine points out that courts became "alert to special legislation" because in the nineteenth century, "the Legislature was a mill for private bills." TR 463. Some would say that the enactment of KRS 160.15911 was the very essence of such a private bill. *See* Mark Payne, *A deep dive into HB9 and NKY's pilot charter school*, LINK NKY (October 11, 2022), TR 511–20, https://linknky.com/news/2022/10/11/a-deep-dive-into-hb9-and-nkys-pilot-charter-school; Mandy McLaren et al., *Kentucky charter school bill may play into real estate tycoon's billion-dollar development*, LOUISVILLE COURIER JOURNAL (March 24, 2022), TR 522–30, https://www.courier-journal.com/story/news/education/2022/03/04/charter-school-bill-raises-questions-kentucky-developers-influence; Linda Blackford, *If it looks like a duck …' Push on charter schools fuels conspiracy theories. Are they true?* LEXINGTON HERALD-LEADER (March 24, 2022), TR 532–34.

HB 9 escaped the House Education Committee only after being reassigned there when it did not have the votes in the original committee to which it was assigned, the House Appropriations and Revenue Committee. And then it only narrowly passed after reassigning committee members to ensure that the votes existed to pass HB 9 out of the Education Committee. *See* Jess Clark, *Ky. House of Representatives passes charter school funding bill*, Louisville Public Media (March 22, 2022), TR 536–38, https://www.lpm.org/news/2022-03-22/ky-house-of-representatives-passes-charter-school-funding-bill ("The measure was originally slated to be heard last week in the House Appropriations and Revenue Committee, but . . . House Republican leaders pulled it from the agenda because they knew it wouldn't have the votes to pass . . . . [T]he bill was given to the House Education Committee [where it passed 11-9], but only after swapping out one committee member, Morehead Republican Rep. Richard White, for McCoy, the bill's sponsor."). And after HB 9 escaped the Education Committee, it only narrowly passed the House of Representatives. *See id.* ("Hours after House Bill 9 squeaked through the House Education Committee Tuesday morning, it passed the full House, but only by the slimmest of margins. The measure got 51 votes, the exact number needed to pass."). Just as in *Johnson*, HB 9 passed by a "razor thin" vote and it cannot be presumed that without the unconstitutional Pilot Project, HB 9 would have passed. *See Johnson*, 658 S.W.3d at 31 n.4. HB 9 is unconstitutional special or local legislation and severing KRS 160.15911 from the bill cannot save it.

VII. PROPOSED CONSTITUTIONAL AMENDMENT 2 IS FURTHER EVIDENCE THAT HB 9 IS UNCONSTITUTIONAL.

On November 5, 2024, voters across this Commonwealth will see proposed Constitutional Amendment 2 on their ballots. Amendment 2 is designed to enable

legislation, like HB 9, by stripping many, but not all, of the existing constitutional provisions at issue in this case of their applicability to the General Assembly's use of public money to support education outside the common schools:

> The General Assembly may provide financial support for the education of students outside the system of common schools. The General Assembly may exercise this authority by law, Sections 59, 60, 171, 183, 184, 186, and 189 of this Constitution notwithstanding.[27]

If the voters approve Amendment 2, the parties to these appeals will need to address the impact of the adopted provision on the questions presented here.

If, on the other hand, Amendment 2 fails at the ballot box, the General Assembly's perceived need to propose a constitutional amendment to salvage HB 9 demonstrates the legislature's belief that the charter school statute is presently unconstitutional. The Attorney General has reminded this Court that the General Assembly is "made up of members who each swore to uphold the Kentucky Constitution." Att'y Gen. Br. 5. He has said that the Court should not lightly cast aside the General Assembly's interpretations of the Constitution. *Id.* If that is the case, then the Court should recognize the General Assembly's perception that HB 9 cannot survive a test of its constitutionality without the passage of Amendment 2.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

[27] *See* House Bill 2, 2024 Ky. Acts ch. 8, https://apps.legislature.ky.gov/law/acts/24RS/documents/0008.pdf.

Respectfully submitted,

/s/ Sean G. Williamson
Byron E. Leet
Mitzi D. Wyrick
Sean G. Williamson
Wyatt, Tarrant & Combs, LLP
400 West Market Street, Suite 2000
Louisville, KY 40202
502.589.5235
bleet@wyattfirm.com
mitziwyrick@wyattfirm.com
swilliamson@wyattfirm.com

Counsel for Appellees Council for Better Education, Inc., Jefferson County Board of Education, and Dayton Independent Board of Education

WORD-COUNT CERTIFICATE

This document complies with the word limit of Rule of Appellate Procedure 31(G)(3)(a) because, excluding the parts of the document exempted by Rules of Appellate Procedure 15(D) and 31(G)(5), this document contains 16,087 words.

/s/ Sean G. Williamson
Sean G. Williamson