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Supreme Court of Kentucky

No. 2024-SC-0024

IN THE SUPREME COURT OF KENTUCKY

GUS LAFONTAINE, *et al.*,

Intervening Defendant-Appellant,

v.

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

Plaintiffs-Appellees.

Appeal from Franklin Circuit Court, Div. I
Civil Action No. 23-CI-00020

BRIEF OF APPELLANT GUS LAFONTAINE

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CERTIFICATE OF SERVICE

I certify that on August 2, 2024, I served a copy of this brief by U.S. mail on: Byron E. Leet, Mitzi D. Wyrick, and Sean G. Williamson, Wyatt, Tarrant & Combs, LLP, 400 W. Market St., Ste. 2000, Louisville, KY 40202 (also by email); Donald J. Haas and Todd G. Allen, Kentucky Department of Education, 300 Sower Blvd., 5th Fl., Frankfort, KY 40601 (also by email); Matthew F. Kuhn and Sarah N. Christensen, Office of the Attorney General, 700 Capital Ave., Ste. 118, Frankfort, KY 40601 (also by email); Clerk, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601; and Clerk, Court of Appeals, 669 Chamberlain Ave., Ste. B, Frankfort, KY 40601. Appellate certifies that he did not withdraw the record on appeal from the Franklin Circuit Court.

/s/ Paul E. Salamanca

INTRODUCTION

Gus LaFontaine is an experienced teacher. He is also a member of the Army National Guard who deployed to both Iraq and Afghanistan. Before this litigation began, he submitted an application to the Madison County Public Schools to establish a public charter school in that county. His goal, he explained, is to "close achievement gaps for ***low-performing groups of students***." Application, Part II-A-1, Record at 222 (emphasis added). He also explained that his public charter school would emphasize "engineering instruction." He stated: "[T]he teaching of creativity is needed now more than ever, as it motivates children to learn, develops higher-order cognitive skills, spurs emotional development, ***ignites hard-to-reach students***, and is an essential skill for future jobs." Application, Part II-D-2, Record at 229 (emphasis added). His goal, in short, is to help introduce children to the Information Age.

As of December 2023, about 3.7 million children were attending about 8000 public charter schools across the country.[1] Of these 8000 schools, not one is in Kentucky. This is not because our Constitution forbids it. To the contrary, because public charter schools depend entirely on community engagement, assessment tests, and parents voting with their feet, they represent the highest aspirations of this Court's groundbreaking decision in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212 (Ky. 1989). This Court should reverse the decision below.

STATEMENT ON ORAL ARGUMENT

Mr. LaFontaine respectfully asks the Court to hold oral argument in this case, which presents important issues of constitutional law.

[1] *See* https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/ (visited Jul. 24, 2024).

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. Factual Background

Public charter schools are an innovative, 100% results-oriented approach to public, common school education. In simple terms, they live or die by serving their students and families. Because parent preference is their life blood, they are profoundly adaptive, and they have proven themselves effective in a wide variety of seemingly intractable situations. For example, they have flourished in New Orleans since Hurricane Katrina.[2] Today, forty-six states, plus the District of Columbia, have public charter schools up and running.

In fact, all seven states that border Kentucky have enacted public charter school legislation. Tennessee had 116 public charter schools up and running as of 2020-2021, serving over forty thousand students.[3] Many of these schools are in Memphis.[4] Similarly, Missouri had 77 public charter schools up and running as of 2020-2021, serving over twenty-five thousand students.[5] Many of these schools are in St. Louis and Kansas City.[6] Illinois, for its part, had 137 public charter schools up and running as of 2020-2021, serving over sixty thousand students.[7] Almost all of these schools are in Chicago.[8] In Indiana, 102 public charter schools were serving over forty thousand students as of 2018-

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[2] *See* https://www.gnocollaborative.com/ (visited Jul. 23, 2024).
[3] *See* https://publiccharters.org/charter-school-state-resources/tennessee/ (visited Jul. 24, 2024).
[4] *See* https://www.scsk12.org/charter/ (visited Jul. 24, 2024).
[5] *See* https://publiccharters.org/charter-school-state-resources/missouri/ (visited Jul. 24, 2024).
[6] See https://dese.mo.gov/media/pdf/st-louis-charter-school-directory-0 (St. Louis) (visited Jul. 24, 2024); https://dese.mo.gov/media/pdf/kansas-city-charter-school-directory (Kansas City) (visited Jul. 24, 2024).
[7] *See* https://publiccharters.org/charter-school-state-resources/illinois/ (visited Jul. 24, 2024).
[8] *See* https://www.incschools.org/#:~:text=Chicago%20is%20home%20to%20128,drop%2Dout%20recovery%20students) (visited Jul. 27, 2024).

2019.[9] Many of these schools are in Indianapolis.[10] In Ohio, 318 public charter schools were serving just under 120,000 students as of 2020-2021.[11] Many of these schools are in Cleveland.[12] More modestly, West Virginia has seven authorized public charter schools as of this writing.[13] Similarly, seven public charter schools were up and running in Virginia as of 2020-2021, serving over a thousand students.[14]

In 2022, Kentucky decided to join this exciting movement. Our Public Charter School Law, KRS 160.1590 to 160.1599, popularly known as "HB 9," sets up a fiscal structure for public charter schools in our Commonwealth. This case concerns the constitutionality of that statute.

Although HB 9 has many moving parts, at its core it is simple. It sets up a market ***within the public sector***. Parents choose a public charter school for their children, and the money — ***which the General Assembly has been expanding for years*** — follows the kids.[15]

The process works from the ground up. At the start, "teachers, parents" and others submit an application to form a public charter school. KRS 160.1593(1). They submit

[9] *See* https://publiccharters.org/charter-school-state-resources/indiana/ (visited Jul. 24, 2024).
[10] *See* https://www.themindtrust.org/charter-schools/ (visited Jul. 24, 2024).
[11] *See* https://publiccharters.org/charter-school-state-resources/ohio/ (visited Jul. 24, 2024).
[12] See https://www.clevelandmetroschools.org/charter-school-collaboration (visited Jul. 24, 2024).
[13] *See* https://wvcharters.org/schools (visited Jul. 24, 2024).
[14] *See* https://publiccharters.org/charter-school-state-resources/virginia/ (visited Jul. 24, 2024).
[15] *Compare* 2021 Ky. Acts ch. 169, I-C-1(2), at 1063 (intended base guarantee of $4000 per student in average daily attendance in fiscal years 2020-2021 and 2021-2022); *with* 2022 Ky. Acts ch. 199, Part I-C-1(2), at 1656 ($4100 in fiscal year 2022-2023 and $4200 in fiscal year 2023-2024); *with* 2024 Ky. Acts ch. 175, Pt. I-C-1(2), at 1828 ($4326 in fiscal year 2024-2025 and $4586 in fiscal year 2025-2026).

this package to a "public charter school authorizer," often a local board. KRS 160.1590(15). In fact, and as noted above, Mr. LaFontaine submitted an application to the Madison County Public Schools to establish a public charter school in that county before this litigation began. *See* Opinion and Order, *Council for Better Educ., Inc. v. Glass*, No. 23-CI-00020, at 1-2, Record at 599-600.

KRS 160.1593 sets forth what an application must contain. Consistent with HB 9's focus on innovation, results, and underserved populations, an application's contents begin with a description of the school's mission and vision, along with a description of the population and community it seeks to serve. *See* KRS 160.1593(3)(a). The statute then requires, among other things, "[a] description of the school's proposed academic program," KRS 160.1593(3)(b), and an explanation of how that program "is likely to improve the achievement of ***traditionally underperforming students***, serve the needs of ***students with individualized education programs***, or provide ***students with career readiness education opportunities***." KRS 160.1593(3)(c)(2) (emphasis added). The focus on underserved populations is baked into the cake of the statute.

Mr. LaFontaine's proposal illustrates this. His goal is to "close achievement gaps for ***low-performing groups of students***." The core of his strategy is "the 20/20/20 Vision." This strategy has three components: (1) reduce class sizes by 20%; (2) increase student instructional time by 20%; and (3) increase teacher compensation by 20%. Application, Part II-A-1, Record at 222 (emphasis added). These components interact to maximize individualized contact between highly qualified teachers and children. Notably, Mr. LaFontaine would increase the number of instructional hours per year for students from the statutory minimum of 1062 to 1275. *See id.*, Part II-A-2, Record at

224. He would also increase the number of instructional days by four. *See id.*, Record at 224.

As noted in the introduction, Mr. LaFontaine also explains that his public charter school would emphasize "engineering instruction." Application, Pt. II-D-2, Record at 229. Not only would this be an important service to students, it would also fit well with the Commonwealth's larger needs in the area of STEM education. As the Legislature explains in KRS 158.846(6) (emphasis added):

> Bold, collaborative, and strategic action is needed by ***all stakeholders*** in Kentucky's P-20 education system, business sector, and government to improve Kentucky's position for success in the knowledge-based economy by ***expanding and strengthening STEM educational opportunities*** from prekindergarten through the doctoral degree level. . ..

Mr. LaFontaine proposes to answer this call.

Once the application is submitted, the authorizer reviews it according to objective criteria set forth in the statute. *See* KRS 160.1594(3)(f), (7). Among other things, the authorizer is "encouraged to give preference to" applications that focus on categories of students who are at risk or who might otherwise benefit from a focused program, reiterating the emphasis on underserved populations. KRS 160.1594(2). The statute also authorizes appeal to the State Board of Education if an authorizer denies an application. *See* KRS 160.1595(2).

After an application is approved, the school and authorizer enter into a contract "that identifies the roles, powers, responsibilities, and performance expectations for each party." KRS 160.1590(4). *See also* 701 KAR 8:020E, § 5 (Standards of Authorizer Performance Concerning Charter Contracts). These schools are called "public ***charter*** schools" because of this contract. And they are properly called "***public*** charter schools" because of a whole host of characteristics that make them "public institutions" in every

sense of the phrase. For one example among many, they are subject to open-meetings and open-records requirements. *See* KRS 160.1592(3)(k). For a second, members of the boards of public charter schools take the same oath of office as any other public servant. *See* KRS 160.1596(1)(a) (cross-referencing to KRS 62.010). For a third, members of such boards may be removed for malfeasance like any other public servant. *See* KRS 160.1592(4). For a fourth, public charter school employees participate in either the Teachers' Retirement System or the County Employees Retirement System, depending on the circumstances. *See* KRS 161.141(2)(a). The foregoing statements cannot be made about private schools.

Once a public charter school opens, it participates in the per-pupil budgeting that prevails for public schools in Kentucky. *See* KRS 160.1596(5), (6). For example, its SEEK allocation is identical to what it would be if it were a conventional public school under the direct supervision of a local district. *See* KRS 160.1596(5), (6)(a)(1). Importantly, and as noted previously, the General Assembly has enhanced SEEK funding year-over-year for several biennia.[16]

Last, in keeping with the market-driven approach that animates HB 9, the statute recognizes that a public charter school may close. KRS 160.1596(15), for example, sets forth the priority for the distribution of assets of "a public charter school that closes for any reason." Similarly, KRS 160.1598(11) requires authorizers to "develop a public charter

[16] At one point in its opinion, the court below describes HB 9 as "re-allocat[ing]" funds from traditional public schools to public charter schools. See Opinion and Order at 7, Record at 605. This metaphor only makes sense if we think of traditional public schools as the ultimate beneficiaries of educational appropriations. They are not. Schools do not exist for their own sake. They exist because they serve students, the true ultimate beneficiaries of appropriations.

school closure protocol." This is to address such matters as "timely notification to parents," "orderly transition of students," and "proper disposition of school funds, property, and assets." *Id.* And the Kentucky Department of Education ("KDE"), nominal defendants in this matter, has promulgated detailed provisions to elaborate on these closure protocols. *See* 701 KAR 8:020E, § 8 (Standards of Authorizer Performance Concerning Charter Closure).

These protocols reflect the essence of public charter schools. Because they operate 100% by boldness and experimentation, they do not always succeed. With the oversight of their authorizer, they may be able to navigate through challenges. Under the Department of Education's implementing regulations, for example, authorizers may engage public charter schools with a "progressive system of monitoring consequences," which may include "notices of deficiencies or conditions unilaterally imposed on the charter school prior to revocation or nonrenewal." 701 KAR 8:020E, § 7(8). If these measures are insufficient, however, the statute empowers an authorizer to decline to renew a charter. *See*, *e.g.*, KRS 160.1594(1)(h) (requiring an authorizer to "[d]etermine whether each charter contract it authorizes merits renewal or revocation. . . ."); KRS 160.1598(6) (setting forth grounds for non-renewal of a charter). Success, of course, is always preferable to failure. This provides the incentive that animates public charter schools. And when they do succeed, they can catch lightning in a bottle. Witness New Orleans. Public charter schools' approach to education may be a series of trials — and perhaps errors. But great things may emerge, and parents vote with their feet. HB 9 gives Kentucky an opportunity to take part in this worthwhile movement.

II. Procedural History

The General Assembly enacted HB 9 as 2022 Ky. Acts, ch 213, on April 13, 2022. On January 9, 2023, Appellees Council for Better Education, Inc., Jefferson County Board of Education, and Dayton Independent Board of Education (collectively, "the Council") brought suit in Franklin Circuit Court challenging its constitutionality. The original defendants in this action were Jason E. Glass, in his official capacity as Commissioner of the Kentucky Department of Education, the Kentucky Board of Education, and Lu Young, in her official capacity as Chair of the Kentucky Board of Education. On February 24, 2023, the court below allowed Appellant Commonwealth of Kentucky, *ex rel.* Attorney General Daniel Cameron, to intervene as a defendant. It similarly allowed Appellant Gus LaFontaine to intervene as a defendant on March 16, 2023. Cross-motions for summary judgment followed, and the court held a hearing on June 20, 2023.

On December 11, 2023, the court issued an Opinion and Order granting Plaintiffs' motion for summary judgment, denying the cross-motions for summary judgment of Intervening Defendants, and declaring "the provisions of House Bill 9. . . unconstitutional under Sections 183, 184 and 186 of the Constitution." Opinion and Order at 13 (capitalization altered), Record at 611. The Commonwealth of Kentucky, *ex rel.* Attorney General Daniel Cameron (now Russell Coleman) filed a timely notice of appeal on January 9, 2024. Mr. LaFontaine filed a timely notice of appeal the next day. On January 19, 2024, the Commonwealth asked this Court to transfer the case to its docket. Mr. LaFontaine did the same on January 22, 2024. On January 29, 2024, the Council responded to both motions, agreeing that transfer was appropriate. On April 18, 2024, this Court granted both motions.

STANDARD OF REVIEW

This Court reviews holdings of law, including interpretations of the Constitution, *de novo*. *See Commonwealth v. Doebler*, 626 S.W.3d 611, 618 (Ky. 2021). Although the court below repeatedly and incorrectly referred to public charter schools as "private," these references were not findings of fact. The case was submitted on cross-motions for summary judgment. No party argued that the case presented genuine issues of material fact. Therefore, any conclusions the court below reached were necessarily conclusions of law, subject to *de novo* review in this Court.

ARGUMENT

In *Rose v. Council for Better Education, Inc.*, this Court famously held that students in Kentucky have a "fundamental" right to "an adequate education." 790 S.W.2d 186, 212 (Ky. 1989). "The General Assembly," it said, "must protect and advance that right." *Id.* Although the decision applied only in Kentucky, it had national impact. In the words of one commentator, *Rose* was a "paradigm shift." Scott R. Bauries, Foreword: Rights, Remedies, and *Rose*, 98 Ky. L.J. 703, 708 (2009-2010). "The [*Rose*] Court," he said, "in stating this positive conception of individual rights and legislative duties relating to education, opened the doctrinal door to ***adequacy*** as a theory of relief." *Id.* at 709 (emphasis added) . The key, post *Rose*, is adequacy.

Although "adequacy" is not easy to define, there are two basic ways to do so. One is to measure inputs. An example of an input-based metric would be a requirement that a legislature appropriate, or make available, no less than a certain amount of money per child per year for education. Another input-based metric would be a requirement that each school make available to each child a certain number of hours per year of instruction. *See*, *e.g.*, KRS 158.070(1)(f) (1062 hours). As may be evident from these examples, input-

based metrics depend on the assumption that inputs correlate with outputs.

A second approach to adequacy is to measure outputs directly. An example of an output-based metric would be a goal that every student be able to demonstrate certain aptitudes at certain points in his or her education, or that a certain percentage of students be able to demonstrate such aptitudes at such points. "Can Johnny read?" is a famous output-based metric. It makes perfect sense. At the end of the day, we want our kids to be able to read, write, compute, and exercise their role as citizens. That is what schools are for. As Chief Justice Warren wrote in *Brown v. Board of Education*, education "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." 347 U.S. 483, 493 (1954).

In *Rose*, this Court firmly associated Section 183 with output-based metrics. "[A]n efficient system of education," this Court held, is one whose "goal" is to give each child seven articulated "capacities." 790 S.W.2d at 212. These are, in simple terms: (1) the capacity to communicate effectively; (2) the capacity to understand social, economic, and political systems; (3) the capacity to interact meaningfully with others; (4) appreciation for mental and physical wellness; (5) appreciation for the arts; (6) preparedness for post-secondary academic or vocational training; and (7) possession of sufficient academic or vocational skills to obtain gainful employment. *Id.* The animating spirit of *Rose* is that, if schools seek to impart these capacities to every student, our children will have the benefit of "an efficient system of common schools."

Importantly, the *Rose* Court did not simply associate Section 183 with inculcation of the seven capacities and leave the matter there. It also specified where the

responsibility lies for getting the job done. In other words, this Court identified not only the ***what*** but the ***who***. The ***General Assembly***, it held, is responsible for maintaining an "efficient system of common schools." As this Court explained in *Rose*, "it is the obligation, the ***sole obligation***, of the General Assembly to provide for a system of common schools in Kentucky." *Rose*, 790 S.W.2d at 205 (emphasis added) . The Council said the same. It not only recognized, but ***emphasized***, that this duty lies with the General Assembly. "Education is a state responsibility," it said. Brief for Appellees at 34, *Rose*, 790 S.W.2d 186. "'In this state,'" it repeated, "'the subject of public education has always been regarded and treated as a matter of state concern.'" *Id.* (quoting *City of Louisville v. Commonwealth*, 121 S.W. 411, 412 (Ky. 1909)). As the Council's own expert wrote after the case, "[i]t is a state system, not a local one." Kern Alexander, The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case, 28 Harv. J. on Legis. 341, 360 (1991).

As we all know, the General Assembly took heed of *Rose*. Said one prominent commentator, the "legislature took its cue from [*Rose*] and enacted the most sweeping education reform legislation then seen." Bauries, 98 Ky. L.J. at 713. This was a reference to KERA, the Kentucky Education Reform Act of 1990. 1990 Ky. Acts ch. 476. As part of KERA, the General Assembly embedded *Rose*'s seven capacities into statute, even adding an eighth: the development of "[c]ore values and qualities of good character to make moral and ethical decisions throughout [one's] life." *See* 1990 Ky. Acts ch. 476, Pt. I, sec. 2 (codified as amended at KRS 158.645(3)) .

Importantly, KERA also mandated broad and regular assessments of student achievement. This is precisely the kind of output-based metric that *Rose* had in mind.

See 1990 Ky. Acts ch. 476, Pt. I, sec. 4 (codified as amended at KRS 158.6453(3)(a)). Asking Johnny to explain a passage is a straightforward way to see if he can read. In this enactment, the Legislature instructed the Kentucky Board of Education to "implement[] a balanced statewide assessment program that measures the students', schools', and districts' achievement of the goals set forth in KRS 158.645," which is the statutory reiteration and expansion of the capacities in *Rose*. This mandate ensures that the system keeps its eyes on the prize, and retains the goal of imparting of *Rose*'s capabilities.

Public charter schools fit perfectly into this structure, because students there take ***exactly the same assessment tests*** as students at conventional public schools, thus taking up *Rose* as their North Star. KRS 160.1592 (3)(f) provides that "[a] public charter school shall. . . ***[d]esign*** its education programs to meet or exceed the student performance standards adopted by the Kentucky Board of Education." (Emphasis added.) In other words, HB 9 requires public charter schools to orient their programs, ***from the drawing board***, toward achievement of standards. Similarly, KRS 160.1592(3)(g) requires students at public charter schools to "participat[e] in required state assessment of student performance" under KRS 158.6453. As the members of this Court are surely well aware, results are then published. *See* KRS 158.6453(17). This means parents can see for themselves which schools are moving the ball forward and can vote with their feet. Because of this market-based dynamic, life for a public charter school is like life for any start-up, with the key distinction that public charter schools operate ***entirely within the public sector***.

Contrary to the intimations of the court below, HB 9 is an integral part of the General Assembly's response to *Rose*, which necessarily merits a measure of deference.

As this Court has recognized, education is "the 'most vital' question" the Legislature faces. *Rose*, 790 S.W.2d at 206. It is a grave responsibility. Importantly, however, responsibility is nothing without discretion. As this Court observed in *Jones v. Russell*, "it is reasonable to allow great freedom of discretion to the legislative power where the right and responsibility of regulation is reposed." 6 S.W.2d 460, 462 (Ky. 1928). In fact, this Court has recognized this latitude in the specific context of education. "In obeying the constitutional mandate to provide an efficient system of common schools," it noted in *Prowse v. Board of Education for Christian County*, "the Legislature must necessarily have ***the discretion of choosing its own agencies***, and conferring upon them the powers deemed by it necessary to accomplish the ends aimed at." 120 S.W. 307, 309 (Ky. 1909) (emphasis added). *Rose* itself recognizes this principle. "[L]egislative discretion — in this specific matter of common schools — is to be given ***great weight***," it noted in that case. 790 S.W.2d at 209 (emphasis added).

HB 9 is an exercise of that discretion, reflecting the highest aspirations of *Rose*. In this law, the General Assembly made four specific findings, two of which are simple matters of economics, and two of which, although largely empirical, are entitled to deference. The economic findings are set forth in KRS 160.1591(1)(a) and (c). In KRS 160.1591(1)(a), it found that "reducing achievement gaps" is "necessary for the state to realize its [full potential]." KRS 160.1591(1)(a). This cannot be gainsaid. As the Supreme Court of the United States wrote in *Brown*, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. at 493.

In KRS 160.1591(1)(c), meanwhile, the General Assembly found that "[a]dditional public school options are necessary to help reduce socioeconomic, racial, and ethnic achievement gaps." This too cannot be gainsaid. *See* KRE 201. As the President's Council of Economic Advisors has noted, "[b]asic economic theory demonstrates that when firms have to compete for customers, it leads to lower prices, ***higher quality goods and services***, greater variety, and ***more innovation***." Heather Boushey & Helen Knudsen, The Importance of Competition for the American Economy (Jul. 9, 2021) (emphasis added). As Drs. Boushey and Knudsen added, "[w]hen only a single firm sells a product or service for which there is no substitute, the firm is a monopoly." *Id.* n.1. HB 9 institutes competition ***within the public sector***, responding to the economic advisors' call.

The General Assembly also found in HB 9 that "[p]ast and current measures have been insufficient for making progress toward reducing the state's achievement gaps," and that "demand exists for high-quality public charter schools in the Commonwealth." KRS 160.1591(1)(b), (d). Although these findings are largely empirical, they are entitled to a strong presumption of validity. As this Court has emphasized, "it is within the province of the legislature to assimilate, consider and weigh all the factors inherent in the concept of public welfare. That which is detrimental to the Commonwealth is a proper basis for the legislature's consideration." *Stephens v. Bonding Ass'n of Ky.*, 538 S.W.2d 580, 582 (Ky. 1976). This Court should reiterate the General Assembly's broad discretion with respect to the common schools, uphold HB 9, and reverse the judgment below. HB 9 is fully consistent with, and reflects the highest aspirations of, Sections 183, 184, and 186 of the Constitution.

I. Public charter schools are common schools under Sections 183 and 184.

Under *Rose*, "an 'efficient' system of common schools" is one that is "free to all," that is "available to all Kentucky children," that is "substantially uniform throughout the state," that provides "equal educational opportunities to all Kentucky children," that is "monitored by the General Assembly," and that is "sufficient[ly]" funded. 790 S.W.2d at 212-13. In *City of Louisville v. Commonwealth*, this Court's predecessor similarly identified the "one main essential" of common schools as their status as "free schools, open to all the children of proper school age residing in the locality, and affording, so long as the term lasts, equal opportunity for all to acquire the learning taught in the various common school branches." 121 S.W. 411, 412 (Ky. 1909).

Public charter schools adhere to these teachings in every respect. They are "free to all" and "available to all," and they provide "equal educational opportunities to all." KRS 160.1590 (14)(f) defines a "[p]ublic charter school" as "a public school that admits students on the basis of a random and open lottery if more students apply for admission than can be accommodated, " and KRS 160.1590(18) defines a "[s]tudent" as "any child who is eligible for attendance in a public school in Kentucky. " And KRS 1592(14) provides that a "public charter school. . . shall not. . . charge tuition or fees."

Public charter schools are also "substantially uniform throughout the state." Under KRS 160.1592(3)(f), they must "[d]esign [their] education programs to meet or exceed the student performance standards adopted by the Kentucky Board of Education." Notably, these are the same standards that apply to traditional public schools. As KDE explains, "[t]he Kentucky Academic Standards (KAS) contain the minimum required standards that ***all Kentucky students*** should have the opportunity to learn before graduating from Kentucky high schools."

https://www.education.ky.gov/curriculum/standards/kyacadstand/Pages/default.aspx (emphasis added) (visited Jul. 28, 2024). Likewise, KRS 160.1592(3)(g) requires public charter schools to "[e]nsure students' participation in ***required state assessment of student performance***." (Emphasis added.) Again, these are the same tests that students in traditional public schools take.

To continue, public charter schools are "monitored by the General Assembly." On the fiscal side, KRS 160.1592(3)(h) requires public charter schools to "[a]dhere to all generally accepted accounting principles ["GAAP"] and adhere to the same financial audits, audit procedures, and audit requirements as are applied to other public schools under KRS 156.265." Similarly, KRS 160.1592(3)(l) requires public charter schools to "[c]omply with purchasing requirements and limitations under KRS Chapter 45A and KRS 156.074 and 156.480, or provide to the public charter school board of directors a detailed monthly report of school purchases over ten thousand dollars ($10,000), including but not limited to curriculum, furniture, and technology." In addition, HB 9 gives the authorizer substantial power to oversee the affairs of a public charter school. Under KRS 160.1592(3)(o), a public charter school "operate[s] under the oversight of its authorizer in accordance with its charter contract and application." KRS 160.1594(1)(g) similarly requires the authorizer to "monitor" a public charter school's "performance and compliance. . . according to the terms of the charter contract." And behind all this is the elemental fact that parents monitor public charter schools through the simple expedient of voting with their feet.

Finally, HB 9 effects no change whatsoever in aggregate appropriations for the common schools, which, as noted previously, have been increasing year-over-year for

some time. Just as before, money follows the student. *See* KRS 160.1596(5), (6). HB 9 thus does not derogate from the principle of sufficient funding. In every respect, then, public charter schools are common schools within the meaning of Sections 183 and 184 of the Constitution.[17]

The court below improperly describes public charter schools as "private," relying primarily on the fact that, if there are more applicants than seats at a public charter school, it must use a lottery. See Opinion and Order at 5-6, Record at 603-04. This untoward description mistakes public charter schools' most promising feature — the possibility that they would actually ***attract students*** — for a bug. As Justice Robert Jackson once observed, however, "[t]he Constitution is not a suicide pact." *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). This Court should not run to the strained interpretation of the Constitution proffered by the court below.

In any case, that interpretation is beyond strained. It cannot bear the weight of decades of recognized practice, which this Court should take into account. As Justice Breyer wrote in *NLRB v. Noel Canning*, "the longstanding 'practice of the government' can inform our determination of 'what the law is.'" 573 U.S. 513, 525 (2014) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819), and *Marbury v. Madison*, 5 U.S. 137, 177 (1803)) (citations omitted)). Many magnet schools in Kentucky already turn highly desirous applicants away, and not solely on the basis of a lottery. In Louisville, for example, duPont Manual High School does not admit everyone who applies. Instead, it

[17] Mr. LaFontaine's reliance on *Rose* fully answers the contention by the court below that, according to the Intervening Defendants, "the term 'common schools' essentially means whatever the legislature says it does." Opinion and Order at 3, Record at 601.

has a complex algorithm for admission, and many are turned away.[18]

Relatedly, the court below chides HB 9 on the ground that public charter schools are not expected to "'take all comers.'" Opinion and Order at 6, Record at 604. This is a canard. No school in the twenty-first century literally "takes all comers." Instead, the "efficient system" ***as a whole*** takes all comers, as the Constitution requires, and public charter schools are part of that system. Here, as elsewhere, the court below confuses the familiar with the necessary.[19]

The court below also suggests that public charter schools will play favorites in admissions before the lottery kicks in. *See* Opinion and Order at 5-6, Record at 603-04. This uncharitable suggestion assumes the worst about a movement that has addressed acute concerns among socioeconomically disadvantaged populations across the United States. It also assumes, without any basis in fact, that both applicants to form public charter schools and authorizers will ignore the many provisions in HB 9 that put a thumb on the scale for underserved populations. *See* KRS 160.1593 (3)(c)(2) (emphasis added) (requiring an applicant to explain how a proposed program "is likely to improve the achievement of ***traditionally underperforming students***, serve the needs of ***students with individualized education programs***, or provide ***students with career readiness education***

[18] *See* https://sites.google.com/jefferson.kyschools.us/dupontmanualadmissions24-25/ (last visited Jun. 25, 2024).

[19] Relatedly, the court below asks why, "if the 'money follows the child,'" public charter schools limit their enrollment. Opinion and Order at 6, Record at 604. This rhetorical question misses the point. Sometimes, and perhaps often, a relatively small school with a targeted population works well for that population. Scaling the school up to a larger population could well defeat the model for success that the school identified. *Cf.* KRS 160.1593(f)(2) (requiring applicants to form public charter schools to anticipate a population "at least one hundred" students, "unless the application is focused on serving special needs or at-risk students seeking career readiness education").

opportunities."); KRS 160.1594(2) (encouraging an authorizer "to give preference to" applications that focus on categories of students who are at risk). In fact, the court below appears even to assume that Mr. LaFontaine's own proposal to "close achievement gaps for ***low-performing groups of students***" is insincere. Application, Part II-A-1, Record at 222 (emphasis added). This Court should eschew such uncharitable assumptions. Social and economic disparities are part of our reality, but they also help us identify ways we can do better. This Court should not indulge the pessimistic assumptions of the court below.

Nor do the Franklin Circuit Court's repeated descriptions of public charter schools as "private" cut any mustard. As this Court has correctly noted, conclusory labels are not law. *See Fannin v. Williams*, 655 S.W.2d 480, 484 (Ky. 1983). Public charter schools have every aspect of a public entity. They are subject to open-meetings and open-records requirements, which is not the case for private schools. *See* KRS 160.1592(3)(k). Members of their boards take an oath of office, which is not true for private schools. *See* KRS 160.1596(1)(a) (cross-referencing to KRS 62.010). Members of their boards may be removed for dereliction of duty just as any other public official under KRS 61.040, which is not the case for private schools. *See* KRS 160.1592(4). And employees of public charter schools participate in the public retirement system, which is not true for private schools. *See* KRS 161.141(2)(a). The court below appears to have misapprehended the public nature of public charter schools, but this Court should not.

A. Sections 183 and 184 do not require plenary district control.

The court below tried to import a requirement of plenary district control into Sections 183 and 184 of the Constitution, but this argument immediately runs into two difficulties. The first is textual. Neither Section 183 or nor Section 184 says anything about "districts." The word simply does not appear. The second is precedential. This

Court has repeatedly held that districts are simply agents of the General Assembly. It is hard to imagine an agent that can compel a principal to leave it in control. As this Court explained in *Yanero v. Davis*, "public schools are the responsibility of the state, and the General Assembly has established the Kentucky Board of Education and the local school boards as ***agencies*** through which it implements its constitutional mandate. . . ." 65 S.W.3d 510, 527 (Ky. 2001) (emphasis added, citations omitted). "[T]he *sole responsibility* for providing the system of common schools," this Court said in *Rose*, "lies with the General Assembly." 790 S.W.2d at 216. "If they ***choose to delegate*** any of this duty to institutions such as the local boards of education, 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." *Id.* (emphasis added). *See also Prowse v. Board of Education for Christian County*, 120 S.W. 307, 309 (Ky. 1909) (emphasis added) ("[T]he Legislature must necessarily have the discretion of ***choosing its own agencies***, and conferring upon them the powers deemed by it necessary to accomplish the ends aimed at."). The status of districts as agents of the Legislature could not be more clear.

Importantly, the Legislature's power to appoint suitable agents to administer the common schools goes to the point where it could even eliminate the districts, if it came to the unlikely conclusion that doing so was the best path forward. As this Court explained in *Board of Education of Fayette County v. Board of Education of Lexington Independent School District*, "school districts are ***creatures of the legislature***, and the legislature has the power under section 183. . . to alter them or even ***do away with them entirely***." 250 S.W.2d 1017, 1019 (Ky. 1952) (emphasis added). In *Yanero*, this Court similarly

recognized that "the Constitution does not provide for the creation of local boards of education." 65 S.W.3d at 526.

The cases on which the court below relied are not to the contrary. In fact, it is hard to fathom exactly what the court below means when it says that "[t]he definition of 'common schools' adopted by Kentucky's highest court is based on. . . statute and. . . long tradition." Opinion and Order at 8, Record at 606. This is because *all four* of the cases on which it below relies, *Sherrard v. Jefferson County Board of Education*, 171 S.W.2d 963 (Ky. 1942), *Pollitt v. Lewis*, 108 S.W.2d 671 (Ky. 1937), *Collins v. Henderson*, 74 Ky. (11 Bush) 74 (Ky. 1874), and *Underwood v. Wood*, 19 S.W. 405 (Ky. 1892), emphasize the role of "trustees" in our common schools. But we no longer have trustees, and in fact they had largely ceased to exist when *Pollitt* and *Sherrard* were decided. It is thus hard to imagine how they could somehow have been incorporated into Section 184.

In addition, trustees were a problem, not a solution. According to William E. Ellis, "[t]he local district trusteeship persisted far longer than it should have. Trustees, a remnant of excessive localism and ruralism in the guise of true democracy, proved difficult to eliminate." *A History of Education in Kentucky* 205 (2011). Thomas D. Clark likewise described the "system of local school district trustees" as "an albatross in the history of educational progress." "Kentucky Education Through Two Centuries of Political and Social Change," 83 *Register of the Kentucky Historical Society* 173, 182 (Summer 1985) . Jesse Stuart said the following about trustees:

> The bitterest denunciation I ever made in print was in regard to the school trustee system. I wrote many articles about school trustees. In these articles I said the state should pass a law to do away with this system, for as long as members of the teaching profession in the rural school districts of Kentucky had to be subject to, and controlled by, these little self-important dictatorial drones, we could never have a school system.

The Thread That Runs So True 215 (1949).

The Legislature put a thankful end to this system in 1934, when it authorized county boards of education to "discontinue subdistricts." *See* 1934 Ky. Acts ch. 65, Art. V, § 6; *see also* Stuart at 237-38 (noting this development). This Court should not now resurrect this defunct and discredited statutory regime. Section 184 is not a straightjacket. As Delegate Beckner observed at the Convention:

> Now, what I object to is, that the amendment [referring to what would become Section 184] should be put in that ties the hands of future generations, and says to the General Assemblies that shall come after us, representing the people from whom they come, and whose views they speak, that they shall do nothing beyond these things which our ancestors, or those of the present day, have done. I think that is a mistake.

3 Official Report of the Proceedings and Debates in the Convention 4570 (1890). To be sure, Delegate Beckner was addressing himself largely to post-secondary education in this passage, but he did refer to "the school for the blind" and "the school for the deaf" in the course of these remarks. *Id.* More to the point, he counseled strongly against the error the court below made more than once, to confuse the familiar with the necessary.

Apart from their obsolescence, both *Sherrard* and *Pollitt* actually went off on far narrower grounds than the opinion below suggests. The issue in *Pollitt* was whether a "junior college" could qualify as a common school, the obvious answer being no. *See* 108 S.W.2d at 671. *Sherrard*, in similar fashion, reached the uncomplicated conclusion that Section 184 prohibited paying for bus rides to explicitly private schools. *See* 171 S.W.2d. at 964. In fact, its actual holding was quite simple. "[I]t is well settled," the Court said, "that the words 'common schools' as used in the Constitution mean 'public' or 'free' schools maintained by the State at public expense, as distinguished from any private,

parochial or sectarian school." *Id.* at 966.

Underwood v. Wood, for its part, was simply a case about what would later be called special legislation. 19 S.W. 405 (Ky. 1892). In this case, a school that had none of the characteristics of a public entity that apply to a public charter school was the beneficiary of custom legislation that authorized it to receive money from the school fund. *See id.* at 406. The fact that teachers at this private school were not subject to full and direct control of the local district was not necessary to the decision.

The cases on which the court below relied also suffer from an infirmity of age. As noted above, they refer to an institution that no longer exists. Their wooden language is also hard to reconcile with the managerial dynamism exemplified by such decisions as *Fayette County*, from 1952, and *Rose*, from 1989. Perhaps a ready explanation can be found in *Dodge v. Jefferson County Board of Education*, 181 S.W.2d 406 (Ky. 1944). In *Dodge*, the Court began by describing *Collins v. Henderson* (referred to below as *Bush v. Henderson*) as an "older and frequently quoted case[]." *Dodge*, 181 S.W.2d at 407-08. It went on to note, however, that *Collins*, "as years went by, has been ***considerably liberalized*** though it may be conceded that the principles announced and applied to the facts of the case are sound." *Id.* at 407-08 (emphasis added). *Dodge* thus limited *Collins* to its facts. This Court should not resurrect this obsolete line of cases.

Relatedly, the court below also emphasized the fact that local boards are elected. As far as the Constitution is concerned, however, this is beside the point. The General Assembly is free to appoint agents, and free as well to provide for their election. *See* Ky. Const. § 93. They are still agents. No one would suggest that the University of Kentucky is a private entity, even though its board is not elected. *See* KRS 164.131.

This Court should also bear in mind that for years the General Assembly has appropriated funds for public primary and secondary schools outside the control of local districts. For the current fiscal biennium, for example, it has appropriated over $39 million for the Kentucky School for the Blind and the Kentucky School for the Deaf. *See* 2024 Ky. Acts ch. 175, Pt. I-C-3(7), at 1840. These are K-12 schools under the direct control of Kentucky Board of Education. *See* KRS 167.015(1). The existence of these institutions proves that "common schools" are not limited to institutions under the full and direct control of local districts.

B. Public charter schools are fully accountable.

At various points in its Opinion and Order, the court below asked about the accountability of public charter schools. In the abstract, this is an important inquiry. As this Court has held, a school must be "monitored by the General Assembly" to qualify as a common school. *Rose*, 790 S.W.2d at 213. But how the Legislature delegates its responsibility is a matter of public policy, not constitutional law. *See Cameron v. Beshear*, 628 S.W.3d 61, 75 (Ky. 2021) ("As we have noted time and again, so many times that we need not provide citation, the General Assembly establishes the public policy of the Commonwealth.").

In any case, accountability comes in many forms. First, the General Assembly itself is accountable. In fact, it is accountable the same way local boards are. Second, HB 9 makes public charter schools accountable by a variety of mechanisms, each fully transparent. For example, it requires them to keep books according to GAAP. *See* KRS 160.1592 (3)(h). It requires them to "[d]esign their programs to meet or exceed the student performance standards adopted by the Kentucky Board of Education." KRS 160.1592(3)(f). It makes their proceedings subject to open records and open meeting

requirements. *See* KRS 160.1592(3)(k). And it requires them to ensure that their students "participat[e] in required state assessment of student performance." KRS 160.1592(3)(g) .

Most importantly of all, public charter schools are accountable because they have to compete for students. There is no better engine for innovation and quality than the prospect of students and parents voting with their feet, and a student will only attend a public charter school if a parent or guardian chooses. KRS 160.1590(14)(e) defines a "[p]ublic charter school" as "a public school to which parents ***choose*** to send their children." (Emphasis added.) KRS 160.1592(6) similarly provides that "[a] local school district shall not assign or require any student enrolled in the local school district to attend a public charter school." This process is facilitated immensely by two other key aspects of public charter schools. First, parents can look up how students are performing at such schools and make a decision on the basis of that information. Second, parents themselves can submit an application to organize such a school. *See* KRS 160.1593. It would be hard to imagine a more responsive and accountable school than one that: (1) operates from the ground up; (2) has to sing for its supper; and (3) has to meet academic performance standards set by the state in order to remain in operation.

Public charter schools are also subject to oversight by their authorizer, typically a district. Thus, under KRS 160.1592(3)(o), a public charter school "operate[s] under the oversight of its authorizer in accordance with its charter contract and application." Similarly, KRS 160.1594(1)(g) instructs the authorizer to "monitor" the "performance and compliance [of a public charter school] according to the terms of the charter contract." Moreover, no district is bound to renew a public charter school's contract, and the term of

a contract can be as short as three years, although the default is five. *See* KRS 160.1598(1). Under HB 9, the district may refuse to renew a contract if the school has "[c]ommitted a material violation of any of the terms [of] the charter contract, and has persistently failed to correct the violation after fair and specific notice from the authorizer," KRS 160.1598(6)(a), "[f]ailed to meet or make significant progress toward the performance expectations identified in the charter contract," KRS 160.1598(6)(b), "[f]ailed to meet generally accepted standards of fiscal management, and has failed to correct the violation after fair and specific notice from the authorizer," KRS 160.1598(6)(c), or "[s]ubstantially violated any material provision of law from which the public charter school was not exempted and has failed to correct the violation after fair and specific notice from the authorizer." KRS 160.1598(6)(d). No 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. The relationship between a public charter school operating in a district and the local board is thus much the same as the relationship between a regulated entity and its regulatory agency. It is a complex and continuing, with clear oversight. In addition, an authorizer "may take immediate action to revoke a charter contract if a violation threatens the health and safety of the students of the public charter school." KRS 160.1598(7).[20]

[20]In certain situations, HB 9 empowers public bodies or officials other than local boards to serve as authorizers, including "[a] collaborative among local school boards," KRS 160.1590(15)(b), "[t]he mayor of a consolidated local government," KRS 160.1590(15)(c), or "[t]he chief executive officer of an urban-county government." KRS 160.1590(d). No matter what public body or officer serves as authorizer for a public charter school, however, that body or officer has the responsibilities and authority described in the text.

The court below also expresses apprehension over a public charter school's possible use of an "education service provider" as a vendor. *See* Opinion and Order at 7, Record at 605. This apprehension is misplaced. To start with, HB 9 explicitly requires a public charter school's board of directors, not a service provider, to "retain[] oversight and authority over the school." KRS 160.1592 (3)(p)(3). And KDE has made clear in its regulations implementing HB 9 that this provision has real meaning. Among other things, KDE makes all contracts between public charter schools and education service providers subject to approval by the authorizer. *See* 701 KAR 8:020E § 5(9) (emphasis added) (requiring all contracts between authorizers and public charter schools to include a provision whereby "any contract the charter school board of directors enters with an education service provider has to be ***approved by the authorizer prior to execution***"). The regulations go on to require authorizers to include in their contracts with public charter schools a long list of sub-requirements regulating the relationship between schools and providers. For example, they must "[p]rovide for payments to the charter school to be made to an account controlled by the charter school board of directors, ***not the education service provider***." *Id.* § 5(9)(e) (emphasis added). They must also "[r]equire [that] all instructional materials, furnishings, and equipment purchased or developed with charter school funds be the property of the charter school, ***not the education service provider***." *Id.* § 5(9)(f) (emphasis added). In addition, and with specific relevance to the concern expressed by the court below that a public charter school's assets could be "pledged as collateral" and lost, KDE requires all contracts between schools and providers to "identify and describe all other financial terms of the contract, including disclosure and documentation of ***all loans or other investments*** by the education service provider to the

charter school board of directors, and provision for the ***disposition of assets upon closure*** [under the terms of the statute and KDE's regulations]." *Id.* § 5(9)(l) (emphasis added). There is thus no basis for the statement by the court below that "there appear to be no guardrails [to] ensure [that] tax dollars are used for a public purpose," or that "there appear to be no restrictions as to the ultimate ownership or control of assets purchased with tax dollars." Opinion and Order at 7, Record at 605. HB 9 and its implementing regulations are chock full of guardrails and restrictions.

II. HB 9 comports with Section 186.

Section 186 provides in full that:

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

HB 9 easily satisfies this language. The court below took the position that funds are not distributed "among" the districts under HB 9 either because the money does not terminate with local boards, or because public charter schools are not their wholly owned subsidiaries. This contention lacks traction. First, it confuses the phrase "among the school districts," a term Section 186 uses, with the phrase "to the school districts," which it does not. Second, it squarely contradicts *Fayette County*, *Rose*, and *Yanero*, which recognize that districts are agents of the Legislature, which could "do away with them entirely." *Fayette County*, 250 S.W.2d at 1019. If the court below were correct, which is not the case, its construction of the word "among" would make no sense, because it would require the Legislature to distribute funds to entities that need not exist. A far more logical construction would follow Section 186's origins, which were essentially geographic. As first ratified, it compelled per capita distribution of the school fund. It

was later amended, more than once, to modify and then eliminate this requirement, substituting the Legislature's judgment for a rigid per capita distribution. *See Rose*, 790 S.W.2d at 194. This history makes inescapable the conclusion that "among the school districts" is a geographic concept, not a political one. In other words, as long as the General Assembly appropriates funds "among the districts" ***as geographic units***, it satisfies Section 186. The fact also remains that public charter schools are located ***in*** districts, receive funds ***through*** districts, and are overseen ***by*** districts. *See* KRS 160.1590(7) (physical location); KRS 160.1596(6) (routing of funds); KRS 160.1592(3)(o) (subjecting a public charter school to "the oversight of its authorizer in accordance with its charter contract and application"). Any funds they receive would therefore be distributed "among the school districts." Finally, even if Section 186 required distribution of funds "to" districts, which it does not, it concludes with a simple reference to "public school purposes," which is not limited to districts.

III. No other ground supports enjoining the operation of HB 9.

In the proceedings below, the Council raised a number of objections to HB 9 that the court did not reach. Because these objections present pure issues of constitutional law, this Court is fully empowered to reject them and remand the case with instructions to dissolve the injunction and grant summary judgment in favor of the Commonwealth and Mr. LaFontaine.

A. HB 9 comports with Sections 3 and 171.

In the proceedings below, the Council argued that HB 9 violates Sections 3 and 171 of the Constitution because public charter schools do not serve a "public purpose" as per Ky. Const. § 171 or perform a "public service" as per Ky. Const. § 3. As Mr. LaFontaine has abundantly established, however, they do both. As "common schools" in every sense

of the phrase, they serve exactly the same "public purpose" and perform exactly the same "public service" as traditional public schools.

B. HB 9 satisfies the non-delegation doctrine and Section 2.

Relatedly, the Council argued below that HB 9 violates the non-delegation doctrine and the rule against arbitrary legislation because public charter schools operate with a fairly high degree of autonomy, including authority to engage "education service providers" to provide discrete services. This claim appears to break into two parts: first, that HB 9 authorizes non-public entities to exercise governmental power, and, second, that HB 9 fails to set forth sufficient standards for the exercise of discretion. For numerous reasons, this claim fails.

First, a public charter school is a public body in every sense of the phrase. To be sure, it has its own board of directors, *see* KRS 1590(14)(c), and it is exempt from certain restrictions. *See* KRS 160.1592(1). But the University of Kentucky has a Board of Trustees, and no one would call it a "non-public entity." In addition, a public charter school "operate[s] ***under the oversight of its authorizer*** in accordance with its charter contract and application," KRS 160.1592(3)(o) (emphasis added), and its authorizer "***monitor[s]" its "performance and compliance*** . . . according to the terms of the charter contract." KRS 160.1594(1)(g) (emphasis added). Moreover, its proceedings are subject to open records and open meeting requirements, *see* KRS 160.1592(3)(k), and the members of its board may be removed from office for malfeasance like other public servants. *See* KRS 160.1592(4). Finally, HB 9 empowers districts to receive and evaluate applications to form public charter schools, *see* KRS 160.1594, and to determine whether contracts may be renewed. *See* KRS 160.1598(1). There is thus no basis for the argument that public charter schools exercise public powers outside the aegis of our governmental structure.

The fact that a public charter school may engage vendors to provide discrete services does not change this calculus. As noted above, a public charter school is a public body in every sense of the phrase. Public bodies, such as traditional school districts, engage vendors all the time. More to the point, HB 9 requires a public charter school's board, not the vendor, to "retain[] oversight and authority over the school," KRS 160.1592(3)(p)(3). *See* KRS 160.1592(3)(o). And, as we have seen, KDE has promulgated detailed regulations to implement this statutory provision. *See* 701 KAR 8:020E, § 5(9).

The Council's argument that HB 9 lacks standards fares no better. In making this claim, it overlooks the complexity of the statute itself. In particular, it overlooks the various rules that govern the proposal, approval, formation, and operation of public charter schools. *See* KRS 160.1590(14) (setting forth the obligatory characteristics of a public charter school); KRS 160.1592(3) (setting forth the duties of a public charter school); KRS 160.1593(3) (setting forth the required contents of an application); KRS 160.1594(7) (setting forth the criteria for approval). It also overlooks the fact that public charter schools must "[a]dhere to all generally accepted accounting principles and adhere to the same financial audits, audit procedures, and audit requirements as are applied to other public schools under KRS 156.265." KRS 160.1592(3)(h). In light of the foregoing, there is no doubt that HB 9 sets forth more than ample standards for the exercise of discretion.

C. HB 9 comports with Sections 180 and 181.

In the proceedings below, the Council also argued that HB 9 violates Section 180 of the Constitution because money raised locally in support of the common schools must be devoted to that purpose. The answer to this contention lies in the simple fact that public

charter schools ***are*** common schools in every sense of the phrase. Therefore, if a locality levies taxes for common schools, it necessarily levies taxes for public charter schools operating within its boundaries.

Relatedly, the Council argued below that HB 9 violates Section 181 of the Constitution because it instructs localities in some respects as to the use of locally raised funds. This argument fails for several reasons. First, it reads Section 181 upside down. That is, it reads the section as controlling the uses to which *locally levied taxes* may be put. But that is not what it says. Section 181 says, in relevant part, that "[t]he ***General Assembly*** shall not impose taxes for the purposes of any county, city, town or other municipal corporation . . . ." (Emphasis added.) This language focuses entirely upon what the ***General Assembly*** may not do with money that ***it raises*** at the ***state level***. And this Court has confirmed, or at least strongly intimated, that this is ***all*** that Section 181 means. *See Board of Trustees v. City of Paducah*, 333 S.W.2d 515, 519-20 (Ky. 1960). As this Court noted in that case, Section 181 "has an obvious purpose — to prohibit the General Assembly, through *its* taxing power, from evading by indirection the limits on the tax rates of cities and counties imposed by Section 157 of the Constitution." *Id.* at 520. HB 9 in no way implicates Section 181 as properly read.

Even if Section 181 could be read the way the Council reads it, which would be contrary to text, it still would not help. This is because this Court has consistently allowed the Legislature to require municipalities to impose levies for general public purposes. In the *Board of Trustees v. City of Paducah*, for example, this Court upheld an act of the Legislature that required the city to impose a levy for firefighters' retirement. In reaching this conclusion, the Court described "***education***, agriculture, health and welfare" as

"matters of general public concern" and held that, because "public safety is equally a matter of such concern," Section 181 "does not prohibit the General Assembly from requiring cities to levy taxes or expend city funds for the purposes of police and fire departments. . . ." 333 S.W.2d at 519 (emphasis added). This case completely answers the Council's argument.[21]

D. HB 9's Pilot Project does not violate Section 59.

Finally, to the extent HB 9's Pilot Project has not been superseded by events, it is not special legislation. This provision, which required "pilot project authorizer[s]" to take certain actions by July 1, 2023, simply put in motion a generally applicable statute. KRS 160.15911(3). "Beginning in academic year 2022-2023," the Legislature provided, "***any authorizer*** may authorize ***an unlimited number*** of public charter schools." KRS 160.1591(3) (emphasis added). The Pilot Project was simply the first step in a statewide process. As this Court has noted, "[i]n addressing social problems, a legislature 'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Commonwealth v. Fulkerson*, 761 S.W.2d 631, 633 (Ky. 1988) (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)). The Pilot Project did no more than this. It reflected the Legislature's considered judgment that there are two categories of places where a public charter school could most easily be put in place: "a county school district located in a county with a consolidated local government" and "any county containing four (4) or more local school districts." KRS 160.15911(2)(a), (b).

[21]In fact, Sections 180 and 181 do not apply to local boards of education at all, because they are agencies of the state. *See Yanero v. Davis*, 65 S.W.3d 510, 527 (Ky. 2001) ("[P]ublic schools are the responsibility of the state, and the General Assembly has established the Kentucky Board of Education, KRS 156.070, and the local school boards, KRS 160.160, as agencies through which it implements its constitutional mandate. . . .").

This judgment is entitled to deference.

In any case, if this Court should nevertheless conclude that the Pilot Project does constitute special legislation, that aspect of HB 9 is readily severable from the rest of the statute. Straightforward application of KRS 446.090 would require severance. There is no reason to suppose HB 9 could not operate without a pilot project. In connection with this point, this Court should also bear in mind that HB 9, unlike the law at issue in *Johnson*, did not pass the Legislature "by a narrow margin." *Commonwealth ex rel. Cameron v. Johnson*, 658 S.W.3d 25, 29 (Ky. 2022). HB 563, the law in *Johnson*, passed the House 48-47. *Id.* HB 9, by contrast, passed the House and Senate by votes of 52-46 and 22-15, respectively, after the Governor's veto. *See* https://apps.legislature.ky.gov/record/22rs/hb9.html (visited Jul. 28, 2024). There is no basis for the argument that HB 9 would not have passed without the Pilot Project.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below, declare HB 9 constitutional in all respects, and remand this matter to the Franklin Circuit Court with instructions to deny the motion for summary judgment of the Council and grant the motions for summary judgment of the Commonwealth of Kentucky and Gus LaFontaine.

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Respectfully submitted,

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WORD-COUNT CERTIFICATE

This brief motion complies with the limit of 17,500 words under RAP 31(G)(3)(a) because it contains 9939 words.

/s/ Paul E. Salamanca