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

REPLY OF APPELLANT GUS LAFONTAINE

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CERTIFICATE OF SERVICE

I certify that on November 1, 2024, I served a copy of this reply 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

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

In describing education as a "'fundamental right,'" the Council knocks on an open door. Brief of Appellees Council for Better Education, Inc., *et al.*, at 1 (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989)). Gus LaFontaine could not agree more. As the U.S. Supreme Court noted 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). Education is indeed vital. This is why HB 9, far from departing from the principles of *Rose*, is that decision's best champion, for it enables parents and guardians to adapt the common schools to their children's needs. The Council's arguments to the contrary are largely policy objections, not constitutional law. Public charter schools are common schools in every sense of the phrase, and they are fully accountable.

I. HB 9 is in perfect accord with Sections 183 and 184.

In *Rose*, this Court defined "an 'efficient' system of common schools" as 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.

Public charter schools meet this definition in full and thus satisfy §§ 183 and 184. They are "free to all," and they are as much "available to all" as any other public school in Kentucky, given that no school is *literally* open to all, even all children in the same political unit.[1] In fact,

[1] For the same reason, KBE missteps when it argues that "charter schools are not required to operate throughout the state." Brief of Appellees Kentucky Board of Education, *et al.*, at 4. No school does this.

they are potentially *more* "available to all" than conventional schools, because *all* parents and guardians can undertake to start such a school on their own, including parents who wish to focus on students with special needs. This is not the case for a conventional school, which can only be started by a local board. For these same reasons, they provide "equal educational opportunities to all Kentucky children."

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." Similarly, KRS 160.1592(3)(g) requires them to "[e]nsure students' participation in required state assessment of student performance." Finally, as explained below, they are adequately "monitored by the General Assembly" and "sufficient[ly]" funded, because they share a funding model with conventional schools.

II. Public charter schools are fully accountable.

The Council is correct to argue that accountability is important. *See Rose*, 790 S.W.2d at 213. But accountability comes in many forms. For starters, the Legislature itself is accountable. If HB 9 does not appear to be working, the Legislature can repeal or modify it. This Court should not lightly assume that the Legislature, a co-equal branch of government, is not up to the task of re-evaluating its own work.

In addition, HB 9 includes many structural protections, most of which the Council overlooks. For example, it requires public charter schools to keep books according to GAAP. *See* KRS 160.1592(3)(h). It subjects their proceedings to open records and open meetings requirements. *See* KRS 160.1592(3)(k). It makes members of their boards removable for malfeasance the same as members of any other public board. *See* KRS 160.1592(4). Continuing,

KRS 160.1592(3)(l) requires public charter schools to comply with Kentucky's general procurement statutes for public entities, or provide detailed monthly reports on all purchases over $10,000, which is a low threshold in education.

Most importantly of all — and this the Council mentions only in passing — public charter schools are accountable because parents and guardians vote with their feet. No one is compelled to attend one. *See* KRS 160.1592(6). Parents and guardians can look up the scores of a school and make a kitchen-table decision about whether to send their children there. *See* KRS 158.6453(17). Equally importantly, they can start such a school on their own. *See* KRS 160.1593(1). Thus, HB 9 gives them true agency in their children's public education.

Finally, the Council grossly misapprehends the extent to which authorizers actually *can* hold public charter schools accountable.[2] Under HB 9, for example, an authorizer may refuse to renew a contract for various deficiencies after giving a school "fair and specific notice." KRS 160.1598(6). The Council decries this as too little too late, suggesting that not all schools may respond to such notice. *See* Council's Brief at 27. This is myopic. "[F]air and specific notice" is *public* and specific notice. Everyone can see it. This includes parents and guardians, who will send kids elsewhere. It also includes teachers and administrators, who will update resumes. The virtue of public charter schools is that they live or die by serving students and families. *See* Brief of Appellant Gus LaFontaine at 5-6. People making a decision at the kitchen table are not going to ignore "fair and specific notice" of a deficiency at their children's current or prospective school.

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[2] In certain cases, HB 9 empowers officials other than local boards to serve as authorizers, including "[t]he mayor of a consolidated local government," KRS 160.1590(15)(c). The Council objects to this because it means that sometimes an official other than one of its members will monitor a public charter school. *See* Council's Brief at 26. But, as noted below, nothing in the Constitution requires that local boards even *exist*, let alone that they have ubiquitous control.

Furthermore, the Council overlooks the regulatory structure that KBE, one of the Council's co-parties, has adopted for monitoring. This structure enables the authorizer to exercise real authority while the contract is in place. Under these regulations, authorizers are empowered to adopt 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 8:020, § 7(8). And JCBE, also one of the Council's co-parties, has embraced this opportunity. Its Manual of Policies and Procedures provides that "[t]he Superintendent may implement appropriate consequences at any time during the term of a charter school contract . . . when the Superintendent has received evidence of underperformance by the charter school against the [board's] performance framework standards, or noncompliance by the charter school with the terms and conditions of the charter school's contract."[3] JCBE's muscular approach to monitoring cannot be reconciled with the Council's claim that authorizers have "no leverage to negotiate meaningful oversight terms." Council's Brief at 26.[4]

The Council's concerns with respect to education service providers are similarly misplaced. An education service provider is simply a vendor, which conventional schools rely on all the time. The Council also overlooks the many guardrails the statute ***and its co-parties*** put in place for such entities. For example, 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

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[3] Powers and Duties of the Board of Education, 01.9111, Charter School Contract at 3, https://policy.ksba.org/Chapter.aspx?distid=56 (visited Oct. 19, 2024).

[4] The Council's argument that HB 9 somehow violates separation of powers and the rule against arbitrary power is conceptually indistinguishable from its argument that public charter schools are inadequately monitored, because it reduces to an assertion that they are not subject to standards by which others may hold them accountable. *See* Council's Brief at 46-47. As Mr. LaFontaine explains, this is not the case.

160.1592(3)(p)(3). And KBE has implemented this requirement vigorously. Among other things, KBE makes all contracts between public charter schools and education service providers subject to approval by the authorizer. *See* 701 KAR 8:020 § 5(9). It also requires all payments to go into "an account controlled by the charter school board of directors, not the education service provider." *Id.* § 5(9)(e). Another regulation provides that "all instructional materials, furnishings, and equipment purchased or developed with charter school funds [are] the property of the charter school, not the education service provider." *Id.* § 5(9)(f); *see also* JCBE Manual, 01.9111, Charter School Contract at 2. There is thus no more reason to suppose that public charter schools are vulnerable to "fraudsters" than a conventional public school. Council's Brief at 27.[5]

III. The Constitution does not require all common schools to be identical.

The Council, quoting the court below, chides HB 9 for establishing "'two separate and unequal systems of education.'" Council's Brief at 19 (quoting the opinion below). The Council cannot mean this. For surely it knows that existing public schools differ greatly from one another. In fact, its members *celebrate* these differences. JCBE, for example, has numerous magnet programs that are not cookie-cutter replicas of each other. "Magnet programs," it explains, "have a specific theme and focus or provide a specialized learning environment."[6] Thus, Kentucky's largest system, far from striving for a single, uniform system, celebrates variety. And the statutes

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[5] In its brief, the Council cites allegations of fiscal defalcation in public charter schools. *See* Council's Brief at 27 & n. 18. With approximately 8000 such schools across the country, such allegations are not astonishing. Mr. LaFontaine could surely saturate his reply with examples of similar misconduct in conventional schools. The question is whether HB 9 includes adequate safeguards to deter or catch such abuses. It does. In raising similar arguments, KBE overlooks its own regulations addressing fiscal matters at public charter schools. *See* KBE Brief at 9-11; *see also* 701 KAR 8:020, § 5.

[6] Jefferson County Public Schools, Magnet Program, https://www.jefferson.kyschools.us/page/magnet-program (visited Oct. 21, 2024).

encourage this. *See, e.g.*, KRS 158.010(2). The Council cannot credibly argue that a public charter school's differentiation in pedagogical approach from conventional public schools somehow renders it not a common school.

To be sure, these schools are exempted from some of the regulations that govern conventional schools, but not all. Most importantly, they are not exempted from the requirement that their students take the same assessment tests as students at other public schools, or that they devise their programs with those tests in mind. *See* KRS 160.1592(3)(g) (assessment); KRS 160.1592(3)(f) (design). Thus, they are subject to precisely the same regulations as conventional schools where *results* are concerned, which is what parents and guardians care about. They are also required to retain only certified teachers for the classroom. *See* KRS 160.1592(3)(d); 160.1590(16). In addition, they are subject to the same regulations as other public schools in the areas of "health, safety, civil rights, and disability rights." KRS 160.1592(1). At bottom, the Council objects because public charter schools are exempted from statutes that make them fully dependent on *local boards*. This is but another example of its erroneous argument that the entire system must be under its members' full control. The Constitution does not require this.

IV. HB 9's main focus is students at risk.

The Council, which represents almost all the incumbent providers,[7] expresses concern that proponents of public charter schools might ignore HB 9's focus on at-risk students. *See* Council's Brief at 4-5. This concern is misplaced, for three reasons. ***First***, it defies the whole trajectory of the statute, which puts a thumb on the scale for students at risk. As the Council acknowledges, HB 9 encourages authorizers "'to give preference to applications that demonstrate the intent,

[7] *See* Council's Brief at 15 n. 9.

capacity, and capability'" to serve such students. Council's Brief at 4 (quoting KRS 160.1594(2)). In fact, JCBE has operationalized this principle with vigor. According to its Manual, it "expects" applicants to "[d]emonstrate the capacity of [their] programs to close achievement gaps for low-performing groups of public school students." It also "expects" them to "[c]lose such . . . gaps and increase such . . . outcomes at an accelerated pace so as to exceed the student and school performance and achievement of the non-charter schools in the District." "The Board will enforce the foregoing high expectations for the charter schools it authorizes," it states. JCBE Manual, 01.91, Authorization of Charter Schools at 1. This is hard to square with the Council's argument that authorizers' hands are tied.[8]

Nor does JCBE's position emerge from thin air. KBE's implementing regulations for HB 9 instruct authorizers to "create policies and procedures" setting forth "[t]he authorizer's strategic vision for chartering, including a clear statement of any preference for a charter application that demonstrates the intent, capacity, and capability to provide comprehensive learning experiences or expanded learning opportunities to students identified in KRS 160.1594(2) or 160.1592(19)," which both involve students at risk, students with special needs, or students seeking career readiness education opportunities. 701 KAR 8:020, § 2(1). JCBE cites this KAR in its Manual. *See* JCBE 01.91 at 3.

Second, the Council's concerns do not reflect reality. According to one database, for example, 60% of students at public charter schools across the country are eligible for free or

[8] JCBE's expectation that public charter schools "exceed" performance at conventional schools is also hard to square with the Council's assertion that programs at such schools "need be no more rigorous than the student performance standards adopted by the State Board." Council's Brief at 5.

reduced lunch, compared to approximately 50% in conventional public schools.[9] Thus, if Kentucky's experience is anything like the experience of the forty-six other states with public charter schools, those schools will preponderantly serve the underprivileged. As *amicus curiae* Reverend Jones observes, "[i]n state after state in which public charter schools have been authorized[, such] schools have been particularly popular and utilized in urban areas where there is a largely underserved population; like that of the West Louisville community in which Reverend Jones has been involved." Brief on Behalf of *Amicus Curiae* Reverend Walter Jones III in Support of Appellant at 9. As Mr. LaFontaine has noted, all of Kentucky's contiguous states have authorized public charter schools, and many of those schools are located in areas with large populations of underprivileged children, including Memphis, St. Louis, Kansas City, Chicago, Indianapolis, and Cleveland. *See* LaFontaine Brief at 1-2. The Council is describing a world that does not exist.

Third, the Council's concerns do not reflect the record in this very case. Mr. LaFontaine has submitted an application to start a public charter school in Madison County, and he has identified his specific goal as "clos[ing] achievement gaps for low-performing groups of students." Application, Part II-A-1, Record at 222.

Thus, for the Council's concern to have traction, one must ignore the language of the statute, ignore KBE's regulations, ignore JCBE's Manual, ignore the data, and ignore the only relevant evidence in the record. This Court should not indulge such speculation.

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[9] Bruce V. Manno, Charter Schools Are Learning Communities And Sources Of Community Rebirth, Forbes, May 22, 2024 (citing the Data Dashboard of the National Alliance for Public Charter Schools), https://www.forbes.com/sites/brunomanno/2024/05/15/charter-schools-are-learning-communities-and-sources-of-community-rebirth/?sh=728121f04496 (visited Oct. 19, 2024).

Relatedly, the Council argues that proponents of public charter schools could choose as their "'targeted student population' . . . children living in . . . select neighborhoods or zip codes." Council's Brief at 21 (quoting KRS 160.1593(3)(a)). This is a canard. Apart from defying KBE's regulations, JCBE's Manual, the reality of public charter schools, and the record in this case, this argument also misapprehends how the statute works.

HB 9 sets forth six purposes: (1) to improve outcomes; (2) to encourage new methods; (3) to "[c]lose achievement gaps"; (4) to promote flexibility; (5) to increase opportunities for "all students, especially those at risk of academic failure"; and (6) to provide parents, among others, with "expanded opportunities for involvement." KRS 160.1591(2). It puts these purposes into action by authorizing parents and others at the ground level to submit applications to start a public charter school that reflects their understanding of how best to serve their children or their community. To that end, it instructs them to include in their application "[a] mission statement and a vision statement for the public charter school, including the targeted student population and the community the school hopes to serve." KRS 160.1593(3)(a). It also instructs them to include "[a] description of the school's proposed academic program . . . that implements one (1) or more of the purposes described in KRS 160.1591." KRS 160.1593(3)(b).

These provisions should be read together, as with any statute. *See Ky. Bd. of Med. Licensure v. Strauss*, 558 S.W.3d 443, 448 (Ky. 2018). Thus, once proponents of a school develop an "academic program" that serves one of the statute's purposes, the "targeted student population" must correspond to that approach. If, for example, the school adopts "STEM education for at-risk students" as its focus, then its target population would be at-risk students with an interest in STEM. In light of this required relationship between pedagogical focus and target population, the Council's dystopian vision lacks traction. It would be impossible to imagine a

pedagogical focus that would be attractive only to students in a particular ZIP code.

The Council similarly argues that public charter schools are free to admit students within their "targeted student population," whereas "a 'common school' district operated by the elected school officials is available to every potential student residing within its district boundaries." Council's Brief at 21. The Council is confusing levels. The comparator for a public charter school is not a district, but a school within a district. And quite a few magnet schools have algorithms for admission that are obscure and exclude many applicants. The algorithm for duPont Manual is a complex function of "achievement test scores, attendance, extra-curricular involvement, grades, personal essays, and recommendations."[10] Public charter schools, by contrast, are bound to admit students who are attracted to their pedagogical focus. And, if demand exceeds supply — which is a good thing — they must use a "transparent, open, equitable, and impartial" lottery. 701 KAR 8.010, §1(24).

V. The Constitution does not give the Council a monopoly on common schools.

The Council and Mr. LaFontaine agree that education is a fundamental right. They diverge, however, on the Council's implicit assertion that the Constitution allows only its members to provide this service. As this Court has explained, this is not true. In *Board of Education of Fayette County v. Board of Education of Lexington Independent School District*, this Court recognized that "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). In *Yanero v. Davis*, this Court similarly recognized that "the Constitution does not provide for the creation of local boards of education." 65 S.W.3d 510, 526 (Ky. 2001). The

[10] See duPont Manual Admissions 25-26, https://sites.google.com/jefferson.kyschools.us/dupontmanualadmissions (visited Oct. 21, 2024).

language of these cases cannot be reconciled with the Council's assertion that common schools must be fully dependent on them. If the Constitution does not require local boards at all, it certainly cannot require them to be in charge.

Case law is not to the contrary. The Council quotes *Sherrard v. Jefferson County Board of Education* for the proposition that courts "have long understood" that common schools must be governed by elected local boards. Council's Brief at 2 (quoting 171 S.W.2d 963, 966 (Ky. 1942)). But what *Sherrard* actually says is impossible to reconcile with the last ninety years of educational policy. Although the Council italicizes "in a district" and "elected" when quoting *Sherrard*, it neglects to italicize "trustees." *See id.* Yet *Sherrard* explicitly includes "trustees" in its purported description of what the term "common schools . . . have long [been] understood to mean." 171 S.W.2d at 966. So do *Pollitt v. Lewis*, 108 S.W.2d 671, 673 (Ky. 1937), and *Collins v. Henderson*, 11 Bush 74, 82-83 (Ky. 1874). Does § 184 actually bind us to resurrect the trustee system, which we repudiated in 1934? Even more ironically, both *Sherrard* and *Pollitt*, which *Sherrard* quotes, post-dated the repudiation of trustees. Thus, they were anachronisms at birth. And both are older than *Fayette County* and *Yanero*, where this Court recognized that local boards are not required.

The Council repeatedly describes public charter schools as "private," but the basis for this conclusory claim is never clear. It cannot be because they are governed primarily by boards, because such quintessentially public institutions as the University of Kentucky and the University of Louisville are governed by boards. *See* KRS 164.131(1)(a) (UK); 164.821(1) (Louisville). Nor can it be that members of their boards cannot be removed like other public servants, because they can. *See* KRS 160.1592(4). Nor is it because they can ignore open meetings and open records laws, because they cannot. *See* KRS 160.1592(3)(k). At bottom, the Council calls public

charter schools "private" because they are not fully answerable *to them.* Nothing in the Constitution requires this.

VI. Under HB 9, as under SEEK, the money follows the child.

Once a public charter school is up and running, it participates in the same per-pupil funding model that prevails for all public schools in Kentucky.[11] Thus, its SEEK allocation is identical to what it would be if it were a conventional school under the direct supervision of a local board. *See* KRS 160.1596(5), (6). In fact, the Council recognizes this. *See* Council's Brief at 11-12. The Council's grievance is not that kids get *more* funding at public charter schools than at conventional schools. Instead, it objects that they receive any funding at all. This is nothing but its standby argument in another garb, that public charter schools should not exist because its members do not completely control them.[12]

Similarly incorrect is the Council's assertion that HB 9 somehow violates the Constitution because it allows funds levied at the local level to be expended for students outside a district. To its credit, it does not deny that many of its members already do this. *See* Council's Brief at 6. Its objection, therefore, is not that *any* students from outside the district may attend a public charter

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[11] The Council missteps in suggesting public charter schools "divert" money from conventional schools. This only makes sense if conventional schools are the intended beneficiaries of the money. They are not. Children are.

[12] The Council's amicus Kentucky Center for Economic Policy argues that the Legislature's appropriations for elementary and secondary education are deficient, but it does not deny that SEEK base guarantees have been rising for some time. *See* LaFontaine Brief at 2 n. 15. KyPolicy simply argues that appropriations are down 27% since 2008, adjusting for inflation. KyPolicy Brief at 8. But this argument does not take into account substantial appropriations for teachers' pensions and health care, which are critical to educational finance. *See* 2024 Ky. Acts ch. 175, Pt. I-A(28), at 1824 (appropriating $867,559,400 in fiscal year 2024-2025 and $1,059,365,600 in fiscal year 2025-2026 to the Teachers' Retirement System); *Id.* Pt. I-C-3(3), at 1834 (appropriating $942,925,300 in fiscal year 2024-2025 and $1,076,821,500 in fiscal year 2025-2026 for employer contributions to health insurance).

school, but only that *its members' policies* do not control.[13]

VII. HB 9 is fully consistent with Section 186.

Section 186 can be divided into two distinct parts. The first 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." HB 9 easily comports with this part, because public charter schools *are* "public schools."[14]

The second part of § 186 provides that "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 comports with this part of § 186 as well. For starters, any public funds distributed pursuant to HB 9 are manifestly distributed "among the districts." Public charter schools are located ***in*** districts (in a geographic sense) and they receive funds ***through*** districts (in a political sense). *See* KRS 160.1590(7) (location); KRS 160.1596(6) (routing).[15] In fact, § 186 would make no sense if it required the distribution of funds to local boards, as the Council seems to imply. *See* Council's Brief at 30-31. As this Court has

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[13] The Council also raises the specter that public charter schools will create disruption because kids will change schools. *See* Council's Brief at 44-46. Of course, if kids change schools because their parents and guardians want them to, HB 9 is working, not failing. In addition, HB 9 includes at least two structural barriers against the disruption the Council fears. ***First***, it excludes capital outlays and debt service from the funding model for public charter schools. *See* KRS 160.1596(6). ***Second***, it authorizes transactions at cost between authorizers and public charter schools, enabling the efficient use of any space that becomes surplus. *See* KRS 160.1592(12)(a).

[14] HB 9 satisfies §§ 3 and 171 for the same reason. Section 3 forbids the payment of public money "except in consideration of public services," but educating children in a public charter school is a public service. Similarly, § 171 permits taxes to be levied "for public purposes only," but public charter schools serve such a purpose.

[15] The Council implies that Mr. LaFontaine did not discuss the geographical nature of § 186 below. *See* Council's Brief at 31. This is not accurate. *See* Reply in Support of Intervening Defendant Gus LaFontaine's Motion for Summary Judgment at 16-17.

recognized, "the Constitution does not provide for the creation of local boards of education." *Yanero*, 65 S.W.3d at 526. It would be bizarre if the Constitution required the Legislature to distribute funds to entities that need not exist.

In addition, the second part of § 186 does not actually limit the Legislature to distribution of funds "among the districts," for it also allows appropriations "for public school purposes." This would include public charter schools even if they were *not* in districts, which they are. If this were not the case, the Legislature could not pay for the Department of Education, which is not itself a school. *See Superintendent of Public Instruction v. Auditor of Public Accounts*, 30 S.W. 404, 405 (Ky. 1895).

VIII. HB 9 comports with Sections 180 and 181.

The Council argues that HB 9 violates § 180 because money raised locally in support of common schools must be devoted to that purpose. *See* Council's Brief at 49. The answer to this contention lies in the simple fact that public charter schools ***are*** common schools. If a locality levies taxes for common schools, it necessarily levies taxes for public charter schools operating within its boundaries.

Relatedly, the Council argues that HB 9 violates § 181 because it instructs localities in some respects as to the use of locally raised funds. *See* Council's Brief at 49-50. This argument fails for two reasons. ***First,*** it reads § 181 upside down. That is, it reads § 181 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 . . . ." In other words, the Legislature must not use ***its apparatus*** to raise money for a locality. This Court has recognized that this is ***all*** § 181 means. *See Board of Trustees v. City of Paducah*, 333 S.W.2d 515, 520 (Ky. 1960). HB 9 does not

implicate § 181 when properly read.

Second, even if § 181 could be read upside down, which it cannot, it would not help. This Court has consistently allowed the Legislature to require municipalities to impose levies for general public purposes. In *Board of Trustees v. City of Paducah*, for example, it upheld legislation that required a city to impose a levy for firefighters' retirement. According to this Court, "education, agriculture, health and welfare" are "matters of general public concern," for which the Legislature may require localities to impose taxes. 333 S.W.2d 515, 519 (Ky. 1960). *Reid v. Allinder*, 504 S.W.2d 706 (Ky. 1974), is not to the contrary. *Reid* involved an act of the Legislature whereby a "relatively small number of voters" could "by petition establish a taxing district imposing a tax without the exercise of any discretion on the part of the duly constituted local authorities." *Id.* at 707. HB 9 does nothing of the sort. It was duly enacted by the Legislature, and the local levies at issue here are also duly enacted.[16]

IX. HB 9's Pilot Project is constitutional.

Assuming 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).

In any case, if this Court should nevertheless conclude the Pilot Project is special legislation, which it is not, it is easily severable. *See* KRS 446.090. HB 9 can operate in full without a pilot project. And HB 9, unlike the law in *Commonwealth ex rel. Cameron v. Johnson*, did not pass the Legislature "by a narrow margin." 658 S.W.3d 25, 29 (Ky. 2022). HB 9 passed the House and Senate by votes of 52-46 and 22-15, respectively.

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[16] In fact, §§ 180 and 181 do not apply to local boards at all, because they are agencies of the state. *See Yanero v. Davis*, 65 S.W.3d at 527.

The Council tries to muddy the water by raising questions about how HB 9 was handled in committee. The argument relies critically on hearsay, which this Court must exclude. *See Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992) ("[I]inadmissible hearsay" is "not suitable to support a motion for summary judgment."). The fact that a bill moved from one committee to another may be a matter of public record, but why it moved is not. In any case, even if the Council's citations were admissible, which they are not, they would only establish that leadership in the House is capable of moving a bill from one committee to another, and capable as well of substituting one member of a committee for another. The Council could only make its point if it could show, contrary to the public record, that leadership was incapable of moving the bill from one committee to another, or incapable of substituting one member of a committee, without the Pilot Project. This they cannot do, even if their citations did not constitute inadmissible hearsay, which they do. A majority of the chamber is fully empowered to discharge a bill from committee. *See* 22 House Resolution 1 (Jan. 4, 2022) (adopting rules for the 2022 Regular Session); *id.* § 48 ("Discharge Petition").

We know as a matter of public record that HB 9 passed the House and Senate by votes of 51-46 and 22-14, respectively, on its third reading, and by votes of 52-46 and 22-15, respectively, after the Governor's veto. [17] These are wide margins, unlike in *Johnson*, where the margin in the House was a single vote, 48-47. There is thus no basis for the argument that HB 9 would not have passed without the Pilot Project.

[17] *See* https://apps.legislature.ky.gov/record/22rs/hb9.html (visited Oct. 24, 2024).

CONCLUSION

For these reasons, this Court should reverse, declare HB 9 constitutional, and remand this matter to the Circuit Court with instructions to deny appellees' motions for summary judgment and grant appellant's motions for summary judgment.

Dated: November 1, 2024

Respectfully submitted,

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WORD-COUNT CERTIFICATE

This brief motion complies with the limit of 5250 words under RAP 31(G)(3)(b) because it contains 5235 words.

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