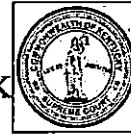


COMMONWEALTH OF KENTUCKY
SUPREME COURT
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GUS LAFONTAINE

APPELLANT

vs.

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

Kentucky Court of Appeals
No. 2024-CA-0064

COUNCIL FOR BETTER EDUCATION, INC., et al.

APPELLEES

BRIEF ON BEHALF OF *AMICUS CURIAE*
REVEREND WALTER JONES III IN SUPPORT OF APPELLANT

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 19, 2024, I served a copy of this brief via US Postal Service and/or Electronic 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; Donald J. Haas and Todd G. Allen, **KENTUCKY DEPARTMENT OF EDUCATION**, 300 Sower Blvd., 5th Fl., Frankfort, KY 40601; Matthew F. Kuhn, John H. Heyburn and Sarah N. Christensen, **OFFICE OF THE ATTORNEY GENERAL**, 700 Capital Ave., Ste. 118, Frankfort, KY 40601; Paul E. Salamanca, 279 Cassidy Avenue, Lexington Kentucky 40502. I further certify that a copy was served via overnight delivery on Clerk, Franklin Circuit Court, 222 St. Clair St., Frankfort, KY 40601; and Clerk, Court of Appeals, 669 Chamberlain Ave., Ste. B, Frankfort, KY 40601. The record on appeal was not removed from the Clerk's office.

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PURPOSE AND INTEREST OF AMICUS CURIAE

Reverend Walter Jones III (“*Reverend Jones*”) files this *Amicus Curiae* brief in support of Appellant. A similar brief is being tendered in *Commonwealth of Kentucky, ex rel. Attorney General Russell Coleman v. Council for Better Education, Inc., et. al.*, Case No. 2024-SC-0022 being considered by the Court on the same issues.

The purpose and interest of Reverend Jones in filing this *Amicus Curiae* brief is to dispel the myth that KRS 160.1590 et. seq. (the “*Act*”) is an unconstitutional exercise of the General Assembly’s discretion that favors economically affluent and well-connected families. In this brief, Reverend Jones contends that the public charter schools authorized by the Act (the “*Public Charter Schools*”) are permissible common schools under the Kentucky Constitution. Reverend Jones, an award-winning educator with a history of community activism in the west end of Louisville, seeks to bring the Court’s attention to the significant benefits of establishing a Public Charter School option in those urban areas serving a primarily Black, Hispanic, and non-affluent population. This *Amicus Curiae* brief focuses on the need for educational opportunities and options within the public school system for those children currently being underserved.

While this Court is not tasked with making these important policy decisions which are constitutionally delegated to the discretion of the General Assembly, the Opinion Below appears to rest (at least in part) on the mistaken premise that the Public Charter Schools will primarily serve and favor families “that are affluent” and “well connected”. Opinion Below p.5; TR. 603. This *Amicus Curiae* provides the unique perspective of an educator and leader from a community where the child population is predominantly not economically affluent and not considered “well connected”. Contrary to the Opinion

Below, this *Amicus Curiae* Brief posits that the Public Charter Schools will primarily serve the interests of non-affluent families currently being underserved by the existing system.

Reverend Jones's tenure as a high school teacher gives him direct insight into the challenges that both students and educators encounter in traditional public schools ("*TPS*"). This experience is further enriched by his role as an adjunct professor at Simmons College of Kentucky, where he showed a strong commitment to enhancing educational outcomes for diverse student groups. Jones's dedication and effectiveness as an educator are highlighted by his achievements, including being named Jefferson County Public Schools High School Teacher of the Year and a finalist for Kentucky Teacher of the Year.

Reverend Jones is committed to addressing disparities, educational gaps, and accessibility issues in Kentucky's public education system. A primary means of doing so is by establishing Public Charter Schools. His deep understanding of the significant challenges faced by families of color and those with lower incomes in accessing educational resources has uniquely equipped him to work towards greater educational equity.

This Brief first addresses the academic benefits and opportunities for Black, Hispanic, and underserved non-affluent children that are derived by the availability of Public Charter Schools. Next, this Brief addresses the Opinion Below's incorrect assessment that the Public Charter Schools primarily serve the affluent and "well connected" families. Finally, although addressed at length by Appellant, this Brief summarily addresses the Constitutionality of the Act.

- ARGUMENT

I. The Act Is Intended to Reduce The Achievement Gap For Children Underserved By The Current System

The Act was passed to address the “achievement gap” between performance goals and actual performance on state standardized examinations and other academic performance measures for certain students. Specifically, the Act was passed to enhance the academic performance of groups defined by socioeconomic status, race, and ethnicity. KRS 160.1590(1); KRS 160.1591. The Public Charter Schools were created based on the General Assembly’s finding that “past and current measures have been insufficient for making progress toward reducing the state's achievement gaps”. KRS 160.1591(b). In particular, the General Assembly noted the need for “[a]dditional public school options” “to help reduce socioeconomic, racial, and ethnic achievement gaps.” KRS 160.1591(c).

To achieve this reduction of achievement gaps, the Act establishes a public charter school project with a “renewed commitment to the mission, goals, and diversity of public education”. KRS 160.1591(2). Contrary to the Opinion Below, the express purposes of the Public Charter Schools include, *inter alia*, closing the achievement gaps for low-performing groups of public-school students and increasing high-quality educational opportunities within the public education system for all students, especially those at risk of academic failure. KRS 160.1591(2)(c) and (e).

The Public Charter Schools authorized under the Act must meet certain criteria and are limited to those authorized by existing publicly elected governing entities, whether it be local school boards or chief executives of the county. KRS 160.1590 (14) and (15). No Public Charter School can be created, nor continue, without the approval and authority of

elected officials. This authority negates the Opinion Below's implication that the Public Charter Schools are not accountable to the citizens of Kentucky.

The Public Charter Schools are open to all students and do not charge any tuition. The only limitation on enrollment occurs if the Public Charter School is in such demand that there are not enough resources to handle all the applicants. In such circumstances, the Act specifies that enrollment preferences are given to students who attended the school the prior year; siblings of such students; those in urban areas that live in close proximity to the Public Charter School; children of board of directors members or employees (subject to a 10% cap); those that meet eligibility requirements for free or reduced priced meals; and those students who attend persistently low-achieving noncharter public schools. KRS 160.1591(5).

Thus, far from being the closed-ended affluent havens for "well connected families" portrayed by the Opinion Below, the Public Charter Schools are egalitarian institutions open to all students. Indeed, if anything, to accomplish its primary purpose of closing the achievement gaps of underserved communities, the Act provides enhanced opportunities to those students most underserved by the existing noncharter public schools.

II. Public Charter Schools Are Effective in Closing Achievement Gaps of Students Underserved by the TPS

Despite the dedicated efforts of very well intentioned and hard-working teachers and administrators throughout the Commonwealth, the present school system structure continues to under-deliver on the promise of an adequate education opportunity for all students. For many, the existing public school system is fine. For those students, they can stay in their established structure. Nothing in the Act requires any student to change their school.

However, for a significant number of students in the Commonwealth of Kentucky, the current TPS structure does not provide optimal educational outcomes. State assessments show that students, particularly those in urban public schools, are performing well below expectations. Kentucky state mathematics and reading assessments provide each student with an Individual Student Report that classifies their performance into one of four categories: Novice (lowest), Apprentice, Proficient (goal), or Distinguished (highest). Kentucky Board of Education, Kentucky School Report Card (2024), https://www.kyschoolreportcard.com/organization/20/academic_performance/assessment_performance/state_assessments_enrollment?year=2023, (last visited August 7, 2024).

In the context of high school mathematics and reading, the data reveals significant disparities among different student groups. The following depicts these disparities:

High School Student Performance by Subject and Demographics

Category	Math: Novice (%)	Math: Proficient (%)	Reading: Novice (%)	Reading: Proficient (%)
Overall	36%	24%	28%	30%
African American Students	57%	12%	47%	18%
Hispanic Students	45%	19%	37%	25%
White Students	32%	27%	24%	32%
Economically Disadvantaged Students	44%	19%	36%	25%
Economically Advantaged Students	25%	32%	18%	36%

Id. Thus, 36% of high school students are classified as Novice in math, and 28% are Novice in reading, indicating a low level of performance. *Id.* Conversely, 24% are Proficient in math, and 30% in reading, meeting the target performance level. *Id.* The disparities become more pronounced within specific subgroups. For African American

students, 57% are classified as Novice in math, and 47% in reading. *Id.* Only 12% reached Proficient in math, and 18% in reading. *Id.* For Hispanic students, 45% are Novice in math, and 37% in reading. *Id.* Exactly 19% achieved Proficient status in math, and 25% in reading. *Id.* Meanwhile, White students show a 32% Novice level and a 27% Proficient level in math. *Id.* In reading, 24% of White students are at the Novice level, while 32% are at the Proficient level. *Id.*

The data also reveals achievement gaps for economically disadvantaged students in that 44% are Novice in math, with only 19% classified as Proficient. *Id.* In reading, 36% fall into the Novice category, and 25% reach Proficient. *Id.* Economically advantaged students performed relatively better, with 25% Novice in math and 18% in reading. *Id.* Proficiency levels are higher, with 32% in math and 36% in reading. *Id.*

These figures highlight the urgent need for targeted interventions to address the educational gaps experienced by Black, Hispanic, and economically disadvantaged students. Furthermore, the lack of equitable access to quality education undermines the core principle of equal opportunity that is fundamental to a just society. Addressing these disparities is essential not only for the individuals affected but also for fostering a more inclusive and fair education system that benefits all students.

The academic benefits provided by the alternative of a Public Charter School in urban areas, and for underrepresented populations in particular, has been demonstrated repeatedly in the states that have adopted public charter schools. Compared to their peers in TPS, students in urban public charter schools showed an extra 29 days of reading growth and 28 days of math growth per year, both of which were statistically significant. Center for Research on Education Outcomes, The National Charter School Study III

(2023), <https://ncss3.stanford.edu/wp-content/uploads/2023/06/Credo-NCSS3-Report.pdf>, (last visited August 7, 2024).

A study of ten states and regions utilizing public charter schools demonstrated statistically significant improvements in reading and math for public charter school students compared to TPS students: Tennessee, Missouri, Massachusetts, Illinois, Colorado, Michigan, New Jersey, New York City, Upstate New York, and Rhode Island. *Id.* at 28. Across the sample of 6,802 public charter schools, in both math and reading 36 percent had overall learning gains that were statistically significantly larger than the local public-school alternatives. *Id.*

Consistent with its application across the United States, Reverend Jones expects that the Public Charter Schools authorized under the Act would provide additional educational alternatives that would enhance academic performance for those students in his community struggling in the present system; particularly students of color and financially challenged families.

III. These Benefits Are Particularly Realized By Children From Urban Areas With Significant Black, Hispanic, and Economically Disadvantaged Populations

Urban schools account for 24 percent of all public-school students in the United States, 35 percent of low-income students, and 43 percent of non-white (Black, Hispanic, Asian American, American Indian, Native Hawaiian, and other Pacific Islanders) students. Rachel M. Perera, J.V., Kelly Rosinger, R.K. and Carolyn Esswein, J.H. (2016) A New Era in urban education?, Brookings, <https://www.brookings.edu/articles/a-new-era-in-urban-education/> (last visited August 12, 2024). Students in urban public schools with a

high percentage of low-income children tend to perform worse on tests compared to their peers in high-poverty public schools located outside cities. *Id.*

These poor academic performances and educational achievement gaps are prevalent in Kentucky as well. Pursuant to federal and state law, the Kentucky Department of Education (“*KDE*”) identifies Comprehensive Support and Improvement (“*CSI*”) schools that are under-performing. *See* KRS 160.346. The latest data from the KDE regarding the CSI School Roster shows that a significant number of the bottom 5% of Kentucky schools are located in the urban area of Jefferson County, Kentucky. Kentucky Department of Education, Comprehensive Support and Improvement/Educational Recovery(2024),

<https://www.education.ky.gov/school/prischedrecov/Pages/CompSuppImproveER.aspx>, (last visited August 15, 2024).

This distressing data highlights the urgent need for improvement and new approaches particularly in the urban areas serving predominately Black, Hispanic, and economically disadvantaged students. A solution to tackle the significant underperformance in these areas is to offer marginalized students an alternative learning option through public charter schools. *See, Section II, supra.*

Notwithstanding the benefits experienced nationwide by Black, Hispanic, and economically disadvantaged students in public charter schools, the Opinion Below suggests that the Public Charter Schools would favor primarily affluent and well-connected students and lead to the exclusion of those identified as being served by the Act. (Opinion Below p. 5; TR 603). Without any factual support, and contrary to the stated intention of the Act, the Opinion Below states that the Public Charter Schools “appear[] to allow charter

schools to adopt admissions policies that--explicitly or implicitly-favor families that are affluent, well educated, well connected, and academically (or athletically) gifted and talented..." *Id.* The Opinion Below proceeds to find that the Public Charter Schools are not "common schools" because they "would be allowed to limit enrollment, resulting in rejection of children who through no fault of their own lack the resources, parental involvement, language skills, or other means to succeed in school or the charter school admissions process." *Id.* at p.6; TR 604.

These dire predictions are directly contrary to the legislative intent stated in the Act. *See supra.* p.3. Moreover, the experience of the numerous states that have enacted public charter school legislation across the country negates the Opinion Below's jaundiced forecast. In state after state in which public charter schools have been authorized (now 46 out of 50 states), the public charter 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.

The National Center for Education Statistics (NCES) conducted a national study of public charter schools, which found that 53.6% of public charter school students attend public charter schools located in an urban setting. Center for Research on Education Outcomes, The National Charter School Study III (2023), <https://ncss3.stanford.edu/wp-content/uploads/2023/06/Credo-NCSS3-Report.pdf>, (last visited August 6, 2024). Additionally, only 29% of public charter school students attend a public charter school located in a suburban area. *Id.* at pg. 43.

More than 55% of students enrolled in public charter schools across the United States are Black, Hispanic, Asian/Pacific Islander, Native American, and Multiracial.

These students maintain significantly stronger growth in math and reading than their peers in TPS. Free and Reduced-Price Meal Enrollment Does Not Measure Student Poverty: Evidence and Policy Significance (2023), <https://doi.org/10.1016/j.econedurev.2023.102374>, (last visited August 6, 2024).

Addressing the education gap between Black and Hispanic students and their peers is crucial for promoting equity and ensuring that every child has the opportunity to succeed. These disparities often reflect broader socioeconomic inequalities, which can lead to perpetuated cycles of poverty and limiting career opportunities. By creating public charter schools specifically designed to meet the needs of these communities, targeted strategies can be implemented that address the unique challenges faced by these students, such as lower access to resources, varying levels of parental involvement, and differences in educational support.

Nationwide, approximately 55% of students in public charter schools live in poverty, compared to 51% in TPS. Center for Research on Education Outcomes, The National Charter School Study III (2023), <https://ncss3.stanford.edu/wp-content/uploads/2023/06/Credo-NCSS3-Report.pdf>, (last visited August 6, 2024). While this 4% difference might appear minor, the consistent success of public charter schools in making education more accessible to impoverished urban children underscores their importance.

Public Charter Schools have the flexibility to innovate and tailor their curriculum and teaching methods to better engage students from diverse backgrounds. They can provide culturally relevant pedagogy, offer additional academic support, and create environments that foster a sense of belonging and motivation. By addressing these needs,

public charter schools can help bridge the education gap, contributing to a more equitable and adequate educational landscape. This approach not only benefits the students directly but also has broader societal implications, fostering a more inclusive and just society by giving all students the tools they need to succeed.

The Act enunciates its intention that Public Charter Schools be available to provide quality education opportunities to all children of Kentucky regardless of socio-economic background. It further expressly states the intent that the Public Charter Schools would particularly be available for those in urban areas, in need of financial assistance and/or those attending persistently low achieving schools. Based on the express language of the Act and the evidence available from across the country, the Public Charter Schools will close the education gap that is acutely felt in non-affluent communities including the west end of Louisville.

IV. The Public Charter Schools Are Constitutional

This Court has repeatedly recognized it is the duty and responsibility of the General Assembly under the Kentucky Constitution to provide for an efficient system of common schools throughout the State. *See e.g. Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205 (Ky. 1989). In *Rose*, this Court held that it was “the responsibility of the General Assembly, using its own judgment and exercising its own power and constitutional duty, to establish such a system.” *Id.* at 203.

In addressing the Act, the Court's role is to determine the constitutional validity of the Act. *Id.* at 214. In so doing, it is textbook law that enactments of the General Assembly have a strong presumption of constitutionality. *Id.* at 208 *citing Jefferson County Police Merit Board v. Bilyeu*, 634 S.W.2d 414 (Ky. 1982). This Court will not interfere with the

judgment of the General Assembly unless there is “a palpable effort to evade the mandate of the Constitution.” *Rose*, 790 S.W.2d at 209.

The express language of the Act demonstrates that there has been no such unconstitutional effort. As stated in the Act, the Act represents the General Assembly’s exercise of its duty to provide an efficient system of education for all students and to address perceived deficiencies in the existing structure, particularly for certain students.

The Act seeks to provide opportunities for those currently being educationally underserved. The General Assembly had valid reasons for its findings that there are achievement gaps in certain segments of the Commonwealth and that Public Charter Schools would enhance the education provided in Kentucky’s public schools and close achievement gaps in certain populations. The General Assembly’s exercise of its judgment in this regard was within its Constitutional power and should not be overthrown. *See id.* at 209 (citing the separation of powers doctrine under the Kentucky Constitution §§27, 28, 29).

Nonetheless, the Opinion Below finds that the Act violates §§184 and 186 of the Kentucky Constitution which provide:

Ky. Con. §184:

The interest and dividends of said [common school] fund, together with any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose. No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation ...

Ky. Con. §186:

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.

These provisions ensure that funds raised for education are used exclusively for public schools, reflecting the framers' intent to prioritize and protect these resources. Ky. Con. §186 specifies that all funds for education must be devoted solely to maintaining public schools, with no diversion to other purposes. This exclusivity is intended to safeguard the integrity of educational funding, ensuring it is applied directly to support and improve public schooling.

Rather than running counter to the constitutional purposes of providing and improving accessible free high-quality education to all students, the Act enhances these purposes envisioned by the Constitutional framers. The Opinion Below turns the intent of the referenced Constitutional provisions (§§183, 184, 186) on their head. The purpose of the educational provisions of the Constitution was two-fold; first to empower and task the General Assembly to legislatively decide and implement public education in the Commonwealth (§183) and second to ensure that funds raised for public education went to the public education of all Kentucky children so that they had access to the best educational opportunities available at no cost (§§184, 186).

The premise for the existence of common schools under these Constitutional provisions is that all children in Kentucky have a fundamental constitutional right to an adequate education. *Rose*, 790 S.W.2d at 212. In *Rose*, this Court noted that the General Assembly must protect and advance that right. *Id.*

The Opinion Below pays lip service to the General Assembly's responsibility in making policy decisions on education but then negates this discretion by impermissibly

concluding that the Public Charter Schools are not “common schools.” Opinion Below p. 10; TR 608. Ironically, the Opinion Below appears to conclude that the Public Charter Schools are not “common schools” based primarily on the premise that the Public Charter Schools will be so popular that the demand for attendance at the Public Charter School will outstrip the resources available necessitating a lottery for available spots. Opinion Below pp.5-6; TR 603-604.

The Act authorizes the creation of Public Charter Schools that are open to all students. The Public Charter Schools do not exclude students on the basis of race, religion, or any other category. The Act would create additional educational options at no charge to the public, options currently available to those who can afford private school education; but unavailable to those unable to pay such tuition.

Those are the essential features of a “common school.” *City of Louisville v. Commonwealth*, 134 Ky. 488, 121 S.W. 411, 412 (1909) (the one main essential of common schools are that they are 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). Rather than an impermissible palpable effort to evade the Constitution, the Act represents the General Assembly’s expressed effort to “protect and advance” the fundamental constitutional right of every child in Kentucky to an adequate education. The Act seeks to close achievement gaps for those students that for whatever reason are not receiving an adequate education under the current structure. The Opinion Below’s rejection of this effort because the Public Charter Schools may become too popular for the available resources is an unwarranted interference in the discretion of the General Assembly as to the best way to make an

efficient common school education available to all Kentucky children; not just those in certain areas or of certain means.

The Opinion Below's reliance on the "lottery" to determine the Public Charter Schools are not "common schools" is also betrayed by the systemic use of "lotteries" in the existing TPS. In contrast to the Opinion Below's chastisement of use of a lottery, a lottery admissions system is employed by school boards in the Commonwealth of Kentucky to manage the selection process for various educational programs, such as magnet schools, magnet programs, and optional programs. Kentucky School Boards Association, Online Policy and Procedure Manuals (2024), <https://policy.ksba.org/>. (last visited August 15, 2024). The boards of education use a lottery to ensure a fair and transparent approach when the number of applicants exceeds available resources. *Id.* This lottery system is designed to handle admissions for magnet schools and elementary, middle, and high schools, where the programs are either interest-based or do not use specific admissions criteria. *Id.*

No one has suggested that the Magnet program at Jefferson County's DuPont Manual High School (for example) or other magnet schools throughout the Commonwealth are not "common schools." Yet, these schools utilize a "lottery" when necessitated by parents/students' demand for the education provided at such Magnet schools.

The "lottery" envisioned by the Act for Public Charter Schools likewise does not preclude the Public Charter Schools from being common schools. The Public Charter Schools authorized by the Act would employ a lottery admissions system that mirrors the approach used by TPS magnet and optional programs. Public Charter Schools often face high demand for limited spots, making a lottery system an effective method to handle

applications impartially. The lottery system in the Public Charter Schools under the Act is governed by similar principles as those currently used in the TPS, emphasizing fairness and equity, and aligns with the overarching goal of providing diverse educational options while managing capacity and demand. Use of such a “lottery” does not place the Public Charter Schools outside the “common school” system.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Reverend Walter Jones III respectfully urges this Court to reverse the Circuit Court’s ruling and hold that the Act is valid under the §§183, 184 and 186 of the Kentucky Constitution.

Respectfully submitted,

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WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 34(B)(4) because, excluding the parts of the document exempted by RAP 15(D), it contains 4,048 words according to the count of Microsoft Word software.

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