Supreme Court of Kentucky

No. 2023-SC-0498

RUSSELL COLEMAN, Attorney General,
on behalf the Commonwealth of Kentucky — *Appellant*

v.

On appeal from
Jefferson Circuit Court No. 22-CI-02816;
Court of Appeals No. 2022-CA-0964

JEFFERSON COUNTY
BOARD OF EDUCATION, *et al.* — *Appellees*

REPLY BRIEF OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
Attorney General of Kentucky

MATTHEW F. KUHN (No. 94241)
Solicitor General
JACOB M. ABRAHAMSON (No. 99238)
Assistant Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Matt.Kuhn@ky.gov
Jacob.Abrahamson@ky.gov
(502) 696-5300

Counsel for the Attorney General

CERTIFICATE OF SERVICE

I certify that a copy of this brief was served by U.S. mail on July 23, 2024 on David Tachau, Katherine Lacy Crosby, Amy D. Cubbage, Tachau Meek PLC, PNC Tower, Suite 3600, 101 South Fifth Street, Louisville, Kentucky 40202 (also served via email); Todd G. Allen, Donald J. Haas, Kentucky Department of Education, Office of the Commissioner of Education, 300 Sower Boulevard, Fifth Floor, Frankfort, Kentucky 40601 (also served via email); Clerk, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, Kentucky 40202; Clerk, Kentucky Court of Appeals, 669 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40601. I also certify that the record on appeal was not withdrawn in preparing this brief.

Matthew F. Kuhn

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Senate Bill 1 changed the division of labor between a county board of education and superintendent in any consolidated local government. For now, that open class includes only the Jefferson County Board of Education and the Superintendent of the Jefferson County Public Schools, Dr. Marty Pollio. But that need not always be true. If generally applicable statutory prerequisites are met, any other county in Kentucky and its largest city can combine to create a consolidated local government and thus make SB 1 applicable there.

Despite this statutory reality, the Board sued the Commissioner of Education, but not Superintendent Pollio, to challenge several provisions in SB 1 as violating Sections 59 and 60 of the Kentucky Constitution. Although the courts below sided with the Board, this Court should reverse. It should do so for any one of three reasons: (i) the Board lacks standing to bring this lawsuit; (ii) the Board failed to name a necessary party; and (iii) SB 1 does not violate Section 59 or 60.

As to standing, the Board claims that SB 1 puts it at risk of enforcement by the Commissioner. But the Board can only speculate about whether the Commissioner will or even can enforce SB 1 against it—and the Commissioner himself takes no position on this issue. The Board therefore lacks standing to bring this pre-enforcement challenge. The Board also disclaims any need for Superin-

tendent Pollio to be a party to this lawsuit. But Superintendent Pollio is the official vested with the authority granted by SB 1. He is the very definition of a necessary party. And on the merits, the Board claims that the General Assembly violates Sections 59 and 60 whenever it enacts class-based legislation if the affected class is small at the time of enactment. But that is not the test Kentucky courts apply to special-legislation challenges. Plus, adopting the Board's proffered test would jeopardize the General Assembly's ability to legislate as to consolidated local governments and urban county governments.

I. There is no credible threat that the Commissioner will or even can enforce SB 1 against the Board.

In Kentucky's courts, standing requires a plaintiff to show an injury that can be traced to the defendant's conduct and redressed by the court. *Commonwealth, Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 196 (Ky. 2018). More simply, to show standing, a plaintiff must "sufficiently answer the question: 'What's it to you?'" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (citation omitted). The Board has not answered how its chosen defendant can cause it any injury or how a court can redress its alleged harm via relief against that defendant.

Before proceeding, recall that the Board raises a pre-enforcement challenge to SB 1. In light of the circuit court's declaratory judgment, we still do not know whether the Commissioner will try to enforce SB 1 against the Board. And

the Commissioner refuses to tip his hand on this issue. In his brief, the Commissioner is careful (at 4) "not [to] take a position on this issue." That's a problem for the Board because the Court has expressed a "general reluctance to allow pre-enforcement constitutional challenges outside the First Amendment context." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 684 (Ky. 2023) (Nickell, J., concurring) (citations omitted). The Court's caselaw bears out that reluctance. *City of Pikeville v. Ky. Concealed Carry Coal., Inc.*, 671 S.W.3d 258, 266 (Ky. 2023) (denying standing where plaintiff organization identified no threatened enforcement against its members); *Beshear v. Ridgeway Props., LLC*, 647 S.W.3d 170, 176–77 (Ky. 2022) (declining to hear case when "the record contain[ed] no evidence of impending [government enforcement] action"); *Beshear v. Acree*, 615 S.W.3d 780, 827–28 (Ky. 2020) (rejecting challenge to penalty because plaintiffs "d[id] not identify any among themselves who has been threatened with a fine, fined, threatened with closure, or closed"); *Commonwealth v. Bredhold*, 599 S.W.3d 409, 417 (Ky. 2020) (refusing to decide challenge to the death penalty brought before defendants were "tried, convicted, or sentenced").

To be sure, these recent cases differ slightly from this one. In those cases, the plaintiff or plaintiffs at least were litigating against a defendant with enforcement authority. But their claims could not go forward because they did not establish that their feared harms would come to pass. The Board has the same problem—but for a different reason. In particular, the Board cannot explain how

the Commissioner can cause it any injury or how a court order can remedy its injury by relief against the Commissioner. Put simply, the Board cannot identify "a credible threat" of enforcement by the Commissioner. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted). Because the Board's "fears" that the Commissioner will enforce SB 1 against it "are imaginary or speculative," it lacks standing. *See Younger v. Harris*, 401 U.S. 37, 42 (1971).

The Board's arguments to the contrary are unpersuasive. It mainly claims (at 15) that the Commissioner's referral role under KRS 156.210(3) creates a credible threat of enforcement. But the Board admits (at 19) that "the Commissioner does not have independent enforcement authority under KRS 156.210(3)." On this key point, the Commissioner took a position, and he agrees with the Board. As he explains (at 4), his authority under KRS 156.210(3) is "limited to a referral to an outside enforcement agency or the Kentucky Board of Education." Try as it might, the Board cannot explain why a mere referral by the Commissioner to an independent official with enforcement authority creates a credible threat of enforcement. Referring is distinct from enforcing. And enforcing is what injures the Board.

On top of that, it is far from clear that the Commissioner can even make a referral for violating SB 1. Under KRS 156.210(3), the Commissioner's referral, once made to the state Board of Education, must then go to a prosecutor "for indictment, prosecution, and conviction of the accused." But everyone, the

Board included (at 23 n.4), agrees that there are *no* criminal consequences for violating SB 1. It follows that violating SB 1 does not implicate the Commissioner's referral power under KRS 156.210(3). It is true that the state Board of Education has secondary enforcement authority under KRS 156.210(3) if a prosecutor decides "prosecution is not warrantable." But without an issue that is subject to criminal prosecution in the first instance, the state Board of Education's secondary enforcement authority is never triggered. Put more directly, if prosecution for violating SB 1 is never legally on the table, as the Board concedes, the Commissioner has nothing to refer in the first place. So the Board can violate SB 1 without fear of a referral under KRS 156.210(3).

Unable to overcome this fact, the Board pivots to another statute: KRS 156.132(1). But the Board failed to raise this statute in its briefing below. And the Court of Appeals didn't consider this statute. *Cameron v. Jefferson Cnty. Bd. of Educ.*, 2023 WL 6522192, at *3–5 (Ky. App. Oct. 6, 2023). In any event, KRS 156.132(1) is of no help to the Board. It provides:

> The [Commissioner] shall recommend, by written charges to the proper school authorities having immediate jurisdiction, the removal of any superintendent of schools, principal, teacher, member of a school council, or other public school officer to whom he has reason to believe is guilty of immorality, misconduct in office, incompetency, willful neglect of duty, or nonfeasance.

As the Board sees it, this statute empowers the Commissioner to seek removal of a school board member who violates SB 1. That is mistaken.

To begin with, the Commissioner does not have any enforcement authority under KRS 156.132(1). The statute only allows the Commissioner to make a "recommendat[ion]" about removal. Indeed, the statute recognizes that someone else has "immediate jurisdiction" to take removal action.[1] In this sense, KRS 156.132(1) is just like KRS 156.210(3) as much as it grants enforcement authority to someone other than the Commissioner.

Even putting that aside, the Board is wrong that KRS 156.132(1) allows the Commissioner to recommend that a local school board member be removed. To be clear, no one doubts that the General Assembly can establish removal procedures for the Board's members. *See Hale v. Combs*, 30 S.W.3d 146, 150 (Ky. 2000) ("The authority to determine who is eligible or ineligible to hold office as a local school board member is vested in the General Assembly."). Indeed, the legislature has created a unique process for removing school board members that the Attorney General initiates. KRS 160.180(3)(a). The Commissioner, it is true, previously had authority under KRS 156.132 to recommend the removal of a school board member. *Hale*, 30 S.W.3d at 148 (discussing the prior version of the statute); *State Bd. for Elementary & Secondary Educ. v. Ball*, 847 S.W.2d 743, 745–

[1] That someone else with "immediate jurisdiction" is either the local board of education or the superintendent, as KRS 156.132(3) makes clear. So any recommendation under the statute goes in the first instance to the Board or Superintendent Pollio.

46 (Ky. 1993) (same). But the General Assembly amended KRS 156.132 in 2021 to remove any reference to a local school board member. 2021 Ky. Acts ch. 144, § 1 (House Bill 331). As a result, KRS 156.132 no longer empowers the Commissioner to recommend the removal of the Board's members.

Out of options, the Board turns (at 28) to yet another statute. This one, passed last year, makes the Commissioner subject to confirmation by the state Senate. 2023 Ky Acts ch. 134, § 1 (Senate Bill 107). But changing the method of appointment for the Commissioner is altogether different from granting him statutory authority to enforce SB 1 against the Board. Only the latter suffices to establish standing.

All told, the Board offers nothing but speculation that the Commissioner will enforce SB 1 against it. It speculates about the Commissioner's referral authority under KRS 156.210(3). It speculates about what the state Board of Education can or will do upon receiving a referral under KRS 156.210(3). It speculates about whether the Commissioner can or will recommend removal under KRS 156.132(1). And it speculates about how Senate confirmation by the Commissioner will affect all its other speculation. But "[t]he causation requirement [of standing] precludes speculative links." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024). More to the point, "[s]peculative fears of prosecution . . . are legally insufficient to confer standing." *City of Pikeville*, 671 S.W.3d at 266.

II. Superintendent Pollio is a necessary party.

If Superintendent Pollio is not a necessary party to this suit, KRS 418.075 and CR 19.01 have no real meaning. It is hard to imagine a party who is more necessary to a constitutional challenge than a party situated like Superintendent Pollio. Consider this issue in the abstract. If a party seeks to challenge a statute that grants new authority to a state official, it is obvious that the newly empowered official, to quote KRS 418.075, "claim[s] an[] interest which could be affected by the declaration" and is at risk of "prejudice" to his "rights." The same result follows under CR 19.01. The official with new authority must be a party for the court to "accord[]" "complete relief." *See id.* The official also "claims an interest relating to the subject matter of the action" and stands to have his ability to protect that interest "impair[ed]" and "imped[ed]." *See id.*

The Board's only response (at 33) is to rely on its statutory relationship with the Superintendent. According to the Board, the Superintendent is no different from the Board, given that he serves as its agent. This point perhaps could have some salience if the Superintendent's job were simply to help the Board carry out its statutory mandates. That is part of the Superintendent's job, but it is not all of it. SB 1 makes that clear.

Under SB 1, Superintendent Pollio has statutory authority that the Board lacks. For example, under SB 1, day-to-day management of Jefferson County schools rests with the Superintendent. KRS 160.370(2)(a)1. And SB 1 directs that

the Superintendent must "[p]repare all rules, regulations, bylaws, and statements of policy for approval and adoption by the board, with approval not to be withheld without a two-thirds (2/3) vote of the board to deny approval or adoption." *Id.* at (2)(b)2. And SB 1 gives the Superintendent independent expenditure authority. *Id.* at (2)(c). The Superintendent has an obligation to enforce these parts of SB 1 independent of the Board's statutory authority.

The Board stresses that KRS 160.370(1) describes the Superintendent as the Board's "executive agent." But SB 1 expressly modifies KRS 160.370(1) to the extent it conflicts with SB 1. It accomplishes this by doing what is known in legislative parlance as "notwithstanding" the conflicting provision. KRS 160.370(2)(b) ("Notwithstanding any provision to the contrary in subsection (1) of this section, the superintendent shall . . . ."); *see also Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 166 (Ky. 2010) (explaining that the General Assembly "typically" "suspend[s] statutes . . . by inserting a clause beginning with the word *notwithstanding*"). The "notwithstanding" provision in SB 1 makes clear that the Superintendent is not the Board's agent when he exercises authority that the Board lacks. Stated in agency terms, the Superintendent is not an agent when he undertakes tasks within his authority that his principal lacks authority to take. As a result, the Superintendent must be a party to this litigation given that the Board challenges the independent authority that only he can exercise under SB 1.

The Board also complains (at 33–34) about having to pay for Superintendent Pollio's legal fees. Those financial considerations have no bearing on whether the Superintendent is a necessary party. What matters is that a necessary party is bound by a court's judgment, not what it costs to get to that judgment. Even still, there's no guarantee as to what the Superintendent would do as a party and thus the amount of legal fees that would be needed. Maybe he would agree with the Board (thus requiring very few legal fees). Maybe he would agree with the Attorney General.[2] Or maybe he would take no position on SB 1's legality (thus requiring very few legal fees). Indeed, nominal parties are a mainstay in litigation challenging the constitutionality of state law precisely because of the necessary-party requirements in KRS 418.075 and CR 19.01.

The Board also suggests in passing (at 32–33) that the Attorney General has not been diligent in arguing that Superintendent Pollio is a necessary party. But at every appropriate juncture in both courts below, the Attorney General raised this point, including at a time when the Board could have amended its complaint to add the Superintendent as a party. Indeed, the Court of Appeals

[2] Under KRS 15.020(3), the Attorney General regularly represents state officials like the Superintendent to defend the constitutionality of state law. *E.g.*, *Foresight Coal Sales, LLC v. Chandler*, 60 F.4th 288 (6th Cir. 2023) (representing employees of the Public Service Commission); *Doe v. Burlew*, No. 4:24-cv-00045, 2024 WL 3463960 (W.D. Ky. July 18, 2024) (representing a county attorney).

agreed that the Attorney General has been diligent in raising this objection. *Cameron*, 2023 WL 6522192, at *6 ("The Attorney General, although not a party, was present from the outset of this litigation and argued that the Superintendent was a necessary party; he did not 'lie back' and await the outcome of the proceedings before raising an attack on the judgment.").

One final point about the necessary-party analysis. The Board does not seriously try to defend the lower courts' reasoning on the necessary-party point. That is telling. The Board has convinced two courts that Superintendent Pollio is not a necessary party to this case. Yet even after those wins, the Board stands behind neither court's reasoning. It instead presses an agency argument on which it has yet to prevail.

III. SB 1 is in keeping with Sections 59 and 60.

The "appropriate test" under Sections 59 and 60 "is whether the statute applies to a *particular* individual, object or locale." *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 573 (Ky. 2020) (emphasis added). In other words, "local or special legislation, according to the well-known meaning of the words, applies *exclusively* to particular places or particular persons." *Id.* at 572 (emphasis added). SB 1 applies to an open class of county school districts and their superintendents—those in a county with a consolidated local government, both now or in the future. To use *Woodall*'s language, the law does not apply "exclusively" or "particular[ly]" to the Board and Superintendent Pollio. *See id.* at 572, 573. The

Board argues otherwise by misinterpreting the history that led to Sections 59 and 60 and by distorting this Court's precedent.

Start with the historical record, which the Board (at 37) says should remove "[a]ny doubt" about its claim. The Board's opening discussion (at 37–38) tracks *Woodall*'s summary that "the proliferation of special and local laws" addressing "exceedingly mundane and trivial matters unworthy of state legislative consideration" prompted Sections 59 and 60. *Id.* at 570–71; *accord* Debates from the 1890 Constitution Convention at 3990–93 (1890 Debates). This historical discussion, however, only hurts the Board's position. SB 1 does not address an "exceedingly mundane and trivial matter." It concerns a matter of surpassing importance: how a county school district and its superintendent within a consolidated local government educate the many children within their jurisdiction. Because a consolidated local government must include at least 250,000 residents, KRS 83A.160(6), under no circumstances can SB 1 be characterized as addressing a topic that is "exceedingly mundane and trivial." To the contrary, educating Kentucky's children is a pursuit of "immeasurable worth . . . to our state and its citizens, especially to its young people." *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 189 (Ky. 1989). So SB 1 is unlike the laws that prompted Sections 59 and 60.

The Board next turns (at 39–40) to the constitutional debates about what became subsection 25 of Section 59. The draft did not apply to "cities and towns

having a population of more than twenty-five thousand inhabitants." 1890 Debates at 3990. That language, however, did not make it into the adopted provision. *Id.* at 3999. Although the debate about this issue was fleeting and thus its implications are not altogether clear, this portion of the constitutional debates is not the silver bullet that the Board claims. Here's how the debate on this topic unfolded:

- Delegate McDermott explained that "[a] system which would be satisfactory in the country would not be sufficient in a large city," so "it seems proper that the distinction should be made." *Id.* at 3998.

- Delegate W.H. Miller asked "if this section would not permit any city having 25,000 inhabitants or more to have local legislation on the subject of schools applicable to itself alone?" *Id.*

- Delegate McDermott responded by pointing to what became Section 156 (he called it "the article relative to municipalities") to note that "cities and towns have to be divided into classes, and each class must have the same laws." *Id.*

- Delegate Bullitt asked why Louisville should be singled out. *Id.* When Delegate Young explained the reasons justifying "laws particularly governing schools" in Louisville, Bullitt requested "those same privileges." *Id.* at 3999.

- But the key exchange was the final one. Delegate Nunn pointed out that the delegates' concerns might be addressed with "a general law applicable to cities of ten, fifteen, and twenty thousand[.]" *Id.* Delegate McDermott explained that Section 156 "provided for" that solution, but that "this section was drawn before that article was adopted" and that "we thought a town of twenty-five thousand inhabitants should have a school system different from that of smaller towns." *Id.*

This fuller context shows that no delegate stated that an open-class law like SB 1 would violate Section 59(25). At most, the delegates' discussion suggests that, to paraphrase Delegate Miller, "local legislation on the subject of schools applicable to [Louisville] alone" would be suspect. That is to say, a closed-class law applicable only to Louisville's schools and never anywhere else would be problematic. *See Singleton v. Commonwealth*, 175 S.W. 372, 373 (Ky. 1915) ("[T]he Legislature could not, without violating [Section 59], enact a law for the punishment of a designated crime in Henry county."). But Delegate Nunn's qualification that the Constitution would permit a "general law applicable to cities of ten, fifteen, and twenty thousand" conveys that open-class laws do not violate Section 59(25). Thus, it appears that at least some delegates deleted the proposed language from Section 59(25) not because they disagreed with it, but because they believed that the Constitution otherwise allowed what the deleted language permitted. Indeed, as the Attorney General explained in his opening brief (at 47–48), shortly after our Constitution was ratified, Kentucky's high court upheld county-based limitations similar to those suggested by Delegate McDermott. *See Stone v. Wilson*, 39 S.W. 49, 50–51 (Ky. 1897), *overruled on other grounds by Vaughn v. Knopf*, 895 S.W.2d 566, 569–70 (Ky. 1995); *Winston v. Stone*, 43 S.W. 397, 397–98 (Ky. 1897), *overruled on other grounds by Vaughn*, 895 S.W.2d at 569–70. As a result, the debate surrounding what became Section 59(25) does not cast doubt on an

open-class law like SB 1. If anything, that debate shows why SB 1 is constitutional.

The Board's caselaw-based arguments are no more persuasive. Just like the Court of Appeals, the Board leads with *University of Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010). But the law there applied to a closed class of one school. The Board counters (at 40) that the *Pennybacker* law did not specifically identify that school. But the law might as well have done so. As *Pennybacker* put it, "the statute *can only be read* as funding scholarships for students attending the planned UC Pharmacy School." *Id.* at 683 (emphasis added). For one thing, the statute used closed-class language: it created "*a* scholarship program" at "*a* private four (4) year institution." *Id.* at 672 (citation omitted) (emphasis added). And for another, the law elsewhere identified the sole institution that benefitted from the scholarship program. *Id.* at 671 (noting that the same bill "appropriated $10 million for the construction of a pharmacy school building on the campus of the University of the Cumberlands, a Baptist college located in Whitley County."). In short, *Pennybacker* as affirmed by *Woodall* teaches that a closed-class law violates Section 59.

That conclusion is nothing new. Before *Pennybacker*, this Court's predecessor repeatedly invalidated closed-class laws. In fact, *Woodall* collected these closed-class cases in *the same footnote* in which it favorably cited the result in *Pen-*

nybacker. 607 S.W.3d at 573 n.19. This reinforces that *Woodall* (correctly) understood *Pennybacker* to be a closed-class case. The other closed-class cases identified in *Woodall* were: *Commonwealth v. McCoun*, 313 S.W.2d 585, 587, 589 (Ky. 1958) (invalidating statute that could only ever allow two individuals to sue the Commonwealth for a particular amount of money); *Dep't of Conservation v. Sowders*, 244 S.W.2d 464, 465, 467 (Ky. 1951) (finding unconstitutional statute that could only ever allow one widow to sue the Commonwealth); *Bentley v. Commonwealth ex rel. State Bd. of Dental Examiners*, 239 S.W.2d 991, 992–93 (Ky. 1951) (striking down statute that could only ever allow a single dentist to practice without a license); and *Reid v. Robertson*, 200 S.W.2d 900, 901, 903 (Ky. 1947) (invalidating statute that could only ever allow a single veterinarian to obtain a license). Just like the statute in *Pennybacker*, the laws in these other closed-class cases could never apply outside the person or entity named or described in the statute. Under *Woodall*, those laws violate Sections 59 and 60 by "appl[ying] exclusively to particular places or particular persons." 607 S.W.3d at 572.

The Board next alleges (at 43) that the Attorney General's view of *Woodall* would allow "clever legislative drafting" to avoid Sections 59 and 60. But legislating touching on consolidated local governments is not a "clever" gambit to circumvent Sections 59 and 60, given how many such laws are in the KRS (as collected in the Attorney General's brief at 54–57). That aside, *Woodall* specifi-

cally addressed how to handle "clever legislative drafting" under our Constitution. "The answer to this objection," *Woodall* tells us, is Section 3's restriction on class-based legislation. 607 S.W.3d at 573. The Board quibbles (at 43) that Section 3 is not a "genuine remedy." *Woodall*, however, disagreed. It held that "[o]ver the last 130 years, courts have had experience with the [Section 3] analysis and have showed little hesitancy in engaging a more rigorous analysis with respect to classification legislation."[3] *Id.* So Section 3 stands as a backstop against "clever legislative drafting." The problem for the Board is that it didn't bring a Section 3 claim.

The Board's other arguments do not move the ball either. The Board accuses the Attorney General (at 42–43) of "misrepresent[ing]" SB 1's language. That charge has no basis. SB 1 applies uniformly across the Commonwealth. As the Board admits (at 3), SB 1 does "not expressly mention Jefferson County or the Board." To quote SB 1, it applies in a "county school district in a county with a consolidated local government adopted under KRS Chapter 67C." KRS 160.370(2). Of course, at present only the county school district in Jefferson

[3] Without seriously pressing the point, the Board says (at 43) that *Woodall*'s reference to a "more rigorous analysis" is an invitation to supercharge Section 59. The Court of Appeals agreed. *Cameron*, 2023 WL 6522192, at *9 ("*Woodall* endorses the development of a more rigorous analysis under Section 59 . . . ."). Respectfully, merely reading *Woodall* is enough to reject that contention, as the Attorney General previously explained (at 51).

County meets this definition. But that need not always be true. If another consolidated local government is created anywhere in Kentucky, SB 1 automatically applies there just the same as it does in Jefferson County. The Board makes much (at 44) of *Woodall*'s use of the present tense verb "applies." 607 S.W.3d at 573 ("As for the analysis under Sections 59 and 60, the appropriate test is whether the statute *applies* to a particular individual, object or locale." (emphasis added)). But this confusing argument gets the Board nowhere. SB 1 "applies" anywhere in Kentucky where a consolidated local government exists.

The Board's contrary view would limit the General Assembly from legislating about open classes that happen to be small. But sometimes a general law is needed to regulate a small class—especially when a limited, but pressing, problem threatens to worsen. The Board, however, would make the General Assembly wait for those problems to become more widespread. In its view, Section 59 and 60 prohibit a general law if it covers only a few locales or entities at the time of passage. But a law is general no matter how big or small the class it regulates. Any other conclusion poses line-drawing problems. For example, at what point does a class become big enough that the law complies with Sections 59 and 60? Would SB 1 be constitutional if there were two consolidated local governments in Kentucky? Three? The Board never says. That's because the Board's view of Sections 59 and 60 would return us to the pre-*Woodall* paradigm of "unfettered discretion" that "is unworthy of any legal system." *See id.* at 569.

The Board next accuses (at 42) the Attorney General of "never even mention[ing] the additional prohibition in Section 60" in his brief. The Attorney General, however, exhaustively discussed *Woodall*, which instructs that the "appropriate test" for challenges "under Sections 59 *and 60* . . . is whether the statute applies to a particular individual, object or locale." 607 S.W.3d at 573 (emphasis added). So by discussing *Woodall*, the Attorney General fully engaged with Section 60. Even still, Section 60 requires the General Assembly to use "a general law" to "grant[] powers or privileges." That describes SB 1 to a "T."

The Board next criticizes (at 47) the Attorney General's contention that legislative history matters little to the constitutional inquiry under Sections 59 and 60. This Court, however, has explained that *Woodall*'s test turns on the "statutory text" of the law at issue. *See Cates v. Kroger*, 627 S.W.3d 864, 872 (Ky. 2021). But even if legislative history plays some limited role, the legislative history the Board invokes does not reveal anything impermissible. All it shows is that some members of the General Assembly considered how SB 1 would affect Jefferson County Public Schools. That is to be expected—and even hoped for. When the General Assembly considers a law that applies in a county containing a consolidated local government, it is natural to ask how the law will apply in the only consolidated local government that currently exists.

Finally, the Board (at 47–50) downplays the significance of this case for the only consolidated local government in Kentucky at present. Two Louisville-

based organizations, however, offer a clear-eyed perspective. As Greater Louisville Inc. and Impetus for a Better Louisville explained in their motion for leave to file an amicus brief, the reasoning of the decisions below would have a "significant negative impact" on the General Assembly's ability to legislate with respect to a consolidated local government. *See* Mtn. at 1. For example, under the Court of Appeals' logic, a law that applies only in a consolidated local government is unconstitutional under Sections 59 and 60 if some members of the General Assembly merely discussed the consequences of the law in Louisville Metro. *Cameron*, 2023 WL 6522192, at *9. It's hard to imagine a law touching on consolidated local governments that would not fall prey to the Court of Appeals' legislative-history rule.

The Board cannot avoid these cascading consequences. It's true, as the Board notes (at 47–48), that only SB 1 is before the Court. But as Kentucky's court of last resort, this Court does not announce decisions that are good for one ticket only. This Court's reasoning is binding on lower courts and receives respect in future cases via stare decisis. In every case it hears, including future cases that will rely on the resolution here, the Court has a duty to "maintain stability and consistency in the law." *Gasaway v. Commonwealth*, 671 S.W.3d 298, 328 (Ky. 2023). So it's fair game for the Attorney General to list the many statutes that would be imperiled by the Board's constitutional theory.

CONCLUSION

The Court should reverse the judgment below and reinstate the challenged parts of SB 1.

Respectfully submitted,

RUSSELL COLEMAN
Attorney General of Kentucky

MATTHEW F. KUHN (No. 94241)
Solicitor General
JACOB M. ABRAHAMSON (No. 99238)
Assistant Solicitor General

Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Matt.Kuhn@ky.gov
Jacob.Abrahamson@ky.gov
(502) 696-5300

WORD-COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G)(3)(b) because two appellee briefs were filed and, excluding the parts of the document exempted by RAP 15(D) and 31(G)(5), this document contains 5,114 words.