Supreme Court of Kentucky

CASE NO. 2023-SC-0498

RUSSELL COLEMAN, Attorney General,
on behalf of 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

AMICUS CURIAE BRIEF OF THE NICKLIES FOUNDATION, INC.

Respectfully submitted,

FULTZ MADDOX DICKENS PLC

/s/ Benjamin C. Fultz
Benjamin C. Fultz (#84398)
101 South Fifth Street, 27th Floor
Louisville, Kentucky 40202-3116
(502) 588-2000
bfultz@fmdlegal.com

Counsel for the Nicklies Foundation, Inc.

CERTIFICATE OF SERVICE

I certify that on May 21, 2024, I electronically filed this Amicus Curiae Brief through the Court's eFiling system, which will automatically generate and send a Notice of Electronic Filing to all eFilers associated with the case, including those shown below, along with a hyperlink to the electronic document, which transmission constitutes service of the filed document under CR 5, and by U.S. Mail to Russell Coleman, Matthew F. Kuhn, Jacob M. Abrahamson, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, KY 40601; David Tachau, Katherine Lacy Crosby, Amy D. Cubbage, Tachau Meek PLC, PNC Tower, Suite 3600, 101 S. Fifth Street, Louisville, KY 40202; Todd G. Allen, Ashley Lant, Kentucky Department of Education, Office of the Commissioner of Education, 300 Sower Boulevard, Fifth Floor, Frankfort, KY 40601; Sheryl G. Snyder, Frost Brown Todd, 400 W. Market Street, Suite 3200, Louisville, KY 40202; Clerk, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, KY 40202; Clerk, Kentucky Court of Appeals, 669 Chamberlin Avenue, Suite B, Frankfort, KY 40601.

/s/ Benjamin C. Fultz

STATEMENT OF AUTHORITIES

PURPOSE OF BRIEF AND POINTS TO WHICH IT IS DIRECTED

The purpose of this brief is to assist the Court in its consideration of the constitutionality of Senate Bill 1 ("SB 1"), which is the subject of this appeal. The Nicklies Foundation aligns with the Appellant, Russell Coleman, the Attorney General of the Commonwealth of Kentucky, in defending SB 1 and urging reversal of the Court of Appeals opinion affirming the Jefferson Circuit Court in declaring SB 1 unconstitutional. The Nicklies Foundation does not seek to repeat the legal arguments the Attorney General has so ably made, but rather to present some supplemental, practical, and public policy perspective on those arguments. The Nicklies Foundation's interest in this matter is consistent with its long and well-demonstrated emphasis on improving education performance and outcomes, expanding educational opportunities, and improving the quality of life for young people through education. The Nicklies Foundation believes that SB 1 is not only consistent with, but conducive to, those goals, objectives, and the purposes of the Foundation.

ARGUMENT

A. Lack of Standing and Failure to Name a Necessary Party

Upon review of the record and briefs in this matter one cannot help but ask, "Why didn't the Jefferson County Board of Education (the "Board") make the Superintendent of Schools, Dr. Marty Pollio, a defendant?" After all, everyone acknowledges, as indeed they must, that SB 1 directly concerns *his* authority *vis*-à-*vis* that of the Board.

The Circuit Court admitted that Dr. Pollio "is the person most negatively impacted" by its decision striking down SB 1. Declaratory Judgment, July 11, 2022, at (unnumbered) 8; Trial Record ("TR") at 224. The Court of Appeals acknowledged that SB 1 "significantly modifies the relationship between local boards of education and superintendents, by giving greater autonomy and power to the superintendents." *Cameron v. Jefferson Cnty. Bd. of Educ.*, No. 2022-CA-0964-MR, 2023 WL 6522192, at *1 (Ky. App. Oct. 6, 2023), *review granted* (Mar. 6, 2024).

The Attorney General touches on the question, but understandably does not attempt to answer it, saying only, "Yet for whatever reason the Board opted not to take that route" of naming Dr. Pollio as a party given that SB 1 so directly impacts him. Brief of the Attorney General at 11. But the reason is nonetheless relevant to the Attorney General's very well-made arguments on the Board's lack of standing and failure to name a necessary party.

Even those most sympathetic to the Board's cause from a policy or political perspective must, if being candid, admit that the reasoning and rationales offered by the lower courts to hold that the Board had standing to bring the action without naming Dr.

Pollio and that Dr. Pollio was not a necessary party is, well, strained and tenuous at worst and considerably less than compelling at best.

And even the Attorney General acknowledges that if the Board had made Dr. Pollio a defendant there would be no basis for arguing for dismissal of the Board's action on grounds of lack of standing or failure to name a necessary party or both. Brief of the Attorney General at 11.

Naming Dr. Pollio would not have adversely affected the Board's ability to challenge the constitutionality of SB 1 on the sole basis that it did, *i.e.*, that it is special or local legislation. The Board could have advanced that same argument with Dr. Pollio as a party just as it did without him.

So why would the Board, with the advice and counsel of its excellent lawyers, roll the dice on losing the case on optional, preventable standing and necessary party grounds when it did not have to? There must have been a really important reason the Board did not name Dr. Pollio.

In its belated, folksy, and dismissive treatment of the issue (an issue which the Court of Appeals rightly described as being "of paramount importance in any lawsuit"), the Circuit Court said that, "[P]laintiff's counsel has, as ethically as possible, suggested Mr. Polio [sic] has no interest in defending the law ...." Declaratory Judgment, July 11, 2022, at (unnumbered) 8; TR 224.

Perhaps not, but with due respect to counsel who made that "as ethical as possible" suggestion, the Board's counsel does not speak for Dr. Pollio in this matter which involved a significant modification of the relationship between the Board and Dr.

Pollio. Thus, that suggestion is far from the same thing as hearing from Dr. Pollio himself.

And even if the "as ethical as possible" suggestion by the Board's counsel was true, Dr. Pollio, if named as a party and truly uninterested, could have filed what essentially amounted to an old-fashioned demurrer and gone about his business of superintending what is by far the state's largest school district, which even he would have to admit has its share (and perhaps more) of unique and distinctive issues and problems the Commonwealth's other district's do not face. At least he would have been before the Court and directly subject to any judgment as the Attorney General so ably defends SB 1.

But what if the "ethical as possible" suggestion is incorrect for whatever reason, and Dr. Pollio had an interest in defending SB 1 or had facts or opinions about it relevant to the Board's constitutional challenge? Again, he would have been before the Court and in a position to provide such evidence.

If Dr. Pollio was before the Court might have helped explain the rational basis for why the state's most populous county, which is the only one operating (and constitutionally so) under a consolidated local government adopted under KRS Chapter 67C, should also operate under a Board-superintendent relationship that is also different from that in other, smaller counties. He might have had helpful input on how the SB 1 structure would have actually operated in practice; how it would have helped students; how it would have helped attract more and better applicants to succeed him when that time comes.

Perhaps the Board's decision to not name Superintendent Pollio as a defendant despite the fact that SB 1 grants additional power to him, not to the Commissioner of Education whom the Board did name, was a cynical and tactical one. Perhaps the Board did not want to hear, or have anyone else hear, what Dr. Pollio would have to say, potentially under oath, on SB 1's reforms and the issues implicated by the Board's legal challenge. Could Dr. Pollio more effectively lead Jefferson County Public Schools without the shackles that SB1 attempted to remove? And what does Dr. Pollio believe SB1 would accomplish when it is time to recruit his successor? For these and other reasons, Dr. Pollo is a necessary party.

But this is precisely why the law of standing and necessary parties is so important. It is especially so in litigation like this, which raises constitutional issues and impacts not just the parties, but the many tens of thousands of children now or soon to be in the Jefferson County Public Schools to whom constitutional duties are also owed. *See* Kentucky Constitution, §§ 183 *et seq.*

The requirements of standing and necessary parties are not just interesting issues of civil procedure as to which lawyers and judges attempt to craft clever ways to claim satisfaction. They have important substantive purposes in ensuring that important issues are well and fully presented for decision and that the parties and interests actually affected are heard, or at least have the opportunity to be heard, and fairly bound to the ultimate decision.

Dr. Pollio should have been before the Court on a matter of this magnitude directly affecting his position and powers. There is no good or sufficient reason why he wasn't.

In his absence, the Board did not, and really could not, establish the requisite standing elements of causation and redressability because the Board could not show either that the Commissioner of Education caused the Board's alleged injury or that any such injury could be truly and meaningfully redressed by relief against the Commissioner. Accordingly, this Court should reverse the Court of Appeals on standing and failure to join a necessary party and order the dismissal of the action.

B. SB 1 is Not Unconstitutional as Special or Local Legislation

The General Assembly must be able to legislate on issues specific to consolidated local governments like Louisville Metro. Indeed, it did so in enacting KRS Chapter 67C, which, constitutionally, applies to counties containing a city of the first class.

Just like SB 1, the provisions of KRS 67C now apply only to Jefferson County, but would apply anywhere in the Commonwealth upon a city reaching the population threshold and other statutory prerequisites being satisfied. It just makes sense that a county qualifying for a different structure of local government should also qualify for a different structure of school board-superintendent relations.

This Court's decision in *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 572 (Ky. 2020) brought a much-needed return to clarity, rationality, and historic intention and precedent: "We therefore return to the original test for Section 59: local or special legislation, according to the well-known meaning of the words, applies exclusively to particular places or particular persons."

It applies to SB 1 here. So applied, SB 1 is clearly not a violation of the constitutional prohibition against local or special legislation.

It does so without impairing state constitutional rights to equal protection of the law. The Court in *Woodall* made clear that "state constitutional challenges to legislation based on classification succeed or fail on the basis of equal protection analysis under Sections 1, 2, and 3 of the Kentucky Constitution." *Id.* at 573.

> "[A] person challenging a law upon equal protection grounds under the rational basis test has a very difficult task because a law must be upheld if ... any reasonably conceivable state of facts ... could provide a rational basis for the classification." *Commonwealth ex rel. Stumbo v. Crutchfield*, 157 S.W.3d 621, 624 (Ky. 2005) (citing *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 178–79, 101 S. Ct. 453, 461, 66 L.Ed.2d 368 (1980)). Furthermore, "the General Assembly need not articulate its reasons for enacting the statute, and this is particularly true where the legislature must necessarily engage in a process of line drawing." *Id.* (citing *Fritz*, 449 U.S. at 179, 101 S. Ct. at 461). Accordingly, "[o]ur General Assembly, under the Equal Protection Clause, has great latitude to enact legislation that may appear to affect similarly situated people differently." *Id.* (citation omitted).

Woodall, 607 S.W.3d at 564.

The Board did not plead an unconstitutional classification or equal protection violation here. The reason for that is clearer than is the reason the Board did not make Superintendent Pollio a party: SB 1 clearly passes muster under applicable equal protection standard set forth above.

The Court of Appeals decision threatens to undo the good of *Woodall* and invites a return to confusion and subjectivity. It does so by trying to use partial legislative history of SB 1 to cram this case into *Woodall*'s reference in footnoted dicta to *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668, 685 (Ky. 2010) as having "reached [the] correct result since the statute applied to [a] particular project." *Woodall*, 607 S.W.3d at 573 n. 19.

The peril of using legislative history is obvious. The legislative history relied on by the Court of Appeals was meager. It is the actual language of SB 1 that should matter, not the remarks of a couple of legislators as the Court of Appeals relied on here. *Cameron v. Jefferson Cnty. Bd. of Educ.*, No. 2022-CA-0964-MR, 2023 WL 6522192, at *9 (Ky. App. Oct. 6, 2023), *review granted* (Mar. 6, 2024).

Should it not order the dismissal of this action on grounds of lack of standing or failure to join a necessary party, this Court should decline the invitation by the Board and the Court of Appeals to go back to the wild and wooly realm of misinterpretation and misapplication of Kentucky Constitution, Section 59 that it only so recently rectified in *Woodall*. It should, instead, reverse the Court of Appeals and hold that SB 1 is not unconstitutional as local or special legislation. If the Court instead finds that SB1 violates Section 59, it should expect a flood of other constitutional challenges to other legislation flowing from KRS 67C – and that is a huge risk of unintended consequences.

STATEMENT OF THE RELIEF SOUGHT

The Nicklies Foundation therefore seeks relief in the form of reversal of the Court of Appeals opinion affirming the Jefferson Circuit Court in declaring SB 1 unconstitutional and either a dismissal of the challenge to SB 1 presented by the Appellee or a declaration that SB 1 is constitutional as against that challenge.

Respectfully submitted,
FULTZ MADDOX DICKENS PLC

/s/ Benjamin C. Fultz
Benjamin C. Fultz (#84398)
101 South Fifth Street, 27th Floor
Louisville, Kentucky 40202-3116
(502) 588-2000
bfultz@fmdlegal.com
Counsel for the Nicklies Foundation, Inc.

WORD COUNT CERTIFICATE

I certify that this document complies with the word limit of RAP 34 because, excluding the parts of the document exempted by RAP 15(E), this document contains 2121 words.

/s/ Benjamin C. Fultz
Benjamin C. Fultz