Supreme Court of Kentucky

No. 2023-SC-0498
ELECTRONICALLY FILED

RUSSELL COLEMAN, ATTORNEY GENERAL,
ON BEHALF OF THE COMMONWEALTH OF KENTUCKY **APPELLANT**

ON MOTION FOR DISCRETIONARY REVIEW FROM
COURT OF APPEALS
CASE NO. 2022-CA-0964-MR

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
CIVIL ACTION NO. 22-CI-002816

JEFFERSON COUNTY BOARD OF EDUCATION
AND ROBIN FIELDS KINNEY, IN HER OFFICIAL CAPACITY
AS COMMISSIONER OF EDUCATION **APPELLEES**

BRIEF FOR *AMICUS CURIAE* SEN. ROBERT STIVERS, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE SENATE

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum for Amicus Curiae was sent via electronic and/or U.S. Mail on May 17, 2024 to Kate Morgan, Clerk, Kentucky Court of Appeals, 669 Chamberlin Ave., Ste. B, Frankfort, KY 40601; David Tachau, Katherine Crosby, Amy Cubbage, 101 S. Fifth St., Ste. 3600, Louisville, KY 40202; Victor Maddox, Matthew Kuhn, Office of the Attorney General, 700 Capital Ave., Ste. 118, Frankfort, KY 40601; Todd Allen, Ashley Lant, Kentucky Dept. of Education, 300 Sower Blvd., Fifth Fl., Frankfort, KY 40601.

/s/ Sheryl G. Snyder
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INTRODUCTION

For over a century, Kentucky's highest Court has held that statutes that are applicable only in counties containing a city of the first class are not special, local legislation under Section 59 of the Constitution, despite the fact that – at the present time – there is only one such county.[1] The Court reasoned that the statute is a classification that would apply in any county that in the future contained a city of the first class.[2]

The provisions of Senate Bill 1 (2022) at issue in this case apply to the board of education in any county which – now or hereafter – has a consolidated local government (*i.e.*, the merger of a county and a first class city).

The Court of Appeals nevertheless held these statutes apply to a "specific locale, not a class,"[3] – Jefferson County – and therefore constitute local legislation in violation of the Constitution. The court erroneously held that *Calloway County Sheriff's Department v. Woodall*, 607 S.W.3d 557 (Ky. 2020) "endorses the development of a more rigorous analysis under Section 29, to address legislation drafted to avoid the Section 59 prohibition but nonetheless applying to only one specific individual, object or locale."[4]

But, in fact, *Woodall* overruled a line of cases that had applied heightened scrutiny to statutes creating a classification, and applied the rational basis test to classifications, squarely holding 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" – not Sections 59 and 60. *Woodall*, 607 S.W.3d at 573.

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[1] *Winston v. Stone*, 43 S.W. 397 (Ky. 1897).
[2] *Sims v. Bd. of Ed. of Jefferson Cnty.*, 290 S.W.2d 491, 495 (Ky. 1956).
[3] Slip Op. at 26.
[4] *Id.* at 24.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The amicus adopts the Statement of the Case in the brief for the Attorney General and adds only a few factual points.

Jefferson County taxpayers, and Louisville community and civic leaders, are very concerned that the Jefferson County Public School system ("JCPS") is failing too many of its students, especially students of color and those living below the poverty level. These concerns have been expressed loudly in the public square for years. *See, e.g., Courier Journal*, 2018 WLNR 23794074 (August 5, 2018).[5]

These concerns have coalesced into a concern about how JCPS is micromanaged by the Jefferson County Board of Education ("JCBE"). That concern reached a crescendo in 2018 when the state Board of Education publicly proposed to take over control of JCPS and totally remove JCBE from any role in managing JCPS, effectively placing JCPS in a receivership managed by the superintendent.

Specifically, after conducting "an extensive management audit of the district," the state Board of Education recommended a state "takeover" of JCPS with the superintendent acting as the state-appointed manager of JCPS, and JCBE remitted to "an advisory capacity to" the superintendent. *Courier Journal*, 2018 WLNR 28903035 (May 1, 2018).

After extensive negotiations, JCBE and the state Board of Education agreed to a settlement that avoided a complete state takeover of JCPS. Under the settlement, the state assumed control of certain aspects of JCPS, particularly the early childhood program and the students with disabilities program. JCBE retained authority for the remainder of JCPS, albeit under a "corrective

[5] The abbreviation WLNR is for Westlaw Newsroom.

action plan" with "more than 200 goals across 10 categories." *Courier Journal*, 2019 WLNR 26275752 (August 29, 2019).

In a letter dated November 20, 2020, a new state Commissioner of Education "released [JCPS] from further implementation of formal corrective action under the [settlement] agreement." *Courier Journal*, 2020 WLNR 34306304 (November 25, 2020). However, student achievement, especially the achievement gap between white students and students of color, continued to be a cause for concern that was widely discussed in the public arena. *Courier Journal*, 2021 WLNR 29373928 (September 8, 2021).

Against this backdrop, it is hardly surprising that the 2022 General Assembly enacted the significant management reforms in S.B. 1 which, like the proposed state takeover, allow the superintendent to function as a chief executive officer, with JCBE functioning more like a board of directors. Much of the reform legislation applies to all public school systems in Kentucky. Some of the reforms apply to boards of education in a county having a consolidated local government – presently Jefferson County.

In this lawsuit, JCBE contested only five specific provisions of the omnibus bill.[6] One provision requires the county school board in a county with a consolidated local government to delegate authority over the district's day-to-day operations of the county school system to the superintendent. Another provision requires such a county board of education to "approve a rolling three (3) year strategic plan for the district that outlines student achievement goals, faculty and staff improvement goals, facility and infrastructure improvement, and other key objectives" and delegates to the superintendent sole authority over "implementation of the board-approved strategic plan . . . ."

[6] For ease of reference, this amicus brief refers to those five statutes collectively as "the challenged provisions of S.B. 1." Those provisions are codified at KRS 160.370(2)(a)1-2; KRS 160.370(2)(b)2, 5; KRS 168.370(2)(c).

Another provision authorizes the superintendent to "[p]repare all rules, regulations, bylaws, and statements of policy for approval and adoption by the board," but expressly provides that "approval [by the board shall] not be withheld without a two-thirds (2/3) vote of the board to deny approval or adoption . . . ."

Another provision limits the authority of the board of education to those powers expressly enumerated in S.B. 1 and provides that "[e]xcept as expressly required by statute," the board of education shall "not meet more than once every four (4) weeks for the purpose of approving necessary administrative matters . . . ."

The circuit court declared the five challenged provisions of S.B. 1 unconstitutional. The circuit court held that the provisions are special, local legislation prohibited by Section 59 of the Kentucky Constitution as recently interpreted by the Supreme Court in *Woodall*. The Court *sua sponte* held in the alternative that in enacting the challenged provisions, the General Assembly had exercised the legislative power arbitrarily.

The Court of Appeals affirmed the judgment that Senate Bill 1 is special, local legislation and held that the equal protection argument was moot. The Attorney General's motion for discretionary review was granted.

ARGUMENT

I. A constitutional infringement must be clear, complete and unmistakable in order to render the contested statutes unconstitutional.

It is well settled in Kentucky that "[a] constitutional infringement must be 'clear, complete and unmistakable' in order to render the statute unconstitutional." *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 806 (Ky. 2009) (quoting *Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998)).

That doctrine is not merely a rhetorical flourish. Quite the contrary, it is a bedrock rule of Kentucky constitutional law that emanates from the separation of governmental powers mandated by Sections 27 and 28 of the Constitution, the most forceful separation of powers provisions in any state constitution. *Sibert v. Garrett*, 246 S.W. 455, 457 (Ky. 1922).

A judicial decision to declare unconstitutional an act of the General Assembly is an awesome responsibility, not to be taken as lightly as did the circuit court in this case. The unconstitutionality of the statute "must be 'clear, complete and unmistakable'" before a court may declare it unconstitutional. *Caneyville*, 286 S.W.3d at 806.

In this case, the circuit court did not heed that bedrock principle of constitutional law. Instead, in a rather flippant opinion, the circuit court disregarded well settled precedent concerning statutory classifications of counties containing a city of the first class, as well as the actual holding in *Woodall* that statutory classifications are to be reviewed under the rational basis test, and erroneously declared the challenged statutes unconstitutional under Section 59.

Under *Woodall*, classifications by county are reviewed under the rational basis test for equal protection of the laws. And, "[i]n fact, '[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." *Woodall*, 607 S.W.3d at 564 (quoting *Com. ex. rel. Stumbo v. Crutchfield*, 157 S.W.3d 621, 624 (Ky. 2005)) (ellipses in original).

In so holding, the *Woodall* Court overruled the holdings in *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459 (Ky. 1998) and *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1986) that the burden of persuasion is on the party upholding the statute, and squarely held that the burden

is upon the party challenging the constitutionality of the statute to demonstrate that it has no rational basis. *Woodall*, 607 S.W.3d at 564.

In its opinion affirming, the Court of Appeals initially recognized that "Sections 59 and 60 . . . represented an attempt to prevent from legislature from wasting its time on mundane and trivial local matters and neglecting general legislation." Slip Op. at 18 (quoting *Woodall*, 607 S.W.3d at 571). The Court of Appeals then contradicted itself by holding that "Woodall endorses the development of a more rigorous analysis under Section 59, to address legislation drafted to avoid the Section 59 prohibition but nonetheless applying to only one specific individual, object or locale." Slip Op. at 24. In fact, the portion of *Woodall* quoted by the Court of Appeals (Slip Op. at 23 quoting 607 S.W.3d at 573) holds that classifications intended to get around the special, local legislation prohibition are analyzed under the rational basis test of Sections 2 and 3 of the Constitution of Kentucky. This Court did not create a "more rigorous analysis under Section 59" for such legislation.

In sum, the burden is on JCBE to demonstrate that it is "clear, complete and unmistakable" that the General Assembly had no rational basis, at all, for enacting the challenged provisions of S.B. 1. But JCBE did not even plead an equal protection claim, tacitly conceding that it could not carry that burden of proof. *See* JCBE Court of Appeals Brief at 10 n2.

II. A statutory classification by counties containing a city of the first class is not special, local legislation under Section 59.

Kentucky's highest court has repeatedly held that statutes applicable only in counties containing a city of the first class are not special, local legislation under Sections 59-60 of the Constitution, despite the fact that – at the present time – there is only one such county. *Sims v. Bd. of Ed. of Jefferson Cnty.*, 290 S.W.2d at 495. The Court reasoned that the statutory classification would apply in any county that in the future contained a city of the first class. *Id.*

> If there were now in the state a half dozen cities in the first class, the act in question would be applicable to all of them. The fact that there is only one city in that class does not change or affect in any way the power of the General Assembly.

Veail v. Louisville and Jefferson Cnty. Metro. Sewer Dist., 197 S.W.2d 413, 418 (Ky. 1946); accord *Conrad v. Lexington-Fayette Urban Cnty. Gov't.*, 659 S.W.2d 190, 194 (Ky. 1983) ("The fact that there is presently only one urban county government does not mean that the law is unconstitutional.").

This line of cases began contemporaneously with the adoption of the 1892 Constitution. In *Winston v. Stone*, *supra*, the Court held that a statute applicable only in counties having a population in excess of 75,000 was not unconstitutional, despite the fact that at that moment in time there was only one such county, namely, Jefferson County. The 1897 decision applied the test resurrected in *Woodall*:

> . . . "local" or "special" legislation, according to the well-known meaning of the words, applies exclusively to special or particular places or special and particular persons, **and is distinguished from a statute** intended to be general in its operation, and that **relating to classes of persons or subjects.**

Id. at 398 (quoting *Stone v. Wilson*, 39 S.W. 49, 50 (Ky. 1897)) (emphasis added). The Court then squarely held that a statute applicable only to Jefferson County did not contravene the "particular persons or places" standard of review:

> It may be a fact that Jefferson County is the only county in the state having a population in excess of 75,000, but the statute in question would apply to all counties of that class within the state, and is clearly within the principles announced in the two decisions hereinbefore referred to.

Id. (citing *Com. v. E.H. Taylor, Jr. Co.*, 41 S.W. 11 (Ky. 1897)). It is well settled that cases decided close in time to the Constitutional Convention are persuasive of the Delegates' intent. *Williams v. Wilson*, 972 S.W.2d 260, 267 (Ky. 1998).

In the 125 years since those seminal decisions, the Court has repeatedly adhered to that analysis, recognizing the authority of the General Assembly to deal legislatively with issues unique to a county which – now or hereafter – is as populous as Jefferson County. *Sims*, 290 S.W.2d at

493; *Miller v. Hoblitzell*, 271 S.W.2d 899 (Ky. 1954); *Veail*, 197 S.W.2d at 418; *Somsen v. Sanitation Dist. No. 1 of Jefferson Cnty.*, 197 S.W.2d 410 (Ky. 1946); *City of Louisville v. Com.*, 121 S.W. 411, 413 (Ky. 1909); *Hager v. Gast*, 84 S.W. 556 (Ky. 1905).

Despite SCR 1.040(5) – which mandates that lower courts must follow Supreme Court precedent – the circuit court belittled the reasoning in the "first class city" line of cases. The circuit court asserted that, by the logic of those cases, the legislature could limit a statute to the county in which Mammoth Cave is located by arguing that we may someday discover another equally large cave system in another county. What the circuit court blithely ignores is that his hypothetical statute would not survive scrutiny under the rational basis test, which is the proper test for reviewing the constitutionality of statutory classifications.

The circuit court applied the portion of *Woodall* which holds: "As for analysis under Sections 59 and 60, the appropriate test is whether the statute applies to a particular individual, object or locale." 607 S.W.3d at 573. The circuit court seemed to believe that this holding reinvigorated the prohibition against special, local legislation. But, in fact, *Woodall* was narrowing that prohibition.

The very thrust of *Woodall* was to overrule the line of cases, beginning with *Schoo v. Rose*, 270 S.W.2d 940 (Ky. 1954) and exacerbated by *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1986), that "supercharged" Section 59 to invalidate classifications conferring special privileges on politically powerful groups:

> The problem with applying an equal protection analysis to the special legislation prohibition is that over the last 30 years, it has been cited to enhance Kentucky's equal protection provisions. . . .
>
> "Instead of requiring a 'rational basis,' we have construed our Constitution as requiring a 'reasonable basis' or a 'substantial and justifiable reason' for discriminatory legislation in areas of social and economic policy."

> This Court's decision in *Tabler* is the genesis of the heightened standard analysis of Section 59.

Woodall, 607 S.W.3d at 568-69 (quoting *Elk Horn Coal Corp. v. Cheyenne Res,, Inc.*, 163 S.W.3d 408, 418 (Ky. 2005)). The Court then reviewed in detail the legislative history of Sections 59-60 and rejected the holding in *Tabler* as ahistorical:

> This historical digression has been necessary to demonstrate that [the] reasons the *Tabler* court gave for "super-charging" *Schoo's* flawed analysis were erroneous and ultimately misleading.

607 S.W.3d at 571.

The genesis of the *Woodall* opinion is (now Chief) Justice VanMeter's law review article concerning the proper interpretation of Section 59. Laurance B. VanMeter, *Reconsideration of Kentucky's Prohibition of Special and Local Legislation*, 109 KY. L.J. 523 (2021). Justice VanMeter's extensive historical research rejected *Tabler's* view that Section 59 was enacted to limit legislation favoring the powerful. Justice VanMeter demonstrated that the problem was special and local legislation was consuming the time and attention of the General Assembly on unimportant, picayune bills for a particular person or locale, rather than attending to the important business of the people. As the Court said in *Woodall*:

> In other words, contemporary sources and legal historians demonstrate that the main problem with local and special legislation was the resulting legislative inefficiency and wasted time, as opposed to the corrupt, rent-seeking motive ascribed by the *Tabler* court. The simple test set forth by our predecessor court evinces a purpose to the special legislation prohibition that is rooted in legislative efficiency, *i.e.,* to put an end to the interminable legislative sessions of the 1870s and 1880s and the proliferation of special and local laws that predominated the Kentucky session laws before 1981. The vast majority of these laws addressed exceedingly mundane and trivial matters unworthy of state legislative consideration.

607 S.W.3d at 570-71.

Thus, *Woodall* did not announce a new, robust standard for applying Section 59's prohibition against special or local legislation. Quite the contrary, Justice VanMeter's opinion for the Court expressly stated that it was restoring the original understanding of Sections 59-60:

> The original test for a violation of Section 59's prohibition on special and local legislation was simply "special legislation applies to particular places or persons as distinguished from classes of places or persons."

607 S.W.3d at 567 (quoting *Greene v. Caldwell*, 186 S.W. 648, 654 (Ky. 1916)).

Significantly, that original understanding of Section 59 is contemporaneous with the holding in *Winston v. Stone* that a statute applicable only in counties containing a city of the first class is not special, local legislation. Indeed, *Winston v. Stone* applied that "original test" in making that decision. 43 S.W. at 398.

The Court of Appeals initially recognized the holding in *Woodall* that "Section 59 and 60 . . . represented an attempt to prevent the legislature from wasting its time on mundane and trivial local matters and neglected general legislation." Slip Op. at 18. Moreover, the Court of Appeals correctly summarized the holding in *Woodall*, as follows:

> *Woodall* set forth the following test which represents a return to the original test: a statute is special or local legislation prohibited by Sections 59 and 60 if 'the statute applies to a particular individual, objective or locale.' Challenges based on a classification, on the other hand, succeed or fail on the basis of equal protection analysis under Sections 1, 2, and 3 of the Kentucky Constitution.

Slip Op. at 19-20 (quoting *Woodall*, 607 S.W.3d at 573).

In sum, the holding in *Woodall* that special, local legislation is legislation applicable to "a particular individual, object or locale" is a narrowing of Section 59, not an expansive interpretation of it. The decision in *Woodall* is expressly stated to be a "return to the original test for Section 59 . . . ." 607 S.W.3d at 572. The holding in *Woodall* is therefore intended to limit Section 59 to the kind of picayune statutes that dominated the legislature before the 1891 Constitutional Convention.

The holding in *Woodall* has no application to substantive legislation like the challenged provisions of S.B. 1 that address serious problems in the largest school system in Kentucky.

The Court of Appeals then focused on a passing reference in a footnote in the *Woodall* opinion stating that *University of the Cumberlands v. Pennybacker,* 308 S.W.3d 668 (Ky. 2010) correctly decided that the legislation in that case was special, local legislation even though the Court applied the now-overruled *Schoo* line of cases. The Court of Appeals focused on the statement in the *Woodall* opinion that Kentucky's courts are equipped to adjudicate legislation that attempts to evade the prohibition against special, local legislation. *Woodall,* 607 S.W.3d at 573. But the Court of Appeals misunderstood what this Court said in *Woodall.*

In the portion of the *Woodall* opinion quoted by the Court of Appeals (Slip Op. at 23), this Court expressly states that it is referring to judicial review of such legislation under the "equal protection" provisions of Sections 2 and 3 of the Constitution of Kentucky. *Woodall,* 607 S.W.3d at 573. The Court of Appeals nevertheless held – erroneously – that that quotation from "*Woodall* endorses the development of a more rigorous analysis under Section 59, to address legislation drafted to avoid the Section 59 prohibition but nonetheless applying to only one specific individual, object or locale." Slip Op. at 24. That is simply an egregious misstatement of this Court's holding in *Woodall.* This Court expressly held that such legislation receives judicial review under the rational basis test of the equal protection clauses of the Constitution of Kentucky.

Moreover, *Woodall* clearly does not overrule the time-tested line of cases that recognizes the essential authority of the General Assembly to tailor legislation to the needs and circumstances of Louisville and Jefferson County. Indeed, it is not an exaggeration to say that, if the Court of Appeals opinion stands as the proper interpretation of the prohibition against special, local legislation, then the General Assembly will no longer have the legislative power to address issues unique to Louisville and Jefferson County. That simply cannot be the law.

RELIEF SOUGHT

For the foregoing reasons, the opinion of the Court of Appeals and the judgment of the circuit court should be reversed, and the case should be remanded with directions to dismiss the complaint with prejudice.

Respectfully submitted,

/s/ Sheryl G. Snyder
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Counsel for Amicus Curiae
Sen. Robert Stivers, in his official capacity
as President of the Senate

CERTIFICATE OF COMPLIANCE

It is hereby certified that this document complies with the word limit of RAP 34(B)(4), excluding the parts of the document exempted by RAP 15(D), as it contains 3,253 words.

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