Supreme Court of Kentucky

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*

BRIEF OF THE ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I served a copy of this brief by U.S. mail on May 6, 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, Ashley Lant, 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 I certify that the record on appeal was not withdrawn in preparing this brief.

INTRODUCTION

This case challenges the constitutionality of several parts of Senate Bill 1 from the 2022 legislative session. The Jefferson Circuit Court entered a declaratory judgment that those provisions violate the Kentucky Constitution. The Court of Appeals affirmed. The Court should reverse the judgment below and reinstate SB 1 for three reasons. First, the Jefferson County Board of Education lacks constitutional standing to challenge the law in this lawsuit. Second, the Board failed to name a necessary party. And third, SB 1 survives scrutiny under this Court's seminal decision in *Calloway Cnty. Sheriff's Department v. Woodall*, 607 S.W.3d 557 (Ky. 2020).

STATEMENT CONCERNING ORAL ARGUMENT

The Attorney General looks forward to addressing the Court during oral argument on August 14, 2024.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

In Kentucky, superintendents and school boards work together to ensure the best public education for our children. Superintendents manage the "general conduct of the schools." KRS 160.370(1). This is no small task. Superintendents make decisions about, for example, the course of instruction, purchases, hiring, and discipline. *Id.* School boards, by contrast, make decisions about, among other things, buying and selling property, KRS 160.160(1), overseeing and choosing the superintendent, KRS 160.290, 160.370(1), and preparing public reports regarding their schools, KRS 160.340(1). The delicate balance between superintendents and schools boards must work well for Kentucky children to get the education they need.

Finding the appropriate balance can be especially difficult when a superintendent and school board oversee a sprawling county school district in a consolidated local government, like in Jefferson County. It is not hard to imagine that the issues faced by such a county school district (for example, how to accomplish busing) differ from those in other school districts. For reference, Jefferson County Public Schools serves over 95,000 students, with over 60,000 bus riders and nearly 7,000 teachers. It is the 30th largest school district in the country. JCPS Facts, https://perma.cc/GF2B-YTB9.

Senate Bill 1. The General Assembly passed Senate Bill 1 during its 2022 legislative session. SB 1 is an omnibus education bill, but only a few parts of it

are at issue. Those parts of the bill restructure how a superintendent and school board interact "in a county school district in a county with a consolidated local government adopted under KRS Chapter 67C." KRS 160.370(2). In broad strokes, SB 1 treats such a superintendent more like a chief executive officer and such a school board more like a board of directors. Under SB 1, the school board delegates to the superintendent "the district's day-to-day operations and implementation of the board-approved strategic plan." KRS 160.370(2)(a)1. The board, by contrast, creates a rolling, three-year strategic plan, approves an annual budget, and oversees an annual financial audit and an annual review of student performance. KRS 160.370(2)(a)3.–5. And to keep the board focused on these big-picture tasks, it generally can meet once every four weeks "for the purpose of approving necessary administrative matters." KRS 160.370(2)(a)2.

SB 1 does not make the superintendent free to do whatever he or she wants. Far from it. After all, the board retains the authority to "dismiss[]" the superintendent and hire a new one. KRS 160.370(2)(a)6., 8. Plus, the superintendent must provide a "quarterly, informational report" to the board about the district's daily operations, its implementation of the board's strategic plan, and its finances. KRS 160.370(2)(b)1. And the superintendent must send "all rules, regulations, bylaws, and statements of policy" to the board for approval or disapproval. KRS 160.370(2)(b)2.

In sum, SB 1 creates a unique relationship between the school board and

the superintendent in a county school district in any consolidated local government. KRS 160.370(2). At present, this means the law only applies in Jefferson County—the only county in Kentucky that currently has a consolidated local government. *See generally* KRS 67C.101 *et seq.* But nothing in SB 1 or the statutory chapter governing consolidated local governments says that only Louisville and Jefferson County can operate a consolidated local government going forward. In fact, SB 1 can apply anywhere in the Commonwealth if a county meets the population threshold and local approval is secured. KRS 67C.101(1); KRS 81.005(1)(a); KRS 83A.160(6).

Litigation in circuit court. In June 2022, the Jefferson County Board of Education sued to challenge the above-noted parts of SB 1. R. 1. The Board named only one defendant: the then-Commissioner of the Kentucky Department of Education, Dr. Jason Glass.[1] R. 3. The Board, notably, did *not* name as a defendant the Superintendent of Jefferson County Public Schools, Dr. Marty Pollio. The Board failed to do so despite this lawsuit relating to Superintendent Pollio's authority under SB 1.

The Board brought a single claim: that SB 1 violates the prohibition

[1] The current Interim Commissioner of the Kentucky Department of Education, Robin Fields Kinney, has been automatically substituted as an appellee. RAP 8(E). When the new Commissioner, Dr. Robbie Fletcher, assumes the role on July 1, he will be automatically substituted as an appellee.

against special or local legislation in Sections 59 and 60 of the Kentucky Constitution. R. 8–9. The five parts of SB 1 that the Board challenged are:

- The provision giving a superintendent authority over the "day-to-day operations and implementation of the board-approved strategic plan." KRS 160.370(2)(a)1. This authority encompasses "pupil transportation." *Id.*

- The provision setting a school board's general ability to meet once every four weeks "for the purpose of approving necessary administrative matters." KRS 160.370(2)(a)2.

- The provision requiring a two-thirds vote of a school board to disapprove a rule, regulation, bylaw, or statement of policy submitted by a superintendent. KRS 160.370(2)(b)2.

- The provision granting a superintendent responsibility for any "administrative duty not explicitly granted" to a school board. KRS 160.370(2)(b)5.

- The provision allowing a superintendent to make contract purchases not exceeding $250,000 and to make line-item transfers in the annual budget for the same amount. KRS 160.370(2)(c).

After the Board sued, the Attorney General entered his appearance to defend the constitutionality of SB 1. R. 159; *see* KRS 418.075(1). Briefing followed, after which the Jefferson Circuit Court (Judge Charles Cunningham, Jr.) entered a declaratory judgment that the challenged parts of SB 1 are unconstitutional. Tab 1. The circuit court, however, declined to enter an injunction against the enforcement of SB 1. *Id.* at 7.

The circuit court decided three issues. First, it ruled that the Board "is the

only entity with standing to seek a ruling on the constitutionality of the provisions." *Id.* at 8. The court, however, addressed constitutional standing only after resolving the merits because "sooner or later [the merits] question will have to be answered." *Id.* at 4.

Second, the circuit court found that Superintendent Pollio was not a necessary party while acknowledging that "in theory" he "is the person most negatively impacted by this ruling." *Id.* at 8. The court reasoned that the Attorney General's presence in the suit overcame this issue, given that the court was not entering an injunction against anyone. *Id.*

Third, the circuit court determined that the challenged parts of SB 1 are unconstitutional. The court recognized that *Calloway Cnty. Sheriff's Department v. Woodall*, 607 S.W.3d 557 (Ky. 2020), is the starting point for its Section 59 analysis, but it "admit[ted]" to having "no idea" what *Woodall* "means as a practical matter." Tab 1 at 2–3. In finding a violation of Section 59, the circuit court focused on two hypothetical laws to explain that if SB 1 conformed to Section 59, "truly silly classifications could, and no doubt would, proliferate." *Id.* at 4. Because these two hypotheticals were central to the circuit court's holding, the Attorney General quotes them in full.

The circuit court's first hypothetical was:

> [A]s an example, if Edm[on]son County did something to irritate the leadership in the General Assembly, and those leaders decided to single it out for retribution, all they'd have to do is designate the

> law to apply to all counties containing a cave system greater than 400 miles in length. Sure, right now, that means only Edm[on]son County. But potentially, someday, somewhere, we might discover that Mother Nature had carved out a comparable set of passages through the limestone of Kentucky and thus nobody was picking on the good citizens of Edm[on]son County!

Id. at 4–5. The circuit court's second hypothetical was:

> [I]f a recent Kentucky Governor had wanted to get some relief from our pesky traffic laws, he might have persuaded his Republican pals in the House and Senate to pass a bill saying that no one named Matt Bevin residing at [his address][2] in Louisville was required to comply with KRS Chapter 189. While that law would waddle, quack, and swim like a piece of fine-feathered special legislation, it actually wouldn't be according to the Attorney General. You see, Governor Bevin might someday have a son named Matt living there too or even a grandson (or his father, if he's a junior). The whole class of Matt Bevins would be exempt, not just the Governor!

Id. at 5. Based on these two hypotheticals, the circuit court reasoned that "[t]he provisions of [S]B 1 which only apply to Jefferson County violate §59(25)." *Id.* The court was emphatic: "It is not even a close call." *Id.*

The circuit court did not stop there. "[O]ut of an abundance of caution," it proceeded to find that SB 1 violates the equal-protection rights of the "voters, parents, students, and taxpayers of Jefferson County," *id.* at 5–6, none of whom are parties here. The Board, however, did not bring an equal-protection claim,

[2] The circuit court's decision listed an actual street address in Louisville, but this brief omits it for privacy purposes. The listed address is also redacted from Tab 1.

much less one on behalf of third parties. R. 1–10.

Upon receiving the circuit court's ruling, the Board filed a post-judgment motion to clarify its scope. R. 227. The circuit court granted the motion, clarifying that it declared the five specified provisions of SB 1 to be "unenforceable." Tab 2. The Attorney General timely appealed. R. 231; *see* KRS 15.020, 15.090.

Appeal. On appeal, the Court of Appeals affirmed. *Cameron v. Jefferson Cnty. Bd. of Educ.* (*Cameron*), 2023 WL 6522192 (Ky. App. Oct. 6, 2023) (attached at Tab 3). First, the court found that the Board proved its constitutional standing based on a statute the circuit court's decision did not discuss. *Id.* at *3–5. Although the challenged parts of SB 1 do not mention the Commissioner, the Court of Appeals determined that the Commissioner's duties under KRS 156.210(3) provide the Commissioner with at least "some connection" to the enforcement of SB 1. *Id.* at *4 (citation omitted). It followed, reasoned the Court of Appeals, that the Commissioner's enforcement of SB 1 through KRS 156.210(3) could injure the Board and that a declaratory judgment against the Commissioner would remedy that injury. *See id.* at *4–5.

Second, the Court of Appeals held that Superintendent Pollio is not a necessary party to this matter. *Id.* at *5–6. Although it acknowledged that Superintendent Pollio is affected by the challenged parts of SB 1, the panel cursorily held—in a single paragraph citing no caselaw—that the Superintendent is not a necessary party. *Id.* at *6. It reasoned that because "the Superintendent is not

given any means by which to enforce" certain parts of SB 1, the "Superintendent's presence as a party was not required." *Id.*

Third, the Court of Appeals resolved the merits of the Board's constitutional challenge. *Id.* at *6–10. Unlike the circuit court, the panel did not reach the equal-protection argument that the Board did not allege in its complaint. The court admitted that the circuit court reached this constitutional issue "[o]f its own accord," *id.* at *3, but it concluded that the argument is "moot" in light of the panel's holding on special legislation, *id.* at *10. Indeed, in its briefing before the Court of Appeals, the Board affirmatively waived its equal-protection claim. Board COA Br. at 10 n.2.

As to special legislation, the panel recognized that this Court's *Woodall* decision establishes the applicable rule. *Cameron*, 2023 WL 6522192, at *7. The panel emphasized, however, that *Woodall* endorsed the result reached in *University of Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010). And "[u]nder *Pennybacker* and *Woodall*, an express reference to a particular locale is not an essential prerequisite to finding a violation of Section 59." *Cameron*, 2023 WL 6522192, at *8. The panel then went a step further and held 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." *Id.* at *9 (emphasis added).

Under this "more rigorous analysis," the Court of Appeals found that

"[t]he unmistakable intent of the legislature in this case was to ameliorate problems specific to Jefferson County." *Id.* To discern this intent, the panel did not rely on the language of SB 1. Instead, it primarily focused on an amicus brief filed in the appeal by Senate President Robert Stivers. According to the panel, "[b]y the Senate President's own admission, the challenged provisions were intended to address the unique problems of the Jefferson County school district." *Id.* The panel also discussed another legislator's statement during the floor debate about SB 1. *Id.* This legislative history, the panel reasoned, amounted to a "clearly-stated legislative intent" sufficient to violate Sections 59 and 60. *Id.* at *10.

After reviewing the Court of Appeals' decision, the Attorney General timely sought discretionary review. The Court granted review on March 6, 2024.

ARGUMENT

The Board has an uphill battle to succeed in its constitutional challenge to SB 1. As a duly enacted law, SB 1 expresses the public policy of Kentucky. The members of the General Assembly who passed SB 1 swore an oath to support Kentucky's Constitution, Ky. Const. § 228—just like the members of this Court. For this simple reason, and because the General Assembly is the branch of government vested with the legislative power, SB 1 comes to this Court with a "strong presumption of constitutionality." *Wynn v. Ibold, Inc.*, 969 S.W.2d 695, 696 (Ky. 1998). This means that SB 1 must violate the Constitution in a "clear,

complete and unmistakable" way for it to be declared unconstitutional. *Cameron v. Beshear* (*Cameron v. Beshear*), 628 S.W.3d 61, 73 (Ky. 2021) (citation omitted).

The Court should reverse the judgment below and reinstate SB 1 for any one of three reasons. First, the Board lacks constitutional standing because the Commissioner—the only named defendant—cannot cause any injury to the Board and because relief against the Commissioner cannot redress the Board's injury. Second, because SB 1 concerns the Board's relationship with Superintendent Pollio, the Superintendent is a necessary party to this suit. This result follows from both the Declaratory Judgment Act and the civil rules. Third, SB 1 is constitutional. It is not special or local legislation because it applies statewide in any county with a consolidated local government now or in the future.

I. The Board lacks constitutional standing.[3]

SB 1 grants additional powers to the Superintendent, not to the Commissioner. Yet the Board only sued the Commissioner. The Board therefore lacks constitutional standing to bring this suit as pleaded.

To establish constitutional standing, a plaintiff must show (i) that the plaintiff suffered an actual or imminent injury (ii) that the defendant caused and (iii) that the court can redress. *Commonwealth, Cabinet for Health & Fam. Servs., Dep't*

[3] The Attorney General preserved this argument below. R. 178–82; AG COA Br. 7–14. Even so, constitutional standing must be addressed regardless of preservation. *See Commonwealth v. Bredhold*, 599 S.W.3d 409, 419–20 (Ky. 2020).

for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc., 566 S.W.3d 185, 196 (Ky. 2018). These three showings are not optional. If a plaintiff fails to make any one of them, the Court of Justice is powerless to decide the case—full stop. *Id.* at 192.

The Board has not made the second and third of these showings. Even if SB 1 injures the Board, the Board cannot show that the Commissioner caused that injury or that the Court can redress that injury through relief against the Commissioner. Consider each point in turn.

A. To show causation, a plaintiff must show that its injury in fact is "fairly traceable *to the defendant's* allegedly unlawful conduct." *Id.* at 196 (citation omitted) (emphasis added). This the Board cannot do. SB 1 does not transfer any of the Board's powers to the Commissioner. Rather, SB 1 gives new authority *to the Superintendent*. KRS 160.370(2). But the Board did not name Superintendent Pollio as a defendant. If the Board had sued Superintendent Pollo, the Board quite easily would have established causation (and redressability too). As a result, the Board had a surefire way to establish constitutional standing to challenge SB 1. Yet for whatever reason the Board opted not to take that route.

Instead, the Board chose to sue only the Commissioner. The problem, however, is that the challenged parts of SB 1 do not even mention the Commissioner. SB 1 deals with the relationship between the Board and the Superintendent, not that between the Board and the Commissioner. Because SB 1 does not

empower the Commissioner to take any action that could injure the Board, the Board cannot establish that any injury it suffers from SB 1 is fairly traceable to the Commissioner. More to the point, the Board cannot establish causation for the simple reason that it sued a government official who does not enforce SB 1.

The law is settled that to challenge a statute the plaintiff must sue a government official who enforces that statute. Only then can the government official injure the plaintiff. *Revis v. Daugherty*, 287 S.W. 28, 29 (Ky. 1926) (finding a plaintiff could not challenge a statute because the defendant government official was not "given any official duties pertaining to the question presented for determination"); *Kasey v. Beshear*, 626 S.W.3d 204, 209 (Ky. App. 2021) (finding no causation for purposes of standing where the challenged statutes "do not vest enforcement power" with the defendants); *California v. Texas*, 593 U.S. 659, 669–70 (2021) (finding no causation for purposes of standing because the plaintiffs "have not pointed to any way in which the [government] defendants . . . will act to enforce" the challenged statute against them).

The circuit court did not address this foundational point about constitutional standing. Instead, it opted to address the constitutionality of SB 1 without first considering standing because "sooner or later [the constitutional] question will have to be answered." Tab 1 at 4. That gets the sequence backwards. *Bredhold*, 599 S.W.3d at 414 ("As a threshold matter, Kentucky courts do not have constitutional jurisdiction to adjudicate a question raised by a litigant who does not

have standing to have the issue decided."). To be fair, the circuit court eventually returned to standing. But all it said was that the court "believes the [Board] is the only entity with standing to seek a ruling on the unconstitutionality of the provisions." Tab 1 at 8. The Attorney General does not dispute that the Board could establish standing in a suit against Superintendent. But that is not this case.

The Court of Appeals did not adopt the circuit court's reasoning as to standing. Instead, the panel invoked a statute the circuit court did not mention. *Cameron*, 2024 WL 6522192, at *4–5 (discussing KRS 156.210(3)). This statute states:

> When [the Commissioner] or his assistants find any mismanagement, misconduct, violation of law, or wrongful or improper use of any district or state school fund, or neglect in the performance of duty on the part of any official, he shall report the same, and any other violation of the school laws discovered by him, to the Kentucky Board of Education, which shall, through the [Commissioners] or one (1) of his assistants, call in the county attorney or the Commonwealth's attorney in the county or district where the violation occurs, and the attorney so called in shall assist in the indictment, prosecution, and conviction of the accused. If prosecution is not warrantable, the Kentucky Board of Education may rectify and regulate all such matters.

KRS 156.210(3). As the Court of Appeals saw it, under KRS 156.210(3), the Commissioner is under a statutory duty "to report violations [SB 1] and to seek enforcement of [SB 1]." *Cameron*, 2023 WL 6522192, at *5.

This line of reasoning is flawed for two overarching reasons. First, under KRS 156.210(3), the Commissioner does not actually enforce Kentucky law

against anyone. He just plays a referral role. Second, the Board's theory of causation rests on unsubstantiated fear that independent, non-parties who are not before the Court will receive a referral from the Commissioner and exercise their discretion to take enforcement action against the Board. Consider each problem in turn.

As written, the statute merely grants the Commissioner two types of *referral authority*. Look at the statutory text closely. Upon learning of a "violation of law,"[4] the Commissioner "shall report the same" to the Kentucky Board of Education. If such a report is received, the Kentucky Board of Education then uses the Commissioner to make another referral, this time to a local prosecutor (the relevant County Attorney or Commonwealth's Attorney). In the first instance, that local prosecutor has enforcement authority. If the local prosecutor elects not to prosecute, the Kentucky Board of Education has secondary enforcement authority—it "may rectify and regulate all such matters." In sum, under KRS 156.210(3), there are three government actors with potential enforcement authority: (i) the County Attorney, (ii) the Commonwealth's Attorney, and (iii) the Kentucky Board of Education. *See generally Gearhart v. Ky. State Bd. of Educ.*, 355 S.W.2d 667, 670–71 (Ky. 1962).

[4] Assume for now that violating SB 1 qualifies as a "violation of law" under KRS 156.210(3). As discussed below, this conclusion is far from obvious.

To state the obvious, the Commissioner is *not* one of those three government actors. All the Commissioner does under KRS 156.210(3) is play a reporting role to the government actors with enforcement authority. Indeed, that is how the Commissioner understands his[5] statutory role. In briefing to the Court of Appeals, the Commissioner admitted that "his authority in this instance would have been *limited* to a referral to an outside enforcement agency or the Kentucky Board of Education consistent with the statute." Comm'r COA Br. at 4 (emphasis added). So the Commissioner views his KRS 156.210(3) authority just like the Attorney General does.

The question thus becomes whether the Commissioner's ability to report a violation of law to another government actor with enforcement authority causes an injury to the Board. It does not. The Board can suffer an injury only if one of the actual enforcers ultimately decides to take action. Without enforcement, a mere referral from the Commissioner does not harm the Board. Indeed, the Board may never even learn of the referral because enforcement is by no means a given. Each of the three government actors with enforcement authority has discretion not to take action against the Board. In fact, KRS 156.210(3) itself states as much. Consistent with prosecutorial discretion more generally, a local

[5] The identity of the Commissioner has changed throughout this lawsuit. The Attorney General uses the pronoun "his" because the new Commissioner will be in the position when oral argument occurs.

prosecutor can determine that "prosecution is not warrantable." KRS 156.210(3). And under the statute, the Kentucky Board of Education "may"—not "must" or "shall"—take action if prosecution is declined. So all the Commissioner can do under KRS 156.210(3) is tee up a potential issue for consideration to an enforcement authority that might or might not take action against the Board. A mere referral to someone else with enforcement discretion does not itself cause an injury.

The Court of Appeals disagreed. It cited a federal decision stating that a defendant need only have "'some connection' with the enforcement" of the challenged law to cause an injury. *Cameron*, 2024 WL 6522192, at *4 (quoting *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015)). But the panel's favored case did not concern a government official with only referral authority. Instead, the federal court held that the plaintiff there could *not* sue the named government officials because they "do not have authority" to enforce the challenged law and thus "do not cause injury" to the plaintiff. *Hutchinson*, 803 F.3d at 958. So even the panel's favored decision supports finding no causation here. As does other caselaw from outside Kentucky. *See, e.g.*, *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007) ("[T]he causation element of standing requires the named defendants to possess authority to enforce the complained-of provision."); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir.

2004) ("Where [a state official] cannot direct, in a binding fashion, the prosecutorial activities of the officers who actually enforce the law or bring his own prosecution, he may not be a proper defendant."); *Ashe v. Hargett*, No. 3:23-cv-01256, 2024 WL 923771, at *7 (M.D. Tenn. Mar. 4, 2024) (rejecting claim that defendant official's ability to refer prosecution to a nonparty official with the duty to enforce law was sufficient for standing).

Although the Court could (and should) end its analysis here, the repercussions of the Court of Appeals' reasoning cannot be missed. If statutory referral authority can alone cause an injury for standing purposes, all manner of referring defendants are at risk of being sued. Kentucky law abounds in reporting provisions. *E.g.*, KRS 154A.650(2)(d); KRS 211.854(2); KRS 213.031(6); KRS 216B.208(1)(e)7., 10.; KRS 286.4-425(3); KRS 286.9-107(3); KRS 286.11-032(3)(b); KRS 311.619(4). Consider two such provisions. Every Kentucky lawyer should be familiar with the duty to report certain ethical violations by another lawyer to the Kentucky Bar Association. SCR 3.130(8.3(a)). Under the Court of Appeals' logic, is a potential referring attorney sufficiently connected to the enforcement of the Rules of Professional Conduct such that the attorney can be sued?[6] A similar problem exists for physicians who follow the referral requirements of KRS 311.606(2) to report a violation of KRS Chapter 311 to the State

[6] Of course, a lawyer who makes a good-faith report is immune from liability. SCR 3.130(8.3(d)). But the point is that the Court of Appeals' reasoning could

Board of Medical Licensure. Does the doctor's reporting obligation alone create standing to be named as a defendant? Taken to its logical conclusion, the Court of Appeals' decision seems to supply an affirmative answer to both questions. The panel made no attempt to explain why the Commissioner's reporting role under KRS 156.210(3) suffices for standing purposes but these other examples would not.

This leads to the second problem with the Court of Appeals' causation analysis. The Board's fear that violating SB 1 will lead to enforcement action is pure conjecture. Since this Court's decision in *Sexton*, the Court has repeatedly held that a mere fear of enforcement is not enough to establish constitutional standing. *Beshear v. Ridgeway Props., LLC*, 647 S.W.3d 170, 176 (Ky. 2022) ("To the extent [a plaintiff] allege[s] a 'fear' of enforcement, that speculative concern is not legally sufficient."); *City of Pikeville v. Ky. Concealed Carry Coal., Inc.*, 671 S.W.3d 258, 266 (Ky. 2023) ("Speculative fears of prosecution or other future injuries are legally insufficient to confer standing."). More generally, this Court has held that a plaintiff does not establish causation for standing purposes where "there are too many 'steps' that hinge on uncertainty in the causal chain for [the

lead to that lawyer being haled into court as a matter of constitutional standing, at which point the lawyer would have to invoke his or her immunity.

Court] to find that any injury suffered is fairly traceable" to the defendant. *Ky. Unemp. Ins. Comm'n v. Nichols*, 635 S.W.3d 46, 53 (Ky. 2021).

Speculative fear of enforcement is all that the Board offers—and multiple levels of it at that. There are at least two layers to the Board's speculation. It first worries that the Commissioner will decide that a violation of SB 1 is reportable under KRS 156.210(3). On top of that, the Board layers additional concern that the actual government enforcers will opt to exercise their discretion to act against the Board.

Consider these two levels of speculation in reverse. The second level of speculation about what the nonparty government enforcers may or may not do severs any connection between a referral by the Commissioner and enforcement by a prosecutor or the Kentucky Board of Education. It is black-letter standing law that causation requires the injury to be fairly traceable "to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up) (citation omitted).[7] Yet under KRS 156.210(3), the Board can suffer injury from a referral by the Commissioner only if an independent, nonparty exercises discretion to take enforcement action. Because any enforcement injury

[7] This Court has adopted *Lujan*'s three-part test for standing. *Bradley v. Commonwealth ex rel. Cameron*, 653 S.W.3d 870, 877 (Ky. 2022).

depends on such independent choice, a referral by the Commissioner is not fairly traceable to the Board's alleged injury. *See Lujan*, 504 U.S. at 560.

Now turn to the Board's speculation about what the Commissioner will do if the Board violates SB 1. As a statutory matter, it's not obvious that a violation of SB 1 is even proper for a referral by the Commissioner under KRS 156.210(3). True, the statute allows referral for a "violation of law." But the statute envisions the Commissioner making *criminal referrals* for "indictment, prosecution, and conviction." *See id.* SB 1, however, does not itself impose any potential criminal consequences on the Board. Nor does the statutory chapter in which SB 1 is housed. *See* KRS 160.990(3) (listing penalties but not including any consequences against a board of education or its members for violating KRS 160.370).

The Board bears the burden of establishing its constitutional standing. *Ward v. Westerfield*, 653 S.W.3d 48, 51 (Ky. 2022). Yet it has never offered even a theory for how an alleged violation of SB 1 by the Board could come across the desk of a prosecutor under KRS 156.210(3). It is true that the statute gives the Kentucky Board of Education secondary authority to "rectify and regulate" matters "[i]f prosecution is not warrantable." But that language envisions a criminal referral being made first. So without the Board offering a plausible basis for how it could ever face criminal consequences for violating SB 1, secondary enforcement by the Kentucky Board of Education appears not to be an option.

In any event, assume for the sake of argument that there is some possibility of criminal enforcement related to SB 1 through a referral under KRS 156.210(3). Even in this paradigm, the Board has not shown causation in light of the Commissioner's litigation conduct here. So far, the Commissioner has been conspicuously noncommittal—even cagey—about whether he would in fact make a referral under KRS 156.210(3) if the Board violates SB 1. The most the Commissioner's trial-court brief offered was an acknowledgment that SB 1 is presumed constitutional while underscoring that the constitutional issue "warrant[s] clarity." R. 164–65. And much of the Commissioner's brief reads like the Commissioner believes the law is unconstitutional. The Commissioner argued that "[t]he link between the consolidated local government distinction and [the challenged sections] of SB 1 *is not readily apparent*." R. 166 (emphasis added). The Commissioner also contended that "a review of the legislative history does not clearly set forth a reasonable connection between a consolidated local government designation and the adopted legislation." *Id.* And the Commissioner cited two cases in which Kentucky courts struck down a law that by operation applied only in Jefferson County. *Id.* at 165–66.

The Commissioner's appellate brief created even more uncertainty about whether he would make a referral under KRS 156.210(3). Although recognizing the Commissioner's role in SB 1 would at most be a reporting one (as noted above), the Commissioner carefully qualified that "the Commissioner does not

take a position on how he would have responded to a violation of SB 1 or what action may have been taken against the [Board]." Comm'r COA Br. at 4. And the Commissioner's brief criticized SB 1 because "[t]he operations of the county as a government entity . . . are wholly unrelated to the operations of the publicly elected local board of education." *Id.* at 4–5.

The Commissioner's calculated hedges cannot help undermining the Board's causation theory. If the Commissioner intended to make a referral under KRS 156.210(3) for a violation of SB 1, it would have been easy to say so. Yet the Commissioner has gone out of his way—again and again—to keep his cards close. To be sure, like every state officer, the Commissioner has a duty to follow Kentucky law, which includes SB 1. But this Court has recognized that a state officer may have very narrow leeway to decline to enforce a law that the official believes in good faith to be unconstitutional. *See Stivers v. Beshear*, 659 S.W.3d 313, 325 (Ky. 2022). The Commissioner's refusal to commit to following SB 1 is yet another reason the Board has not proved causation.

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For all these reasons, the Board cannot establish that the Commissioner can cause it any injury. The Commissioner has only referral authority that may not apply to a law like SB 1 and that the Commissioner will not even commit to using here. And the actual enforcement authorities are nonparties with enforcement discretion that act independently from the Commissioner.

B. Causation is not the only standing problem for the Board. It also cannot show that relief against the Commissioner will redress its alleged injury from SB 1. To satisfy this element of standing, the Board must show that its injury is "likely to be redressed by the requested relief." *Sexton*, 566 S.W.3d at 196 (citation omitted). Put differently, "relief from the injury must be 'likely' to follow from a favorable decision." *Id.* (citation omitted).

Because SB 1 grants authority to Superintendent Pollio, a declaratory judgment against the Commissioner does not get the Board what it wants. It wants Superintendent Pollio to be required not to follow SB 1. But under the declaratory judgment issued below, the Superintendent is *free to follow SB 1*. Nearly a century of Kentucky caselaw establishes that a nonparty is not bound by a declaratory judgment. *Coke v. Shanks*, 273 S.W. 552, 552–53 (Ky. 1925) ("It is obvious that any adverse declaration would not be binding on any" nonparty.); *Herbert C. Heller & Co. v. Hunt Forbes Constr. Co.*, 1 S.W.2d 970, 970 (Ky. 1928) (similar); *accord Jarvis v. Nat'l City*, 410 S.W.3d 148, 153 (Ky. 2013) (making a "binding declaration of rights" to resolve "a present actual controversy presented by adversary *parties*" is "the very purpose of declaratory judgment actions" (citation omitted) (emphasis added)). After all, the Superintendent is not a party to this case. True, the Commissioner will not enforce SB 1 (to the extent that he can enforce it) in light of the circuit court's declaratory judgment. But what good

does that do for the Board? For the Board to get what it wants, the declaratory judgment must run against the Superintendent. Yet the Board did not sue him.

The Court of Appeals pushed back by suggesting that KRS 156.210(3) somehow gives the Commissioner authority "to proceed against the Superintendent if he attempts to follow the provisions [of SB 1] after they are declared unconstitutional." *Cameron*, 2023 WL 6522192, at *5. Even putting aside (as discussed above) that the Commissioner has at most referral authority under KRS 156.210(3), the Court of Appeals' statement flatly contradicts the rule that a non-party is not bound by a declaratory judgment. *Coke*, 273 S.W. at 552–53; *Herbert C. Heller*, 1 S.W.2d at 970. The Court of Appeals did not identify any precedent to the contrary. Nor did it even try to distinguish the caselaw cited above. Thus, even assuming the Commissioner could take action against the Superintendent for following SB 1, all the Superintendent would have to do in response is point to the parties to this case. It follows that a declaratory judgment against only the Commissioner gains the Board nothing against the Superintendent.

The Board simply cannot explain how the declaratory judgment below redresses its injury. That's because to challenge a statute in court a plaintiff must seek relief against a government official who enforces the law. The key case here is *Revis*, in which the plaintiff sought a declaratory judgment against the Attorney General. The problem was that "nowhere in the act, or any other statute, or in the Constitution, is [the Attorney General] given any official duties pertaining to

the question presented for determination." *Revis*, 287 S.W. at 29. The Court explained that merely "inserting the name of the Attorney General after 'v.' in the caption of [a] petition" is not enough. *Id.* A government official can be sued for a declaratory judgment about a statute only if that official "occupies some official relation thereto with imposed duties, which, if exercised, would impair, thwart, obstruct, or defeat plaintiff in his rights." *Id.* The government official who occupies this position for SB 1 is Superintendent Pollio.

At bottom, because the Commissioner does not enforce SB 1, this case would be no different than if the Board had filed suit without naming a defendant. To be sure, the Board no doubt hopes Superintendent Pollio will voluntarily follow the circuit court's declaratory judgment. But without a defendant who enforces SB 1, this lawsuit is "of no more legal efficacy" than "a letter written to the judge of the court to obtain his opinion upon a purely academic question." *See id.* The Court of Justice, however, does not give advisory opinions, even on the most pressing of issues. *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992); *In re Constitutionality of House Bill No. 222*, 90 S.W.2d 692, 692–93 (Ky. 1936). The declaratory judgment entered below against a party who does not enforce the challenged statute is a quintessential advisory opinion.

II. Superintendent Pollio is a necessary party.[8]

Even if the Board had standing to sue, the complaint should be dismissed for failure to name Superintendent Pollio as a necessary party.

Under Kentucky's Declaratory Judgment Act, a court cannot issue a declaratory judgment without joining "*all*" parties who have "*any interest* which would be affected by the declaration." KRS 418.075 (emphasis added). Nor may a court issue a declaratory judgment that will "prejudice the rights of persons not parties to the proceeding." *Id.* These parts of the Declaratory Judgment Act are "mandatory." *See Commonwealth ex rel. Meredith v. Reeves*, 157 S.W.2d 751, 753 (Ky. 1941) (collecting cases for this proposition).

Although not limited to declaratory-judgment actions, Kentucky's civil rules reinforce that necessary parties must be named in the complaint. Under CR 19.01, a party must be joined if (a) his absence means that "complete relief cannot be accorded among those already parties," or (b) "he claims an interest relating to the subject of the action" and his absence may "as a practical matter impair or impede his ability to protect that interest."

Whether viewed through the lens of KRS 418.075 or CR 19.01, Superintendent Pollio is a necessary party. The challenged parts of SB 1 deal with the

[8] The Attorney General preserved this argument below. R. 178–81; AG COA Br. 14–18.

relationship between two government actors: the Board and Superintendent Pollio. *See* KRS 160.370(2). The Board cannot hide from this fact. In trial-court briefing, the Board framed SB 1 this way: it "amend[s] KRS 160.370 in numerous ways concerning the duties and powers of the Jefferson County Board of Education and the superintendent of the Jefferson County Public Schools." R. 136. The Court of Appeals could only agree. *Cameron*, 2023 WL 6522192, at *1 (stating that SB 1 "significantly modifies the relationship between local boards of education and superintendents"). The bottom line is that the Board's dispute has always been with Superintendent Pollio, whether the Board likes it or not and whether Superintendent Pollio agrees with the Board's legal position or not. The Board cannot seek judicial relief about Superintendent Pollio's statutory duties without suing him. More to the point, the Board cannot litigate about its relationship with Superintendent Pollio behind his back—he must be in court to represent his interests as he sees fit.

Numerous cases applying the Declaratory Judgment Act make this very point. For example, this Court's predecessor determined that a school district is a necessary party when a declaratory judgment would affect its contractual authority. *Reeves*, 157 S.W.2d at 753–54. And claims against a public agency cannot be declared invalid without those who hold the claims being parties. *Coke*, 273 S.W. at 552–53. That is because "any adverse declaration would not be binding on" a nonparty who then "would have the right to relitigate the questions here

raised." *Id.* at 553. In short, it is "obvious" that a court should not enter a declaratory judgment "which, if made one way, decides nothing and ends no controversy[.]" *Id.*; *accord Ezzall v. Exall*, 269 S.W. 752, 752–53 (Ky. 1925); *City of Louisville v. Louisville Auto. Club*, 160 S.W.2d 663, 668 (Ky. 1942).

This conclusion holds no matter what the Superintendent would do once a party (a topic on which there has been much speculation). The Superintendent might or might not defend SB 1 once before the court. But that's not the point. And the Superintendent may naturally prefer not to be brought into court, as the Board's counsel stated below.[9] VR 6/10/22 at 1:57:46–58:13. That's not the point either. Whatever Superintendent out-of-court beliefs or preferences may be, the point is that without Superintendent Pollio in court, any declaratory judgment about SB 1 "would be a brutum fulmen"—translated, a judgment without effect. *See Coke*, 273 S.W. at 552.

[9] The Court of Appeals characterized the Board's counsel's representation in trial court as that Superintendent Pollio "was not planning to defend the challenged provisions." *Cameron*, 2023 WL 6522192, at *2. The panel also seemed to say Superintendent Pollio had given "his personal assurances that he will not follow" SB 1. *Id.* at *5. But neither of those characterizations tracks what the Board's counsel said in trial court. He said: "To be candid with the Court, I do know where [the Superintendent] stands on it. But I don't think I am authorized to discuss it . . . . And I don't think [the Superintendent] was given an option to consider being a party and he didn't think that that was necessarily something he wanted with a few other things going on to get himself involved in." VR 6/10/22 at 1:57:46–58:13.

The same result follows under the civil rules. Under CR 19.01, a necessary party is one (i) whose absence prevents the court from granting "complete relief" to those already parties or (ii) whose interests could be "impair[ed] or impede[d]" by the action "as a practical matter." *See also Jones by Jones v. IC Bus, LLC*, 626 S.W.3d 661, 670 (Ky. App. 2020). Superintendent Pollio qualifies under either prong.

Start with the complete-relief prong. Although the circuit court said that "[i]t does not envision . . . that anyone will be actively trying to enforce the contested provisions once this declaratory judgment has been disseminated," Tab 1 at 7, its declaratory judgment is not binding on a nonparty like Superintendent Pollio. *See Coke*, 273 S.W. at 552–53. So without Superintendent Pollio before the circuit court, it could not grant "complete relief" to the Board under CR 19.01. For example, Superintendent Pollio might approve contract purchases under $250,000 as allowed by KRS 160.370(2)(c). As a nonparty, he would not violate the circuit court's declaratory judgment by doing so. Yet that would enforce a provision of SB 1 that the circuit court has declared unconstitutional, so the Board would not have complete relief. *See Commonwealth v. Ky. Ret. Sys.*, 396 S.W.3d 833, 840 (Ky. 2013) (holding that a state agency that enforces the statutes at issue is a necessary party because the agency "is necessary to take whatever actions may be required after the ruling in the case").

The other prong of CR 19.01 is no less straightforward. Because the Board will follow the declaratory judgment, Superintendent Pollio will necessarily suffer a diminution in his statutory authority. In CR 19.01 speak, his statutory rights will be "impair[ed] or imped[ed]" by this suit. *See RAM Eng'g & Constr., Inc. v. Univ. of Louisville*, 127 S.W.3d 579, 582 (Ky. 2003) (describing this prong of CR 19.01 as referring to "those persons whose interest would be divested by an adverse judgment" (citation omitted)). To understand this point, recall that SB 1 directs the Board to "[d]elegate authority" to the Superintendent. KRS 160.370(2)(a)1. Because the Board is bound by the circuit court's declaratory judgment, it will not follow this provision. So the declaratory judgment in this respect purports to divest Superintendent Pollio of authority he would otherwise have under SB 1.

The circuit court's contrary reasoning is unavailing. For starters, the circuit court *agreed* that "in theory Superintendent Pol[l]io is the person most negatively impacted by this ruling." Tab 1 at 8. It nevertheless found that "[w]hat matters, in reality, is that someone assert before the Court any countervailing argument addressing the [Board's] claims, so the issue is fairly contested and weighed." *Id.* The court found that the Attorney General was that "someone" and that he did "as good a job as one could, given the rather miserable hand [he was] dealt by the General Assembly." *Id.* That is not how the necessary-party analysis works. The question is not whether arguments are sufficiently disputed in court, but *who*

is before the court. In any event, the Attorney General's presence does not make up for the failure to name a necessary party. *See Revis*, 287 S.W. at 29.

The Court of Appeals framed its necessary-party analysis somewhat differently—but no more persuasively. It did not dispute that this lawsuit concerns the scope of the Superintendent's authority vis-à-vis the Board. Indeed, it conceded as much. *Cameron*, 2023 WL 6522192, at *1. Instead, the panel seemed to say that the particular nature of the relationship between the Superintendent and the Board somehow rendered the Superintendent a non-necessary party. On this point, the panel variously emphasized that under SB 1 the Board must "delegate authority to the Superintendent" and must "authorize him" to take action and that "the Superintendent is not given any means by which to enforce" parts of SB 1. *Id.* at *6. The Court of Appeals cited no caselaw suggesting that the nature of a statutory relationship makes one party to that relationship a non-necessary party in litigation concerning that relationship.

Respectfully, the Court of Appeals' reasoning cannot be right. The undisputed fact that this litigation concerns the relationship between the Board and the Superintendent under SB 1 compels the conclusion that the Superintendent is a necessary party. The Declaratory Judgment Act could not be clearer: "When declaratory relief is sought, *all* persons shall be made parties who have or claim *any interest* which would be affected by the declaration, and *no* declaration shall prejudice the rights of persons not parties to the proceedings." KRS 418.075

(emphasis added). The civil rules are no less categorical. CR 19.01. In short, because *everyone* agrees that the Board sought a declaration concerning its relationship with Superintendent Pollio, the Superintendent is a necessary party to this litigation.

The final point to make here is one that the Attorney General prevailed on below. *See Cameron*, 2023 WL 6522192, at *6. In the Court of Appeals, the Board argued that the Attorney General could not raise the necessary-party argument because he did not intervene as a party in circuit court. But that matters not. The Attorney General did what he often does in constitutional challenges to state law: He entered his appearance under KRS 418.075(1) and filed a brief in defense of SB 1. R. 159–60, 172–94. This well-worn procedure follows directly from KRS 418.075(1), which "entitle[s]" the Attorney General "to be heard" in "any proceeding which involves the validity of a statute." Indeed, this Court just affirmed that the Attorney General can exercise his duty to defend Kentucky law without becoming a party.[10] *Beshear*, 647 S.W.3d at 179 & n.6.

[10] The Attorney General is a party now—he is the appellant. He appealed under KRS 15.090, which empowers him to "prosecute an appeal, without security, in *any* case from which an appeal will lie whenever, in his judgment, the interest of the Commonwealth demands it." (emphasis added); *see also* KRS 15.020(1), (3).

The Attorney General's duty to defend Kentucky law is not all about arguing constitutional issues. It also entails ensuring that courts reach a constitutional issue only when necessary. Indeed, the Attorney General regularly makes, and regularly prevails on, threshold arguments that allow Kentucky courts to avoid reaching constitutional questions. *E.g.*, *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 661 (Ky. 2023); *G.P. v. Bisig*, 655 S.W.3d 128, 132 (Ky. 2022); *Ward*, 653 S.W.3d at 50; *Bradley*, 653 S.W.3d at 881. That is exactly what the Attorney General is trying to do here. He has raised the necessary-party argument all the way up, asserting in circuit court, in the Court of Appeals, and now in this Court that the declaratory judgment here could not be entered without the Superintendent as a party.

The Attorney General's timely and continued diligence distinguishes the Board's favored caselaw, as the Court of Appeals correctly held. *Cameron*, 2023 WL 6522192, at *6. It is true that a nonparty cannot "collaterally attack a judgment on the ground that KRS 418.075 or CR 19.01 had not been complied with." *Murphy v. Lexington-Fayette Cnty. Airport Bd.*, 472 S.W.2d 688, 690 (Ky. 1971). A contrary rule would allow the nonparty to "simply lie back and await the result of the action in the circuit court and then, if not satisfied with the judgment, compel a retrial by the device of intervening after judgment." *Id.* at 690. But the Attorney General did not do that here—or anything close to it. He entered his appearance in circuit court and timely filed a brief defending SB 1 that argued,

among other things, that the Superintendent is a necessary party. As the Court of Appeals recognized, the Attorney General "did not 'lie back' and await the outcome of the proceedings before raising an attack on the judgment." *Cameron*, 2023 WL 6522192, at *6. It follows that the Attorney General "is entitled to appellate review of his argument that the Superintendent was a necessary party." *Id.*

III. SB 1 is constitutional.

A. SB 1 is not special or local legislation.[11]

SB 1 is a general law that applies in any consolidated local government in Kentucky. At present, there is only one such government—in Jefferson County. But under state law, that need not always be true. As a result, SB 1 does not apply to a "*particular* individual, object or locale" under *Woodall*. 607 S.W.3d at 573 (emphasis added).

The analysis below proceeds in three parts. First, it summarizes the history of litigation challenging laws that by operation apply at the time only in Louisville or Jefferson County ("Louisville-specific laws"). Second, it discusses the Court's decision in *Woodall*, which returned us to the original test for Sections 59 and 60

[11] The Attorney General preserved this argument below. R. 182–90; AG COA Br. 18–25.

challenges. And third, it explains why SB 1 comports with *Woodall*'s straightforward test.

1. Since our Constitution was ratified, there has been a "great volume of litigation" about Louisville-specific laws. *See Bd. of Educ. of Jefferson Cnty. v. Bd. of Educ. of Louisville*, 472 S.W.2d 496, 498 (Ky. 1971). This case, however, is the first one following *Woodall* to ask whether such a law violates Sections 59 and 60 of the Constitution. Although the parties agree that *Woodall* establishes the governing rule, it helps to recount the caselaw regarding Louisville-specific laws that brought us to *Woodall*. They help frame *Woodall*'s straightforward rule.

The pre-*Woodall* caselaw about Louisville-specific laws is hard to reconcile in some respects. One thing, however, is not up for debate. Such laws have been upheld more often than courts have struck them down. These Louisville-specific laws generally came in three flavors.[12]

First, Kentucky courts have repeatedly turned away challenges to laws that only applied in a city of the first class, of which Louisville was the only one at the time. To be sure, these cases were not strictly about Sections 59 and 60. They more directly implicated what was then Section 156 of the Constitution, which allowed the legislature to pass laws related to a specified class of cities. *See*

[12] The below survey does not discuss every case that involved a Louisville-specific law. It hits only the high points.

Woodall, 607 S.W.3d at 566 n.8; *accord Louisville/Jefferson Cnty. Metro Gov't Waste Mgmt. Dist. v. Jefferson Cnty. League of Cities, Inc.*, 626 S.W.3d 623, 628 (Ky. 2021) (discussing the replacement of Section 156 with Section 156A). Even still, this Court's predecessor regularly upheld these types of laws. Such laws that were upheld:

- Established the time from which "taxes shall draw interest" in a city of the first class. *Walston v. City of Louisville*, 66 S.W. 385, 386 (Ky. 1902);

- Empowered cities of the first class to regulate sewage disposal differently. *Miller v. City of Louisville*, 99 S.W. 284, 284–86 (Ky. 1907);

- Established the "minimum level of taxes for school purposes in cities of the first class." *City of Louisville v. Commonwealth*, 121 S.W. 411, 411, 413 (Ky. 1909);

- Authorized cities of the first class "to construct and operate bridges across any navigable stream forming a state boundary." *Klein v. City of Louisville*, 6 S.W.2d 1104, 1105, 1106–07 (Ky. 1928);

- Specified how "public real estate" in a city of the first class "shall defray its proportionate part of the cost of local improvements." *Logan v. City of Louisville*, 142 S.W.2d 161, 161, 163 (Ky. 1940); and

- Authorized a sewer district in each city of the first class. *Veail v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, 197 S.W.2d 413, 415, 417–18 (Ky. 1946);

Although the reasoning in these cases differs in some respects, the Court sounded similar themes. Relevant here, in *Miller*, the Court pointed out that "[i]f 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." 99 S.W. at 285. The Court made the same

point in *Veail*. 197 S.W.2d at 418 ("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.").

The second group of cases to uphold Louisville-specific laws is similar to but distinct from the first. Rather than being city-based, these Louisville-specific laws were county-based. They applied to any county containing a city of the first class, which at the time was only Jefferson County. In the educational context, the Court allowed a board of education in a county containing a city of the first class to impose an occupational license fee. *Sims v. Bd. of Educ. of Jefferson Cnty.*, 290 S.W.2d 491, 493, 495–96 (Ky. 1956). The Court in *Sims* was not blind to reality. "While it is not probable that another city will qualify as a first-class city in Kentucky at any time in the immediate future, nevertheless, it is always possible and the statute would then be applicable to more than one county." *Id.* at 495. Other cases upholding county-based laws like that in *Sims* are *Allison v. Borders*, 187 S.W.2d 728, 728–29 (Ky. 1945), *Second St. Props., Inc. v. Fiscal Ct. of Jefferson Cnty.*, 445 S.W.2d 709, 715–16 (Ky. 1969), and *Veail*, 197 S.W.2d at 415, 417–18.

The third type of Louisville-specific laws that have been upheld applied only in counties above a population threshold that at the time only Jefferson County met. For example, in the founding-era decision of *Winston v. Stone*, this Court's predecessor considered a law that applied only in counties with a population above 75,000 persons. 43 S.W. 397, 398 (Ky. 1897), *overruled on other grounds by Vaughn v. Knopf*, 895 S.W.2d 566, 569–70 (Ky. 1995). The Court interpreted

Section 59 to prohibit laws that "appl[y] exclusively to special or particular places, or special and particular persons." *Id.* (citation omitted). The Court reasoned that "[t]he statute in question applies alike to all, counties of the same class, and is therefore not in conflict with Section 59 of the constitution." *Id.* The Court emphasized: "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." *Id.* Other cases upholding population-based laws similar to the one in *Winston* are *Shaw v. Fox*, 55 S.W.2d 11, 14–16 (Ky. 1932), *Connors v. Jefferson Cnty. Fiscal Ct.*, 125 S.W.2d 206, 209–10 (Ky. 1938), and *Jefferson Cnty. Police Merit Board v. Bilyeu*, 634 S.W.2d 414, 415–16 (Ky. 1982). *See also Herold v. Talbott*, 88 S.W.2d 303, 305 (Ky. 1935) (noting that for "more than forty years" the Court has held that "classification on the basis of population of the county alone was not special or local legislation within the purview of section 59 of the Constitution").

Arrayed against this wealth of caselaw upholding Louisville-specific laws are several cases striking down such laws. Generally, these cases relied heavily on classification-based reasoning.[13] That is, the courts found a constitutional defect in part because they determined the legislature had insufficient justification to

[13] To be fair, some cases cited above upholding Louisville-specific laws similarly relied on classification-based reasoning.

treat Louisville or Jefferson County differently. One such case is *City of Louisville v. Kuntz*, in which the law created a shorter statute of limitations for only cities of the first class. 47 S.W. 592, 592 (Ky. 1898). In finding the law unconstitutional, this Court's predecessor focused on how it classified—that the law created "one rule of limitation for cities of the first class, and another for all persons, natural or artificial." *Id.* Classification-based reasoning also drove the result in *James v. Barry*, 128 S.W. 1070 (Ky. 1910). There, relying on *Safety Bldg. Loan Co. v. Ecklar*, 50 S.W. 50 (Ky. 1899),[14] the *James* Court found no "distinctive and natural reasons" for changing the timing for paying officials in a county containing a city of the first class. 128 S.W. at 1073 (citation omitted). Classification-based reasoning likewise is present in *Gorley v. City of Louisville*, 47 S.W. 263, 263–64 (Ky. 1898), *City of Louisville v. Louisville Taxicab & Transfer Co.*, 238 S.W.2d 121, 124 (Ky. 1951), *City of Louisville v. Klusmeyer*, 324 S.W.2d 831, 833–34 (Ky. 1959), *Bd. of Educ. of Jefferson Cnty.*, 472 S.W.2d at 498–501, and *Louisville/Jefferson Cnty. Metro Government v. O'Shea's-Baxter, LLC*, 438 S.W.3d 379, 383–86 (Ky. 2014).

Most of these decisions striking down Louisville-specific laws shared a second key trait: They applied the previous Section 156. *See Kuntz*, 47 S.W. at 592; *James*, 128 S.W. at 1072; *Klusmeyer*, 324 S.W.2d at 833; *Bd. of Educ. of Jefferson Cnty.*, 472 S.W.2d at 498; *accord Woodall*, 607 S.W.3d at 566 n.8 (holding that *Kuntz*

[14] *Ecklar* is not a Section 59 case. *See Woodall*, 607 S.W.3d at 566.

and "similar cases" are "properly viewed as interpretations of § 156"). One qualification is *O'Shea's-Baxter*, which was decided after Section 156A replaced Section 156. That said, *O'Shea's-Baxter* applied Section 156 principles, given that its reasoning turned on a two-part test derived in part from Section 156. 438 S.W.3d at 383–84 (applying *Mannini v. McFarland*, 172 S.W.2d 631 (Ky. 1943)).

To summarize the above, Louisville-specific laws have regularly but not always been upheld under Kentucky's Constitution, including under Sections 59 and 60. When they have been upheld, the Court has stressed that other cities or counties can be subject to the challenged law in the future. And when Louisville-specific laws have been invalidated, the Court has usually invoked classification-based reasoning mostly while applying the previous Section 156.

2. That brings us to *Woodall*. That decision came on the heels of a vigorously contested 4–3 ruling about Sections 59 and 60 in *Zuckerman v. Bevin*, 565 S.W.3d 580 (Ky. 2018). In a three-Justice concurrence there, Kentucky's then-Chief Justice urged the Court to reconsider its special-legislation caselaw because he "fear[ed] this Court risks overstating its role in Kentucky's tripartite government." *Id.* at 605–06 (Minton, C.J., concurring).

This Court took up that task in *Woodall*. In an exhaustive opinion, the Court held that "[f]or too long" it had "misconstrued the proper analysis" under Section 59 by "conflat[ing] its meaning" with Kentucky's equal-protection guar-

antee in Section 3. *Woodall*, 607 S.W.3d at 565–66. This blending of distinct constitutional provisions, the Court held, "does not comport with a proper interpretation of these sections as understood in 1891." *Id.* at 566. The Court determined that "[t]he 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.'" *Id.* at 567 (quoting *Greene v. Caldwell*, 186 S.W. 648, 654 (Ky. 1916)). As a result, the Court held that going forward "the appropriate test is whether the statute applies to a particular individual, object or locale." *Id.* at 573.

In returning to this original test, *Woodall* made three points relevant here. First, the Court identified several founding-era decisions that correctly stated the original special-legislation test. *See id.* at 567. One of those cases is *Stone v. Wilson*, 39 S.W. 49 (Ky. 1897), *overruled on other grounds by Vaughn*, 895 S.W.2d at 569–70. The law in *Wilson* applied in only part of the Commonwealth—more specifically, only "in a county having a population of over forty thousand and under seventy-five thousand." *Id.* at 50. *Wilson* adopted the same Section 59 test the Court returned to 130 years later in *Woodall*. It explained that local or special legislation "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.* Applying that test, this

Court's predecessor held that the law in *Wilson* "was both authorized and required by the constitution." *Id.* at 51. As a result, by citing *Wilson*, *Woodall* left little doubt that county-based classifications comport with Section 59. *See also* Laurance B. VanMeter, *Reconsideration of Kentucky's Prohibition of Special & Local Legislation*, 109 Ky. L.J. 523, 570 (2021) ("The statute, in *Wilson*, obviously involved a classification of counties, and thus was not within the prohibition of Section 59.").

The second relevant point from *Woodall* is that it foresaw and rejected one obvious criticism of its straightforward test. That criticism is this: "Some may say that with this simple test legislators will be able to draft around the Section 59 prohibition by avoiding express reference to a specific person, entity or locale but articulating criteria for a statute's application that as a practical matter only a specific person, entity or locale can satisfy." *Woodall*, 607 S.W.3d 573. The Court's response to this concern was not to assure critics that Section 59 in fact prohibited such laws. Instead, the Court held that *another constitutional provision*—Section 3's equal-protection guarantee—was the backstop against such laws. As the Court emphasized, "[o]ver the last 130 years, courts have had experience with the [Section 3] analysis and have shown little hesitancy in engaging a more rigorous analysis with respect to classification legislation." *Id.* So *Woodall* made clear

that laws that "avoid[] express references" while "articulating criteria for a statute's application that as a practical matter only a specific person, entity or locale can satisfy" do not raise a problem under Section 59. *See id.*

The third relevant part of *Woodall* comes in a footnote at the end of the decision. There, in a string cite, *Woodall* briefly mentioned a prior decision that applied the wrong test under Section 59 "but reached the correct result since the statute applies to a particular object." *Id.* at 573 n.19. That case was *Pennybacker*. *Woodall*'s endorsement of *Pennybacker*'s result has played a prominent role in follow-on decisions by lower courts, including the Court of Appeals here, so it's worth dwelling on the law invalidated in *Pennybacker*.[15]

The law in *Pennybacker* was written so that it could only ever apply to a single school. That is to say, the law applied to a *closed class of one*. The law "establish[ed] *a* scholarship program to provide eligible Kentucky students the opportunity to attend an accredited school of pharmacy at *a* private four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county in the Commonwealth." *Pennybacker*, 308 S.W.3d at 672 (citation omitted) (emphasis added). Notice the twice emphasized article "a"

[15] Another recent Court of Appeals' decision similarly emphasized *Woodall*'s footnoted reliance on *Pennybacker*. *Coleman v. CorneaGen, Inc.*, No. 2023-CA-0093, 2024 WL 501166, at *7 (Ky. App. Feb. 9, 2024), *motion for discretionary review filed* No. 2024-SC-0102 (Ky. Mar. 11, 2024).

in this statute, which unmistakably signified that the law could only ever apply at "a" single pharmacy school. Not coincidentally, in the very same bill, the General Assembly "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." *Id.* at 671.

Putting these two statutory provisions together, the Court acknowledged the obvious: the scholarship program "can *only be read* as funding scholarships for students attending the planned UC Pharmacy School." *Id.* at 683 (emphasis added). That is to say, the scholarship program could only ever apply to a closed class of a single, particular pharmacy school. *See also id.* ("No party to this litigation has questioned that the sole institution which would fit that description is UC, providing the Pharmacy School is built."). That's exactly how *Woodall* understood *Pennybacker*. In *Woodall*'s words, the *Pennybacker* law "applied to a particular object" because it "had clearly been drafted to provide scholarships to an equally unconstitutionally funded pharmacy school at a private, religious university." 607 S.W.3d at 573 n.19.

A casual reader of *Woodall* could perhaps argue (incorrectly) that its endorsement of *Pennybacker*'s result creates tension within *Woodall*. On the one hand, *Woodall* held that the legislature "articulating criteria for a statute's application that as a practical matter only a specific person, entity or locale can satisfy" is not a Section 59 problem. *Id.* at 573. Yet on the other hand, *Woodall*'s citation

of *Pennybacker* shows that a law without an explicit reference to the benefitted entity can violate Section 59. But there is no tension in those two propositions. The law in *Pennybacker* was not an open classification that "as a practical matter only a specific person, entity or locale [could] satisfy." Instead, it was a law that could "only be read" as applying to a particular school and no other. *Pennybacker*, 308 S.W.3d at 683. That is to say, the law in *Pennybacker* was unconstitutional under Section 59 because it could only apply to a closed class of one school.

3. Against this backdrop, SB 1 survives scrutiny under *Woodall*. Everyone agrees that the challenged parts of SB 1 "d[o] not mention Jefferson County." R. 136. Nor do they mention Louisville. If they did, that could raise Section 59 problems. *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.").

Rather than single out Jefferson County or Louisville, SB 1 applies to an open class. It applies in *any* consolidated local government that exists *now or in the future*. KRS 160.370(2) (applying in "a county school district in a county with a consolidated local government under KRS Chapter 67C"). More to the point, SB 1 is a general statute that applies uniformly across the entire Commonwealth. *Cameron v. Beshear*, 628 S.W.3d at 77 (applying *Woodall* to hold that legislation that "applies statewide" does not violate Section 59). It follows that SB 1 does not apply to a particular locale in violation of Section 59.

The Board will counter that there is only one consolidated local government in Kentucky. That is true—for now. But it does not follow that SB 1 applies to a closed class. The current existence of only one consolidated local government is not a function of Kentucky law, but of county population levels and local choice. In fact, the statutory chapter governing consolidated local governments makes clear that this local-government classification is an open class. Under KRS 67C.101(1), "any" city of the first class may combine with its county to create a consolidated local government. *See also* KRS 67C.101(6) (providing a naming convention for consolidated local governments that envisions an open class).

Nor is the category of first class cities a closed class. Even though Louisville is currently the only such city under KRS 81.005(1)(a), that could change. Nothing in Kentucky law prevents the largest city by population in any other Kentucky county with more than 250,000 residents from choosing to become a city of the first class. KRS 83A.160(6). Right now, only two Kentucky counties (Jefferson and Fayette) meet that population threshold.[16] And for now, Lexington has chosen another form of local government. *See generally* KRS 67A.010 (allowing an urban county government anywhere in Kentucky "except in a county containing a city of the first class"); *Holsclaw v. Stephens*, 507 S.W.2d 462, 466 (Ky.

[16] U.S. Census Bureau, Kentucky: 2020 Census, https://perma.cc/H27G-EQRF.

1973). But that does not mean that in the future there will not be one or more additional first-class cities and then consolidated local governments in Kentucky.

Woodall gave a not-so-subtle hint that laws with a county-based classification comply with Section 59. As noted above, *Woodall* identified *Wilson* as a founding-era case that correctly stated the applicable test for a Section 59 challenge. 607 S.W.3d at 567. The law there applied "in a county having a population of over forty thousand and under seventy-five thousand." 39 S.W. at 50. In upholding the statute under Section 59, *Wilson* pointed out that it applied "in counties that may *now or hereafter* have a population of over 40,000 and under 75,000." *Id.* (emphasis added). SB 1 is no different. It applies in any consolidated local government that may "now or hereafter" exist. Under *Wilson* as reaffirmed in *Woodall*, SB 1 therefore comports with Section 59.

Indeed, just after *Wilson*, Kentucky's high court considered a Louisville-specific law and upheld it under Section 59. As summarized above, that law applied only in counties with a population greater than 75,000. *Winston*, 43 S.W. at 397–98. The parties in *Winston* "admitted that Jefferson county has a population of over 75,000 inhabitants, and, further, it is the only county that at the present has such population." *Id.* at 397. That single-county sweep was of no moment. *Winston* viewed the case as presenting the "identical question" to *Wilson*. *Id.* at 398. *Winston* quoted *Wilson* for the proposition that local or special legislation

"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.* (citation omitted). Of course, that is the very same test this Court returned to in *Woodall*.[17] So to recap, shortly after our Constitution was ratified, this Court's predecessor applied the proper test for a Section 59 challenge to a county-based law that in practical effect applied only in Jefferson County.

The law upheld in *Winston* is just like the one here—both apply by operation only in a single county. As to such a law, *Winston* squarely held that "[t]he statute in question applies alike to all, counties of the same class, and is therefore not in conflict with section 59 of the constitution." *Id. Winston* understood well that it was upholding a law that in practical effect applied only in Jefferson County. But that was of no matter: "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." *Id.*

The Board's special-legislation argument cannot overcome *Winston*. It is a founding-era case that applied *Woodall*'s test to a county-based classification that

[17] As further support for its interpretation of Section 59, *Winston* cited *Commonwealth v. E.H. Taylor, Jr., Co.*, 41 S.W. 11 (Ky. 1897). That is another Section 59 founding-era decision that *Woodall* identified as stating the proper test. *Woodall*, 607 S.W.3d at 567.

in practical effect applied only in Jefferson County. *Winston* instructs that although Jefferson County is now the only county with a consolidated local government, SB 1 "would apply to all counties of that class within the state." *See id.* For this simple reason, as in *Winston*, the Board's Section 59 argument "cannot be sustained." *See id.*

That brings us to how the courts below got turned around. Start with the circuit court. The circuit court did not meaningfully engage with *Woodall*'s simple test. In fact, the court got very close to arguing with it. Tab 1 at 3 ("The undersigned readily admits he has no idea what [*Woodall*] means as a practical matter."). Rather than apply *Woodall*'s test, the circuit court offered two hypotheticals, one about Edmonson County and the other about former Governor Bevin, that it believed demonstrate that "truly silly classifications could, and no doubt would, proliferate" if SB 1 were constitutional. *Id.* at 4. In so doing, the circuit court leveled the very criticism that *Woodall* predicted *and rejected*. As noted above, *Woodall* recognized that some may argue that under its "simple test" legislators can "draft around" Section 59 by "avoiding express reference" and by "articulating criteria . . . that as a practical matter only a specific person, entity, or locale can satisfy." 607 S.W.3d at 573. That is exactly the circuit court's point with its two hypotheticals: the legislature could avoid explicitly saying Edmonson County or former Governor Bevin in legislation by crafting highly individualized criteria. Tab 1 at 5.

The Attorney General does not dispute that these hypothetical laws are "truly silly," as the circuit court found. But *Woodall* tells us that "[t]he answer" to such outlandish laws is an equal-protection challenge. *Woodall* was confident that Kentucky's equal-protection guarantees would stand strong against such "truly silly" laws. 607 S.W.3d at 573 ("Over the last 130 years, courts have had experience with the [Section 3] analysis and have shown little hesitancy in engaging a more rigorous analysis with respect to classification legislation."). And even though the Attorney General is charged with defending the constitutionality of Kentucky's laws, he has no hesitation admitting that a litigant suing about a law singling out Edmonson County for unfavorable treatment based on its many caves would have an airtight equal-protection case. In addition, a litigant who challenges a law giving any former Governor a free pass from our traffic laws based on name and home address would have a winning case, too.

The circuit court's response to *Woodall* was to profess to having "no idea what . . . [*Woodall*] means as a practical matter." Tab 1 at 2–3. Respectfully, this part of *Woodall* directs—plainly—that the appropriate way to address the circuit court's concerns about "truly silly" laws is through an equal-protection challenge. *See Woodall*, 607 S.W.3d at 573. Indeed, the circuit court seemed to recognize this very point later in its decision. Tab 1 at 5 (addressing equal protection "out of abundance of caution" because "the Kentucky Supreme Court might say the

provisions [of SB 1] cannot be unconstitutional special or local legislation because they apply to an entire class (albeit one specific locale) of school board(s)").

Turn now to the Court of Appeals' decision, which considered *Woodall* at much more length. Its reasoning, however, departed from *Woodall* in several respects. Most obviously, the panel held 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." *Cameron*, 2023 WL 6522192, at *9 (emphasis added). That misreads *Woodall*. When *Woodall* spoke of a "more rigorous analysis," it was discussing how Section 3's equal-protection guarantee operates as a constitutional backstop. 607 S.W.3d at 573. On this point, there can be no doubt. The sentence in *Woodall* with the phrase "more rigorous analysis" was discussing "classification legislation," *id.*—the province of Section 3. Indeed, Justice Keller's separate opinion in *Woodall* understood this part of the majority's decision exactly this way. *Id.* at 582 (Keller, J., concurring in part and in result only) ("[T]he majority asserts that the 'exclusive, separate privilege' prohibition of section 3 prevents such abuse."). By endorsing a "more rigorous analysis" under Section 59, the Court of Appeals effectively returned us to a paradigm that "equate[s] special/local legislation with class legislation," contrary to *Woodall*'s holding. *See id.* at 567.

The Court of Appeals next error was overreading *Woodall*'s endorsement of the result reached in *Pennybacker*. In the panel's view, the most important part

of *Woodall* was its passing mention of *Pennybacker* in a footnote. This footnote, the Court of Appeals determined, was "[o]f key importance." *Cameron*, 2023 WL 6522192, at *8. The footnote of course matters. After all, the Court saw fit to include it. But it stands for only a modest proposition. As discussed above, *Woodall*'s approval of *Pennybacker*'s result recognizes that the legislature can create a closed class by writing a law that can "only be read" to apply to a particular school. *See Pennybacker*, 308 S.W.3d at 683. This footnote, however, takes nothing away from *Woodall*'s unmistakable holding that Section 59 is not concerned with the General Assembly "articulating criteria for a statute's application that as a practical matter only a specific person, entity or locale can satisfy." *See Woodall*, 607 S.W.3d at 573.

This leads to the Court of Appeals' final error in applying *Woodall*. The panel found *Woodall*'s test to be satisfied based on only legislative history. *See Cameron*, 2023 WL 6522192, at *9. It relied on an amicus brief filed below by Senate President Robert Stivers and another legislator's floor statement about SB 1 to conclude that "[t]he unmistakable intent of the legislature in this case was to ameliorate problems specific to Jefferson County." *Id. Woodall*'s test, however, turns on statutory text, not on what one or two legislators think or said. *See Cates v. Kroger*, 627 S.W.3d 864, 872 (Ky. 2021) (applying *Woodall* by considering "[t]he statutory text at issue here"). On top of that, this Court is "generally reluctant"

to use legislative history as an aid to discern legislative intent.[18] *MPM Fin. Grp., Inc. v. Morton*, 289 S.W.3d 193, 198 (Ky. 2009). With good reason. "Inquiries into [legislative] motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). And presuming, as the Court of Appeals did, that a majority of legislators all voted for a bill because of the reasons given by a legislator in a floor speech or in a later-filed amicus brief is more hazardous still. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) ("[T]he legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents.").

Even if Court goes down the bumpy road of considering legislative history, all it shows is legislators faithfully doing the job Kentuckians elected them to do. Given that at present the only consolidated local government is in Jefferson County, it should come as no surprise that legislators considered the situation on the ground in Jefferson County while debating SB 1. Such consideration does not betray a sinister motive. It is *good government*—exactly what we hope happens in Frankfort. A legislator considering how to vote on a bill affecting consolidated local governments would not be doing her job if she altogether ignored the current state of affairs in Jefferson County. The Court of Appeals'

[18] This Court will consider legislative history in narrow circumstances. Under precedent, it can be relevant if the statutory text is ambiguous. *See Morton*, 289 S.W.3d at 198. But the text of SB 1 unambiguously creates an open class, as discussed above.

contrary reasoning would lead to the nonsensical result that the General Assembly could not consider the most relevant evidence related to a law under consideration, lest it violate Sections 59 and 60. Kentuckians should expect their legislators to carefully consider what's happening back home in their districts before voting on all laws, especially when the education of Kentucky's children is at stake.

Beyond this, it should go without saying that this case matters a great deal to the General Assembly's ability to pass laws like SB 1 going forward. Put differently, the stakes here could not be higher for Louisville Metro as the single consolidated local government at present in our Commonwealth. Indeed, the rulings below, taken to their logical end, cast serious doubt on the General Assembly's prerogative to legislate with respect to consolidated local governments. If the Court adopts the Court of Appeals' legislative-history reasoning, the General Assembly apparently can legislate about consolidated local governments only if legislators happen not to mention the only consolidated local government while debating the law. Judged by that metric, it's hard to imagine any law about consolidated local governments that would survive scrutiny under Section 59.[19]

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[19] Louisville Metro is not the only locality that will be affected by the ruling here. As noted above, Lexington and Fayette County currently operate as an urban county government, which is permitted in any county "except a county containing a city of the first class." KRS 67A.010. This aspect of an urban county government has long been permissible under Section 59. *Holsclaw*, 507 S.W.2d at 472 (holding that even though this form of local government "is applicable to one-

Consider a timely example. This past legislative session, the General Assembly made local elections in a consolidated local government nonpartisan. 2024 House Bill 388, §§ 4, 5. The legislative debates about this bill were unsurprisingly filled with references to Louisville Metro. *E.g.*, Sylvia Goodman, *Kentucky legislature reshapes Louisville's future, ending partisan mayoral elections*, Kentucky Public Radio (Mar. 28, 2024), https://perma.cc/ZCN3-L965. As was the Governor's veto message. As a result, this law could be readily subject to challenge under the Court of Appeals' legislative-history theory. After all, it would likely be difficult to contest that "[t]he unmistakable intent of the legislature [with this law] was to ameliorate problems specific to Jefferson County." *See Cameron*, 2023 WL 6522192, at *9.

As this recent example shows, SB 1 is not the only statute in the KRS that applies only in a consolidated local government. In fact, we have *an entire statutory chapter* that shares this basic trait with SB 1. KRS Chapter 67C establishes a host of unique requirements and grants a number of combined powers that apply only in a consolidated local government. As this Court has summarized, a consolidated local government "possesses enhanced authority that is distinct from other municipalities." *Ky. Rest. Ass'n v. Louisville/Jefferson Cnty. Metro Gov't*, 501 S.W.3d

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hundred and nineteen counties" "[a]t the present time," it "is a general act, not special, in that it applies generally to all counties except those which contain a city of the first class").

425, 428 (Ky. 2016). Other than its statutory address, KRS Chapter 67C is no different than SB 1. Both apply only in a consolidated local government. If KRS Chapter 67C comports with Sections 59 and 60 (it of course does), the same must be true for SB 1. *See Holsclaw*, 507 S.W.2d at 470 ("We see no reason why the General Assembly may not establish a new unit of local government in which are combined the powers of both city and county governments.").

The Board may try to distinguish SB 1 from KRS Chapter 67C because they reside in different statutory chapters. That non-distinction elevates form over substance, especially because SB 1 itself references KRS Chapter 67C. KRS 160.370(2) (stating that it applies in "a county school district in a county with a consolidated local government adopted under KRS Chapter 67C"). SB 1 is far from unique. Although the Attorney General recognizes that the next two paragraphs listing statutes similar to SB 1 make for a tiresome read, he provides them to show the ubiquity of laws like SB 1.

To begin with, there are other education-related laws that apply only in a consolidated local government. Indeed, some of these statutes track the precise language of SB 1. *E.g.*, KRS 160.345(2)(h)3. (providing a unique procedure for filling a vacancy for a "principal in a county school district in a county with a consolidated local government adopted under KRS Chapter 67C"); KRS 160.597(1)(c) (establishing a distinct procedure for recalling a school tax in "con-

solidated local governments"); KRS 161.720(4)(c) (providing a different definition of the term "continuing service contract" for certain teachers "in a county school district in a county with a consolidated local government adopted under KRS Chapter 67C"); KRS 161.740(4) (providing that certain teachers "shall not be issued a written continuing contract" in a "county school district in a county with a consolidated local government adopted under KRS Chapter 67C"); KRS 161.765(1)(b) (addressing when a superintendent may "demote an administrator" who is "in a district-level administrative position in a county school district in a county with a consolidated local government adopted under KRS Chapter 67C").

In addition, non-education statutes similar to SB 1 abound outside of KRS Chapter 67C. *E.g.*, KRS 65.500 to 65.506 (creating the West End Opportunity Partnership in a consolidated local government with specified boundaries); KRS 69.130 (requiring a consolidated local government to provide an automobile for the use of the Commonwealth's Attorney for that county); KRS 77.320(1) (providing for discontinuance of a vehicle-emissions testing program in a consolidated local government); KRS 99.727(2) (allowing the legislative body of a consolidated local government to establish a tax delinquency diversion program for blighted property); KRS 117.088 (creating a pilot program in a county containing a consolidated local government to permit blind and visually impaired individuals to vote without assistance); KRS 198B.290 (providing for certain building permits in counties with a consolidated local government).

This list of statutes is a long way of making a simple point. Whatever this Court says about SB 1 here will have undeniable implications for KRS Chapter 67C as well as many other statutes about consolidated local governments. For all these reasons, the Court should uphold SB 1 under Sections 59 and 60.

B. An equal-protection challenge is not before the Court.[20]

The Court should address only the Board's special-legislation claim and nothing else for the simple reason that it is the only claim the Board alleged in its complaint. The circuit court, however, went further. It decided "out of an abundance of caution" to "extend its analysis" to conclude that SB 1 also violates equal protection. Tab 1 at 5–6. But the Board, represented by capable counsel, did not bring an equal-protection claim in its complaint. R. 1–10. And before the Court of Appeals, the Board, again with capable counsel, expressly waived any equal-protection claim. Board COA Br. at 10 n.2. The Court should accept that waiver and accordingly limit its analysis.

As a matter of procedure, the Board was "the master of [its] complaint." *See Bradley*, 653 S.W.3d at 879. The only claim it brought was that SB 1 violates Sections 59 and 60 of the Constitution. R. 8–9. For whatever reason, the Board

[20] Because the Board did not plead an equal-protection claim below, the Attorney General did not have the opportunity to preserve such an argument in circuit court. The Attorney General did raise this argument in the Court of Appeals. AG COA Br. at 26–28.

did not to bring an equal-protection claim. That decision matters. Our adversarial system depends on courts not acting as "self-directed boards of legal inquiry and research," but serving "essentially as arbiters of legal questions presented and argued by the parties before them." *Delahanty v. Commonwealth*, 558 S.W.3d 489, 503 n.16 (Ky. App. 2018) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)). Put more directly, courts "do not, or should not, sally forth each day looking for wrongs to right." *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (citation omitted). Instead, courts should "wait for cases to come to [them]" and "normally decide only questions presented by the party." *Id.* (citation omitted).

This foundational rule, known as the party-presentation principle, should apply with added force when a plaintiff challenges the constitutionality of Kentucky law. That is because the "non-enforcement of a duly-enacted statute constitutes irreparable harm to the public and the government." *Cameron v. Beshear*, 628 S.W.3d at 73. In addition, "[a] judge's *sua sponte* declaration of unconstitutionality is a derogation of the strong presumption of constitutionality accorded legislative enactments." *Delahanty*, 558 S.W.3d at 504 (citation omitted). As a result, the circuit court could not have been more wrong to extend its constitutional analysis sua sponte "out of an abundance of caution." Tab 1 at 5. Caution

cuts in the opposite direction—in favor of judicial modesty. At bottom, Kentucky courts should be loath to invalidate a duly enacted statute on a basis not pleaded and not argued.

This reticence pairs perfectly with the importance of a plaintiff following Kentucky's rules of civil procedure. Under CR 8.01, a plaintiff must "set[] forth a claim for relief." This is not a particularly high bar. The claim for relief must simply contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for judgment for the relief to which he deems himself entitled." *Id.* The Board did not even try to plead an equal-protection claim here. The Board has admitted as much. Board COA Br. at 10 n.2 ("The Attorney General correctly notes in his brief that the Board did not bring a due process or equal protection claim under Ky. Const. §§ 2-3."). If our procedural rules are the "lights and buoys to mark the channels of safe passage" in litigation, *Gasaway v. Commonwealth*, 671 S.W.3d 298, 314 (Ky. 2023) (citation omitted), the Board should be held responsible for its failure to plead an equal-protection claim.[21]

[21] This is especially true here because the equal-protection claim sustained by the circuit court was based on the alleged rights *not* of the Board, but of "voters, parents, students, and taxpayers of Jefferson County." Tab 1 at 5; *see also id.* at 6 (finding SB 1 violates "Jefferson County residents' rights to equal protection"). Thus, not only did the circuit court sustain a claim that the Board did not plead, but it sustained a third-party claim that the Board *could not have brought*. *See EMW Women's Surgical Ctr.*, 664 S.W.3d at 650–51 (setting forth the three requirements

The Board also should be held to what it said before the Court of Appeals. In its brief there, it knowingly declined to address equal protection even though the Attorney General's brief argued the issue out of an abundance of caution given the circuit court's decision. In the Board's words, it "does not elect to pursue those claims here, and consequently does not address that discussion in the Circuit Court's declaratory judgment or in the Attorney General's brief." Board COA Br. 10 n.2. This statement is not a forfeiture; it is an affirmative waiver of the claim. *See Gasaway*, 671 S.W.3d at 314 (discussing the difference). And "[t]he valid waiver of a known right *precludes* appellate review." *Id.* (emphasis added).

CONCLUSION

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

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in Kentucky "for a litigant to have third-party standing to assert the constitutional rights of another in order to obtain relief for himself or herself").

Respectfully submitted,

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WORD-COUNT CERTIFICATE

This brief complies with the word limit of RAP 31(G)(3)(a) because, excluding the parts of the brief exempted by RAP 15(D) and 31(G)(5), this brief contains 15,311 words.

APPENDIX

Tab	Description
1	Opinion and Order, R. 217–24, entered July 11, 2022 (Jefferson Cir. Ct.)
2	Order Amending July 11, 2022 Opinion and Order, R. 229, entered July 18, 2022 (Jefferson Cir. Ct.)
3	Opinion, *Cameron v. Jefferson Cnty. Bd. of Educ.*, 2023 WL 6522192 (Ky. App. Oct. 6, 2023)

Exhibit 1

CASE NO. 22-CI-002816

JEFFERSON CIRUCIT COURT
DIVISION FOUR (4)
JUDGE CHARLES L. CUNNINGHAM, JR.

JEFFERSON COUNTY BOARD OF EDUCATION PLAINTIFF

V. **DECLARATORY JUDGMENT**

DR. JASON GLASS, ETC. DEFENDANT

# # # # # #

This matter is before the Court for a determination of whether a recent legislative enactment impacting the operations of Jefferson County's public schools violates the Kentucky Constitution. A conference was held on June 10, 2022. Pleadings have been submitted consistent with the Court's directive entered that day. There appears to be a consensus that a hearing to take testimony or otherwise create an evidentiary record is unnecessary. Therefore, the matter stands submitted for a decision. Having considered the arguments of counsel and applicable law, for the reasons which follow, the Court finds that certain provisions of the recently enacted SB 1 violate the Kentucky Constitution and the Court is compelled to enter a judgment directing the Jefferson County Board of Education that it need not follow those provisions.

Kentucky's Constitutional Bar to Special or Local Legislation

When the drafters of Kentucky's current constitution met in 1890, one of their concerns was the proclivity of the legislative branch to enact laws which treated particular Kentuckians or their communities or their businesses differently for no justifiable reason. Education was another topic of considerable discussion with various delegates singing the praises of government support for common and higher education. The amounts appropriated for

education in other states was reviewed and Kentucky's efforts were generally found to be lagging behind -- which the delegates set out to rectify. §§183 – 189 deal with education.

These twin concerns intersected in §59(25): "The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: . . .Twenty-fifth: to provide for the management of common schools."

Broader constraints against abuse of legislative (or judicial or executive) power are found in the first few sections of the adopted Constitution, *i.e.*, ". . .arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." §2. These provisions are generally utilized by courts to afford Kentuckians "equal protection" under the laws in a roughly similar manner to that provided by §14 of the federal constitution.

Current Kentucky Common Law Approach to Local or Special Act Analysis

The current approach for analyzing whether a law passed by the General Assembly violates the prohibition against special or local legislation is set out in *Calloway County Sheriff's Dept. vs. Woodall,* 607 S.W.3d 557 (Ky. 2020):

> To summarize, and for the sake of clarity going forward, 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. As for analysis under Sections 59 and 60, the appropriate test is whether the statute applies to a particular individual, object or locale.

Id., at 573. *Woodall* reversed a line of cases which had found various legislation unconstitutional because, although ostensibly appliable to an entire class of persons or localities, there was no reasonable basis for the classification. Thus, in *Tabler vs. Wallace,* 704 S.W.2d 179 (Ky. 1986), the Kentucky Supreme Court struck down a statute of repose for construction-related entities. *Woodall* anticipated the challenge its holding would pose for those feeling singled out by vexatious, or simply clueless, legislation and seeking the courts' protection:

> Some may say that with this simple test legislators will be able to draft around the Section 59 prohibition by avoiding express reference to a specific person, entity or locale but articulating criteria for a statute's application that as a practical matter only a specific person, entity or locale can satisfy, essentially reverting to the ways of the 1870s and 1880s.19 The answer to this objection is that Kentucky's courts, in that pre-1891 Constitution period, had only just begun to apply the "exclusive, separate" privilege prohibition of the Bill of Rights to evaluate class or partial legislation, and to equate that section with equal protection. Over the last 130 years, courts have had experience with the analysis and have shown little hesitancy in engaging a more rigorous analysis with respect to classification legislation.

Id. The undersigned readily admits he has no idea what this means as a practical matter.

Plaintiff's Concerns and Argument Regarding SB 1

SB 1 of the 2022 general session changes a number of details about the operation of common schools in Kentucky. However, the Plaintiff only takes issue with a handful which directly impact the role of the elected school board *vis-à-vis* Jefferson County's school superintendent, and which only apply to said district. Those clauses are 3(2)(a)(1), 3(2)(a)(2), 3(2)(b)(2), and 3(2)(b)(5). If the legislation was drafted to say something to the effect of "in Jefferson County, but not any other Kentucky county, the following provisions shall apply . . .", it would be a simple matter to strike those provisions as being unconstitutional because they apply to 'a particular locale' as proscribed in §59 and *Woodall.* However, the law is expressly applicable to any "county school district in a county with a consolidated local government adopted under KRS Chapter 67C." Plaintiff points out this is a class of one, and only one, locale – Jefferson County.

Plaintiff's concern is not a mere didactic scolding of the legislature. The provisions would require the Plaintiff to:

(a)(1) = delegate authority to the superintendent over many aspects of school operations

(a)(2) = with limited exceptions, meet not more than once every four (4) weeks

(b)(2) = require a two-thirds vote to deny approval of most superintendent actions

(b)(5) = assigns authority to the superintendent regarding expenditures of $250,000 or less.

These provisions are a significant transfer of power away from the Board and no member worthy of their position would acquiesce in such a transfer to the extent the General Assembly's enactment was unconstitutional.

The Attorney General's Response on the Merits of Plaintiff's Motion

The pleading filed by Attorney General Daniel Cameron raises a number of arguments in opposition to Plaintiff's motion for relief. These include what might be described as legalistic assertions that no controversy exists yet, that the necessary or appropriate parties have not been brought before the Court, and the Board lacks standing to pursue the matter. The Court will address these in a moment.

First, however, the Court will address the fundamental question of constitutionality – because sooner or later that question will have to be answered, and AG Cameron has set out the argument that it is constitutional as best as one could. That argument distills down to this; the General Assembly didn't single out Jefferson County, it singled out counties with a type of governance that only exists in Jefferson County. Importantly, in theory, if additional counties a) grew significantly in terms of their population, and b) chose to adopt the 67C form of governance, then the provisions could apply to two or possibly more counties. Thus, this is not special or local legislation.

The Court's Determination on the Merits

The Attorney General's argument cannot be the law of Kentucky without essentially saying that §59(25) of the *Kentucky Constitution* no longer exists. But the problem with that is that it *does* exist. If the language of SB 1 was all it took to enact special or local legislation, truly silly classifications could, and no doubt would, proliferate. So, as an example, if Edmundson County did something to irritate the leadership in the General Assembly, and those leaders

decided to single it out for retribution, all they'd have to do is designate the law to apply to all counties containing a cave system greater than 400 miles in length. Sure, right now, that means only Edmundson County. But potentially, someday, somewhere, we might discover that Mother Nature had carved out a comparable set of passages through the limestone of Kentucky and thus nobody was picking on the good citizens of Edmundson County! Taken in the other direction, if a recent Governor had wanted to get some relief from our pesky traffic laws, he might have persuaded his Republican pals in the House and Senate to pass a bill saying that no one named Matt Bevin residing at [redacted] in Louisville was required to comply with KRS Chapter 189. While that law would waddle, quack, and swim like a piece of fine-feathered special legislation, it actually wouldn't be according to the Attorney General. You see, Governor Bevin might someday have a son named Matt living there too or even a grandson (or his father, if he's a junior). That whole class of Matt Bevins would be exempt, not just the Governor! The Court is compelled to agree with the Plaintiff. The provisions of HB 1 which only apply to Jefferson County violate §59(25). It is not even a close call.

However, out of an abundance of caution, the Court will extend its analysis since the Kentucky Supreme Court might say the provisions cannot be unconstitutional special or local legislation because they apply to an entire class (albeit one specific locale) of school board(s). This takes us (it seems) to an equal protection analysis which is going to waddle, quack, and swim like the old "reasonable basis" standard from *Tabler, et al,* but, of course, is something entirely different.

The voters, parents, students, and taxpayers of Jefferson County are entitled to equal protection under the law. In this context, the Commonwealth of Kentucky may not treat those folks arbitrarily. In certain respects, because Jefferson County is Kentucky's most populous county, by a wide margin, reasonable legislators will treat it differently from all other counties. But in other respects (as enumerated in §59) the legislature must treat all communities the same

or at least have a basis for singly out a particular community (okay, a particular *class of communities*). So, given that the Jefferson County Board of Education oversees the largest school district in Kentucky, are the provisions in question reasonable things to impose essentially only here or are they, by any rational assessment, arbitrary?

Defendant Glass supplied what is available in the way of legislative history on the bill and it seems devoid of any suggestion as to why Jefferson County was being singled out in these provisions aside from comments that some unnamed person or persons indicated 'we wanted to keep doing things the way we have because it works.' This makes no sense because, it seems, "we" hadn't been doing things that way. If legislators wanted to address how often a school board can meet, if it did anything, it would allow extra meetings in Jefferson County, where there is so much to wrangle with, as opposed to limiting meetings in our largest district. Frankly, if having the superintendent control things as much as HB 1 seems to think is advisable for Jefferson County is a good thing, then why isn't it a good thing for all counties? No one seems to be able to articulate such a reason. Why in Jefferson County, and only in Jefferson County, is it prudent to require a super-majority to override an action of the superintendent?

Given the impact the provisions would have over the education of Jefferson County students, over the considerable tax revenue Jefferson County taxpayers devote to their schools, and over local citizens' liberty to influence the path of their common schools with their franchise, §2 of the Constitution prohibits an arbitrary assertion of control, or power, over those things. Yet, there is no intellectually honest way to describe the provisions in question as anything other than an arbitrary assertion of power. Thus, HB 1, to the extent it singles out Jefferson County, violates Jefferson County residents' right to equal protection under the law and is therefore unconstitutional on that basis or analysis as well.

Extent of the Court's Determination

It seems prudent to clarify precisely what the Court is, and isn't, doing. What it is doing is declaring that the Plaintiff Jefferson County Board of Education does not have to comply with the provisions of HB 1 complained of. This Judgment does not however strike down the entire bill as unconstitutional. All the many other provisions of the new and revised statutes are to be complied with.

This Court is not making a policy judgment that the provisions are bad policy. If the General Assembly sees fit to enact the same provisions in the next or a future session, and applies those provisions to all school boards, then Jefferson County will have to fall in line, irrespective of this ruling. The undersigned took an oath to uphold the Kentucky Constitution. But no judge takes the oath of a legislator and this Court has neither the power nor the desire to make those policy decisions.

This Court is not entering an injunction. It does not envision, absent a differing opinion being issued by an appellate court, that anyone will be actively trying to enforce the contested provisions once this declaratory judgment has been disseminated. This judgment is being entered prior to the effective date of the statute. Should anyone actually attempt, by prosecution or litigation, to enforce the provisions in question, this Court would retain jurisdiction to address same. Then an injunction might be appropriate.

Other Issues

The Attorney General contends there is no justiciable controversy because Superintendent Polio has not asserted an intention to invoke his new powers and Defendant Glass similarly does not appear poised to take action. But this is an impractical, unworkable contention. Contracts no doubt will be inked here in Jefferson County on, or shortly after, July 14 for matters involving between $20,000 and $250,000. Who signs off? Should the persons about to undertake those

contractual obligations have to wonder whether they got a valid approval? If the Board finds itself needing to call a meeting in both the first and third weeks of August to address critical matters for the beginning of a new school year, does it have to wait for this sort of legal process to both begin and end before publicly announcing the meetings? These are but two of what would undoubtedly be a myriad of issues where the new provisions will stand in conflict with the old. The school children of Jefferson County and their parents deserve a timely answer to these questions and this Court is required to provide it.

The Attorney General claims the Plaintiff lacks standing to bring this action. On the contrary, the Court believes the Plaintiff is the only entity with standing to seek a ruling on the unconstitutionality of the provisions.

While in theory Superintendent Polio is the person most negatively impacted by this ruling, he is not a necessary party. More importantly, given that Plaintiff's counsel has, as ethically as possible, suggested Mr. Polio has no interest in defending the law, and an injunction against him is not being issued, it is essentially a moot point. What matters, in reality, is that someone assert before the Court any countervailing argument addressing Plaintiff's claims, so the issue is fairly contested and weighed. The Attorney General and his colleagues have done as good a job as one could, given the rather miserable hand they were dealt by the General Assembly.

WHEREFORE, the motion for a declaratory judgment is GRANTED.

This is a final and appealable ruling, there being no just reason for delay.

CHARLES J. CUNNINGHAM, JR., JUDGE

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
JUL 11 2022
BY _____
DEPUTY CLERK

xc: David Tachau
Todd Allen
Heather Becker

Exhibit 2

NO. 22-CI-002816

JEFFERSON CIRCUIT COURT
DIVISION FOUR (4)
JUDGE CHARLES L. CUNNINGHAM, JR.

JEFFERSON COUNTY BOARD OF EDUCATION PLAINTIFF

v.

ORDER AND JUDGMENT
Electronically Filed

DR. JASON E. GLASS, in his official capacity as Commissioner of Education DEFENDANT

* * * * *

Plaintiff JCBE having moved to have the Court alter its July 11, 2022 "Declaratory Judgment," and the Court being sufficiently advised,

IT IS SO ORDERED AND ADJUDGED. Pursuant to the Court's findings and analysis contained in its July 11, 2022 "Declaratory Judgment," which is adopted as if restated in full with this addition, the specific provisions of Section 3(2) of Senate Bill 1 as enacted by the 2022 Regular Session of the Kentucky General Assembly which are declared to have been enacted in violation of Kentucky Constitution Section 59 and thus unenforceable, are the following: Sections 3(2)(a)(1) and 3(2)(a)(2), 3(2)(b)(2) and 3(2)(b)(5), and 3(2)(c).

This is a final and appealable Order and Judgment, and there is no just cause for delay.

Entered: _____ Judge, Jefferson Circuit Court

ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
JUL 18 2022
BY _____ DEPUTY CLERK

Tendered by:

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Counsel for Main Street Revitalization LLC

Exhibit 3

2023 WL 6522192
Only the Westlaw citation is currently available.

Court of Appeals of Kentucky.

Daniel CAMERON, Attorney General, on Behalf of the Commonwealth of Kentucky, Appellant
v.
JEFFERSON COUNTY BOARD OF EDUCATION and Dr. Jason E. Glass, in His Official Capacity as Commissioner of Education, Appellees

NO. 2022-CA-0964-MR
|
October 6, 2023; 10:00 A.M.

Synopsis

Background: School board brought action against Commissioner of Education of Kentucky seeking declaratory judgment stating that provisions of statute that placed restrictions on powers of local boards of education and gave more autonomy and power to superintendents violated state constitutional ban on special and local legislation. Attorney General entered appearance to defend constitutionality of the legislation. The Circuit Court, 30th Circuit, Jefferson County, Charles L. Cunningham, J., entered declaratory judgment holding that the provisions violated the constitutional ban on special and local legislation and also violated the equal protection clause of the state constitution. Attorney General appealed.

Holdings: The Court of Appeals, Karem, J., held that:

school board had standing;

superintendent was not a necessary party to the action; and

challenged provisions violated constitutional ban on local or special legislation.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment.

West Codenotes

Held Unconstitutional

Ky. Rev. Stat. Ann. §§ 160.370(2)(a)(1), 160.370(2)(a)(2), 160.370(2)(b)(2), 160.370(2)(b)(5), 160.370(2)(c)

APPEAL FROM JEFFERSON CIRCUIT COURT, HONORABLE CHARLES L. CUNNINGHAM, JUDGE, ACTION NO. 22-CI-002816

Attorneys and Law Firms

BRIEFS FOR APPELLANT: Victor B. Maddox, Deputy Attorney General, Matthew F. Kuhn, Solicitor General, Frankfort, Kentucky.

ORAL ARGUMENT FOR APPELLANT: Victor B. Maddox, Deputy Attorney General, Matthew F. Kuhn, Solicitor General, Frankfort, Kentucky.

AMICUS BRIEF FILED FOR SENATOR ROBERT STIVERS, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE SENATE: David Fleenor, Frankfort, Kentucky, Sheryl G. Snyder, Louisville, Kentucky.

BRIEF FOR APPELLEE JEFFERSON COUNTY BOARD OF EDUCATION: David Tachau, Katherine Lacy Crosby, Amy D. Cubbage, Louisville, Kentucky.

BRIEF FOR APPELLEE JASON E. GLASS, COMMISSIONER OF EDUCATION: Ashley Lant, Frankfort, Kentucky.

ORAL ARGUMENT FOR APPELLEE JEFFERSON COUNTY BOARD OF EDUCATION: David Tachau, Katherine Lacy Crosby, Amy D. Cubbage, Louisville, Kentucky.

BEFORE: CALDWELL, COMBS, AND KAREM, JUDGES.

OPINION

KAREM, JUDGE:

***1** In 2022, the Kentucky General Assembly passed an omnibus education bill, Senate Bill (S.B.) 1, entitled "an Act

relating to education and declaring an emergency."[1] Section 3(2) of S.B. 1, codified in Kentucky Revised Statutes (KRS) 160.370(2), significantly modifies the relationship between local boards of education and superintendents, by giving greater autonomy and power to the superintendents. KRS 160.370(2) only applies, however, in "a county school district in a county with a consolidated local government[.]" KRS 160.370(2). The only school district which meets this description is that of Jefferson County.

1 2022 Ky. Acts ch. 196, S.B. 1.

The Jefferson County Board of Education (the Board) sought a declaratory judgment in Jefferson Circuit Court, contending that five specific provisions of KRS 160.370(2) violate the ban on special and local legislation found in Sections 59 and 60 of the Kentucky Constitution. The circuit court ruled that the contested provisions violated not only Section 59 but also the equal protection clause found in Section 2 of the Kentucky Constitution.

The appellant, the Attorney General of Kentucky, argues that the Board lacked constitutional standing to challenge the legislation and failed to name a necessary party to the suit. As to the merits, he argues that the challenged provisions survive constitutional scrutiny under Sections 59 and 60 because they do not apply to a particular individual, object, or locale and that the legislation creates a classification which passes rational basis review for purposes of equal protection.

Upon careful consideration, we hold that the Board had standing to bring this suit, that it did not fail to name a necessary party, and that the contested provisions of KRS 160.370(2) are local or special legislation prohibited under Sections 59 and 60 of the Kentucky Constitution.

I. FACTUAL AND PROCEDURAL BACKGROUND

The five subsections of KRS 160.370(2) at issue in this appeal provide as follows:

> (2) For a county school district in a county with a consolidated local government adopted under KRS Chapter 67C:
>
> (a) A local board of education shall:
>
> 1. Delegate authority to the superintendent over the district's day-to-day operations and implementation of the board-approved strategic plan in a manner that promotes the efficient, timely operation of the district, including but not limited to the authority over contracts related to daily operations of the district, pupil transportation, personnel matters, and the organizational structure of administrative staff;
>
> 2. Except as expressly required by statute, including subparagraphs 3. and 5. of this paragraph, not meet more than once every four (4) weeks for the purpose of approving necessary administrative matters[.]

KRS 160.370(2)(a)1., 2.

> (b) Notwithstanding any provision to the contrary in subsection (1) of this section, the superintendent shall:
>
> 2. Prepare 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; [and]
>
> ***2** ....
>
> 5. Notwithstanding any law that assigns an administrative duty, responsibility, or authority to a board of education, or other law to the contrary, be responsible for any administrative duty not explicitly granted to the board under paragraph (a) of this subsection[.]

KRS 160.370(2)(b)2., 5.

> (c) If the county adopts the provisions of the Kentucky Model Procurement Code, the board shall authorize the superintendent to approve purchases, in accordance with small purchase procedures adopted by the board, for any contract for which a determination is made that the aggregate amount of the contract does not exceed two hundred fifty thousand dollars ($250,000). The board shall authorize the superintendent to approve a line-item transfer within its annual budget

> as she or he deems necessary, provided that the aggregate amount of any individual transfer does not exceed two hundred fifty thousand dollars ($250,000). The superintendent shall provide a quarterly report to the board on any purchases made under this subsection.

KRS 160.370(2)(c).

To summarize, the provisions that are being challenged require the school board to give the superintendent authority over the "day-to-day operations and implementation of the board-approved strategic plan"; require the board to limit its meetings to once every four weeks; require a two-thirds vote of the board to disapprove a rule, regulation, by-law, or statement of policy of the superintendent; require the board to grant the superintendent responsibility for "any administrative duty not explicitly granted to the [school] board"; and require the board to authorize the superintendent to make purchases not exceeding $250,000 and transfers to the annual budget in the same amount, without board approval.

As previously stated, the Jefferson County school district is currently the only "county school district in a county with a consolidated local government adopted under KRS Chapter 67C[.]" KRS 160.370(2).

The Board's complaint named one defendant, Dr. Jason E. Glass, in his official capacity as the Commissioner of Education of Kentucky (the Commissioner). The complaint sought a declaratory judgment that the challenged provisions of S.B. 1 violate the prohibition against special or local legislation found in Sections 59 and 60 of the Kentucky Constitution and requested temporary and permanent injunctive relief. The Attorney General entered an appearance, pursuant to KRS 418.075(1) and KRS 15.020(3), to defend the constitutionality of the legislation.

The circuit court conducted a hearing at which the Commissioner expressed no opinion regarding the constitutionality of the provisions, or whether he would enforce them, stating it was not his role to determine if they were constitutional and that he had to assume they were constitutional until told otherwise. The Attorney General argued that because the Commissioner was not taking a position contrary to the Board it was unclear whether a case or controversy existed. Counsel for the Board indicated that Dr. Marty Pollio, the Superintendent of the Jefferson County School District, was not planning to defend the challenged provisions.

***3** The Jefferson Circuit Court entered a declaratory judgment holding that the challenged provisions violate Section 59 of the Kentucky Constitution, which prohibits special and local legislation. Of its own accord, it held that the provisions also violate the equal protection clause of Section 2 of the Kentucky Constitution. Its order declared that the Board did not have to comply with the provisions, but it did not enter an injunction, explaining that it did "not envision, absent a differing opinion being issued by an appellate court, that anyone will be actively trying to enforce the contested provisions once this declaratory judgment has been disseminated." The circuit court retained the right to enter an injunction if any attempts were made to enforce the provisions after the date the statute became effective. Upon unopposed motion by the Board, the circuit court entered a motion to amend the judgment to clarify the specific provisions of S.B. 1 to which the declaratory judgment applied. This appeal by the Attorney General followed. The President of the Kentucky Senate, Robert Stivers, submitted an *amicus curiae* brief defending the legislation.

II. STANDARD OF REVIEW

"The standard of review on appeal from a declaratory judgment is whether the judgment was clearly erroneous." *Public Service Commission of Kentucky v. Metropolitan Housing Coalition*, 652 S.W.3d 648, 651 (Ky. App. 2022), *discretionary review denied* (Oct. 12, 2022) (citing *American Interinsurance Exchange v. Norton*, 631 S.W.2d 851, 852 (Ky. App. 1982)).

III. ANALYSIS

i. The Board had standing to challenge the statutory provisions

The Attorney General argues that the Board lacked constitutional standing to bring this suit. Whether the Board has standing "is a jurisdictional question of law that is reviewed *de novo*." *Ward v. Westerfield*, 653 S.W.3d 48, 51 (Ky. 2022), *reh'g denied* (Sep. 22, 2022) (citation omitted).

The existence of standing is of paramount importance in any lawsuit. The Kentucky Supreme Court "has held, and reaffirmed, that 'the existence of a plaintiff's standing is a constitutional requirement to prosecute any action in the courts of this Commonwealth.' " *Id.* (quoting *Commonwealth Cabinet for Health & Family Services, Department for Medicaid Services v. Sexton by & through Appalachian Regional Healthcare, Inc.*, 566 S.W.3d 185, 188 (Ky. 2018)).

To determine whether a party has standing, Kentucky has adopted the federal *Lujan* test. *Sexton*, 566 S.W.3d at 196; *see* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). The test requires the plaintiff to prove three elements: (1) injury, (2) causation, and (3) redressability. *Id.* "To invoke the court's jurisdiction, the plaintiff must allege an injury caused by the defendant of a sort the court is able to redress." *Kenton County Board of Adjustment v. Meitzen*, 607 S.W.3d 586, 597 (Ky. 2020) (citations omitted). Kentucky's Declaratory Judgment Act allows the courts to determine a litigant's rights before harm occurs if the plaintiff shows the existence of an actual controversy. *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833, 839 (Ky. 2013); KRS 418.040. Such a controversy occurs when a defendant's position would "impair, thwart, obstruct or defeat plaintiff in his rights." *Kentucky Retirement Systems*, 396 S.W.3d at 839 (quoting *Revis v. Daugherty*, 215 Ky. 823, 287 S.W. 28, 29 (1926)).

The Attorney General argues that the Board failed to prove the elements of causation and redressability, because even if the challenged provisions injure the Board by transferring some of its powers to the Superintendent, the Board cannot show that the Commissioner caused that injury or that the Court can redress that injury by granting relief against the Commissioner.

When, as in this case, a plaintiff is bringing a pre-enforcement challenge to the constitutionality of a statute, the *Lujan* elements of causation and redressability are met when the plaintiff names as the defendant the government official charged with enforcing the law. So, for example, plaintiffs who brought suit against the Governor and the Commissioner of Agriculture for failure to enforce animal protection statutes failed to meet the *Lujan* element of causation because "the animal shelter statutes do not vest enforcement power with the Governor or the Commissioner of Agriculture." *Kasey v. Beshear*, 626 S.W.3d 204, 209 (Ky. App. 2021), *discretionary review denied* (Aug. 18, 2021). By contrast, plaintiffs who challenged the constitutionality of the Education Opportunity Account Act as impermissibly redirecting state revenues to public schools properly named as defendants the Secretary of the Kentucky Finance and Administration Cabinet and the Commissioner of the Kentucky Department of Revenue "based on their statutorily-prescribed roles in implementing the program." *Commonwealth ex rel. Cameron v. Johnson*, 658 S.W.3d 25, 30 (Ky. 2022).

***4** Kentucky law in this respect mirrors the federal standard, which provides that "when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007). For standing to exist, there must be "an actual enforcement connection – some enforcement power or act that can be enjoined – between the defendant official and the challenged statute." *Okpalobi v. Foster*, 244 F.3d 405, 419 (5th Cir. 2001). Similarly, to meet the redressability prong of the *Lujan* test in the context of a challenge to a statute, the named defendant must have the power to enforce the challenged statute. *Bronson*, 500 F.3d at 1111. The enforcement requirement is critically important because, without it, a court could issue "what would amount to an advisory opinion without the possibility of any judicial relief." *California v. Texas*, 539 U.S. ——, 141 S. Ct. 2104, 2116, 210 L. Ed. 2d 230 (2021) (internal quotation marks and citation omitted).

The Board argues that the Commissioner, the chief state school officer,[2] was the appropriate defendant for purposes of standing because the contested statutory provisions are enforceable only by the Commissioner, as provided in KRS 156.210, which states:

> (1) The chief state school officer shall have access to the papers, books and records of all teachers, trustees, superintendents, or other public school officials.
>
> (2) He may administer oaths and may examine witnesses under oath in any part of the state in any matter pertaining

> to the public schools, and may cause the testimony to be reduced to writing. He may issue process to compel attendance of witnesses before him and compel witnesses to testify in any investigation he is authorized to make.
>
> (3) When he or his assistants find any mismanagement, misconduct, violation of law, or wrongful or improper use of any district or state school fund, or neglect in the performance of duty on the part of any official, he shall report the same, and any other violation of the school laws discovered by him, to the Kentucky Board of Education, which shall, through the chief state school officer or one (1) of his assistants, call in the county attorney or the Commonwealth's attorney in the county or district where the violation occurs, and the attorney so called in shall assist in the indictment, prosecution, and conviction of the accused. If prosecution is not warrantable, the Kentucky Board of Education may rectify and regulate all such matters.

KRS 156.210.

2 The Commissioner is appointed by the Education Management Selection Commission "to carry out the duties of the chief state school officer." KRS 156.147(2).

The Attorney General argues that the challenged statutory provisions do not provide the Commissioner with sufficient enforcement powers to create standing. He points out that the challenged legislation does not transfer the Board's powers to the Commissioner, but to the Superintendent, and it does not empower the Commissioner to take any action to enforce the provisions. He contends that KRS 156.210(3) cannot make up for the Commissioner's "lack of role" and that any fear he will choose to enforce the statutory provisions is "pure conjecture."

But the Commissioner's duty to enforce the statute is not conjectural; it is mandatory. The Commissioner is the executive and administrative officer of the Kentucky Board of Education in its administration of all educational matters and functions. KRS 156.148(3). The Commissioner must report any violations of the law to the Board, which is required, through the Commissioner or his assistants, to call in the county attorney or Commonwealth's attorney who in turn is required to assist in prosecuting the accused. KRS 156.210(3). If prosecution is not warranted, the Kentucky Board of Education has the discretion to rectify and regulate the matter. *Id.* Whether a defendant possesses enforcement authority sufficient for standing purposes turns on whether the defendant "has 'some connection' with the enforcement of the [challenged state law]." *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015). The Commissioner's role under KRS 156.210(3) meets this standard.

***5** The Attorney General contends that because the challenged legislation does not contain any specific internal provision empowering the Commissioner to take any action that could harm the Board, the Board is unable to establish that any injury it suffers is traceable to the Commissioner. He relies on *California v. Texas*, *supra*, a case in which the plaintiffs claimed the Patient Protection and Affordable Care Act, which required them to purchase minimal essential health insurance coverage, was unconstitutional. Originally, the Act imposed a monetary penalty on individuals for failing to purchase such coverage, and provided that the penalty would be included with the taxpayer's federal tax return. Accordingly, the IRS required taxpayers to report on their federal income tax return whether they carried minimum essential coverage. Congress thereafter amended the Act to reduce that penalty to $0. The Supreme Court held that this amendment deprived the plaintiffs of standing because "the statutory provision, while it tells them to obtain that [minimum essential health insurance] coverage, has no means of enforcement. With the penalty zeroed out, the IRS can no longer seek a penalty from those who fail to comply." *California*, 141 S. Ct. at 2114. "Because of this, there is no possible Government action that is causally connected to the plaintiffs' injury – the costs of purchasing health insurance." *Id.* If the monetary penalty still existed, the IRS would have enforcement authority; without the penalty, the IRS had nothing to enforce and there was simply no means to compel the plaintiffs to purchase the insurance.

By contrast, KRS 156.210(3) imposes a clear and mandatory duty on the Commissioner to report violations of law and to seek enforcement of those laws. The Commissioner has the means to compel enforcement of statutes, either via criminal proceedings or referral to the state Board, which is responsible for "the management and control of the common schools and all programs operated in these schools," KRS 156.070(1), and whose sweeping powers include the ability to remove school board members. *See Gearhart v. Kentucky State Bd. of Educ.*, 355 S.W.2d 667, 670 (Ky. 1962). It is true that when a prosecution is not deemed appropriate, the Kentucky Board

of Education is given the discretion to rectify and regulate all such matters, but the Commissioner is the entity tasked with initiating and executing such a proceeding.

The Attorney General argues that Superintendent Pollio is nonetheless free to follow the challenged provisions without any interference from the Commissioner. But the Commissioner has the authority and the duty under KRS 156.210(3) to proceed against the Superintendent if he attempts to follow the provisions after they are declared unconstitutional.

We conclude that the Board had standing to bring this suit because the Commissioner possesses sufficient enforcement powers to meet the causation and redressability elements of the *Lujan* test.

ii. The Superintendent was not a necessary party

In a related argument, the Attorney General argues that this appeal should be dismissed because Superintendent Pollio was a necessary party under both Kentucky Rules of Civil Procedure (CR) 19.01 and the terms of the Declaratory Judgment Act.

CR 19.01 provides in pertinent part that

> [a] person who is subject to service of process, either personal or constructive, shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties, or (b) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case an involuntary plaintiff.

The Declaratory Judgment Act states that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." KRS 418.075.

The Attorney General argues that, fundamentally, the Board's dispute is with the Superintendent, whatever Dr. Pollio's personal view of the matter and his personal assurances that he will not follow the statute, and that the Board cannot seek judicial relief with respect to the Superintendent's duties without naming him as a party.

***6** As a preliminary matter, the Board contends that because the Attorney General did not intervene in the lawsuit and become a party, choosing instead to enter an appearance to defend the constitutionality of the challenged provisions, he is not empowered to raise this issue at all. The Board relies on a series of cases which hold that CR 19.01 can be invoked only by parties. "[T]he provision of the Declaratory Judgment Act relating to parties, KRS 418.075, and ... the civil rule which prescribes what parties shall be joined if feasible, CR 19.01[,] ... can be invoked only by *parties*, not by a person who seeks to become a party." *Murphy v. Lexington-Fayette County Airport Bd.*, 472 S.W.2d 688, 689-90 (Ky. 1971). (Emphasis in original.) Holding otherwise would permit a nonparty to "simply lie back and await the result of the action in the circuit court and then, if not satisfied with the judgment, compel a retrial by the device of intervening after judgment." *Id.* at 690. *Uninsured Employers' Fund v. Bradley*, 244 S.W.3d 741, 746 (Ky. App. 2007).

Under KRS 418.075(1), the Attorney General is specifically entitled to be heard regarding the validity of a statute, without becoming a party. 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. Under these circumstances, the Attorney General is entitled to appellate review of his argument that the Superintendent was a necessary party.

The express language of the challenged provisions requires action on the part of the Board to delegate authority to the Superintendent over day-to-day operations and requires

the Board to authorize him to approve purchases. KRS 160.370(2)(a)1. and 160.370(2)(c). The Superintendent is not empowered to force the Board to limit the frequency of its meetings. KRS 160.370(2)(a)2. Only KRS 160.370(2)(b)2. and 5. expressly constrain the Board from withholding its approval of the Superintendent's rules and regulations without a two-thirds vote and make the Superintendent responsible for any administrative duty not explicitly granted to the Board. But the Superintendent is not given any means by which to enforce these latter provisions. The Superintendent's presence as a party was not required.

iii. The contested provisions violate the prohibition against special and local legislation

Finally, we address whether the circuit court erred in holding that the challenged legislation violates the prohibition against special or local legislation found in Sections 59 and 60 of the Kentucky Constitution. The constitutionality of a statute is a question of law which we review *de novo*. *Teco/Perry County Coal v. Feltner*, 582 S.W.3d 42, 45 (Ky. 2019). "In considering an attack on the constitutionality of legislation, this Court has continually resolved any doubt in favor of constitutionality rather than unconstitutionality." *S.W. v. S.W.M.*, 647 S.W.3d 866, 873 (Ky. App. 2022), *discretionary review denied* (Aug. 16, 2022).

Sections 59 and 60 first appeared in Kentucky's fourth and final Constitution in 1891. They represented an attempt to prevent the legislature from wasting its time on mundane and trivial local matters and neglecting general legislation. *Calloway County Sheriff's Department v. Woodall*, 607 S.W.3d 557, 571 (Ky. 2020).

Section 59 expressly forbids local or special legislation relating to the management of public schools. It states in relevant part that "[t]he General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: ... [t]o provide for the management of common schools." KY. CONST. § 59(25).

Section 60 provides that

> [t]he General Assembly shall not indirectly enact any special or local act by the repeal in part of a general act, or by exempting from the operation of a general act any city, town, district or county; but laws repealing local or special acts may be enacted. No law shall be enacted granting powers or privileges in any case where the granting of such powers or privileges shall have been provided for by a general law, nor where the courts have jurisdiction to grant the same or to give the relief asked for. No law, except such as relates to the sale, loan or gift of vinous, spirituous or malt liquors, bridges, turnpikes or other public roads, public buildings or improvements, fencing, running at large of stock, matters pertaining to common schools, paupers, and the regulation by counties, cities, towns or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the General Assembly, unless otherwise expressly provided in this Constitution.

***7** KY. CONST. § 60.

The original test for a violation of Section 59 was simply that "special legislation applies to particular places or persons as distinguished from classes of places or persons[.]" *Woodall*, 607 S.W.3d at 567 (quoting *Greene v. Caldwell*, 170 Ky. 571, 587, 186 S.W. 648, 654 (1916)). With the passage of time, however, special, or local laws became confused with class legislation and for years, Kentucky courts mistakenly applied what was essentially an equal protection analysis to the special legislation prohibition in Section 59. They followed the test set out in *Schoo v. Rose*, 270 S.W.2d 940 (Ky. 1954), which states: "[I]n order for a law to be general in its constitutional sense it must meet the following requirements: (1) [i]t must apply equally to all in a class, and (2) there must be distinctive and natural reasons inducing and supporting the classification." *Id.* at 941.

The *Woodall* Court held that the *Schoo* test, whose origins can be traced to the 1792 Constitution, does not "comport with a proper interpretation" of Sections 59 and 60 as they were understood at the time of the passage of the Third Constitution

in 1891. *Woodall*, 607 S.W.3d at 566. *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, object or locale." Challenges based on 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. *Woodall*, 607 S.W.3d at 573.

The circuit court held that the challenged legislation in this case violated Section 59 because, although it did not mention Jefferson County expressly by name, the provisions plainly singled out counties with a type of governance that only exists in Jefferson County.

The Attorney General argues that the challenged provisions instead represent a classification which could apply to any school district in a county with a consolidated local government that exists now, or in the future, and consequently the statute is one of general application across the entire Commonwealth. The Attorney General points out that nothing is preventing a city in a county with a population of more than 250,000 residents from choosing to become a city of the first class and thereafter opting for consolidation with its county under KRS 67C.101(1). In other words, the statute applies to a class rather than a specific individual, object, or locale, and therefore does not violate Section 59.

In the same vein, the *amicus* brief of the President of the Kentucky Senate contends that this case falls squarely in a line of cases holding that statutes applicable only in counties of a certain population are not special, local legislation under Section 59. For example, in *Winston v. Stone*, our highest court held that a taxation statute applying only to counties with a population greater than 75,000 did not violate Section 59. *Winston v. Stone*, 102 Ky. 423, 43 S.W. 397 (1897), *overruled on other grounds by Vaughn v. Knopf*, 895 S.W.2d 566 (Ky. 1995). The Court reasoned that the statute

> ***8** operates upon a multitude of property of like character owned by persons all over the state, and, in our judgment, it is neither local nor special, but general in purpose and detail, and most effective for securing to the state the revenue it seeks to collect.... It may be a fact that Jefferson [C]ounty 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[.]

Id. at 398.

Similarly, in *Sims v. Board of Education of Jefferson County, Ky.*, 290 S.W.2d 491 (Ky. 1956), it was held that a statute which applied only to boards of education in a county containing a city of the first class did not violate Section 59, because it would apply in any county that in the future contained a city of the first class. "While it is not probable that another city will qualify as a first-class city in Kentucky at any time in the immediate future, nevertheless, it is always possible and the statute would then be applicable to more than one county." *Sims*, 290 S.W.2d at 495. The *Sims* Court ultimately applied the rational basis test that was rejected by *Woodall* to approve the legislation, stating "[w]e have long ... held that a legislative enactment is not necessarily local nor repugnant to Section 59 of our Kentucky Constitution because such enactment applies to only one class or group of subjects, provided that the classification thus made is not unreasonable nor arbitrary." *Id.* at 495 (citation omitted).

In response, the Board argues that the challenged legislation does indeed apply to a particular individual, object, or locale, not to a class, and that an express reference to Jefferson County is not required for the legislation to be special or local. The Board relies on a more recent opinion, *University of Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010), which addressed the constitutionality of a bill providing for the construction of a pharmacy school building on the campus of the University of the Cumberlands, a Baptist college located in Whitley County. The bill also provided for a Pharmacy Scholarship Program to benefit pharmacy students "at a private four (4) year institution of higher education with a main campus located in an Appalachian Regional Commission county." *Pennybacker*, 308 S.W.3d at 671. "No party to this litigation has questioned that the sole institution which would fit that description is [the University of the Cumberlands], providing the Pharmacy School is built." *Id.* at 683. The Court held that the Pharmacy Scholarship Program was special legislation which violates

Section 59, based on "the inescapable conclusion ... that the Pharmacy Scholarship Program was intended only for students attending the anticipated UC Pharmacy School." *Id.* at 683-84.

Of key importance is the *Woodall* Court's statement that even though the *Pennybacker* Court applied the superseded *Schoo* test in determining that the legislation at issue was unconstitutional, it "reached [the] correct result since the statute applied to [a] particular object." *Woodall*, 607 S.W.3d at 573 n.19. Under *Pennybacker* and *Woodall*, an express reference to a particular locale is not an essential prerequisite to finding a violation of Section 59; a description that can apply to only one individual, object, or locale may be sufficient. The *Woodall* Court directly addressed concerns that by abandoning the *Schoo* test it was enabling legislators "to draft around the Section 59 prohibition by avoiding express reference to a specific person, entity or locale but articulating criteria for a statute's application that as a practical matter only a specific person, entity or locale can satisfy, essentially reverting to the ways of the 1870s and 1880s." *Woodall*, 607 S.W.3d at 573. According to *Woodall*,

> ***9** [t]he answer to this objection is that Kentucky's courts, in that pre-1891 Constitution period, had only just begun to apply the "exclusive, separate" privilege prohibition of the Bill of Rights to evaluate class or partial legislation, and to equate that section with equal protection. Over the last 130 years, courts have had experience with the analysis and have shown little hesitancy in engaging a more rigorous analysis with respect to classification legislation.

Id.

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. Thus, the fact that the challenged legislation does not expressly name the Jefferson County school district is not automatically dispositive of the constitutional question.

The interpretation and construction of a statute are concerned primarily with legislative intent. *Miller v. Bunch*, 657 S.W.3d 890, 894-95 (Ky. 2022); *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). "[O]ur first guiding principle in statutory construction is to ascertain and effectuate legislative intent." *Martin v. Warrior Coal LLC*, 617 S.W.3d 391, 394 (Ky. 2021).

The unmistakable intent of the legislature in this case was to ameliorate problems specific to Jefferson County. The Senate President's *amicus* brief states that the purpose behind the legislation was to address concerns that the Jefferson County Public School System (JCPS) was "failing too many of its students, especially students of color and those living below the poverty level." The brief describes concerns expressed in the media and by the public that these problems were attributable in part to micromanagement of JCPS by its Board. The brief outlines a subsequent attempt by the Kentucky Board of Education to give greater power to the Superintendent of JCPS, which culminated in a settlement agreement from which JCPS was ultimately released by the Commissioner in 2020. The gap in student achievement persisted, however. The brief states that "[a]gainst 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 [the Jefferson County Board] functioning more like a board of directors."

By the Senate President's own admission, the challenged provisions were intended to address the unique problems of the Jefferson County school district. This conclusion is supported by State Representative Ed Massey's statements in the debate over the final passage of S.B. 1:

> There are three large components that are rolled into one committee substitute that we discussed actually in committee today. The first one is a request with regards to Jefferson County which had done some things differently – had gotten some approval to do some things differently. They had the largest board in the state of

> Kentucky. There was at times a power struggle that existed between the board and the superintendent and how the day-to-day operations would be able to run. So, this language was brought to us and asked to be added into this as a house committee sub to allow them to continue to do what we believe is good work in Jefferson County in trying to deal with that particular issue.

Kentucky General Assembly Regular Session/Debate/House Chambers, *Part 2 at 5:08 p.m.*, KET (Mar. 22, 2022) https://ket.org/legislature/archives/2022/regular/house-chambers-part-2-201453.

***10** In view of this clearly-stated legislative intent and the *Woodall* Court's approval of the decision in *Pennybacker*, we conclude that the challenged provisions were intended to apply only to a specific locale, not a class, and consequently are local or special legislation which is prohibited under Sections 59 and 60 of the Kentucky Constitution. The circuit court's holding that the provisions also violate the state's equal protection clause is consequently moot and will not be addressed here.

CONCLUSION

For the foregoing reasons, the circuit court's order holding that the challenged provisions of S.B. 1, now codified at KRS 160.370(2)(a)1. and 2.; KRS 160.370(2)(b)2. and 5.; and KRS 160.370(2)(c) violate the prohibition against special and local legislation is affirmed.

ALL CONCUR.

All Citations

--- S.W.3d ----, 2023 WL 6522192

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