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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

SECOND SUPPLEMENTAL BRIEF OF THE ATTORNEY GENERAL

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Matthew F. Kuhn

INTRODUCTION

Since filing suit, the Jefferson County Board of Education has made this case all about, and only about, how *Calloway County Sheriff's Department v. Woodall*, 607 S.W.3d 557 (Ky. 2020), applies to Senate Bill 1. The only merits question litigated has been whether a statute like SB 1, which governs a small but open class of county school districts, is general or local under *Woodall*. On merits review, the Court rejected the Board's arguments and found SB 1 to be a general law. Nothing in the Board's first supplemental brief changes matters. Its arguments remain unconvincing.

In asking the Court to reverse itself, the Board takes two eleventh-hour detours. First, in convincing the Court to grant rehearing, the Board asserted that the class created by SB 1 would be open to other school districts only after "multiple statutory amendments." In a single sentence, the Board's rehearing petition also invited the Court to "rescind" *Woodall*. Both brand-new arguments were wrong. But more importantly, the Board all but abandons them in its first supplemental brief. Instead of pressing the arguments that led to rehearing, the Board takes a second detour by defending the circuit court's sua sponte equal-protection ruling. The Board, however, did not plead an equal-protection claim, and it has waived such a claim several times over.

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The Court has set oral argument for August 6, 2025.

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ARGUMENT

The Court directed the parties to address two questions in supplemental briefing. Although the parties disagree about a lot in this case, the Board's first supplemental brief shows that there is surprisingly little daylight between them on the Court's two questions.

The Court's first question is whether SB 1 applies to an open or closed class "as that concept was articulated" in the Court's opinion. Order at 1 (Apr. 24, 2025). In its rehearing petition, the Board asserted (at 9 & n.1) that "multiple statutory amendments" were required before the class regulated by SB 1 could expand. The Board, however, walks back that position in its first supplemental brief. It now *agrees* (at 4–5) with the Attorney General that there is a generally applicable statutory process that allows an eligible city to become a first-class city at which point the county can exercise local choice to form a consolidated local government. Under the Court's opinion, it follows that the class regulated by SB 1 is not "permanently closed." *Coleman v. Jefferson Cnty. Bd. of Educ.*, 2024 WL 5180457, at *8 (Ky. Dec. 19, 2024). Instead of accepting this statutory fact, the Board argues with the Court's opinion. But the Court explicitly directed the parties to address its first question "as th[e] concept was articulated" in the Court's opinion. Order at 1 (Apr. 24, 2025). So on the Court's first question, the parties see things similarly.

The Court’s second question is whether the circuit court applied the correct standard under Sections 59 and 60. *Id.* at 2. To recap, the circuit court applied the standard from *Woodall*, albeit incorrectly. R.218–21. The circuit court also recognized that *Tabler v. Wallace*, 704 S.W.2d 179 (Ky. 1986), had been “reversed.” R.218. The Board’s first supplemental brief does not seriously dispute that *Woodall* applies here. It even concedes (at 16) that the Court was “accurate” in holding that “both parties agree the outcome turns on the proper application of *Woodall*.” *Coleman*, 2024 WL 5180457, at *6.

Given all this agreement, there can be no dispute that the Board is using rehearing simply to reargue the positions that the Court already rejected. But rehearing is not a redo. The Court should accordingly uphold SB 1 again for the reasons it already gave. It should leave for another day whether to overrule or modify *Woodall*—when a party appropriately raises the issue. Recall that the General Assembly adopted SB 1 over three years ago. It is well past time for that duly enacted law to be enforced. Families and students in Jefferson County deserve the law that their representatives in Frankfort passed to benefit county school districts like Jefferson County Public Schools.

To be clear, the Board’s first supplemental brief suggests in passing that the Court should overrule *Woodall*. The Board volunteers (at 16) that it “agrees” with the dissent that the Court should “reaffirm the standards in *Schoo* and *Tabler*.” But the Board does not develop that argument at all. Instead of doing

that legwork, as the Attorney General’s first supplemental brief did, the Board submits (at 16) that it was “not necessary for the Board to make this argument” because *Woodall* should “be applied as written.” So even when given the opportunity, the Board refuses to offer any reason to overturn *Woodall*.

The well-established rule is that “error raised for the first time in a petition for rehearing will not be considered.” *Johnson v. Commonwealth*, 450 S.W.3d 707, 713 (Ky. 2014). It follows that error not raised after rehearing has been granted should not be considered. The Board had every chance (and then some) to argue that *Woodall* should be overruled. Instead, it accepted *Woodall* in circuit court, in the Court of Appeals, and in this Court. The Board’s rehearing petition was the first time it suggested (at 13)—in only a single sentence—that *Woodall* should be “rescind[ed].” Even after the Court’s rehearing order, which the Attorney General took to direct the parties to brief whether *Woodall* was correctly decided, the Board still declined to press this argument beyond merely asserting it.

The Board’s litigation decisions matter. Courts do not litigate cases. Parties do. The Board, represented by capable counsel, has accepted *Woodall* as the governing standard at every level of the judiciary, even after three members of the Court argued at length that *Woodall* should be overturned. The Court should not bend its procedural rules to address an issue that the Board never raised—indeed, that it now affirmatively refuses to develop.

The Attorney General appreciates that he is making a big deal out of issue preservation. But that’s because the rules of procedure are a big deal. As the Court unanimously reiterated just two years ago, those rules “are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right decision” in litigation. *Gasaway v. Commonwealth*, 671 S.W.3d 298, 314 (Ky. 2023) (citation omitted). Those rules “serve[] the orderly administration of justice” and “cannot be said to elevate form over substance or otherwise unfairly cut off the rights of litigants.” *Id.*

* * *

With all that said, this second supplemental brief proceeds in three parts. The first addresses the Board’s argument that the Court misapplied *Woodall*. On this point, the Court should stick to its guns. It applied *Woodall* consistent with a century of precedent. In arguing to the contrary, the Board simply repeats arguments it already lost without confronting the caselaw on which the Court relied. The second part of this brief responds to the Board’s attempt to raise an equal-protection claim at this late juncture. That claim is easy to reject: the circuit court was wrong to raise it in the first instance, and the Board is even more wrong to raise it now. And third, this brief discusses how this matter should proceed if the Court overrules or modifies *Woodall* despite all the arguments to the contrary.

I. Sections 59 and 60 permit open-class statutes like SB 1.

Sections 59 and 60 of the Constitution prohibit “local” and “special” laws, but they allow the General Assembly to legislate via “general law.” To differentiate between the two, “the appropriate test is whether the statute applies to a particular individual, object or locale.” *Woodall*, 607 S.W.3d at 573. The test thus focuses on whether a law is *particular* to a subject. In other words, *Woodall* asks whether a statute applies to a particular subject or subjects and nothing else. Since shortly after our Constitution was adopted, Kentucky courts have rejected Sections 59 and 60 challenges to statutes that currently apply to one member but could apply to new members in the future. *Stone v. Wilson*, 39 S.W. 49, 50–51 (Ky. 1897), *overruled on other grounds by Vaughn v. Knopf*, 895 S.W.2d 566 (Ky. 1995); *Winston v. Stone*, 43 S.W. 397, 397–98 (Ky. 1897), *overruled on other grounds by Vaughn*, 895 S.W.2d at 566; *Sims v. Bd. of Educ. of Jefferson Cnty.*, 290 S.W.2d 491, 495 (Ky. 1956). SB 1 fits within this long tradition of open-class laws upheld under Sections 59 and 60. It applies to a county school board and its superintendent in any county with a consolidated local government—an open class that can expand under a generally applicable statutory process. The Court was right to apply *Stone*, *Winston*, and *Sims* to uphold SB 1.

The Board offers three counterarguments. First, it claims (at 1) that the distinction between open- and closed-class statutes applied by the Court is “new.” But the Court anchored its holding in founding-era decisions and more

recent precedent applying that very distinction. Indeed, there is additional, unmentioned precedent on which the Court could have relied. Second, the Board asks (at 1–2) the Court to read *Woodall*'s use of the present-tense verb “applies” to prohibit any open-class statute that regulates an open class with one current member. Courts, however, do not read precedent like they interpret statutes. In any event, the Board’s interpretation of *Woodall* is both wrong and ungrammatical. Third, the Board cites (at 3–11) *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010), and several out-of-state cases for the proposition that expanding an open class must be sufficiently likely for a law to pass constitutional muster. But the Board’s favored cases support upholding SB 1. Even still, the Board does not identify a single Kentucky case applying its predictive rule in the century plus that Sections 59 and 60 have been in force.

A. The Court applied a longstanding test to uphold SB 1.

In applying *Woodall*, the Court held that a law comports with Sections 59 and 60 if it applies to a class that is not “permanently closed.” *Coleman*, 2024 WL 5180457, at *8. The Board’s first supplemental brief characterizes that inquiry as “new” six times. But it is the Board’s theory that’s novel.

The Court has long understood Sections 59 and 60 to differentiate between a law that “relates to persons or things *as a class*” and one that “relates to particular persons or things *of a class*.” *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 825 (Ky. 1942) (citation omitted); *accord Stone*, 39 S.W. at 50. Yet, as

the Court explained, even a law that seemingly regulates a class could pose a Sections 59 and 60 problem if that class is “permanently closed” to new members. *Coleman*, 2024 WL 5180457, at *8. That’s because a permanently closed class actually “relates to particular persons or things of a class,” *Johnson*, 165 S.W.2d at 825 (emphasis omitted), not to the class itself. Without drawing the open-closed distinction, the Court’s analysis would have been incomplete—allowing some laws that relate to particular persons, places, or things to skirt Sections 59 and 60’s prohibition. The open-closed distinction is thus an essential part of the constitutional inquiry.

Since the founding era, Kentucky courts have applied that very distinction. As early as 1897, this Court’s predecessor rejected a special-legislation challenge to a law that applied in counties with “a population of over 40,000 and under 75,000.” *Stone*, 39 S.W. at 49–50. Although the law applied to only one county at the time, the Court found no Section 59 problem because the law applied “in counties that may *now or hereafter*” qualify. *Id.* at 50 (emphasis added). The Court reached the same result later that year in considering a law that applied in counties with a population above 75,000 persons. *Winston*, 43 S.W. at 397–98. On its face, the law was class based—it mentioned no particular county. Yet only Jefferson County was a member of that class of counties at the time. In rejecting a Section 59 challenge, the Court confirmed that “the statute in question would apply to *all counties* of that class within the state.” *Id.* at 398 (emphasis added).

These founding-era decisions were not one-off rulings. *See 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 the population of the county alone was not special or local legislation within the purview of section 59 of the Constitution”). Indeed, as the Court noted in upholding SB 1, it has even applied the open-closed distinction in the context of education—in Jefferson County no less. *Coleman*, 2024 WL 5180457, at *8. In *Sims*, the Court upheld a law that applied “only to boards of education in a county containing a city of the first class.” 290 S.W.2d at 495. Only a school board in Jefferson County could qualify at the time, and “it [was] not probable that another city will qualify as a first-class city in Kentucky at any time in the immediate future.” *Id.* But the class was not closed; expansion was “always possible and the statute would then be applicable to more than one county.” *Id.*; accord *Veail v. Louisville & Jefferson Cnty. Metro Sewer Dist.*, 197 S.W.2d 413, 418 (Ky. 1946) (“If there were now in the state a half dozen cities in the first class, the act in question would be applicable to all of them. The fact that there is only one city in that class does not change or affect in any way the power of the General Assembly.”).

Against this century of precedent, the Board’s first supplemental brief does not even acknowledge *Stone*, *Winston*, or *Sims*. Dwell on that fact. Those three decisions formed the core of the Court’s holding, yet the Board somehow fails to mention them while claiming that the Court did something “new.” Still

worse for the Board, the Court didn't cite the universe of Kentucky caselaw applying the open-closed distinction.

It also could have cited *Harlan County v. Brock*, 55 S.W.2d 49 (Ky. 1932). The law there applied in two-county judicial districts above a specified population. *Id.* at 50. That sounds like the population-based laws upheld in *Stone* and *Winston*. But there was a wrinkle in *Brock*. The statute there tied its population threshold to “the Federal Census of 1930.” *Id.* (citation omitted). This created a closed class. As the Court’s predecessor explained, “the classification here employed is not based generally on population but on a population at a fixed time and according to a specific and specified census.” *Id.* More to the point, the classification “permits no changes, though the other judicial districts composed of two counties may by the passage of time become equal in population.” *Id.* In invalidating the statute, *Brock* relied on same *Sutherland* treatise that the Court returned to in its opinion here. *Brock* explained: “A classification based upon existing or past conditions or facts which would exclude the persons, places, things or objects thereafter coming into the same situation or condition is special and void.” *Id.* at 52 (quoting 1 *Sutherland Statutory Construction* § 214). That holding is the same one reached here—nearly a century after *Brock*.

The reality is that the open-closed distinction is firmly rooted in Kentucky caselaw. In light of *Stone*, *Winston*, *Sims*, and *Brock*, there is no serious argument

that the Court did something new by upholding SB 1 because the class it regulates is not permanently closed.

B. The Court did not alter *Woodall*.

The Board next contends that the distinction between open and closed classes violates *Woodall* because the opinion used a present-tense verb in stating the governing test. The relevant sentence from *Woodall* is: “the appropriate test is whether the statute *applies* to a particular individual, object or locale.” 607 S.W.3d at 573 (emphasis added). Focusing on the word “applies,” the Board contends (at 1–2) that *Woodall* asks where a statute “currently applies,” not where it “might apply” in the future. (emphasis omitted). The Board, however, fails to account for the word “particular” in *Woodall*’s holding. If “applies” means what the Board says, then the word “particular” does no work.

Even so, courts don’t read their opinions like statutes. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) (“[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.”). Instead, courts ascertain a case’s holding in light of all its reasoning and the applicable facts. The sentence the Board cites is, no doubt, *Woodall*’s enunciation of the applicable rule. But that rule cannot be read in a vacuum, apart from the reasoning behind it.

To begin with, the Court must account for the fact that *Woodall* drew its rule from, among other founding-era decisions, the open-class case of *Stone*. 607

S.W.3d at 567 (citing *Stone*). If the Board is right about what “applies” means, then *Woodall* endorsed *Stone* despite effectively overruling it. The Court should not read so obvious a contradiction into *Woodall* based merely on the verb tense in a single sentence.

More importantly, the Board’s single-minded focus on the word “applies” overlooks that several sentences earlier *Woodall* acknowledged that its test in fact allows a current class-of-one law like SB 1. More specifically, *Woodall* held that a law that applies “as a practical matter [to] only a specific person, entity or locale” is subject to only an equal-protection challenge. *Id.* at 573. Indeed, that part of *Woodall* specifically envisions the Board’s current argument by discussing what “[s]ome may say” in response to its simple test. *Id.* Changing the word “some” to “the Board” shows just how decisively *Woodall* rejected the Board’s current argument:

[The Board] 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. 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. (footnote omitted). It is not often that a court pre-rejects an argument so directly. The Court could rule against the Board merely by block-quoting the above.

Even if the Court flyspecks *Woodall*'s verb tense, the Board is wrong as a grammatical matter to place so much weight on *Woodall*'s use of the present tense. Present-tense verbs express ongoing truths. Garner's Dictionary of Legal Usage 882 (3d ed. 2011) ("General and ongoing truths require the present tense."). Or as the Court's predecessor put it, present-tense verbs often describe something that "may have been present formerly; [that] may be present now; or, [that] may be present at some future period." *Mercer Cnty. Fiscal Ct. v. Slaughter*, 28 S.W.2d 986, 988 (Ky. 1930) (citation omitted). Consider what that means here: SB 1 "applies" to a county school board and its superintendent in a county with a consolidated local government. So the word "applies" means that SB 1 applied in consolidated local governments yesterday, applies in them right now, and will apply in them tomorrow.

Grammar aside, the word "applies" in no way dictates that the Court look only to the present application of the statute. Such an artificial view contradicts how legislation works in the real world. A law like SB 1 applies just the same now as it does a year or a decade from now. The Board's "applies" argument also would mean that an open, class-of-one law is unconstitutional until a second member joins the regulated class. But a law is either constitutional or not. A law

does not instantly become constitutional once the class it regulates gets enough members. The Board’s argument also would handcuff the General Assembly from addressing emerging issues. If the General Assembly identifies a societal harm perpetrated by a single bad actor and seeks to stop its spread before the problem worsens, the Board’s position would require the legislature to wait until multiple bad actors enter the scene. Sections 59 and 60 do not require the legislature to sit on its hands until the problem worsens. For all these reasons, the legislature can adopt a law that applies to only one actor as long as the law will apply to any such actor in the future.

C. The Court need only ask whether a statute’s class is open or permanently closed.

The Court also should reject the Board’s contention that the generally applicable statutory process for adding members to SB 1’s class is insufficient to make it an open class. SB 1 applies to an open class because it governs any county school board and its superintendent in a county with a consolidated local government, now or in the future. *See* KRS 160.370(2). The Board resists this conclusion by claiming that *Pennybacker* is dispositive, by criticizing the scope of SB 1’s class, and by appealing to out-of-state caselaw. Take each in turn.

1. Start with *Pennybacker*. For our purposes, it offers a helpful example of an impermissible, permanently closed class. It dealt with a “scholarship program” for students “at a private four (4) year institution of higher education with a main

campus located in an Appalachian Regional Commission county in the Commonwealth.” 308 S.W.3d at 672. The parties agreed that “the sole institution which would fit that description is [the University of the Cumberlands].” *Id.* at 683. That agreement tracked the bill at issue, which coupled the scholarship program with funding for the “construction of a pharmacy school building on the campus of the University of the Cumberlands.” *Id.* at 671. As the prevailing parties in *Pennybacker* aptly noted in their brief,¹ “the simultaneous creation of a pharmacy school through a \$10 million appropriation to one specific school demonstrated the legislative intent to benefit UC and UC alone.” Brief of Appellees, *Univ. of the Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010) (Nos. 2008-SC-253; 2008-SC-285), 2009 WL 2760816, at *27–28. So the winning parties in *Pennybacker* would disagree with how the Board characterizes the case all these years later.

The *Pennybacker* Court would disagree too. It held that the law “*can only be read* as funding scholarships for students attending the planned UC Pharmacy School.” *Pennybacker*, 308 S.W.3d at 683 (emphasis added). That is a closed-class holding. Of course, *Pennybacker* reached that conclusion by applying the now-repudiated *Schoo* test. *Woodall*, 607 S.W.3d at 573 n.19. But *Woodall* saw no reason

¹ The Board’s lead counsel filed this brief in *Pennybacker*.

to cast doubt on the *Pennybacker*'s closed-class holding. As *Woodall* explained, *Pennybacker* “reach[ed] the correct result since the statute applied to a particular object.” *Id.* In other words, despite applying *Schoo*, *Pennybacker* correctly rejected an attempt to create a closed-class statute.

The Board claims (at 3–6) that *Pennybacker* is indistinguishable from this case. But the Court persuasively rejected that contention, and the lengthy dissent did not see fit even to mention *Pennybacker*. The problem in *Pennybacker*, the Court explained, was “not [that] there was only a single currently existing member of the class.” *Coleman*, 2024 WL 5180457, at *10. Instead, *Pennybacker* concerned a “closed” class because the statute “categorically foreclos[ed] the addition of public schools from outside the Appalachian region to the class.” *Id.* Put differently, the statute in *Pennybacker* was closed because it applied only in particular counties—to quote the statute, it applied in only “an Appalachian Regional Commission county.” 308 S.W.3d at 672 (citation omitted). Under no circumstances could a county outside the Appalachian Regional Commission join the *Pennybacker* class. In this simple way, the class was closed to every other county. *See Coleman*, 2024 WL 518047, at *10.

As outlined above, the Attorney General and the Board *agree* that there is a generally applicable statutory process by which new members from anywhere

in Kentucky can join the class regulated by SB 1.² Rather than dispute this statutory fact, the Board counters (at 4) that it is “unrealistic in 2025 to suggest that any school district other than” JCPS will be subject to SB 1. The Board’s pessimism about Kentucky’s future population growth ignores our past. Recall that the law in *Winston* applied in a county with at least 75,000 residents. 43 S.W. at 397. At the time of *Winston*, only Jefferson County met that population threshold. *Id.* Now, 10 Kentucky counties meet that threshold (Jefferson, Fayette, Kenton, Warren, Boone, Hardin, Daviess, Madison, Campbell, and Bullitt). And several more are not far behind. Similarly, in *Stone*, only one Kentucky county had a population between 40,000 and 75,000 persons. 39 S.W. at 49. Now, 15 Kentucky counties qualify (Oldham, Christian, McCracken, Pulaski, Laurel, Scott, Jessamine, Pike, Franklin, Shelby, Nelson, Boyd, Barren, Hopkins, and Henderson). The point here is simple: Classifications tied to population, like that in SB 1, are by their nature open.

² The Board quibbles (at 4–5) with whether the county school board in Fayette County could join SB 1’s class. But it identifies no statute prohibiting an urban county government like that in Fayette County from becoming a consolidated local government. If Lexington chooses to become a first-class city through the generally applicable statutory process, KRS 83A.160(6), that decision would effectively dissolve the current urban county government, KRS 67A.010 (directing that an urban county government can exist “in any county except a county containing a city of the first class”). And upon becoming a first-class city, local voters could make Lexington and Fayette County into a consolidated local government. KRS 67C.101(1).

Even if the Court indulges the Board’s gloom about Kentucky’s future, it is irrelevant to the legal question under Sections 59 and 60. It is enough that the legislature creates a class in which expansion “is *always possible* and the statute would then be applicable to more than one county.” *Sims*, 290 S.W.2d at 495 (emphasis added). SB 1 allows for that possibility: a city with 250,000 or more residents can choose a “mayor-alderman plan of government,” KRS 83A.160(6),³ making it a first-class city, KRS 81.005(1)(a). And “any city of the first class” can become a consolidated county government “upon approval by the voters of the county.” KRS 67C.101(1). The Board was thus flat wrong to argue in its rehearing petition (at 9 & n.1) that expanding SB 1’s class would require “multiple statutory amendments.” Perhaps acknowledging its mistake, the Board now abandons that argument and cites (at 4–5) the same statutory scheme identified by the Attorney General.

2. The Board next complains (at 6) that the Court’s analysis will allow arbitrary classifications to survive constitutional challenge. But our Constitution guards against “[a]bsolute and arbitrary” legislation. Ky. Const. § 2. Our charter also guarantees equal protection of the law. Ky. Const. § 3. *Woodall* plainly directs that objections to how the legislature defines a class must “succeed or fail on the

³ This population-based distinction is unlike that in *Brock*. Here, population is determined “based upon the most recent federal decennial census.” KRS 83A.160(6).

basis of equal protection analysis.” 607 S.W.3d at 573. Kentucky courts, *Woodall* continued, “have had experience with [equal-protection] analysis and have shown little hesitancy in engaging a more rigorous analysis with respect to classification legislation.” *Id.*

The Board protests (at 6–9) that the Constitution’s equal-protection guarantee is inadequate. It takes issue (at 8) with putting the burden on a plaintiff to prove that a law is unconstitutional and with the rational-basis standard. Taking each in turn, the constitutional norm in Kentucky is that “[t]he one who questions the validity of an act bears the burden to sustain such contention.” *Stephens v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 624, 626 (Ky. 1995). That rule follows from the “strong presumption of constitutionality” that every duly enacted law receives. *See Wynn v. Ibold*, 969 S.W.2d 695, 696 (Ky. 1998). As the Attorney General explained in his first supplemental brief (at 64–66), *Tabler* went against a mountain of precedent by stating that Sections 59 and 60 place the burden on the Commonwealth to justify a law. *Tabler* cited nothing for this extraordinary holding—no constitutional text and no caselaw. *Tabler* could not have been more wrong to conclude that a law violates Sections 59 and 60 unless the sovereign

justifies the law to the judiciary’s satisfaction. Respectfully, *Tabler* gets our separation of powers very wrong. It is an outlier in the extreme.⁴

The Board’s critique of rational-basis review does not land either. No doubt, rational-basis review is a government-friendly standard. Such deference keeps the judiciary in its constitutional lane by preventing courts from second-guessing the policy judgment of the General Assembly. See *Zuckerman v. Bevin*, 565 S.W.3d 580, 596 (Ky. 2018). But the government does *not* win every rational-basis case. Although rational-basis review requires a litigant to overcome a “steep burden,” “it is not an insurmountable one.” *Parker v. Webster Cnty. Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759, 767 (Ky. 2017). Indeed, “both our nation’s highest court and this Court have, in several cases, recognized equal protection violations based upon the rational basis standard.”⁵ *Vision Mining v. Gardner*, 364 S.W.3d 455, 466–67 (Ky. 2011). Put simply, the “rational basis standard, while deferential, is certainly not demure.” *Id.* at 469.

⁴ Given the many problems with *Tabler*, the Attorney General agrees with the suggestion (at 5) in the Senate President’s amicus brief that the Court should not reinstate *Tabler* even if it overrules *Woodall*. *Tabler*’s gloss on *Schoo* is indefensible regardless of whether *Schoo* was correctly decided. *Schoo* without *Tabler* would be a middle ground between the Court and the dissent.

⁵ See also, e.g., *Parker*, 529 S.W.3d at 766–69 (invalidating a statute under rational-basis review); *Vision Mining*, 364 S.W.3d at 469–74 (same); *Cain v. Lodestar Energy*, 302 S.W.3d 39, 42–43 (Ky. 2009) (same); *Commonwealth Nat. Res. & Environmental Cabinet v. Kentec Coal Co.*, 177 S.W.3d 718, 724–26 (Ky. 2005) (same); *D.F. v. Codell*, 127 S.W.3d 571, 577–78 (Ky. 2003) (same); *Burrow v. Kapfhammer*, 145 S.W.2d 1067, 1070–72 (Ky. 1940) (same).

In any event, the Board’s equal-protection critique matters not here. As explained below, the Board chose not to bring an equal-protection claim to challenge SB 1. R.8–9. And it chose to waive any such argument in its Court of Appeals brief (at 10 n.2), even after the circuit court sustained the argument. The Board should not be heard to criticize equal protection when it never asked the courts to address the issue.

One final point on this topic. The Board argues (at 8–9) that the Attorney General’s position in *Coleman v. CorneaGen*, No. 2024-SC-0102 (Ky.), which concerns an equal-protection challenge to a different statute, casts doubt on his argument that rational-basis review protects litigants harmed by a class-based law. That is a stretch. Equal-protection claims are inherently context-specific. *Teco/Perry Cnty. Coal v. Feltner*, 582 S.W.3d 42, 46 n.2 (Ky. 2019) (“No case can be completely dispositive of another when conducting rational basis analysis unless it involves the same statute, same facts and same arguments for what ‘rational basis’ exists to uphold the statute.”). So to say that the corneal-tissue law in *CorneaGea* survives rational-basis review has little bearing on rational-basis review more generally. Moreover, that the Attorney General is vigorously defending the law in *CorneaGen* is not cause to criticize his position here. The law in *CorneaGen* stands or falls on its own under rational-basis review, and the Court of Appeals did not even reach that issue. *Coleman v. CorneaGen*, 2024 WL 501166, at *6–7 (Ky. App. Feb. 9, 2024), *motion for discretionary review pending* No. 2024-SC-0102

(Ky.). Plus, the Court has said that the Attorney General “must defend duly adopted statutory enactments that are not unconstitutional.” *Commonwealth ex rel. Beshear v. Commonwealth Off. of the Governor ex rel. Bevin*, 498 S.W.3d 355, 364 (Ky. 2016). To be clear, the Attorney General’s position is *not* that every law survives rational-basis review. His opening brief admitted (at 50) that the two hypothetical laws on which the circuit court relied would fail even rational-basis review.

3. With no Kentucky caselaw to support its position, the Board retreats (at 9–11) to decisions from our sister States. One note: “[w]hile these sources provide context, this Court’s North Star is our own Kentucky Constitution” and “the language used” therein. *Beshear v. Acree*, 615 S.W.3d 780, 805 n.30 (Ky. 2020). So the Court should take these non-Kentucky views with a grain of salt.

Citing *Sutherland Statutory Construction*, the Board focuses (at 9) on Florida and Nebraska caselaw for the proposition that when new class membership “is merely theoretical, not probable, the act is special legislation.” 2 *Sutherland Statutory Construction* § 40:4 (8th ed.) (citation omitted). Before discussing that out-of-state caselaw, it must be remembered that nothing in Sections 59 and 60 remotely suggests that a court should examine the likelihood that a class will grow over time. Tellingly, the Board does not even try to root its argument in the constitutional text. Indeed, as the Attorney General’s first supplemental brief explained (at 27), Section 60 addresses anti-circumvention concerns in a very targeted way that differs from the Board’s preferred rule. In addition, the Board identifies no

Kentucky caselaw that has applied its predictive test in the century plus that Sections 59 and 60 have existed. These are reasons enough to decline the Board’s invitation to go outside Kentucky to invalidate SB 1. *See Commonwealth v. Claycomb*, 566 S.W.3d 202, 216–18 (Ky. 2018) (declining to uphold a statute even though “the majority of our sister courts” had done so).

Even still, the Board’s favored cases, along with others that the treatise cites, are consistent with the test applied by the Court. Consider a few:

- A Nebraska law required that two percent of lottery proceeds be paid to a fund benefiting the horse-racing industry. *City of Ralston v. Balka*, 530 N.W.2d 594, 597 (Neb. 1995) (per curiam). Because “[n]othing is prohibiting any county, city, or village currently without either a horseracing track, a lottery, or both from operating one,” the court held that the statute created an open class. *Id.* at 601.
- Another Nebraska law appropriated funds to compensate depositors, with the class defined so that “only depositors of [three institutions] fit within the defined class of recipients.” *Haman v. Marsh*, 467 N.W.2d 836, 843 (Neb. 1991). Several steps—including new charters, new membership in Nebraska’s deposit guaranty corporation, receivership or bankruptcy, and deposit losses—were required to expand the class. *Id.* at 848–49. Those

“realities” meant that “except for a highly improbable set of events the class is permanently closed to future members.” *Id.* at 849.

- An Alaska law required the operator of a medical facility to obtain a certificate of need. *Bridges v. Banner Health*, 201 P.3d 484, 487 (Alaska 2008). Because the law “does not specifically target [the operator], and the class covered by the statute will grow if additional health care providers seek to construct [similar] facilities,” the class was open. *Id.* at 495.
- A Florida law tailored a certificate-of-need exemption to the circumstances of one hospital, with a fast-approaching sunset date. *St. Vincent’s Med. Ctr., Inc. v. Mem’l Healthcare Grp.*, 967 So.2d 794, 796–97 (Fla. 2007). The evidence showed that no other hospital could “take advantage of the exemption before it sunsets,” so the court determined that the class was closed. *Id.* at 802; *see also id.* at 801 (describing evidence that the “entire process contemplated by the statute takes so long to accomplish that other parties could not realistically utilize the exemption before the sunset date”).

Of these cases, only *Haman* found too much improbability in the potential chain of events to conclude that a class was closed. And *St. Vincent* read the sunset provision to make expansion all but impossible. As *Sutherland* notes in describing

both cases, “non-numerical specifications ma[d]e it unlikely that other individuals or entities will enter the class in the future.” § 40:4. In other words, the criteria for expansion were too dependent on near-impossible what ifs, instead of numerical thresholds.

Here, much like *Stone*, *Winston*, and *Sims*, class expansion under SB 1 depends in large part on the numerical criterion of population size. See KRS 83A.160(6). Additional Florida caselaw that the Board and treatise cite provide useful examples of what that means in practice:

- A statute created a water management district in any county with a population over 260,000. *City of Coral Gables v. Crandon*, 25 So.2d 1, 2–3 (Fla. 1946). Despite then applying in one county, the law was “potentially applicable to other counties in the state” and thus permissible. *Id.* at 2.
- A statute allowed licensed facilities to simulcast horse racing and conduct pari-mutuel wagering, contingent on a county having “two unused quarter horse racing permits prior to January 1, 1987.” *Dep’t of Bus. Regulation v. Classic Mile*, 541 So.2d 1155, 1157 (Fla. 1989). Only one county could ever join the class, so it was unconstitutional. *Id.* at 1158.
- A statute allowed municipalities with over 300,000 residents as of a specific date in the past to impose a parking tax. *City of Miami v. McGrath*, 824

So.2d 143, 146 (Fla. 2002). That “forever exclude[d]” any other municipality by “tying the population threshold to an anchoring date . . . that preceded the effective date of the legislation.” *Id.* at 150–51, 154.

In the latter two examples, the laws were special only because numerical criteria were tied to a specific date. Those holdings about a date-specific population threshold mirror this Court’s holding in *Brock*. In *Crandon*, by contrast, the open-ended population criterion was permissible. That holding mirrors this Court’s holdings in *Stone*, *Winston*, and *Sims*.

Two takeaways are clear from these non-Kentucky cases, neither of which helps the Board. First, courts that analyze whether a class is permanently closed take it one case at a time based on the statutory language and the applicable facts. And second, when a class incorporates numerical criteria, like population, or uses a well-settled statutory process, the law survives scrutiny. SB 1 has both features. So if the Court looks to outside caselaw, it can be confident that the test applied by the Court is within the mainstream. More to the point, even if the Court adopts the predictive rule urged by the Board, the result is still to uphold SB 1. SB 1 depends on population and local choice, not upon reticulated and artificial distinctions that that no other locality can ever possibly satisfy as Kentucky continues to grow.

* * *

All told, the Board offers nothing to show that the Court got this case wrong on first view. The Board accepts *Woodall*. Under *Woodall*, class-based legislation is permissible if the class is open to new members. And the Board agrees that a generally applicable statutory process governs how the class created by SB 1 can expand. The Board claims only that such expansion is too improbable. But it cites no Kentucky authority even hinting at such a predictive rule. Even if the Court adopts the Board's probability inquiry, SB 1 still wins out given that expansion of its regulated class depends on population and local choice—distinctions that are definitionally open.

II. The Board's detour into an equal-protection analysis need not be addressed.

The Court need only reach the issues described above, and in earlier briefing, to resolve this appeal. The Board, however, inexplicably uses rehearing to defend (at 13–15) the circuit court's equal-protection ruling. The Court should reject this last-minute pivot for any number of reasons, as the Attorney General's merits brief already explained (at 58–60).

To begin with, whether SB 1 survives equal-protection scrutiny is outside the two issues the Court told the parties to brief. Order at 1–2 (Apr. 24, 2025). In addition, the Board did not plead an equal-protection claim in its complaint.

R.8–9. And after the circuit court nevertheless sustained such a claim sua sponte, the Board explicitly declined to defend that ruling. Its brief below said (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. The Board 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 (at 26-31).

After making that explicit waiver of an equal-protection argument, the Board made no effort to defend the circuit court’s equal-protection ruling in its merits brief here. So the Court was demonstrably correct to hold that the Board “abandon[ed]” any equal-protection argument about SB 1. *Coleman*, 2024 WL 5180457, at *11. The dissent did not argue otherwise. Not only that, the Court found that the general rule against sua sponte invalidation of a statute was “especially applicable” in this case. *Id.* at *11 & n.10. On this point as well, the dissent did not push back.

Given the Court’s seeming unanimity on an equal-protection argument not being before it, the Board’s decision to raise the issue at rehearing is hard to make sense of. Its first supplemental brief does not even acknowledge the Court’s abandonment holding, much less dispute it. Yet the Board somehow faults (at 13) the Attorney General and the legislature for not “attempt[ing] to offer any ‘rational basis’” for SB 1. That confuses matters—badly. The Board

alone bears the burden of sustaining an equal-protection challenge. *See Zuckerman*, 565 S.W.3d at 596 (“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” (citation omitted)). In any event, the reason that the Attorney General’s merits brief did not explain why SB 1 survives rational-basis review is because the Board did not press such a claim even after the circuit court sustained it.

If the Board had alleged an equal-protection claim and preserved it all the way up, the Attorney General would have explained why empowering a superintendent in a sprawling county school district like JCPS is rational.⁶ Indeed, the Court previously upheld a change in “management structure” for only JCPS even under the less deferential *Schoo* test. *Bd. of Educ. of Louisville v. Bd. of Educ. of Jefferson Cnty.*, 522 S.W.2d 854, 857 (Ky. 1975) (“The statutes with which we are concerned in the instant case deal directly with the management structure of [JCPS], as to which subject we think the characteristics possessed by a large urban center of population have relevancy.”). If a change in JCPS’s “management structure” survives *Schoo*, it surely survives rational-basis review. Indeed, the Board appears to admit as much by acknowledging (at 13) that the circuit court “seemingly failed

⁶ If the Court wants a flavor of what the Attorney General would have argued, he discussed rational-basis review in his brief below out of an abundance of caution given the circuit court’s sua sponte ruling (at 28–31).

to apply the highly deferential ‘rational basis’ standard of review in its equal protection analysis.”

III. If the Board overrules or modifies *Woodall*, it should remand to the circuit court.

Out of an abundance of caution, the Attorney General makes one final point. If the Court takes the monumental (and mistaken) step of overruling *Woodall*, or if it modifies *Woodall*, the Court should remand this matter to the circuit court to apply the applicable rule in the first instance.

When the Board filed this lawsuit, *Woodall* had been the law for over two years. So when the Attorney General appeared to defend SB 1 in circuit court, he had no reason to offer affirmative evidence to justify the line drawn by the law. This approach became even more justifiable after the Board accepted *Woodall* as the governing rule. If *Schoo* had been the law, the Attorney General would have defended SB 1 quite differently. Under *Schoo*, as modified by *Tabler*, the Attorney General would have had the “burden” to prove that there is a “valid nexus between the classification and the purpose for which the statute was drafted” that is “substantially more than merely a theoretical basis for a distinction.” *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 468 (Ky. 1998).

If that had been the law when the Board sued, the Attorney General would have come forward with real-world proof about why SB 1 was and is needed based on the situation on the ground in a school district like JCPS. That evidence,

some of which is discussed in the Senate President’s amicus brief (at 19–20), would have amply justified empowering such a superintendent to proactively and creatively address intractable issues like student performance, student discipline, the dropout rate, busing, and school assignment. Indeed, as noted just above, the Court has already upheld a change in the “management structure” of only JCPS under *Schoo. Bd. of Educ. of Louisville*, 522 S.W.2d at 857. That case gives the Attorney General a roadmap to success in defending SB 1 under *Schoo.*

The Board does not dispute that JCPS is unlike every other county school district in the state. It admits that JCPS stands alone in many respects. To quote the Board (at 14), JCPS has “by far the greatest number of administrative, budgetary, curricular, disciplinary, employment, financial, school security, student assignment, transportation and general policy issues.” Those unique features of a school district like JCPS more than justify a distinct management structure under *Schoo.* There is a distinctive and natural reason to empower such a superintendent vis-à-vis the Board. The Board of course disagrees with that conclusion as a policy matter. That is no surprise, given that SB 1 removes authority from the Board and transfers it to the superintendent. But even under *Schoo.*, the Court cannot second-guess the legislature’s policy judgment. *See, e.g., Shannon v. Wheeler*, 103 S.W.2d 718, 723 (Ky. 1937) (applying *Ecklar* to uphold a law that applied in only Jefferson County and holding that “what may have been the legislative motivating policy for such enactment is not for us to determine, nor is it within our

province to approve or disapprove of it”). The question under *Schoo* is not whether the Court agrees with the General Assembly’s policy judgment but whether there is a distinctive and natural reason for SB 1 to apply in only a massive school district like JCPS. The Attorney General can readily prove that truth in court.

For all these reasons, if the Court overrules *Woodall* or modifies its test, the proper remedy is to remand this matter to the circuit court to apply the new standard in the first instance. The Court should not, as the dissent did, rely on the “evidence of record” built under a different legal regime to fault the Attorney General for not doing what the law did not require of him. *See Coleman*, 2024 WL 5180457, at *33. As the elected official charged with defending SB 1, the Attorney General is entitled to an opportunity to defend SB 1 based on the applicable law. Not giving the Attorney General that chance would be manifestly unfair. More importantly, it would profoundly disrespect the General Assembly’s policy judgment about how best to serve families and students in a county school district like JCPS.

CONCLUSION

For these reasons and those explained in the Attorney General’s earlier briefs, the Court should reverse the Jefferson Circuit Court’s judgment. If the Court nevertheless decides to overturn or modify *Woodall*, it should remand this matter to circuit court.

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WORD-COUNT CERTIFICATE

This document complies with the word limit of RAP 31(G)(3)(a) and the Court's April 24, 2025 order because, excluding the parts of the document exempted by RAP 15(D) and 31(G)(5), this document contains 7,755 words.

Matthew F. KH

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