COMMONWEALTH OF KENTUCKY

SUPREME COURT OF KENTUCKY

Case No. 2025-SC-0135

COMMONWEALTH OF KENTUCKY,
ex rel. Attorney General Russell Coleman, *Appellant*

v. Jefferson Circuit Court, No. 23-CI-3628
Court of Appeals, No. 2024-CA-0452

SAULETTE DAVIS, individually and as representative respectively of the American Federation of State, County & Municipal Employees Local 2629, AFL-CIO et al. *Appellees*

AND

Case No. 2025-SC-0137

COMMONWEALTH OF KENTUCKY,
ex rel. Attorney General Russell Coleman, *Appellant*

v. Franklin Circuit Court, No. 23-CI-343
Court of Appeals, No. 2023-CA-1025

KENTUCKY EDUCATION ASSOCIATION, et al. *Appellees*

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY AND THE AMERICAN CIVIL LIBERTIES UNION

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PURPOSE OF AMICUS BRIEF AND ISSUES ADDRESSED

The American Civil Liberties Union of Kentucky and the American Civil Liberties Union Foundation agree with Appellees that SB 7 violates the Kentucky Constitution under any level of scrutiny. *Amici* submit this brief to make several additional points: the text and history of the Kentucky Constitution's equality provisions, as well as this Court's precedents, show that Sections 1, 2, and 3 of the Kentucky Constitution require a more searching standard of review for non-suspect classifications than federal rational-basis review; the same text, history, and precedents belie the State's assertion that Kentucky's equality provisions should be interpreted in lockstep with federal law; and while strict scrutiny should apply here given SB 7's facial burden on disfavored unions' political speech, SB 7 cannot survive even federal rational-basis review, much less Kentucky's higher standard for reasonableness.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Kentucky Constitution's three equality provisions are sweeping. They affirm that, in society and by nature, "[a]ll men . . . are equal." Ky. Const. §§ 1, 3. And they contain precise, absolute language prohibiting legislative majorities from using their power to pick favorites—disallowing "grant[s] of exclusive, separate" payments and privileges, *id.* at § 3, and declaring that "[a]bsolute and arbitrary power . . . exists nowhere in a republic," *id.* at § 2. Rooted in vehement opposition to arbitrary majority rule, these provisions arose from distinctively Kentuckian concerns.

Consistent with this constitutional text and history, this Court has correctly held that Kentucky's equality provisions provide stronger protection than the federal Equal Protection Clause. *See Parker v. Webster Cnty. Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759, 767 (Ky. 2017), *superseded by statute as stated in Cates v. Kroger*, 627 S.W.3d 864, 869 (Ky. 2021); *Elk Horn Coal Corp. v. Cheyenne Res., Inc*, 163 S.W.3d 408, 418–19 (Ky. 2005), *abrogated on other grounds by Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 568–69, 572 n.17 (Ky. 2020). In so doing, this Court has recognized that Kentucky's provisions are more "detailed and specific" than their federal counterpart. *Parker*, 529 S.W.3d at 767 n.5 (quoting *Elk Horn Coal*, 163 S.W.3d at 418). And it has established a standard of review for non-suspect classifications that is more stringent than federal rational-basis review. To satisfy that standard, a classification "must be supported by a 'reasonable basis' or a 'substantial and justifiable reason.'" *Woodall*, 607 S.W.3d at 564 (citing *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 42–43 (Ky. 2009)). In practice, this reasonable-basis standard means a statute must advance a legitimate interest that is

reflected in the legislative and factual record, and the method of achieving it must be reasonably tailored to the interest.

The State makes the pernicious assertion that "there is no daylight between the federal and state equal-protection standards" and that this Court should interpret Kentucky's equality protections as coextensive with federal law. Br. for the Commonwealth of Kentucky at p. 9. As *amici* explain, that assertion is belied by the text and history of the Kentucky Constitution as well as this Court's precedents.

Under those precedents, SB 7 violates the Kentucky Constitution's guarantee of equality as set out in Sections 1, 2, and 3. SB 7 prohibits public employers from deducting amounts from their employees' wages for union dues and union political activities—except when those payments go to unions that primarily represent police, fire, and corrections officers. KRS 336.134, .180. The "only stated purpose" of SB 7 was to avoid "the appearance that public resources are being used to support partisan political activity." *Commonwealth v. Ky. Educ. Ass'n*, Nos. 2023-CA-1025-MR, 2023-CA-1194-MR, 2024-CA-0452-MR, 2025 WL 728078, at *2 (Ky. App. Mar. 7, 2025) [hereinafter *KEA*]. In litigation, the State added that SB 7 provides "a convenience" to public employees working in "protective" vocations. *Id.* at *8.

Because SB 7 facially burdens the political speech of disfavored unions and union members, strict scrutiny should apply. However, given that the parties' briefing does not advance this argument, *amici* focus on Kentucky's reasonable-basis standard for reviewing classifications that do not implicate suspect classes or fundamental rights. *Amici* agree with Appellees that SB 7 is unconstitutional under even the most deferential standard of review, and applying the more searching reasonable-basis standard confirms that conclusion. The

official purpose is patently illegitimate: the goal of eliminating apparent entanglement with union political activity *for only some unions* evinces animus toward certain speakers. The carveout actively undercuts the official purpose of the legislation. And insofar as SB 7 promotes "convenience" for employees engaging in protective or hazardous work, it is dramatically over- and under-inclusive, since the favored unions have many members who do not engage in such work and the disfavored unions have many members who do.

A case study in governmental favoritism, SB 7 is unconstitutional under any test. It certainly cannot survive reasonable-basis review under the Kentucky Constitution's stringent protections against arbitrary and unequal treatment.

ARGUMENT

I. The Kentucky Constitution's text and structure require stronger protection against unequal treatment than the federal Equal Protection Clause provides.

The Kentucky Constitution's guarantee of equality—housed in Sections 1, 2, and 3—was designed as a bulwark against official favoritism and arbitrary majority rule. Together, the three equality provisions command that "the legislature does not have arbitrary power and shall treat similarly situated persons equally." *Vision Mining, Inc. v. Gardner*, 364 S.W.3d 455, 465 (Ky. 2011); *see also Runyon v. Smith*, 212 S.W.2d 521, 522 (Ky. 1948) ("All the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the purposes of all the provisions."). On their face and by design, these provisions require more stringent judicial scrutiny of statutory classifications than does the federal Equal Protection Clause. Holding that Kentucky's equality protections go no further than federal law, as Appellant urges this Court to do, *see* Br. for the Commonwealth of Kentucky at p. 9, would not only be inconsistent with constitutional text and history, but would also require this Court to overrule its precedents

recognizing the breadth and strength of Sections 1, 2, and 3. *Cf. Commonwealth v. Claycomb by and through Claycomb*, 566 S.W.3d 202, 210 (Ky. 2018) (interpreting state constitutional provision based on its "plain text . . . , its history, and our long-standing precedent interpreting its reach").

A. The only reasonable reading of Sections 1, 2, and 3 is that Kentucky's equality guarantee is independent from—and stronger than—its federal counterpart.

When interpreting the Kentucky Constitution, this Court looks to the text's "plain and ordinary meaning" and presumes that the framers crafted the language with "great care." *Bluegrass Trust for Hist. Pres. v. Lexington Fayette Urban Cnty. Gov't Planning Comm'n*, 701 S.W.3d 196, 204 (Ky. 2024). Kentucky's equality provisions exemplify such care, as they are "much more detailed and specific than the [federal] Equal Protection Clause." *Parker*, 529 S.W.3d at 767 n.5 (internal citations omitted). Since its adoption in 1792, the Kentucky Constitution has provided: "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services . . . ." Ky. Const. § 3. In first declaring that "[a]ll men . . . are equal," Section 3 establishes a positive equality principle. It then prohibits the state from doling out special privileges to favored individuals or groups; the text specifically forbids public emoluments and other privileges that are "exclusive" and "separate." Section 3 thus identifies a particular problem for special scrutiny: the unequal distribution of benefits to favored groups.

Section 2, adopted as part of the Constitution of 1850, provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 2. By declaring that arbitrary power has no

place in Kentucky, Section 2 showcases a commitment to rational government and the rights of individuals and minorities. It also highlights that unequal treatment of different groups is at its most pernicious when it lacks genuine justification.

Finally, Section 1, adopted in the Constitution of 1891, states that "[a]ll men are, by nature, free and equal." Ky. Const. § 1. These are the first words of the introduction to the Bill of Rights, and they express principles that undergird the Constitution as a whole. By invoking human "nature," Section 1 casts equality as fundamental and immutable. And it sets forth a broad and simple mandate: government actors in Kentucky must respect not only specific enumerated rights but also the intrinsic equality of all Kentuckians.

The combined text of Sections 1, 2, and 3 amounts to a guarantee of equality that is both specific and sweeping—and distinct from federal constitutional law. That is no accident. Much of that text predated the federal Equal Protection Clause; Section 3's language did so by nearly a century. Even Section 1, adopted after the Fourteenth Amendment's ratification, bears little resemblance to the federal text. *Contrast* Ky. Const. § 1 ("All men are, by nature, free and equal . . . ."), *with* U.S. Const. amend. XIV, § 1 (prohibiting "any State" from "deny[ing] to any person within its jurisdiction the equal protection of the laws"). Because Kentucky's "constitutional guarantees against the intrusive power of the state do not derive from the Federal Constitution," they should not be interpreted in lockstep with federal law. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992), *abrogated on other grounds by Woodall*, 607 S.W.3d at 568–69, 572 n.17. Instead, the text of Sections 1, 2, and 3 demands an independent, and broader, reading.

B. Constitutional history confirms that Kentucky's equality guarantee is broader than federal equal protection.

The history of Kentucky's equality provisions lends further support to that broad reading. When this Court interprets the state constitution, "the meaning, purpose, and reach of the words used must be deduced from the intention they express considered in the light of the history that pertains to the subject." *Woodall*, 607 S.W.3d at 572 (quoting *Commonwealth v. Ky. Jockey Club*, 38 S.W.2d 987, 992 (Ky. 1931)). In debating the text of Sections 1, 2, and 3, drafters expressed deep concerns about the potential for arbitrary majority rule and sought to restrain the legislature from distributing privileges unequally.

Section 1, for example, was adopted in 1891 to restrain the legislature and reinforce individual rights, including the right to equal treatment. Drafters envisioned Section 1 as a protection against a "government [that was] drifting on to greater power than anybody ever dreamed of," and a reflection of "the true idea of government, that the individual is the unit." 1 Official Report of the Proceedings and Debates in the Convention Assembled at Frankfort, on the Eighth Day of September, 1890, to Adopt, Amend, or Change the Constitution of the State of Kentucky 494 (1890) [hereinafter 1 Debates of 1890]. This Court has observed that—while the historical narrative is complex, *see Woodall*, 607 S.W.3d at 569—a "primary motivating force behind enactment of the new Kentucky Constitution of 1891" was a "[c]oncern for limiting the powers of the legislature," which "had become the captive of special interest groups," *Tabler v. Wallace*, 704 S.W.2d 179, 183 (Ky. 1985), *abrogated on other grounds by Woodall*, 607 S.W.3d at 568–69, 572 n.17.

The purpose of Section 2, which predates the federal Equal Protection Clause by eighteen years, was even more pointed. As delegates described it, Section 2 represented a total ban on the exercise of arbitrary power over minority groups. After its adoption in the

Constitution of 1850, the text was most vigorously debated at the Convention of 1890–91, with delegates disagreeing on whether it was superfluous. *See* 1 Debates of 1890 at 440 ("The very things we attempt to inculcate and establish by this Constitution . . . are utterly opposed to, and inconsistent with, the idea of arbitrary power."). Section 2's supporters saw the provision as being "of higher importance than almost anything else in the Constitution," 2 Official Report of the Proceedings and Debates in the Convention Assembled at Frankfort, on the Eighth Day of September, 1890, to Adopt, Amend, or Change the Constitution of the State of Kentucky 1757 (1890), because it was "not against kings and monarchies, but against *majorities*," 1 Debates of 1890 at 618. Distilled simply by one delegate, Section 2 expresses in "unequivocal language that absolute, arbitrary power . . . exists nowhere, not even in the very largest majority." *Id.* at 829. The supporters won the day. That unequivocal language now enjoys pride of place in the Constitution, embodying an essential check on the legislature's power.

And while records for Kentucky's first constitutional convention are a "mere 22 pages long," *Shell v. Beshear*, Nos. 2021-CA-1459-MR, 2021-CA-1503-MR, 2022-CA-0020-MR, 2024 WL 1005023, at *53 (Ky. App. Mar. 8, 2024) (Acree, J., dissenting), the framers' constitutional models provide some insight as to the equality principles Section 3 protects. The second clause of Section 3, barring "exclusive, separate public emoluments or privileges," also appeared in the Virginia Declaration of Rights of 1776. Robert M. Ireland, *The Kentucky State Constitution* 35 (2d ed. 2013). James Madison, who helped draft that document, considered preserving "equal liberty" to be of paramount importance, on a par with preserving the state itself. *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 719 (Va. 2023) (quoting James Madison, *Madison's Amendments to the Declaration of Rights*,

in 1 *The Papers of James Madison* 174, 174–75 (William T. Hutchinson & William M.E. Rachal eds., 1962)). In addition, delegates debating the Pennsylvania Constitution, another model for Kentucky's, *see Wasson*, 842 S.W.2d at 492, emphasized that the people "most ardently love equal liberty" and "abhor all attempts to lift one class of citizens above the heads of the reast [sic]." *Proceedings of the 1776 and 1790 Pennsylvania Constitutional Conventions*, at 79.[1] In discussing Section 3 at Kentucky's 1890–91 Constitutional Convention, one delegate recognized a growing concern: Kentucky's "Legislatures seem[ed] to have granted many exclusive and special privileges." 1 Debates of 1890 at 665. As another put it, the legislature ought not to have "the right to confer some exclusive privileges to some people," as that would "open[] the door" for "vampires" to "suck[] the life-blood of the people." *Id*. at 821. This fear—that an unbounded legislature might privilege one class of citizens over the rest—was foundational to Section 3's historical understanding.

In sum, each of Kentucky's equality provisions was adopted to protect individuals and groups from unequal, arbitrary treatment by the legislature. And together, they enshrine a historical conception of equality that is both specific and broad: affirming the right to equality in the face of powerful majorities and resisting governmental favoritism.

C. This Court has previously applied a more searching standard of review to non-suspect classifications than federal rational-basis review.

Acknowledging its responsibility to interpret the Kentucky Constitution

[1] The full citation is: *A View of the Proceedings of the First Session of the Council of Censors*, *in* The Proceedings Relative to Calling the Conventions of 1776 and 1790: The Minutes of the Convention that Forms the Present Constitution of Pennsylvania, Together with the Charter of William Penn, the Constitutions of 1776 and 1790, and a View of the Proceedings of the Convention of 1776, and the Council of Censors 79 (1825).

independently, this Court has previously articulated a standard of review for non-suspect classifications that is more searching than federal rational-basis review. If accepted, Appellants' contrary argument for lockstepping with federal law, *see* Br. for the Commonwealth of Kentucky at p. 9, would require this Court to overrule its own precedents and default on its duty to provide what James Madison called a "double security" for liberty, *State ex rel. Cincinnati Enquirer v. Bloom*, 251 N.E.3d 79, 88 (Ohio 2024) (quoting James Madison, *The Federalist No. 51*, at 323 (Clinton Rossiter ed. 1961)).

1. Kentucky's reasonable-basis standard requires that non-suspect classifications be reasonably tailored to advance a legitimate government interest that is supported by the legislative and factual record.

This Court has, in some cases, applied a "heightened standard" in place of the federal rational-basis standard to review classifications that do not implicate a suspect class or fundamental right. *Elk Horn Coal*, 163 S.W.3d at 418–19. The federal standard asks only whether a classification is "rationally related to a legitimate state interest," *Woodall*, 607 S.W.3d at 564, and even post hoc justifications can suffice, *see Bright v. Gallia Cnty.*, 753 F.3d 639, 655–56 (6th Cir. 2014). By contrast, Kentucky's test—in line with practices in other state courts around the country, *see Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7–8 (Iowa 2004); *infra* Part I.C.2—demands more. Under the Kentucky Constitution, non-suspect classifications must have a "'reasonable basis' or a 'substantial and justifiable reason'" for the discrimination they impose. *Parker*, 529 S.W.3d at 767 n.5 (quoting *Elk Horn Coal*, 163 S.W.3d at 418). This means a "real" basis, reflected in the record, for the distinction drawn. *Vision Mining*, 364 S.W.3d at 472.

This Court's precedents illustrate the elements of reasonable-basis review: (1) a classification must advance a legitimate government interest supported by the legislative

and factual record, not only the State's assertions in litigation; and (2) the means employed by the law must be reasonably tailored to achieve the State's interest, to ensure that it is not the kind of arbitrary legislative action that the framers of the Kentucky Constitution so abhorred. While a statute "need not be . . . perfectly calibrated in order to pass muster," *Elk Horn Coal*, 163 S.W.3d at 417 (citation omitted), extreme over- or under-inclusiveness would render it unconstitutional. Similarly, a statute that undermines, rather than advances, the asserted government interest would fail reasonable-basis review.

For example, in *Vision Mining*, this Court struck down for lack of a reasonable basis a statute governing workers' compensation claims for pneumoconiosis, or "black lung" disease. 364 S.W.3d at 457. The statute "plac[ed] a more stringent burden of proof" on workers who developed pneumoconiosis from coal mining "than those who suffer from pneumoconiosis from other sources." *Id.* The Court noted, first, that the factual record did not support this differential burden because "there is no 'natural' or 'real' distinction between coal workers' pneumoconiosis and other forms of pneumoconiosis"—it is the same disease. *Id.* at 472. Second, the Court determined that the statute was grossly underinclusive in relation to its "cost-saving" purpose because "the state would save more money by subjecting *all* occupational pneumoconiosis claimants to the more exacting procedure," not just coal workers. *Id.* Third, instead of accepting at face value the assertion that the stringent procedure for coal workers "promotes prompt and efficient processing" of compensation claims, the Court observed that the actual impact of the procedure was to erect "another formidable hurdle" for claimants. *Id.* In other words, the statute undermined the efficient processing of claims rather than facilitating it.

In *Elk Horn Coal* and *Parker*, this Court also struck down statutes that lacked reasonable tailoring between means and ends.[2] The statute in *Elk Horn Coal* sought to "prevent frivolous appeals" by imposing a monetary penalty "*only* [on] unsuccessful appellants in second appeals *from superseded money judgments*." 163 S.W.3d at 413–14. The Court recognized that it was both extremely overinclusive, because it deterred meritorious and frivolous appeals alike, and extremely underinclusive, because it applied only to a "narrow class" of money judgment creditors. *Id.* at 421; *see id.* at 420 (noting that the statute "actually impacts only a small number of appellants"). Moreover, the Court pointed out that the law was likely ineffective at preventing even frivolous appeals because many parties who could not afford to pay a money judgment would "have nothing to lose by filing an appeal." *Id.* at 421.

This Court pointed out similar flaws in the statute at issue in *Parker*, which limited benefits for "injured older workers who qualify for normal old-age Social Security retirement benefits," but not for teachers, who "have [their own] retirement program and do not participate in Social Security." 529 S.W.3d at 768 (citation omitted). In striking down that law, the Court highlighted its inadequate tailoring: although it purportedly sought to "prevent duplication of benefits," the law did so "only for non-teachers." *Id.*

This Court should clarify that this reasonable-basis standard—requiring a legitimate interest supported by the legislative and factual record, plus reasonable tailoring between means and ends—applies to any classification that is not subject to strict or

[2] In both cases, this Court concluded that the challenged statutes failed even the more deferential form of rational-basis review. *See Elk Horn Coal*, 163 S.W.3d at 419; *Parker*, 529 S.W.3d at 767 n.5. These cases therefore show that the reasonable-basis standard requires more precise tailoring between means and ends than was present in the statutes in *Elk Horn Coal* and *Parker*.

intermediate scrutiny. Such a rule accords with the Kentucky Constitution's strong protections against arbitrary and unequal treatment. *See supra* Part I.A–B.

Although the State suggests that *Woodall* abrogated the *Elk Horn Coal* line of cases, Br. for the Commonwealth of Kentucky at pp. 8–9, that contention is at odds with *Woodall*'s plain text. *Woodall* clarified that challenges under Kentucky's equality provisions should be analyzed separately from challenges under Kentucky's prohibition on special and local legislation, and it recognized that the Court had sometimes conflated the two analyses. 607 S.W.3d at 568–69. But *Woodall* then went on to ask—solely under Sections 1, 2, and 3—whether "[s]ubstantial and justifiable reasons support[ed] th[e] classification" at issue. *Id.* at 564–65. That is the same reasonable-basis test set forth in *Vision Mining*, *Elk Horn Coal*, and *Parker*. Notably, *Woodall* did not say that Kentucky's equality provisions must be interpreted in lockstep with the federal Equal Protection Clause. To the contrary, quoting *Woodall*, this Court recently acknowledged that "the appellate courts of Kentucky have . . . developed extensive jurisprudence on [Section 3] 'and have shown little hesitancy in engaging in a more rigorous analysis with respect to classification legislation.'" *Coleman v. Jefferson Cnty. Bd. of Educ.*, No. 2023-SC-0498-DG, 2024 WL 5180457, at *10 (Ky. Dec. 19, 2024) (quoting *Woodall*, 607 S.W.3d at 573), *reh'g granted* (Apr. 22, 2025).

2. Interpreting Kentucky's equality guarantee broadly comports with the values underlying our federalist system and other states' practice of applying heightened reasonableness review.

Our federalist system rests on the idea that state courts and constitutions provide a genuinely independent layer of protection—or "double security"—for individual rights. *Bloom*, 251 N.E.3d at 88 (quoting James Madison, *The Federalist No. 51*, at 323); *see also*

Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 179 (2018) ("A state-first approach to litigation over constitutional rights honors the original design of the state and federal constitutions."). Within that system, the U.S. Constitution acts as "a floor, . . . not as a ceiling." *Parker*, 529 S.W.3d at 767 n.5; *see also Traylor v. State*, 596 So.2d 957, 961–62 (Fla. 1992) ("[U]nlike their federal counterparts, state courts and constitutions have traditionally served as the prime protectors of their citizens' basic freedoms.").

Accordingly, this Court has a "responsibility to interpret and apply our state constitution independently," and in doing so is "not bound by decisions of the United States Supreme Court." *Wasson*, 842 S.W.2d at 492. Other high courts speak of the same duty. *See, e.g.*, *People v. Tanner*, 853 N.W.2d 653, 666 (Mich. 2014); *Bloom*, 251 N.E.3d at 88; *State v. Athayde*, 277 A.3d 387, 394 (Me. 2022).

To provide Kentuckians with the double layer of protection they are due, this Court should consider Kentucky's equality provisions on their own terms and reaffirm that they are as broad as their text and history provide. Such an approach would be in line with the heightened forms of rational-basis review that sister states apply. For example, Iowa's standard requires a statute to "serve a legitimate governmental interest" that must be "realistically conceivable" and "ha[ve] a basis in fact," and "the relationship between the classification" and its "purpose" cannot be "so weak that the classification must be viewed as arbitrary." *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 7–8 (emphasis and citations omitted); *see id.* at 10–16 (surveying case law from state courts across the country in applying this standard); *see also, e.g.*, *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶¶ 25, 27 (adopting a heightened rational-basis standard under the state constitution); *Baker*

v. State, 744 A.2d 864, 871 (Vt. 1999) (noting that the Vermont Constitution "require[s] a 'more stringent' reasonableness inquiry than" the federal rational-basis standard (quoting *State v. Brunelle*, 534 A.2d 198, 201–02 (Vt. 1987))); *Balboni v. Ranger Am. of the V.I., Inc.*, 2019 V.I. 17, 19 (noting that state high courts "have overwhelmingly rejected the test the United States Supreme Court applies for the lowest tier of scrutiny"). Thus, a classification with "extreme degrees of overinclusion and underinclusion in relation to any particular goal" lacks a reasonable basis. *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 10 (quoting *Bierkamp v. Rogers*, 293 N.W.2d 577, 584 (Iowa 1980)). Consistent with the framers' design for Kentucky's equality provisions, this standard helps ensure that a legislative majority cannot "pick out a group it disfavors, declare that group to be different, and then impose a special . . . burden on the disfavored group." *Id.* at 16 (quoting 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 18.3(e), at 244 (3d ed. 1999)).

II. SB 7 violates equal protection under the Kentucky Constitution.

This Court should hold SB 7 unconstitutional. *Amici* note at the outset that the "nature of the statute"—which determines the standard of review, *see Graham v. Adams*, 684 S.W.3d 663, 686 (Ky. 2023)—actually calls for strict scrutiny. SB 7 facially targets contributions to "[p]olitical activities" of disfavored unions, making it more difficult for members to subsidize their unions' political speech and more difficult for disfavored

unions to engage in such speech, while smoothing the way for favored unions. KRS 336.134, .180.[3]

As this Court has recognized, the "right to free speech" is a quintessential fundamental right. *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 397 (Ky. 2009); *see* Ky. Const. § 1 (establishing "[t]he right of freely communicating . . . thoughts and opinions" and "[t]he right of assembling together in a peaceable manner" as "inherent and inalienable rights"); Ky. Const. § 8 ("Every person may freely and fully speak, write and print on any subject . . . ."); U.S. Const. amend. I. And it is well established that a statute whose classifications burden the exercise of a fundamental right is subject to strict scrutiny, *Woodall*, 607 S.W.3d at 564, a stringent standard that the State could not possibly meet here, *Gingerich v. Commonwealth*, 382 S.W.3d 835, 842 (Ky. 2012) (noting that strict scrutiny places the burden on the State).

Amici recognize, however, that the parties and lower courts have assumed this case does not involve application of strict scrutiny. This Court may feel compelled to proceed on that assumption as well.[4] In that case, too, the Court should hold SB 7 unconstitutional,

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[3] Notably, unions exempted from SB 7's restrictions overwhelmingly endorsed Republican candidates in the November 2022 election cycle, while disfavored unions overwhelmingly endorsed Democrats. *See* Gastel Aff. 2 (R. 920); Ex. C (R. 1087–88); Ex. D (R. 1090); Davis Aff. 9–10 (R. 886–87); Stovall Aff. 6 (R. 898); Devine Aff. 5 (R. 908). Only Republican legislators voted to override the Governor's veto of SB 7. Compl. 18 (R. 18); *AN ACT Relating to the Administration of Payroll Systems and Declaring an Emergency* 5–7, Commonwealth of Ky. S. (2023), https://apps.legislature.ky.gov/record/23rs/sb7/vote_history.pdf [https://perma.cc/FX25-PCMP].

[4] It is worth noting that Appellees have preserved the free speech issue. COA Br. for Appellees Ky. Educ. Ass'n & Nicholas Cnty. Educ. Ass'n at pp. 11–12 (noting that unions are quintessential expressive associations and "it would be an obvious constitutional wrong for the government to identify certain preferred speakers while imposing restrictions on certain disfavored speakers" (internal quotation marks omitted) (quoting *Citizens*

and *amici* urge the Court to clarify that the standard of review it applies is based on party agreement, not a conclusion that laws facially targeting the political activities of disfavored speakers are immune from heightened review.

As the Court of Appeals determined, SB 7 fails even the most deferential standard of review under federal law because no "rational basis exists for the General Assembly to believe that the legislation would further [a legitimate] government purpose." *KEA*, 2025 WL 728078, at *9 (citation omitted). It is motivated by bare animus and burdens fundamental speech rights. COA Br. for Appellees Ky. Educ. Ass'n & Nicholas Cnty. Educ. Ass'n at pp. 11–12; *KEA*, 2025 WL 728078, at *9. And it classifies based on the type of *union* for the stated purpose of providing a convenience to certain types of *workers*, even though unions that primarily represent one type of worker can have entire bargaining units that do not include any such workers. COA Br. for Appellees at pp. 12–13; *KEA*, 2025 WL 728078, at *9–11.

These defects are all the more fatal under reasonable-basis review. First, "the exception allowed by SB 7 is in direct opposition to the stated purpose of SB 7," because "it creates an appearance of favoritism for some labor organizations over others" depending on the "partisan political activity" they engage in. *KEA*, 2025 WL 728078, at *9. SB 7 itself picks favorites, evincing an animus toward disfavored unions' political speech that cannot qualify as a legitimate government interest. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S.

United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010))). Moreover, this Court has considered constitutional issues and arguments sua sponte. *See, e.g.*, *Parker*, 529 S.W.3d at 768, 770; *see also Gasaway v. Commonwealth*, 671 S.W.3d 298, 311 (Ky. 2023) (stating that appellate courts have "inherent power" to "decide an issue that was not presented by the parties so long as the appellate court confines itself to the record").

528, 534 (1973) ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). Second, classifying based on the type of union instead of the type of worker results in dramatic overinclusion, because many members of exempt unions, such as clerical employees, do not "engage in protective or hazardous work," *KEA*, 2025 WL 728078, at *10, as well as dramatic underinclusion, because many members of non-exempt unions engage in hazardous work, such as courtroom peace officers, *id.* at *9. And third, Appellants' claim that SB 7's exception serves to provide "a convenience" to certain employees is both a post hoc justification and a reflection of the law's arbitrariness: the state could convenience "more [employees] by [sparing] *all*" of them from SB 7's restrictions. *Vision Mining*, 364 S.W.3d at 472. Under this Court's precedent, SB 7 must be unconstitutional.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to hold that Kentucky's equality provisions confer broader protection than the federal Equal Protection Clause and accordingly require a more stringent standard of review for non-suspect classifications, and that SB 7 violates the Kentucky Constitution under any standard of review.

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Respectfully submitted,

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