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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 19-1056

STATE OF WEST VIRGINIA *ex rel.*  
PATRICK MORRISEY,  
ATTORNEY GENERAL,

*Petitioner,*

*v.*

DIOCESE OF WHEELING-  
CHARLESTON and MICHAEL  
J. BRANSFIELD in his capacity  
as former Bishop of the Diocese of  
Wheeling-Charleston,

*Respondents.*

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PETITIONER'S BRIEF

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## ASSIGNMENTS OF ERROR

- I. The circuit court's proposed answer to Certified Question 1 incorrectly concludes that Article 6 of the West Virginia Consumer Credit and Protection Act ("CCPA") does not apply to any religious institutions that sell or advertise educational or recreational services.
- II. The circuit court's proposed answer to Certified Question 2 incorrectly concludes that it is impossible to apply the CCPA against the Diocese of Wheeling-Charleston and former-Bishop Bransfield (collectively, "the Diocese") in this case without violating the First Amendment of the United States Constitution or the West Virginia Constitution.

## INTRODUCTION

The CCPA prohibits unfair or deceptive acts or practices when advertising or selling any goods or services, including educational and recreational services. W. Va. Code §§ 46A-6-104, 46A-1-102(47). Advertisements based on false promises and sales that conceal or omit "any material fact" are squarely within the statute's reach. *Id.* § 46A-6-102(7)(I), (L), (M). Here, the State alleges that the Diocese did not deliver services it advertised and concealed facts critical to parents' decisions whether to send their children to the Diocese's fee-based schools and camps. Despite this straightforward CCPA case, the circuit court asks for a declaration that the CCPA *never* applies to religious schools and camps as a matter of statutory interpretation, and that the Constitution further prohibits any relief. The Court should reject both proposed answers.

*First*, the CCPA's plain meaning resolves certified question one. In a statute with multiple carve-outs and exemptions, the Legislature gave no hint that it meant to exclude from the CCPA schools and camps generally, nor religious schools and camps specifically. Quite the opposite: The Legislature specifically included "education" and "recreation" in its definition of "services." W. Va. Code § 46A-1-102(47). Further, other provisions of the West Virginia Code regulating education are no reason to set aside this text-based conclusion. The circuit court's approach flips

on its head the rule that generally applicable statutes like the CCPA are given their plain meaning unless in irreconcilable conflict with another, more specific statute—which is not true here.

*Second*, the First Amendment does not bar relief because the State’s case expressly does not interfere with the Diocese’s hiring decisions, employment policies, doctrines, or other internal affairs. The CCPA does not infringe religious freedom to the extent it requires religious schools and camps to avoid material misrepresentations when advertising and selling services to the general public. Premature fears that some of the injunctive remedies available under the CCPA in other contexts might raise constitutional concerns here are no basis to stop this litigation now. Because at least some of the remedies contemplated in this action do not raise these questions, the issue should be resolved at the remedies stage with the benefit of a full record.

Indeed, it would be especially inappropriate to cut off this action early because the information on which the State based its complaint is still developing. Without the State’s investigative subpoenas the Diocese might not have published the names of priests credibly accused of child sexual abuse, and even today the Diocese has yet to release full information to the public about these issues. Adopting the circuit court’s proposed answers would also have significant consequences for consumer-protection law beyond this case. The Court should reject the untenable conclusion that the CCPA is never a recourse for consumers who purchase educational and recreational services from religious entities, no matter how egregious the violation. And while the State strongly affirms religious freedom’s paramount role in our society,<sup>1</sup> it is not a shield for unfair and deceptive consumer transactions at the public’s expense.

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<sup>1</sup> See, e.g., *Br. Amici Curiae of W. Va. et al., Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (No. 17-1717), 2018 WL 6819435; *Br. Amici Curiae of Texas et al., Little Sisters of the Poor Home for the Aged v. Burwell*, 136 S. Ct. 1557 (2016) (No. 15-105), 2015 WL 5029191.

## STATEMENT

The two questions certified to this Court arise from the early stages of an action the State brought against the Diocese for violating the CCPA when advertising and selling educational and recreational services to the public. After an August 2018 Pennsylvania grand jury report detailing decades of sexual abuse by clergy and a pattern of concealment on the part of the Roman Catholic Church, the State began investigating related concerns in West Virginia. The State filed the underlying action in March 2019, which alleges three violations of the CCPA based on issues similar to those in the Pennsylvania report. The Diocese moved to dismiss the State's amended complaint, and the circuit court held oral argument on the motion in September 2019. On November 6, 2019, the circuit court certified the two questions on review and stayed further proceedings pending the Court's decision.

### **I. Facts As Alleged In The Underlying Action**

The Diocese, normally overseen by a bishop, is comprised of parishes, schools, camps, and other entities located within the State of West Virginia. J.A. 58. The Diocese's former bishop, Michael J. Bransfield, retired in September 2018; the Pope ordered an investigation into allegations that Bishop Bransfield sexually abused adults while he was a bishop, and the report of that investigation has not been released to the public by the Roman Catholic Church. J.A. 56, 59. A purported, redacted copy shows that Bishop Bransfield sexually harassed adults and engaged in financial misconduct. *See* Report to Archbishop William E. Lori, *available at* <https://wapo.st/2vUXl4m>.

The Diocese advertises and sells educational and recreational services to parents of children in kindergarten through high school. Its six high schools and 19 elementary schools across the State serve more than 5,100 children. J.A. 57, 59. Yearly fees can be \$6,000 for the Diocese's

elementary schools and more than \$8,000 for high schools. J.A. 59. To encourage parents to enroll their children in diocesan schools, the Diocese sometimes provides partial scholarships and sometimes arranges financing for tuition costs through third parties. J.A. 59. The Diocese also sometimes finances tuition in-house through installment plans. J.A. 59. Behaving like any creditor, the Diocese has sued to enforce the terms of these agreements. J.A. 59, 180-90.

The Diocese advertises to the general public and accepts Catholic students to its schools and camps, as well as those of other faiths and denominations and those professing no faith. J.A. 58. The Diocese has advertised its educational and recreational services since at least 1974 through various media, including print, radio, television, billboards, and the internet. J.A. 58. It competes for children that might otherwise attend public or other private schools and camps. J.A. 58.

The Diocese adopted a “Safe Environment Program” following a conference of Catholic bishops in 2002. J.A. 60. The Safe Environment Program is meant to protect minors from abuse by the Diocese’s religious and lay employees, as well as volunteers. The program includes background checks for employees and volunteers, policies relating to child sexual abuse, and awareness training for adults. J.A. 60. At times relevant to this action, the Diocese’s website promised that “a safe learning environment is inherent in the mission of our Catholic schools,” and that “[s]chool employees and volunteers must pass a national background check, [and] be fingerprinted and trained according to the Diocesan Safe Environment Policy (VIRTUS).” J.A. 60. These statements were removed after the State initiated this action. J.A. 61.

None of the Diocese’s advertisements for its schools and camps disclosed that the Diocese sometimes employed priests and laity that had been convicted of, admitted to, or credibly accused of sexually abusing children. On November 29, 2018, after the State issued its first subpoena, the Diocese published a list of 18 priests the Diocese deemed to have been credibly accused of sexually

abusing children within the Diocese from around 1950 to the summer of 2018. J.A. 61. The list also named 13 priests employed by the Diocese that had been credibly accused of sexual abuse in another State. J.A. 61. That list has since grown to include 40 priests.

Bishop Bransfield and other former bishops of the Diocese Joseph Hodges and Bernard Schmitt knew of sexual abuse complaints against Diocese priests but did not disclose the conduct to law enforcement or parents paying for or otherwise considering the Diocese's educational or recreational services for their children. The Diocese has instead practiced a policy of concealing information about incidents of child abuse, despite a public letter in February 2003 that announced purported changes to diocesan policies regarding sexual abuse of children and expressly promised the Diocese would not "enter into confidentiality agreements in the future so that the truth may be known to all." J.A. 61. The Diocese did not follow this policy under Bishop Bransfield's direction; notes from a former Diocese Chancellor show that Bishop Bransfield refused to disclose incidents of sexual abuse unless the victim or the victim's family agreed. J.A. 62.

As one example, in 2006 the Diocese was made aware that a teacher at a Kanawha County school had sexually abused a student for the previous two academic years. J.A. 62. Bishop Bransfield directed an investigation into the claims on behalf of the Diocese, which revealed that the teacher groomed the teenage student by providing the student with alcohol and prescription drugs. J.A. 62. Parents of other students at the school were never advised of this abuse, even though the school's Safe Environment Coordinator recommended making the information public to help ensure that other students had not been abused by the same teacher. J.A. 63.

The Diocese concealed other behavior of admitted child sex abusers as well. In 1995 a priest working at the St. Joseph Preparatory Seminary high school in Vienna, West Virginia was accused of sexually abusing a student in the past. J.A. 64-65. The priest, Patrick Condon,



admitted the allegations when confronted by diocesan leadership. J.A. 65. Nevertheless, after some time Bishop Schmitt returned Condron to active ministry, first at a parish in Wheeling and later at Wheeling Catholic Elementary School from 1998-2001. J.A. 65. The Diocese did not advise parents of children at the school that it employed an individual who admitted to abusing a student, neither at the time nor for years later. J.A. 65.

Victor Frobias was also employed by the Diocese after being credibly accused of sexually abusing a child in another jurisdiction. Frobias had been asked to leave the Philadelphia seminary system because of the complaint, and then-Bishop Hodges agreed to give Frobias a second chance in the Diocese. J.A. 66-67. Among other positions, Frobias was chaplain of the Catholic Committee on Scouting in 1969, the Diocesan Director of Scouting in 1971, and the director of a summer youth camp—now known as Camp Bosco—from 1972 until early 1976. J.A. 67. Frobias was accused of sexually abusing children, again, while directing the camp. J.A. 67. After a leave of absence, Frobias was returned to work as a chaplain in Wheeling in 1976 and then as chaplain at Wheeling Central Catholic High School in 1977. J.A. 67. The Diocese allowed Frobias to take another leave of absence after yet more allegations of abuse in 1978. J.A. 67. In 1980 he was assigned to a church in Weirton that operates an elementary school, and was also placed in charge of the church's Boy Scout troop. J.A. 68. Once again, Frobias used his position to harm children by taking students out of class and sexually abusing them in the rectory. J.A. 68. The Diocese finally suspended Frobias in 1987, the same year he pled guilty and agreed to a five-year prison sentence for inappropriate contact with two minors during a leave of absence in 1983. J.A. 68-69.

These are only some examples of the Diocese refusing to disclose credible allegations of child sexual abuse to parents, even where the Diocese continued to place priests in positions



involving children after the allegations or admissions. Some incidents came to light only years later, after the State began its investigation, through the 2018 list of credibly accused priests.

The Diocese also has not lived up to its public statements when advertising its programs that it conducts background checks for all employees and priests as part of the Safe Environment Program. For at least 15 years, the Diocese represented to consumers that it employs a rigorous screening and training process for all personnel and volunteers at its camps and schools. J.A. 60, 64. Nevertheless, the Diocese did not ensure that these processes were followed before allowing employees and volunteers to work with children at its schools and camps.

As one result of this failing, the Diocese employed a convicted sex offender at Madonna High School in Weirton because of an inadequate background check. This individual failed to disclose on his 2011 employment application that he had been convicted of third-degree statutory rape in Washington. J.A. 71-72. The Diocese did not discover this information until 2013, after the individual had been working at the high school for over two years. J.A. 72. The Diocese terminated the individual's employment after finally conducting a background check that disclosed the criminal conduct. J.A. 72.

The Diocese also delegated background checks to local parishes and schools, yet failed to verify that they performed the required procedures before placing employees and individuals in positions with children. J.A. 70-72. As of May 2008, background checks had not been performed for as many as 22 employees and volunteers who had worked at a single school in Kanawha County the prior year. J.A. 71. The Diocese continued to advertise its universal background check policy during this time and after, even though Bishop Bransfield was personally aware that the background checks had not been done. J.A. 71. Still another individual never received a criminal background check or completed the advertised VIRTUS training, yet was allowed to hold positions

at schools in Cabell County from 2004 to 2016, including serving as a chaperone on overnight trips and a guest teacher. J.A. 71.

## **II. Procedural History**

On the basis of the examples described above and similar allegations, the State sued the Diocese of Wheeling-Charleston and Bishop Bransfield under the CCPA in March 2019. J.A. 3. As amended, the complaint asserts three claims under Article 6 of the CCPA: failure to deliver advertised services, failure to warn of dangerous services, and unfair methods of competition. J.A. 74-78 (citing W. Va. Code § 46A-6-102(7)(I), (L), (M)). The State requested appropriate equitable relief, which can include a declaration that the Diocese violated the CCPA and an injunction against violating the CCPA moving forward, as well as civil penalties. J.A. 78. The State also expressly affirmed the Diocese's right "to select priests and other employees who advance its religious mission, and [its] freedom to act pursuant to its doctrinal tenets." J.A. 57. The amended complaint states that nothing in it "should be construed as an attempt to modify or interfere with doctrinal matters and hiring decisions," J.A. 57, and that the circuit court should only grant relief that does not "modify[] or interfer[e] with doctrinal decisions, other internal church matters, or the Diocese's hiring and firing decisions," J.A. 78.

The Diocese filed a motion to dismiss the amended complaint, J.A. 86-89, and after briefing the circuit court heard argument on the motion in September 2019, J.A. 130. Two months later, the circuit court certified two questions to this Court.<sup>2</sup> J.A. 283-84. The first question asks

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<sup>2</sup> As required for certification, the circuit court's order lists the two questions, then analyzes them and provides proposed answers. The order also, however, states that the court granted the Diocese's motion to dismiss. In light of this potential ambiguity, the State filed a protective notice of appeal in Case No. 19-1199 to preserve its appellate rights if this Court determines that the circuit court issued a final order dismissing the amended complaint rather than an interlocutory order, and thus the appropriate avenue for review is direct appeal. The Court granted the State's motion to hold the protective appeal in abeyance pending resolution of this appeal.

whether the CCPA’s prohibition against unfair or deceptive acts or practices applies to “religious institutions in connection with their sale or advertisement of educational or recreational services.” J.A. 283-84. The second asks whether applying the CCPA in this case violates the First Amendment. J.A. 284. The second question also references West Virginia’s Constitution, but the circuit court’s analysis proceeds entirely on federal-law grounds.

On the first question, the circuit court proposes that Article 6 does not reach religious schools or camps. In the court’s view, the statute’s definition of “services” is ambiguous, and other tools of statutory construction indicate that the Legislature did not intend to include religious schools or camps under this definition. The circuit court also relies on quasi-preemption analysis to conclude that West Virginia’s overall scheme of regulating primary and secondary education precludes applying the CCPA to religious schools. J.A. 294-312. On the second question, the circuit court reasons that applying the CCPA in this case would violate the First Amendment’s Religion Clauses because, in its view, any possible remedy for violating the CCPA would create an excessive entanglement with religion. J.A. 286-94.

The Court accepted the certified questions, ordered expedited briefing, and set this case for Rule 20 argument on May 19, 2020.

## **SUMMARY OF ARGUMENT**

**I.** Article 6 of the CCPA applies to fee-based schools and camps, whether operated by a religious entity or not.

**A.** The CCPA forbids unfair or deceptive acts or practices in “advertising, offering for sale, sale or distribution of any goods or services.” W. Va. Code §§ 46A-6-104, 46A-6-102(6). A “service” includes “privileges with respect to . . . education [and] . . . recreation.” *Id.* § 46A-1-102(47). Under their plain terms, these definitions show that the CCPA expressly includes consumer transactions related to schools and camps. And even assuming the definition of

“services” is ambiguous, the CCPA’s structure and context, this Court’s precedent, the Federal Trade Commission’s policies, and decisions of other States interpreting similar statutes cut against the circuit court’s proposed reading.

**B.** Concerns about the potential breadth of CCPA liability do not support reading an exception into the statute for religious schools and camps. What conduct rises to the level of false advertising or what constitutes omission of a “material” fact, W. Va. Code § 46A-6-102(7)(I), (M), are questions of law and fact that exist in every CCPA claim proceeding under similar theories. Skepticism whether the State will prevail on the merits in this case is not a sufficient reason to construe the statute as forbidding any Article 6 claim to proceed against any religious school or camp under any theory.

**C.** Other statutes do not show that the Legislature intended to exempt religious schools and camps from the CCPA. The circuit court’s quasi-preemption analysis focuses entirely on schools, so at a minimum it does not support reading camps out of the CCPA. As to schools, the Legislature knows how to exempt entities from the CCPA and did not do so here. Statutes relating to schools generally and to reporting child abuse do not expressly provide that generally applicable laws like the CCPA cannot be applied to a school. Nor is there any conflict between these laws and the CCPA—much less the irreconcilable conflict the proper legal standard requires. Even a federal-law preemption theory, which does not apply when construing multiple *state* statutes, provides no basis to limit the CCPA because the Legislature has not comprehensively regulated all aspects of education and the CCPA and statutes relating to education complement each other.

**II.** The State expressly stated in its amended complaint that this action should not be “construed as an attempt to modify or interfere with doctrinal matters and hiring decisions.” J.A.

57. The CCPA is a neutral and generally applicable statute; applying it here does not violate the First Amendment.

A. The circuit court's analysis improperly relies on the *Lemon* test, which has been all-but supplanted by the U.S. Supreme Court and does not apply in cases like these involving the intersection of religious freedom and generally applicable laws. Instead, the CCPA may be enforced consistent with the Constitution provided that any remedies do not interfere with the church's internal governance or doctrines.

B. There is no constitutional concern under either the appropriate standard or the circuit court's preferred approach. As multiple federal courts of appeals decisions confirm, requiring honest representations and disclosure of material facts when the Diocese chooses to advertise and sell services to the general public does not interfere with personnel decisions, doctrine, or church policy. Finally, worry that some forms of injunctive relief might raise constitutional concerns is no basis to stop this case from moving forward where there are multiple forms of relief that do not require ongoing monitoring. Holding otherwise would have serious consequences beyond this case, turning the standard for resolving a motion to dismiss on its head.

The Court should reject the proposed answers to both certified questions.

#### **STATEMENT REGARDING ORAL ARGUMENT**

Rule 20 argument is scheduled for May 19, 2020.

#### **ARGUMENT**

##### **I. The CCPA Applies To Fee-Based Educational and Recreational Services That Religious Entities Offer To The General Public.**

The first certified question asks whether Article 6 of the CCPA—a broad consumer-protection provision required to be construed liberally—has no resonance wherever a religious entity offers educational and recreational services to the public. The circuit court proposes the



answer to this question is no. The statute's plain language and the tools of statutory interpretation, however, make clear that the Legislature placed schools and camps in the CCPA's reach, without a blanket exception for *certain* schools and camps that engage in otherwise-covered consumer transactions, based solely on their religious character.

In several respects, the circuit court agrees that the State's amended complaint alleges facts sufficient to make out a claim under the CCPA. *See, e.g.*, J.A. 295 (rejecting Diocese's argument that Article 6 does not apply "to consumer transactions and sales where neither credit nor privileges are involved"), 313 (rejecting statute of limitation argument on basis that the State alleges unfair and deceptive acts that "continue[] to the present"). Nevertheless, three concerns animate the court's proposed conclusion that the CCPA does not apply to religious entities: Whether fee-based schools and camps are "services"; whether the State's theory of CCPA liability is overbroad; and whether the Legislature—expressly or implicitly—"preempted" applying the CCPA to schools. None warrant restricting the statute's application. This is a straightforward CCPA action, directed at services expressly described by the statute and alleging violations that track its language. The Court should give the statute its ordinary and intended meaning.

Further, the Court should consider this statutory-interpretation question separate from the constitutional concerns the second certified question presents. The circuit court improperly views question one through the lens of its proposed answer to question two—it reasons that whether the CCPA applies to religious entities' "education and recreation services" "can only be answered through a comprehensive analysis of the constitutional prohibition against Church-State entanglement." J.A. 295; *see also, e.g.*, J.A. 299-300. As discussed in Part II, applying the CCPA here would not violate the First Amendment. More fundamentally, the meaning of the CCPA and whether the Constitution allows it to be enforced against religious entities are distinct and



independently important questions. In *Lemon v. Kurtzman*, for example—the lynchpin of the circuit court’s analysis—the *constitutionality* of statutes authorizing government aid to nonpublic schools did not change their *meaning*. 403 U.S. 602 (1971). Unlike the circuit court’s approach of interpreting the CCPA to encompass secular schools only, the Supreme Court gave the challenged statutes their plain meaning, then considered the constitutional claims.

The distinction between statutory meaning and constitutional application is particularly critical here because there is no statute-based reason to distinguish religious and secular schools and camps. After all, choosing an interpretation that avoids serious constitutional concerns can also be a canon of statutory construction, but only where there are two plausible readings at play. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). With no basis to exclude religious and only religious schools and camps, conflating the certified questions could lead to the counter-textual result that the CCPA does not apply to *any* schools or camps. The Court should reject this flawed methodology.

#### **A. Fee-Based Schools And Camps Are “Services” Subject To Article 6 Of The CCPA.**

Article 6 of the CCPA reaches educational and recreational services. This Article makes unlawful “unfair or deceptive acts or practices in the conduct of any trade or commerce.” W. Va. Code § 46A-6-104. The phrase “trade or commerce” is defined in Article 6 to mean “the advertising, offering for sale, sale or distribution of any goods or services.” *Id.* § 46A-6-102(6). “Services,” in turn, are defined in the CCPA’s general definitions section as “privileges with respect to transportation, use of vehicles, hotel and restaurant accommodations, *education*, entertainment, *recreation*, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like.” *Id.* § 46A-1-102(47) (emphases added); *see also id.* § 46A-1-

102(43) (defining “sale of services” as “furnishing or agreeing to furnish services,” including by “making arrangements to have services furnished by another”).

The CCPA’s definitions thus leave no question that Article 6 applies to educational and recreational services like fee-based schools and camps. Section 46A-1-102(47) expressly includes “privileges with respect to . . . education [or] . . . recreation” as “services” subject to Article 6’s prohibition on unfair or deceptive practices. A statute’s plain language forecloses further inquiry. *Appalachian Power Co. v. State Tax Dep’t of W. Va.*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995); *see also Foster Found. v. Gainer*, 228 W. Va. 99, 110, 717 S.E.2d 883, 894 (2011) (holding that where statutory “language is plain,” the statute “must be applied as written” (citation omitted)). The analysis should therefore begin and end here.

The circuit court’s contrary view turns on finding ambiguity in this straightforward text. J.A. 294-95. The statute is not ambiguous. The alternate meaning of “services” the circuit court uses to find ambiguity cannot be squared with the statutory definition as a whole, nor with the rest of the CCPA. The circuit court reasons that “privileges with respect to . . . education” might have the narrow, technical meaning of a creditor’s right to defer payment on a debt or to have a claim paid before a debtor’s other creditors receive payment. J.A. 294-95. This definition is illogical in context—and it is “a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation.” *W. Va. Health Care Cost Review Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996) (citation omitted).

It is unreasonable that the Legislature intended Article 6 to prohibit unfair or deceptive practices only in “advertising, offering for sale, sale or distribution,” W. Va. Code § 46A-6-102(6), of the right to defer payment on a debt. *See State v. Louk*, 237 W. Va. 200, 214, 786 S.E.2d 219, 233 (2016) (explaining that courts avoid interpreting statutes to reach absurd results). At a

minimum, that would be a novel reading of Article 6 with consequences for every “service” the CCPA covers. While education is frequently financed by debt, other services listed in the definition are not—like “hotel and restaurant accommodations” and “recreation.” W. Va. Code § 46A-1-102(47). Construing “privileges with respect to” as requiring a creditor-borrower relationship would render these examples meaningless. As a result, either “privileges” would modify only some of the examples listed in the “services” definition (thus violating the series-qualifier canon, *see* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 147-51 (2012)), or the examples it cannot make sense of would fall out of the statute altogether (in violation of the canon against surplusage, *see id.* at 174-79).

The circuit court’s alternate reading also makes the definition of “services” incompatible with other parts of the CCPA. As a general consumer-protection provision, Article 6 focuses on “consumer transaction[s],” which are defined as “sale[s] or lease[s] to a natural person or persons for a personal, family, household or agricultural purpose.” W. Va. Code § 46A-6-102(2). Reading “services” through a securities-focused lens might make sense for Article 2, but it would take Article 6 outside its intended personal, family, and household realm.

Citing a specialized definition of “privilege” is thus not enough to make the term “services” ambiguous, especially where context makes clear the Legislature did not intend such a restrictive meaning. The more commonly understood and contextually appropriate meaning of “privilege” avoids these concerns by interpreting “privilege with respect to . . . education” as a right to receive the educational services a customer pays for. *See* Black’s Law Dictionary 1390 (10th ed. 2014) (defining “privilege” as “[a] special legal right, exemption, or immunity granted to a person or class of persons”); *see also United States v. Balde*, 943 F.3d 73, 81 (2d Cir. 2019) (explaining that

“substituting a technical term-of-art meaning for the ordinary plain meaning of a straightforward English word” “invert[s]” principles of statutory construction).

Further, even assuming that the definition of “services” is ambiguous, the CCPA’s structure and other principles of statutory interpretation resolve any confusion in favor of finding schools and camps within Article 6’s reach.

*First*, the Court has already recognized that education is a “service” under the CCPA. *Mountain State College v. Holsinger* held that a college was not a creditor for purposes of Article 2 because it did not lend money to its students. 230 W. Va. 678, 684, 742 S.E.2d 94, 100 (2013). Nevertheless, the Court noted that the college was a “seller of education services” as defined in the CCPA. *Id.* Indeed, even the circuit court recognizes that *Mountain State* “clearly implies that had the college been a creditor of the students it enrolled then the provisions of Article 2 would apply.” J.A. 303. The court brushes aside *Mountain State* because it was an Article 2 case, but the CCPA uses the same definition of “services” throughout the statute. W. Va. Code § 46A-1-102(47). It does not mean something different in Article 6 than the Court said it does in Article 2.

*Second*, the CCPA references education even beyond its definition of “services.” Section 46A-2-138 discusses the CCPA’s application to correspondence courses, and directs the State Board of Education to promulgate rules for refund of tuition fees and cancellation of correspondence-course contracts “with regard to goods and services not wholly delivered.” W. Va. Code § 46A-2-138(a). Section 46A-2-128 also contains limited exceptions to the CCPA’s debt-collection requirements when collecting “any delinquent educational loans made by any institution of higher education.” *Id.* § 46A-2-128(c). If schools were wholly outside the CCPA’s scope, there would be no need to exempt higher education loans in this way. Many sellers of consumer goods or services are not listed in the CCPA at all even though the statute undoubtedly

applies to them. There is no mention of mail-order marketers, for instance, as in *State ex rel. McGraw v. Imperial Mktg.*, 196 W. Va. 346, 472 S.E.2d 792 (1996). The same is true for pharmaceutical sellers (e.g., *State ex rel. McGraw v. Johnson & Johnson*, 226 W. Va. 677, 704 S.E.2d 677 (2010)); some car title pawnors (*State ex rel. McGraw v. Pawn America*, 205 W. Va. 431, 518 S.E.2d 859 (1998)); and a host of other entities. Against that backdrop, the fact education is described when defining “services” and elsewhere makes it even more likely the Legislature intentionally included schools when describing privileges with respect to education. W. Va. Code § 46A-1-102(47).

*Third*, Article 6 directs courts “construing this article” to “be guided by the policies of the Federal Trade Commission” and federal courts when enforcing 15 U.S.C. § 45(a)(1) and “other federal statutes dealing with the same or similar matters.” W. Va. Code § 46A-6-101(1); *see also White v. Wyeth*, 227 W. Va. 131, 138-39, 705 S.E.3d 828, 835-36 (2010). Like Article 6, federal law prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). The Federal Trade Commission has no misgivings bringing enforcement actions against educational institutions under federal law, underscoring that Article 6 should be interpreted the same way. *See, e.g., FTC v. Univ. of Phoenix, Inc.*, Trade Reg. Rep. ¶ 18062 (D. Ariz. 2019) (stipulated order for injunction and monetary judgment regarding deceptive advertising); *FTC v. Stratford Career Inst.*, Case No. 1:16-cv-00371 (N.D. Ohio Jan. 31, 2017) (same).

*Fourth*, other States’ unfair or deceptive practices laws similar to the CCPA are frequently applied to schools. In *Scott v. Association for Childbirth at Home, International*, the Illinois Supreme Court rejected an argument that education is not a “trade or commerce” for purposes of the State’s consumer-protection law, 430 N.E.2d 1012, 1015 (Ill. 1981). The court noted that (like



the CCPA), the Illinois law did not specifically exempt educational institutions as it did other entities. *Id.* Instead, it emphasized that “purchasers of educational services may be as much in need of protection against unfair or deceptive practices in their advertising and sale as are purchasers of any other service.” *Id.* (citing *State ex rel. Douglas v. Ledwith*, 281 N.W.2d 729 (Neb. 1979)). Minnesota and Ohio courts have reached similar results under their state consumer-protection statutes. Syl. pt. 2, *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 469 (Minn. App. 1999); *Malone v. Acad. of Ct. Reporting*, 582 N.E.2d 54, 58-59 (Ohio App. 1990) (collecting cases).

The circuit court deems these decisions irrelevant because they involved for-profit schools and challenges to “representations ancillary to enrollment agreements or on statements specifying the educational services to be provided.” J.A. 305-06. As to the first objection, nothing in the CCPA limits its scope to for-profit companies. The FTC likewise enforces federal consumer-protection law against for- and non-profit entities alike. *See, e.g., FTC v. Cancer Fund of Am., Inc.*, Case No. 2:15-cv-00884 (D. Ariz. 2016) (challenge involving FTC and 50 States, including West Virginia, against charities engaged in unfair or deceptive conduct). To the second objection, Article 6 prohibits unfair or deceptive “advertising”—representations designed to retain students *and* attract new customers—not simply representations connected with current students’ enrollment materials.

In short, there is no ambiguity in the meaning of “privilege with respect to . . . education [or] . . . recreation.” W. Va. Code § 46A-1-102(47). And if there were, the better reading is that the Legislature intended to include consumer transactions related to schools and camps under Article 6’s protection against unfair or deceptive acts or practices.



**B. The State's Theory Of Liability Does Not Warrant Creating A CCPA Exemption For Religious Schools Or Camps.**

The circuit court's second reservation against applying the CCPA to religious schools and camps reflects fear that the underlying action is overbroad. J.A. 314-17. The State's amended complaint, however, pleads a straightforward case: The Diocese has engaged in unfair and deceptive conduct through, among other things, falsely promising background checks of all employees and failing to disclose material facts related to the safety of its schools and camps. The first set of allegations faults the Diocese for not living up to promises in its external-facing communications to conduct background checks for all employees and volunteers, even though the Diocese advertised this policy since at least 2002, and where failure to conduct the promised checks resulted in hiring a convicted sex offender on at least one occasion. The second theory alleges the Diocese failed to disclose, and in fact actively concealed, that it knowingly employed individuals credibly accused of child abuse or misconduct despite a history of numerous instances of abuse at multiple schools and camps. If these allegations are proven—and the circuit court must construe them as true at the motion-to-dismiss stage—liability is appropriate under the CCPA: Article 6 prohibits “[a]dvertising goods or services with intent not to sell them as advertised,” conduct “creat[ing] a likelihood of confusion or of misunderstanding,” and “the concealment, suppression or omission of any material fact . . . whether or not any person has in fact been misled, deceived or damaged thereby.” W. Va. Code § 46A-6-102(7)(I), (L), (M).

The circuit court acknowledges this statutory language, J.A. 314-15, as it must. Yet rather than attempting to explain how the State's case does not fit within that framework, the court cites the potential breadth of a theory of liability “based on past conduct and a present failure to disclose it” that could place the State in the role of deciding unilaterally “when a religious institution must warn of and disclose to prospective students and parents” information about past misconduct. J.A.

315. This concern is no reason to read an implicit exception for religious schools and camps into the CCPA. Rather, it speaks to the separate question of what conduct rises to the level of “unfair or deceptive acts or practices” for *any* entity, religious or not.

For instance, the State’s false advertising theory proceeds on the premise that if an entity chooses to advertise a particular fact—like a policy of background checks for all employees and volunteers—that fact must be true. But it is both a legal issue and a matter of proof how many failed background checks, and under what circumstances they were omitted, equate to failing to deliver advertised services. A failure to warn theory of CCPA liability likewise turns on the legal question whether an omitted fact is “material.” W. Va. Code § 46A-6-102(7)(M). At some point (perhaps immediately, depending on the circumstances) an isolated instance of misconduct is not a “material fact.” A pattern of misconduct and knowing concealment of abuse, however, very well may be material to parents deciding where to send their children to school or camp. At this early stage before discovery, it is premature to judge whether the State will ultimately prevail on its claims. But skepticism on that score is no reason to stop the case from moving forward—much less to interpret the CCPA as not applying to religious schools or camps under any theory.

The same answer assuages the circuit court’s concern that giving the CCPA its plain meaning could unbox a parade of horrors. J.A. 317. The order asks if a hospital could be required to disclose “whether any current or former employee had been convicted of domestic violence, a sexual offense, a crime of violence, a drug offense or had received treatment for drug addiction, or successfully been sued for malpractice.” J.A. 317. But which of these facts (if any) are “material” cannot be decided in a vacuum. For many companies their employees’ criminal histories are not material to their customers—but for a skydiving school even a 5% injury rate very likely is. Further, hospitals already routinely disclose information like “negative results” and

“morbidity rates of patients treated for various diseases,” J.A. 317, presumably because this information is important for patients choosing among healthcare providers. And of course, if a hospital *advertises* its morbidity rate as less than 1% when it is actually as high as 10%, it becomes much harder to characterize CCPA liability as inappropriate.

In reality, it is the circuit court’s theory that sweeps too far, not the State’s. The solution to sometimes difficult questions about the line between material and immaterial omissions is not to refuse ever to apply Article 6 to religious camps and schools. Sanctioning that approach would lead to the untenable result of closing the door on even the most egregious unfair or deceptive conduct simply because it was perpetuated by a religious entity. It would mean that a religious high school could falsely tout 100% graduation rates, 80% acceptance rates to Ivy League colleges, 10:1 student-teacher ratios, and a complement of AP classes with full CCPA immunity. Or that a religious camp could promise that all its counselors are CPR-trained and its high-ropes course and swimming instructors are recertified every year, with no recourse if reality fails to align with those claims. There will always be CCPA cases with difficult issues of proof. But the circuit court is wrong to use that concern as a reason to graft a blanket exception onto the statute for religious entities that advertise educational and recreational services to the general public.

**C. Other Statutory Provisions Governing Education Do Not Preempt The CCPA’s Application To Educational And Recreational Services.**

Finally, the Legislature has neither expressly nor implicitly excluded schools from an otherwise generally applicable statute like the CCPA. The Court should reject the circuit court’s suggestion that laws relating to education elsewhere in the West Virginia Code “preempt” the CCPA’s application to religious schools and camps. J.A. 308-12. As an initial matter, the circuit court’s quasi-preemption analysis focuses solely on education-related laws, so any inference about the CCPA’s scope drawn from other statutes does not apply to recreational camps. This means

that, at a minimum, the proposed answer to question one must be limited to schools. Yet even in that context a theory of CCPA preemption lacks legal and factual heft. The circuit court correctly recognizes that the “primary object in construing a statute is to ascertain and give effect to the intent of the Legislature,” and that legislative intent can be discerned through explicit or implied cues. J.A. 310 (quoting *State ex rel. Morrissey v. Copper Beech Townhome Cmtys. Twenty-Six, LLC*, 239 W. Va. 741, 747, 806 S.E.2d 172, 178 (2017)). At both of these steps, however, the court gets the analysis backward. The order does not acknowledge that West Virginia law has “a general bias against preemption,” *Gen. Motors Corp. v. Smith*, 216 W. Va. 78, 83, 602 S.E.2d 521, 526 (2005), nor that a finding of “preemption is disfavored in the absence of exceptionally persuasive reasons warranting its application,” *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 68, 680 S.E.2d 77, 83 (2009). There are no exceptionally persuasive reasons for preemption here.

#### **1. There Is No Express Exemption To The CCPA For Religious Schools.**

Express preemption requires “specific and plain language” showing the Legislature intended to preempt a specific field of law. *Morgan*, 224 W. Va. at 69, 680 S.E.2d at 84. Clear language revealing intent to exempt religious schools from the CCPA is missing from both the CCPA itself and laws specifically governing schools. Starting with the CCPA, the circuit court’s analysis proceeds almost as if courts should presume an entity is not covered by the CCPA unless specifically named in the statute. *See, e.g.*, J.A. 311 (“[I]t is significant that nowhere in the [CCPA] does it explicitly indicate that the provisions of Article 6 apply to religious schools and camps.”). This premise is factually incorrect. As discussed above, the CCPA *does* reference education, both in its definition of “services” and elsewhere. The premise is also legally flawed. Article 6 does not single out any specific entities or industries—as a statute of general applicability that must be



“liberally construed,” W. Va. Code § 46A-6-101(1), it applies to all consumer transactions except those specifically exempted, not the other way around.

Further, the Legislature knows how to exempt entities from the CCPA, yet did not do so for all schools or even religious schools specifically. The sale of insurance, entities regulated by the Public Service Commission, and licensed pawnbrokers are exempt from the CCPA. W. Va. Code § 46A-1-105(a)(2), (4), (5). Other sectors are exempt from specific parts only: Banks, lawyers, and accountants from Article 6C, *id.* § 46A-6C-2(b), and stockbrokers, supervised financial organizations, and cable television operators from Article 6F, *id.* § 46A-6F-202, 46A-6F-209, 46A-6F-211. This pattern of deliberate exemptions for certain entities strongly suggests that the Legislature did not intend for courts to read additional, unwritten exceptions into the statute. *See* Syl. pt. 4, *Christopher J. v. Ames*, 241 W. Va. 822, 828 S.E.2d 884 (2019) (“In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies” (citation omitted)). In fact, this Court construes even these *express* exemptions narrowly. *See, e.g., Pawn America*, 205 W. Va. at 434, 518 S.E.2d at 862 (holding that the exemption for pawnbrokers does not apply if the entity is not functioning as a pawnbroker).

Education-specific statutes do not support express preemption either. The circuit court relied on two statutory schemes, sections of West Virginia Code Chapters 49 and 61, addressing child abuse, and West Virginia Code Chapter 18, addressing schools. The relevant sections of Chapter 49 require clergy and school personnel to report suspected child abuse, W. Va. Code § 49-2-803(a), provide education and training programs for mandatory reporters, *id.* § 49-2-805, and outline penalties for failing to report and for child abuse generally, *id.* §§ 49-2-812, 49-4-601, 61-8B-1 *et seq.*, 61-8D-1 *et seq.* Neither these nor other parts of Chapter 49 contain preemptory

language. If anything, Section 49-2-803(c) emphasizes that it is not exclusive in that it does not “prevent individuals from reporting suspected abuse or neglect on their own behalf.” The portions of Chapter 61 the circuit court relies on are similar. Articles 6B and 6D provide the criminal penalties for sexual offenses and child abuse. Neither contains preemption clauses. And far from exempting other law, Section 61-8D-9 states that it works with Sections 49-4-601 and 49-4-610.

Chapter 18 also does not purport to be the exclusive statute governing educational services. The only section containing preemptory language of any kind is housed within Article 28 concerning non-public schools. This section provides:

No private, parochial or church school or school operated by any other religious group or body as part of its religious ministry or other nonpublic school which complies with the requirements of this article shall be subject to any other provision of law *relating to education* except requirements of law respecting fire, safety, sanitation and immunization.

W. Va. Code § 18-28-6 (emphasis added). Because the section does not exempt non-public schools from all other laws, the key question is whether the CCPA “relat[es] to education.”

The phrase “related to” cannot be construed “to the furthest stretch of its indeterminacy.” *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Rather, courts should look to the statute’s purpose when discerning its scope. *See id.* at 658. Article 28 directly states its purpose: to ensure that “all people shall be free . . . to select their religious instructor” and “that religion, morality and knowledge being necessary to good government and the happiness of humankind, the means of education shall forever be encouraged.” W. Va. Code § 18-28-1. This focus on free choice of religious teachers and encouraging religious instruction indicates that the Legislature’s concern was keeping state law separate from the content of religious education. The exceptions listed in Section 18-28-6—“laws respecting fire, safety, sanitation and immunization”—underscore that the statute preempts requirements surrounding curriculum or organizational structure, not any law that might tangentially touch on a school.



Applying the CCPA to religious schools does not run afoul of this purpose because requiring fairness when advertising and selling educational services to the general public does not interfere with the content of the services themselves.

Reading Section 18-28-6 expansively would also create conflict with the CCPA's purpose as an intentionally broad, remedial statute: "[The CCPA] shall be liberally construed so that its beneficial purposes may be served." W. Va. Code § 46A-6-101(1). Viewing the CCPA as a statute altering schools' curriculum or organizational structure would make state consumer-protection law powerless whenever any non-public school puts out deceptive advertising materials, regardless how serious the deception or how vulnerable the target audience. Read together in light of their stated purposes, the CCPA and Section 18-28-6 cannot fairly be construed to require this result.

## **2. West Virginia's Education Statutes Do Not Implicitly Preempt The CCPA.**

Turning to implied preemption, the dominant thread in the circuit court's analysis is whether the "overarching design" of West Virginia's education statutes, including "specific and comprehensive statutes and regulations in this area," J.A. 312, reveal a legislative intent not to apply the CCPA against schools. Here, too, the court's analysis starts from an incorrect legal standard and rests on factually suspect grounds.

*First*, the theory that regulating an industry in one part of the Code grants immunity from other generally applicable laws conflicts with one of the most important canons of construction: Because laws frequently overlap to some extent, "[s]tatutes which relate to the same subject matter should be *read and applied together* so that the Legislature's intention can be gathered from the whole of the enactments." Syl. pt. 8, *Barber v. Camden Clark Mem. Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018) (citation omitted; emphasis added). The only exception is where statutes are in irreconcilable conflict; otherwise, courts must "construe such statutes so as to give effect to each." Syl. pt. 9, *id.* (citation omitted); *see also, e.g., Utility Air Reg. Group v. EPA*, 573

U.S. 302, 320 (2014) (“statute[s] must be read . . . with a view to their place in the overall statutory scheme” (citation omitted)).

The CCPA and the education laws the circuit court invokes are not in tension, much less irreconcilable conflict. Chapter 18 relates to school organization, structure, and policy; a school can comply with all of these requirements *and* avoid unfair or deceptive practices when advertising and selling educational services. Chapter 18 speaks to advertising only in limited respects. *See, e.g.,* W. Va. Code §§ 18-5-13a(a)(2) (providing for the advertisement of school closings), 18-9-3a (providing for the advertisement of school financial information). Because the legal standard requires conflict—not mere overlap—even these somewhat similar provisions cannot support preemption. Finally, the requirements specific to non-public schools in Chapter 18, Article 28 can also coexist with the CCPA’s demands because they concern issues like schools attendance, testing, and state health and safety requirements. *See, e.g.,* W. Va. Code §§ 18-28-2, 18-28-3.

The same is true for the regulations surrounding reporting child abuse in Chapters 49 and 61. Prohibiting false advertising and requiring schools to provide material facts when advertising and selling their services does not conflict with the duties to report abuse in Chapter 49 or make it difficult to enforce Chapter 61’s penalties. If anything, the CCPA complements these laws by requiring fair and non-misleading advertising about issues, like child safety, that are material to parents choosing where to send their children to school. Because each of these laws can be “read and applied together” with the CCPA “so as to give effect to each,” syl. pts. 8 & 9, *Barber*, 240 W. Va. 663, 815 S.E.2d 474, the circuit court’s answer regarding preemption must be set aside.

*Second*, nothing in the CCPA supports departing from these ordinary rules. To the contrary, actions routinely go forward under the CCPA even though other Code sections regulate different aspects of the target entity’s activities. CCPA claims are common against automobile

dealers, for example, despite extensive regulation of dealers under West Virginia Code § 17A-1-1, *et seq.* See, e.g., *State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995); *Muzelak v. King Chevrolet, Inc.*, 179 W. Va. 340, 368 S.E.2d 710 (1988). Other arguably “double-regulated” entities may not engage in unfair or deceptive practices either. See, e.g., *State ex rel. Cavalry SPVI, LLC v. Morrissey*, 232 W. Va. 325, 752 S.E.2d 356 (2013) (collection agencies registered by Tax Commission, W. Va. Code § 47-16-1, *et. seq.*).

Cases where this Court found the CCPA does not apply turned on facts not relevant here. In *State ex rel. CitiFinancial, Inc. v. Madden*, a borrower brought a counterclaim against a lender under the CCPA for allegedly charging “unreasonable and excessive amounts for credit insurance.” 223 W. Va. 229, 232, 672 S.E.2d 365, 368 (2008). The Court rejected this counterclaim because it was effectively a “challenge to an approved insurance rate,” an area that Chapter 33 entrusts solely to the Insurance Commissioner. Syl. pt. 2, *id.* There are no similar statutes giving the School Superintendent or any other entity sole authority to police unfair or deceptive practices when advertising schools.

Nor is this case like *State ex rel. McGraw v. Bear, Stearns & Co., Inc.*, 217 W. Va. 573, 618 S.E.2d 582 (2005). The circuit court characterizes *Bear, Stearns* as refusing to extend the CCPA to “an action based upon conduct that was ancillary to a business governed by other statutory requirements, such as buying and selling securities.” J.A. 312. The critical factor for this Court, however, was that securities are not “goods or services” under the CCPA, *see* W. Va. Code § 46A-1-102(21), not the existence of other statutory requirements. *Bear, Stearns*, 217 W. Va. at 578, 618 S.E.2d at 587. As explained above, education is a “good or service.” And in any event, there is nothing “ancillary” about tuition payments when it comes to advertising and selling educational services.

*Copper Beech* does not require a different result, either. Although *Copper Beech* was also resolved in a certified question posture, the similarities end there. The Court's holding that the CCPA does not apply to residential leases of real property was based on two primary factors. First, the Court emphasized that the CCPA is wholly silent about the landlord-tenant relationship and residential property leases. *Copper Beech*, 239 W. Va. at 748, 806 S.E.2d at 179. Second, the Court emphasized the "extensive, detailed statutory law regulating the landlord-tenant relationship," including provisions specifically governing residential leases. *Id.* That is the type of statutory framework "pervasive[]" enough to conclude that the Legislature did not intend the CCPA to apply. *Id.*

Neither factor is present here. The Legislature explicitly included "education" in the definition of "services" and referenced education at other points in the statute. *E.g.*, W. Va. Code § 46A-1-102(47). Rather than operating in an area of legislative silence, the statute itself thus makes clear that the Legislature intended the CCPA to reach education in some circumstances. Further, while Chapters 18, 49, and 61 speak generally about schools and measures to protect children from abuse, they do not "pervasively" regulate either the specific consumer relationship (parent-school) or the discrete conduct (unfair or deceptive acts or practices when advertising and selling educational services) at issue here. Extending *Copper Beech* in the absence of either factor would be inappropriate as a matter of legislative intent, and would unsettle a host of areas where the CCPA has long been understood to apply despite far less textual support and equal or greater overlapping regulations elsewhere in the Code.

*Third*, federal-law principles of field preemption do not support setting aside the CCPA with respect to schools. *Barber*, of course, should resolve this issue as it governs the construction of overlapping state statutes, whereas field preemption applies to the relationship between state

and federal law. Nevertheless, even though in a true field preemption inquiry the relevant legislature is the U.S. Congress, legislative intent remains the “ultimate touchstone.” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citation omitted). Discerning this intent under a field preemption theory turns on whether a statutory scheme is so pervasive that it is reasonable to infer Congress did not leave room for supplemental regulation. *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 674, 474 S.E.2d 559, 604 (1996). This standard is not satisfied because the circuit court builds on the false premise that the Code comprehensively regulates non-public schools.

Nothing in Chapters 18, 49, or 61 discusses unfair or deceptive practices in education. This means there are gaps in these statutes regarding the commercial aspects of educational services. Last Term, the U.S. Supreme Court found that the Atomic Energy Act did not preempt Virginia’s law banning non-federal uranium mining because the Act regulated every aspect of nuclear fuel *except* mining. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1903 (2019) (Gorsuch, J., opinion announcing the judgment of the Court). Applying the same reasoning here, even if the education statutes were otherwise comprehensive, at most, they regulate all aspects of education *except* the commercial, consumer-focused side. The provisions in Article 28 governing non-public schools are also silent about unfair or deceptive practices. Failure to regulate the commercial components of education while extensively regulating other aspects is “persuasive evidence” that the Legislature did not intend to preempt other generally applicable laws. *McComas v. Fin. Collection Agencies, Inc.*, 1997 WL 118417, at \*2 n.4 (S.D. W. Va. Mar. 7, 1997).

If anything, federal law supports extending the CCPA to schools. As explained above, the CCPA directs courts to consider the interpretation of federal consumer-protection law when construing the CCPA. W. Va. Code § 46A-6-101. And federal courts frequently allow the FTC to pursue enforcement actions for false representations against schools, even though the arguments



about West Virginia's pervasive education laws could just as easily be applied to Title 20 of the United States Code. *See, e.g., Rushing v. FTC*, 320 F.2d 280 (5th Cir. 1963).

Even at its broadest, a theory of implied preemption does not support the circuit court's conclusion that provisions of the Code governing education and child abuse preempt the CCPA's application to educational services. Combined with the lack of textual support discussed above, this Court should accordingly answer the first certified question in the affirmative.

## **II. Applying the CCPA To The Diocese's External Communications Involving Educational And Recreational Services Does Not Violate The First Amendment's Religion Clauses.**

The State strongly affirms "the right of the Diocese to select priests and other employees who advance its religious mission, and the Diocese's freedom to act pursuant to its doctrinal tenets." J.A. 57. Indeed, the State's amended complaint is clear that "[n]othing in this action should be construed as an attempt to modify or interfere with doctrinal matters and hiring decisions." J.A. 57. The State's action asks only that the Diocese deal fairly when it advertises its fee-based educational and recreational services to the public. This means performing the background checks and providing the safe environment it advertises—or advertising consistent with its actual policies, which remain fully within the Diocese's prerogative to enforce or change. It also means disclosing information that a concerned parent or other consumer would find material when deciding whether to pay for the Diocese's schools and camp programs. The Constitution does not forbid requiring honest disclosures like these.

The circuit court, however, would let concerns about potentially far-reaching injunctive relief it speculates the State *might* seek at the end of this action cut off the litigation in its infancy. Yet the amended complaint contemplates multiple remedies that would not involve the "continuous monitoring and supervision of Diocese communications, including policy statements

and procedures,” that the circuit court fears, J.A. 293—and motions to dismiss must be judged “in the light most favorable to the plaintiff, taking all allegations as true,” *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008) (citation omitted). Turning this standard on its head, the circuit court’s proposed answer to the second certified question transforms the First Amendment into a shield for religious entities to evade responsibility under neutral laws of general applicability like the CCPA, even where enforcement would not interfere with church doctrines, internal practices, or hiring decisions. There is no support for such an expansive rule. Federal courts routinely allow claims concerning a religious entity’s outward communications to go forward under generally applicable statutes, especially those touching on the State’s interest in protecting its citizens from misleading or deceptive conduct. This Court should do the same.

**A. The Circuit Court’s Order Proceeds Under The Wrong Constitutional Standard.**

The circuit court’s constitutional analysis rises and falls with the three-prong test in *Lemon v. Kurtzman*. Yet although the court notes (without citation) that “*Lemon* continues to be quoted with approval,” J.A. 319, the *Lemon* test has been widely discredited and all-but supplanted as a tool for First Amendment analysis. Last year the Supreme Court explained that *Lemon* failed to live up to its promise to become a “framework for all future Establishment Clause decisions”; instead, the Court has frequently “either expressly declined to apply the test or simply ignored it.” *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080 (2019) (collecting cases).<sup>3</sup>

One of these areas where *Lemon* does not control is the extent to which religious entities are subject to generally applicable laws. In contrast to Establishment Clause questions about

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<sup>3</sup> See also, e.g., *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (explaining that “a majority of” Supreme Court justices “have, in separate opinions, repudiated the brain-spun ‘*Lemon* test’”); *Gaylor v. Mnuchin*, 919 F.3d 420, 427 n.7 (7th Cir. 2019) (noting that the Supreme Court has declined to apply *Lemon* for “many years”).

religious monuments or displays on public property, or even state aid to religious organizations as in *Lemon* itself, there is typically no constitutional barrier to enforcing laws of general applicability that do not single out religious entities for disfavored treatment. *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990). Consistent with this rule, the Supreme Court refused to apply *Lemon* to a religious school seeking an exemption from a generally applicable employment law. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). The Court adopted the “ministerial exception” as the appropriate First Amendment safeguard instead. This doctrine prevents “intru[sion] upon . . . the internal governance of the church, [and] depriving the church of control over the selection of those who will personify its beliefs” by barring enforcement of otherwise applicable laws that would require “a church to accept or retain an unwanted minister” and “punish[] a church for failing to do so.” *Id.* at 188.

The ministerial exception is the appropriate lens to prevent excessive entanglement with religion in contexts like these. See *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 120 (3d Cir. 2018). Even the Wisconsin state-court decision the circuit court relies on used similar reasoning: *Coulee Catholic Schools v. Labor & Industry Review Commission* did not turn on *Lemon*, but held that the federal Constitution bars state employment-law claims “for employees whose positions are important and closely linked to the religious mission of a religious organization.” 768 N.W.2d 868, 892 (Wis. 2009). The doctrine is also not limited to employees with the formal title of “minister.” *Lee*, 903 F.3d at 122 n.7; *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 205 (2d Cir. 2017); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012). Thus, the precise question in this case—which the circuit court does not analyze—is whether applying the CCPA interferes with “the internal governance of the church.” *Hosanna-Tabor*, 565 U.S. at 188. It does not.

**B. The First Amendment Does Not Bar Applying The CCPA To The Diocese's External Communications.**

Viewed through the correct constitutional standard, nothing about this CCPA action offends the Diocese's First Amendment rights. The same is true even under the circuit court's preferred approach. And in any event, the circuit court is wrong to allow questions about potentially too-broad theories of injunctive relief best addressed at the remedies stage to stop this case from moving forward. It may be true that some of the remedies available under the CCPA against a non-religious company would raise constitutional questions if applied here. But because there are multiple avenues of relief included in the State's amended complaint that do not raise those concerns, the answer to the second certified question is no.

**1. This Action Does Not Interfere With Hiring Decisions Or Internal Church Doctrine Or Policies.**

Taking the constitutional analysis first under the correct framework, *Hosanna-Tabor* is clear that First Amendment concerns would arise if applying the CCPA interfered with the Diocese's decisions about who to hire or fire, or with doctrinal tenets or other internal church affairs. *Hosanna-Tabor*, 565 U.S. at 188; *see also Fratello*, 863 F.3d at 206. Yet this case does not implicate who the Diocese may hire or how it treats its teachers or other employees. There is likewise no need for the circuit court to interpret Canon Law or any other Catholic doctrines or policies to determine whether the CCPA has been violated. The State's amended complaint states plainly that the action must not be "construed as an attempt to modify or interfere with doctrinal matters or hiring decisions." J.A. 57. Fair advertising and disclosure of material facts to potential customers does not presume—much less require—any personnel changes or specific employment practices. The Diocese is free to hire as it chooses using its preferred policies; what it cannot do under the CCPA is advertise on the basis of policies it does not, in fact, follow.

The circuit court's contrary conclusion draws heavily on the four-decade old decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), but that reliance is misplaced, particularly in light of *Hosanna-Tabor*'s more detailed analysis of religious freedom in the face of generally applicable laws. *Catholic Bishop* was about who could serve as a teacher in parochial high schools; the Court rejected the NLRB's attempt to assert jurisdiction over certification of lay teachers in church schools because that degree of oversight would unquestionably intrude on the church's internal affairs and hiring decisions. *Id.* at 503. The same is true for *Coulee*, which the circuit court acknowledges concerned an age discrimination claim brought by a first-grade teacher. J.A. 320-21 (citing 768 N.W.2d at 892).

In contrast to decisions involving interference with personnel matters, the circuit court (like the Diocese in its briefing below) does not cite any case holding that applying a general consumer-protection statute to a religious entity requires an excessive entanglement of religion. Supreme Court precedent more recent than *Lemon* trends toward equal treatment for religious entities, and that principle goes both way: In 2017 the Court held that a church-operated preschool and daycare center could participate in a government program providing shredded tires for playgrounds, finding no First Amendment barrier to allowing a religious entity to benefit from a "generally available benefit." *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017). This holding is the corollary of precedents rejecting free exercise claims where "the laws in question have been neutral and generally applicable without regard to religion" and did not "single out the religious for disfavored treatment." *Id.* at 2020. When choosing to sell consumer recreational and educational services to the general public, religious entities must take the bitter with the sweet.

There are also multiple cases making clear that laws policing deceptive practices generally do not violate the Constitution when applied against religious entities. *First*, the circuit court



essentially adopts the argument that the Archdiocese of Chicago made before the Seventh Circuit—and lost. *See Listecky v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015). There, the court found no constitutional concern with resolving a fraud claim. Although the Archdiocese argued the claim was barred by the ministerial exception, the Seventh Circuit disagreed because it “need not interpret any religious law or principles” to resolve the case, nor was it necessary to “examine a decision of a religious organization or tribunal on whether or not [fraud occurred].” *Id.* at 742 (citation omitted).

*Second*, the Third Circuit’s decision in *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006), analyzes in more detail the line between claims barred by the ministerial exception and those the First Amendment allows to proceed. In *Petruska* the court first rejected a Title VII claim brought by a former chaplain at a Catholic university. *Id.* at 307-09. Applying Title VII’s prohibitions against employment discrimination (which include discrimination based on religion, *see* 42 U.S.C. § 2000e-2(a)(1)), would cause undue interference with the church’s internal affairs by allowing courts to inquire into the religious motivations for employment decisions. *Petruska*, 462 F.3d at 307-08. The same concerns did not, however, apply to the plaintiff’s fraudulent misrepresentation claim. *Id.* at 309-10. That claim asked whether the university spoke honestly to potential employees during the recruitment process, and thus enforcing the “the state’s prohibition against fraud” did not infringe on the university’s “freedom to select its ministers.” *Id.* at 310; *see also Weishuhn v. Lansing Catholic Diocese*, 787 N.W.2d 513, 522 (Mich. App. 2010) (citing with approval *Petruska*’s holding).

*Finally*, the Sixth Circuit’s decision in *Hutchison v. Thomas*, 789 F.2d 393 (6th Cir. 1986), is the exception that proves the rule. There the court held that the ministerial exception barred consideration of a minister’s fraud claim, *id.* at 393, but the case was atypical in that it involved

*internal* church matters: The court explained that the minister sought “civil court review of subjective judgments made by religious officials and bodies that he had become ‘unappointable’ due to recurring problems in his relationships with local congregations.” *Id.* Whether and under what circumstances a religious body chooses to appoint a minister is a quintessential example of a question the First Amendment makes clear the State has no power to answer. Requiring a church to speak honestly to the extent it chooses to advertise its educational services, however, is not.

## **2. Applying The CCPA Does Not Create “Excessive Entanglement” Under *Lemon*.**

The Court should answer no to the second certified question even if it considers *Lemon* to be the appropriate framework. Under *Lemon*, defendants must prove one of three prongs to prevail in a First Amendment challenge: (1) the statute lacks an adequate secular purpose; (2) the statute advances or inhibits religion; or (3) applying the statute to the defendant would cause an “excessive entanglement with religion.” 403 U.S. at 612-13. As the circuit court agrees, J.A. 290, the only prong potentially relevant here is the third. Yet requiring the Diocese to adhere to the CCPA’s bar on unfair or deceptive acts or practices does not create excessive entanglement between church and state. At most, it affects the Diocese’s external communications. Even assuming this constitutes “entanglement,” it is not “excessive.”

As the Supreme Court held in *Cantwell v. Connecticut*, the First Amendment does not prohibit applying a generally applicable law that treats religious and non-religious entities the same and that does not “unreasonably obstruct or delay” religious activities, even though the State’s interest in “protect[ing] its citizens from injury” may “inconvenience” the “exercise of religion.” 310 U.S. 296, 306 (1940). In that vein, the CCPA’s requirements for external representations when an entity chooses to engage in consumer transactions are more akin to the “[f]ire inspections, building and zoning regulations, and state requirements under compulsory school-attendance

laws” that *Lemon* itself deemed “necessary and permissible contacts” than to the statute directly aiding religious schools that it struck down. 403 U.S. at 614.

The circuit court’s comparisons to the First Circuit’s decision in *Surinach v. Pesquera De Busquets*, 604 F.2d 73 (1st Cir. 1979), are also unavailing. For one thing, more recent First Circuit decisions call *Surinach*’s continued vitality into question. After the Supreme Court’s decision in *Smith*, and 34 years after *Surinach*, the First Circuit clarified that “the Free Exercise Clause does not relieve individuals of the obligation to comply with neutral laws of general applicability that burden their religious exercise.” *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 94 (1st Cir. 2013) (citing *Smith*, 494 U.S. at 879). Indeed, even before *Smith* the First Circuit declined to extend *Surinach* to a case that, much like this one, challenged the applicability of a general consumer-protection law to a religious school. *Cuesnongle v. Ramos*, 835 F.2d 1486, 1487 (1st Cir. 1987). There, a Catholic school sought a declaration that it did not have to issue refunds for services it failed to provide on the basis that applying the consumer-protection law would create excessive entanglement with religion. The First Circuit briskly rejected that argument. *See id.* at 1502. Any persuasive value *Surinach* might have had in 1979 thus falls away in light of current First Circuit law.

*Surinach* is also distinguishable on its facts. It did not hold that all state regulation of religious schools violates the First Amendment. Rather, the court explained that Puerto Rico had not articulated a “rational end product use” for the extensive information it requested from church-related schools that would not “encroach on [the Church’s] First Amendment rights.” *Surinach*, 604 F.2d at 74-75. Combined with a highly invasive investigation into annual budgets, sources of finances, transportation costs, detailed per-student cost breakdowns, salaries, book suppliers, and scholarship information and criteria, the court found “a palpable threat of state interference with

[the Church's] *internal policies and beliefs*.” *Id.* at 76-77 (emphasis added). Mandating fairness in voluntary consumer transactions is on a different plane.

### **3. Premature Concerns About Remedies Do Not Justify Ending This Case Now.**

Finally, the heart of the circuit court's constitutional analysis is fear that, if the State prevails, there would be no way to order relief short of “continuous monitoring and supervision of Diocese communications, including policy statements and procedures, for an indefinite time.” J.A. 293 (emphasis removed). Caution to avoid remedies that require state intrusion into internal religious practices is valid—indeed, the State shares that concern. It is not, however, reason to grant a motion to dismiss. Because the amended complaint seeks relief that does not violate the constitutional principles discussed above, the answer to the second certified question is no.

The circuit court's first objection on this score is that the State cannot at this preliminary stage “delineate specifically the remedies it seeks under the Act” because the State conceded the scope of relief will necessarily depend on facts developed over the full course of litigation. J.A. 292. This dynamic is present in every civil case, whether a party seeks damages, injunctive relief, or both. Compensation in a breach of contract action depends on damages proven at trial, after all, and whether an injunction enforcing a non-compete agreement should cover one county or several turns on facts about the relevant market. Inability to describe all details of potential remedies in a complaint thus does not mean a plaintiff failed to state a claim upon which relief may be granted.

The circuit court also inverts the standard when reviewing a motion to dismiss. Dismissal for failure to state a claim may be granted “only if ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Newton v. Morgantown Mach. & Hydraulics of W. Va., Inc.*, 2019 WL 6258350, at \*2 (W. Va. Nov. 19, 2019) (quoting Syl. pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977)). Here, the circuit court's analysis flows from “foresee[ing] substantial difficulties in



fashioning an appropriate remedy.” J.A. 290. The fact that, in the circuit court’s view, a party may have a difficult case ahead falls short of proof there are no set of facts that could allow relief.

And the reality is that there are multiple potential remedies that do not require ongoing monitoring and supervision of church policies and procedures. The amended complaint seeks an order permanently enjoining the Diocese from violating Article 6’s prohibition on unfair or deceptive acts or practices, appropriate equitable relief, civil penalties for willful and repeated violations of the CCPA, and “other and further relief as the Court deems just and appropriate.” J.A. 78. Some of these remedies involve no oversight whatsoever, like civil penalties. Similarly, the broad umbrella of “appropriate equitable relief” includes hands-off options like a declaratory judgment the Diocese violated the CCPA. It is also possible to enjoin future violations or order restitution to individuals harmed by material omissions without imposing ongoing monitoring or requiring the Diocese to seek approval for new advertisements—especially if the full record gives the court confidence the Diocese has corrected its CCPA violations. And of course, the constitutional standard is not zero involvement with the Diocese’s external conduct. Courts routinely enforce relief that requires some oversight of a religious entity’s external relations. *See, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) (State could oversee building requirements of a house of worship); *Cheffer v. Reno*, 55 F.3d 1517, 1521 (11th Cir. 1995) (court could prohibit church and its members from violently protesting at abortion clinics). Here, the court could set an expiration date for any ongoing injunctive relief and limit information shared in connection with compliance efforts, if any.

The circuit court’s failure to recognize that at least some forms of legal or equitable relief do not violate the First Amendment is even more perplexing because the State expressly urged in its prayer for relief that any remedies not “modify[] or interfere[] with doctrinal decisions, or other




church matters, or the Diocese's hiring and firing decisions." J.A. 78. No doubt some relief the State could pursue under the CCPA against another, non-religious entity would be inappropriate here. Nevertheless, those hypothetical remedies are not dispositive. The Court should hold the State to its word and—should the State ultimately prevail—direct the circuit court to award only those remedies consistent with the First Amendment analysis above.

### CONCLUSION

This Court should answer the first certified question in the affirmative and the second certified question in the negative.

Respectfully submitted.

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