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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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REPLY BRIEF

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INTRODUCTION

Both certified questions center on the same threshold issue: whether religious schools and camps are an appropriate *subject* of West Virginia's Consumer Credit and Protection Act ("CCPA"). The Diocese of Wheeling-Charleston and Bishop Michael J. Bransfield ("the Diocese") largely dodge this question. Instead, the better part of the Diocese's response argues that the State will be unable to prove its specific claims—disputing both the facts alleged in the Amended Complaint and the State's theories of liability—and that if it does, any remedies would violate the First Amendment. The State is confident that a fair assessment of what the Amended Complaint does (and does not) allege reveals a straightforward CCPA case, and it should have the chance to prove it on a fully developed record. At this stage, however, these disputes are irrelevant: Whether the Diocese violated the CCPA here is not before the Court. The question now is whether it could be liable on any facts—and whether any other fee-based schools or camps could be, either.

The Court should thus reject both proposed answers even if it doubts whether the State will ultimately prove its case. High on rhetoric and premature disputes over facts and allegations, the response brief is thin on engaging the specific arguments in the State's opening brief. The reality is that the CCPA, the Constitution, and the opinions of this and other courts undercut the proposed answers. The CCPA's plain text shows that it applies when entities market educational and recreational services to the public, and although constitutional concerns inform appropriate remedies in a case involving religious actors, fear of hypothetical First Amendment concerns does not justify blanket CCPA immunity. Adopting the Diocese's approach would also upend settled law applying the CCPA to a host of entities it never mentions by name, and would leave consumers without recourse from even the most brazen deceptive practices by fee-based schools and camps. The law is clear that the CCPA covers these entities, and that the Constitution allows relief.

ARGUMENT

I. The Court Should Disregard Premature Fact Disputes And Mischaracterizations Of The Amended Complaint.

The circuit court certified two questions about the CCPA's scope: Does Article 6 "apply to religious institutions in connection with their sale or advertisement of educational or recreational services," and if so, does the First Amendment bar applying the statute to them in light of "the cumulative impact of the entire relationship between Church and State." J.A. 283-84. A substantial portion of the Diocese's response brief, however, argues separate issues surrounding the facts and concerns about potentially far-reaching liability or remedies in *this* case. These concerns are unfounded, and more importantly, irrelevant, to the questions before the Court now.

First, the Diocese challenges many of the factual allegations in the Amended Complaint. The response brief argues, for example, that the State is wrong that it failed to implement fully its background check policy and other advertised safety programs, Resp. Br. 3, and that the alleged facts "cannot be squared with the success of the current and ongoing safe environment program," Resp. Br. 9. It also disputes specific instances where the Amended Complaint alleges failure to conduct background checks, Resp. Br. 7-8, and describes the "fundamental issue here" as a failure to establish the Diocese's educational services were in fact "defective or shoddy," Resp. Br. 12.

The Amended Complaint alleges multiple CCPA violations based on good-faith information and belief. The factual allegations, specifically, are grounded in a months-long investigation and information the Diocese provided in partial compliance with the State's subpoenas—and the State is confident that discovery and trial will further support these claims.*

* With respect to the Diocese's allegation of compromising victim confidentiality, Resp. Br. 5 n.3, 6, the attorney in question was not "livid" when calling the State, because the victim's identity had not been revealed. Counsel was invited to propose a protective order to resolve potential concern as the case moves forward, but so far has not done so.

Nevertheless, this is not the right time or forum for fact-finding. The Court has “repeatedly said a certified question will not be considered . . . unless the disposition of the case depends wholly or principally *upon the construction of law*,” not case-specific facts. *State ex rel. Advance Stores Co. v. Recht*, 230 W. Va. 464, 468, 740 S.E.2d 59, 63 (2013) (citation and internal alteration omitted; emphasis added); *see also Martino v. Barnett*, 215 W. Va. 123, 126, 595 S.E.2d 65, 68 (2004) (explaining that the Court reviews certified questions *de novo* because they raise questions of law). And these concerns are doubly strong here because the case was certified at the motion-to-dismiss stage, where “all allegations” are viewed “in the light most favorable to the plaintiff” and taken “as true.” *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008).

Second, the Diocese objects that the Amended Complaint has not adequately alleged all elements of an Article 6 claim. *See, e.g.*, Resp. Br. 5 n.2 (disagreeing with allegation that language on Diocese’s website constitutes an advertisement), 8 (arguing complaint lacks allegations that “background check failures resulted in harm”), 9 (claiming State “makes no allegations within the four year look back period”). These concerns are factually and legally inaccurate—the circuit court rejected the Diocese’s position that the Amended Complaint fails on statute-of-limitation grounds, for instance, J.A. 313, and actual reliance is not a required element when the State brings an Article 6 claim, *see syl. pt. 4, State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (2003). More to the point, they have nothing to do with whether the CCPA applies to fee-based religious schools and camps in the first place.

Third, the Diocese spills much ink challenging the State’s theory of CCPA liability and remedies as overbroad. As a few examples, the Diocese argues:

- The State’s “theory has no limits.” Resp. Br. 2.
- The State claims “plenary authority to analyze the Church’s policy for its inadequacy” and to “determine whether the Diocese is sufficiently following its policy.” Resp. Br. 5.

- The State is trying to “tak[e] control of the Church’s communications with its faithful.” Resp. Br. 12.
- The State believes “all education is covered under the CCPA.” Resp. Br. 19.
- The State’s theory “simply promises to decide which businesses and organizations have run afoul of an unknown, undocumented misleading advertising standard and file suit,” then unilaterally “determine the appropriate sanction.” Resp. Br. 27.

These outsized claims fail to engage the entire section of the opening brief explaining that the Amended Complaint asserts a more modest theory of liability grounded in the language of the CCPA itself: not fulfilling promises in school and camp advertisements and failing to disclose material facts to consumers. State Br. Part I.B. The brief likewise ignores the multiple remedies contemplated by the Amended Complaint that would require no monitoring or supervision, such as a declaration or civil penalties. State Br. 39. Similarly, it does not explain how deciding whether the CCPA covers fee-based schools and camps would resolve concerns about potentially expansive remedies—which are not unique to this context. After all, exempting schools and camps would say nothing about whether other entities that work with children could face liability under similar false-advertising and failure-to-warn theories. State Br. 20-21. These are important questions of proof in every CCPA case that should be evaluated on a fully developed record, but they are different from the issues here. Simply put, what entities the CCPA applies to is not the same question as whether a particular entity violated it.

Finally, the Diocese has no answer to its theory’s troubling implications: Reading fee-based schools and camps (including religious ones) out of the statute would mean they could adopt blatant unfair and deceptive practices under even the strictest view of Article 6. State Br. 21. A theory sweeps too far that would allow a private high school to falsely tout that 80% of its seniors get full-ride scholarships to WVU, or that would let a summer camp assure parents a licensed nurse dispenses all medications when it actually means a counselor one year into an undergraduate pre-

med program. In short, how facts develop in a specific case might lead to a defense verdict in that case, but factual questions at the motion-to-dismiss stage are no reason to read immunity into the statute for all others. The Court should reject the Diocese's misdirection and focus instead on the issues relevant to the questions before it at this preliminary stage—which have implications far beyond this case.

II. The CCPA Reaches Fee-Based Schools And Camps.

The CCPA includes “privileges with respect to” both “education” and “recreation” as two of the “services” expressly subject to its prohibition on unfair or deceptive practices. W. Va. Code § 46A-1-102(47). The Diocese does not give an adequate reason to depart from that plain text. Rather, its response ignores well-settled law refuting its proposed interpretative framework.

To begin, the response brief does not acknowledge the Legislature's directive that Article 6 be “liberally construed,” which suggests doubts should be resolved in favor of coverage, not against. State Br. 23 (quoting W. Va. Code § 46A-6-101(1)). It does not respond to this Court's routine practice of applying the CCPA even to industries that are not expressly listed in the statute's definitions, nor rebut the interpretive principle that the Legislature's decision to expressly exempt some industries counsels against creating additional, implicit exceptions for others. State Br. 16-17, 23. And it is silent about the strong presumption against preemption in West Virginia law, as well as the rule that overlapping statutes must be interpreted together unless in irreconcilable conflict. State Br. 22, 25-26. Viewed through these and other lenses more fully described in the opening brief, the Diocese's objections that “education” and “recreation” do not cover consumer transactions involving schools and camps fall flat.

A. Fee-Based Schools And Camps Sell Educational And Recreational Services.

1. The Diocese begins by insisting that the State “avoids” the issue whether religious camps and schools (at least primary and secondary ones) can “constitute a trade or commerce . . .

subject to” Article 6’s bar on “unfair or deceptive practices in the conduct of any trade or commerce.” Resp. Br. 14. Not so. *See* State Br. 13-14. “[T]rade or commerce” is defined as “advertising, offering for sale, sale or distribution of any goods or services,” W. Va. Code § 46A-6-102(6), and a “service” includes “privileges with respect to . . . education [and] . . . recreation,” *id.* § 46A-1-102(47). The CCPA’s plain language thus encompasses fee-based schools and camps.

A contrary position must account for the Legislature’s choice to include “education” and “recreation” in the definition of “services.” The Diocese agrees that Article 1’s definition of “services” applies to Article 6 and that any undefined terms within *that* definition must be “given their common, ordinary and accepted meaning.” Resp. Br. 14-15 (quoting syl. pt. 4, *Osborne v. United States*, 211 W. Va. 667, 567 S.E.2d 677 (2002)). Yet the response brief does not offer an alternate definition of “education,” so there is no reason to exclude schools. As for “recreation,” the Diocese asserts that “the plain meaning of the word” is not broad enough to include camps. Resp. Br. 16. It is difficult to square that position with the Diocese’s proposed definition—under any ordinary view, archery and canoeing at summer camp is “a means of refreshment or diversion.” Resp. Br. 16 (citation omitted).

Thus, the real dispute is the meaning of “privileges with respect to.” The Diocese argues that the State reads this language out of the statute in order to gain “unfettered jurisdiction over all aspects of all businesses and organizations that conduct advertising.” Resp. Br. 17. Yet the State explained why the creditor- and securities-focused definition of “privilege” the circuit court cited was not enough to find ambiguity, especially when compared to the term’s more common and accepted meaning of a “right” to something. State Br. 14-16 (quoting Black’s Law Dictionary 1390 (10th ed. 2014)). The Diocese responds that the Legislature used the word “privilege” in the

CCPA's definition of "credit," Resp. Br. 18, but using one term to illustrate another does not mean the two are coextensive. Extending credit is one type of "privilege," but not the only kind.

Critically, the response brief does not answer how this definition makes sense of Article 6's broader focus on sales and leases for "personal, family, household or agricultural purpose[s]," in contrast to Article 2's credit-focused frame. State Br. 15. Nor does it adequately explain how its view would not create a novel restriction on the other categories of services "privileges with respect to" modifies. State Br. 14-15. It is not enough to assert that consumers sometimes use credit cards and installment payments for restaurants and hotels. Resp. Br. 18. Payment plans are at best extremely uncommon in these contexts, and paying with a credit card involves a credit transaction between the diner and Visa, not the diner and the restaurant. This means that a credit-focused definition would give no meaning to (or at least dramatically shrink) entire categories of goods and services the Legislature expressly listed in the statute. Indeed, even the circuit court recognized that Article 6 applies to "sales of services offered for cash or credit," J.A. 295—further undercutting the Diocese's alternate definition of "privilege" in this context. Nor would this distinction help the Diocese, even if it were plausible, because the Amended Complaint alleges transactions that involve financing and installment plans. J.A. 59.

Finally, the Diocese is wrong (at 16) that because Article 6, Section 104 is "among the most ambiguous provisions of the [CCPA]," Article 1, Section 102's definition of "services" is necessarily ambiguous, too. *State ex rel. Morrissey v. Copper Beech Townhome Communities Twenty-Six, LLC*, 239 W. Va. 741, 750-51, 806 S.E.2d 172, 181-82 (2017). Ambiguity exists where a statutory term is reasonably "susceptible of two or more constructions" or of "doubtful or obscure meaning that reasonable minds might be uncertain or disagree." *Id.* at 745-46, 806 S.E.2d at 176-77 (citation omitted). A narrow, technical definition of "privilege" that cannot make sense

of all relevant statutory text does not rise to this level. The CCPA's plain language accordingly controls. *Id.* at 745, 806 S.E.2d at 176.

2. There is also no reason to read schools and camps out of the statute even if the definition of "services" were ambiguous. *First*, the statute's purpose does not favor the Diocese. The Diocese places great weight on this argument, even urging that the "definition of the term 'services' cannot expand the scope of the CCPA beyond its clearly intended purpose." Resp. Br. 15 n.10. In other words, the Diocese would disregard the text of the statute in the definitional section if it goes against its view of the statute's purpose. This approach turns the first rule of statutory interpretation on its head—the best evidence of a statute's purpose is what it says; plain text "must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995).

It also rests on the false premise that sources outside the text show a clear purpose to exclude religious schools and camps. The Diocese quotes from this Court's decisions explaining the CCPA's broad, remedial purposes to "protect consumers and promote sound and fair businesses practices," Resp. Br. 10 (citation omitted), then inexplicably suggests the statute is limited to ending unfair practices by "debt collectors" and "creditors." Resp. Br. 10-11. There is no support for this narrow view of the CCPA's purpose.

As noted above, the Diocese ignores what the Legislature itself says about the statute's goals: Article 6 must be "liberally construed" to advance its "beneficial purposes." W. Va. Code § 46A-6-101(1). The Diocese's reliance on Professor Cardi's leading CCPA law review article is similarly unhelpful. Resp. Br. 11. Some of the statutory goals Professor Cardi describes focus on credit issues, but he also explains that the Legislature intended to "protect consumers who purchase

goods or services for cash or credit from . . . unfair and deceptive selling practices.” Vincent Paul Cardì, *The West Virginia Consumer Credit and Protection Act*, 77 W. Va. L. Rev. 401, 402 (1975).

Nor does citing abrogated cases about the Attorney General’s supposed lack of common law authority support interpreting the CCPA narrowly. Resp. Br. 11. This Court recently made clear that “[t]he Office of Attorney General retains inherent common law powers, when not expressly restricted or limited by statute.” Syl. pt. 3, *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 744 S.E.2d 625 (2013). The Court need not address that issue here because the Attorney General has explicit statutory authority to enforce the CCPA, W. Va. Code § 46A-7-101 *et seq.*, and the only legislative history addressing Articles 6 and 7 confirms the Attorney General’s role: Most of the CCPA debate addressed provisions in Chapter 31A regulating banking, but one senator explained that “responsibility” for “consumer protection” should be “place[d] under the office of the Attorney General.” 1974 J. W. Va. Senate 913.

Second, the Diocese’s theory that “[i]f the Legislature intended for the unlawful acts or practices provisions of the CCPA to apply to education, . . . it would have done so explicitly,” Resp. Br. 15, proves too much and fails on the facts. There is a long list of businesses not explicitly mentioned in the CCPA, yet covered nonetheless. The CCPA does not mention mail-order marketers, yet the Court applied the CCPA to them in *State ex rel. McGraw v. Imperial Marketing*, 196 W. Va. 346, 472 S.E.2d 792 (1996). The same is true for many other industries. State Br. 16-17. Adopting the Diocese’s interpretive paradigm would call these and the decisions relying on them into question, with devastating consequences for consumers by removing protections in these important areas. Further, the CCPA’s structure belies the Diocese’s proposed “interpret narrowly unless expressly included” approach: The Legislature followed a pattern of broad definitional language combined with limited and specific exemptions. State Br. 23. The Diocese ignores that

the Legislature used this approach even in the specific context of education: If schools were outside the statute's scope, then the exception for "institution[s] of higher education" from certain debt-collection provisions would serve no purpose. State Br. 16 (quoting W. Va. Code § 46A-2-128(c)). And of course, the Legislature *did* explicitly reference education (and recreation): the terms are in the definition of "services" itself.

Third, the only case from this Court discussing education and the CCPA supports a plain-text reading. The Diocese argues that *Mountain State College v. Holsinger*, 230 W. Va. 678, 742 S.E.2d 94 (2013), turned on whether the college extended credit, Resp. Br. 16-17; the opening brief acknowledges as much and the distinction is irrelevant because this case also alleges credit transactions. State Br. 16; J.A. 59. The Diocese cannot, however, explain the Court's own words that the college was a "seller of education services," *Mountain State*, 230 W. Va. at 684, S.E.2d at 100, nor that being an Article 2 case is beside the point because "services" has the same definition throughout the CCPA. Finally, pointing out that the case did not address K-12 schools, Resp. Br. 17, is a distinction without a difference: The Diocese fails to identify any textual support for its position that the CCPA applies differently to post-secondary education than to K-12 schools.

Fourth, decisions from other jurisdictions and brought by the Federal Trade Commission ("FTC") support keeping "education" and "recreation" within the CCPA's scope. The Diocese apparently concedes that courts interpreting Article 6 must be "guided by the policies of the [FTC]" and federal courts enforcing certain federal consumer-protection statutes. State Br. 17 (quoting W. Va. Code § 46A-6-101(1)). It objects, however, that examples of FTC cases in the opening brief do not establish liability for non-profit or religious entities, or for primary and secondary schools. Resp. Br. 19-20. Again, the Diocese does not explain how these purported factual differences are legally relevant. The CCPA uses terms like "buying" and "selling" that suggest a

limiting principle where consumers do not pay for services, which is why the Amended Complaint focuses on the Diocese's *fee-based* schools and camps. *Cf. Dobson v. Milton Hershey Sch.*, 356 F. Supp. 3d 428, 435 (M.D. Pa. 2018) (holding that Pennsylvania's unfair and deceptive practices law does not apply to public schools because educational services "were given to [students] free of charge"). The statute does not, however, suggest that it applies to for-profit entities only.

As explained above, there is likewise no textual support for treating post-secondary institutions different from K-12 schools. Even if there were, the FTC sued a school "offer[ing] a high school diploma program" alleging "misleading statements in advertising this program," and the district court entered a permanent injunction for violation of the FTC Act. *FTC v. Stratford Career Inst.*, 2016 WL 3769187, *1 (N.D. Ohio July 15, 2016); *FTC v. Stratford Career Inst.*, 16cv371 (N.D. Ohio Jan. 31, 2017). Similarly, claims against fee-based high schools have been brought under other States' deceptive practices laws. *E.g., Dungan v. The Acad. at Ivy Ridge*, 249 F.R.D. 413, 419 (N.D.N.Y. 2008), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008).

The Diocese also has no rebuttal to the Illinois Supreme Court's decision parsing "trade or commerce" language identical to the CCPA's, which emphasized that consumers buying educational services may need consumer-protection laws as much as "purchasers of any other service." *Scott v. Ass'n for Childbirth at Home, Int'l*, 430 N.E.2d 1012, 1015 (Ill. 1981). It distinguishes two other decisions on the same, atextual for-profit and post-secondary grounds as above, as well as on their specific factual allegations and theories of liability—arguing they involve "clearly measurable external issues." Resp. Br. 19-20 (citations omitted). Yet whether "instructors are qualified" or "the instruction provided is satisfactory," Resp. Br. 21, are *more* subjective inquiries than whether the Diocese conducted background checks, not less. And in any event, this

purported distinction would still allow liability in some circumstances, such as in cases where plaintiffs alleged schools failed “to deliver on specific educational services.” Resp. Br. 20. Even under the Diocese’s view of these decisions, then, it cannot be the case that fee-based schools and camps are *always* exempt from the CCPA.

B. The Rest Of The West Virginia Code Supports The CCPA’s Plain Meaning.

With statutory text, context, secondary sources, precedent, and federal and other state cases pointing against its narrow construction, the Diocese turns outside the CCPA for support. This argument focuses on education statutes, so at a minimum it leaves liability for camps in place. Even so, the Legislature did not conceal an exemption for fee-based schools elsewhere in the Code.

1. West Virginia Code § 18-28-6 does not preempt applying the CCPA to religious fee-based schools. That section exempts religious schools from “any other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization.” W. Va. Code § 18-28-6. The key question is thus what it means to relate to education. The Diocese does not contest that this term has limits, State Br. 24, nor propose an alternate definition for it.

There must be a “direct relationship” for a law to be “related to” a field. *See Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218-19 (11th Cir. 2011) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). That is not the case here. The CCPA does not grant “power over education” or the substance of educational services, Resp. Br. 19; it governs the relationship between entities (including schools) and the consumers who buy what they choose to sell. The Diocese itself recognizes this difference elsewhere in its brief, arguing that the CCPA applies to a wide array of consumer-related transactions and crediting the circuit court’s statement that “the CCPA does not apply to substantive education and recreation services.” Resp. Br. 13.

Other courts adopt this distinction, too. In a New York case affirmed on appeal just last year, for example, the court allowed a state-law claim for false advertising on a school's website. *Harris v. Dutchess Cty. Bd. of Co-op. Educ. Servs.*, 25 N.Y.S.3d 527, 538 (N.Y. Sup. 2015), *aff'd on other grounds*, 93 N.Y.S.3d 910 (N.Y. App. Div. 2019) (*per curiam*). The court reasoned that claims focusing on the school's outward-facing relationship with potential consumers "d[id] not concern the quality of the education Plaintiffs received from the Program or the adequacy of the course of instruction." *Id.* at 535-36. The same logic applies to claims like these challenging how fee-based schools market to the general public.

The statute's purposes also support distinguishing regulation of education from policing consumer transactions. The Diocese quotes (at 23) the statutory language describing Section 18-28-6's purpose as not "interfer[ing] with the rights of conscience" and ensuring freedom "to select [a] religious instructor." W. Va. Code § 18-28-1. Yet it does not attempt to explain how this goal of "keeping state law separate from the content of religious education," State Br. 24, supports preempting the CCPA, which is concerned with the entirely different purpose of protecting the consumer public and ensuring "fair and honest competition," W. Va. Code § 46A-6-101. The principle that statutory construction is meant "to accomplish the general purpose of the legislation," syl. pt. 3, *State ex rel. Fetters v. Hott*, 173 W. Va. 502, 318 S.E.2d 446 (1984), counsels against applying Section 18-28-6 too far afield. And to the extent the Diocese fears the CCPA could be used as a front to regulate the substance of education, the solution would be a motion to dismiss that hypothetical case because it does not state a claim *under the CCPA*—not to hold that even straightforward CCPA actions cabined to "advertising, offering for sale, sale or distribution of any goods or services," W. Va. Code § 46A-6-102(6), must fail, too.

Finally, the Diocese's contrary view sweeps too far. If any law that touches on "administration of its schools" "relat[es] to education," Resp. Br. 22, laws like West Virginia's Wage Payment and Collection Act, W. Va. Code § 21-5-1 *et seq.*, would be preempted. It is difficult to imagine the Legislature intended Section 18-28-6 to be a free pass not to pay employees for work performed. The Diocese does not offer a principled basis to exempt religious schools from the CCPA while leaving intact other laws affecting non-substantive aspects of their business.

2. The Diocese's implied preemption arguments fare no better. As an initial matter, through silence the Diocese appears to agree that federal preemption standards are irrelevant here—and that if anything, they support the State's position. State Br. 28-30. The Diocese does not engage the correct legal framework, either. It is a key canon of statutory construction that "[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." State Br. 25 (quoting syl. pt. 8, *Barber v. Camden Clark Mem. Hosp. Corp.*, 240 W. Va. 663, 815 S.E.2d 474 (2018)). And the only time that statutes are not read *in pari materia* is when they conflict. Syl. pt. 2, *Tug Valley Recovery Ctr., Inc. v. Mingo Cty. Comm'n*, 164 W. Va. 94, 261 S.E.2d 165 (1979).

The Diocese points to nothing in the CCPA that conflicts with West Virginia's general education statutes. *See* State Br. 26. To be sure, the Legislature has "put into place a mechanism to monitor the 'health and safety' of students." Resp. Br. 24 (emphasis removed). Yet the Diocese does not explain—nor could it—how regulating health and safety conflicts with a statute requiring fair and non-deceptive advertising practices. If anything, the CCPA supports these other statutes by ensuring that parents receive accurate information about advertised policies. The CCPA does not require schools to hire off-duty police officers to protect students and staff, for example, but if a fee-based school falsely advertises that it does, they may be liable under Article 6. Put another

way, religious schools are free to adopt whatever health and safety measures they choose (consistent with other laws); what they cannot do is misrepresent those policies when advertising to the public. Because showing that some aspects of education policy are regulated elsewhere in the Code does not establish conflict between those laws and the CCPA, the Court must therefore “give effect to each.” Syl. pts. 8 & 9, *Barber*, 240 W. Va. 663, 815 S.E.2d 474.

The Diocese has not shown that *Bear*, *Sterns* or *Copper Beech* supplant this interpretive principle, either. Resp. Br. 25-27. The Diocese notes that *Bear*, *Sterns* centered on buying and selling securities, yet does not respond to the salient difference that securities—unlike education and recreation—are not “goods or services.” State Br. 27. And the “two primary” bases for the decision it relies on (at 27) undercut its position: Unlike selling securities, school tuition and camp fees involve “relatively common cash and credit transactions in which [consumers] engage on a regular basis,” and religious education is not “pervasively regulated by the federal government”—certainly nowhere close to the level of oversight the federal government gives the financial sector.

As to *Copper Beech*, the Diocese analogizes the “extensive, detailed statutory law regulating the landlord-tenant *relationship*,” 239 W. Va. at 748, 806 S.E.2d at 179 (emphasis added), to laws governing religious schools. Yet a smattering of statutes about mostly health-and-safety concerns is not “pervasive” regulation of religious education, much less of the specific relationship between schools and the consumers who pay for tuition. Similarly, the Diocese has no answer to the Court’s reasoning that the CCPA is silent about the landlord-tenant relationship and does not include residential leases in the definition of goods or services. *Id.* at 748, 750-51, 806 S.E.2d at 179, 181-82. The Diocese cannot explain why the Court should nonetheless adopt the same analysis here, even though the Legislature explicitly listed education in the definition of services. State Br. 28.

Nor does the Diocese address the numerous examples where the Court has upheld applying the CCPA to industries that are regulated in other parts of the West Virginia Code. *See* cases cited State Br. 26-27. If *Copper Beech*'s "so pervasively regulated" and statutory silence standards are watered down here, decisions applying the CCPA to other regulated industries like car dealerships and collection agencies are in danger, too. West Virginia law disfavors preemption "in the absence of exceptionally persuasive reasons to warrant its application." *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 68, 680 S.E.2d 77, 83 (2009). The response brief does not meet this standard.

III. It Is Constitutional To Apply The CCPA To Religious Schools And Camps.

The Diocese's constitutional arguments also do not support an exemption from CCPA liability. Contrary to the Diocese's insistence that the State's position would elevate the CCPA to "such a special statutory scheme that the Constitution does not apply to it," Resp. Br. 28, the Amended Complaint champions the Diocese's freedom to choose priests and employees and "to act pursuant to its doctrinal tenets." J.A. 57. The Diocese objects to treating the statutory and constitutional analyses sequentially, Resp. Br. 28, but does not respond to the Supreme Court's similar approach in cases including *Lemon v. Kurtzman*, 403 U.S. 602 (1971), itself. State Br. 12-13. There is no constitutional violation here, but even if there were, using the tools of statutory interpretation to determine whether a statute covers an entity for *any* purpose is a threshold question before resolving whether the First Amendment trumps *specific* applications.

A. Applying The CCPA To Religious Entities Does Not Interfere With Internal Affairs.

Viewed under either party's preferred standard, allowing this case to proceed would not violate the Diocese's constitutional rights. *First*, the Diocese does not explain why *Lemon* is the correct standard in the face of substantial, recent Supreme Court precedent explaining that the Court "expressly decline[s] to apply the test or simply ignore[s] it," most often using other tests instead. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019); *see also* State Br. 31

& n.3. In fact, the Diocese cites no recent Supreme Court precedent applying *Lemon* from any context. The Diocese also objects to applying *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990), where doing so would “burden[] a Church’s internal affairs.” Resp. Br. 32. But the State agrees that if that were the case—and it is not here—the ministerial exception would override the *Smith* default. State Br. 31-32 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012)).

Second, there is no violation even if judged under outdated *Lemon* precedent. The Diocese is incorrect that the State’s brief did not “meaningfully address” the “excessive entanglement analysis,” Resp. Br. 28—Part II.B.2. speaks entirely to that question. For its part, the Diocese ignores *Cantwell v. Connecticut*, 310 U.S. 306 (1940), altogether. State Br. 36-37. And it fails to rehabilitate *Surinach v. Pesquera De Busquets*, 604 F.2d 73 (1st Cir. 1979). The response brief argues (at 37-38) that *Cuesnongle v. Ramos*, 835 F.2d 1486 (1st Cir. 1987), did not cast doubt on *Surinach*’s persuasiveness, yet does not explain how its holding applying a consumer-protection law to a Catholic school—almost identical to this case—is less on point than *Surinach*’s discussion of a broad, forward-looking investigation into church finances. State Br. 37. And the Diocese says nothing at all about the 2013 decision clarifying that the First Amendment does not grant immunity from “neutral laws of general applicability that burden [entities]’ religious freedom.” *Roman Catholic Diocese of Springfield v. City of Springfield*, 724 F.3d 78, 94 (1st Cir. 2013).

The two new cases the Diocese cites do not advance its case either. It is uncontroversial that churches have a right “to be free of government oversight into the selection and discipline of clergy.” Resp. Br. 38. Further, the Supreme Court of Connecticut explained that its decision in *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011), was abrogated by *Hosanna-Tabor*. See *Trinity Christian Sch. v. Comm’n on Human Rights & Opportunities*, 189 A.3d 79, 83

n.4 (Conn. 2018). And *United Methodist Church, Baltimore Annual Conference v. White* allowed a minister's claim to go forward so long as it was separate from other claims implicating internal church affairs. 571 A.2d 790, 795 (D.C. 1990). *That*, not entanglement, is the correct inquiry.

Third, applying the CCPA to religious entities does not interfere with internal affairs. *Hosanna-Tabor's* summary of a prior decision, Resp. Br. 33-34, is not to the contrary. That case involved direct interference with Church doctrine, choice of leaders, and disciplinary process—an attempt to reinstate a bishop on the basis that his removal proceedings did not “comply with church laws and regulations.” *Hosanna-Tabor*, 565 U.S. at 187 (citation omitted). The CCPA leaves schools and camps free to make personnel decisions, develop curriculum, and enforce internal policies. Barring deceptive practices when *advertising* those policies—whatever they are—does not intrude on matters “that affect[] the faith and mission of the church itself.” *Id.* at 190.

Listecki v. Official Committee of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015), and *Petruska v. Gannon University*, 462 F.3d 294 (3d Cir. 2006), illustrate this point well. State Br. 34-35. The Diocese concedes these cases show that “State regulation under generally applicable laws may be appropriate against religious entities” in certain circumstances, Resp. Br. 37—undercutting its position that statutes like the CCPA *never* apply to religious schools or camps. The Diocese describes permissible circumstances as those involving “specific alleged violations occurring in the past that are supported by factual allegations.” Resp. Br. 37. But that is what the Amended Complaint pleads. Among other allegations, it asserts the Diocese advertised on its website at specific times despite specific instances where it failed to conduct background checks or omitted material facts about the employees it hired. And *Listecki* and *Petruska* further undercut the Diocese's position because they were less concerned with specificity of allegations than with the nature of the claims. *Listecki* squarely held that a fraud claim did not require “interpreting any

religious law or principle” or examining “a decision of a religious organization.” 780 F.3d at 742 (citation omitted). And *Petruska* allowed a fraudulent misrepresentation claim to proceed. 462 F.3d at 309-10. The Diocese does not contest either court’s reasoning.

B. Constitutional Relief Is Available In This Case.

The response brief’s unsubstantiated fears about far-reaching, invasive remedies also miss the mark. *First*, as explained above, these characterizations ignore the State’s brief and Amended Complaint. The Diocese argues, for instance, that the State seeks “to regulate on an ongoing basis the Diocese’s current and future child protection policies and compliance efforts,” thereby running roughshod over the First Amendment. Resp. Br. 39. Yet at every stage the State has made clear this is neither the purpose nor necessary consequence of its claims. The Diocese does not engage any part of the opening brief addressing this issue, including the State’s concern to “avoid remedies that require state intrusion into internal religious practices.” State Br. 38. The Diocese likewise fails to explain how a declaration that it violated the CCPA would interfere with its internal affairs, nor the other examples of plainly constitutional relief. State Br. 39. And it does not account for the Amended Complaint itself, which affirms the Diocese’s First Amendment rights and expressly disclaims any interpretation of the pleading or relief that could “modify[] or interfere[] with doctrinal decisions, [or] other church matters,” J.A. 78. This mismatch between reality and the response brief’s characterizations is reason alone to reject this concern.

Second, the Diocese’s proposed approach to dismiss unless all potential remedies can be stated with particularity at this early stage, *e.g.*, Resp. Br. 2, 36, is out of step with litigation’s usual course. The response brief has no answer to the fact that the scope of remedies—injunctive relief especially, but even the amount of damages—often turns on facts and evidence proven at trial. State Br. 38. Nor does it explain how dismissing an action with at least some constitutional

remedies based on fears others may go too far is consistent with the standard that dismissal is improper unless “no set of facts” supports relief. State Br. 38 (citation omitted). This is no “look first and decide later” strategy, Resp. Br. 36; the State affirms its burden to allege facts sufficient to establish a claim and to support relief. Fishing expeditions are thwarted by enforcing established rules of pleading and fair discovery, not by rejecting cases that seek “other appropriate equitable relief” as insufficiently specific, nor exempting an entire class of defendants from CCPA liability.


Finally, the Diocese never gives a satisfactory answer to the concern that letting questions about potential remedies drive the analysis would extend CCPA immunity too far. The Diocese’s fear of overbroad remedies is bound up with its factual arguments: It agrees the First Amendment would not bar using “all the tools of law enforcement” if the Diocese committed “a fraud or a crime,” yet argues this case is different because it believes “no specific instance of fraud or deceptive advertising is alleged here.” Resp. Br. 35. The problem, of course, is that the Diocese’s approach would close off relief even in clear and egregious cases because concern about potentially overbroad injunctive relief would exist there, too. The solution is not turning the First Amendment into a cloak of invincibility for religious entities—there is no support for such an extreme position. Instead, courts can protect constitutional rights and the public’s interest in regulating unfair and deceptive practices by allowing cases to proceed as long as constitutional remedies are available. Applying that rule here means taking the Amended Complaint’s limited claims for relief seriously, and trusting our courts to hold the constitutional line.

CONCLUSION

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

Respectfully submitted.

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