IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 22-0070

CRAIG BLAIR, President of the West Virginia Senate,
ROGER HANSHAW, Speaker of the West Virginia House of Delegates,
JAMES C. JUSTICE, II, Governor of West Virginia,

Respondents below, Petitioners,

v.

SAM BRUNETT and ROBERT MCCLOUD,

Petitioners below, Respondents,

AMICUS CURIAE BRIEF OF MOUNTAIN STATE LEARNING SOLUTIONS, INC. IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Mountain State Learning Solutions, Inc. is a West Virginia nonprofit corporation that was created in 2021 for the express purpose of opening and governing a public charter school in West Virginia in accordance with West Virginia Code § 18–5G–1, *et seq.* (the "Charter School Act" or "Act"). *Amicus* is a "governing board" under the Act whose diverse members come from across the State, and include, among others, former longtime legislator John Overington.

Over the past year, including during the time that Respondents sat on their hands before eventually filing suit, *Amicus* expended time and resources to develop, and ultimately submitted, an application to open a statewide virtual charter school to the Professional Charter School Board ("PCSB"). *See* Addendum.[2] The proposed school—the West Virginia Virtual Academy ("WVVA")—was approved by the PCSB in November 2021. And during the first quarter of 2022, *Amicus* successfully executed a charter contract with the PCSB and contracted with an educational products and services provider to operate the school. Enrollment is ongoing. As of

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[1] Pursuant to Rule 30(b) of the West Virginia Rules of Appellate Procedure, Mountain State Learning Solutions, Inc. certifies that it timely notified counsel of record for the parties of its intention to file this brief. All parties consented to this filing. Mountain State Learning Solutions, Inc. also certifies, pursuant to Rule 30(e)(5), that no party's counsel authored this brief in whole or in part. Nor did such counsel or any party make a monetary contribution intended to fund the preparation or submission of this brief.

[2] The PCSB was created by the Act to authorize public charter schools, and its members were appointed by the Governor with the advice and consent of the State Senate. *See* W. Va. Code § 18–5G–15. The PCSB is subject to the "general supervision" of the West Virginia Board of Education ("State BOE") regarding "standards for student performance." *Id.* § 18–5G–5; *see also id.* § 18–5G–15(a) (providing that the PCSB "report[s] directly" to the State BOE).

the date of filing of this *amicus* brief, the WVVA has enrolled well-over 100 West Virginia students, and those students have been notified that they will be WVVA students in the next school year. *Amicus* projects that this figure will grow dramatically throughout the summer, as the virtual doors to the public charter school open this fall.

This case presents a question of existential importance to *Amicus*. This Court's holding on the constitutionality of the Act—specifically, the question of whether charter schools authorized under the Act are "created" in violation of Article XII, § 10 of the West Virginia Constitution—will affect everything *Amicus* is undertaking to open its public school this fall, including everything it has already done. *See* Addendum. Allowing the Circuit Court's unprecedented decision to stand will not only make waste of thousands of dollars of time and money expended in good-faith reliance on the Act, but it will also upend the lives of hundreds of families who have already enrolled their children in one of the handful of authorized public charter schools set to open this fall and are reasonably relying on those placements for the next school year. Whether this Court permits a decision with such ramifications to stand is critical to the hard-won efforts of many—the legislature, job creators, and West Virginia families—to bring much-needed choices to our State's public education system.

INTRODUCTION

Having lost the debate in the legislature on the policy issue of establishing public charter schools in West Virginia—and having since then been unable, apparently, to make changes at the ballot box—Respondents have turned to the

judiciary. Based on novel arguments not grounded in the text, history, or precedent of this Court, Respondents would have the judiciary effectively rewrite the Act to *require* a local popular vote before authorizing a public charter school. But the West Virginia Constitution mandates no such thing. And so, in seeking extraordinary relief, Respondents have failed to satisfy their heavy burden to show that the Charter School Act is contrary to the West Virginia Constitution "beyond a reasonable doubt" such that injunctive relief can possibly be justified.

The role of the judiciary is a modest one under the circumstances. Former Justice Margaret Workman perhaps put it best: "In a democratic society, the power to make the law rests with those chosen by the people. The judiciary's role, however, is significantly more confined. We are asked only 'to say what the law is.'" *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 537, 782 S.E.2d 223, 232 (2016) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). This recognition compels reversal and remand with instructions to dismiss.

SUMMARY OF ARGUMENT

There are numerous reasons why the Circuit Court was wrong to grant a preliminary injunction, and why it should have, instead, dismissed the case, as Petitioners thoroughly explain. To avoid unnecessary repetition, *Amicus* simply emphasizes two fundamental points.

First, the Circuit Court's interpretation of Article XII, § 10 of the West Virginia Constitution is divorced from its actual, fixed meaning—that is, the original public meaning of the provision as it was understood by those who ratified it. The text, as demonstrated by the historical application of Article XII, § 10

explained by Petitioners, plainly shows it has no application to the Charter School Act. Despite paying lip service to the original meaning of Article XII, § 10, Respondents' interpretation is not a reasonable reading of the provision in light of the text, history, or this Court's precedent. By asking the judiciary to enshrine Respondents' policy preferences when interpreting this constitutional provision, they would contravene this Court's recent admonition that courts must "apply" the West Virginia Constitution "in a way that is consistent with the original purpose and understanding of the citizens at the time of the Constitution's ratification." *State ex rel. Justice v. King*, 244 W. Va. 225, 852 S.E.2d 292, 298 (2020). In short, Respondents fail to show "beyond a reasonable doubt" that the Charter School Act runs afoul of the original public meaning of Article XII, § 10. *Morrisey v. W. Virginia AFL-CIO*, 239 W. Va. 633, 638, 804 S.E.2d 883, 888 (2017).

Second, there is nothing unusual about the legislature's decision to enact a law providing for the creation of public charter schools for the benefit of West Virginia children that is not conditioned on a local public vote. Public charter schools have existed for decades in States across the country in various forms and with different rights and powers. *See, e.g.*, *Wells v. One2One Learning Found.*, 141 P.3d 225, 228 (Cal. 2006) (describing California's charter school law, first enacted nearly 30 years ago, calling it a "revolutionary change in the concept of public education"); *New York Charter Sch. Ass'n, Inc. v. DiNapoli*, 914 N.E.2d 991, 992 (N.Y. 2009) (discussing the history of New York's charter school law).

Our legislature's policy decision to add our State to the growing majority of States seeking to improve public education by introducing school choice for families should be applauded—not enjoined as unconstitutional for unsupported reasons. The judiciary need not be concerned about the policy implications of the Charter School Act, for that is the business of the representative policymakers under our constitutional system. If the Act does not work as intended, the People have the benefit of regular elections to vote in new representatives to the House of Delegates and State Senate to consider such changes. That is how public policy is made under the West Virginia Constitution—not through judicial decrees that rewrite laws.

ARGUMENT

As well-explained by Petitioners, Respondents lack standing and the Circuit Court's attempted fix violates the separation of powers. As a result, the Circuit Court committed legal error by granting the preliminary injunction and by refusing to dismiss the case, which is the *only* proper remedy where standing is lacking. *See, e.g., Pavone v. NPML Mortg. Acquisitions, LLC*, No. 20-0970, --S.E.2d --, 2022 WL 669305, at *6 (W. Va. Mar. 7, 2022) (reversing and remanding to the circuit court with instructions to dismiss "for lack of standing").

Although *Amicus* endorses all of Petitioners' arguments, to avoid duplication, *Amicus* makes two fundamental points in its brief. *First*, the Circuit Court's merits analysis failed to interpret the West Virginia Constitution consistent with its original public meaning, which is illuminated by the historical application of the provision nearest in time to its ratification. *Second*, the Circuit Court failed to appreciate that the legislature's policy decision of providing for the authorization of

public charter schools without an additional local vote must be respected and enforced. After all, charter schools in a variety of forms have been implemented as an additional tool in the education reform toolbox by a majority of states, from those as diverse as California and New York, to Texas and Minnesota.

I. Courts must interpret the West Virginia Constitution in accordance with its original public meaning.

In addition to the jurisdictional defects in this case, Respondents fail to state a claim as a matter of law because Article XII, § 10 of the West Virginia Constitution has nothing to do with charter schools. For the reasons set forth in detail by Petitioners, Respondents do not have a cause of action that can survive legal scrutiny. Here, *Amicus* focuses on the critical methodological issue that led the Circuit Court astray on its constitutional interpretation.

The Circuit Court reached the wrong result in applying Article XII, § 10 of the West Virginia Constitution by failing to apply the proper method to determine its meaning. Had the Circuit Court read the provision "in a way that is consistent with the original purpose and understanding of the citizens at the time of the Constitution's ratification"—as this Court recently reminded the bench and bar—the Circuit Court would have been compelled to refuse the motion for preliminary injunction and dismiss Respondents' complaint for failure to state a claim. *State ex rel. Justice v. King*, 244 W. Va. 225, 852 S.E.2d 292, 298 (2020). If this Court reaches the merits in this case, it should instruct lower courts—by way of a new syllabus point—that the West Virginia Constitution may *only* be interpreted by reference to evidence of its original public meaning.

A. This Court has historically interpreted the West Virginia Constitution by focusing on the original meaning of the text.

This Court has long instructed the lower courts in this state to interpret the West Virginia Constitution based on the original public meaning, or original understanding, of its provisions. Most recently, this Court reemphasized that courts must apply the state constitution's provisions "in a way that is consistent with the original purpose and understanding of the citizens at the time of the Constitution's ratification." *Justice*, 244 W. Va. 225, 852 S.E.2d at 298.

Original public meaning, or original intent originalism, has long been the way this Court has interpreted the state constitution. *See* Syl. Pt. 3, *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 543, 122 S.E.2d 436, 437 (1961) ("The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it."). As this Court explained over 100 years ago,

> The plain terms of this constitutional provision should prevail. A Constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it; "for as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or obstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." *Cooley's Const. Lim.* 81. The great Chief Justice Marshall in the interpretation of a provision of the national Constitution said: 'As men whose intentions require no concealment generally employ the words which most distinctly and aptly express the ideas they intend to convey, the enlightened patriots who adopted it must be understood to have employed words in their natural sense, and to have intended what they said.'

May v. Topping, 65 W. Va. 656, 64 S.E. 848, 850 (1909) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824)).

Yet Respondents' newfangled interpretation of the state constitution in this case is not grounded in original public meaning. Rather, they would have the judiciary imbue Article XII, § 10 with an updated, new meaning—Respondents' preferred policy—by requiring a local vote to authorize a public charter school. That is a fundamental violation of the separation of powers, because it would result in an effective rewriting of the law by the judiciary, instead of through the prescribed legislative or constitutional amendment processes.

As early as 1882, this Court explained, as "a well settled rule, . . . the meaning of the Constitution is fixed, when it is adopted; and it is not different at any subsequent time, when a court has occasion to pass upon it." *Chesapeake & O.R. Co. v. Miller*, 19 W. Va. 408, 418–19 (1882), *aff'd*, 114 U.S. 176 (1885). As such, the goal of state courts when applying the provisions of the state constitution "is to give effect to the intent of the people in adopting it." *Id.* Because the meaning of the Constitution is "fixed," this Court rightly explained that "[n]o change of public sentiment after the adoption of the Constitution should have the slightest weight with the court to influence them to give a construction to the instrument not warranted by the intention of its framers." *Id.* This Court went on to explain why judicial interpretation of constitutional provisions cannot be based on the changes in public views and sentiments:

> To be so influenced would justly subject the court or Legislature to the charge of reckless disregard of official oath and public duty; and if such

> case should become a precedent, these instruments would be of little avail. What a court is to do therefore *is to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require.

Id. (emphasis in original).

The court must first begin with the text, understood as those who ratified or framed the language into our constitution. *See id.* ("To ascertain this meaning, the first resort in all cases is to the natural signification of the words employed in the order of grammatical arrangement, in which the framers of the instrument have placed them."). If, based on an original understanding, the words "embody a definite meaning" that creates no "absurdity" or "contradiction" with other parts of the same provision, "then that meaning apparent on the face of the instrument is *the one, which alone*, . . . was intended to be conveyed." *Id.* (emphasis added).

Yet, in a case in which there is "doubtful meaning in the words used," this Court "look[s] to contemporaneous and practical construction." *Id.* at 420. Again quoting *Cooley*, this Court explained:

> Contemporaneous construction may consist simply in the understanding, with which the people received it at the time, or in the acts done in putting it in operation, and which necessarily assume, that it is to be construed in a particular way. In the first case it can have very little force, because the evidences of the public understanding, when nothing has been done under the provision in question, must always necessarily be vague and indecisive. But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force, which it is not easy to resist.

Id. Here, as Petitioners explain, this Court's historical, "practical construction" of Article XII, § 10—that is, cases applying the provision as

contemporaneous to its ratification as possible—sheds light on its fixed, original public meaning. *See* Petitioners' Brief.

Failure to follow this longstanding interpretive process "would inappropriately expand the judicial power" by infringing upon the legislative branch. *Ex parte Tutt Real Est., LLC*, 334 So.3d 1249, 1253 (Ala. 2021) (Mitchell, J., concurring). There is no sound reason this Court should abandon its historical approach to applying the language of our written state constitution, which is firmly rooted in this Court's precedent.

Looking to the text as informed by the history of how Article XII, § 10 was understood and applied nearest to the time it was added to the state constitution, Petitioners correctly explain that the provision has no application to charter schools generally or the Charter School Act in particular. Petitioners' textual analysis is based on a careful reading of the constitutional provision and historical usage, and it should be adopted if this Court reaches the constitutional question—though for several reasons this Court need not do so to order the case dismissed.

B. The U.S. Supreme Court applies the U.S. Constitution based on the original meaning.

This approach to constitutional interpretation is not new or unusual. Many of the best-known examples of originalism have been demonstrated by the U.S. Supreme Court.

Indeed, several recent landmark decisions are based on an original meaning analysis of the U.S. Constitution. *See, e.g., Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020) (holding that the "original public meaning" of the Sixth Amendment, as

applied to the states through Fourteenth Amendment incorporation, requires a unanimous jury verdict to convict a defendant of a serious offense); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 353 (2010) ("There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations."); *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (analyzing the "the original understanding of the Second Amendment" to hold that it protects the right to possess and lawfully use a firearm for self-defense within the home); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (holding that, absent a prior opportunity for cross-examination by the defendant, the use of testimonial out-of-court statements from unavailable witnesses is barred based on the original understanding and history of the Sixth Amendment).

C. Many other states interpret their own state constitutions based on original meaning.

West Virginia would be far from alone in applying the language of its constitution based on original public meaning, or a similar originalism methodology. In fact, many other states do so. *See, e.g.*, *Elliott v. State*, 824 S.E.2d 265, 268 (Ga. 2019) ("We have often explained that we interpret the Georgia Constitution according to its original public meaning."); *State v. Antonio Lujan*, 459 P.3d 992, 999 (Utah 2020) ("We have repeatedly reinforced the notion that the Utah Constitution is to be interpreted in accordance with the original public meaning of its terms at the time of its ratification."); *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 450-51 (Mich. 2020) ("Our primary objective in interpreting a state

constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." (cleaned up)).

II. Statutes authorizing public charter schools are common nationwide.

Since Article XII, § 10 has nothing to do with charter schools, the legislature's policy decision *not* to require an additional local popular vote sought by Respondents must be respected. Respondents' policy objections to expanded charter schools absent conditions *they* believe necessary should therefore be directed to the legislature—not the judiciary. Regardless, charter schools have existed in different forms over decades in many other states and remain an important tool in the public educational toolbox.

There is nothing unusual about the West Virginia legislature's decision to provide for the creation and regulation of charter schools for West Virginia children. On the contrary, the legislature's education reforms are consistent with national trends. Indeed, "a *significant majority of states* allow for the creation of charter schools, typically allowing those schools to use the per-pupil funding stream from either state or local coffers to pay for services and staff."[3]

As the California Supreme Court explained in discussing its own charter school statute, statewide charter school statutes "[are] adopted to widen the range of educational choices available within the public school system. That is a salutary policy." *Wells v. One2One Learning Found.*, 141 P.3d 225, 244 (Cal. 2006), as

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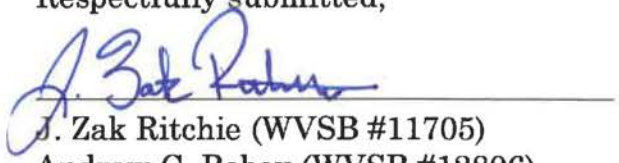
[3] 50 State Regulatory Surveys, Charter School Licensing Requirements, Inspections, and Testing, 0040 REGSURVEYS 2, at *1 (Thomson Reuters June 2021) (emphasis added); *see also* 50 State Statutory Surveys, Charter School Licensing Requirements, Inspections, and Testing, 0040 SURVEYS 2 (Thomson Reuters Oct. 2021).

modified (Oct. 25, 2006). Indeed, the California Supreme Court began its opinion observing that California's Charter Schools Act—which was adopted nearly 30 years ago—"represents a revolutionary change in the concept of public education." *Id.* at 228. We should be proud to say the same 30 years from now about West Virginia's Charter School Act.

CONCLUSION

For the foregoing reasons, and those advanced by Petitioners, this Court should reverse the preliminary injunction order and remand with instructions that the Circuit Court dismiss the action.

Respectfully submitted,



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Dated: May 20, 2022

ADDENDUM

Amicus Curiae Brief of Mountain State Learning Solutions, Inc. In Support of Petitioners

AFFIDAVIT OF BRYAN HOYLMAN

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

The undersigned Bryan Hoylman hereby swears and affirms under oath as follows:

1. I, Bryan Hoylman, am the founding chair of the governing board of Mountain State Learning Solutions, Inc. ("MSLS"), a West Virginia nonprofit corporation formed for the purpose of opening and governing a statewide virtual charter school under the West Virginia Charter School Act.
2. The MSLS governing board consists of five members, West Virginians all.
3. The MSLS governing board, in partnership with its education service provider, expended significant time and resources developing an application to seek authorization from the Professional Charter School Board to open and operate a statewide virtual public charter school in reliance on the West Virginia Charter School Act.
4. Specifically, in reliance on the Act, MSLS formed the founding board; retained legal counsel and began incurring professional fees; conducted research and decided to work in partnership with education service provider Stride, Inc.; worked with Stride to complete the charter school application process; held monthly board meetings during the application process (which were open to the public); filed incorporation documents with the State of West Virginia; participated in public meeting with the Professional Charter School Board; and participated in a formal interview with the Professional Charter School Board designees, among other things.
5. On August 30, 2021, MSLS submitted an application to obtain authorization to open and operate the West Virginia Virtual Academy, a proposed statewide virtual charter school,

to the Professional Charter School Board. All such applications were due no later than August 31, 2021.

6. On November 17, 2021, the Professional Charter School Board authorized the West Virginia Virtual Academy as a virtual public charter school.
7. In adherence with the timeframe set forth in Charter School Act, MSLS will negotiate and enter into a charter contract with the Professional Charter School Board in the time period ending no later than February 15, 2022.
8. Although the West Virginia Virtual Academy may not initiate operations absent a charter contract, it may continue to perform start-up tasks and it is in fact doing so in partnership with our education service provider.
9. In reliance on the November 17 approval by the Professional Charter School Board, MSLS, in partnership with its education service provider, will be working on/making numerous start-up preparations, including but not limited to, developing a transportation plan for Work-Based Learning, Special Programs' services, and state testing, as well as determining whether the West Virginia Virtual Academy will participate in the E-Rate program; negotiating a charter contract with the Professional Charter School Board; negotiating a contract for services with the education service provider; obtaining § 501(c)(3) tax exempt status; and drafting proposed school policies, including but not limited to, fiscal policies and procedures, personnel policies, student discipline policy, student safety policy, dispute resolution policies, employee code of conduct.
10. In further reliance on the November 17 approval by the Professional Charter School Board, MSLS will continue to hold regular meetings of its board, and will in partnership with its education service provider, identify and develop a plan for finalizing facility location and

leasing, as well as plans for furnishings and technology to support school administration; developing policies related to enrollment and student lotteries; developing a parent/student handbook; planning for appropriate finance and accounting systems and business processes; developing a plan for school website, email systems, and becoming more familiarity with appropriate state regulatory guidance, including reporting timelines.

11. There are numerous other critical tasks that must be completed by MSLS in partnership with its education service provider, subject to the charter school contract and other requirements as set forth by law, which I reasonably anticipate will be required in the coming months to ensure the West Virginia Virtual Academy can open to students in the fall of 2022. These include undertaking efforts relating to school personnel, the academic program, and training of MSLS governing board members and school staff, among other things.
12. I am an adult being over the age of eighteen (18) years old and have not been adjudicated incompetent by any court of law which would hinder my ability to sign this affidavit.
13. I make this affidavit of my own free will, based upon my personal knowledge of the information contained herein.

FURTHER THIS AFFIANT SAYTH NOT:

Bryan Hoylman

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

I, Cindy Cragg Notary Public in and for the County and State aforesaid, do hereby certify that Bryan Hoylman whose name is signed to the writing hereto annexed, bearing date the 8th day of December 2021, has this day acknowledged the same before me and in said county.

Given under my hand this 8th day of December 2021.

OFFICIAL SEAL
STATE OF WEST VIRGINIA
NOTARY PUBLIC
Cindy Cragg
707 Virginia Street E Suite 260 Charleston, WV 25301
My Commission Expires June 11, 2025

Cindy Cragg
Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 20, 2022, a copy of the foregoing was served on the parties to this case by U.S. Mail as set forth below:

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