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No. 22-0070



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

**DO NOT REMOVE
FROM FILE**

Respondents Below, Petitioners,

v.

SAM BRUNETT and ROBERT McCLOUD,

Petitioners Below, Respondents.

On Appeal from the Circuit Court of Kanawha County, West Virginia
Civil Action No. 21-P-340 (Judge Bailey)

**AMICUS BRIEF OF NATIONAL COALITION FOR PUBLIC
SCHOOL OPTIONS IN SUPPORT OF PETITIONERS AND REVERSAL**

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INTRODUCTION

Amicus Curiae, National Coalition for Public School Options (“NCPSO”), by counsel, Orndorff Mowen PLLC, submits this *amicus* brief in support of Petitioners, Craig Blair, President of the West Virginia Senate, Roger Hanshaw, Speaker of the West Virginia House of Delegates, and James C. Justice, II, Governor of West Virginia.¹ This Court should vacate the circuit court’s grant of injunctive relief, correct the lower court’s erroneous interpretation of Article XII, Section 10 of the West Virginia Constitution, and uphold the validity of West Virginia Code § 18-5G-15.

STATEMENT OF IDENTITY AND INTEREST

The National Coalition for Public School Options is an alliance of parents devoted to supporting access to the best possible school options for their children. NCPSO is active in more than 30 States, organizing parents to bring their voices to important education issues. NCPSO understands that competition drives entities and institutions to innovate and improve, and it supports efforts that expand public schooling options, such as the establishment of public charter schools, in an effort to improve educational outcomes for all students. NCPSO advocates for free and equal access to nontraditional public schools for all children and has a history of advocacy at both the national and state levels for public schooling options that best serve every individual student’s unique learning needs. NCPSO also works to inform the public about the many benefits of public education options and innovative public schools, policies, and open enrollment initiatives.

As a result, NCPSO is well positioned to help this Court appreciate why the Legislature’s authorization of public charter schools does not violate Article XII, Section 10 of the West Virginia Constitution and why West Virginia’s charter school authorization statute, West Virginia Code §

¹ In accordance with Rule 30(a), NCPSO has obtained consent of all parties to submit this *amicus curiae* brief and provided timely notice of this filing. W. Va. R. App. P. 30(a)-(b). No party to this action or its counsel authored this brief in whole or in part, and no such counsel or party made a monetary contribution specifically intended to fund the preparation or submission of the brief. W. Va. R. App. P. 30(e)(5).

18-5G-15(a), is both a reasonable exercise of the Legislature’s authority over public education and fully consistent with the Constitution’s dual mandates of providing a “thorough and efficient system of free schools,” W. Va. Const. Art. XII, § 1, and “foster[ing]” and “encourag[ing]” education through the “organization of such institutions of learning as the best interests of general education in the State may demand.” *United Mine Workers of Am. Int’l Union by Trumka v. Parsons*, 172 W. Va. 386, 394, 305 S.E.2d 343, 351 (1983) (quoting W. Va. Const. Art. XII, § 12).

In addition, this *amicus* brief is designed to provide perspective regarding the charter school authorization structure established by the Legislature, illustrating that the framework West Virginia has adopted aligns closely with the majority of other States which authorize public charter schools. Against this backdrop, and as explained below, West Virginia’s charter school statute comports with the West Virginia Constitution, the manner in which it authorizes those schools is lawful, and injunctive relief in any form is unwarranted.

ARGUMENT

A. Charter schools improve student outcomes, which is why West Virginia joined the burgeoning nationwide authorization trend.

While charter schools are relatively new to West Virginia, much of the rest of the country has had decades of experience with them. Charter schools were first introduced to the education landscape in the early 1990s.² Since the 2005-06 school year, the number of charter schools in the U.S. has more than doubled while the number of children enrolled in charter schools has more than tripled.³ Today, 45 states and the District of Columbia have charter schools that provide free,

² M. Danish Shakeel & Paul E. Peterson, *Charter Schools Show Steeper Upward Trend in Student Achievement than District Schools*, Education Next Vol. 21, No. 1 (Sept. 2020), <https://www.educationnext.org/charter-schools-show-steeper-upward-trend-studentachievement-first-nationwide-study/>.

³ Jamison White, et. al, *How Many Charter Schools and Students are There?* National Alliance for Public Charter Schools (Sept. 9, 2020), <https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/>.

effective, and innovative methods of instruction to children.⁴ Nationwide, more than 3.3 million children attend over 7,500 public charter schools.⁵ Parents clearly see the value in charter schools: Nearly 1 in 5 parents would choose to send their child to a public charter school if given the opportunity,⁶ and this preference continued to rise in recent years.⁷

One of newest members to join the nationwide charter school movement, West Virginia first adopted a charter school statute in 2019.⁸ In West Virginia, like elsewhere, charter schools are public, non-profit, secular, non-discriminatory institutions of learning. W. Va. Code § 18-5G-3(a)(4)-(6), (8). They are part of the State’s system of public schools, are subject to the supervision of the West Virginia Board of Education, and must enroll any student who would otherwise be permitted to enroll in a non-charter public school. W. Va. Code § 18-5G-3-(a)(1), (8). Like traditional public schools, West Virginia’s public charter schools must meet certain educational standards, cannot be home-based, have no power to levy taxes, and may not charge tuition. W. Va. Code § 18-5G-3(b)(2)-(7). They must also comply with various state and federal standards—such as compulsory attendance and maintaining a minimum number of instructional days during each school year. W. Va. Code § 18-5G-3(b)(4)-(5).⁹

⁴ *Charter School Facilities: Emerging Trends* at 2, U.S. Dept. of Educ., National Charter Schools Resources Center (March 23, 2020); Alyssa Rafa & Ben Ewin, *50-State Comparison: Charter School Policies*, Education Commission of the States (January 28, 2020), <https://www.ecs.org/charter-school-policies/>; *50-State Comparison, Charter School Policies: Does the state have a charter school law?* Education Commission of the States (Jan. 2020), <https://reports.ecs.org/comparisons/charter-school-policies-01>; see also Shakeel, *supra* note 2.

⁵ See White, *supra* note 3.

⁶ Rebecca David & Kevin Hesla, *Estimated Public Charter School Enrollment, 2017-2018*, National Alliance for Public Charter Schools (March 2018), <https://www.publiccharters.org/sites/default/files/documents/2018-03/FINAL%20Estimated%20Public%20Charter%20School%20Enrollment%2C%202017-18.pdf>.

⁷ See *id.*

⁸ See W. Va. Code § 18-5G-1 (eff. June 24, 2019 to May 31, 2021).

⁹ State and federal standards set a floor for charter schools, not a ceiling. The freedom to innovate that charter schools enjoy permits them to adopt more stringent or ambitious standards—e.g., increasing the length of the school day or mandating more instructional days in the school year—and many charter schools do just that. See, e.g., Meg Benner, *High-Performing Charter Schools Help Working Families Find Balance*, The Center for American Progress, (April 20, 2018), <https://www.americanprogress.org/article/high-performing-charter-schools-help-working-families-find-balance/> (noting that “some charter [school] networks with consistently strong student outcomes offer significantly longer school days and nearly year-round school” and providing examples).

Unlike traditional schools, however, a charter school has the flexibility to develop innovative curriculum and teaching methods designed to maximize the educational outcomes of their students. *See* W. Va. Code § 18-5G-3(c). Public charter schools have autonomy over “key decisions,” which includes their curriculum, method of instruction, and personnel scheduling. W. Va. Code § 18-5G-3(b)(1). This freedom—the primary aspect distinguishing public charter schools from traditional public schools—allows charter schools to “serve as laboratories of innovation,” “attract pioneering educators,” and “try out new approaches to education that, if proven effective, can be transplanted back into the larger public education system,” such as lengthening the instructional day or year, or increasing the time and focus spent on core subjects such as reading and math (or emphasizing the arts, focusing on STEM, prioritizing cross-curricular integration—the possibilities for innovation are boundless).¹⁰ This combination of freedom and the highest standards of accountability—higher than traditional public schools because every parent must *choose* to enroll their child in a charter school and then *choose* to maintain their child’s enrollment there—paves the way for public school innovation and reform.¹¹

The end results are evident. At the national level, student success continues to drive charter school popularity, particularly among traditionally underserved communities.¹² Multiple studies confirm that charter schools have a continued positive effect on their students, from increasing college attendance,¹³ to decreasing delinquency and future criminal conduct.¹⁴ The benefits are not

¹⁰ *Innovation in Education: Successful Charter Schools*, U.S. Dept. of Educ. (June 2004) at v, <https://www2.ed.gov/admins/comm/choice/charter/comm/choice/charter/report.pdf>.

¹¹ *Id.* at 1 (“Underwritten with public funds but run independently, charter schools are free from a range of state laws and district policies stipulating what and how they teach, where they can spend their money, and who they can hire and fire. In return, they are held strictly accountable for their academic and financial performance.”).

¹² Shakeel & Peterson, *supra* note 2.

¹³ Peter Bluestone & Nicholas Warner, *The Effects of Start-Up Charter Schools on Academic Milestones*, The Center for State and Local Finance, Georgia State University (Apr. 18, 2018); Julia A. Gwynne & Paul T. Moore, *Chicago’s Charter High Schools* at 1, UChicago Consortium on School Research (Nov. 2017).

¹⁴ David J. Deming, *Does School Choice Reduce Crime?* (Education Next, Spring 2012 Vol 12, No. 2), <https://www.educationnext.org/does-school-choice-reduce-crime/>.

just confined to students who ultimately attend charter schools; the “competition from charter schools appears to boost the performance of nearby traditional public schools, making the majority of students who do not enroll in charters beneficiaries as well.”¹⁵ In short, charter schools help public education systems better prepare all students for a successful future.

West Virginian families are well-positioned to benefit from public charter school education. Traditionally underserved communities thrive from the flexibility afforded to charter schools, which can design and implement policies and curriculum that account for the specific challenges often faced by members of those communities. The proof is in the pudding. Statistics show that charter schools improve educational outcomes for many groups of traditionally disadvantaged students. Children from low socioeconomic backgrounds perform better in charter schools than traditional public schools¹⁶—and up to one-half of West Virginia students fall into that category.¹⁷ Similarly, African-American¹⁸ student performance in reading and math is higher at charter schools,¹⁹ and students with disabilities (nearly as prevalent in West Virginia as those from low socioeconomic backgrounds)²⁰ who attend charter schools outperform those in traditional public schools.²¹

¹⁵ Max Eden, *Charter Schools Boost Results for Disadvantaged Students and Everyone Else*, Manhattan Institute for Policy Research (January 28, 2020), <https://www.manhattan-institute.org/issues-2020-charter-schools-benefits-for-low-income-minority-students>.

¹⁶ *Charter School Facilities: Emerging Trends* at 5, U.S. Dept. of Educ., National Charter School Resource Center, U.S. Department of Education (March 23, 2020); see also Shakeel & Peterson, *supra* note 2.

¹⁷ See West Virginia Department of Education, *ZoomWV (Enrollment)*, <https://zoomwv.k12.wv.us/Dashboard/dashboard/2056> (indicating that 50% of West Virginia students—over 125,000 children—enrolled in 2022 qualify as “Low Socioeconomic Status”).

¹⁸ Approximately 4% of West Virginia students identify as African American. See *The Nation’s Report Card*, U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress (NAEP), https://www.nationsreportcard.gov/profiles/stateprofile/overview/WV?cti=PgTab_Demographic.

¹⁹ Shakeel & Peterson, *supra* note 2.

²⁰ Over 20% of West Virginia students have been identified as having a disability. See *The Nation’s Report Card*, *supra* note 18.

²¹ Elizabeth Setren, *The Impact of Targeted vs. General Education Investments: Evidence from Special Education and English Language Learners in Boston Charter Schools*, working paper, (July 2019), <https://blueprintlabs.mit.edu/research/the-impact-of-targeted-vs-general-education-investments-evidence-from-special-education-and-english-language-learners-in-boston-charter-schools/>.

Public charter schools also expand school choices for families—especially families of students in the traditionally underserved communities described above. Parents are not required to send their child to a charter school. Instead, charter schools merely augment, rather than replace, traditional public schools. That said, the option of sending a child to a charter school provides a realistic way to escape the confines of geographically-locked school zones without the need to resort to infeasible measures such as relocating the entire family or sending a child to live with far-flung relatives. And, because charter schools are free to attend, parents can choose a school that fits their needs without worrying about the often prohibitive expense of private or parochial school tuition.

The flexibility afforded parents coupled with the diversity of charter school options combine to deliver superior results. “Because they are schools of choice, [charter schools] are held to the highest level of accountability—consumer demand.”²² This dynamic is reflected in real-world outcomes. A 2017 *U.S. News and World Report* ranking of the best schools in each State found that, even accounting for the handful that did not (at the time) authorize charter schools, the majority of Top 10 public high schools were charters and “60 percent of the Top 100 high schools [nationwide] [were] public schools of choice—either charter or magnet.”²³

B. West Virginia has adopted a reasonable, multi-track system for authorizing charter schools.

When the West Virginia Legislature first implemented public charter schools in 2019, it left no doubt that it sought to expand public education options for “students, parents, teachers, and community members” through the authorization of charter schools designed specifically to “[i]mprove student learning by creating more diverse public schools with high standards for student

²² *Closing the Achievement Gap: Charter School FAQ*, PBS.org, <https://www.pbs.org/closingtheachievementgap/faq.html> (last accessed May 19, 2022).

²³ See Howard Fuller & Nina Rees, *Proof Positive that Charter Schools are Better*, Newsweek (May 12, 2017), <https://www.newsweek.com/proof-positive-charter-schools-are-better-606146>. Cf. *Best U.S. High Schools*, U.S. News & World Report <https://www.usnews.com/education/best-high-schools/national-rankings> (last accessed May 19, 2022) (searchable database and ranking of all U.S. high schools).

performance.” W. Va. Code § 18-5G-1 (eff. June 24, 2019 to May 31, 2021). Consistent with this stated purpose, the Legislature created an application and approval process for prospective charter schools. Under the initial 2019 legislation—which went into effect on June 24, 2019—county boards of education were to serve as the primary authorizers for charter school applicants. *See* W. Va. Code § 18-5G-1(2)(A)-(B) (eff. June 24, 2019 to May 31, 2021).²⁴

Yet, despite the Legislature’s plain desire for the implementation of public charter schools to improve educational outcomes for children across the State, county school boards routinely denied charter school applications. *See generally State ex rel. W. Virginia Acad., LTD v. W. Virginia Dep’t of Educ.*, No. 21-0097, 2021 WL 2435876, at *2 (W. Va. June 15, 2021) (memorandum decision) (recounting the denial of a charter school applicant by two county school boards). And, under the 2019 statute, applicant charter schools were unable to appeal these adverse decisions. *See id.* at *4 n.9. As a result, the legislative intent and policy prescription reflected in the initial 2019 statute was entirely frustrated—not a single charter school was authorized.

The 2021 amendments to the charter school statute were carefully crafted by the Legislature to directly address these obstacles to charter school authorization. In addition to creating an appeals process, the Legislature expanded the list of potential authorizers to include the West Virginia Professional Charter School Board (“PCSB”). W. Va. Code § 18-5G-15 (eff. June 1, 2021). The PCSB is an agency of the State, and, alongside the other authorizers,²⁵ is permitted to approve or deny charter school applicants. *Id.*

The Legislature tasked the PCSB with authorizing “high-quality public charter schools throughout the state that provide more options for students to attain a thorough and efficient

²⁴ In limited circumstances, the State Board of Education was permitted to serve as the authorizing authority. W. Va. Code § 18-5G-1(2)(C) (eff. June 24, 2019 to May 31, 2021).

²⁵ Today, a charter school may seek authorization from: a county school board (or boards, if a charter school plans to operate across multiple county lines); the PCSB; or, in limited circumstances, the State Board of Education, *see* W. Va. Code § 18-5G-2(2)(A)-(D) (eff. June 1, 2021).

education, particularly through schools designed to expand the opportunities for at-risk students.” W. Va. Code § 18-5G-15(a). It reports directly to the State Board of Education, *id.*, and consists of five voting members appointed by the Governor and approved by the Senate. W. Va. Code § 18-5G-15(b). Its members must “reside in geographically diverse areas of the state, with no more than two members residing in the same county” and may not “hold any other public office or . . . employment under the government of th[e] state or any of its political subdivisions.” W. Va. Code § 18-5G-15(e). They must “possess experience and expertise” in one of several fields, such as “public school leadership” “curriculum or instruction” or “public education law.” W. Va. Code § 18-5G-15(d). And no member be engaged or employed by “a person or company whose primary function involves the sale of service and activities to public charter schools.” *Id.* In short, the PCSB is an objective, nonpartisan, geographically diverse body of individuals possessing education or education-adjacent expertise, who provide a safety valve authorization path that ensures access to high quality charter schools is not thwarted by potentially hostile or territorial local entities.

This multi-track structure for approving public charter schools is consistent with the authorization schemes prevalent in other jurisdictions. It is evident the Legislature studied and drew inspiration from the experiences of other States when crafting the 2021 amendments to the charter school statute. Indeed, the vast majority of States that authorize public charter schools—37 of the 45—provide for the approval of charter schools by entities other than, or co-extensive with, a local school district.²⁶ Only 8 do not.²⁷

²⁶ Jamison White & Jessica Snyder, *Who Authorizes Charter School?* National Alliance for Public Charter Schools (July 19, 2021), <https://data.publiccharters.org/digest/charterschool-data-digest/who-authorizes-charter-schools/>; *50-State Survey, Charter School Policies: What organizations may authorize charter schools, and is there a statewide authorizing body?* Education Commission of the States (January 2020), <https://reports.ecs.org/comparisons/charter-school-policies-10>.

²⁷ White & Snyder, *supra* note 27.

An authorization framework of this sort makes sense. While county school boards have the power to authorize a public charter school within their geographic scope, the availability of additional authorizers ensures that the review and approval of public charter schools are not frustrated by potentially hostile (or merely territorial) local institutions whose primary focus has historically been on traditional schooling.²⁸ Providing a State-level approval pathway also avoids friction between charter schools and other school districts, and ensures a level of uniformity and fairness for West Virginia families across the State that would clearly not be present when done in county-by-county isolation. Parents in West Virginia are thus afforded the opportunity to choose whether or not to send their child to a charter school. It was exactly this—the opportunity for parents to have that choice—that the Legislature sought to provide when it enacted the charter school statute. The prospect of localized opposition, sadly predicated on the misconception that the mere existence of charter schools harms traditional public schools,²⁹ is why entities that advocate for education reform and innovation recommend States avoid making county boards of education the sole authorizers of charter schools.³⁰ The wisdom of this approach is borne out by data: Nationwide,

²⁸ See *Authorizer Types Across the Country*, National Association of Charter School Authorizers, <https://www.qualitycharters.org/authorizer-types/> (last accessed May 19, 2022).

²⁹ The reality is the opposite—a recent study explains that “in most states an increase in the percentage of students attending independent charter schools was associated with a significant *increase* in their host districts: Total revenue per pupil, total spending per pupil, local revenue per pupil, [and] per-pupil spending on support services.” Mark Weber, *Robbers or Victims? Charter Schools and District Finances*, Thomas Fordham Institute (Feb. 9, 2021), <https://fordhaminstitute.org/national/research/robbers-or-victims-charter-schools-and-district-finances>; see also Jason Zwara, *A Reality Check for Evaluating the Fiscal Impact of Charter Schools*, National Association of Charter School Authorizers (Feb. 9, 2021), <https://www.qualitycharters.org/2021/02/a-reality-check-for-evaluating-the-fiscal-impact-of-charter-schools/> (discussing mechanisms that operate to protect traditional public school districts from receiving less revenue as a result of parents choosing to enroll their children in charter schools).

³⁰ *Independent Chartering Board Authorizers*, National Association of Charter School Authorizers, available at <https://www.qualitycharters.org/wp-content/uploads/2018/05/Overview-of-Independent-Chartering-Board-Authorizers.pdf> (last accessed May 19, 2022); *State Board of Education Authorizers*, National Association of Charter School Authorizers, <https://www.qualitycharters.org/state-policy/multiple-authorizers/state-board-of-education-authorizers/> (last accessed May 19, 2022). Since 2018, the National Association of Charter School Authorizers has recommended States create authorizing boards that serve the entire state rather than the limited geographically regions, recognizing, in part, that such boards “are vital to quality state charter systems, and provide the expertise, scale, and capacity crucial to quality authorizing.” *Id.* (“NASCA strongly recommends that every state create [such a board] as part of a quality state charter system.”).

more than 60% of public charter schools have been authorized by an entity other than a local school board.³¹

The circuit court's interpretation of Section 10 would effectively nullify the 2021 amendments to the charter school statute. The Legislature created the PCSB to ensure the aims of that statute are not entirely frustrated by local actors. But, under the circuit court's misreading of Section 10, the very obstacle the PCSB was designed to surmount would return with a vengeance.

Consider an online charter school, armed with remote-learning techniques, staff and teachers specifically trained for the online setting, and a purpose-built curriculum also designed specifically for online use, that seeks authorization to operate statewide, opening its virtual doors to students no matter where in West Virginia they physically reside. Under the reasoning employed in the lower court's injunction, such a school—even one that only enrolls a handful of students in a particular county—is equivalent to a new “independent” district and thus would be required to obtain approval of that county's voters before it could operate. Taken to its logical extreme, an online charter school that desires to permit statewide enrollment would face the daunting prospect of contesting and winning 55 separate county-by-county referendums.³²

Requiring an online charter school to pass such a herculean test is clearly not warranted by any burden imposed on a county where such a school would operate. As discussed below, the true purpose of Section 10 was to ensure that preexisting preferences adopted by communities with

³¹ Ted Rebarber & Alison Conseletti Zgainer, *Survey of America's Charter Schools 2014*, The Center for Education Reform at 3 (2014), <https://edreform.com/wp-content/uploads/2014/02/2014CharterSchoolSurveyFINAL.pdf>.

³² It is unclear, under the circuit court's framework, what happens if such a charter school prevails in some referendums but falls short in others. Perhaps the school would be permitted to enroll students on a county-by-county basis, guided by the outcome of each individual election. Or perhaps only a charter school that sweeps all 55 referendums would be in compliance with the strictures of the circuit court's breathtaking interpretation of Section 10. In either case, why county voters should be afforded veto power over an entity that cannot impose new taxes or otherwise modify the county's preexisting school funding schema—the interest that animates Section 10—goes unsaid.

respect to taxation (and other funding schemes) supporting their local schools would not be displaced by legislative whim. *See* Section C.2, *infra*. But this consideration is not implicated by a charter school that operates within a county because charter schools do not qualify as new “independent free school districts” under a proper, historically rooted understanding of Section 10.

This Court should not allow the circuit court’s attempted nullification of the 2021 amendments to stand. The path charted by the Legislature is both wiser as a matter of policy (it retains county school boards as authorizers while also permitting authorization by an objective body less likely to be hostile to the very idea of charter schools) *and* far more consistent with the relevant law (it suffers from none of the interpretive flaws that infect the circuit court’s reading of Section 10). As discussed further below, the Legislature’s establishment of an alternate path to authorization is both faithful to the Constitution and ensures West Virginians are not denied the opportunity to reap the manifold benefits that flow from high-quality charter schools.³³

C. West Virginia’s framework for approving and authorizing charter schools is consistent with the West Virginia Constitution.

Article XII of the West Virginia Constitution opens with the declaration that the Legislature “shall provide, by general law, for a thorough and efficient system of free schools.” W. Va. Const. Art. XII, § 1. It ends with the exhortation that the Legislature “foster and encourage moral, intellectual, scientific and agricultural improvement” and “whenever it may be practicable, make suitable provision for . . . the organization of such institutions of learning as the best interests of general education in the state may demand.” W. Va. Const. Art. XII, § 12; *see also Parsons*, 172 W. Va. at 394, 305 S.E.2d at 351 (recognizing the same). The commands set forth in Article XII make clear that “education is a fundamental, constitutional right in this State,” Syl. Pt. 3, *Pauley v.*

³³ *See State Board of Education Authorizers*, National Association of Charter School Authorizers, <https://www.qualitycharters.org/state-policy/multiple-authorizers/state-board-of-education-authorizers/>.

Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979), and one of the “prime functions” of West Virginia’s government, *id.* at 719, 255 S.E.2d.

In recognition of the importance and primacy of education, this Court long ago recognized that the Legislature has “plenary power” over the subject, “except for specified inhibitions” outlined in the “Constitution itself.” *Leonhart v. Bd. of Educ. of Charleston Indep. Sch. Dist.*, 114 W. Va. 9, 170 S.E. 418, 420 (1933). Deference to the Legislature’s designs regarding education flow directly from the constitutional text—the key provisions reproduced above both expressly name “the Legislature” and include the mandatory “shall.” *See, e.g., Rogers v. Hechler*, 176 W. Va. 713, 717, 348 S.E.2d 299, 303 (1986). Indeed, as this Court stated in its seminal *Kelly* decision, “our Constitution manifests” a “clear mandate to the Legislature” regarding education. 162 W. Va. at 719, 255 S.E.2d at 884 (emphasis added). Thus, the Legislature “has the right to make change in the educational system as it may see fit, subject, of course, to constitutional limitations.” *Leonhart*, 114 W. Va. 9, 170 S.E. at 420.

The circuit court below determined that despite the Legislature’s nigh plenary power to provide a “thorough and efficient system of free schools,” allowing the PCSB to authorize charter schools violates a constitutional limitation on the Legislature’s power. Namely, the circuit court concluded that permitting the PCSB to authorize new charter schools violates Article XII, Section 10, which constrains the Legislature’s power to establish new “independent free school districts” in the absence of “the consent of the school district or districts out of which the same is to be created,” W. Va. Const. Art. XII, § 10. (*See Order Granting Motion for Preliminary Injunction and Denying Motion to Dismiss*, hereinafter “Order Below,” at ¶¶ 78-80, 86-87, 91, 95, 98, 101).

That conclusion is demonstrably wrong. The court’s error flows from a fundamental misreading of the text of Section 10, as well as a failure to appreciate the history underlying its enactment. Section 10, which was adopted by constitutional amendment in direct response to a

decision of this Court, was designed and clearly intended to remedy a specific Legislative practice that bears no resemblance to the authorization of charter schools. For the reasons discussed below, Section 10—properly understood—is not implicated by the creation of the PCSB or its authorization of charter schools. And, because Section 10 does not prohibit public charter schools authorized by the PCSB, there is no other constitutional impediment to the Legislature’s exercise of its plenary power over education justifying the injunctive relief in this case.

1. Historical context concerning public school districts in West Virginia and the enactment of Article XII, Section 10 confirms that public charter schools authorized by the PCSB are constitutional.

In the early history of West Virginia, there were a multitude of public school districts, usually small in geographic scope; often (but not necessarily) coterminous with the boundaries of a single township. Robert M. Bastress, Jr., *The West Virginia State Constitution*, 334 n.27 (2d. ed. 2016) (“When the 1872 Constitution was adopted, school districts were generally organized along township lines”); *see also* Charles H. Ambler, *A History of Education in West Virginia: From Early Colonial Times to 1949*, 138-39 (1951); *Kuhn v. Bd. of Educ. of Wellsburg*, 4 W. Va. 499, 510 (1871). This state of affairs was not unique to West Virginia—it was a byproduct of the organic, ad-hoc manner in which school districts and their historical predecessors had originally come into being. *See generally* Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 Nw. U. L. Rev. 945, 963-85 (2017) (hereinafter “Hist. of S. Dist.”) (describing the mid-17th century emergence of the first proto-school board in the Massachusetts Bay Colony and tracing the evolution of similar institutions across the United States).

School districts of this time period were largely distinct from other local governmental units; most States’ “[e]arly school acts authorized, but did not force, residents to form” a school board or district. Hist. of S. Dist. at 981. This piecemeal structure meant that “distinct communities, even when subject to the same general government—*i.e.*, county or township—could differ in their

approach [to public education] . . . [e]ach community within [a] county or township could create its own public schooling system—or choose to refrain from creating one.” *Id.*; see Ambler at 2 (“As in New England and elsewhere, Virginia common schools [including those in the territory that would eventually become West Virginia] owed their origin and development to a spirit of cooperation . . . [and like] all . . . places . . . having free schools . . . the people join and build [them]”); see also *Kuhn*, 4 W. Va. at 510 (describing West Virginia’s “general system of free schools,” initially established by the Legislature in 1863, as “one of districts, whether embraced by the boundaries of one township, or embracing within its own boundaries parts of several townships,” as well as a subsequent refinement, passed in 1866, that “authoriz[ed] the division of every township ‘into a suitable number of school districts’”).

This state of affairs may seem alien to modern eyes, but it provides crucial context underlying the enactment of Article XII, Section 10. At the time of the adoption of Section 10—as well as at the time of the legislative enactment and subsequent Supreme Court decision that precipitated it (*Kuhn*)—“the school district was the smallest, and most voluntary, unit of self-government in the political system.” Hist. of S. Dist. at 981. Such districts were “not required to geographically overlap with a general government” allowing “parents [to] form a district across township and county lines” with other “similarly accommodated communities.” *Id.* This, in turn, allowed those parents to “pick teachers reflecting” the priorities of their particular (often ethnically or religiously homogeneous) communities. *Id.*; see also Ambler at 55 (remarking, in discussion of a 1846 Virginia statute concerning free public schools, that “[n]o mention was made of the certification of teachers, which, together with their moral qualifications, was left entirely with their employers, the trustees”).³⁴ As a result, the early school district system was a “powerful tool for

³⁴ Ambler’s seminal history confirms localized control in the era immediately preceding West Virginia’s founding. See Ambler at 55 (explaining that the 1846 Virginia Act “vested control of the district public school

small-scale communities to design their own public institutions and services and to manage their [own] affairs.” Hist. of S. Dist. at 981. Perhaps most crucially, it allowed local communities to control the levers of taxation (usually a property tax levy or special assessment) that was the predominate mechanism for funding public education during that time period.³⁵

The impetus for Article XII, Section 10—the events of *Kuhn*—flows from an inversion of the then-established order: A top-down pronouncement from the Legislature. In 1868, the Legislature passed a statute creating a new “school district of Wellsburg” made up of parts of three townships in Brooke County, including a portion of Buffalo township. *Kuhn*, 4 W. Va. at 499-50. The newly established district then imposed “taxes and levies” enabling it to establish a “building fund” and provide “support [for] schools within th[e] [new] district.” *Id.* at 499. In response, Adam Kuhn, a resident of and property owner in the portion of Buffalo township included in the new district, sought an injunction “to restrain [the new school board] from collecting from [him] any moneys assessed and levied by [the] board on [his] property.” *Id.*

Buffalo township, Kuhn argued, had previously “erected and established . . . suitable school houses in all the school districts of that township,” funded by a prior special assessment which he had been subject to and paid. *Id.* at 500. Meanwhile, the township of Wellsburg had (prior to the

system of any adopting county in voter elected commissioners, but the subdistricts or individual schools were under the immediate control of three trustees”). Local control continued after West Virginia’s secession. See, e.g., *id.* at 231 (“Prior to 1880 the office [of county superintendent of schools] was generally considered superfluous and proposals were made to abolish it”).

³⁵ See Ambler at 233 (noting that even after changes were wrought in the late 1890s and early 1900s, local “boards retained control of levies, salaries, building, and maintenance.”); see also Hist. of S. Dist. at 982 & n. 257 (noting that the “general governments” of that era “ran miniscule budgets and hardly raised taxes” and further explaining that “much of th[e] revenue” raised by localities was in the form of “special assessments: charges levied on property owners who stood to benefit from the specific local improvement funded”); *New York Cent. R. Co. v. Town of Glasgow*, 142 W. Va. 291, 299, 95 S.E.2d 420, 425 (1956) (discussing special assessments); *Fought v. Murdoch*, 114 W. Va. 445, 172 S.E. 536, 536 (1933) (additional discussion of special assessments and levies). The importance of local control over such—usually temporary assessments, see *Heavner v. City of Elkins*, 69 W. Va. 255, 71 S.E. 184, 186 (1911) (“Special assessments, on the other hand, are not made at regular intervals, but whenever the public necessity or convenience requires”)—and other, similar property tax levies is easy to glean from context when examining the claims advanced in *Kuhn*, discussed *infra*.

passage of the enactment establishing the new school district), begun the “erection of a large and costly school building,” a project initiated “without the knowledge and consent of Buffalo township or of its people.” *Id.* Thus, when the Legislature established the new Wellsburg district and included within its ambit “several square miles of the townships of Buffalo and Cross Creek,” *id.*, property owners in the annexed portions of Buffalo township—who had already been subject to a recent special assessment—were now subject to another. The Legislature’s action, Kuhn argued, was unconstitutional because it “disregard[ed] township boundaries” and “direct[ed] how the money for the support of . . . school[s] [in the newly created district] shall be raised . . . without the authority of the people of [the annexed] townships.” *Kuhn*, 4 W. Va. at 502.

The *Kuhn* court rejected Kuhn’s constitutional attacks. It relied primarily on the Legislature’s plenary power over education, invoking the language of the precursor provisions to the present Article XII, Sections 1 and 12. *Kuhn*, 4 W. Va. at 509, 511 (citing constitutional language requiring the Legislature to provide “a thorough and efficient system of free schools” and “make suitable provisions . . . for the organization of such institutions of learning as the best interests of general education in the State may demand.”). It was “evident” from these provisions, the *Kuhn* court explained, that the Legislature had “ample power” to establish a new school district in the manner it had done so. *Id.* at 511. The constitutional text extended to the Legislature a “great prerogative” and it was not the “province” of the Court to “criticize the system adopted for the Wellsburg district.” *Id.*

Less than a month after *Kuhn* was decided, the West Virginia Legislature announced a statewide referendum to consider whether or not to convene a new constitutional convention.³⁶ Although far from the sole impetus for the referendum, questions regarding the State’s current “free

³⁶ *Constitutional Convention of 1872*, e-WV: The West Virginia Encyclopedia, www.wvencyclopedia.org/articles/1570.

public school system” were one of the reasons cited by those in favor of a convention.³⁷ The referendum narrowly passed and eventually produced the Constitution of 1872 (ratified by popular vote in August of that year)—the State’s current governing charter.³⁸

The new constitution yielded two provisions with special relevance to this case. First, Article XII, Section 6 “continued” the then-existing patchwork of local school districts unless and “until changed pursuant to act of the Legislature.” W. Va. Const. Art. XII, § 6.³⁹ This section enshrined into the constitutional text the principal of Legislative control over the structure of local school districts. The framers of the new constitution then tempered the reach of that power by adopting the second relevant provision—Article XII, Section 10—which constrained the Legislature’s power to establish new “independent free school district[s]” without the “consent of the school district or districts out of which the same is to be created” by majority vote. W. Va. Const. Art. XII, § 10. The latter provision “was included in the 1872 Constitution” specifically “to nullify the decision rendered the prior year in *Kuhn*.” Bastress, *supra*, at 333. Section 10 is the “only specific limitation on the legislature’s ability to define school districts.” *Id.*

It was not until more than half a century later, in 1933, that the Legislature chose to exercise the power it had reserved to itself by way of Section 6, by enacting a statute abolishing all of the then-existing public school districts and replacing them with a new county-oriented district system. *See Leonhart*, 114 W. Va. 9, 170 S.E. at 419; *see also* W. Va. Code § 18-1-3.⁴⁰

³⁷ *Id.*

³⁸ *Id.*

³⁹ Express recognition that the status quo pertaining to school boards was being maintained was a necessary byproduct of a different reorganization wrought by the 1872 constitution: the abolition of the township system (which had been imported from New England by the 1863 Constitution) and the “resurrect[ion] [of] the county court” system which had previously been inherited from Virginia. *See Constitutional Convention of 1872*, e:WV: The West Virginia Encyclopedia, <https://www.wvencyclopedia.org/articles/1570>; *see also* Bastress at 334 n.27. Given that many local school districts were organized by reference to townships, Section 6 ensured that adoption of the new constitution did not wipe all pre-existing school districts off the map.

⁴⁰ This wholesale reorganization did not require majoritarian approval by county voters. In *Leonhart*, this Court reasoned that Section 10’s restriction on the Legislature’s power must be construed as attaching only to the

2. Charter Schools are *not* “Independent Free School Districts” for purposes of Section 10.

Viewed in relevant historical context, there can be little doubt that charter schools do not qualify as “free independent school districts” as that phrase was understood by the framers of the 1872 Constitution who adopted Section 10. It follows that Section 10 has no application in this case and provides no basis for the injunction imposed below.

The circuit court’s contrary conclusion—that charter schools qualify as “independent,” *see, e.g.*, Order Below at ¶ 98 (“Independence is a defining feature of charter schools”)—flows from its failure to appreciate the historical context surrounding Section 10 and the concomitant purpose of that provision, which is necessarily informed by this context. The circuit court highlighted, for example, the fact that charter schools are largely exempted from the “statutes and rules applicable to nonpublic charter schools.” *Id.* The court further noted that charter schools are not subject to meaningful supervision by the State Board of Education. *Id.* at ¶ 98.

Independence of this sort, however, is not the independence implicated by Section 10. In 1872, when Section 10 was incorporated into the West Virginia Constitution, there were few (*if any*) analogs to the many statutes and voluminous regulations that now apply to educational institutions. The vast majority of Chapter 18 of the West Virginia Code, which today outlines the regulatory framework for education in West Virginia, was not enacted until the twentieth century.⁴¹ The State

creation, and not to the abolition, of an independent district” because to do otherwise would “divest the Legislature of the broad powers conferred upon it.” 114 W. Va. 9, 170 S.E. at 421. Thus, the Legislature was free to abolish all independent districts—indeed all preexisting districts entirely—and substitute an alternate form (such as the countywide system it had chosen to implement). As discussed below, this conclusion is consistent with the animating purpose of Section 10’s restriction on legislative authority—shielding communities from new special assessments and other tax burdens imposed by localities without the input and acquiescence of the communities affected. Voters in the new countywide districts would have the opportunity to weigh in on any new special assessments or levies, which, crucially, would not be imposed *in addition* to an already existing funding structure.

⁴¹ It is easier to list the few examples the did exist, such as W. Va. Code § 18-1-2 (identifying the start and end date of the school year), a prior incarnation of W. Va. Code § 18-1-3 (defining a school district).

Board of Education did not even exist until 1908.⁴² Local residents, via their local school boards with no guidance from the Legislature, made choices that today would be highly regulated, regarding such questions as what materials to teach and who was qualified to be a teacher.⁴³ Thus, the authors of Section 10 cannot have been concerned with the indicia of “independence” cited by the circuit court; that provision cannot have been designed to restrict the Legislature’s power to establish schools unburdened by regulations and a regulatory body *that did not yet exist*.

*

So what was the intent of Section 10; what did it accomplish? The answer can be divined from the previously discussed historical context. For the authors of Section 10, both the highly localized structure of public school districts (which, via the adoption of Section 6, they had expressly chosen to maintain) and this Court’s *Kuhn* decision (barely a year old when the 1872 constitutional convention was convened) were firmly in mind. The primary overlap between the two is their impact on how schools are funded. The localized, amorphous, and quilt-like structure of late nineteenth century school districts ensured, for better or worse, that it was the particular communities served by a school district that had direct control over the taxes and special assessments necessary to finance its operations. This same reverence for localism—and, in particular, local control over the locally-sourced aspects of school funding—lay at the heart of the case advanced by the plaintiff in *Kuhn*.

The twin centerpieces of Kuhn’s constitutional argument were (1) that the Legislature’s enactment “withdr[ew] from . . . the voters assembled in their township meetings, a business relating

⁴² See *Department of Education*, e-WV: The West Virginia Encyclopedia, <https://www.wvencyclopedia.org/articles/2169>; see also W. Va. Code § 18-2-1 (establishing the State Board).

⁴³ See generally Hist. S. Dist. at 966-72; Sun Go & Peter Lindert, *The Uneven Rise of American Public Schools*, *The Journal of Economic History* Vol. 70, No. 1 at 5 (March 2010) (explaining that throughout the 1800s “teacher credentials and [educational] curriculum were not at all standardized” and that “unregulated academies and grammar schools played a major role” in the education children received).

to their township, [to wit] the raising of school money” and (2) that the Legislature had “disregard[ed] township boundaries” and “direct[ed] how the money for the support of [a] school shall be raised, irrespective of the townships concerned.” *Kuhn*, 4 W. Va. at 502. The *Kuhn* court, of course, brushed aside these arguments. The authors of Section 10 did precisely the opposite—they wove the principles espoused by Adam Kuhn into the text of the constitution.

Thus, Section 10 was designed as a shield against Legislature efforts to disrupt local control over the financing of their schools. In the wake of its enactment, existing local school districts—and, most pertinently, those districts’ existing structure of taxes and special assessments approved by that community—were afforded majoritarian protection. The Legislature could only intervene to modify or replace an existing district (which, invariably, portends an alteration of the attendant taxation structure) if granted approval by the residents whose tax incidence and funding preferences would be impacted.

This understanding is confirmed by the few cases addressing Section 10 prior to the 1933 wholesale reorganization of West Virginia’s system of school districts. In *Herold v. McQueen*, where this Court declined to enjoin the establishment of a county high school or preclude the collection of a county-wide tax to pay for its construction, it was emphasized that county’s preexisting school districts retained the “same amount of property on which to lay their levy” as they had “before the act was passed.” 71 W. Va. 43, 75 S.E. 313, 316 (1912). Section 10 was inapposite because the Legislature had not altered any preexisting district or otherwise disturbed the structure for financing schools already extant in the county.

Similarly, in *Casto v. Upshur Cty. High Sch. Bd.*, this Court again declined to enjoin a newly established high school (on this occasion, a second high school set to operate in Upshur County). 94 W. Va. 513, 119 S.E. 470, 471 (1923). The Court explained that Section 10 was not violated because the enactment providing for the new school and an associated levy to pay for its

construction, did not “affect the integrity of the [pre-existing] Buckhannon independent school district [that operated the first high school] in any way.” *Id.* The pre-existing district would “function as before,” continuing to operate its pre-existing high school and, critically, could “lay levies therefor” because “the taxable property [of the pre-existing district] is not affected by [the new] levy for the [new] county high school.” *Id.*

Herold and *Casto* illustrate the narrow focus of Section 10. The provision was narrowly designed to prevent the Legislature from disturbing the *already existing, entirely local* aspects of a given community’s school financing framework (which, at the time, accounted for most, if not all, of school funding) without majoritarian approval. Section 10 was not designed to prevent school districts from being “independent” in some general, generic sense; it was aimed squarely at the then-extant legislative practice of creating a very specific entity, the “independent free school district.” In short, Section 10 does not use the word “independent” as an adjective, it uses it as a noun (specifically part of the noun phrase “independent free school district”).

Charter schools do not implicate the “stability interest”—requiring majoritarian approval to create a local entity that might levy new local taxes in addition to those already in place—secured by Section 10. The reason is simple: Charter schools have “no power to levy taxes.” W. Va. Code § 18-5G-3(b)(2). A charter school authorized to operate in a particular county cannot impact the financial structure associated with an existing school district in a way that implicates Section 10. Charter schools are funded on a per pupil basis from funds sourced from the State’s general revenues; not a single penny flows from local property taxes or special assessments. *See* W. Va. Code § 18-5G-5(a). Without the power to levy taxes or otherwise raise revenue from any locality, the difference between a charter school and an “independent school district” could not be brought into sharper relief. After all, this Court has observed that one of the hallmarks of an “independent school district” was its power to levy a “special rate of taxation.” *Casto*, 94 W. Va. 513, 119 S.E.

at 471 (also observing that taxes levied on property inside independent school districts were generally higher). Of course, as already noted, neither charter schools nor the PCSB have the authority to levy *any* taxes or assessments on the populace of or property within a locality where they operate. *See* W. Va. Code § 18-5G-3(b)(2). Nor does the existence and operation of a charter school in a particular county impact a county board of education’s existing level of local taxation or alter power to levy local taxes and assessments. W. Va. Code § 18-9-1; *see also* W. Va. Code § 11-8-16 (eff. June 2022). Thus, the concerns underlying Section 10 are just not at play.

To be sure, the concerns that led to the inclusion of Section 10 in the 1872 Constitution have a greatly reduced salience today. Given the modern structure of school financing, in which general revenue from the State’s coffers is the primary source of education funding,⁴⁴ and the current county-based structure of public school districts, Section 10, though undoubtedly still valid, is a constitutional relic with no practical impact on the structure of West Virginia’s school system. Unless and until the Legislature revives the practice of “carving out” new districts *with the power to levy taxes and assessments* from the existing countywide districts, Section 10 simply has no work to do. *See* Bastress, *supra*, at 334 (“Section 10 has virtually no operation today”); *see also id.* (“There has been no movement in the State to re-create sub-county districts.”).

* *

It is also true that charter schools are not “carved out of” existing school districts. As discussed above, in *Herold*, this Court held that Section 10 did not apply to the creation of a high school within its own “separate” school district because the Legislature did not “create a school district out of any part of any [already existing] school district or districts. 71 W. Va. at 50, 75 S.E.

⁴⁴ *See, e.g., John E. Taylor, Pauley—and ‘The Recht Decision’—at Forty*, 121 W. Va. L. Rev. 757, 808 (2019) (“According to the West Virginia Department of Education, the state provides 57.4% of the revenue supporting the public schools, while local governments contribute 32.6% and the federal government contributes 10%.”).

at 316.⁴⁵ Similarly, in *Casto*, this Court approved the Legislature’s creation of a second high school in Upshur County on the basis that this new school was not “carved out” of any existing school district, that the original high school could “function as before,” and that the school district could “conduct its high school . . . lay levies therefore, and the taxable property therein is not affected by levy for the county high school.” 94 W. Va. at 516, 119 S.E. at 471. The *Casto* court explained: “We do not have an independent district. The territories of the school districts are left intact, and the boards thereof are functioning as before. Nothing is carved out of them or any of them.” *Casto*, 94 W. Va. at 517, 119 S.E. at 472.

Charter schools are not created “out of” existing school districts and they do not force a division of attendees. Instead, they operate alongside existing public school districts and, unlike the “independent school districts,” charter schools do not “take away” from the existing structure; no child is required to attend a charter school, existing territories are left intact, and the already extant school boards function as they did before. *Casto*, 94 W. Va. at 517, 119 S.E. at 472. These fundamentally different methods of creation and operation establish that a public charter school is not an “independent free school district” for purposes of Article XII, Section 10.

* * *

The circuit court has jammed a square peg into a round hole. Article XII, Section 10 is a narrow provision enacted for a specific purpose concerning historical conditions that have largely fallen by the wayside. It has *nothing* to do with charter schools. The school financing considerations

⁴⁵ *Herold*, 71 W. Va. at 50, 75 S.E. at 316 (further explaining that “[t]he act in question does not create a school district out of any part of any school district or districts of the county. The integrity of the different districts remains intact, and the several boards of education thereof have the same territorial jurisdiction, and the same amount of property on which to lay their levy to raise revenue to run the schools of their several districts that they had before the act was passed. Hence we do not think the act is repugnant to the sections referred to in article 12 of the Constitution.”).

that were the impetus for Section 10's adoption simply are not implicated by a local entity unable to levy local taxes or assessments or otherwise alter a preexisting school district's funding regime.

D. West Virginia's embrace of public charter schools lives up to the highest ideals articulated in the West Virginia Constitution.

In *Pauley v. Kelley*, this Court discussed Article XII's use of the descriptor "thorough and efficient" appended to West Virginia's mandate that the Legislature provide a system of free public schools. Guided by discussion at Ohio's 1851 Constitutional Convention—when Ohio embedded the same phrase into its foundational charter, which served as a model for West Virginia's later adoption of the same—the Court noted that despite the absence of an "explicit definition," the "tenor of discussion . . . leaves no doubt that excellence was the goal, rather than mediocrity." 162 W. Va. at 685, 255 S.E.2d at 867. Building on that foundation, the *Kelly* court would go on to define a "thorough and efficient system of schools" thusly—one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically." *Id.* at 705.

Public charter schools are an embodiment of this ethos of excellence. Afforded the freedom to experiment and explore, charter schools unlock hidden potential and challenge conventional wisdom. Not every charter school will succeed, but that is a feature, not a bug—the cream rises to the top, while failing efforts are shuttered rather than allowed to linger in a zombified state for years or decades.⁴⁶ And the innovations developed and refined at the best charter schools represent the

⁴⁶ See, e.g., Jonathan Gelbart, *Charter schools: Free to succeed, free to fail*, Medium.com (October 2013) (charter schools in Arizona are "five times more likely . . . to perform in the top 2.5% of all schools the state" and "12 times more likely to . . . fall in the bottom 2.5%"); Libetti, Burgoyne-Allen, *et al.*, *The State of the Charter Sector: What You Need to Know About the Charter Sector Today*, Bellweather Education Partners (January 2019), (from 2006 to 2012 "a higher percentage of low-performing charter schools than traditional public schools have closed"). Unlike traditional public schools, there is a natural mechanism that drives poor performing charter schools to close—the choices of the parents about where to send their children to school. See *Closing the Achievement Gap: Charter School FAQ*, note 22, *supra*. Charter schools that do not produce results neither retain the existing enrollees nor attract the new ones necessary to remain operational.

cutting edge of educational advancement;⁴⁷ they are undoubtedly examples of “the best the state of education expertise allows.”

Charter schools are also the epitome of economical. They do more with less. It is no secret that “economically disadvantaged students are generally more expensive to educate.”⁴⁸ Yet, as noted above, children from low socioeconomic backgrounds frequently perform better in charter schools⁴⁹ and charter schools obtain that impressive result despite receiving significantly less funding on a per pupil basis than traditional public schools.⁵⁰

The West Virginia Constitution’s mandate that the Legislature provide a thorough and efficient system of free schools makes “public education a Prime function of our State government.” *Kelly*, 162 W. Va. at 719, 255 S.E.2d at 884. The final words of the *Kelly* decision contain an exhortation that “we must not allow that [constitutional] command to be unheeded.” *Id.* The embrace of public charter schools is a clear example of West Virginia’s Legislature responding to that command—one of its most sacred duties—with a clarion call. This Court must set things straight. West Virginia’s parents and students should not be deprived of educational choice for even one day more.

CONCLUSION

NCPSO joins Petitioners in requesting this Court vacate the circuit court’s preliminary injunction preventing the authorization and operation of charter schools in West Virginia.

⁴⁷ See Gelbart, note 46, *supra* (noting that the “BASIS [network of] charter schools . . . ha[s] redefined what is possible in American education”). In the most recent US News & World Report ranking of best high schools, 7 of the 10 top ten rated charter schools are part of the BASIS network, *see* note 23, *supra*.

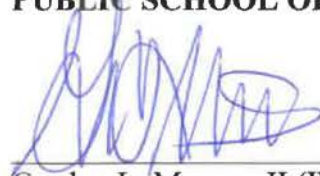
⁴⁸ See Taylor, note 44, *supra*

⁴⁹ See note 16, *supra*; *see also* Lewis, note 50, *infra* (“Not only do charter schools serve higher percentages of historically underserved student groups, they also have positive effects on their academic performance.”).

⁵⁰ Brandon Lewis, *New Analysis Shows How a \$13 Billion Funding Gap Between Charter Schools & Traditional Public Schools Hurts Underserved Students*, The 74 (April 15, 2019), <https://www.the74million.org/article/analysis-new-analysis-shows-how-a-13-billion-funding-gap-between-charter-schools-traditional-public-schools-hurts-underserved-students/> (“charter school students receive 27 percent less in per-pupil funding than their traditional public school counterparts”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gordon L. Mowen, II, hereby certify that the foregoing *AMICUS BRIEF OF THE NATIONAL COALITION FOR PUBLIC SCHOOL OPTIONS IN SUPPORT OF PETITIONERS* was served via email and US Mail, postage prepaid, on May 20, 2022 to the following counsel of record:


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