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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 22-0070

(Civil Action No. 21-C-340

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,

Petitioners,

v.

SAM BRUNETT and ROBERT McCLOUD,

Respondents.

DO NOT REMOVE FROM FILE

OPENING BRIEF OF PETITIONERS

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ASSIGNMENTS OF ERROR

The Circuit Court of Kanawha County preliminarily enjoined Governor James C. Justice II from enforcing House Bill 2012 of the 2021 Legislative Session ("HB 2012"), which empowers the Professional Charter School Board ("PCSB") to authorize charter schools in West Virginia. This Court stayed that preliminary injunction. Now it should dissolve it based on the following:

I. The circuit court should have dismissed the case for lack of standing, as the Petitioners—the Governor, as well as West Virginia Senate President Craig Blair and West Virginia House of Delegates Speaker Roger Hanshaw—are not responsible for enforcing the challenged law.

II. The circuit court's order purports to enjoin a nonparty and compel the Governor's exercise of purely discretionary authority, violating the separation of powers.

III. A preliminary injunction is not justified because Respondents are unlikely to succeed on the merits and the injunction will cause Petitioners and the public irreparable harm.

INTRODUCTION

Respondents here sued the wrong parties. None of the Petitioners are responsible for enforcing HB 2012. And none have power to authorize the charter schools Respondents oppose—the statute assigns that task to the PCSB. Yet Respondents chose not to sue that agency. The circuit court should have thus dismissed this suit for lack of standing; instead, it wrongly overlooked that failing. This Court should not. Respondents' own litigation choices erased their claim for standing because the parties they did sue did not cause their alleged harms and could not redress them moving forward. Indeed, any relief the circuit court could appropriately grant against Petitioners would not block any charter schools the PCSB authorizes under HB 2012.

Nor could the circuit court shore up Respondents' standing problems by ordering the Governor to direct the PCSB's members not to authorize charter schools. This purported remedy highlights the illogic of the PCSB's absence from the case—Respondents' actual quarrel is with the agency, but the circuit court lacked power to bind a *non*party, so it tried to order the Governor

to do so instead. Worse still, this novel approach violates the separation of powers by invading the Governor's discretionary removal powers. This Court has never sanctioned such an intrusion into executive discretion before, and it should not start now.

These foundational defects should end the case. But even setting them aside, the Court should reverse because the preliminary injunction factors favor Petitioners. Since the West Virginia Constitution's ratification, no court has held that an act of the Legislature ran afoul Article XII, section 10's requirements for independent school districts. The circuit court erred when it found that it was likely to be the first. Instead, this Court has held—twice—that the Legislature may create new schools without a countywide vote as long as the geographic territories of existing school districts do not change. So because the charter schools HB 2012 permits would not alter existing school district borders, there is no constitutional requirement to hold a countywide vote before they can open. Respondents are thus exceedingly unlikely to prevail on the merits.

Respondents are also not entitled to preliminary relief because they will not suffer irreparable harm during litigation. Respondents claim that HB 2012 deprives them of the right to vote, but they will be able to exercise whatever right Article XII, section 10 gives them at the end of this case. In contrast, Petitioners and the public will suffer irreparable harm if the Court affirms the preliminary injunction. The Governor will be forced to choose between acquiescing to the circuit court's invasion of his discretionary removal powers or risking contempt of court. Already-authorized charter schools may not be able to open—nullifying the significant work they have done to be ready for the upcoming year, leaving the West Virginians they employ without jobs, and depriving the students who intend to enroll of the educational opportunities they offer.

The circuit court improperly ignored the defects in Respondents' standing, the separation of powers violation its novel remedy creates, and the irreparable harms its hasty injunction will visit on Petitioners and the public. This Court should reverse.

STATEMENT

1. Article XII, section 10 of the West Virginia Constitution provides that "[n]o independent free school district, or organization shall hereafter be created, except with the consent of the school district or districts out of which the same is to be created, expressed by a majority of the voters voting on the question." This provision's history shows that it was included in the 1872 Constitution to govern efforts to *reshape* existing school districts. It was not meant to limit new schools that operate parallel to current district lines—like those HB 2012 permits.

During the post-Civil War era, West Virginia's public schools were administered by local townships, the precursors to the current magisterial districts. CHARLES H. AMBLER, A HISTORY OF EDUCATION IN WEST VIRGINIA 139 (1951). Each district typically "embraced . . . the boundaries of one township." *Kuhn v. Bd. of Ed. of Wellsburg*, 4 W. Va. 499, 510, 1871 WL 2753, *9 (1871). The Legislature also created school districts independent of the township districts by passing special acts that carved out a new school district from the geographic territory of one or more existing township districts. *Casto v. Upshur Cnty. High Sch. Bd.*, 94 W. Va. 513, 517, 119 S.E. 470, 471 (1923). Typically, the Legislature placed these independent districts in "populous centers" of the State, ROBERT M. BASTRESS JR., THE WEST VIRGINIA STATE CONSTITUTION 334 (2d. ed. 2016), where students otherwise could not "receive instruction to the degree desired under the ordinary district system." *Casto*, 94 W. Va. at 516, 119 S.E. at 471. These districts were "independent of the general system in the length of the school term, employment of teachers,

branches taught and to what extent, [and] internal management generally." *Id.* Often, independent districts would also levy higher taxes on the property within their borders. *Kuhn*, 4 W. Va. at 500.

Under the State's original Constitution, the voters in the existing township district did not need to approve the Legislature's decision to create an independent district. In 1868, for example, the Legislature passed a special act creating "the school district of Wellsburg" by "annex[ing]" the territory of the Wellsburg Township and parts of two other adjacent townships. *Kuhn*, 4 W. Va. at 500. In an 1871 lawsuit challenging tax levies that the new independent school district imposed, this Court affirmed the district's taxing power and held that the Legislature had "exclusive power to create independent school districts, without the assent of the citizens residing therein." Syl. pt. 2, *Kuhn*, 4 W. Va. at 499.

A year later, the people adopted Article XII, section 10 "to nullify" *Kuhn*. BASTRESS, *supra*, at 333. The 1872 Constitution preserved all existing school districts, township and independent, and authorized the Legislature to make future changes to those district lines with the local voters' consent. *See* W. Va. Const. art. XII, § 6 (1872). When it came to new "independent free school district[s], or organization[s]," the Legislature had to get "the consent of the" voters in a "school district or districts out of which the same is to be created." W. Va. Const. art. XII, § 10. The purpose of this language was to prevent the Legislature from unilaterally "removing part of [the] territory" of an existing school district to make a new independent district. BASTRESS, at 333.

Though Article XII, section 10 remains in effect today, the Legislature abolished all "[e]xisting magisterial school districts and subdistricts and independent districts" in the State in 1933. W. Va. Code § 18-1-3 (1933). In their place, it established the current county-district system in which "all the territory" of each county comprises a single "school district." *Id.*

2. Moving ahead 85 years, the Legislature passed comprehensive education reform in the First Extraordinary Session of 2019. W. Va. Acts 2019, 1st Sess., c. 31 (June 24, 2019). Among other things, this law established the process "for the creation, governance and oversight accountability of public charter schools." W. Va. Code § 18-5G-1(a) (2019). The Legislature designed this system to "empower new, innovative, and more flexible ways of educating" West Virginia's children, *id.* § 18-5G-1(b), and to "[p]rovide expanded opportunities *within* the public school[]" system "for parents to choose among the school curricula, specialized academic or technical themes, and methods of instruction that best serve the interests or needs of their child." *Id.* § 18-5G-1(b)(4) (emphasis added).

Specifically, any "parents, community members, teachers, school administrators, or institutions of higher education" that form a non-profit may apply to become a public charter school. W. Va. Code § 18-5G-2(1). Applications are submitted for approval to an "authorizer." *Id.* § 18-5G-6. If approved, the authorizer negotiates a contract with the charter school and provides oversight to ensure that it fulfills its statutory and contractual duties. *Id.* § 18-5G-6(a). Originally, the primary "authorizers" were the county boards of education ("BOEs") where the proposed charter schools would operate, with the State BOE empowered to take on this role in limited circumstances. *Id.* § 18-5G-2(2)(A)-(C). If the county BOE rejected the application, the statute provided no right to appeal that decision to the State BOE. *State ex rel. W. Va. Acad., LTD v. W. Va. Dep't of Ed.*, No. 21-0097, 2021 WL 2435876, *4 & n.9 (June 15, 2021) (memorandum decision).

The Legislature changed that system when it enacted HB 2012 during the 2021 Session. W. Va. Acts 2021, c. 98 (June 1, 2021). This new law established an appeal process to the State BOE if an authorizer rejects an application. W. Va. Code § 18-5G-13 (2021). It also created the

PCSB. *Id.* § 18-5G-15 (2021). This new agency consists of five voting members appointed by the Governor with the advice and consent of the Senate. It "report[s] directly to" the State BOE, *id.* § 18-5G-15(a), and is subject to the State BOE's "general supervision" regarding the "standards for student performance," *id.* § 18-5E-5. The Legislature also empowered the PCSB to act as an authorizer to evaluate and approve charter school applications. *Id.* § 18-5G-2(2)(C).

To become a charter school through the PCSB process, an applicant submits an application that meets the requirements of West Virginia Code Section 18-5G-8 and West Virginia Code of Regulations Section 126-79-4. If the PCSB accepts the application, the school and the PCSB negotiate a contract that lays out the school's responsibilities and the expectations it "must meet to continue operating," W. Va. Code R. § 126-79-6.1.a, as well as its academic standards of performance, W. Va. Code § 18-5G-9(c). Charter schools have "autonomy over key decisions" like "finance, personnel, scheduling, curriculum, and instruction." *Id.* § 18-5G-3(b)(1). But they must provide the "same minimum number of" instructional days and meet the "same student assessment requirements" as noncharter schools. *Id.* § 18-5G-3(c)(5), (6). And unlike the now-obsolete independent school districts, they have "no power to levy taxes." *Id.* § 18-5G-3(b)(2).

A charter school's contract also "designate[s]" the school's "primary recruitment area." W. Va. Code § 18-5G-11(a)(4). A charter school must be "open for enrollment to all students of appropriate grade level" in that recruitment area, and a portion of state school aid "follow[s]" students who apply and are accepted "to the public charter school." *Id.* §§ 18-5G-11(a), 18-5G-5. Critically, the county BOEs maintain authority to "establish attendance zones within" their counties to "designate" the *noncharter* schools students must "attend." *Id.* § 18-5-16(a). A charter school's recruitment area "does not negate" those established "attendance" areas. *Id.* Nor does it create a requirement that "any student residing in the" recruitment area attend the charter school.

Id. § 18-5G-11(a)(3). In other words, charter schools do not change any existing school district lines, but operate as an alternate option within the county system.

3. On September 29, 2021, Respondents Sam Brunett and Robert McCloud filed this action in circuit court alleging that any charter schools the PCSB authorized would be "independent free public school organizations." A.R. Vol. I, at 17. And because HB 2012 allows these organization "without the consent of" county voters, they claimed the statute violates Article XII, section 10. A.R. Vol. I, at 17. Respondents did not sue the PCSB; they named only the Governor, Senate President, and House Speaker. Respondents asked the circuit court for a writ of mandamus ordering Petitioners "to permit county residents the opportunity to vote on the creation of any PCSB-authorized charter schools"; an injunction preventing "the creation of any PCSB-authorized charter schools absent a vote of county residents"; and a declaration that HB 2012 is unconstitutional. A.R. Vol. I, at 17-18. Over a month later they filed a motion for preliminary injunction. Meanwhile, the PCSB authorized three in-person charter schools and two virtual charter schools. A.R. Vol. I, at 299-300.

Petitioners filed an opposition to the motion for preliminary injunction and a motion to dismiss. A.R. Vol. I, at 55-98. On January 20, 2022, the circuit court entered the order on appeal, which rejected Petitioners' motion to dismiss and granted the preliminary injunction. A.R. Vol. I, at 292.

The circuit court found first that Respondents had standing. A.R. Vol. I, at 304. It held that the Senate President and House Speaker were essential parties because the Legislature passed HB 2012 and the statute implicated their "mandatory duties respecting public education." A.R. Vol. I, at 304-05. Nevertheless, the court concluded that it did not need to "enjoin the Senate President and House Speaker." A.R. Vol. I, at 308. But it did not dismiss them from the case—it

explained that it could not "exclude the possibility" of granting mandamus against these parties in the future. A.R. Vol. I, at 305-06, 308. The court also found that the Governor was a proper party for standing purposes because he "signed" HB 2012 "into law," appointed the PCSB's members, and is responsible for seeing that the State's laws are "faithfully executed." A.R. Vol. I, at 306.

The circuit court also found that the "PCSB's participation as a named party" was "unnecessary." A.R. Vol. I, at 309. Recognizing that Respondents were concerned about actions the PCSB would take, however, the court held that its injunction bound the PCSB anyway. A.R. Vol. I, at 309. Though the court could not directly bind a nonparty, it ordered *the Governor* to do so by "direct[ing] the PCSB, under threat of removal, if necessary, to temporarily suspend the creation of PCSB-authorized charter schools to comply with the preliminary injunction." A.R. Vol. I, at 308-09.

Finally, the circuit court found that the factors for a preliminary injunction weighed in Respondents' favor. A.R. Vol. I, at 310-11. The court concluded that Respondents are likely to prevail on their claim that HB 2012 permits "independent school organization[s]" "within existing school districts" in violation of Article XII, section 10. A.R. Vol. I, at 311. It also found that Respondents would be irreparably deprived of the right to vote if charter schools open while this litigation moves forward, and that this harm outweighed students' interests in attending charter schools and parents' increased educational options for the next one or more school years. A.R. Vol. I, at 319, 321. So it enjoined the "enforcement of [HB] 2012 in the creation of PCSB-authorized charter schools by the Governor, the Governor's executive officers, agents, or employees, and any persons acting in concert or participation with them." A.R. Vol. I, at 322.

On January 24, 2022, Petitioners appealed the preliminary injunction and sought a stay, which this Court granted on February 23, 2022.

SUMMARY OF ARGUMENT

I. The circuit court's order suffers from a jurisdictional defect: Respondents sued the wrong state officials. They claim that HB 2012 deprives them of rights under Article XII, section 10 because it allows the PCSB to authorize charter schools in the counties where they live. But instead of suing the PCSB, they chose to sue the Senate President, House Speaker, and Governor. This choice deprives them of standing, and the circuit court of jurisdiction, as to each of their claims. Their requests for injunctive and declaratory relief fail because none of the Petitioners caused the alleged injuries; they are not responsible for authorizing charter schools, and redressing those injuries requires an order against a nonparty—the PCSB. Relief in mandamus is similarly defective because, even if Respondents were right on the merits, Article XII, section 10 does not impose a non-discretionary obligation on Petitioners to hold a countywide vote on charter schools. It does not even empower these officials to convene a countywide vote. Instead, as Respondents concede, the Constitution gives the Legislature discretion to select the appropriate manner of complying with Article XII, section 10. Because the circuit court cannot direct or supervise Petitioners' performance of discretionary acts, Respondents have no injury mandamus can redress.

II. The circuit court's preliminary injunction is also overbroad and attempts to bind an independent nonparty by invading the Governor's discretionary power to remove members of the PCSB for "official misconduct, incompetence, neglect of duty, or gross immorality." W. Va. Code § 18-5G-15(g). This indirect approach to injunctive relief is not only an improper attempt to bypass Respondents' choice not to sue the correct party, but it violates the separation of powers along the way. The Court should dissolve the injunction on this structural constitutional ground, too.

III. The circuit court also abused its discretion by entering preliminary relief because each of the preliminary injunction factors favors Petitioners. *First*, Respondents are unlikely to succeed on the merits because Article XII, section 10's text and original meaning only prevent the Legislature from "carv[ing] out" or "annex[ing]" territory from a previously existing school district to "create[]" a new one. *Casto*, 94 W. Va. at 517, 119 S.E. at 472; *see also Kuhn*, 4 W. Va. at 500. It does not bar schools, like those under HB 2012, that leave "intact" "the territories of the [existing county] school districts." *Casto*, 94 W. Va. at 517, 119 S.E. at 472. *Second*, Respondents have not met their burden to show they will likely suffer irreparable harm—the Court has already made clear that the voting rights in question will be just as viable after this litigation ends. *Third*, Petitioners and the public *are* highly likely to suffer irreparable harm. If the preliminary injunction goes into effect, the Governor will face an untenable choice between agreeing to give up his discretionary removal powers or facing contempt. This serious separation-of-powers concern alone causes irreparable harm. Plus, the charter schools the PCSB has already approved will not be able to open, delaying the educational opportunities they would otherwise provide for at least one full school year, and maybe more. That lost time can never be made up if Petitioners ultimately prevail. Because the circuit court abused its discretion finding otherwise, this Court should dissolve the circuit court's preliminary injunction and remand with directions to dismiss the suit.

STATEMENT REGARDING ORAL ARGUMENT

Petitioners request oral argument under Rule 20 because this case involves constitutional questions regarding the validity of HB 2012 and other issues of high public importance.

STANDARD OF REVIEW

The "jurisdictional issues" raised in this appeal "are questions of law" subject to "de novo" review. *State ex rel. Univ. Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 343, 801 S.E.2d 216, 221 (2017). Respondents bear the burden of establishing the circuit court's jurisdiction. *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 242, 800 S.E.2d 506, 509 (2017). By comparison, a "three-pronged deferential standard of review" applies when this Court reviews a preliminary injunction. *Morrisey v. W. Va. AFL-CIO*, 239 W. Va. 633, 637, 804 S.E.2d 883, 887 (2017). The Court reviews "the final order granting the preliminary injunction and the ultimate disposition under an abuse of discretion standard," the "underlying factual findings under a clearly erroneous standard," and "questions of law de novo." *Justice v. W. Va. AFL-CIO*, 246 W. Va. 205,—, 866 S.E.2d 613, 619 (2021) (cleaned up).

ARGUMENT

I. Respondents Lack Standing Because The Parties They Sued Did Not Cause Their Alleged Harm And An Order Against Them Could Not Fix It.

The circuit court's order is jurisdictionally defective because Respondents did not meet their burden to "demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlow Envtl. Serv. (TOC),* 528 U.S. 167, 185 (2000). Respondents' requests for injunctive and declaratory relief fail because they sued the wrong state officials. Their alleged harm is not causally connected to Petitioners, and an injunction or declaratory judgment binding the actual parties would not set that purported injury right. Nor is their claim redressable in mandamus because the Constitution gives the Legislature discretion regarding the "precise mode of" compliance with Article XII, section 10. Syl. pt. 5, *State ex rel. Justice v. King*, 244 W. Va. 225, 227, 852 S.E.2d 292, 294 (2020) (cleaned up). Because Respondents lack standing for each

type of relief they seek, the circuit court should have dismissed instead of taking "further action." Syl. pt. 7, *State ex rel. St. Clair v. Howard*, 244 W. Va. 679, 684, 856 S.E.2d 638, 642 (2021).

A. Respondents lack standing for injunctive and declaratory relief.

The circuit court lacked jurisdiction to award injunctive and declaratory relief because the Senate President, House Speaker, and Governor did not cause Respondents' purported injury, so any relief granted against them will not stop any actions the PCSB—a separate state agency—may take going forward. Respondents could have pursued their claims against the PCSB, which is statutorily responsible for authorizing charter schools in West Virginia. The circuit court excused this litigation error by finding the PCSB's presence "unnecessary," A.R. Vol. I, at 309, and concluding that Petitioners were "vested with ample constitutional authority to redress the asserted constitutional injury." A.R. Vol. I, at 306-07. Established standing law says otherwise.

1. Standing is a threshold jurisdictional requirement for both injunctive and declaratory relief. *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 680 (4th Cir. 2020). It requires plaintiffs to establish three elements: injury-in-fact, causation, and redressability. Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 84, 576 S.E.2d 807, 811 (2002). For either injunctive or declaratory relief, the alleged injury-in-fact must be prospective—an "ongoing or future injury," *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018). After all, injunctions are designed to prevent "a real threat of a future wrong or a contemporary wrong," *Bd. of Ed. of Cnty. of Taylor v. Bd. of Ed. of Cnty. Marion*, 213 W. Va. 182, 186, 578 S.E.2d 376, 380 (2003), and declaratory judgments "clarify [litigants'] legal rights and obligations *before* acting upon them," *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 61, 475 S.E.2d 55, 61 (1996) (citation omitted).

Causation looks for a "causal connection between" that prospective injury and the "conduct forming the basis of" the suit. Syl. pt. 5, *Findley*, 213 W. Va. at 84, 576 S.E.2d at 811. The alleged injury must be "fairly traceable to the challenged conduct *of the defendant*." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (emphasis added). It is not enough to attribute injury generally to "the provision of law that is challenged." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). Redressability, in turn, requires that the alleged injury will "likely be redressed by a favorable decision." *Id.* Both of these elements "become problematic" if a nonparty "must act in order for an injury to arise or be cured." *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013). In those circumstances, an order could not redress the alleged injury "because it would not [be] binding upon the" absent parties. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 (1992).

2. Respondents falter first at causation because the alleged injury is not fairly traceable to Petitioners. The circuit court found that *the PCSB's* choice to authorize charter schools without obtaining county voters' consent would infringe Respondents' voting rights. A.R. Vol. I, at 319. And to be sure, the PCSB can "approve or reject" charter schools' applications. W. Va. Code § 18-5G-2(2). But Petitioners cannot. The circuit court lacks jurisdiction over the PCSB because Respondents chose not to sue it, and the officials Respondents did name have no power to authorize the charter schools they oppose.

Even the circuit court admitted this is true for the Senate President and House Speaker. It recognized that an injunction against these officers would be improper—that is why it enjoined the Governor only. A.R. Vol. I, at 308. As members of the Legislature, the President and Speaker "can play no role in" the "implementation" of any statute. *State ex rel. W. Va. Citizens Action Group v. W. Va. Econ. Dev. Grant Comm.*, 213 W. Va. 255, 264, 580 S.E.2d 869, 878 (2003).

The injunction is also defective against the Governor because he lacks authority to take any action Respondents wish to restrain. The circuit court insisted that the Governor is a proper party because he signed HB 2012 "into law" and he has a constitutional duty to "take care that the laws be faithfully executed." A.R. Vol. I, at 306-07 (quoting W. Va. Const. art. VII, § 5). But the Governor approves nearly all statutes "before [they] become law." W. Va. Const. art. VII, § 14. This reality does not "make him a proper defendant in every action attacking [those statues'] constitutionality." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001). Nor does it make him responsible for the duties those laws assign to other officials. *Cf.* syl. pt. 15, *Shields v. Bennett*, 8 W. Va. 74, 75, 1874 WL 3229, at *2 (1874), *overruled on other grounds by Simms v. Sawyer*, 85 W. Va. 245, 101 S.E. 467 (1919).

Past practice shows the flaw in the circuit court's reasoning. There have been countless cases challenging the constitutionality of state statutes, and most were properly brought against the officials "charged with the administration of the statute"—not the Governor. *Farley v. Graney*, 146 W. Va. 22, 24, 119 S.E.2d 833, 835 (1960) (constitutional suit against State Road Commissioner); *see also, e.g., Grant Comm.*, 213 W. Va. 255, 580 S.E.2d 869 (suit against state committee). Constitutional challenges to education-related statutes are no exception. *E.g., Carvey v. W. Va. State Bd. of Ed.*, 206 W. Va. 720, 527 S.E.2d 831 (1999) (against State BOE). Even plaintiffs in prior Article XII, section 10 cases did not sue the Governor. Instead, they named the State Superintendent of Schools, *Leonhart v. Bd. of Ed. of Charleston Indep. Sch. Dist.*, 114 W. Va. 9, 170 S.E. 418 (1933), the relevant county board of education, *Casto*, 94 W. Va. 513, 119 S.E. 470, or the county sheriff, *Herold v. McQueen*, 71 W. Va. 43, 75 S.E. 313 (1912). In each case, the litigants wished to stop the named defendants from taking some specific actions under the challenged law and named them in their complaints accordingly.

By contrast, courts typically have no trouble dismissing governors from suits that allege no justiciable claims against them. *E.g.*, *Disability Rights of S.C. v. McMaster*, 24 F.4th 893, 901 (4th Cir. 2022) (dismissing Governor because he had no power to "enforce the complained-of statute"); *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (same); *Melange Café LLC v. Erie Ins. Prop. & Cas. Co.*, No. 2:20-cv-00441, 2020 WL 5199275, *4 (S.D. W. Va. 2020) (dismissing Governor because plaintiffs "do not allege any wrongdoing by" him "and they seek no relief from" him). The exception to this general rule is if the Governor has some "specific duty to enforce" the challenged law beyond his general "take care" responsibility. *McMaster*, 24 F.4th at 901 (cleaned up). Here, though, the Governor has no prospective role in enforcing HB 2012. He cannot approve or reject charter school applications, nor veto the PCSB's decisions. *Cf.* W. Va. Code § 18-5G-6. His only duty under the statute is to appoint the PCSB's members. *Id.* § 18-5G-15(b). Though he also has discretion to remove members for "official misconduct, incompetence, neglect of duty, or gross immorality," *id.* § 18-5G-15(g), he has no statutory authority to control the PCSB or otherwise direct its operations. Put simply, he cannot do anything Respondents allege will cause them harm.

3. Respondent's request for an injunction also suffers from the "obvious" redressability "problem," *Lujan*, 504 U.S. at 568, that an injunction against Petitioners cannot stop a nonparty—the PCSB—from approving charter schools. Again, the Senate President and the House Speaker cannot enforce HB 2012, *Grant Comm.*, 213 W. Va. at 264, 580 S.E.2d at 878, so an injunction against them would change nothing. Enjoining the Governor is as ineffective. He has already done his only duty under HB 2012 to appoint the PCSB's members, and an injunction can only "restrain[] actions that have not yet been taken." *Taylor Bd. of Ed.*, 213 W. Va. at 186, 578 S.E.2d at 380. Thus, no proper order against *these* parties can redress Respondents' concerns.

The circuit court's unorthodox "order a party to order a nonparty to act" approach shows that it appreciated the problem, too. Its solution, however, runs into black-letter-law limits.

An injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys" and "those persons in active concert or participation with them." W. Va. R. Civ. Pro. 65(d). The circuit court seemingly embraced this rule by finding that the PCSB is "a state agency within the executive charge of the Governor," A.R. Vol. I, at 309, and so could be bound by agency principles through the Governor's presence in the case. *Id.* But the PCSB is not the Governor's agent. In the "restricted and proper sense," syl. pt. 2, *Teter v. Old Colony Co.*, 190 W. Va. 711, 713, 441 S.E.2d 728, 730 (1994), an agent "acts for and represents the principal, and acquires [its] authority from him," *State ex rel. Clark v. Blue Cross Blue Shield of W. Va., Inc.*, 203 W. Va. 690, 714, 510 S.E.2d 764, 788 (1998). The PCSB does not act for or represent the Governor, nor did it acquire its authority to authorize charter schools from him. The PCSB came into existence by statute and acts pursuant to its statutory powers—the Governor cannot direct or veto its choices. *Cf.* W. Va. Code § 18-5G-6. Indeed, the PCSB's members are removable only for cause, *id.* § 18-5G-15(g), so the Governor's "control" over their actions is even more tenuous than in cases involving officials who serve at his will and pleasure.

If anything, the PCSB is an agent of the State because it derives its authority from state law. *See, e.g., State ex rel. Affiliated Const. Trades Found. v. Vieweg*, 205 W. Va. 687, 697, 520 S.E.2d 854, 864 (1999) (Workman, J., concurring) ("The Commissioner is a statutory animal, created, molded, and maintained by legislative authority."). But "the state and the government of the state are two different things." *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 750, 310 S.E.2d 675, 683 (1983). Blurring this line, as the circuit court did, would effectively erase the default rule that the Governor is not a proper party to every state-law challenge. *See,*

e.g., *Gun Owners of Am., Inc. v. Fed. Bureau of Investigation*, No. CV 21-1601, 2022 WL 856388, at *4 (D.D.C. Mar. 23, 2022) ("[T]he phrase ["agent of the Governor"] could apply to every individual working for Virginia's executive branch, each of whom could plausibly be considered an 'agent[ ] of' the Governor."). And it would make irrelevant the rule that injunctions "so broad" to purport to bind "the conduct of persons who act independently and whose rights have not been adjudged" are invalid. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945). If Respondents wanted the circuit court to bind the PCSB, it should have brought that agency into court.

4. Nothing about declaratory relief calls for a different result. The circuit court thought otherwise because it presumed that the Legislature and Governor would address the purported constitutional concerns it identified. A.R. Vol. I, at 305. It also reasoned that the PCSB is bound by the Constitution and thus must abide by the circuit court's interpretation of Article XII, section 10, even though it is a nonparty. A.R. Vol. I, at 309. But standing applies to declaratory judgment actions, too. Courts cannot "simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees," no matter how "persuasive or even awe-inspiring" they may be. *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring). Rather, standing requires that a court be able to grant relief "through the exercise of its power." *Id.*

So Respondents still must contend with the rule that redressability requires that a litigant will "personally ... benefit in a tangible way from the court's intervention." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) (cleaned up). That benefit cannot be speculative. *Lujan*, 504 U.S. at 561. Nor can the "declaratory judgment" *itself* "be the redress that satisfies the third standing prong." *Comite de Apoyo a los Trabajadores Agricolas (CATA) v. U.S. Dep't of Labor*, 995 F.2d 510, 513 (4th Cir. 1993). Respondents must

demonstrate "some further concrete relief that will likely result from the declaratory judgment," *id.*, and that relief must "be of practical assistance in setting the underlying controversy to rest." Syl. pt. 2, *Martinsburg v. Berkeley Cnty. Council*, 241 W. Va. 385, 386, 825 S.E.2d 332, 333 (2019). This "specific" showing is what salvages declaratory judgments from being mere advisory opinions. *California v. Texas*, 141 S. Ct. 2104, 2116 (2021).

Respondents cannot meet that standard. If the circuit court ultimately declares HB 2012 unconstitutional, charter schools would still be able to come into existence. As a nonparty, the PCSB would not be bound by any final order, declaratory or otherwise—state law is clear that "no declaration shall prejudice the rights of persons not parties to the proceeding." W. Va. Code § 55-13-11. If Respondents sued the PCSB later, the declaratory judgment in this case would also not block the agency from raising any and all defenses to the new suit. *See Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 798 (1996) (affirming "general consensus in Anglo-American jurisprudence" that a court's judgment "does not conclude the rights of strangers to those proceedings"). At most, the declaration would serve as advice for the next judge. *Huston v. Mercedes-Benz USA, LLC*, 227 W. Va. 515, 523, 711 S.E.2d 585, 593 (2011).

Any potential attempt to read a declaration as direction to Petitioners to change the statute would also fail. There is no redressability under that theory, either, because the President and Speaker cannot amend statutes on their own. Regardless, directing the Legislature to adopt a particular law would be a strident violation of the separation of powers: Courts cannot order "a particular *legislative* remedy." *Kanawha Cnty. Pub. Library Bd. v. Bd. of Ed. of Cnty. Kanawha*, 231 W. Va. 386, 403 n.22, 745 S.E.2d 424, 441 n.22 (2013) (emphasis added). At best, a final ruling would give the Legislature the circuit court's opinion of the Constitution. And courts lack

jurisdiction to "advis[e]" anyone without a valid case or controversy—including a coequal branch of government. *Id.* at 403 n.22, 745 S.E.2d at 441 n.22.

B. Respondents lack standing for a writ of mandamus.

The circuit court also should have dismissed Respondents' request for mandamus relief. Standing requires causation and redressability no matter what form of relief the plaintiff seeks, so this claims fails for the same reason as Respondents' other two. It also fails in light of the *higher* showing for standing in the mandamus context. Here, standing requires a "clear legal right to the relief" and a corresponding "legal duty" on the part of the specific state official "to do the thing" the plaintiff "seeks to compel." *Smith v. W. Va. State Bd. of Ed.*, 170 W. Va. 593, 596, 295 S.E.2d 680, 683 (1982) ("The clear legal right to the relief sought is generally a question of standing" and is "entwined" with the official's "legal duty."). To be "non-discretionary" the duty must be "so plain" "that no element of discretion is left as to the precise mode of its performance." Syl. pt. 5, *King*, 244 W. Va. at 227, 852 S.E.2d at 294 (cleaned up). Mandamus—and the standing showing bound up with its standard—is not about the "manner" in which the official performs that duty. *Id.* at 235, 852 S.E.2d at 302.

The circuit court wrongly thought Respondents cleared this bar because it found that Respondents have a constitutional right to a vote "before an independent school district may be created," A.R. Vol. I, at 303, and thus Article XII, section 10 creates "an enforceable, affirmative duty" for Petitioners to conduct a countywide vote on charter schools. A.R. Vol. I, at 303. Directing an election is the only thing the circuit court thought it could order Petitioners to do on this claim. After all, unlike injunctive and declaratory relief that seek to *prevent* conduct (here, approving charter schools), a successful mandamus action results in an order to *act*.

The problem is that there is no nondiscretionary duty to act in the Constitution's plain text. The provision is proscriptive, not prescriptive. It mandates only what the Legislature cannot do—"create[]" an "independent" district or organization "out of" a previously existing district unless it first receives the consent of the existing district's voters, W. Va. Const. art. XII, § 10—not what it must do. So even if Respondents ultimately prevail on the merits, they would not be entitled to a remedy in mandamus to force an election.

The law is also silent about any nondiscretionary duty to correct a purported constitutional failing through legislation. The Legislature *could* modify HB 2012 to provide for a countywide vote, but even Respondents agree that is not the only valid solution. They concede "there are several ways that" the statute "could be fixed" that do not include a countywide referendum on charter schools. A.R. Vol. II, at 415. Respondents also concede that the 2019 version of the charter school law was constitutional even though it also did not provide for a countywide vote. A.R. Vol. I, at 25. The existence of these multiple, discretionary ways to conform to Respondents' alleged constitutional demands precludes mandamus relief.

More generally, although courts may determine "whether an act of the legislature is" constitutional, *State ex rel. Cnty. Ct. of Marion Cnty. v. Demus*, 148 W. Va. 398, 401, 135 S.E.2d 352, 355 (1964), they cannot "make or supervise legislation," *Lucas v. Fairbanks Capital Corp.*, 217 W. Va. 479, 489, 618 S.E.2d 488, 498 (2005), or "decide what the law ought to be." *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 223,530 S.E.2d 676, 696 (1999). Courts cannot compel the Senate President or House Speaker to introduce legislation nor direct the Governor to sign it if the Legislature as a whole chooses to enact it. A writ of mandamus that requires "rewrit[ing] a … law to conform it to constitutional requirements" would thus "constitute a serious invasion of the legislative domain." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (cleaned up).

Article XII, section 10's prescriptive text also distinguishes this case from those the circuit court invoked in which the Court allowed an extraordinary writ against the Legislature or Governor. A.R. Vol. I, at 303, 305-06. For example, this Court granted mandamus and ordered the acting governor to "fix a time for a new statewide election to fill the vacancy in the office of governor" based on a constitutional requirement that "a new election for governor *shall* take place to fill the vacancy." *State ex rel. W. Va. Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 692, 697, 715 S.E.2d 36, 41, 46 (2011) (emphasis added; quoting W. Va. Const. art. VII, § 16). Likewise, mandamus was appropriate against the Legislature under a law stating that "the Legislature *shall* prepare a digest or summary of the budget bill." *State ex rel. League of Women Voters of W. Va. v. Tomblin*, 209 W. Va. 565, 569, 550 S.E.2d 355, 359 (2001) (emphasis added; quoting W. Va. Code § 4-1-18, *repealed by* W. Va. Acts 2006, c.26 (Mar. 2, 2006)). But the Court was careful to direct only information "that has been the subject of discussion, debate, and decision prior to final legislative enactment of the budget bill." *Id.* at 578, 550 S.E.2d at 368.

Article XII, section 10 creates no similar mandatory duty to act. Even if the circuit court ultimately declares HB 2012 unconstitutional (and this Court upholds that judgment), nothing in the Constitution or Code would obligate Petitioners to conduct an election, fix the statute, or do anything else for that matter. An order against other parties—like the PCSB or even the local or state BOEs—might conceivably require action to undo prior approvals. But there would be no nondiscretionary, affirmative duty to act on the part of the parties Respondents chose to sue.

C. The Senate President and House Speaker are not essential parties and their presence does not eliminate Respondents' burden to establish standing.

In spite of these established standing requirements, the circuit court refused to dismiss the Senate President and House Speaker—even though it directed no part of the preliminary injunction

against them—on the basis that this lawsuit implicates the Legislature's duty to provide for a "thorough and efficient system of free schools." A.R. Vol. I, at 305. In its view, the nature of the case made these officials "essential" parties under *Pauley v. Kelly*, 162 W. Va. 672, 718, 255 S.E.2d 859, 883 (1979) ("*Pauley I*"). A.R. Vol. I, at 305. The circuit court also concluded that it could "issue an extraordinary writ against the Legislature" under *State ex rel. Workman v. Carmichael*, 241 W. Va. 105, 121-22, 819 S.E.2d 251, 267-68 (2018). A.R. Vol. I, at 305-06. Neither case supports the circuit court's reasoning.

1. *Pauley I* doesn't apply outside the Article XII, section 1 context, and even within that context it doesn't require the President's and Speaker's presence. In the first iteration of the *Pauley* cases, a group of parents sued the Treasurer, Auditor, State BOE, and State Superintendent of School claiming that public school funding violated the Legislature's affirmative obligation under Article XII, section 1 to provide "for a thorough and efficient system of free schools." *Pauley I*, 162 W. Va. at 673, 255 S.E.2d at 861. This Court reversed the suit's dismissal and suggested that, on remand, it "be amended to include" the Senate President and House Speaker. *Id.* at 718, 255 S.E.2d at 883. Here, by contrast, Respondents' case turns on section 10, not section 1. And unlike section 1, section 10 imposes no affirmative obligation on anyone, much less the Legislature specifically. There is no basis to extend its reasoning about potential necessary parties here.

In any event, *Pauley I* does not mandate that the Senate President and House Speaker be parties to every constitutional challenge to the State's education statutes. It does not even require them to be parties to all Article XII, section 1 cases. On remand after *Pauley I*, the circuit court did not direct the parties to include the President or Speaker as parties. *See Pauley v. Bailey*, Civ. Action No. 75-1268 (Kanawha Cnty. May 11, 1982). They were not parties to any of the three subsequent appeals of the same case, either. *See Pauley v. Bailey*, 171 W.Va. 651, 301 S.E.2d 608

(1983); *Pauley v. Bailey*, 174 W.Va. 167, 324 S.E.2d 128 (1984) ("*Pauley III*"); *Pauley v. Gainer*, 177 W.Va. 464, 353 S.E.2d 318 (1986). Nor were they parties to a later extraordinary writ seeking to prohibit enforcement of a supplemental circuit court order. *See State ex rel. Bd. of Ed. of the Cntys. of Upshur v. Chafin*, 180 W.Va. 219, 376 S.E.2d 113 (1988). Instead, the "various State agencies and officials" responsible for implementing the challenged statutes defended each of these appeals. *Pauley III*, 174 W. Va. at 170, 324 S.E.2d at 130. That history was enough to prompt this Court to clarify, five years after *Pauley I*, that its initial "suggest[ion]" to include the President and Speaker on remand was no more than that. *Id.*

Unsurprisingly, the President and Speaker have been absent from numerous other cases challenging the constitutionality of the State's education statutes—without circuit courts or this Court faulting the parties for omitting "necessary" parties. They are rarely present even in cases that directly implicate school funding. *E.g.*, *Kanawha Cnty.*, 231 W. Va. at 386, 745 S.E.2d at 424 (suit against State BOE challenging library funding in school aid formula); *Bd. of Ed. of Cnty. Kanawha v. W. Va. Bd. of Ed.*, 219 W. Va. 801, 639 S.E.2d 893 (2006) (same); *State ex rel. Bd. of Ed., Kanawha Cnty. v. Rockefeller*, 167 W.Va. 72, 281 S.E.2d 131 (1981) (suit against the Governor seeking to compel restoration of a 2% cut in school aid expenditures); *State ex rel. Bd. of Ed. for Cnty. Randolph v. Bailey*, 192 W. Va. 534, 453 S.E.2d 368 (1994) (suit against Treasurer, Auditor, and various education officials challenging teacher salary statute); *State ex rel. Bd. of Ed. for Grant Cnty. v. Manchin*, 179 W. Va. 235, 366 SE.2d 743 (1988) (same). Once, the Education Association sought a writ directly against the Legislature to compel changes to the state budget. *W. Va. Ed. Assoc. v. Legislature of W. Va.*, 179 W. Va. 381, 369 S.E.2d 454 (1988). But even there, the Court declined to issue the writ out of respect for the coequal Legislative Branch. *Id.* at 383, 369 S.E.2d at 456.

It is thus difficult to follow the circuit court's logic, A.R. Vol. I, at 305, that a suggestion about naming legislative officials affected a sea change in necessary-party law. And *Pauley I* certainly did not create an exception to established principles of standing.

To the extent this Court has any doubt, it could also disapprove *Pauley I*'s "suggestion." This Court's longstanding policy is to "not consider or determine" "a constitutional question" when "it is not necessary in the decision of a case." Syl. pt. 5, *In re Tax Assessments Against Pocahontas Land Corp.*, 158 W. Va. 229, 230, 210 S.E.2d 641, 643 (1974). *Pauley I* departed from this policy. The only issue on appeal was whether the circuit court properly dismissed the case for lack of proof. *Pauley I*, 162 W. Va. at 677, 255 S.E.2d at 863. Once the Court held that the lower court applied the wrong standard, there was no need to consider the parties' constitutional dispute. *Id.* Even so, *Pauley I* "proposed certain guidelines" for the circuit court on remand, *id.* at 677, 255 S.E.2d at 863, including the suggestion about adding new parties, *id.* at 718, 255 S.E.2d at 883. Because that suggestion was not necessary to the decision, the Court could resolve any future confusion in the lower courts by clarifying that this discussion was dicta.

2. The circuit court's reliance on *Workman* was also misplaced. There, the Court granted a writ prohibiting Senate officials from conducting impeachment proceedings against a sitting Justice based on the Senate's "mandatory duty" to "do justice according to law and evidence." *Workman*, 241 W. Va. 105, 118-19, 143, 819 S.E.2d 251, 264-65, 289 (2018) (quoting W. Va. Const. art. VI, § 9). In doing so, the Court disapproved syllabus point 3 of *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2011), to the extent that it "may be interpreted as prohibiting this Court from exercising its constitutional authority to issue an extraordinary writ against the Legislature when the law requires." Syl. pt. 3, *Workman*, 241 W. Va. at 113, 819 S.E.2d at 258.

But holding that the Court *can* issue a writ against the Legislature in the unique circumstances of that case is far different from holding that parties can dispense with foundational standing principles to sue legislators in the first place. Causation and redressability were almost self-evident in *Workman*: The officials named in the lawsuit were days away from starting the impeachment trial. 241 W. Va. at 116, 819 S.E.2d at 262. So the alleged injuries from the trial were traceable to those same officials' imminent actions, and an order—against them directly, not a third party—could grant complete relief. Again: Respondents have not shown these elements here because the PCSB approves charter schools, not the Senate President and House Speaker, and an order against Petitioners will not stop the PCSB's operations. And also unlike in *Workman*, Article XII, section 10 does not set any mandatory duty on the President and Speaker governing their future conduct. Nothing in *Workman* supports overlooking these jurisdictional failings.

These distinctions are enough to brush aside faulty reliance on *Workman*, but the Court could also simply reject the circuit court's idea that the case authorizes writs against the Legislature more broadly. On its face, *Workman*'s extraordinary circumstances imply that it should apply in only rare instances—if any—beyond the impeachment context. *Workman* also rejected persuasive authority from the Supreme Court of the United States and high courts of other States that supported much more limited remedies in contexts where separation-of-powers concerns are strong. *See, e.g., id.* at 120 & 122, 819 S.E.2d at 266 & 268. And it departed from this Court's prior precedent limiting remedies "by mandamus, prohibition, contempt or otherwise" against the proceedings of a co-equal branch. Syl. pt. 3, *Clawges*, 226 W. Va. at 480, 702 S.E.2d at 612. The Court could make clear that *Workman* did not upset established jurisdictional and separation-of-powers principles simply because plaintiffs chose to name members of the Legislature in their complaint.

* * * * *

The preliminary injunction is jurisdictionally defective because the circuit court should have dismissed the case for lack of standing before taking any "further action." Syl. pt. 7, *Howard*, 244 W. Va. at 684, 856 S.E.2d at 642. Respondents are the master of their own complaint, and they made a strategic decision to sue three parties with no authority to enforce HB 2012. They must live with the consequences: They cannot establish a causal connection between Petitioners and their alleged injury, and there is no relief the circuit court could grant against these Petitioners that would redress that injury. The Court should dissolve the injunction on this basis and remand with direction to dismiss.

II. The Circuit Court's Injunction Violates The Separation of Powers.

The circuit court's order also violates separation-of-powers principles. One side effect of improperly relaxing "standing requirements" is the corresponding "expansion of judicial power" into the realms of the other branches. *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 408-09 (2013). That is precisely what happened here. Recognizing that it lacked jurisdiction over the parties with actual authority to enforce HB 2012, the circuit court tried to order the Governor to "direct the PCSB, under threat of removal, if necessary, to temporarily suspend the creation of PCSB-authorized charter schools to comply with the preliminary injunction." A.R. Vol. I, at 308-09. In other words, it co-opted the Governor's statutorily circumscribed removal power to assert *indirect* authority over the nonparty PCSB members—directing the Governor to fire them if they refused to follow an order that does not directly bind them and that they had no opportunity to contest. Not only does the circuit court's attempt to bootstrap its jurisdiction in this way underscore that Respondents sued the wrong parties, but it wrongly invaded the Governor's

discretionary removal authority. That significant separation-of-powers violation requires dissolving the injunction, too.

The theory behind the circuit court's novel approach is that because the Governor has a duty "to ensure 'all executive agencies comply' with the Constitution," A.R. Vol. I, at 308-09 (quoting *Allen v. Human Rights Comm'n*, 174 W. Va. 139, 162, 324 S.E.2d 99, 123 (1984)), he must therefore "remove" state officials who follow a statute that has been held unconstitutional, A.R. Vol. I, at 306-07 (quoting Syl. Pt. 13, *Shields*, 8 W. Va. at 75, 1874 WL 3229, * 2). Then it went further, reasoning that *the court* could force the Governor to remove noncompliant appointees. A.R. Vol. I, at 308-09. No cases support that leap.

The Legislature may "prescribe ... the manner in which" public officers "shall be ... removed." W. Va. Const. art. IV, § 8. But the Governor is vested with exclusive power to decide whether to "remove any officer whom he may appoint in case of incompetency, neglect of duty, gross immorality, or malfeasance in office." *Id.* art. VII, § 10. The exclusive nature of this power matters: The Court has never attempted to force the Governor to exercise the removal power, let alone on a basis that is not even contemplated in the removal statute. *See Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982) (declining to order the removal of officers the Governor appointed); *Trumka v. Moore*, 180 W. Va. 284, 289, 376 S.E.2d 178, 183 (1988) (declining to "rescind appointments" made by Governor out of respect for "the delicate balance" "between the three branches of government").

At most, courts have at times found that the Governor's "duty to appoint is a duty which can be enforced by mandamus." *State ex rel. Brotherton v. Moore*, 159 W. Va. 934, 941, 230 S.E.2d 638, 642 (1976). Yet even there, the Court emphasized that it could not "compel the choice of a particular individual." *Id.* There is even less reason to extend mandamus power to the removal

context, because the ability to fire a subordinate "is more important" to the Executive Branch than the ability to hire. *Collins*, 141 S. Ct. at 1761 (Gorsuch, concurring). If the judicial branch could dictate removal, after all, then it would be the judiciary instead of the Governor "that [the officer] must fear and, in the performance of his functions, obey." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (cleaned up).

Even the circuit court's preferred authorities did not stretch the judiciary's power so far. The Governor was not a party to either case. *See Allen*, 174 W. Va. at 142, 324 S.E.2d at 102 (suit against Human Rights Commission); *Shields*, 8 W. Va. at 75, 1874 WL 3229, *1 (suit against State Auditor). The Court therefore unsurprisingly did not order the Governor to take any action whatsoever—much less remove officials based on criteria the Court imposed. *See Allen*, 174 W. Va. at 167, 324 S.E.2d at 127-28; *Shields*, 8 W. Va. at 93, 1874 WL 3229, *12. These cases do not supplant the constitutional rule that power to remove an officer is "indisputably reserved to the executive branch" alone. *Grant Comm.*, 213 W. Va. at 267, 580 S.E.2d at 881; *see also* W. Va. Const. art. V, § 1 (prohibiting one branch from "exercis[ing] the powers properly belonging to either of the others").

The fact that Respondents would not have been able to win removal as a remedy if *they* had asked for it further shows the flaw in the circuit court's reasoning. The appropriate vehicle for affirmative relief, like a hypothetical order to dismiss an officer, is a writ of mandamus. *State ex rel. Bronaugh v. Parkersburg*, 148 W. Va. 568, 574, 136 S.E.2d 783, 787 (1964). But the law neither gives Respondents a clear legal right to the removal of PCSB members nor imposes a nondiscretionary duty on the Governor to exercise his removal powers at any given time or in any given manner. Instead, "[a]n appointed member of the [PCSB] *may* be removed from office by the Governor for official misconduct, incompetence, neglect of duty, or gross immorality." W.

Va. Code § 18-5G-15(g) (emphasis added). The use of "the word 'may' is inherently permissive in nature and connotes discretion." *Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 725, 791 S.E.2d 168, 171 (2016). The statute's bases for removal implicate the Governor's discretion, too—"incompetence" and "gross immorality" are hardly objective benchmarks. And where removal "necessitates the exercise of executive discretion and judgment, the right of the courts to compel performance is uniformly held to be nonexistent." *Moore*, 159 W. Va. at 940, 230 S.E.2d at 642.

There would thus be serious constitutional concerns with forcing the Governor to exercise discretionary removal power in a case in which the plaintiffs sought that relief directly. They are all the greater where the circuit court invented the remedy in an attempt to expand its jurisdiction to bind parties not actually before it. In short, judicial gymnastics are improper when it comes to manufacturing Respondents' standing. When they intrude on the Governor's exclusive and discretionary powers, they become unconstitutional.

III. Respondents Are Not Entitled To Preliminary Relief Because Each Of The Preliminary Injunction Factors Favors Petitioners.

These foundational flaws are reason enough to resolve this case—but the preliminary injunction was improper under the ordinary standard, too. Preliminary injunctive relief "should be used only in cases of great necessity and not looked upon with favor by the courts." *Justice*, 246 W. Va. at —, 866 S.E.2d at 619 (cleaned up). Courts consider four factors when deciding whether to issue a preliminary injunction: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Id.* at —, 866 S.E.2d at 620 (cleaned up). While all four factors must be considered in "flexible interplay," this Court has

repeatedly emphasized the importance of the "likelihood of success" factor. *Id.* Because each factor weighs against Respondents, this Court should dissolve the injunction.

A. Respondents are unlikely to succeed on the merits.

When the "court lacks subject matter jurisdiction," by definition a plaintiff cannot "succeed on [the] merits." *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009). That problem alone is dispositive on this factor. Beyond it, Respondents have failed to demonstrate that they are likely to succeed on the merits because they cannot meet the high bar to invalidate a duly enacted law. Last year, this Court reaffirmed that "legislative enactments" "are presumed to be constitutional," and that presumption must be overcome "beyond a reasonable doubt." *Justice*, 246 W. Va. at —, 866 S.E.2d at 621. Respondents cannot defeat that presumption and the circuit court "abused its discretion by concluding" otherwise. *Id.*

1. Article XII, section 10 does not prohibit charter schools or require an election before they can be approved. The section provides that "[n]o independent free school district, or organization shall hereafter be created, except with the consent of the school district or districts out of which the same is to be created, expressed by a majority of the voters voting on the question." W. Va. Const. art. XII, § 10. These words must be applied "to give effect to the intent of the people in adopting [them]," syl. pt. 3, *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 543, 122 S.E.2d 436, 437 (1961), which starts "with an examination of the actual language of the constitutional provision at issue," *State ex rel. Forbes v. Caperton*, 198 W. Va. 474, 479, 481 S.E.2d 780, 785 (1996). Further, the Constitution's words are construed "in a way that is consistent with the original purpose and understanding of the citizens at the time of the Constitution's ratification." *King*, 244 W. Va. at 231, 852 S.E.2d at 298; *cf. District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (explaining that the federal Constitution's "words and phrases"

were "written to be understood by the voters" and are interpreted according to "their normal and ordinary" use). Article XII, section 10 is no exception. Its "words are to be understood" as they were "generally used," *Leonhart*, 114 W. Va. at 13, 170 S.E. at 420, and should not be "extended to objects not comprehended" or "contemplated by its framers." *Id.*

Applying these principles to Article XII, section 10's text shows that the provision limits the Legislature's authority to "carve[]" an "independent school district" "out of" an existing school district's geographic territory. *Casto*, 94 W. Va. at 517, 119 S.E. at 471. It does not bar statutes like HB 2012 that create new districts alongside of or on top of existing ones.

Context for the provision's purpose dates to the post-Civil War era. At that time, the State's public schools were administered by local districts that typically "embraced ... the boundaries of one township." *Kuhn*, 4 W. Va. at 510. Originally, the Legislature also had "exclusive power" to annex the geographic territory of existing school districts to "create [an] independent school district." Syl. pts. 2 & 3, *id.* at 499. These districts were "always authorized by special act[s]" of the Legislature that "carve[d]" territory "*out of*" one or more of the previously existing township districts and gave it instead to the newly "created" independent district. *Casto*, 94 W. Va. at 516, 119 S.E. at 471-72 (emphasis added); *Kuhn*, 4 W. Va. at 499-500 (considering special act that "establish[ed] the school district of Wellsburg" by "annex[ing]" "several square miles of the townships of Buffalo and Cross Creek"). Article XII, section 10 was adopted in 1872 to limit this power. *Casto*, 94 W. Va. at 517, 119 S.E. at 471.

It is no coincidence that this historical practice shaped the drafters' precise words. And based on those textual distinctions, this Court has held twice before that the section does not apply to new schools that leave existing school districts' borders in place. First, *Herold* involved a countywide high school that overlapped the territory of several existing school districts. 71 W.

Va. at 44, 75 S.E. at 314. The Court found that the new school did not violate Article XII, section 10 because "the integrity of the different districts remains intact," "the several boards of education thereof have the same territorial jurisdiction," and the existing districts had "the same amount of property on which to lay their levy to raise revenue to run the schools." *Id.* at 316. Second, in *Casto,* the Legislature created a countywide high school that encompassed six existing school districts' territory. 94 W. Va. at 514, 119 S.E. at 471. The Court once again found nothing amiss because "the territories of the [existing] school districts are left intact, and the boards thereof are functioning as before." *Id.* at 472. In other words, both cases concluded that a new district was not created "out of" the old ones.

Charter schools under HB 2012 are not "created" "out of" existing school districts' territory, either. They operate in a defined "recruitment area" that may encompass multiple counties, W. Va. Code § 18-5G-11(a)(4); that is where the school must "actively recruit students." W. Va. Code R. § 126-79-9.2.c.2. Students who live in a charter school's recruitment area cannot be "require[d]" "to enroll in a public charter school." *Id.* § 18-5G-11(a)(3). Nor is any of the territory of the county districts where a charter school operates "annexed" to that charter school. *Kuhn*, 4 W. Va. at 500. Indeed, rather than compromising "[t]he integrity of the different districts," *Herold,* 71 W. Va. at 50, 75 S.E. at 316, HB 2012 protects county districts' territorial boundaries by prohibiting a charter school's recruitment area from "negat[ing] any overlapping attendance area[s]" that the county BOE sets "for noncharter public schools," W. Va. Code § 18-5G-11(a)(4). So just as in *Herold* and *Casto*, Article XII, section 10 does not apply.

The circuit court's attempt to distinguish these cases falls flat. It reasoned that they no longer apply after the Legislature's decision in 1933 to replace the township district system with a countywide system because any new school "created today will necessarily operate within an

existing county school district or districts" and, therefore, violate Article XII, section 10. A.R. Vol. I, at 314-15. But this reasoning disregards the provision's plain text. Section 10 does not prohibit schools from "operat[ing] *within* an existing school district." A.R. Vol. I, at 311 (emphasis added). The word "within" appears nowhere in the section, and courts "may not add" words to the Constitution. *State ex rel. Bagley v. Blankenship*, 161 W. Va. 630, 643, 246 S.E.2d 99, 107 (1978). Rather, the Constitution speaks to creating independent districts "*out of*" existing ones. W. Va. Const. art. XII, § 10 (emphasis added). The concept of making something new out of the pieces of what existed before has no effect where—as here—"[t]he territories of the school districts are left intact, and the boards thereof are [left to] function[] as before." *Casto*, 94 W. Va. at 517, 119 S.E. at 472.

2. Not only are charter schools like the schools the Court approved in *Herold* and *Casto*, but they are *unlike* those Article XII, section 10 was enacted to prevent. In contrast to the original independent school districts, charter schools "are part of the state's public education system." W. Va. Code § 18-5G-1(c). A charter school may even be a "program within a public school." *Id.* § 18-5G-2(12). Stipulations like these show the Legislature's intent not to treat charter schools wholly separate from the county public school system. And "[c]ourts should presume that a legislature says in a statute what it means and means in a statute what it says." *Keener v. Irby*, 245 W. Va. 777, 785, 865 S.E.2d 519, 527 (2021) (cleaned up).

Even the circuit court acknowledged that "independent school districts" were "created by special acts to operate independently of existing township districts." A.R. Vol. I, at 294. They were "independent of the general system" of education "in the length of the school term, employment of teachers, branches taught and to what extent, [and] internal management generally." *Casto*, 94 W. Va. at 516, 119 S.E. at 471. Each independent district was its own taxing

unit, W. Va. Code § 11-8-4 (1933), meaning their boards of education had authority to "levy [] tax[es] on all taxable property" in the independent district. *Id.* § 18-9-1 (1923), *repealed by* W. Va. Acts 2022, HB 4353 (June 10, 2022). And property within an independent district's territory was usually subject to higher taxes than its magisterial or township district counterparts. *Casto*, 94 W. Va. at 516, 119 S.E. at 471; *Kuhn*, 4 W. Va. at 500.

HB 2012 charter schools are different in nearly every relevant respect from these historical districts. HB 2012 was a general act, not a special one. *See State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 758, 143 S.E.2d 351, 363 (1965) (distinguishing "general" and "special laws"). Charter schools have "no power to levy taxes," and the property within a charter school's recruitment area is not subject to additional or different taxes. W. Va. Code § 18-5G-3(b)(2). Nor are any county property taxes allocated to fund charter schools; they receive money by the "per pupil total basic foundation allowance" in the State aid formula that "follow[s] [each] student" when they enroll in a charter school. *Id.* § 18-5G-5(a). The county BOE's authority to levy taxes is also unaffected by the presence of a charter school. Post HB 2012, each county BOE can levy the same taxes as before for "the general current expenses of schools," *id.* § 11-8-6c (1961), on "each class of taxable property within" the county. *Id.* § 11-8-16(4) (2022).

Still, the circuit court tried to bring charter schools under Article XII, section 10's purview by focusing on their status as "independent school organizations." A.R. Vol. I, at 311. But the only support it found was that the words "organizational capacity" appear in West Virginia Code Section 18-5G-6(a)(2)(A)—a section that says nothing about the nature of charter schools. It simply lists certain "standards" charter school authorizers (county BOEs and the PCSB) must meet. W. Va. Code § 18-5G-6(a)(2)(A). Regardless, even if a charter school is an "organization," that term alone does not make it the specific type of "independent school" "organization" the

constitutional provision bars. Where charter schools bear no substantive likeness to bygone independent school districts, similar statutory descriptors are not enough.

Charter schools are also not independent in practice. Instead of setting their own "length of the school term" as prior independent school districts did, *Casto*, 94 W. Va. at 516, 119 S.E. at 471, they are required (as they remain part of the public school system) to provide the "same minimum number of days" of instruction as noncharter schools. W. Va. Code § 18-5G-3(c)(5) (making length of instruction time under W. Va. Code § 18-5-45 applicable to charter schools). Likewise, charter schools do not operate wholly separate from public schools in the "branches taught and to what extent, [and] internal management generally." *Casto*, 94 W. Va. at 516, 119 S.E. at 471. Rather, HB 2012 makes charter schools "subject to general supervision by the [State BOE] for meeting" the same "student performance standards" applicable to "other public schools." W. Va. Code § 18-5G-3 (making W. Va. Code § 18-2E-5(d) applicable to charter schools). They are also subject to the State BOE's rules. W. Va. Code R. §§ 126-79-1 *et seq.* (2021). And charter schools must meet many of the same standards that apply to other public schools, including complying with "[r]eporting information on student and school performance" to parents and the public, W. Va. Code § 18-5G-3(c)(9), and meeting various "accounting and financial reporting" standards, *id.* § 18-5G-3(c)(10).

To be sure, charter schools are "empower[ed]" to develop "new, innovative, and more flexible ways of educating" public school students. W. Va. Code § 18-5G-1(b). But that does not make them "independent" in an Article XII, section 10 sense. The Legislature has granted flexibility even to non-charter public schools before. *See, e.g., id.* § 18-5B-5(b) (allowing non-charter schools "exceptions to county and state board rules, policies and interpretations" as part of the School Innovation Zone Act); *id.* § 18-5B-10 (granting certain statutory exceptions to listed

schools); *id.* § 18-5A-3a (waiving certain statutory requirements for listed non-charter schools on recommendation of local improvement councils). Tellingly, these systems never triggered challenges under Article XII, section 10. And what's more, the Legislature "has the right to make change[s] in the educational system as it may see fit"—the Court has interpreted "independent free school district" narrowly to advance that flexible purpose. *Leonhart*, 114 W. Va. at 14, 170 S.E. at 420. The Legislature is free to establish "such institutions of learning as the best interests of general education in the state may demand," W. Va. Const. art. XII, § 12, and "is not prohibited from augmenting, and making more efficient, the general system of free schools," *Herold*, 71 W. Va. at 49, 75 S.E. at 315-16. This is precisely what the Legislature sought to do through HB 2012. HB 2012 is well within the Legislature's constitutional powers, and the Constitution does not mandate local voter approval for the districts it creates alongside the county district system.

B. Respondents are unlikely to suffer irreparable harm.

Respondents also will not suffer irreparable harm without the preliminary injunction. They claim that without it they will be deprived of the right to vote on charter schools' creation—a right they insist Article XII, section 10 guarantees. Yet this brand of purported harm is bound up with Respondents' likelihood of success. *Justice*, 246 W. Va. at —, 866 S.E.2d at 628. If the Constitution does *not* give them this right, then the lack of an election is not an injury.

Further, harm is only irreparable if there will be no remedy for it after the normal course of litigation. That is not true here. The circuit court concluded that Respondents would lose their alleged voting right after the PCSB executes a contract with a charter school. A.R. Vol. I, at 319. This contract "create[s]" the charter school, so the right to vote prior to that creation would become meaningless. *Id.* But there have been four lawsuits that made it to this Court alleging violations of Article XII, section 10, and each was filed *after* the challenged school was created. *See*

Leonhart, 114 W. Va. at 10, 170 S.E. at 419 (suit against "newly created" county BOE); *Casto*, 94 W. Va. at 514, 119 S.E. at 470 (same); *Herold*, 71 W. Va. at 44, 75 S.E. at 314 (suit to stop taxes of newly created county BOE); *Bd. of Ed. of Flatwoods Dist. v. Berry*, 62 W. Va. 433, 59 S.E.169 (1907) (suit raising Article XII, section 10 as a defense years after district's creation). There was no question in those cases that the State's courts could award meaningful relief at the case's end. Because the schools' creation did not extinguish the parties' rights in any of those cases, there was no basis for the circuit court to reach the opposite conclusion here.

Indeed, Article XII, section 10 challenges are not like many other election cases where a scheduled, fast-approaching election makes the need for immediate relief clear. If voters are deprived of their right to participate in that election, their rights will be lost forever. *See, e.g., Mullins v. Cole*, 218 F. Supp. 3d 488, 495 (S.D. W. Va. 2016). But here, with no established election date there is no similar urgency. As the four prior Article XII, section 10 cases the Court resolved make plain, Respondents will be able to vindicate whatever rights they may establish in this case even after charter schools open in the fall. Dissolving the injunction thus will not extinguish Respondents' alleged voting rights, and the circuit court erred in finding the injunction necessary to prevent irreparable harm.

C. Petitioners' irreparable harm and the public interest heavily favor dissolving the injunction.

The final factors favor Petitioners too: Petitioners and the public will be irreparably harmed if the preliminary injunction goes into effect.

First, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (cleaned up). That harm is particularly

burdensome here because Respondents lack the requisite "traceability" and "redressability" requirements for standing, and granting relief despite these failings risks improperly "expan[ding]" the "judicial power" into the realm "of the political branches." *Clapper*, 568 U.S. at 408-09. As state officers, Petitioners will suffer this irreparable harm, and so will the public they serve.

Second, the Governor is also likely to suffer distinct irreparable injury if the Court upholds the preliminary injunction. The circuit court purported to bind the Governor and his "executive officers, agents, employees, or any persons acting in concert or participation with them" from enforcing HB 2012. A.R. Vol. I, at 322. As explained above, this overly broad order exceeded the circuit court's jurisdiction. Still, this Court has cautioned that even an "erroneously or improvidently awarded" "injunction" "must be obeyed." *E. Assoc. Coal Corp. v. Doe*, 159 W. Va. 200, 206, 220 S.E.2d 672, 677 (1975); *but see id.* (finding that contempt "will not be upheld" where underlying order lacked jurisdiction).

The problem with "obey[ing]" the preliminary injunction is that the circuit court made clear it intended to use the Governor as a vehicle to bind a *nonparty*—the PCSB, A.R. Vol. I, at 308-09. So the order purports to make the Governor responsible for actions that he does not control. The Governor could thus face a contempt action if the PCSB does not stop approving charter schools. The PCSB, after all, has statutory authority to approve charter schools, and approved schools contract directly with the PCSB. W. Va. Code §§ 18-5G-2(2)(C), 18-5G-9. The Governor does not control the PCSB's exercise of this statutory power: He cannot decide whether the PCSB should approve a given school nor decide on what terms it can open for enrollment. And because the PCSB itself is not bound by the preliminary injunction, there is nothing to stop other parties—parents who want their children to attend approved charter schools, for instance—from filing a mandamus action *against the PCSB* if the agency stops fulfilling its statutory duties voluntarily.

The Governor would be in the middle of this mess. The only option to avoid the risk of a contempt action would be to give up his exclusive, discretionary power to decide whether and when to remove PCSB members for "official misconduct, incompetence, neglect of duty, or gross immorality." *Id.* § 18-5G-15(g). The circuit court has no power to dictate this uniquely executive discretion from afar. *See Moore*, 159 W. Va. at 940, 230 S.E.2d at 642. Placing the leader of the Executive Branch in this untenable position is itself irreparable harm.

Finally, the public interest weighs strongly against upholding the injunction. Statutes are presumed constitutional in part because our system trusts that the Legislature acts on the people's behalf, and courts should not lightly second-guess its decisions or delay the benefits to the public from allowing new laws to go into effect. Here, the Legislature provided for charter schools to "improve student learning," promote "higher student achievement," and expand parents' choice in "the school curricula" and "methods of instruction that [would] best serve" their children. W. Va. Code § 18-5G-1(b)(1)-(2), (4). If the preliminary injunction is upheld, those aims will be unjustifiably delayed. Charter schools that are already approved may cease operating and any employees they hired may lose their jobs. New applications may be stymied, too. The result is that parents and students will lose out on the increased educational opportunities charter schools are designed to provide. A single school year can be highly significant for individual children, and the time lost over one (or more) years while this case proceeds to final judgment cannot be made up later. It serves the public interest for a university to "chart its own course" in providing educational opportunities "without judicial interference or oversight" "absent a clear showing that it is in violation of the law." *Equity in Athletics, Inc. v. U.S. Dep't of Educ.*, 291 F. App'x 517, 524 (4th Cir. 2008). So too here—and even more as Respondents' likelihood of success on the

merits is so weak. Allowing HB 2012 to continue expanding educational choice for West Virginia's parents and students weighs strongly against the injunction.

CONCLUSION

The Court should dissolve the preliminary injunction and remand with instructions to dismiss the case for lack of jurisdiction.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 22-0070

(Civil Action No. 21-C-340)

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,

Petitioner

v.

SAM BRUNETT and ROBERT McCLOUD,

Respondent.

CERTIFICATE OF SERVICE

I, Michael R. Williams, Senior Deputy Solicitor General, do hereby certify that the foregoing Opening Brief of Petitioners is being served on counsel of record by email and by depositing a copy of the same in the United States Mail, via first-class postage prepaid, this 20th day of May, 2022, addressed as follows:

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