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.

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Respondents' brief confirms that not one part of this injunction was right. Respondents sued the wrong people, as Petitioners do not implement HB 2012. The circuit court enjoined the wrong party, running over the separation of powers by dictating how the Governor must use his constitutional discretion. The claims behind this unusual lawsuit lack merit, as charter schools are not "independent free school districts" that might trigger constitutional concern. And the equities weighed against an injunction because it hurts the public and the State. The Court should reverse.

ARGUMENT

I. Respondents Sued Parties That Did Not Cause Their Alleged Harm, And No Relief Against These Parties Could Fix It.

Because Respondents did not sue the state officials charged with enforcing HB 2012, they cannot meet the causation and redressability elements of standing. Respondents say their choice of defendants should not "befuddle" the merit of their suit. Resp. 14. But standing is not a way to throw sand in the gears—it is a constitutional prerequisite. Respondents do not have it.

A. Standing is a constitutional requirement for jurisdiction.

Respondents contend that standing is "prudential, not constitutional." Resp. 14. The Constitution, this Court, and other courts say otherwise.

Standing derives from constitutional limits on the judicial power: Article VIII, Section 6 cabins jurisdiction to "cases" and "controvers[ies]," and these words require "a justiciable case or controversy" for a "court to have subject matter jurisdiction." *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 242, 800 S.E.2d 506, 509 (2017). Because standing is "part" of a case and controversy, *id.*, this section "[c]learly" "requires that a litigant have 'standing,'" *Guido v. Guido*, 202 W. Va. 198, 202, 503 S.E.2d 511, 515 (1998) (per curiam) (addressing same limit for appellate standing in Article VIII, Section 3). Likewise, "the core component[s] of standing" are

"an essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Each of the three elements of standing—injury-in-fact, causation, and redressability—is "necessary to establish standing" under the "West Virginia Constitution." *White v. Wyeth*, 227 W. Va. 131, 135 n.5, 705 S.E.2d 828, 832 n.5 (2010).

True, courts have also created prudential rules of standing that do not stem from the Constitution and are "merely" "part of judicial self-government." *Lujan*, 504 U.S. at 560. These prudential rules generally bar a litigant from "raising another person's legal rights," prohibit "generalized grievance[s]," and require that the plaintiff "fall within the zone of interests protected by the law." *State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W. Va. 99, 112 n.3, 602 S.E.2d 542, 555 n.3 (2004) (Davis, J., concurring). But even these rules "should" rarely "be abandoned." *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578 n.14, 584 S.E.2d 203, 212 n.14 (2003) (cleaned up). More to the point, causation and redressability are not among them. As two of the elements that "comprise[]" constitutional standing, syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 84, 576 S.E.2d 807, 811 (2002), they are rooted in Article VIII, Sections 3 and 6's mandatory case-and-controversy limit.

Missing all that, Respondents also invite the Court to ignore federal standing cases that echo these principles. Resp. 14. But the United States Constitution similarly limits federal jurisdiction to "cases" or "controversies." U.S. CONST. art. III, § 2, cl. 1. So this Court regularly (and logically) relies on federal cases defining these terms. In fact, the Court identified the three elements of standing under the West Virginia Constitution by looking to federal opinions. *Coleman v. Sopher*, 194 W. Va. 90 n.6, 459 S.E.2d 367 n.6 (1995) (quoting *Lujan,* 504 U.S. at 560). The Court often uses federal opinions to define each element, too. *E.g.*, *Findley*, 213 W. Va. at 94-95, 576 S.E.2d at 821-22; *Stucky*, 239 W. Va. at 243 nn.13 & 14, 800 S.E.2d at 510 n.13

& 14. Nor can Respondents set aside Fourth Circuit case law as inapplicable unless Eleventh Amendment immunity is at issue. Resp. 16-17 (citing *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001)). The "principles" barring suits against officials who lack "power to enforce the complained-of statute" "apply with equal force in the standing" "context." *Disability Rts. of S.C. v. McMaster*, 24 F.4th 893, 901 (4th Cir. 2022). Standing is constitutionally required, and Respondents must meet that reality head-on.

B. Petitioners did not and will not cause Respondents' alleged injury.

Despite questioning its origins, Respondents ultimately admit that standing requires a "causal connection." Resp. 15. But they identify no such connection here.

Petitioners' role in passing and signing HB 2012 cannot be the basis for standing. Respondents must trace their injury to more than the existence of the "law that is challenged." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). They must also connect it "to allegedly unlawful conduct of the defendant[s]" they chose to sue. *Id.* (cleaned up). And this conduct must be something the defendants *are doing or will do* because injunctions prevent "future wrong or a contemporary wrong," *Bd. of Ed. of Cnty. of Taylor v. Bd. of Ed. of Cnty. of Marion*, 213 W. Va. 182, 186, 578 S.E.2d 376, 380 (2003); 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) (cleaned up); and writs of mandamus force "a State official to adjust prospectively his or her conduct," *Gribben v. Kirk*, 195 W. Va. 488, 497, 466 S.E.2d 147, 156 (1995).

This means that Respondents' injury must be the "result of" HB 2012's "operation or enforcement"—not its passage. *Babbitt v. Union Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Even if Petitioners acted unlawfully in enacting HB 2012 (they did not), those past actions are not future or contemporary wrongs. So Respondents have not established causation.

If the rule were otherwise, Petitioners could be sued over essentially every West Virginia law: The Legislature passes all state laws, and the Governor signs nearly all of them. Respondents recognize this problem, too, but their invented "limiting principles" are not up to the job of fixing it. Resp. 15. They argue that their suit is unique because the Governor had "notice, prior to signing," that there were "credibl[e] and publicly alleged" infirmities with HB 2012. *Id.* at 15-16. But even putting aside how this "principle" is pulled from thin air, it conflates standing and merits analysis. Standing does not turn on the "validity of the claim" asserted. *Stucky*, 239 W. Va. at 243, 800 S.E.2d at 510. A court must assure itself of jurisdiction, including litigants' standing, *before* it reaches "the merits" of a claim. *Pavone v. NPML Mortg. Acquisitions, LLC*, 2022 WL 669305, at *6 n.5 (W. Va. Mar. 7, 2022). And people can have an injury-in-fact under both constitutional and unconstitutional laws. Either way, harm flows from how the law operates, not that someone signed it—no matter what the signer may have said or heard in the news first.

Respondents also cite no authority for their belief that the Governor may be sued because he knew some people objected to HB 2012's legality. In fact, the Fourth Circuit recently rejected a similar argument. *McMaster*, 24 F.4th at 901. There, South Carolina's governor also "publicly advocated" for a bill barring local schools from requiring facemasks "to remain in effect and be vigorously enforced." *Id.* When advocacy groups sued him on that basis, the Fourth Circuit dismissed the claims against him for lack of standing. *Id.* Though COVID-19 issues are no doubt just as public and "high-profile" as Respondents say their suit is, Resp. 16, the plaintiffs' alleged injuries were not traceable to the governor because he had no "specific duty to enforce" the bill. *McMaster*, 24 F.4th at 901. The court held that his public endorsement was not enough. *Id.*

These principles explain why litigants challenging state statutes routinely sue the officials "charged with" enforcing them—not the Legislature or Governor. *E.g.*, *Farley v. Graney*, 146 W.

Va. 22, 24, 119 S.E.2d 833, 835 (1960). It is also why the Governor's "general duty to enforce state laws does not make him a proper defendant in every action attacking" a statute's "constitutionality." *Gilmore*, 252 F.3d at 331. Indeed, the Governor *cannot* assume functions assigned to others by invoking his duty to "take care that the laws be faithfully executed." *Shields v. Bennett*, 8 W. Va. 74, 75, 1874 WL 3229, at *1 (1874) (quoting W. VA. CONST. art. VII, § 5), *overruled on other grounds by Simms v. Sawyer*, 85 W. Va. 245, 101 S.E. 467 (1919). Respondents claim that Article XII, Section 10 is different; it imposes a "special duty to the Constitution." Resp. 16. But their authority repeats the Governor's general duty to "faithfully" uphold *all* of the Constitution. *Id.* (quoting *Cooper v. Gwinn*, 171 W. Va. 245, 256, 298 S.E.2d 781, 792 (1981)). There is and should be no Section-10-only exception to settled standing law.

Respondents counter again with cases in which governors were parties. Resp. 17-18. But standing was not addressed in any of those cases, and the potential "existence of unaddressed jurisdictional defects has no precedential effect." *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Ed. of Cnty. of Kanawha*, 231 W. Va. 386, 396, 745 S.E.2d 424, 434 (2013). The cases are also consistent with the ordinary rules. The statute challenged in *Justice v. West Virginia AFL-CIO* "[b]roadly" barred all "State employers"—including the Governor—from automatically deducting union dues from public employees' wages. 246 W. Va. 205, ___, 866 S.E.2d 613, 617 (2021). A different case sought compliance with Article VI, Section 51, which affirmatively requires "the Governor [to] submit to the Legislature a budget for the next ensuing fiscal year" containing "a complete plan of [his] proposed expenditures." *State ex rel. League of Women Voters of W. Va. v. Tomblin*, 209 W. Va. 565, 569, 550 S.E.2d 355, 359 (2001). Another tried to compel the Governor and others to adequately fund a retirement system. *W. Va. Ed. Ass'n v. Consol. Pub. Ret. Bd.*, 194 W. Va. 501, 506, 460 S.E.2d 747, 752 (1995). The last challenged the validity of contracts that were

"part of the Governor's" education program and for which he had invited "various vendors" to "submit bids." *McGraw v. Caperton*, 191 W. Va. 528, 531, 446 S.E.2d 921, 924 (1994). All, in short, involved theories of harm tied to the Governor's current or future actions.

For similar reasons, this Court's directive to "bring all cases involving the legislature against the presiding officers of the House and Senate," *Common Cause of W. Va. v. Tomblin*, 186 W. Va. 537, 539 n.2, 413 S.E.2d 358, 360 n.2 (1991), does not help Respondents. The term "cases involving the legislature" says who to sue if the Legislature belongs in court, not that plaintiffs can sue these officials anytime the Legislature passes a statute. It presupposes a causal connection.

None exists here. The President and Speaker can never "play [a] role in" the "implementation" of a statute. *State ex rel. W. Va. Citizens Action Grp. v. W. Va. Econ. Dev. Grant Comm.*, 213 W. Va. 255, 264, 580 S.E.2d 869, 878 (2003). Nor does the Governor have a role in implementing *this* statute: Only the Professional Charter School Board can approve or reject charter schools. W. VA. CODE § 18-5G-2(2)(C). So Petitioners can take no action that causally connects them to the alleged injury. Standing is lacking, and the injunction should fall.

C. No order against Petitioners could redress Respondents' alleged injury.

Respondents have another standing problem: They fail to show that their alleged "injury will be redressed through a favorable decision of the court." Syl. pt. 5, *Findley*, 213 W. Va. at 84, 576 S.E.2d at 811. The court's order must afford relief "by virtue of its effect on the" Petitioners, which means that seeking "relief against a defendant with no power to enforce a challenged statute" is a non-starter. *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015). But the circuit court ran into exactly this problem: Petitioners do not approve charter schools. Redressability also "become[s] 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). This principle makes redress speculative here "because [an order] would not [be] binding upon the"

nonparty PCSB. *Lujan*, 504 U.S. at 569. Any relief the court could legitimately grant against Petitioners would not redress the alleged harm.

1. Recognizing that relief against Petitioners would do nothing, the circuit court tried to bind the PCSB indirectly by ordering the Governor to tell it to stop authorizing charter schools. A.R. Vol. I at 308-09. Respondents excuse this overreach by noting that the Governor must "ensure that all executive agencies comply with the Constitution," Resp. 24 (cleaned up), and in the past, has directed other agencies to cease certain actions, *id.* at 26. But this indirect "theory of redressability contravenes the settled principle that it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254 (11th Cir. 2020) (cleaned up). Standing requires more than asking the court to order the defendant to order *someone else* to stop injuring the plaintiff. So it is not "revisit[ing]" precedent to recognize that "the governor was not a named party" in Respondents' cases about his general powers and duties. Resp. 25. If Respondents wish to expand those principles into a lesson on standing, who was and was not a party becomes highly relevant.

Even if influence over third parties could be sufficient, the theory fails here because the Governor does not control the PCSB. Respondents invoke West Virginia Rule of Civil Procedure 65 about binding those "acting in concert or participation with" a defendant—yet do not show how the PCSB meets the test. Resp. 27 (citation omitted). If anything, the case for the PCSB is particularly weak because the Governor cannot influence its decisions or direct it to ignore its obligations under HB 2012. Statutes are "binding upon" "the executive branch of government" and the Constitution "explicitly contemplates and mandates that public officers 'shall perform such duties as may be prescribed by law.'" *Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 449, 451, 300 S.E.2d 86, 90, 92 (1982) (quoting W. VA. CONST. art. VII, § 1). Respondents' own

authorities make this clear. In *Queen v. Moore*, for instance, Governor Moore ordered all executive agencies to stop withdrawing interest on special revenue accounts. Resp. 26. But his order triggered a petition for a writ of mandamus *that this Court granted* because the governor lacked authority to freeze money the Legislature appropriated to the accounts. *Queen v. Moore*, 176 W. Va. 27, 31, 340 S.E.2d 838, 842 (1986). Even reliance on implicit constitutional authority could not salvage his actions. *Id.* at 29, 340 S.E.2d at 840. Similarly, Governor Justice cannot "pick and choose" which laws the PCSB must follow. *Nelson*, 171 W. Va. at 449, 300 S.E.2d at 90. Unless the Legislature changes HB 2012 or a court enjoins the PCSB, the Constitution "mandates" that the PCSB "perform such duties as" HB 2012 commands. *Id.* at 451, 300 S.E.2d at 92.

2. Respondents are also wrong that redressability is met since the Governor could call an election to correct HB 2012's alleged flaws. They admit he has no statutory authority to do so. They argue it is "incumbent on a governor" to call a special election anyway. Resp. 21. Not true.

First, Article XII, Section 10 does not give the Governor authority to call a county election on charter schools. Respondents concede that Section 10 is "non-self-executing" and "silent on this particular issue." Resp. 21. They also admit that the "solution" must come from "a study of the specific provision of the Constitution." *Id.* at 21 (citation omitted). But nothing in Section 10 supports their theory that the Governor can and must call an election. Yes, the section includes the word "shall," but it does so proscriptively. It says what *shall not* be done: No independent school districts "shall" be formed out of existing districts without voter consent. Its text creates no affirmative obligations or otherwise says what the Governor or any other official must do. And Article XII, Section 10 is hardly unique. When, for example, this Court confronted another proscriptive provision—Article X, Section 6's insistence that in certain cases "[t]he credit of the state shall not be granted"—it enjoined the relevant state agency from exercising statutory powers

that conflicted with this proscription. *Gainer v. W. Va. Bd. of Invs.*, 194 W. Va. 143, 144, 459 S.E.2d 531, 533 (1995). It did not order a different officer to take affirmative action based on a theory of the State's implicit duties that the Court gleaned from non-self-executing text.

Respondents' best case for their contrary theory is one line in *Casto*: "The constitutional mandate would be carried out, and the act would be declared unconstitutional." *Casto v. Upshur Cnty. Sch. Bd.*, 94 W. Va. 513, 517, 119 S.E.470, 472 (1923). Respondents think *Casto*'s use of "and" shows that courts have power to affirmatively enforce Article XII, Section 10 not only through declaratory relief but also by ordering the Governor to call an election. Resp. 20. But *Casto* never said that ordering officials to hold an election is the "constitutional mandate" for a Section 10 violation. Nor could such power be implied from context: The plaintiffs in that case sought injunctive relief to stop a new county board from purchasing school property and collecting taxes. *Casto*, 94 W. Va. at 514, 119 S.E. at 470. *Casto* does not support Respondents' leap from that limited preventive relief to power to order an election.

In fact, before now, none of the plaintiffs in Article XII, Section 10 cases sought affirmative relief in mandamus—on an election theory or otherwise. They pursued straightforward injunctions to stop officials from taking specific action to enforce laws they thought violated the Constitution. *See Leonhart v. Bd. of Ed. of Charleston Indep. Sch. Dist.*, 114 W. Va. 9, 170 S.E. 418 (1933) (suit to enjoin school district from surrendering property to newly created county board); *Herold v. McQueen*, 71 W. Va. 43, 44, 75 S.E. 313, 314 (1912) (suit to enjoin sheriff from collecting taxes for new school); *see also Bd. of Ed. of Flatwoods Dist. v. Berry*, 62 W. Va. 433, 439, 59 S.E.2d 169, 171 (1907) (arguing election irregularities meant school board could not take contested land).

Second, Respondents' reliance on cases in which the Governor can call elections fails because in each one, the Governor had an express duty to do so. In one, the constitutional

convention passed an ordinance making it "the duty of the governor ... to issue his writ ... providing for a special election" to fill certain vacancies. *Hawver v. Seldenridge*, 2 W. Va. 274, 279, 1867 WL 1667, at *5 (1867). Another involved West Virginia Code § 3-10-2(b), which requires the acting governor to "issue a proclamation [fixing the] time for a [] statewide election" for the next governor. *State ex rel. W. Va. Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 697, 715 S.E.2d 36, 46 (2011). Even Respondents recognize that the Legislature there "create[d] a mechanism to fulfill [its] constitutional mandate." Resp. 22 (quoting *Tomblin*, 227 W. Va. at 695, 715 S.E.2d at 44). They are wrong to suppose courts can craft similar mechanisms from scratch.

So none of Respondents' authorities authorize (much less compel) the Governor to call an election here. He must perform his "duties in accordance with statute," *State ex rel. Justice v. King*, 244 W. Va. 225, 233 n.9, 852 S.E.2d 292, 300 n.9 (2020); no one suggests that HB 2012 authorizes him to call a special election for charter schools. Respondents concede this, too: "[I]mportantly, the Legislature has failed to prescribe general laws" implementing Section 10. Resp. 21. They are right this fact is important. But they draw the wrong conclusion that the mandatory duty they urge is "incumbent on a governor," *id.*, when the Constitution and law books are silent. Nor can calling on the people's "right to speak" under Section 10 fix Respondents' standing problems. *Id.* at 19 (cleaned up). Respondents need constitutional or statutory support to show that this right implies the particular "correlative duty" they claim against the specific party they chose to sue. *Id.* Without it, they lack standing because the circuit court could not legitimately grant relief against *these* Petitioners that would redress Respondents' alleged harm.

D. Respondents' choice to sue the President and Speaker is reviewable now.

Finally, Respondents ask the Court to ignore their lack of standing to sue the President and Speaker (and thus not remand with direction to dismiss the entire case) since the circuit court enjoined the Governor alone. Resp. 1-2. The circuit court's decision to deny a motion to dismiss

and instead reserve the possibility of future relief against these officials, A.R. Vol. I at 308, does not erase this Court's power to correct threshold, jurisdictional error.

Standing, of course, "is a jurisdictional requirement." *Pavone*, 2022 WL 669305, at *2. Courts must always "address" jurisdiction with "urgency," even *sua sponte*, because "any decree made by a court lacking [it] is void." *State ex rel. Univ. Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 346, 801 S.E.2d 216, 224 (2017). And this Court exercises its "inherent power and duty" to address standing in all cases and to dismiss if it's lacking. *Pavone*, 2022 WL 669305, at *3, *6.

Further, all parts of this appeal are properly before the Court. The circuit court specifically addressed standing against the President and Speaker in its preliminary injunction order. A.R. Vol. I at 304-10. If that leaves any doubt, appealable orders "bring with" them "all preceding non-appealable decrees or orders" that involve "the errors complained of" on appeal. Syl. pt. 6, *Riffe v. Armstrong*, 197 W. Va. 626, 631, 477 S.E.2d 535, 540 (1996). The Court can also review issues "[n]ecessarily intertwined" with the order on appeal. *Jane Doe-1 v. Corp. of President of the Church of Jesus Christ of Latter-day Saints*, 239 W. Va. 428, 444, 801 S.E.2d 443, 459 (2017). Similarly, federal courts review non-appealable issues when "inextricably intertwined" with the appeal or if "pendent review will likely terminate the entire case." *Rendall-Speranza v. Nassim*, 107 F.3d 913, 917 (D.C. Cir. 1997). Here, the circuit court's failure to dismiss the President and Speaker preceded the injunction and is necessarily intertwined with the same error underlying it—Respondents sued the wrong parties. Resolving all standing questions now will end the case without need for multiple rounds of appeals. The Court thus can and should direct dismissal.

II. The Circuit Court's Unusual Attempt To Get Around Standing Violated The Separation Of Powers.

The circuit court also blurred the separation of powers by ordering the Governor to "direct the PCSB, under threat of removal," to stop authorizing charter schools. A.R. Vol. I at 308-09.

"Preserving the separation of powers is one of this Court's most weighty responsibilities," *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 534, 782 S.E.2d 223, 229 (2016), yet Respondents address the circuit court's constitutional error only in passing. They contend that the Governor's discretion is irrelevant because he and the PCSB are bound by the Constitution. Resp. 28. They forget that (even if they are right on the merits) courts' remedies must follow the Constitution, too.

As to the PCSB, nonparty public officials' duty to uphold the Constitution does not bind them to one circuit court's constitutional reading. This reality does not give officials free rein to violate the Constitution as Respondents imply; it means a court must have jurisdiction over them to order a remedy. And people are simply "not bound by a judgment" if they are "not designated as a party." *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996). The PCSB was not.

As to the Governor, the circuit court lacked authority to order him to remove PCSB members. The Constitution gives the Governor exclusive power to decide whether to remove an officer "in case of incompetency, neglect of duty, gross immorality, or malfeasance in office." W. VA. CONST. art. VII, § 10. HB 2012 doubles down on this discretionary power by providing that the Governor "may" remove PCSB members "for official misconduct, incompetence, neglect of duty, or gross immorality." W. VA. CODE § 18-5G-15(g); *see also Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 725, 791 S.E.2d 168, 171 (2016) (explaining that "may" "connotes discretion"). Respondents, though, never explain how exercising express statutory authority under HB 2012 would qualify as misconduct, incompetence, neglect of duty, gross immorality, or malfeasance. In fact, they ellipse these concepts from their quote of the Governor's constitutional removal powers. Resp. 26 (quoting W. VA. CONST. art. VII, § 10). They rely instead on a statute providing for "will and pleasure" removal, *Id.* at 26 n.10, even though "the more specific statute" related to the PCSB controls, *Barber v. Camden Clark Mem'l Hosp. Corp.*, 240 W. Va. 663, 670, 815 S.E.2d 474, 481

(2018). And they argue that these "ordinar[y]" discretionary standards somehow evaporate after the lower court's injunction if "PCSB members" "directly defy that order." Resp. 26. But, again, because nonparties are not bound by the injunction, continuing to follow the statute defies nothing.

So Respondents cannot get around the Governor's constitutional and statutory discretion. And no authority says a circuit court can transfigure discretion into mandatory duty. This Court has never forced the Governor to exercise his removal powers. *See, e.g.*, *Nelson*, 171 W. Va. at 450, 300 S.E.2d at 91 (declining to remove officers the Governor appointed); *Trumka v. Moore*, 180 W. Va. 284, 289, 376 S.E.2d 178, 183 (1988) (declining to "rescind appointments" out of respect for the "delicate balance" "between the three branches of government"). The circuit court's workaround—ordering the Governor to take steps that "necessitate[]" the "exercise of executive discretion and judgment"—ignores that in these circumstances "the right of the courts to compel performance is uniformly held to be nonexistent." *State ex rel. Brotherton v. Moore*, 159 W. Va. 934, 940, 230 S.E.2d 638, 642 (1976). The injunction therefore invaded the separation of powers when it tried to fix Respondents' standing problems. The Court should reverse on this basis also.

III. Each Of The Preliminary Injunction Factors Favors Petitioners.

A. Respondents are unlikely to succeed on the merits.

Respondents continue to ignore the Constitution's words. Article XII, Section 10 prohibits creating "independent" school districts or organizations without consent of the voters in the districts "out of which" they are created. But history, context, and this Court's cases confirm that charter schools don't come "out of" school districts because the existing districts remain as before. Charter schools are also not "independent" in the ways this Court deems constitutionally relevant.

1. Beginning with "out of," Respondents insist that Petitioners are twisting the constitutional text, maintaining that they are trying to add words like "carve," "existing," or "geographic territory." Resp. 29 (citing Petr's Br. 31). But the language Respondents attack

doesn't come from Petitioners—it comes from this Court's opinions construing Article XII, Section 10. *See* Petr's Br. 31 (quoting *Casto*, 94 W. Va. at 517, 119 S.E. at 471). *Casto* grounded its analysis in the same "out of" phrase that Respondents find so nettlesome but that should decide this case, too. It was also not the first time the Court recognized that to take a thing "out of" something can rightfully be understood to "carve" it from an existing something else. *See Marquis v. Thompson*, 109 W. Va. 504, 505, 155 S.E. 462, 463 (1930) (describing "board of education of the district out of which the independent district is in part *carved*"); *Simms*, 85 W. Va. at 245, 101 S.E. at 468 (referring to election "at which all of the voters of the district out of which this independent [school] district is carved have the right to vote"); *State v. Bd. of Ed., Sch. Dist. of Parkersburg*, 68 W. Va. 40, 69 S.E. 378, 378 (1910) ("Independent school districts ... are carved out of the general districts."). *Leonhart* is starker still: By using the phrase "out of," "the power to create in section 1 carries with it the power to *destroy*" existing districts "and re-create" new, independent ones. 114 W. Va. at 15, 170 S.E. at 421. Even Respondents' expert once agreed that "[a]n 'independent school district,' according to the Supreme Court, is one that is carved out of a county or magisterial school district." Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. VA. L. REV. 125, 162 n.179 (2005).

So Respondents are right when they insist that the Court cannot rewrite the Constitution, Resp. 29—but that rule does them no favors. Respondents fall into their own revisionist error because their (and the circuit court's) approach leaves nothing for "out of" to do. Respondents contend that the phrase "modifies 'school district or districts' to indicate which voters must consent." *Id.* at 30. True; the relevant voters are those in districts "out of which" an independent district "is to be created." W. VA. CONST. art. XII, § 10. The problem for Respondents is that this grammatical observation still does not explain what "out of" means. Respondents' reading would

be a roundabout way of writing something like "the school district or districts *in which* the same is to be created." The framers of our Constitution knew how to do that directly: Article IV, Section 1, for example, provides that "[t]he citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside." And in many other contexts, "out of" is *not* treated as synonymous with "in." *Cf. Norfolk S. Ry. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 999 F. Supp. 2d 906, 913 (S.D. W. Va. 2014) (collecting authorities showing that "'arising out of' indicates a broad meaning such as 'originating from,' 'growing out of,' 'incident to,' or 'flowing from'"). The Court should reject Respondents' "strained construction." *Verizon Servs. Corp. v. Bd. of Rev. of Workforce W. Va.*, 240 W. Va. 355, 360, 811 S.E.2d 885, 890 (2018).

Dictionary definitions of the isolated word "created" also do not show that "out of" has nothing to do with existing district lines. Resp. 30-31. For one, that approach ignores context, and the Court has warned against gleaning intent from "any single part ... or word." Syl. pt. 5, *Miller v. Wood*, 229 W. Va. 545, 547, 729 S.E.2d 867, 869 (2012). Context proves critical here: "Created" completes the phrase that "out of" begins. For another, "blind reliance" on dictionaries "makes for an overly formalistic method of interpretation." *Hosaflook v. Consolidation Coal Co.*, 201 W. Va. 325, 345, 497 S.E.2d 174, 194 (1997). This case proves the point. Respondents cite an 1828 Noah-Webster-authored dictionary that defines "created" as "formed from nothing," but an 1831 Noah-Webster-authored dictionary defines "created" more broadly as "brought into being, caused, formed." NOAH WEBSTER, DICTIONARY OF THE ENGLISH LANGUAGE 106 (1831). Plenty of things are "formed" from existing things. Other dictionaries confirm that, at least sometimes, to "create" is to "to make or reproduce *from existing elements or materials*," not just from nothing. ARNOLD J. COOLEY, A DICTIONARY OF THE ENGLISH LANGUAGE 120 (1861) (emphasis added).

Next, Respondents' reinterpretations of prior Section 10 cases bolster Petitioners' reading. Everyone agrees that Article XII, Section 10 was a reaction to *Kuhn v. Board of Education of Wellsburg*, 4 W. Va. 499, 511, 1871 WL 2753, at *9 (1871). But *Kuhn* endorsed a change in the boundaries of existing school districts, not townships, without voter consent—*that* was what the new provision was supposed to foreclose. *Id.* at 511-12, 1871 WL 2753, at *9-10. The plaintiff in *Kuhn*, after all, was not complaining about a new school opening (as Respondents are here); he was concerned about the tax implications after the new district changed the prior township-based boundaries. *Id.* at 502-03, 1871 WL 2753, at *2-4. Likewise, Respondents are wrong that the school in *Herold* passed muster only because the relevant voters approved it. Resp. 31. The Court made plain that the school "could have [been] established ... without submitting the question to a vote of the people at all" because "the act in question d[id] not create a school district *out of* any part of any school district or districts of the county." 71 W. Va. at 49-50, 75 S.E. at 316. And lastly, Respondents seem to have read only part of *Casto*, in which the Legislature created a new school. Respondents are right that the new school did not conflict with Buckhannon's district since it did not "attempt[] to affect the integrity of [that] district in any way." 94 W. Va. at 515-16, 119 S.E. at 471. But keep reading. The Court also held that the school did "not infringe upon section 10, art. 12" because it was not 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." *Id.* at 517, 119 S.E. at 472. So too here.

Respondents then invite the Court to put these cases aside, labelling them "inartful[]," "written for a different age," and "hardly models of clarity." Resp. 33. But the Court gives weight to longstanding interpretations decided close to a constitutional provision's enactment, even if a litigant doesn't appreciate the reasoning behind them. *See Charleston Transit Co. v. Condry*, 140

W. Va. 651, 658, 86 S.E.2d 391, 396 (1955) (relying on "contemporaneous construction or interpretation" undisturbed "for ten years or more by the people and the courts"). Repeatedly, this Court has recognized that not all new independent school districts implicate Article XII, Section 10—just those that purport to strip out part of existing ones.

Lastly, the Court should not re-construe the phrase "out of" because the Legislature banned independent free school districts by statute in 1933. Resp. 33. Respondents seem to argue that the phrase does not operate as a real limit anymore because schools are no longer created "out of" existing, single-county school districts. *Id.* at 33. But it would be odd to infer new constitutional limits on the Legislature's power over education because, 90 years ago, the Legislature exercised that power in a particular way. In any event, courts do not rewrite constitutional provisions just because later circumstances might make them seem less relevant. They interpret "the Constitution and the laws of this State as they exist." *State v. Smith*, 243 W. Va. 470, 478, 844 S.E.2d 711, 719 (2020). So "[a] constitutional provision which is clear and unambiguous cannot be changed or made uncertain by a statute subsequently enacted." Syl. pt. 3, *State ex rel. Dewey Portland Cement Co. v. O'Brien*, 142 W. Va. 451, 451, 96 S.E.2d 171, 171 (1956).

2. Moving to Respondents' insistence that charter schools are "independent," Resp. 34-36, the Court need not reach the issue—holding that charter schools are not "created" "out of" any "district or districts" would resolve the case. But Respondents are wrong regardless.

An "independent free school district, or organization" is a term of art: "As its name implies," it describes a district "independent of the general system" in certain key respects, including "the length of the school term, ... branches taught and to what extent, internal management generally, and taxation." *Casto*, 94 W. Va. at 516, 119 S.E. at 471. The charter schools HB 2012 creates are independent in none of these areas. Petr's Br. 33-36.

Respondents answer with a shrug. Ignoring that *Casto* highlighted them and citing no Article XII, Section 10 authority of their own, they say that none of those features comprise independence. Instead, they put up county-school-board oversight—or lack thereof—as the beginning and end of "independence." But the school at issue in *Casto* was governed by a separate board. 94 W. Va. at 514-15, 119 S.E. at 471. So was the high school in *Herold*. 71 W. Va. at 46, 75 S.E. at 314. Yet this Court did not find that either one was the sort of "independent" entity that Section 10 governs. Other than their policy disagreement with charter schools, Respondents offer no reason for this Court to reverse course and make county-board oversight the new decisive factor. "Mere disagreement" with a prior case "is not a sufficient reason to deviate from a judicial policy promoting certainty, stability and uniformity in the law." *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 1029, 207 S.E.2d 169, 173 (1974). An "ordinary" understanding of the word "independent" is no reason, either, since "independent free school district" is a technical term that "will be presumed to have been used in a technical sense and will ordinarily be given [its] strict meaning." *Wooddell v. Dailey*, 160 W. Va. 65, 68-69, 230 S.E.2d 466, 469 (1976).

None of this reasoning "amends" the Constitution. Resp. 35. Article XII, Section 10 may apply less often after the 1933 statutory change, but it is still a live provision. Respondents are right that *Leonhart*'s "full analysis" after the new statutory scheme shows that much. *Id.* (cleaned up). What they cannot get around is that *Leonhart* refused to extend Article XII, Section 10 beyond the specific issue of creating independent school districts given the "broad powers enjoyed by the Legislature in the absence of constitutional restrictions." 114 W. Va. at 14, 170 S.E. at 420. Stretching the Constitution to address different circumstances that its text and historical context do not support would unduly limit the "almost plenary" powers the Legislature enjoys. *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 725, 414 S.E.2d 877, 882 (1991).

The Court should not bite for two final reasons. First, "when a statute is challenged as being unconstitutional, this Court typically accords great deference to the legislative process" "in an effort to find constitutionality." *Rohrbaugh v. State*, 216 W. Va. 298, 306, 607 S.E.2d 404, 412 (2004). And second, the Court construes Article XII, Section 10 specifically "so as not to divest the Legislature of the broad powers conferred upon it." *Leonhart*, 114 W. Va. at 15, 170 S.E. at 421. Respondents give no convincing reason why that provision can be imaginatively employed to strike down the presumptively constitutional HB 2012. Their claims are unlikely to succeed—and no injunction resting on them should stand. *See Justice*, 246 W. Va. at ___, 866 S.E.2d at 628 (explaining that likelihood of success is the "most important[]" factor).

B. The other injunction factors favor Respondents.

Although Respondents' unlikelihood of success could and should decide this appeal, the other preliminary-injunction factors favor Petitioners, too.

Respondents do not meaningfully engage with the harms that Petitioners and the public will face should this injunction stand. Indeed, they have *no* answer to the risk of contempt that the Governor faces from the injunction, which makes him responsible for PCSB decisions that the statute gives him no power to control. Petr's Br. 38-39. Nor do they have any real answer to the hundreds of students whose educational plans would be thrown into chaos should the injunction take effect; they appear to insist that these students should return to non-charter schools until Respondents' demands are met. But that could derail a year or more of education for these students. And the harms that the circuit court feared could follow from "[a]ny attempt to undo the creation of PCSB-authorized charter schools"—namely, problems resulting from a sudden school stoppage after parents and charter-school educators have relied on the Act—would flow *from the preliminary injunction*. A.R. Vol. I at 319 ¶ 105. Beyond that, parents have a "fundamental right" "to make decisions concerning the care, custody, and control [of their] children." *Lindsie D.L. v.*

Richard W.S., 214 W. Va. 750, 755, 591 S.E.2d 308, 313 (2003); *see also, e.g.*, *Crowley v. McKinney*, 400 F.3d 965, 971 (7th Cir. 2005) (describing "the right to choose [a] school" as "the only federal constitutional right vis-à-vis the education of one's children that the cases as yet recognize"). The preliminary injunction would deprive them of flexibility to make those decisions.

As for their harms, Respondents still struggle to articulate any. Charter schools will not raise their taxes under the statute. Their children will not be forced to attend new schools. If they wish, nothing will change for them and their families. And though they continue to refer to the right to vote enshrined in Article XII, Section 10, they still have not explained why that vote could not be held later. Respondents try to draw factual distinctions with cases like *Casto* or *Herold*, Resp. 38, but regardless whether the parties there *could* have brought legal challenges before the schools' creation, the principle holds that courts have the power to stop schools created in violation of Section 10 even *after* they begin operating. Respondents argue against a belated vote because "voiding" charter schools (if Respondents win this case and if voters disapprove particular schools) would cause its own disruption. *Id.* at 39. But even with that risk, the harms weigh on Petitioners' side, as charter school parents and children will certainly suffer irreparable harm from the injunction and any right to a potential vote is safe until the end of this case.

In the end, "[a] preliminary injunction is a harsh remedial process, and should be used only in cases of great necessity and [is] not looked upon with favor by the courts." *Justice*, 246 W. Va. at __, 866 S.E.2d at 619 (cleaned up). The equities here do not justify it in any way.

CONCLUSION

For these reasons, the Court should dissolve the preliminary injunction and remand with instructions to dismiss the case for lack of jurisdiction.

Respectfully submitted,

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,

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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.

CERTIFICATE OF SERVICE

I, Lindsay S. See, do hereby certify that the foregoing *Reply 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 25th day of July, 2022, addressed as follows:

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