IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0070

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

Respondents Below, Petitioners

v.

SAM BRUNETT and ROBERT McCLOUD,

Petitioners Below, Respondents.

RESPONDENTS' BRIEF

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ASSIGNMENT OF ERROR

The Court lacks jurisdiction to consider the first assignment of error, contending that the circuit court erred in denying the motion to dismiss. Petitioners, Respondents below ("Appellants") styled their motion to dismiss for lack of standing as one made "pursuant to Rule 12(b)(1) and 12(b)(6)." (A.R. Vol. I at 55.) As the Court recently reiterated, a denial of a motion to dismiss under either Rule is not immediately appealable. *See Southern Env't, Inc. v. Bell*, 244 W. Va. 465, 475, 854 S.E.2d 285, 295 (2020). Nor is the denial of the motion to dismiss among the small category of collateral orders appropriate for interlocutory review. Appellants did not (and cannot now for the first time) assert, for instance, qualified or statutory immunity. *See West Virginia State Police v. J.H.*, 244 W. Va. 720, 731, 856 S.E.2d 679, 690 (2021) (qualified immunity); *State ex rel. Grant Cnty. Comm'n v. Nelson*, 244 W. Va. 649, 659, 856 S.E.2d 608, 618 (2021) (statutory immunity).

The circuit court's preliminary injunction order, over which this Court properly has appellate jurisdiction, was issued against Governor Justice *only*.[1] Therefore, because the Court should not consider the denial of the motion to dismiss now, House Speaker Hanshaw and Senate President Blair have no grounds for appeal at this time.[2] Governor Justice is nevertheless entitled to pursue his second and third assignment of errors, regarding the preliminary injunction. But in

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[1] "Governor Justice" will refer to Petitioner, Respondent below, Appellant James C. Justice, II, Governor of the State of West Virginia, consistent with the convention in *State ex rel. Justice v. King*, 244 W. Va. 225, 228, 852 S.E.2d 292, 295 (2020) ("*State ex rel Justice*").

[2] Should the Court disagree, Appellees maintain, pursuant to Rule 10(d), that the Legislature's presiding officers are proper parties for all the reasons articulated by the circuit court. (A.R. Vol. I 304–306, ¶¶53–57.) Appellants here continue to ignore that H.B. 2012 explicitly invokes the Legislature's affirmative obligations under article 12, section 1. Appellants also conveniently fail to mention, much less attempt to distinguish, the Court's admonition to litigants "in the future…to bring all cases involving the legislature against the presiding officers of the House and Senate." *Common Cause of W. Virginia v. Tomblin*, 186 W. Va. 537, 539, 413 S.E.2d 358, 360 n.2 (1991). Instead, Appellants cite cases where the Legislature's presiding officers were not named. But those cases are not authority for a proposition not considered.

no case should the Court remand with instructions to dismiss this suit with prejudice, as Appellants request. Respondents, Petitioners below ("Appellees") are equally entitled to make their case in the circuit court following resolution of this interlocutory appeal.

INTRODUCTION

The People of West Virginia have an affirmative, constitutional *right* to vote on the creation of independent public schools. This action seeks to effectuate that right to *direct* democracy, not representative democracy. The representatives are here subverting the will of the People by enabling independent charter schools with unelected boards, managed by private, for-profit entities, to take taxpayer funds without any direct accountability to the taxpayers. It is for this reason that the People ratified article 12, section 10—they had the foresight to take the decision on the creation of independent schools out of the hands of their representatives and give it directly to the People.[3]

The Court has said as much: "The framers of the Constitution [article 12, section 10] ... thought it best to curb the Legislature in the creation of [independent public schools], unless the people immediately concerned should give their consent thereto." *Leonhart v. Bd. of Educ. of Charleston Indep. Sch. Dist.*, 114 W. Va. 9, 170 S.E. 418, 420 (1933). Voting on the creation of independent schools is the People's one and only opportunity to have any meaningful say on existence and operation of these schools.

Rather than give the People the vote to which they are entitled, Governor Justice wants the Court to rewrite the Constitution by adding to section 10 the words "carve out" or "annex" or "reshape" or "change" plus the words "existing geographic territory." What it all adds up to is a

[3] "No 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. 12, § 10.

thinly disguised tale of revisionist history that misapprehends the relevant precedent and defies established rules of constitutional interpretation, namely, to start (and preferably end) with the actual words of the Constitution. A linguistically correct, textualist reading of section 10 would soundly reject Governor Justice's tortured construction. An originalist reading, adhering to the plain ordinary meaning of section 10 as understood in 1872, would render Governor Justice's contemporary gloss of that provision dull and misinformed.

So unmistakable is section 10's command that Governor Justice must resort to emasculating his office, to convince the Court that he is helplessly without power to take care that this law be faithfully executed. But when section 10 was ratified in 1872, a governor and the Legislature—the proper defendants-respondents in this suit—were the only state actors with express constitutional authority to provide for special election that section 10 requires. Indeed, this Court itself has issued a writ of mandamus against the then-acting governor, directing him to fix a time for a special election under another non-self-executing constitutional provision also ratified in 1872. *See State ex rel. W. Va. Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 697, 715 S.E.2d 36, 46 (2011) ("*Citizen Action*").

The circuit court did not issue any such writ here, all it did was preliminarily enjoin Governor Justice and the state officials within his executive charge from furthering the creation of charter schools that had been authorized by the Professional Charter School Board (PCSB), a state agency. (*See* A.R. Vol. I at 322.) Governor Justice maintains, however, that he is completely powerless to instruct PCSB to suspend further creation of charter schools or even exercise his established authority to remove PCSB members, in the unlikely event they would disobey any such instruction.

Governor Justice instead throws PCSB under the proverbial school bus, insisting that it,

not the State's chief executive, is responsible. Governor Justice's emphasis on PCSB being the state agency tasked with implementing the revised charter school law, H.B. 2012 (2021), is entirely misplaced. This action does *not* seek to enforce H.B. 2012, this action seeks to enforce article 12, section 10 of the West Virginia Constitution. PCSB has no power to order, much less capacity to administer, any special elections in the counties section 10 would require them. That inherent and explicit power belongs to Governor Justice and the Legislature in the first instance.

But even if Governor Justice were correct that PCSB should have been included as a party, if only for purposes of the preliminary injunction, that would not warrant dismissing this suit outright, as he requests. It would simply require a perfunctory remand, permitting Appellees the opportunity to seek leave to amend to include PCSB—a good faith request Appellees have always been willing to make, indeed have already made, should a court find it necessary.

Claiming heads I win, tails you lose, however, Governor Justice remarkably contends that even if a court ultimately finds H.B. 2012 unconstitutional, "charter schools would still be able to come into existence" and Appellees "would not be entitled to a remedy in mandamus" that might require "an election, fix [H.B. 2012], or do anything else for that matter." (Pet'r Opening Br. at 18, 20, 21.) Apparently, Governor Justice could just flout any such judicial order, which evidently would not bind PCSB (even if added as a party) or anyone else for that matter. The Court should not countenance such an injustice; the Constitution, "the organic and fundamental law of the land," Syl. Pt. 2, *Simms v. Sawyers*, 85 W. Va. 245, 250, 101 S.E. 467, 467 (1919), must be followed. And that is all Appellees are asking for in this case.

STATEMENT OF THE CASE

With noted exceptions, this statement reproduces the circuit court's underlying factual findings, which this Court reviews under a deferential, "clearly erroneous standard." Syl. Pt. 1,

Bansbach v. Harbin, 229 W. Va. 287, 290, 728 S.E.2d 533, 536 (2012). Paragraph citations are to the circuit court's order (*see* A.R. Vol. I, at 293–301), omitting excessive quotations to improve readability.

A. Relevant History Relating to the Adoption of Article 12, Section 10

Under the West Virginia Constitution of 1863, the Legislature had exclusive authority to create school districts, including "independent school districts," *i.e.*, those created by special acts to operate independently of existing township districts. (¶ 8.) Those township districts would later evolve into so-called "magisterial school districts." (*Id.*) Both types of districts, independent and magisterial, were considered part of the general system of public education. (*Id.*)

The Legislature's authority to create independent school districts was challenged after it had created, by special act of 1868, an independent school district in Wellsburg, without the assent of the citizens of Brooke County. (¶ 9.) In *Kuhn v. Board of Education of Wellsburg*, the West Virginia Supreme Court rejected the challenge, reasoning that the Legislature had ample and exclusive authority to create the Wellsburg school district under two sections of the 1863 Constitution obligating the Legislature to (1) provide for a "thorough and efficient system of free schools" and (2) "foster" education through "such institutions of learning as the best interests of general education in the State may demand." (*Id.*) Although those two provisions remained in the West Virginia Constitution of 1872 (now, as article 12, section 1 and article 12, section 12), another section was added—article 12, section 10—to nullify the decision rendered the prior year in *Kuhn*. (¶ 10.)

For the next sixty years, many school districts operated within the counties—at one point nearly 400 magisterial school districts and more than 50 independent districts. (¶ 11.) The operation of many school districts was characteristic of public education in late nineteenth and

early twentieth century, still then dominated by small schools and small, independent districts. (*Id.*) The public education system changed in 1933 with the enactment of West Virginia Code § 18-1-1 which defines a "district" for purposes of the Code's chapter on public education as a "county school district" and a "board" as a "county board of education" and section 18-1-3 which further provides, "A school district shall include all the territory in one county." (¶ 12.) The effect of these statutes was to abolish the pre-existing magisterial and independent school districts and replace them with the 55 county school districts, governed by five-member boards. (*Id.*) That governance structure of the public education system has remained in effect until the enactment of the charter school law at issue in this action. (*Id.*)

B. The 2019 Charter School Law

When it was first introduced in the 2019 regular session, education omnibus S.B. 451 defined a "Public charter school" by reference to its organizational independence: "a public corporate body, exercising public power through its governing board" as having "autonomy over decisions relating to finance, personnel, scheduling, curriculum, and instruction," and as "independent of a county board." (¶ 13.) S.B. 451 would have also approved the creation of a mostly independent "West Virginia Public Charter School Commission" as a charter school authorizer. (¶ 15.) Some senators objected to S.B. 451 on the ground that it allowed for the creation of independent school organizations without the consent of a majority of voters in the county in which the charter school would operate—in violation of article 12, section 10. (¶ 14.)

A strike-and-insert version of S.B. 451 passed the Senate but did not advance in the House which adopted instead a motion to postpone indefinitely. (¶ 16.) Governor Justice thereafter called a special legislative session on education matters. (¶ 17.) The West Virginia Department of Education held a series of "public forums as part of a statewide listening tour," seeking input from

the public and key stakeholders on issues raised by S.B. 451 in advance of the special session. (¶ 18.) The Department thereafter released a report, "West Virginia's Voice," stating that "[m]ost participants reported opposition to the creation of charter schools" and noting that "88% disagreed with creating charter schools," among the 690 who submitted comment cards. (¶ 19.) The report recommended to "Place oversight/authorization responsibility with the West Virginia Board of Education and local boards of education." (¶ 20.)

As relevant here, H.B. 206, the charter school bill introduced during the 2019 special session, provided as follows:

- H.B. 206 specified that "All public charter schools established under this article are public schools and are part of the state's public education system."
- H.B. 206 defined "Public charter school" as "a public school or program within a public school [that] meets the general criteria, governance structure and statutory compliance requirements [contained in the statute]."
- H.B. 206 clarified that "The school district in which the public charter school is located remains the local educational agency for all public charter schools authorized by the county board and the public charter school is a school within that local educational agency except that the public charter school is treated as a local educational agency for purposes of applying for competitive federal grants."
- H.B. 206 contained no provision authorizing the creation of a "West Virginia Public Charter School Commission." Instead, county boards of education were designated as the primary charter school authorizers with oversight authority over all authorized charter schools.[4] (¶ 21.)

H.B. 206 passed both the House and Senate and was signed into law by Governor Justice in June 2019. (¶ 22.)

C. H.B. 2012

National charter school groups publicly voiced displeasure with the 2019 charter school

[4] The State Board could also be a charter school authorizer at the request of a county school board or when the State Board has already intervened and limited the power of the county board. (¶ 21 n.2.)

law, disapproving that it limited charter school authorizers primarily to county school boards. (¶ 23.) Then-State "Superintendent Steven Paine said . . . that the National Alliance for Public Charter Schools [was] so displeased with West Virginia's law, they wouldn't provide assistance in designing the state's new charter school policy." (¶ 24.) "'They don't think it's going to work,' [Paine] said." (*Id.*) "'They're used to dealing with private companies that try to make money off of charter schools,' Paine said. 'There are many diverse authorizers that are out there and they think the more the merrier.'" (*Id.*)

On July 24, 2020, West Virginia Academy submitted the first and, at that time, the only application for a charter school to county boards of education—in that instance, to the boards of education for Monongalia County and Preston County. (¶ 25.) The Monongalia County Board of Education unanimously voted to deny that application on November 30, 2020. (*Id.*) Shortly thereafter, commenting on the upcoming 2021 regular legislative session, Senator Patricia Rucker emphasized the need to make changes to the 2019 charter school law, to "establish an authorizing body for approving [charter] schools." (¶ 26.) "Rucker noted she planned to push changes before the local boards' decisions," contending that "local education leaders will reject charter schools, as they perceive the institutions as competition to public institutions." (*Id.*)

H.B. 2012 reversed provisions of the 2019 charter school law that previously subjected charter schools to the oversight of state and county boards of education. (¶ 27.) The relevant changes included the following:

- Striking language maintaining the county school district as the "local educational agency," H.B. 2012 provides instead that "Any public charter school authorized pursuant to this article shall be treated and act as its own local education agency for all purposes."

- H.B. 2012 strikes language that required the charter school contract to include "The specific commitments of the authorizer relating to its obligations to oversee, monitor the progress of, and supervise the public charter school."

- H.B. 2012 permits a charter school applicant to appeal the decision of a county board of education denying the application. It further permits such an appeal when a county board of education fails to renew a charter contract.

- H.B. 2012 establishes the "West Virginia Professional Charter School Board" (PCSB) as a charter school authorizer. PCSB "shall report directly to and be responsible to the state board separate from the Department of Education," although it is subject to the State Board's supervision "solely for the purposes of accountability for meeting the standards for student performance."

- PCSB is appointed by the Governor; confirmed by the Senate; permitted to appoint an executive director and staff; authorized to create, renew, nonrenew, or revoke charter schools; entitled to civil liability immunity; afforded discretion to audit PCSB-authorized charter schools; and empowered to "take corrective actions or exercise sanctions" for charter school law violations.

- H.B. 2012 divests county boards of education of "management and control" over PCSB-authorized charter schools. Except on the issue of "student performance," H.B. 2012 also divests the State Board of general supervision over PCSB-authorized charter schools. (*Id.*)

H.B. 2012 passed the House and Senate and was signed into law by Governor Justice on March 11, 2021. (¶ 28.)

D. PCSB Has Since Authorized Charter Schools

On July 2, 2021, Governor Justice appointed five individuals to PCSB. (¶ 29.) On November 10, 2021, PCSB approved three applications for brick-and-mortar charter schools: Nitro Preparatory Academy in Kanawha County, Panhandle Preparatory Academy in Jefferson County, and West Virginia Academy in Monongalia County. (¶ 30.) A week later, PCSB approved two applications for virtual charter schools: West Virginia Virtual Academy and Virtual Preparatory Academy of West Virginia. (¶ 31.) PCSB authorized both virtual charter schools to operate statewide. (*Id.*)

E. Procedural History

On September 29, 2021, Petitioners-Plaintiffs Sam Brunett and Robert McCloud ("Appellees" here for clarity) initiated this action challenging the provisions of H.B. 2012, relating

to charter schools authorized by PCSB, as violative of article 12, section 10, absent the consent of county voters. (¶ 1.) They sued Respondents-Defendants Governor Jim Justice, House Speaker Roger Hanshaw, and Senate President Craig Blair ("Appellants" here for clarity) in their official capacities relating to H.B. 2012 and the West Virginia Constitution. (¶¶ 4–6.) Appellees' petition seeks compliance with section 10 in the form of mandamus and declaratory relief or, alternatively, injunctive relief as well as attorney's fees and costs. (¶¶ 1, 7.)

Following the commencement of this suit, the Senate confirmed Governor Justice's PCSB appointments on October 20, 2021. (¶ 29.) Days later, and prior to PCSB's authorization of five charter schools, Appellees filed a Motion for Preliminary Injunction on November 2. (¶ 32.) On November 29, Appellants filed a Response in Opposition to the Motion for Preliminary Injunction together with a Motion to Dismiss. (¶ 33) The Motion to Dismiss repeated most of Appellants' arguments in opposition to the preliminary injunction. (*Compare* A.R. Vol I at 58–77 *with* 78–98.) Appellees noticed the hearing on the Motion for Preliminary Injunction for December 14. (¶ 35.) Because Appellees' Reply in support of a preliminary injunction responded to Appellants' Motion to Dismiss, the circuit court also heard argument from counsel on the Motion to Dismiss. (*Id.*)[5]

During the December 14 hearing, Appellants did not object to the admission of Brunett and McCloud's affidavits. (¶ 36.) The circuit court also heard testimony from Appellees' fact witness, Professor Robert M. Bastress, Jr., regarding the relevant history of the adoption of article 12,

[5] The parties also consented to two separate Motions for Leave to File Amicus Brief by Mountain State Learning Solutions, Inc. (MSL), and the National Coalition for Public School Options (NCPSO) (¶ 34.) During the preliminary injunction hearing, Appellant's counsel moved for the circuit court's consideration of the affidavit of Bryan Hoylman, submitted as an exhibit to MSL's amicus brief. (¶ 37.) Appellees filed an objection and Appellants replied. (¶ ¶38–39.) The circuit court did not rule directly on the admissibility of the affidavit but concluded that, "even assuming" its admissibility, "the greater overall harm will result from not issuing a preliminary injunction, including greater harm to would-be charter school operators" like MSL. (¶ 105 n.7.)

section 10. (*Id.*) The circuit court found Professor Bastress's corresponding affidavit and testimony, under direct and cross examination, to be informative and persuasive. (*Id.*)

On December 20, the circuit court announced its ruling. (¶ 36.) Appellants then moved to stay the preliminary injunction, pending an appeal. (*Id.*) The circuit court, having considered the objections thereto, denied the motion to stay. (*Id.*) The circuit court's written order granting the preliminary injunction was entered on January 20, 2022. (A.R. Vol. I at 292.)

Appellants renewed their request for a stay, which the Court granted on February 23. A week later, Appellees moved to expedite the briefing to mature the appeal for consideration by June 1, 2022—prior to PCSB-authorized charter schools receiving the first state funding disbursement on July 1, 2022. Meanwhile, on March 15, 2022, PCSB announced it had approved operating contracts for each of the five charters schools it had authorized, clearing the way for the schools to begin operating in the fall 2022.[6] The Court thereafter denied Appellees' motion to expedite the appeal.

During its most recent public meeting, PCSB projected that four of the five charter schools that are planning and prepared to begin operating in the fall 2022 will have a total enrollment of approximately "1,500 students" with funding of "$9 to $11 million."[7]

SUMMARY OF ARGUMENT

Governor Justice's appeal is premised almost entirely on disclaiming responsibility for, and power to execute, H.B. 2012. It is a classic case of misdirection: Appellees are not seeking to

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[6] *See* Liz McCormick, *Board Approves Contracts For W.Va.'s 5 Charter Schools*, WEST VIRGINIA PUBLIC BROADCASTING (Mar. 15, 2022), https://www.wvpublic.org/section/education/2022-03-15/board-approves-contracts-for-w-va-s-5-charter-schools.

[7] *See* Steven Allen Adams, *Public Charter Schools Making Enrollment Progress in West Virginia*, PARKESBURG NEWS & SENTINEL (JUN. 9, 2022), https://www.newsandsentinel.com/news/business/2022/06/public-charter-schools-making-enrollment-progress-in-west-virginia/.

enforce H.B. 2012, they are seeking to enforce section 10 *against* H.B. 2012. The Constitution vests Governor Justice with both the responsibility and power to execute section 10. That is why, with Appellees' standing here secured, Governor Justice must argue that the Court should either rewrite section 10 or consider it a dead letter. Obviously, the Court can do neither.

Accordingly, given Appellees' likelihood of success on the merits, Governor Justice's appeal is left in the untenable position of arguing that he somehow will be *irreparably injured* by complying with the Constitution but yet Appellees will suffer *no harm* if they are deprived of their constitutional right to vote. Neither argument merits the Court's serious consideration. At last, Governor Justice argues that H.B. 2012 effectively trumps section 10, upsetting the hierarchy of legal authority. But the People's sovereign will for direct democracy expressed in section 10 cannot be subverted in favor of their representatives' policy preferences.

STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument under Rule 20 because this case involves "issues of fundamental public importance," implicating "constitutional questions regarding the validity of a statute."

ARGUMENT

The Court reviews the grant of a preliminary injunction under a "three-pronged deferential standard of review," considering (1) "the ultimate disposition under an abuse of discretion standard," (2) "the circuit court's underlying factual findings under a clearly erroneous standard," and (3) "questions of law de novo." Syl. Pt. 1, *Bansbach*, 229 W. Va. at 290, 728 S.E.2d at 536. Applying the abuse of discretion standard, this Court "will not disturb a circuit court's decision unless the circuit court makes a clear error of judgment or exceeds the bound of permissible choices in the circumstances." *Gribben v. Kirk*, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995). Even if this Court "may not necessarily have obtained the same result" as the circuit court below, a "mere

disagreement with such a ruling does not automatically lead to the conclusion that the lower court abused its discretion." *State v. Allen*, 208 W. Va. 144, 155, 539 S.E.2d 87, 98 (1999). Rather, the circuit court's "decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed." *Id.*

It cannot be said with firm conviction that the circuit court's decision "exceeds the bounds of permissible choices." Nor has Governor Justice carried the burden of showing that the circuit court's factual findings underlying its legal conclusions were erroneous, much less *clearly* erroneous.

Concerning any unsettled questions of law that this Court reviews de novo, the applicable standard for the issuance of a preliminary injunction is a showing "of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: (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." *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 366, 844 S.E.2d 133, 137 (2020).

Considering the "flexible interplay" between these four factors, *see Jefferson Cnty. Bd. of Educ. v. Jefferson Cnty. Educ. Assoc.*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990), the circuit court concluded that Appellees had "established the balance of the hardships weigh in favor of granting a preliminary injunction." (A.R. Vol. I at 311, ¶ 77.) This Court should affirm that decision because each of the preliminary injunction factors favors Appellees, starting with their likelihood of success on the merits which may be this Court's "primary focus" on the constitutional question. *See Justice v. W. Va. AFL-CIO*, 246 W. Va. 205, 866 S.E.2d 613, 620 (2021) ("*Justice*").

A. Appellees Are Likely to Succeed on the Merits

Appellees are likely to succeed on the merits because H.B. 2012 violates section 10 by establishing PCSB-authorized charter schools as independent school organizations, created in school districts, without the consent of affected county voters. It is that simple and straightforward. Governor Justice must therefore try to dodge and befuddle this suit, arguing that (1) Appellees sued the wrong parties, (2) the circuit court's order offends separation of powers, and (3) that section 10 does not apply to PCSB-charter schools. Each argument fails.

1. Appellees Have Standing

Governor Justice's primary argument is that Appellees sued the wrong parties and thus lack standing. His counsel did not challenge Appellees' factual allegations regarding injury in fact when asked directly by the circuit court about their individual standing. (A.R. Vol. II at 410–411.) And the circuit court indeed concluded that Appellees have adequately alleged injury in fact. (A.R. Vol. I at 304, ¶50.) Governor Justice yet maintains on appeal a lack of causation and redressability.

On those requirements, it is telling that Governor Justice relies mostly on federal court decisions. Though perhaps informative, this Court is not bound "the constraints of Article III" or federal "limitations of case or controversy" as interpreted by federal courts. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). In West Virginia courts, standing is a prudential, not constitutional, requirement that has been developed in reference to decisions on declaratory judgments. *See Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94–95, 576 S.E.2d 807, 821–22 (2002). Hence, diverging from federal court doctrine, this Court has permitted more generalized grievances "brought by any citizens, taxpayer, or voter" to effectuate public rights, like the one at issue here. *See Smith v. W. Va. State Bd. of Educ.*, 170 W. Va. 593, 596, 295 S.E.2d 680, 683 (1982).

Respecting standing, the Court has held that each person "in our system of government has

the *right* to expect that [their] elected officials, agents and appointees shall comply with the law." *Shobe v. Latimer*, 162 W. Va. 779, 790, 253 S.E.2d 54, 61 (1979) (emphasis added). That is precisely the point of this action.

a. Governor Justice is Causally Connected to Appellees' Injuries

Standing requires a "causal connection [between] the injury and the conduct forming the basis of the lawsuit." Syl. Pt. 5, *Findley*, 213 W. Va. at 94, 576 S.E.2d at 821. A substantial part of the conduct that forms the basis of this action surrounds H.B. 2012. Governor Justice signed H.B. 2012 into law but now protests that if that alone were sufficient to form a causal connection, then any governor could be hauled into court whenever a bill he signed into law becomes the basis for a lawsuit. Not so. There are two limiting principles in effect here.

First, Governor Justice was on notice, prior to signing H.B. 2012, that it had a constitutional infirmity conflicting with section 10. That conflict was a widely reported point of contention when the charter school law was first debated in the Legislature, as the circuit court found. (A.R. Vol. I at 295, ¶ 14.) It did not escape the attention of Governor Justice, who called a special session on education, when that first charter school bill failed. (*Id.* at 296, ¶ 17.) The section 10 conflict was also the reason that the 2019 charter school law enacted during that special session made school boards the primary authorizers, so that school-board-authorized charter schools would not be "independent" and thereby trigger section 10. (*See id.* at 296–97, ¶ 21.) And yet, that independence was a motivation for the 2021 changes to the charter school law—H.B. 2012 and its establishment of PCSB as a charter school authorizer. (*See id.* at 297–99, ¶¶ 23–27.) Notwithstanding the bill's checkered history, Governor Justice signed H.B. 2012 into law. (*Id.* at 299 ¶ 28.) He has not and cannot now show that these factual findings are clearly erroneous.

So, no, not every bill that a governor signs into law causally connects him with a lawsuit.

The vast majority of bills, drafted with the assistance of counsel, have no facial constitutional infirmity, most bills certainly do not earn such high-profile notoriety. But where, as here, the infirmity is so credibly and publicly alleged *and* the attempt to circumvent that infirmity is the whole purpose for the challenged bill, then, yes, a governor who signs such a bill into the law is casually connected to the inevitable lawsuit.[8] This, of course, would not make the governor automatically at fault for signing the bill—the governor's interpretation of the law might be correct, or he might otherwise have a valid defense—but it should be *at least* sufficient for standing purposes, as the Court has made clear in that context, the People have "the right to expect" and demand his compliance with the law. *Shobe*, 162 W. Va. at 790, 253 S.E.2d at 61.

Second, and alternatively, Governor Justice failed to discharge his special duty to the Constitution to execute section 10 *after* signing H.B. 2012 into law. *See* W. Va. Const. art. 7, § 5; *Cooper v. Gwinn*, 171 W. Va. 245, 256, 298 S.E.2d 781, 792 (1981) ("[T]he Governor, as chief executive officer has a duty to faithfully expedite the will of the people as expressed in the Constitution."). That special duty would not have necessarily precluded Governor Justice from signing H.B. 2012 into law in the first place, provided that he otherwise complied with section 10 by fixing times for special elections in the affected counties, as section 10 requires. His failure to do so provides another causal connection to Appellees' injuries.

To be sure, as Governor Justice observes, some federal courts have concluded—in the context of claims barred by the Eleventh Amendment—that a governor's "general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." *See Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001).

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[8] At best, Governor Justice was deliberately indifferent to prior notice of H.B. 2012's constitutional infirmity which may, in other contexts, establish a causal link to constitutional injuries sufficient to confer standing. *Cf. Randall v. Prince George's Cnty., Md.*, 302 F.3d 188, 206 (4th Cir. 2002).

Other federal courts, however, have concluded that a governor's general duty to enforce "the laws of the state" can satisfy standing requirements. *See Petrella v. Brownback*, 697 F.3d 1285, 1294 (10th Cir. 2012); *Hernandez v. Grisham*, 499 F.Supp.3d 1013, 1052 (D.N.M. 2020) (same).

This Court need not resolve that split of federal authority. Those federal courts that have insisted on a governor's specific or special duty deem it necessary for suit in *federal court* under the *Ex parte Young* exception to the Eleventh Amendment. *Gilmore*, 252 F.3d at 331. Although the U.S. Supreme Court recognized that permitting suit without that "special relation" to the challenged statute "would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law," it judged a special relation important *because of the Eleventh Amendment*—"it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." *Ex parte Young*, 209 U.S. 123, 157 (1908).

The Eleventh Amendment presents no such barrier here and therefore this Court should not labor under that line of reasoning. Other state supreme courts recently have not "because of the unique powers and responsibilities vested in the office of the Governor by [their] state constitution." *See, e.g.*, *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1257 (Ind. 2020); *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, __S.W.3d __, 2022 WL 1561546, at *5 (Tenn. May 18, 2022) (concluding that plaintiffs had standing against governor in action challenging bill signed into law violative of state constitutional amendment).

This Court will also, of course, be guided by its own precedents and our own Constitution. To that end, in the most recent constitutional challenge brought against Governor Justice, this Court decided the propriety of a preliminary injunction that was more far reaching than the one at issue here, "enjoining [a] new law from taking effect," even though Governor Justice had no

special or specific duties to enforce the challenged bill, H.B. 2009, that he signed into law. *Justice*, 246 W. Va. 205, 866 S.E.2d at 617. In fact, the commissioner of labor, not the governor, is explicitly charged with enforcing certain statutory provisions affected by H.B. 2009. *See* W. Va. Code § 21-5-11.

Justice and Governor Justice's current position cannot be reconciled—the former is binding precedent; the latter is unpersuasive argument.

Governor Justice's current position also cannot be reconciled with other decisions of this Court that did not dismiss the governor for lack of standing despite no evidence of any special or specific duty under the challenged statute. *See, e.g.*, *State ex rel. League of Women Voters of W. Va. v. Tomblin*, 209 W. Va. 565, 568, 550 S.E.2d 355, 358 (2001) (mandamus petition challenging budget digest practices required by W. Va. Code § 4–1–18 (1969)); *W. Va. Educ. Ass'n v. Consol. Pub. Ret. Bd.*, 194 W. Va. 501, 507, 460 S.E.2d 747, 753 (1995) (mandamus action contending unconstitutional administration of unfunded liabilities under W. Va. Code 18–9A–6a(c)); *McGraw v. Caperton*, 191 W. Va. 528, 531, 446 S.E.2d 921, 924 (1994) (declaratory action for a "determination of his rights and responsibilities under W. Va. Code § 5A–3–13").

None of this is to suggest that a governor is a proper defendant in *every* constitutional challenge to a law that he signs and has a general duty to execute. Nor does resolving this appeal require the Court to foresee and delineate all the potential circumstances that could casually link a governor with a challenged law. *See State v. Whittaker*, 221 W. Va. 117, 122, 650 S.E.2d 216, 221 (2007) ("Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes."). Rather, the Court can and should decide this matter based on the particular facts and law of *this case*: (1) the special circumstances of Governor Justice's prior notice of, and deliberate indifference to, H.B. 2012's constitutional infirmity before signing it into law or,

alternatively, (2) his failure to discharge his special duty to execute section 10 after signing H.B. 2012 into law. Each causally connects Governor Justice to the failure to act that forms the basis of this action and Appellees' injuries.

b. Governor Justice Is Empowered to Redress Appellees' Injuries

For there to be standing, "*it must be likely that the injury will be redressed through a favorable decision of the court.*" Syl. Pt. 5, *Findley*, 213 W. Va. at 94, 576 S.E.2d at 821. Governor Justice challenges redressability both as to the circuit court's preliminary injunction as well as the underlying mandamus action in terms of Appellees' likelihood of success on the merits. Starting with the latter challenge, because the Court is without jurisdiction at this time to consider the denial of the motion to dismiss for failure to state a claim, the primary focus here will be to emphasize that the circuit court did not commit clear error of judgment in concluding a likelihood of success on mandamus relief against Governor Justice.

i. Governor Justice is Empowered to Provide Mandamus Relief

Governor Justice maintains that section 10 "is proscriptive, not prescriptive" and creates no mandatory duty on him to act. (Pet'r Opening Br. at 20, 21.) That directly contradicts how the Court has construed section 10. In no uncertain terms, the Court has said that, under section 10, "the people have a *right to speak* before an independent school district may be [created]." *Leonhart*, 114 W. Va. at 14, 170 S.E. at 420 (emphasis added). Such a right imposes a correlative duty. *See Hedges v. Price*, 2 W. Va. 192, 224 (1867). Section 10, after all, includes the word "shall" which this "Court has held on numerous occasions . . . connotes a mandatory duty." Sly. Pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 657, 171 S.E.2d 480, 483 (1969).

This surely explains why the Court surmised that if a legislative act violated section 10 "the solution would be simple, the constitutional mandate would be carried out, *and* the act would

be declared unconstitutional." *See Casto v. Upshur Cnty. High Sch. Bd.*, 94 W. Va. 513, 119 S.E. 470, 472 (1923) (emphasis added). The conjunction there is not disjunctive. Declaratory relief would not suffice, in other words, section 10's mandate, *i.e.*, a special election in the affected counties, would have to be "carried out."

The circuit court did not commit clear error in judging the likelihood that mandamus could lie against Governor Justice to carry out that duty. Section 10 is silent as to which entity should carry out its mandate to direct special elections in affected counties before the creation of independent public schools. The Court has previously looked from a historical point of view as to whether the "power in question"—here the power to order special elections—"existed at the time of the adoption" of the Constitution. *See State ex. rel. Dillon v. Braxton Cnty. Court*, 60 W. Va. 339, 384, 55 S.E. 382, 384 (1906).

During the first constitutional convention, the governor was granted such authority to provide "for a special election to fill such vacancy," in the event that an elected officer failed to take his oath of office. *See Hawver v. Seldenridge*, 2 W. Va. 274, 279 (1867). That the governor was entrusted with such power during the organization of the state government demonstrates faith in his office. Later, the governor's power to "issue a writ of election" to fill a vacancy on this very Court was ratified in the 1872 Constitution. W. Va. Const. 1872 art. 8, § 7. That power to "issue a directive of election to fill such a vacancy" on this Court and the circuit courts was retained in the current Constitution, as amended. W. Va. Const. art. 8, § 7.

Both the Constitution of 1863 and 1872 also empowered the Legislature to prescribe the general laws for conducting elections. W. Va. Const. 1863 art. 3, §§ 8, 12; W. Va. Const. art. 4, §§ 7, 8; art. 7, § 2. And the Legislature has since exercised that authority, for example, to empower the governor, in turn, to fix times for special elections in other instances. *See, e.g.*, W. Va. Code

§§ 3-10-1(c)(1), 3-10-2, 3-10-4(a)(1). But, importantly, the Legislature has failed to prescribe general laws relating to the manner of conducting section 10 special elections. In the absence of such implementing statutory law, it is incumbent on a governor, discharging his or her constitutional authority to take care that the laws be faithfully executed, to carry out section 10's mandate.

The fact that section 10 does not name or direct a government officer or entity responsible for issuing special elections makes it non-self-executing—not unenforceable. The Court has instead explained the approach that it will take under such circumstances:

> When the Constitution is silent on a particular issue, the solution cannot be found in a methodology that requires [the Court] to assume or divine the framers' intent on an issue which most likely was never considered. Rather, the solution must be found in a study of the specific provision of the Constitution and the best method to further advance the goals of the framers in adopting such a provision.

Randolph Cnty. Bd. of Educ. v. Adams, 196 W. Va. 9, 22, 467 S.E.2d 150, 163 (1995).

We cannot now discern, nor should we presume to understand, the reasons the framers omitted from section 10 a responsible government officer or entity. It "mostly likely was never considered" in earnest. Nevertheless, the solution here presents itself, considering that, when section 10 was ratified in 1872, the governor was the only statewide officeholder entrusted with express constitutional authority to fix a time for a special election. *Cf. State ex rel. McGraw v. Burton*, 212 W. Va. 23, 36–40, 569 S.E.2d 99, 112–16 (2002) (employing *Adams* approach to ascertain attorney general's constitutional functions). Recognizing the governor's authority to faithfully execute section 10 is not inconsistent with the framers' goals; indeed, it advances those goals most efficiently.

This Court followed similar logic in a case that is decidedly on point: *Citizen Action*. There, the Court was tasked with interpreting another non-self-executing constitutional provision—article

7, section 16—that also does not name or direct a government officer or entity to execute its mandate to hold a special election for governor when there is a vacancy in the office. 227 W. Va. at 694, 715 S.E.2d at 43. Like section 10 here, the Court observed that the language of section 16 there was "plain and unambiguous" and of a "mandatory nature" also employing the word "shall." Syl Pt. 5, *Id.* ("As used in constitutional provisions, the word 'shall' is generally used in the imperative or mandatory sense.").

The Court further emphasized that section 16 was consistent with "the right of the people to elect their highest public officials," rejecting other constructions that "would be in conflict with [that] right." 227 W. Va. at 695, 715 S.E.2d at 44. Appellees are here seeking to give the same effect to the People's right to vote enshrined in section 10. Unlike with section 10, however, the Legislature enacted implementing statutory law for section 16—W. Va. Code § 3-10-2—recognizing, as the Court noted, that it needed "to create a mechanism to fulfill [its] constitutional mandate." *Id.* Although the statute mostly "reproduces verbatim" section 16, it included language that "the acting governor shall issue a proclamation, fixing a time for a special election to fill such vacancy." *Id.* at 696, 715 S.E.2d at 45. The statute provides such a proclamation "by the person acting as Governor *pursuant to* the State Constitution," section 16, specifically. W. Va. Code § 3-10-2(b) (emphasis added).

Exercising its original jurisdiction, the Court granted a writ of mandamus that directed then-acting Governor Tomblin "in executing *his duty to act as governor*, forthwith to issue a proclamation to fix a time for a new statewide election to fill the vacancy." 227 W. Va. at 697, 715 S.E.2d at 46 (emphasis added). For all of Governor Justice's complaints here about the possibility of being subject to mandamus or injunctive relief, it is worth reiterating that this Court did not hesitate to effectuate section 16's mandate in *Citizen Action*.

Here too, it advances the framer's goals for section 10 to allow for the possibility that the governor is best positioned to fix times for special elections in affected counties before the creation of independent schools. For PCSB-authorized charter schools in particular, the timing for the creation of such schools will vary, depending on the circumstances of the counties in which they are authorized. Only the governor or designate can act expeditiously with statewide authority to ensure that a special election in the affected counties takes place.

Governor Justice's suggestion that the State Superintendent of Schools or a county board of education could provide better relief, (Pet'r Opening Br. at 14), is belied by the fact that neither has any involvement in the creation of PCSB-authorized charter schools. And their lack of involvement is by design and part of the reason that H.B. 2012 is unconstitutional. More to the point, the Superintendent lacks power to issue special elections in the affected counties and county school boards—creatures of statute—are only statutorily authorized to hold levy elections. *See* W. Va. Code §§ 11-8-16, 11-8-17. For sure, the Legislature could authorize the Superintendent or county school boards to fix times for special elections on the creation of independent public schools, as section 10 requires, but unless and until it does so, Governor Justice is best positioned with ample authority to execute the Constitution.

Accordingly, it cannot be said with firm conviction that the circuit court here committed clear error of judgment by simply reserving the possibility that mandamus could lie against Governor Justice to fix times for section 10 special elections. A contrary conclusion would unduly rebuke the circuit court and Appellees for following the above-cited authorities while excusing the Legislature's failure to enact a section 10 statutory mechanism or procedure. It would also be especially unwarranted where, as here, the circuit court has not yet issued mandamus relief and

was merely contemplating it in assessing Appellee's likelihood of success on the merits.[9]

ii. Governor Justice is Empowered to Provide Injunctive Relief

Passing the buck, Governor Justice has expended extensive effort in this action pointing the finger at PCSB, contending Appellees should have sued this new state agency instead of the state's chief executive. Setting that contention aside for the moment, the circuit court had a firm basis in state law for granting the preliminary injunction against "the Governor, the Governor's executive officers, agents, or employees, and any persons acting concert or participation with them." (A.R. Vol. I at 322.)

First and foremost, as the circuit court concluded, the Constitution supplies the basis for enjoining Governor Justice, as "the head of the Executive Department," *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 169, 279 S.E.2d 622, 631 (1981), with both the duty and authority to ensure that "*all* executive agencies comply" with the Constitution. Syl. Pt. 13, *Allen v. State, Hum. Rts. Comm'n*, 174 W. Va. 139, 162, 324 S.E.2d 99, 123 (1984) (emphasis added). The Court long ago explained that ensuring all agencies comply with the law means, at minimum, that the governor will "make[] it his duty carefully to observe the manner in which the different officers of the

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[9] Although not properly before the Court at this time, Appellants contend that the circuit court erred in reserving the possibility that mandamus could lie against the Legislature's presiding officers. (A.R. Vol. I 305–306, ¶¶56–57.) They admit that the "Legislature *could* modify H.B. 2012 to provide for a countywide vote," but deny that the Legislature "must" do so and further deny that a court can direct the Legislature to do anything. (Pet'r Opening Br. at 20.) That directly contradicts the Court's precedents that a court may "issue an extraordinary writ against the Legislature when the law requires." Syl. Pt. 3, *State ex rel. Workman v. Carmichael*, 241 W. Va. 105, 121–22, 819 S.E.2d 251, 267–68 (2018). In response, Appellants suggest that *Carmichael* was an aberration, and the Court should either apply it only to impeachment proceedings or effectively overrule this syllabus point. (Pet'r Opening Br. at 24–25.) On this point, *Carmichael* is not an anomaly and cited other decisions recognizing mandamus could lie against the Legislature's presiding officers. But this Court need not seriously consider Appellants' invitation to restrict or overrule *Carmichael* because the issue of whether mandamus lies against the Legislature's presiding officers has not yet been decided by the circuit court in this case. *See State ex rel. State Farm Mut. Auto Ins. Co. v. Bedell*, 228 W. Va. 252, 264–65, 719 S.E.2d 722, 734–35 (2011) (explaining that Court will not decide nonjurisdictional questions not first decided by lower court because facts underlying issue are undeveloped). All the circuit court did was reserve that possibility, upon further factual development, based on this Court's relatively recent precedents. This is not reversible error, even if it were properly before the Court.

government exercise their proper functions and execute the laws committed to their charge, or their failure to perform such duties, and *when they fail...remove them.*" Syl. Pt. 13, *Shields v. Bennett*, 8 W. Va. 74, 75 (1874) (emphasis added), *overruled in part on other grounds by Simms*, 85 W. Va. 245, 101 S.E. 467.

Consequently, if certain Governor Justice-appointed PCSB members are failing to comply with section 10 by continuing to facilitate the creation of independent schools without the consent of affected county voters, and if PCSB members refuse to temporarily halt that activity in conformity with a duly-authorized circuit court order, then Governor Justice has the obligation and authority to remove them from office, if necessary, to ensure full compliance with the Constitution. *See id.*

Governor Justice attempts to brush off *Allen* and *Shields* because the governor was not a named party in those cases. (Pet'r Opening Br. at 28.) But that is of no import to the quoted syllabus points, considering that *Allen* was determining the respective duties of the governor and a state agency under the Human Rights Act, and *Shields* was clarifying the scope of a governor's duty to faithfully execute the law considering whether other state actors were more properly charged. Neither of the syllabus points from *Allen* and *Shields* has been overruled and Governor Justice supplies no compelling reasons for this Court to revisit them.

Also to no avail, Governor Justice insists that PCSB is a state agency, not the Governor's "agent." (Pet'r Opening Br. at 16.) But neither the Human Rights Commission in *Allen* nor the auditor in *Shields* were the governor's agent and yet the Court held that the governor had the duty and authority to ensure compliance with the law. For purposes of the preliminary injunctive relief granted here—which merely restrained further charter school creation, as opposed to ordering affirmative actions—the state agency-governor's agent distinction is without much difference

because Governor Justice's constitutional authority extends to officers in state agencies within his executive charge. *See* W. Va. Const. art. 7, § 10 ("The governor shall have power to remove any officer whom he may appoint...."); *Rice v. Underwood*, 205 W. Va. 274, 281, 517 S.E.2d 751, 758 (1998) (noting that article 7, section 10 "applies to any *executive branch public officer* appointed by the governor") (emphasis added).

There have indeed been several instances of a governor so directing state agencies, purportedly in compliance with the law. *See, e.g.*, *State ex rel. Crist v. Cline*, 219 W. Va. 202, 209, 632 S.E.2d 358, 365 (2006) (instructing insurance commissioner to *cease* application of death benefits policy for future claims); *Wetzel Cnty. Solid Waste Auth. v. W. Va. Div. Nat. Res.*, 184 W. Va. 482, 484–85, 401 S.E.2d 227, 229–230 (1990) (ordering DNR to *cease* issuing solid waste permits pending passage of legislation); *Queen v. Moore*, 176 W. Va. 27, 28, 340 S.E.2d 838, 839 (1986) (ordering agencies to *cease* withdrawing interest on special revenue accounts).

The circuit court also noted a statutory basis for enjoining Governor Justice: H.B. 2012 explicitly grants a governor statutory authority to remove PCSB members for failing to comply with the law. W. Va. Code § 18-5G-15(g). Governor Justice retorts that the statute merely confers on him the discretion to remove. (Pet'r Opening Br. at 28–29.) But a governor, who might ordinarily have discretion, does not enjoy such privilege when (i) a court has preliminarily enjoined the further creation of independent charter schools and (ii) PCSB members, under a governor's executive charge, then take further steps that directly defy that order. *See Eastern Assoc. Coal Corp. v. Doe*, 159 W. Va. 200, 209, 220 S.E.2d 672, 679 (1975) (admonishing that lower court order "must be obeyed until it is reversed by orderly and proper proceedings, without regard to the constitutionality of the act under which the order issued").[10]

[10] In any event, Governor Justice is further statutorily empowered to remove any person he has appointed "at his will and pleasure," without the necessity to "assign any cause." W. Va. Code § 6-6-4.

The circuit court observed a third and final basis for its authority to extend the scope of the preliminary injunction, as it did, to the Governor Justice's executive officers, agents, or employees, and any "persons acting in concert or participation with them," namely, *West Virginia Rule of Civil Procedure* 65. Governor Justice's brief barely mentions Rule 65, but it directly and explicitly addresses the "Scope of Injunction", and the Court has affirmed its application to a nonparty who was "in active concert or participation" with the named defendant. *See PNGI Charles Town Gaming, LLC v. Reynolds*, 229 W. Va. 123, 125, 127, 727 S.E.2d 799, 801, 803 (2011).[11] As the U.S. Supreme Court observed, Rule 65 "is derived from the commonlaw doctrine that a decree of injunction not only binds the parties defendants but also those...*subject to their control*." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (emphasis added).

Because PCSB is subject to Governor Justice's executive charge and bound by his constitutional directives, the circuit court concluded that "PCSB's participation as a named party to this action is unnecessary." (A.R. Vol. I at 309, ¶ 71.) As the court also observed, it is uncertain whether mandamus could properly lie against PCSB because the Legislature did not empower PCSB to order or administer section 10 special elections. (*Id.* ¶ 72.) The circuit court noted yet another reason Appellees did not sue PCSB: because they are not challenging PCSB's legitimacy or its power to *authorize* charter schools. (*Id.*) Hence, had Appellees sued PCSB, then Appellants likely would have moved to dismiss PCSB, for failure to state a claim. (*Id.*)

But even if the circuit court were mistaken in applying all this authority, then at most that calls for remand, not dismissal of this action. Appellees have repeatedly offered "to seek leave to

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[11] As have other courts applying the federal version of Rule 65 with the same language. *See, e.g.*, *SEC v. Homa*, 514 F.3d 661, 674–75 (7th Cir. 2008); *Royal News Co. v. Schultz*, 350 F.2d 302, 303 (6th Cir. 1965); *Al Otro Lado v. Wolf*, 497 F.Supp.3d 914, 930 (S.D. Cal. 2020); *cf. Sisneros v. Nix*, 884 F. Supp. 1313, 1350–52 (S.D. Iowa 1995).

amend to include PCSB" as may be necessary. (*Id.* ¶ 73 n.3.) And the circuit court's order allows for that possibility, stating that if the facts or circumstances change, the court would entertain a "request for leave to amend to add PCSB." (*Id.* ¶ 73.) At that point, it would also be within the circuit court's authority to modify the preliminary injunction to include PCSB. Syl. Pt. 11, *Stuart v. Lake Wash. Realty Corp.*, 141 W. Va. 627, 655, 92 S.E.2d 891, 906 (1956) (explaining such authority "ordinary rests in the sound discretion of the trial court, according to the facts and the circumstances of the particular case").

2. The Preliminary Injunction Follows the West Virginia Constitution

Governor Justice's contention that the circuit court breached separation of powers by temporarily enjoining him to halt the creation of independent charter schools simply retreads his standing arguments fully addressed above and, therefore, Appellees will spare the Court of repeating them here. Suffice it to say, there is a rather large blind spot in Governor Justice's analysis:

> The Constitution of West Virginia is binding upon all the departments of government of this State, all its officers, all its agencies, all its citizens and all persons whomsoever within its jurisdiction. The three branches of our government, the legislative, the executive, and the judiciary, alike derive their existence from it; and all of them must exercise their power and authority under the Constitution solely and strictly in accordance with the will of the sovereign, the people of West Virginia, as expressed in that basic law.

State ex rel. Justice, 244 W. Va. at 233, 852 S.E.2d at 300 and *Citizen Action*, 227 W. Va. at 693–94, 715 S.E.2d at 42–43 (both quoting *Harbert v. County Court*, 129 W. Va. 54, 61–62, 39 S.E.2d 177, 184 (1946)). Governor Justice, the Legislature's presiding officers, PCSB, and this Court are all duty bound to obey article 12, section 10.

3. H.B. 2012 Likely Violates Section 10

For Governor Justice to prevail on the merits of the constitutional issue here, he must convince the Court not to obey, but to rewrite, the Constitution. Otherwise, Governor Justice is

left in the unenviable position of having to argue that independent charter schools are not independent. The circuit court found both arguments unconvincing, as should this Court.

a. Section 10 Applies to the Creation of Any Independent Public School

To be convinced of Governor Justice's position, the Court would have to accept a construction that, from a textual perspective, is linguistically incorrect, and a reading of the case law that, from an originalist perspective, makes revisionist history but no sense. All agree we should start with the plain text:

> No 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. 12, § 10.

Now, then, here is Governor Justice's construction: section 10 "limits the Legislature's authority to 'carve[]' an 'independent school district' 'out of' an existing school district's geographic territory." (Pet'r Opening Br. 31.) Nowhere in section 10 are the words "carve," "existing," or "geographic territory." Elsewhere, Governor Justice uses the words "*reshape*," "change," or "annex," as presumably synonymous with "carve" out. (*See, e.g.*, *id.* at 2, 3, 4.) Those words do not appear in section 10 either. Instead, Governor Justice pulls (out of context) the words carve and annex from early section 10 decisions. But that is the first flagrant foul of constitutional interpretation: "Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it *should be applied and not construed.*" Syl. Pt. 2, *Citizen Action*, 227 W. Va. at 690, 715 S.E.2d at 39 (emphasis added). The Court recently reminded Governor Justice himself on this very point. *See State ex rel. Justice*, 244 W. Va. at 232, 852 S.E.2d at 299.

The circuit court applied (and did not construe) section 10 as it is plainly written to

"prohibit an 'independent free school' being 'created' without the 'consent' of 'a majority of voters.'" (A.R. Vol. I at 313–14 ¶ 88.) The court further explained that the prepositional "phrase 'out of which'" in that sentence is not operating as a "separation prohibition on carving out" as Governor Justice contends, but rather "is modifying 'school district or districts' to indicate which voters must consent to the creation of independent free schools—*i.e.*, only those voters in a school district or districts where an independent free school is to be created." (*Id.*)

The circuit court's application is the linguistically correct one in that it gives effect to the "entirety" of section 10, that is, "*every word or phrase* within the provision," as the Court requires. *Comm. to Reform Hampshire Cnty. Gov. v. Thompson*, 223 W. Va. 346, 353, 674 S.E.2d 207, 214 (2008) (emphasis added) (citation omitted). In contrast, this is how section 10 would have to be rewritten for Governor Justice's *construction* to work:

> No independent free school district, or organization shall hereafter be ~~created~~ *carved out*~~, except with the consent~~ of the *geographic territory of an existing* school district or districts ~~out of which the same is to be created~~, *except with the consent* expressed by a majority of the voters voting on the question *in the school district or districts out of which the same is to be carved out.*

Such a tortured construction is indefensible; it runs afoul of yet another rule of constitutional interpretation: the Court "may not *add to*, *distort* or *ignore* the plain mandates" of a constitutional provision "clear in its terms." *Fields v. Mellinger*, 244 W. Va. 126, 129, 851 SE.2d 789, 792 (2020) (emphasis added) (citations omitted). Even if the Court is not convinced of the "wisdom or expediencies of constitutional provisions," its duty "is merely to carry out the provisions of the plain language stated." *Id.*

Regarding section 10's language, as understood by its framers, standard dictionary definitions dating back to the nineteenth century when it was ratified define "created" firstly as "Formed from *nothing*; caused to exist," etc. *See* NOAH WEBSTER, AMERICAN DICTIONARY OF THE

ENGLISH LANGUAGE DICTIONARY (1828) (emphasis added); CHAUNCEY GOODRICH & NOAH PORTER, WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE: THOROUGHLY REVISED AND IMPROVED (1886) ("To bring into being; to form out of nothing; to cause to exist"). They do not define "created" as something carved out of something else.

Governor Justice thus cannot salvage his construction by further misconstruing the few early section 10 decisions, from which he attempts to constitutionalize the words carve or annex. By his reading of *Kuhn*, you would think that Adam Kuhn's chief complaint was that the Legislature improperly annexed the Wellsburg school district from the Buffalo and Cross Creek townships. But, in fact, Kuhn sued for a personal reason: because he did not want his 67 acres to be assessed to support "a large and costly school building in Wellsburg" under a new "so-called board of education." 4 W. Va. 499, 500–501. His chief complaint, in other words, was one still heard to this day, especially during school consolidations: he did not want to pay more taxes to construct a new school (governed by its own board of education).

True, Kuhn also contended unconstitutional annexation, but the Court flatly rejected that contention: "It does not alter the boundary lines of townships, as argued, it simply *creates an institution of learning*, having jurisdiction for school purposes only over a definite territory embracing one township and parts of two others." *Id.* at 511 (emphasis added). And it was the *creation of the school*, not the annexing of territory, that the Court concluded did not require voter consent: "the assent of [Kuhn and other residents] was not essential to the formation of [the Wellsburg] school; [because] the legislature has the exclusive power to *create* such districts [or schools]." *Id.* at 512 (emphasis added).

When the People ratified section 10 a year later, nullifying *Kuhn*, they were thus prohibiting the Legislature's *creation* of *independent schools* without the assent of the affected

voters, not the annexing of territory for school purposes. If the annexing of territory were the predicate injury, then how can Governor Justice possibly explain *Herold v. Queen*, the first section 10 decision?

There, "Herold and 39 other taxpayers of Nicholas County" also sued complaining of being forced to pay taxes for a new county high school. 71 W.Va. 43, 75 S.E. 313, 314 (1912). Once again, as was common at the time, there was more than one school district in Nicholas County and the legislative act in question did not alter those districts, their governing school boards, or the "amount of property on which to lay their levy." *Id.* at 316. So, no annexing or carving out of territory, and yet, the act did create a mostly independent high school, with its own "board of directors" with power "to levy taxes," *id.* at 314, so why did it not offend section 10?

Because the act *complied with* section 10, providing for a "special election [to be] ordered and taken," on the creation of this high school "and a majority of the votes cast in the whole county was for the high school." *Id.* Although the Court observed that majority of voters in other school districts within the county were against the high school's creation, *id.*, that was not dispositive to trigger section 10's "out of which" phrase because, again, the Court found that the act did not, in fact, create the high school "out of any part of" those other districts, *id.* at 316. So, their consent was not required.

Eleven years later, the Court issued a second, section 10 decision in *Casto* where again a legislative act had created a new high school supervised by its own board of education and superintendent. 94 W. Va. at 516-17, 119 S.E. at 471–72. There too, the "out of which" phrase of section 10 was not triggered to require the consent of the voters in that separate "Buckhannon independent district" because, contrary to Casto's assertions, the new Upshur County high school was not going to be "carved out" of the Buckhannon independent district, whose territory would

be "left intact" and its board "functioning as before." *Id.*

That is the true significance of the "carved out" language that Governor Justice now so desperately wants to insert into section 10 as a separate prohibition, when it was simply a way for the Court to delineate, perhaps inartfully, why the consent of voters in the Buckhannon independent district was not required by section 10 (giving effect to the "out of which" phrase).

What's more, the Court determined that section 10 was not even applicable because the Upshur County high school, while new, would not be "independent of the general system"—"We do not have an independent district"—rather, the Court determined that the new school would function as "part of the general scheme of education." *Id.* at 517, 119 S.E. at 472. *Herold* and *Casto* thus illustrate that the "out of which" phrase indeed modifies "school district or districts" to indicate which voters' consent is required, precisely as the circuit applied it.

Written for a different age, *Kuhn*, *Herold*, and *Casto* are hardly models of clarity, but with careful study on these finer points, it is safe to say they fail to support Governor Justice's maligned construction of section 10. Perhaps most significant for present purposes, the reason section 10 was not offended in *Herold* and in *Casto* is "no longer of consequence," as the circuit court concluded, "because in 1933 the Legislature abolished the system in which counties could have more than one school district and replaced it with the single county school districts." (A.R. Vol. 314, ¶9 1.) "Thus, any new independent school organization created today will necessarily operate within an existing county school district or districts." (*Id.*)

That fact alone triggers section 10's "out of which" phrase *each and every time* an independent public school is proposed to be created in any county school district. And that would be true as well for independent charter schools with recruitment or attendance areas overlapping more than one county school district, in which case "section 10 anticipates that possibility,

requiring then 'the consent of the school district or *districts* out of which the same is created.'" (*Id.* ¶ 91 n.4.)

Because section 10's "out of which" phrase will always be triggered whenever a proposed independent public school is to be created in *any* district, the circuit court found "determinative in this case" whether that school "will be independent." (*Id.* at 315, ¶92.)

b. PCSB-Charter Schools Are Independent; That's the Whole Point

Governor Justice's contortions of section 10 are matched in degree only by the length that he will go to avoid another obvious point: PCSB-charter schools are independent. His maneuvering on this point seems innocuous at first but actually constitutes his most egregious foul of constitutional interpretation yet, with the implication being that section 10 is a dead letter—a relic of a "bygone" era that has no application today. (Pet'r Opening Br. at 35.)

It would be easy to miss that implication because Governor Justice's couches his point as a matter of historical fact: PCSB-charter schools are not exactly like the schools proposed in *Herold* and *Casto*. He incorrectly cites *Casto* for the proposition that independent schools of the late nineteenth, early twentieth century were "independent of the general system of education." (*Id.* at 33.) *Casto* observed just the opposite: "An independent district, [was] a *recognized part of the general [public] school system.*" 94 W. Va. 513, 119 S.E. at 471 (emphasis added). Section 10 after all applies to "free," *i.e.*, public schools, not private schools. So, Governor Justice is just wrong that there is that difference between PCSB-charter schools of today and the independent schools of old. (Pet'r Opening Br. at 33.) Both fall into the public school category.

PCSB-charter schools, like their predecessors, are also independent. Governor Justice says otherwise because PCSB-charter schools are not independent in *all* the same ways as their nineteenth century predecessors. The obvious implication here being that, unless independence is

achieved in exactly the same manner as nineteenth century independent schools, then section 10 does not apply. And the further implication being that, since the Legislature abolished the nineteenth century independent school districts in 1933, then section 10 is effectively dead letter.

The Court should not follow those implications to that offensive end because the Constitution cannot be amended by the Legislature or by judicial decision, but only as ratified by the People. *Fields*, 244 W. Va. at 129, 851 S.E.2d a 792 ("[The Constitution] can be altered or rewritten only in the manner provided for therein."). And unless and until then, it is this Court's duty to effectuate every word of the Constitution. *Id.* The Court did so in *Leonhart*, the third section 10 decision, just a year after the 1933 statutory change that Governor Justice implies makes section 10 no longer applicable. Had that been the effect of that statutory change, as the circuit court concluded, "the Supreme Court's opinion would have easily said so, in a relatively short opinion. Instead, the Court conducted a full analysis, taking section 10 to be good law." (A.R. Vol. I at 316 ¶ 96.)

It would be rather perverse and arbitrary to hold that independence means only what it meant for the now-abolished, pre-1933 independent school districts. And Governor Justice proves just how unreasonable by attempting to distinguish PCSB-charter schools because, unlike their nineteenth century predecessors, they (i) cannot levy taxes, (ii) cannot vary the length of their school year, and (iii) are subject to the same state performance standards as traditional public schools. (*Id.* at 34–35.) But charter schools do not need to levy taxes to operate because, as Governor Justice admits, the State now guarantees their funding through the State aid formula. W. Va. Code § 18-5G-5(a). That *ensures* their independence, even more so than their predecessors, who had to rely on their own tax bases. It is also true that PCSB-charter schools, unlike their nineteenth century predecessors, cannot vary the school year and are held to state performance

standards. But that is because the statutorily prescribed school year and State standards did not exist in the nineteenth century. They are not fair points of comparison.

The most salient point on independence is that PCSB-charter schools are free from "the control and charge of the [county] board of education." *Cf. State ex rel. Nangle v. Bd. of Educ. of Dist. of W. Union*, 81 W. Va. 353, 355, 94 S.E. 500, 502 (1917).[12] That autonomy from county school boards makes them "independent" for purposes of section 10 as West Virginia Constitutional Law expert Professor Bastress explained in his testimony: PCSB-charter schools "have their own governing board and that governing board exists apart from the county board of education, which has no responsibility or control or authority over the charter schools." (A.R. Vol. II at 400.) It is that independence from county school board oversight and supervisory powers which provoked this very action to H.B. 2012 in 2021 but did not provoke a similar challenge to the 2019 charter school law because, under the 2019 version, county school boards were the primary charter school authorizers with supervisory authority over charter schools.

For all his historical references, that is the bit of history that Governor Justice hopes to sweep under the rug, *i.e.*, the circuit court's factual findings that H.B. 2012 was designed to make PCSB-charter schools as independent as they could possibly be and still be called public schools. Indeed that was the whole point: to evade county school board authorization and supervision. (*See* A.R. Vol. I at 297–98 ¶¶ 23–27; 318 ¶ 102.) No matter the history, the circuit court soundly concluded, beyond reasonable doubt, the likelihood of future success on the merits, articulating all the reasons that PCSB-charter schools are independent for section 10 purposes. (*Id.* at 316–18 ¶¶ 97–102.) Appellees stand by those reasons, which Governor Justice has not refuted.

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[12] That understanding is consistent with the ordinary meaning of the word "independent" as defined at ratification. *See* WEBSTER, *supra* (listing first definition of "independent" as "Not dependent; not subject to the control of others"); GOODRICH & PORTER, *supra* (same).

B. Governor Justice Is Not Irreparably Injured By the Preliminary Injunction

Governor Justice contends that *any* time a statute is enjoined, the State suffers irreparable injury. Even assuming Governor Justice can assert the State's injury as his own in these circumstances, this presumption of injury exists under non-binding federal authority. And even under that authority, it is a presumption that does not *always* hold true, particularly where, as here, it is likely that the challenged statute deprives the People of a constitutional right to vote. *Abbott v. Perez*, __U.S.__,138 S. Ct. 2305, 2324 (2018) (agreeing with presumption "[u]nless the statute is unconstitutional"); *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1054 (D.N.D. 2020) (concluding any "harm to the state is outweighed by the harm inherent in the deprivation of the Plaintiffs' fundamental right to vote").

Binding West Virginia precedent does not support such an overly broad presumption each and every time an unconstitutional statute is enjoined. Indeed, as the Court has recently reaffirmed, "[t]he provisions of the Constitution . . . stand upon a *higher plane than statutes*, and they will as a rule be held mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required." *State ex rel. Justice*, 244 W. Va. at 232, 852 S.E.2d at 299 (quoting *Simms*, 85 W. Va. at 250, 101 S.E. at 467) (emphasis added). Applying *State ex rel. Justice*, Governor Justice cannot be said to be injured (much less *irreparably* injured) by complying with an injunction that merely demands compliance with the Constitution. His few arguments to the contrary restate his standing arguments which merit no further reply.

C. Appellees Will Be Irreparably Injured Without the Preliminary Injunction

Governor Justice contends that Appellees will not be irreparably injured by the creation and operation of PCSB-charter schools because section 10 special elections can still happen after the fact. But he completely fails to address, and therefore waives any argument against, the circuit court's conclusion that an after-the-fact vote will needlessly cause further harm:

> Any attempt to undo the creation of PCSB-authorized charter schools will prejudice the vote of affected county voters, will harm would-be charter school parents and children who, at that point, would have more reason to rely on their creation, and will frustrate would-be charter school operators, including school personnel, who would have expended time and resources to commence charter school operations."

(A.R. Vol. I at 319 ¶ 105.)

Governor Justice instead cites prior section 10 decisions, noting that they were "filed *after* the challenged school had been created" and that "[t]here was no question in those cases that the State's courts could award meaningful relief at the case's end." (Pet'r Opening Br. at 36–37.) The latter point is exactly correct: the Court did not address that question and, thus, those decisions are not authority for Governor Justice's assurances of after-the-fact relief. The former point is misleading: true, *Herold* and *Casto* were brought after because the schools were created by legislative act (hence, the legal challenges could *only* come afterwards). H.B. 2012 does not create charter schools by legislative fiat; it establishes a process for their creation, leaving some time before their creation for a special election. *Leonhart* was a challenge to the abolition of an independent school district, not its creation, so that decision is inapposite.

Governor Justice's citation to *Board of Education of Flatwoods District v. Berry* actually supports the circuit court's conclusion of the likelihood of further irreparable harm in the undoing of charter schools after their creation. 62 W. Va. 433, 59 S.E. 169 (1907). Having noted irregularities in the section 10 special election there, the Court concluded it would not undo the creation of the independent school district because that case presented a *collateral* attack and, under those circumstances, the Court was satisfied that the voters had "acquiesced" in its creation. *Id.* at 59 S.E. at 171–72. Perhaps Governor Justice is hoping a court will do the same here, after PCSB-charter schools are created and in operation, simply conclude that voters have acquiesced. But unlike *Berry*, this action presents a *direct* attack on the creation of PCSB-charter schools and

the Court indicated under those circumstances, "it might be forced to hold the [creation of the offending school] void." *Id.* at 172. The voiding of PCSB-charter schools would cause the further harms the circuit court projected, which go unanswered in Governor Justice's opening brief.

But it is worth pausing to consider what Governor Justice does suggest: that a court could award "meaningful relief" to Appellees after PCSB-charter schools are created and in operation. (Pet'r Opening Br. at 37.) What relief exactly? Section 10 mandates a special election before the creation, not after. Is Governor Justice suggesting then that Appellees and all others similarly deprived of their constitutional right to vote would be entitled to a damages award?

D. The Public Interest Favors The Preliminary Injunction

The preliminary injunction would effectuate the People's will and thereby serve the public interest. *See Casto*, 94 W. Va. at 517, 119 S.E. at 471 (noting section 10 "requires the sanction of *the people affected.*") (emphasis added); *cf. United Mine Workers of Am. Int'l Union by Trumka v. Parsons*, 172 W. Va. 386, 398, 305 S.E.2d 343, 354 (1983) ("[T]o operate in the 'public interest' is analogous to the obligation imposed upon state government by the West Virginia Constitution to act 'for the common benefit, protection and security of the people.'"). Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013).

Against the constitutional right to vote, Governor Justice says there might be delays in the statutory aims of H.B. 2012 to improve student achievement and expand parental choice. But as the circuit court concluded, no harm, certainly no *irreparable* harm, will befall the approximately 1,500 charter school students by their continued attendance in traditional public schools "provided those public schools are thorough and efficient, that is constitutionally adequate and equitable, as article 12, section 1 requires. *See Pauley v. Kelly*, 162 W. Va. 672, 672, 255 S.E.2d 859, 861

(1979)." (A.R. Vol. I at 321 ¶ 112.) It would be a stunning indictment of the State's affirmative and mandatory obligations for Governor Justice to herein confess that the traditional public schools are inadequate or inequitable. As to expanding parental choice, there is no constitutional right to attend a publicly-subsidized school of one's choice, whereas it is the constitutional right of every parent, every voter, to vote on the creation of independent public schools.

Any inconvenience occasioned by the delayed creation and operation of PCSB-authorized charter schools "would not constitute *irreparable* harm." (*Id.* at ¶ 113.) The parade of horribles that Amici exaggerate cannot outweigh the constitutional interests protected by section 10 and are not, in any event, inevitable. Indeed, these inconveniences could have been avoided entirely had Amici initially joined Appellees in seeking to effectuate, rather than subvert, section 10's mandate. In any case, Governor Justice is "well-positioned to expeditiously address the constitutional defect alleged in this action." (*Id.* ¶ 115.) Even now, this late in the process, he could halt the further creation of PCSB-charter schools or fix times for special elections.

CONCLUSION

Because Appellees are likely to succeed on the merits and all the remaining factors weigh in favor of preserving the preliminary injunction, the Court should affirm.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0070

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

Respondents Below, Petitioners

v.

SAM BRUNETT and ROBERT McCLOUD,

Petitioners Below, Respondents.

CERTIFICATION OF SERVICE

I, Bren J. Pomponio, do hereby certify that I have served the foregoing **"RESPONDENTS' BRIEF,"** which was filed this 5th day of July, 2022, with the Clerk of the Court and further certify that a true and accurate copy was mailed via U.S. Mail, postage prepaid, addressed as follows:

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