**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**No. 22-616**

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**STATE OF WEST VIRGINIA,**

***Petitioner*,**

**and**

**KATIE SWITZER and JENNIFER COMPTON,**

***Petitioners*,**

**v.**

**TRAVIS BEAVER, WENDY PETERS,**
**DAVID L. ROACH, State Superintendent of Schools, and**
**L. PAUL HARDESTY, President of the West Virginia Board of Education,**

***Respondents.***

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Intermediate Court of Appeals of West Virginia
No. 22-ICA-1 (consolidated with 22-ICA-3)

Circuit Court of Kanawha County
Civil Action Nos. 22-P-24, 22-P-26

# *AMICI CURIAE* BRIEF OF YES. EVERY KID. FOUNDATION AND AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS AND REVERSAL

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## INTRODUCTION

The circuit court's injunction is a devastating one-two punch to West Virginia. On one hand, it had a crushing real-world impact. It threw into complete disarray the educational plans and decisions made by thousands of West Virginians since the Hope Scholarship Act (the Act) took effect on June 15, 2021. Those are real families that justifiably relied on a duly enacted and legally effective law, only to find the world suddenly turned upside down more than a year later on July 6, 2022. Three such families are described in this brief, including one that chose to move to West Virginia because of the new scholarship program.

On the other hand, the circuit court's decision throws aside years of settled state constitutional law principles that have import far beyond this case. *Amici* highlight three of these principles below: (1) that a law may not be decreed facially unconstitutional unless invalid *in all applications*; (2) that state legislatures have plenary power and do not depend on their constitutions for grants of authority; and (3) that all constitutional provisions must be read in context and given meaning. Each principle stands in the way of Respondents' position, and yet all were given short shrift, if any at all, by the circuit court. To affirm the decision below would change state constitutional law in ways fundamentally at odds with this Court's precedent and that of state courts across the country. Indeed, other state high courts considering similar school-choice initiatives have consistently relied on these principles in rejecting challenges that assert the precise arguments Respondents press here.[1]

At bottom, the justification given for all of this is the claim that the Hope Scholarship Act will *necessarily* decrease funding to public schools *next year*. But that is simply false. Nothing in

[1] *Amici* certify that this brief was not authored in whole or part by a counsel for a party, and no such counsel or party made a monetary contribution specifically intended to fund the preparation or submission of this brief. W. Va. R. App. P. 30(e)(5).

the Act mandates a reduction in public school funding. Nor does the school funding formula—on which Respondents rest their entire argument—impose a ceiling on what funding the Legislature may ultimately provide when it considers the 2023-24 public school budget next spring. *No one* knows or can say for certain what that budget will be because the Legislature retains full discretion and authority to set that budget wherever it chooses.

Moreover, if Respondents' hypothetical chain of events does lead to a budget reduction, Respondents would remain free to attempt to challenge that action at that time. *If* the Act leads to lower overall enrollment in the public school, and *if* that lower enrollment triggers a reduction based on the school-aid formula, and *if* the Legislature fails to adjust the formula or make additional appropriations, then Respondents *might* have a claim. But they do not today.

In the meantime, this Court should reaffirm the longstanding principles of constitutional law abandoned by the circuit court, reverse the decision below, and allow the Act to take effect.

## INTEREST OF *AMICI CURIAE*

*Amicus curiae* yes. every kid. Foundation ("Yes") is a national organization dedicated to ensuring families have every available educational option to choose for their children. That includes the freedom to choose the education that best fits a student's needs, whether it is a public school, private school, charter school, or homeschool. *Amicus* Yes supports education policy, like the Hope Scholarship Act, that respects the dignity of every student, fosters a variety of custom-tailored approaches, and opens the free flow of ideas and innovation.

*Amicus curiae* Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization that operates a state chapter in West Virginia committed to educating and empowering Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, AFPF appears regularly as *amicus curiae* before federal

and state courts. *See, e.g.*, *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *Young Americans for Liberty v. Brock*, Case No. 47-cv-21-900878.00 (Ala. 2022).

For several reasons, *amici* are well-positioned to assist this Court in considering this case. As shown in Part II of this brief, *amici* have interacted with West Virginia families who have been approved to participate in the Hope Scholarship Program and are able to offer the perspective of those families. At the same time, *amici* have deep experience nationally with the law and policy of school choice and are able to help situate this case in that broader context.

## ARGUMENT

### I. Fundamental principles of state constitutional law doom Respondents' claims.

Petitioners well explain the numerous flaws with, and obstacles that stand in the way of, Respondents' claims. In this brief, *amici* focus simply on three foundational principles of state constitutional law that bolster Petitioners' argument that the Act does not offend the Legislature's duty to provide "a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1. As discussed further below, those principles are: (1) that a law may not be decreed facially unconstitutional unless invalid *in all applications*; (2) that state legislatures have plenary power and do not depend on their constitutions for grants of authority; and (3) that all constitutional provisions must be read in context and given meaning. Relying on these principles, high courts in other states faced with similar challenges to similar statutes have consistently rejected the same arguments pressed by Respondents. This Court should too, lest it rewrite years of settled constitutional law with implications far beyond this case.

### A. Respondents cannot meet the extraordinary standard required to invalidate a state law as unconstitutional on its face.

Respondents' various contentions that the Act is facially unconstitutional turn, ultimately, on the premise that public schools will lose funding. But a facial attack "is the most difficult [constitutional] challenge to mount successfully" and requires the challenger to "establish that no set of circumstances exists under which the legislation would be valid." *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991) (citing *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). Stated differently, the fact that a law might operate unconstitutionally under "some conceivable set of circumstance" cannot render it invalid. *Rust*, 500 U.S. at 183. Here, because Respondents cannot establish that the Act will *necessarily* reduce public school funding, they cannot come close to showing that the Act is facially unconstitutional.

This Court's decision in *State ex rel. Haden v. Calco Awning & Window Corporation*, 153 W. Va. 524, 170 S.E.2d 362 (1969), is instructive. There, this Court upheld the constitutionality of a statute that allowed the State to tax corporate officers who could not be taxed. *Id.* at 529, 170 S.E.2d at 366. The plaintiffs had asserted that "because the statute *may be* applied so as to attach liability to an officer who has no possible responsibility in relation to the tax, such statute is unconstitutional." 153 W. Va. at 530, 170 S.E.2d at 366 (emphasis added). Among other things, this Court responded that "where a statute is susceptible of application in a valid or in an invalid manner it will, ordinarily, be held valid." *Id.* The "mere possibility of an unconstitutional application" was not enough to invalidate the statute. *Id.*

So, too, here. Like the plaintiffs in *Haden*, Respondents have fallen well short of showing that the Hope Scholarship Act will be unconstitutional *in all its applications*. Respondents' merits arguments rest on the premise that public schools will necessarily lose funding. In support, Respondents rely entirely on the fact that the school funding formula depends on school

enrollment, which they argue will decline with each Hope Scholar. That argument does not withstand scrutiny.

Even assuming that a reduction in overall public-school funding, standing alone, would violate the Constitution,[2] Respondents fail to show that such a reduction will occur or be attributable to the Hope Scholarship Act. As a threshold matter, there are many reasons why the school funding formula might call for a reduction in funding. Attendance in West Virginia public schools has declined for years. *See, e.g.*, Anthony Conn, *Schools forced to cut positions as enrollment declines in most W.Va. counties*, WCHS (May 23, 2022) ("Public School enrollment in West Virginia has gone down every year since 2014."), https://wchstv.com/news/local/as-school-enrollment-declines-in-most-wva-counties-schools-forced-to-cut-positions. And that trend shows no signs of stopping anytime soon. *See* Matthew Ladner, *Honey, we shrunk the schools!*, *reimaginED* (Aug. 22, 2022) (projecting an 18.7% decline in West Virginia public school enrollment over the next eight years), https://www.reimaginedonline.org/2022/08/honey-we-shrunk-the-schools/.

But more important, whether public-school funding will actually decline turns on an independent decision of the Legislature that is in no way dictated or restrained by anything in the Hope Scholarship Act. The school funding formula *does not impose a ceiling* on what funding the Legislature may provide to public schools. Nor is there any language in the Act that *requires* a reduction in public school funding. While the Legislature might allow a reduction to occur if the school funding formula calls for it, the Legislature might also supplement the moneys called for by the school funding formula to ensure no reduction.

[2] Not every reduction in school funding qualifies as unconstitutional, because a reduction still must be shown actually to violate the Legislature's Article XII duty to provide a "thorough and efficient system of free schools."

And, of course, nothing would prevent Respondents from attempting to challenge any future decrease as unconstitutional should it actually materialize. That is what interested parties have done in the past when dissatisfied with legislative expenditures on public schools. *See Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) (reversing dismissal of a declaratory action challenging school funding decisions); *see also W. Virginia Educ. Ass'n v. Legislature of State of W.Va.*, 179 W. Va. 381, 369 S.E.2d 454 (1988) (mandamus proceeding against Legislature challenging constitutionality of cuts in state education expenditures for fiscal year 1987-88).

But what Respondents cannot do in this case —and have not done—is establish that the Hope Scholarship Act will *necessarily* lead to a reduction in public school funding. So even assuming such a reduction would be unconstitutional, Respondents have failed to carry their heavy burden. They argue strenuously that a reduction is *possible*. But "courts will not, *o*n the mere possibility of an unconstitutional application, declare a statute invalid." *Haden*, 153 W. Va. at 530, 170 S.E.2d at 366.

Importantly, this high burden for facial unconstitutionality is no mere technicality, but rather reflects important separation of powers principles. *See MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 722–23, 715 S.E.2d 405, 420–21 (2011). This Court has long said that courts must presume the constitutionality of legislation, avoid constitutional questions where possible, and construe a statute consistent with the Constitution. For example, "[w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." *Frazier v. McCabe*, 244 W. Va. 21, 26, 851 S.E.2d 100, 105 (2020) (quotation marks omitted). The mandate not to strike down a statute facially, except in extraordinary circumstances, is of similar stock and should be enforced equally rigorously.

Nor is there any basis for lowering Respondents' burden just because this case alleges a violation of the education mandate in Article XII. Quite the opposite. This Court has stressed the same separation of powers principles, and the importance of presuming the constitutionality of legislative enactments, when interpreting the very constitutional provisions at issue in this case. *See Herold v. McQueen*, 71 W. Va. 43, 75 S.E. 313 (1912) (observing—in the context of Article XII—that "[e]very presumption . . . is in favor of the validity of the legislative enactment; and, unless the court can clearly see that the act is contrary to the fundamental law, it ought not to declare it unconstitutional").

**B. Respondents ignore that state legislatures possess plenary power.**

State legislatures have authority unless expressly deprived of it. Indeed, "the negation of legislative power *must appear beyond reasonable doubt*." Syl. pt. 3, *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 730 S.E.2d 368 (2012) (emphasis added). But Respondents point to no provision in the West Virginia Constitution that expressly prohibits the Legislature from implementing the provisions of the Act. Instead, they rely on the doctrine of *expressio unius*, arguing that it may be *implied* from the Constitution that the Legislature lacked the power to enact the Hope Scholarship Act. That is inconsistent with how state constitutions work.

Unless expressly limited by the Constitution, the West Virginia Legislature exercises essentially plenary power. This state structure is the opposite of the federal system:

> The Legislature of this State, unlike the Congress of the United States, under the Federal Constitution, does not depend for its authority upon the express grant of legislative power. The Federal Constitution is a grant of power; a State Constitution is a *restriction* of power. The Constitution of a State is examined to ascertain the restraints, if any, which the people have imposed upon the Legislature, *not* to determine the powers they have conferred.

*Harbert v. Cty. Court of Harrison Cty.*, 129 W. Va. 54, 66–67, 39 S.E.2d 177, 187, (1946) (emphases added). Put another way, "[t]he Constitution of West Virginia being a restriction of

power rather than a grant thereof, the legislature has the authority to enact any measure not inhibited thereby." Syl. pt. 1, *Foster v. Cooper,* 155 W. Va. 619, 186 S.E.2d 837 (1972).

This principle counsels against applying *expressio unius* to the Constitution in all but the most exceptional circumstances. Even in the ordinary course, "[v]irtually all the authorities who discuss the negative-implication canon emphasize that it must be applied with great caution, since its application depends so much on context." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012); *see also* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 234–35 (1975) (the doctrine's applicability "depends on the particular circumstances of context"). The context of a state constitution—where "the negation of legislative power *must appear beyond reasonable doubt*"—is one in which the doctrine of *expressio unius* should rarely, if ever, apply.

As one state high court has said, "there is no reason to believe that a [state] Constitutional provision enumerating powers of a branch of government was intended to be an exclusive list." *Idaho Press Club, Inc. v. State Legislature*, 132 P.3d 397, 399–400 (Idaho 2006). And conversely, when a state constitution expressly limits certain powers, "there is no reason to believe that [the drafters] intended the limitation to be broader than they drafted it." *Id.* at 400. "It is not reasonable to assume that they intended to impose other, unstated limitations." *Id.*

Applying these principles, it is clear that Respondents are erroneously construing Article XII, Section 1 of the Constitution, which states: "The Legislature shall provide, by general law, for a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1. Respondents contend that this provision implicitly bars funding for anything other than "free schools." But that reading commits exactly the errors discussed above—"believ[ing] that a Constitutional provision

enumerating powers of a branch of government was intended to be an exclusive list" and "assum[ing] . . . other, unstated limitations." *Idaho Press Club*, 132 P.3d at 399–400.

The proper reading is that this provision addresses the Legislature's duties regarding "free schools"—they must be "thorough and efficient"—and no more. The provision defines *how* the Legislature must provide for "free schools." But nothing indicates, "beyond reasonable doubt," that the Legislature is also stripped of its inherent power to fund other schools or initiatives.

Indeed, over a century ago in *Herold v. McQueen*, this Court refused a similar attempt to imply from Article XII a restriction on the Legislature's powers. 71 W. Va. 43, 75 S.E. 313 (1912). There, the Court considered the constitutionality of a law establishing a high school in Nicholas County and taxing the residents of the county for the creation of that school. *Id.* at 43, 75 S.E. at 314. County taxpayers challenged the law, arguing that the Legislature had violated the Constitution's direction to provide public schools "by general law." *Id.* at 43, 75 S.E. at 315. But the Court held that Article XII, Section 1 operated as a constitutional baseline, not a restriction. Instead of reading the provision as a check on creative legislative measures, it reasoned that the Legislature "is not prohibited from augmenting" the "general system of free schools[] by the establishment of special high schools and graded schools in any locality where it may think it wise to do so." *Id.* at 43, 75 S.E. at 315–16.

Like this Court in *Herold*, other state high courts have held that similar constitutional provisions do not strip legislatures of the power to provide educational opportunities above and beyond what their constitutions require. In Wisconsin, for example, the state supreme court upheld the legislature's decision to fund a school choice program in the face of a constitutional mandate to provide "uniform" "district schools." *Davis v. Grover*, 480 N.W.2d 460, 473 (Wis. 1992). The court reasoned that the uniformity clause "is complied with" once "the legislature has provided for

. . . the privileges of a school district, which [students] may freely enjoy." *Id.* (quoting *Comstock v. Jt. School Dist. No. 1*, 27 N.W. 829 (Wis. 1886)). Beyond that, the legislature was "free to act as it deems proper." *Id.* at 473. The court then concluded that the school choice program "merely reflect[ed] a legislative desire to do more than that which is constitutionally mandated," and that "experimental attempts to improve upon" the uniform district schools "in no way denie[d] any student the opportunity to receive the basic education in the public school system." *Id.* at 474.

The North Carolina Supreme Court reached a similar conclusion in *Hart v. State*, 774 S.E.2d 281, 289 (N.C. 2015). In that case, challengers argued that a school choice program allowing the North Carolina legislature to provide "modest scholarships" outside the public schools created an "alternate system" of publicly-funded education. *Id.* The North Carolina Supreme Court rejected that characterization and upheld the program. Notably, the court began its constitutional analysis with the observation that "the North Carolina Constitution is not a grant of power, but a limit on the otherwise plenary police power of the State." *Id.* at 287. It explained that the constitutional mandate to provide a "general and uniform system of free public schools" spoke only to *how* the legislature must provide for public schools: the provision "applies exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system." *Id.* at 289–90.

Given all of this, it should come as no surprise that Respondents' novel and restrictive reading of Article XII would have sweeping consequences. It would call into question other West Virginia legislative programs that use public funds for non-public education purposes. In 2020, West Virginia provided about $7.5 million of financial aid to students at private universities in the

State, including the annual Promise Scholarship.[3] W. Va. Code § 18C-7-6. West Virginia also supports non-public education through transportation, subsidized funding for textbooks, and other social services. *See id.* § 18-5-21b (allowing county boards to provide state-adopted textbooks to students enrolled in private schools); *Janasiewicz v. Bd. of Educ. of Cty. of Kanawha*, 171 W. Va. 423, 426, 299 S.E.2d 34, 37 (1982) (upholding statute that allowed county to provide bussing to sectarian school students). If the Legislature lacks the power to fund the Hope Scholarship program as Respondents argue, it lacks the power to fund these initiatives too.

### C. Respondents fail to read Article XII, Section 1 in the context of the Legislature's duty to foster and encourage general education.

Courts must interpret provisions of the Constitution in context, not in isolation. "Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction." *State ex rel. Workman v. Carmichael*, 241 W. Va. 105, 117, 819 S.E.2d 251, 263 (2018) (quotation marks omitted). One of those rules is that "a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the [document] in its entirety to ascertain legislative intent properly." *State v. Stone*, 229 W. Va. 271, 283, 728 S.E.2d 155, 167 (2012) (quotation marks omitted).

The Legislature's duty to foster and encourage general education forms part of the necessary context here. Respondents focus on Article XII, Section 1 of the Constitution, but effectively ignore Section 12 of that same article. Section 12 broadly requires the Legislature to foster "moral, intellectual, scientific and agricultural improvements" and provide for "such institutions of learning as the best interests of general education in the State may demand." In full, it states:

[3] *State Profile: West Virginia*, STATE HIGHER EDUCATION FINANCE, https://shef.sheeo.org/state-profile/west-virginia/ (last visited August 1, 2022).

> The Legislature shall foster and encourage moral, intellectual, scientific and agricultural improvements; it shall, whenever it may be practicable, make suitable provisions for the blind, mute and insane, and for the organization of such institutions of learning as the best interests of general education in the State may demand.

W. VA. CONST. art. XII, § 12.

This provision plainly contemplates the Legislature fostering education initiatives beyond the "system of free schools." As the West Virginia Attorney General long ago explained, "Article XII's Section 12 has reference to schools other than those which form a part of the free school system." Letter to the Hon. Charles C. Wise, Jr. & the Hon. Perce J. Ross, 51 W. Va. Op. Att'y Gen. 852, 866 (1966). The provision specifically contemplates more tailored educations for the "blind, mute and insane." But it also recognizes the Legislature's "discretionary power" to create general postsecondary institutions—like West Virginia University and Marshall University—that "are not . . . considered a part of the 'free school' system." *Id.*; *see United Mine Workers of Am. Int'l Union v. Parsons*, 172 W. Va. 386, 394, 305 S.E.2d 343, 350 (1983) (noting that West Virginia University exists as a "legislative fulfillment" of the "constitutional mandate"); *Herold*, 71 W. Va. 43, 75 S.E. 313, 316 ("The Constitution does not provide for the establishment of the state university, or the state normal school at Huntington . . . yet the right and power of the Legislature to create them, and to provide for their maintenance by taxing the people of the whole state, has not been questioned.").

Other states have interpreted similar provisions in their constitutions as recognizing their legislatures' power to fund non-public education in addition to maintaining public schools. For instance, in *Schwartz v. Lopez*, the Nevada Supreme Court considered a statute allowing for the transfer of public funds into education savings accounts that students could use to pay for private school, tutoring, and other educational expenses. 382 P.3d 886, 891 (Nev. 2016) (en banc). As in this case, challengers pointed to a provision in the Nevada Constitution mandating "a uniform

system of common schools." *Id.* at 896. And, as in this case, challengers argued that the *expressio unius* canon applied to forbid public funding of private education outside of the public education system. *Id.* But the Nevada Supreme Court rejected that contention because another constitutional provision required its legislature to "'encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements.'" *Id.* at 897 (quoting NEV. CONST. art. XI, § 1). The court explained that this second provision "reflect[ed] the framers' intent to confer broad discretion on the [l]egislature in fulfilling its duty to promote intellectual, literary, scientific, and other such improvements, and to encourage other methods *in addition to* the public school system." *Id.* (emphasis added).

Likewise, in *Meredith v. Pence*, the Indiana Supreme Court upheld the state's public funding of non-public education because another clause under the Indiana Constitution charged the legislature with making educational improvements "*in addition* to provision for the common school system." 984 N.E.2d 1213, 1222 (Ind. 2013). There too, challengers contended that a provision in the Indiana Constitution providing for "a general and uniform system of Common Schools" prohibited educating students by any other means. *Id.* at 1220. But the court identified a second duty weighing on the analysis—a provision encouraging "by all suitable means, moral, intellectual, scientific, and agricultural improvement." *Id.* at 1221. The court held that the first duty did not operate as a restriction on the second, *expressio unius* notwithstanding, and affirmed the program's constitutionality. *Id.* at 1222 & 1224 n.17.

Significantly, the only court to rely on *expressio unius* in an education funding context dealt with a state constitution that *did not* have two legislative duties. In *Bush v. Holmes*, the Florida Supreme Court relied on a provision of its state constitution that required "'a uniform, efficient, safe, secure and high quality system of *free public schools*.'" 919 So. 2d 392, 407 (Fla.

2006) (quoting FLA. CONST. art. IX, § 1(a)). Both the *Schwartz* and *Meredith* courts distinguished *Bush* because their constitutions contained *two* distinct duties—one for public schools and another for general education. *Meredith*, 984 N.E.2d at 1224; *Schwartz*, 382 P.3d at 898.

As in *Schwartz* and *Meredith*, and unlike in *Bush*, the West Virginia Constitution references two separate responsibilities in Article XII—one to "foster and encourage . . . general education" whenever "practicable" (Section 12) and another to provide for "a thorough and efficient system of free schools" (Section 1). Indeed, the duties to foster general education in West Virginia, Nevada, and Indiana are nearly indistinguishable—each references intellectual, scientific, agricultural, and moral improvement. Like the high courts of Nevada and Indiana, this Court should reject Respondents' attempt to read Section 1 in isolation, divorced from the context provided by Section 12.

And the Hope Scholarship Program clearly advances the Legislature's mandate under Section 12 to "foster and encourage . . . general education" whenever "practicable." School choice has been shown to improve academic outcomes, leading to increased graduation rates and more students going to college.[4] Eighteen "gold-standard" studies have identified a causal relationship between school choice and high student performance.[5] A vast body of research also shows educational choice programs save taxpayers money, reduce segregation in schools, improve students' civic values, and financially assist low-income families.[6] Comments from West Virginia legislators prior to the Act's enactment demonstrate that the Legislature had some of these goals

[4] *See* Joshua M. Cowen, et al., *Student Attainment and the Milwaukee Parental Choice Program: Final Follow-up Analysis*, School Choice Demonstration Project Milwaukee Evaluation Report #30, at 16–17 (Feb. 2012, updated & corrected Mar. 8, 2012), https://www.uaedreform.org/downloads/2012/02/report-30-student-attainment-and-the-milwaukee-parental-choice-program-final-follow-up-analysis.pdf.

[5] Greg Forster, Ph.D., *A Win-Win Solution: The Empirical Evidence on School Choice*, at 10 (4th ed. May 2016), http://www.edchoice.org/research/win-win-solution/.

[6] *See, e.g.*, *id.* at 1–2, 4, 21–23, 26–28, 30.

in mind.[7]

Respondents say that the "specific" terms of Sections 1 to 5 constrain the "general and indefinite" terms of Section 12. Opp. to Mot. to Stay at 10. But that argument flies in the face of how the other state supreme courts have treated the interplay between a general duty to foster education and a specific duty to establish public schools. And for good reason, as Respondents' reading violates another central tenet of textual analysis—that courts should avoid rendering constitutional provisions superfluous. *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 554, 122 S.E.2d 436, 443 (1961) ("An elementary rule of construction is that, if possible, effect should be given to every part and to every word of a constitutional provision and that, unless there is some clear reason to the contrary, no part of the fundamental law should be regarded as superfluous." (citation omitted)). While Respondents might like to read Section 12 out of the Constitution, they cannot.

* * *

Core principles of West Virginia constitutional law cast serious doubt on the circuit court's decision. Sanctioning Respondents' position would lower the high bar for facial challenges to

[7] Statement of Senator Rollan A. Roberts, W. Va. Legislature, S. Floor Debate, at 12:56:37–12:56:58 (Mar. 17, 2021), http://sg001-harmony.sliq.net/00289/Harmony/en/PowerBrowser/PowerBrowserV2/20210317/-1/49811 ("The critics of this Legislation have positioned themselves against some of West Virginia's most vulnerable children. Many of which come from low-income, special needs, and minority populations, and desperately need an alternative method of educating their children."); Steven A. Adams, *West Virginia Senate Passes Education Savinngs* [sic] *Account Bill, Sends It Back to House of Delegates*, THE INTELLIGENCER (Mar. 18, 2021), https://www.theintelligencer.net/news/top-headlines/2021/03/west-virginia-senate-passes-education-savinngs-account-bill-sends-it-back-to-house-of-delegates/ (quoting Senate Education Committee Chairwoman Patricia Rucker) ("'It is funding kids, and these are West Virginia students and West Virginia taxpayers, and there could be a multitude of reasons why they apply for a Hope Scholarship and why they are seeking this help.'"); Liz McCormick, *Bill Creating Publicly Funded Education Savings Accounts Heads To W.Va. Senate*, W. VA. PUB. BROADCASTING (Mar. 4, 2021), https://www.wvpublic.org/section/education/2021-03-04/bill-creating-publicly-funded-education-savings-accounts-passes-w-va-heads-to-w-va-senate (quoting House Education Chair Del. Joe Ellington) ("'[T]here's more than one way to educate our students. This is just one small part to take that population of kids out that need a different environment to learn and excel.'").

legislative acts set by decades of this Court's precedents. It would also turn upside down the Legislature's relationship to the Constitution, casting doubt on a host of statutes and programs enacted pursuant to the Legislature's plenary police powers, in this context and many others. And it would effectively read a provision—Article XII, Section 12—out of the Constitution. Like nearly every state high court faced with similar arguments in similar contexts, this Court should refuse Respondents' invitation to degrade fundamental principles of state constitutional law.

## II. The circuit court's injunction upends the education plans of thousands of West Virginia families.

In addition to disregarding core principles of state constitutional law, the circuit court's decision immediately and irreparably harms real children. *See Foster v. Orchard Dev. Co., LLC*, 227 W. Va. 119, 130, 705 S.E.2d 816, 827 (2010) ("The granting or refusal of an injunction, whether mandatory or preventive, calls for," among other things, weighing of "the comparative hardship or convenience to the respective parties involved in the award or denial of the writ."). Thousands of students based their schooling decisions for this academic year in reliance on the Act. More than a month before the circuit court's injunction, roughly 3,000 scholarships had already been approved for the upcoming school year.[8] That was indisputably the status quo: the Hope Scholarship Act had lawfully taken effect and was being implemented. Contrary to Respondents' past assertions, the injunction did not maintain the status quo, but upset it—as would be true of any injunction that purported to set aside a law currently in effect.

This disruption has dire consequences. Students across West Virginia are unable to undertake the schooling they and their parents intended this year. And it goes without saying that

[8] Ryan Quinn, *More than 3,000 WV students approved for nonpublic school vouchers*, CHARLESTON GAZETTE-MAIL (May 30, 2022), https://www.wvgazettemail.com/news/education/more-than-3-000-wv-students-approved-for-nonpublic-school-vouchers/article_725f7f8c-2d58-5a05-a963-9d767bc44097.html.

they will not be able to get that year back. One need look no further than the last two years for proof of the indelible harm children suffer when deprived of educational opportunities.

In sharp contrast, reversal of the injunction would not harm Respondents. *See Foster*, 227 W. Va. at 130, 705 S.E.2d 816 at 827. *All* of Respondents' alleged harms are premised on the public schools losing funding. But it is undisputed that the Hope Scholarship Act has not affected the public school budget for this school year. And as for *next* year—the 2023-24 school year—*no one knows what that budget is or will be*. Respondents argue that the budget will necessarily be reduced because the school funding formula is based on public school enrollment, which will decrease as students take advantage of Hope Scholarships. But the formula is only based in part on enrollment and, in any event, does not impose a ceiling on what funding the Legislature may provide for public schools. Nor does anything in the Hope Scholarship Act. So until the Legislature actually adopts the budget—*next spring*—Respondents can only speculate about potential harm. Tellingly, despite numerous opportunities, Respondents have offered absolutely no response to any of this.

To aid this Court's understanding of the harms caused by the injunction, the next sections relate the stories of three West Virginia families that sought and were approved for Hope Scholarships: the Harveys, the Gallaghers, and the van Wyks. As the stories show, these families each have different motivations for seeking the scholarships—from safer learning environments to more individualized programming to a closer alignment with the values being taught. But what is common to them all is that without reversal of the circuit court's injunction, they stand to permanently lose the opportunities that the Hope Scholarships would have made available to them this year.

### A. The Harveys

Kristin and Josh Harvey live in Raleigh County with their six children, aged two through twelve. All, except the two-year-old, were enrolled in public schools last year. Kristin applied to the Hope Scholarship Program on behalf of all of her children, and all have been approved.

The Hope Scholarships are important and necessary to the Harvey family because they plan to homeschool their children going forward and the scholarship would fund vital resources. Kristin previously homeschooled the children and found that it worked well for them. Kristin loves the freedom of homeschooling and being able to customize the children's educations to their specific needs. But as the family grew, the resources needed to homeschool exceeded the family budget. For example, each child needs a curriculum, which can be expensive. Kristin tried cobbling together a program using less expensive curricula for each child, rather than purchasing a higher quality—and higher cost—program that could be tailored to multiple children. But trying to piece together cheaper curricula didn't really work and left the children unable to access classes they wanted because some units were too expensive.

The Harveys turned back to both public and private schools, but they felt the children did not thrive in either setting for a variety of reasons. For instance, there were issues with bullying and the children's peer groups. Not all of their kids learned well in the traditional classroom format, especially the ones that had particular interests in certain subject areas, like math. And they did not feel like the schools communicated adequately. Like many other parents, the Harveys would like more transparency into what their children are learning.

Josh, who was homeschooled for years as a child, appreciates the challenges homeschooled children face missing out on extracurriculars that must be individually sought and paid for. Kristin and Josh plan to fill the gaps in enrichment activities with Hope Scholarship money—dance and gymnastics lessons for their seven and nine-year-old daughters; STEM robotics classes for their

eldest son; and musical instrument lessons. And with the goal of "educating the whole child," the Harveys plan to explore opportunities in sports.

They believe that the Hope Scholarships "will change our children's lives 100%." But after hearing of the injunction, the Harveys have had to put together the best possible homeschooling program they can with the finances they have. They are not returning to the public school system, but rather are proceeding with less than what they planned, with the hope that the scholarships will become available again.

**B. The Gallaghers**

Ashli Gallagher and her family live in Harrison County. She has two boys: a five-year-old and an eight-year-old, both of whom have been attending public school.

Ashli was born in West Virginia. She and her husband moved to Pennsylvania to an area that was close to the oil field where they worked. But when they heard that the Hope Scholarship Program was percolating through the legislative process, the thought that they could put their kids in the school of their choice sparked their interest in moving back, which would also put them closer to their families.

They moved back from Pennsylvania in June 2021 and sought a school for their kids. Harrison County was ranked seventh in West Virginia, and the location was within the limited area that was close to work and family. They placed their children in public schools while waiting for the Hope Scholarship Program to begin.

Their experience with the public schools reaffirmed their initial interest in the Hope Scholarship Program. Safety is an issue at the school. Ashli must pick up her kindergartner in the alley behind the school, which is lined by drug houses. In addition, the third grade classroom is small and cluttered and so crowded that the kids can barely move. And although they are happy with the teachers, Ashli and her husband are uncomfortable with some of the things their kids are

learning in the classroom and outside of it from peers. Finally, the Gallaghers have also found that meetings with teachers are strictly time-limited, and there have been incidents at school that have not been timely communicated to them.

The Gallaghers have been looking forward to moving both children to Emmanuel Christian School (Emmanuel) with the help of the Hope Scholarship. Ashli has found Emmanuel to be very responsive and welcoming of parents into the classroom. And Emmanuel also has smaller class sizes, and no time limits on parent conferences. Perhaps most important, Ashli believes that the new school's focus on a classical Christian education will be more consistent with her and her husband's upbringing, which they would like to continue with their own children. Over the summer, both children had been admitted to Emmanuel, and the Gallaghers had already paid the registration fee while waiting for the Hope Scholarship to pay tuition.

The circuit court's injunction forced them to change plans. Neither child is attending Emmanuel this fall. And while they have enrolled in a different public school that seems safer than their previous school, the new school is larger than Ashli would prefer and they have to drive across town to get there.

After hearing of the injunction, Ashli "felt sick." The Gallaghers' only hope of providing the education they feel their children need is with the Hope Scholarships.

### C. The van Wyks

Brittany and Jacques van Wyk live in Mt. Hope. They have three children: a son aged ten who is in fourth grade, a daughter aged seven who is in first grade, and a son aged five who is in pre-K.

The family moved to West Virginia in February 2021. Coming off of homeschooling due to Covid, they enrolled the oldest child in Mt. Hope Christian Academy, a private school. They were planning to finish out the school year by homeschooling their middle child and then enroll

both younger children in the same school. But in the meantime, they heard about the Hope Scholarships. So to maintain eligibility for the program, the two younger children were placed in public school. Both children were approved for Hope Scholarships for this school year.

With the Hope Scholarships, the van Wyks were looking forward to moving all their children into the same school. The faith component of education at Mt. Hope Christian Academy is important to them and, obviously, unavailable in the public schools. Their oldest is thriving, and they believe their younger two will, as well.

But that is not the only benefit they anticipated from the Hope Scholarships. Prior to moving to West Virginia, the van Wyks lived in California, where their oldest participated in a state charter homeschool program that granted families access to funds to craft an a la carte approach to education. That program, which provided funding in an amount similar to the Hope Scholarship, allowed the funds to be used for homeschooling programs and enrichment activities. For example, their fourth grader loves animals, so while he was homeschooled the family could use his funding to visit the San Diego Zoo and Seaworld. He was also able to take skateboarding lessons and get access to the skatepark, which allowed him to become an advanced skateboarder by age five. What is more, the broad availability of funding for enrichment programs spawned a market in which enrichment centers popped up for art, music, and Spanish lessons—the type of lessons that couldn't easily be taught at home.

The van Wyks had been looking forward to the possibility of replicating some of their experience in California by filling in gaps in areas such as music or dance. Their hope was that over time, the availability of the program would result in more vendors entering the market to provide enrichment learning, allowing each kid to have tailored learning experiences. They've seen firsthand just how successful these kinds of scholarships can be in giving students options.

The injunction has been "disheartening and discouraging" to the van Wyks. Instead of sending their children to private school this year they have opted to homeschool. Indeed, the van Wyks are now planning to move out of West Virginia to be closer to family, and cited the "less plentiful" school options as a contributing factor in that decision.

* * *

If nothing else, the experiences of the Harveys, Gallaghers, and van Wyks testify to the real-world impact of the circuit court's injunction. But that is not all.

They also clash with the one-dimensional characterization of Hope Scholarship families that Respondents have presented throughout this litigation. For example, no less than six times in their stay briefs, Respondents painted potential scholarship recipients as "affluent" or "wealthy." Opp. to Mot. to Stay at 2 (the Act would "subsidize private education for the wealthy"); 3 (claiming that "the vouchers can only be used by more affluent families"); 6 (same); 9 ("The State *will* be paying to subsidize the private education of the wealthy."). But the stories of the Harveys, Gallaghers, and van Wyks demonstrate that Hope Scholarships would provide vital funding—filling gaps in home-school curricula and serving as a bridge to an otherwise inaccessible private school option. The program is not merely a subsidy for affluent families.

These accounts similarly challenge the assumption that the Act will lead to lower enrollment in public schools. As the Gallaghers show, the Hope Scholarship has the potential to draw new families into the state—students who are not departing West Virginia public schools but rather schools elsewhere. And, as the Harveys illustrate, many families are committed to remaining outside of the public school system whether or not the scholarship makes that option more attractive.

## CONCLUSION

This Court should reverse the circuit court's decision, dissolve the permanent injunction, and allow the Act to take effect.

September 6, 2022

Respectfully submitted,

**YES. EVERY KID. FOUNDATION**

**and**

**AMERICANS FOR PROSPERITY FOUNDATION**

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**
**No. 22-616**

**STATE OF WEST VIRGINIA,**

***Petitioner,***

**and**

**KATIE SWITZER and JENNIFER COMPTON,**

***Petitioners,***

**v.**

**TRAVIS BEAVER, WENDY PETERS,**
**DAVID L. ROACH, State Superintendent of Schools, and**
**L. PAUL HARDESTY, President of the West Virginia Board of Education,**

***Respondents.***

## CERTIFICATE OF SERVICE

I, Elbert Lin, do hereby certify that the foregoing *Amici Curiae Brief of Yes. Every Kid. Foundation and Americans for Prosperity Foundation in Support of Petitioner and Reversal* has been served on counsel of record via the E-Filing System or, for those parties who are not capable of receiving electronic service, by email and by depositing a copy of the same in the United States Mail, via first-class postage prepaid, this the 6th day of September, 2022, addressed as follows:

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