IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket 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.

REPLY BRIEF OF PETITIONERS KATIE SWITZER AND JENNIFER COMPTON

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INTRODUCTION

Respondents' Briefs catalog their many policy criticisms of the Hope Scholarship Program. Those criticisms are wrong. Providing additional educational options will help parents like Katie Switzer, Jennifer Compton, and thousands of others meet the unique needs of their families, while at the same time improving the per-student funding and effectiveness of public schools. *E.g.*, 4 JA 445–86, 571–76. But that's beside the point because, right or wrong, those policy debates belong on the legislative floor and in newspaper op-eds, not in the courts.

All this Court needs to decide this facial challenge to the Program is West Virginia's Constitution. And when it comes to the Constitution, Respondents concede that nothing in the written text expressly forbids the Legislature from financially supporting additional educational choices. Br. of Plaintiffs/Respondents Beaver and Peters ("Pls.' Br.") 21 (arguing that "express words" are "not necessary"). Instead, Respondents ask this Court to invent an implied prohibition by applying *expressio unius* in a way this Court has never done so before: by reading the Legislature's ***duty*** to do one thing as foreclosing its ***power*** to do other things. Failing that, Respondents advance an unprecedented "frustration" theory. They ask the Court (in a facial challenge, no less) to (a) scrutinize the Hope Scholarship Program statute's policy effects, (b) accept Respondents' speculation about the harms that may arise if it is implemented, (c) agree that those harms will "frustrate" the public schools, and then (d) strike the Program down because of that frustration. Respondents, however, cite no legal support for their novel frustration theory. Nor is there any basis to conclude from the face of the statute that a thorough and efficient public-school system cannot prosper side-by-side with the Hope Scholarship Program. There is no frustration.

Respondents' remaining arguments are equally flimsy. First, this Court has never applied strict scrutiny in a case like this, and it does not make sense to do so. Second, the Hope

Scholarship Program does not touch the School Fund or any other money set aside for public schools. Third, the Board of Education's constitutional authority to supervise "free schools" (that is, K–12 public schools) has nothing to do with the Hope Scholarship Board's administration of scholarships for non-public education. And fourth, the Program is not a special law because it does not establish any arbitrary legislative classifications for any persons, places, or things.

Finally, this Court should reject Plaintiffs' claims as a matter of law—their facial challenge just fails to state a constitutional claim. If, however, this Court believes that any of Respondents' policy criticisms implicate the Program's constitutionality, it cannot affirm, but must remand. Respondents' speculative policy arguments are all based on disputed facts, and the circuit court did not follow the appropriate procedure for finally resolving those factual disputes.

At bottom, this case was filed because the Plaintiffs oppose educational options for West Virginia families. People on both sides of the issue continue to debate the wisdom of such policies. But the constitutionality of the Hope Scholarship Program is clear. Nothing in the West Virginia Constitution prohibits the Legislature from providing financial assistance to parents exercising their fundamental right to direct the upbringing and education of their children. Respondents' lawsuit therefore fails as a matter of law.

ARGUMENT

I. *Expressio Unius* Does Not Transform The Affirmative Duty To Support Public Education Into An Implied Ban On Supporting Other Educational Choices

The main thrust of Respondents' argument is that the Constitution's Education Article ***implicitly*** forbids the Legislature from financially supporting other educational options. Pls.' Br. 17–36; Br. of Respondents Roach and Hardesty ("BOE Br.") 21.[1] They concede, as they must, that nothing in the text expressly prohibits the Hope Scholarship Program. *See* Pls.' Br. 21.

[1] The BOE Brief joins Plaintiffs' Brief as to most issues. *Id.*

Instead, applying *expressio unius*, Respondents argue that the Legislature's duty to provide for thorough and efficient public schools implicitly forbids it from experimenting with other educational policies, such as providing financial support to parents who choose alternatives to public schools.

Respondents' *expressio unius* argument boils down to the notion that because the maxim ***can*** apply to the West Virginia Constitution, it therefore ***must*** apply here to Article 12, Section 1. Pls.' Br. 19–22, 30–34. But that just assumes away the most important question in this case: whether the canon does apply here, transforming the Legislature's affirmative ***duty*** to provide public schools into an implied ***prohibition*** on funding other educational options. On that crucial question, Respondents' arguments fail on every score.[2]

As explained below in section A, the plain meaning of the text controls: the Legislature may enact any policy that is not prohibited, and the unambiguous obligation to provide for thorough and efficient schools simply does not preclude the Legislature from trying other things, too. The duty to provide for the public schools is a floor, not a ceiling, on what the Legislature can do for K–12 education. Section B explains that this Court applies *expressio unius* to the Constitution only based on clear context that that is what the framers intended. All of the textual

[2] Plaintiffs' discussion of the Education Article's history (Pls.' Br. 17–19) is both irrelevant to the issues here and inaccurate. For instance, they assert that a draft report from the constitutional convention said that "[a]ll money . . . shall be . . . sacredly devoted and applied to the support of primary education in common schools throughout the State, and to no other purpose whatsoever. *Id.* at 18 (quoting Rev. Gordon Battelle, *Debates & Proc.*, First Const. Convention of W. Va. (Dec. 19, 1861)) (alterations provided here as used in Respondents' Brief). The first ellipsis omits language specifying that the report is discussing all money ***from specific sources*** (such as forfeitures), while the second ellipsis omits language explaining that those proceeds "shall be carried to the credit of a separate fund to be called the school fund; and invested in the bonds or other securities of the United States or this State; and the annual increase thereof shall under such regulations as may be prescribed by law be sacredly devoted and applied to the support of primary education in common schools throughout the State, and to no other purpose whatever."

clues confirm the Program's constitutionality. Section C confirms that high courts around the country have nearly unanimously rejected Respondents' arguments. Section D explains that providing scholarships to families does not "exceed" any powers under the Education Article. Finally, as section E explains, Respondents' novel "frustration" theory falls short, because there is no reason why the public schools and Hope Scholarship Program cannot coexist and prosper together. This Court also does not facially invalidate laws based on speculation that they may later turn out to be unwise. In short, no amount of reading between the lines can conjure an implied prohibition on supporting ***both*** public schools ***and*** additional educational choices.

A. The Plain Meaning Of The West Virginia Constitution Confirms That It Does Not Forbid The Legislature From Supporting Educational Choice

Article 12, Section 1 provides that the "Legislature shall provide, by general law, for a thorough and efficient system of free schools." As Petitioners/Parent-Intervenors' ("Parent-Intervenors") Opening Brief explained, the plain meaning of this is clear and unambiguous: the Legislature must provide for public schools, but it may do other things, too. Opening Br. 13–15. That is enough to resolve this case. Where language "is not vague or ambiguous," this Court "need not turn to the rules of statutory construction, including the maxim of *expressio unius est exclusio alterius*." *Van Nguyen v. Berger*, 199 W. Va. 71, 77, 483 S.E.2d 71, 77 (1996); *see Fields v. Mellinger*, 244 W. Va. 126, 129, 851 S.E.2d 789, 792 (2020) (where language is "clear in its terms," this Court does "not add to, distort or ignore the plain mandates thereof" (internal quotation marks omitted)). And even where the language is ambiguous, *expressio unius* only applies where the context indicates that the drafters ***intended*** the omission to prohibit what was omitted. Opening Br. 17–18.

The complete failure to wrestle with the language of Section 1 dooms Respondents' case. They do not—and cannot—point to any context or textual clue to suggest that the drafters

intended their imposition of a duty to simultaneously forbid everything else related to K–12 education. They cannot do so because it flouts how normal people use language: when you tell someone they must do one thing, you typically are not even thinking about (much less intentionally restricting) what else they are allowed to do. Telling a child that she ***must*** make her bed does not imply, for example, that the child cannot ***also*** clean up her toys, so long as she does both.

For this reason, it is simply common sense that *expressio unius* does not apply to affirmative constitutional duties. Opening Br. 16–17. The very nature of a duty is that it "is 'not a ceiling but a floor.'" *Schwartz v. Lopez*, 382 P.3d 886, 898 (Nev. 2016) (quoting *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998)). This logic is especially compelling here because under West Virginia's Constitution, the Legislature "may enact any statute which is not specifically prohibited by constitutional provision." Opening Br. 13, 16 (quoting *State v. Tennant*, 229 W. Va. 585, 615, 730 S.E.2d 368, 398 (2012)). Respondents describe this intuition as "bold[]" and unsupported by caselaw (Pls.' Br. 31), but tellingly they themselves never cite to a single decision by this Court to support the proposition that a duty to do one thing restricts doing other things. That is because no such case exists.

There is also strong textual evidence that the framers did not intend to limit the Legislature's power to do other things. That evidence further confirms that *expressio unius* cannot apply.

For instance, Section 11's ban on funding new normal schools confirms that (1) the framers used express prohibitory language when they wanted to ban educational policies beyond the public schools, and (2) the Education Article does not forbid funding other educational options, because otherwise Section 11's ban on funding already-banned normal schools would be

surplusage. Opening Br. 13–14 & nn. 4–5. Respondents try to deflect this powerful textual evidence by declaring normal schools to be just another type of free school. Pls.' Br. 32. Not so. West Virginia has always distinguished between its system of free schools and the system of normal schools.[3]

Another clue that *expressio unius* does not apply is that it would lead to various counterintuitive and absurd results, casting doubt on longstanding programs like university scholarships and the provision of textbooks and transportation assistance. Opening Br. 17 n.7; *cf. Janasiewicz v. Bd. of Educ. of Kanawha Cnty.*, 171 W. Va. 423, 427, 299 S.E.2d 34, 38 (1982) (aid may include "monetary stipend" paid to private-school students for transportation). Respondents assure us that providing textbooks and transportation stipends to non-public-school students is different because they are free. Pls.' Br. 33–34. But it's not clear why directly funneling public-school resources and transportation stipends to private school students for free helps under Respondents' theory; if anything, that would run afoul of their other constitutional arguments. *E.g.*, Pls.' Br. 6 (asserting that "public funds . . . may only be used to fund the system of free schools"). In any event, Respondents' sweeping application of *expressio unius* jeopardizes those programs because they go beyond establishing a system of free schools.

Another textual clue is the Legislature's duty to promote other educational policies enshrined by Article 12, Section 12. Respondents cannot simply shrug off this second duty by invoking the supposedly "definite and specific terms" of Article 12, Sections 1–5. Pls.' Br. 34. After all, there are no such "definite and specific terms." That's why Plaintiffs spend over 19 pages trying to establish ***implicit*** restrictions on the Legislature's authority. *E.g.*, Pls.' Br. 21

[3] *See Herold v. McQueen*, 71 W. Va. 43, 75 S.E. 313, 316 (1912) (Constitution required a "system of free schools," but it "d[id] not provide for the establishment of the state university, or the state normal school at Huntington, or their respective branch schools").

("express words of prohibition were not necessary"). The existence of a second duty to "encourage" other educational policies, as Plaintiffs themselves recognize, led the Nevada and Indiana Supreme Courts to reject similar *expressio unius* arguments. Pls.' Br. at 34–35; *see Lopez*, 382 P.3d at 896–97 (finding "additional support" from that language); *Meredith v. Pence*, 984 N.E.2d 1213, 1224 n.17 (Ind. 2013). West Virginia's Constitution includes nearly identical language.[4] Section 12's creation of a duty to do more than just provide free schools directly refutes Plaintiffs' *expressio unius* arguments.

B. This Court Does Not Apply *Expressio Unius* To The Constitution In The Mechanical, Non-Textual Way Respondents Propose

Respondents apparently skip over the crucial first step of interpreting the text of Section 1 because they think it is unnecessary. By their lights, the text itself doesn't matter because *expressio unius* ***always*** applies to constitutional requirements: "Where the Constitution says that the Legislature 'shall,' actions that do not fit within the mandated conduct are unconstitutional." Pls.' Br. 22. That bold assertion flunks a basic tenet of West Virginia constitutional law—the Legislature "may enact any statute which is not specifically prohibited by constitutional provision." *Tennant*, 229 W. Va. at 615, 730 S.E.2d at 398. It also violates the core principle of

[4] *Compare Lopez*, 382 P.3d at 897 ("The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements[.]" (quoting Nev. Const. art. 11, § 1)), *and Meredith*, 984 N.E.2d at 1221 ("[I]t shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement[.]" (emphasis omitted) (quoting Ind. Const. art. 8, § 1)), *with* W. Va. Const. art. 12, § 12 ("The Legislature shall foster and encourage moral, intellectual, scientific and agricultural improvements; it shall, whenever it may be practicable, make suitable provisions . . . for the organization of such institutions of learning as the best interests of general education in the State may demand."). *Lopez* and *Meredith* emphasized the language, "by all suitable means," but nothing of substance seems to turn on whether the West Virginia Legislature must "foster or encourage" or "foster or encourage by all suitable means." In fact, West Virginia's Constitution apparently grants even more legislative discretion than does Nevada's and Indiana's. *See* W. Va. Const. art. 12, § 12 (stating "whenever it may be practicable" and "as the best interests of general education in the State may demand").

expressio unius—the canon only applies where it is clear that the drafters intended the omission to prohibit what was omitted. Opening Br. 17–18.

Yet this Court's precedent applies *expressio unius* carefully and reluctantly, and only where the context makes clear that it is appropriate to do so. For example, *State Road Commission v. Kanawha County Court* refused to apply *expressio unius* to infer that a ***duty*** to do one thing (fund roads using the state road fund) implied a ***prohibition*** on doing other things (forcing local counties to pay certain road costs). 112 W. Va. 98, 163 S.E. 815 (1932).

Similarly, *State v. Morton*, 140 W. Va. 207, 218, 84 S.E.2d 791, 798 (1954), refused to apply *expressio unius* to a constitutional provision establishing "an irreducible minimum" that the Legislature is free to build upon. The constitutional provision in *Morton* said the Governor "shall have power" to remove for good cause officials appointed by the Governor, but a statute said the Governor could also remove those officials at will. *Id.* at 210–11, 84 S.E.2d at 794. This Court concluded that the constitutional requirement that the Governor "shall have power" to remove appointees for cause was a ***floor*** ("an irreducible minimum"), but the Legislature could provide ***additional*** avenues for removal. *See id.* at 218, 84 S.E.2d at 798.

And so on. *See, e.g.*, *State v. King*, 64 W. Va. 546, 606, 63 S.E. 468, 493 (1908) (constitutional requirement that certain forfeited lands "shall be" transferred to one of three categories of people did not prohibit Legislature from authorizing a fourth category); *State v. Swann*, 46 W. Va. 128, 33 S.E. 89, 91 (1899) (*expressio unius* inapplicable because the "provision in the constitution that tracts of land containing 1,000 acres or more shall be forfeited for nonentry does not prevent the legislature from passing a law forfeiting a less number of acres for the same cause," as nothing "prevent[s] the constitutional provision and the statute from standing together"). The point, of course, is not to tally up cases applying or not applying

expressio unius. Rather, the cases confirm that the Court does not apply *expressio unius* willy-nilly, but instead only when there is compelling textual evidence that "certain omissions" by the drafters "[we]re ***intentional***." *Young v. Apogee Coal Co.*, 232 W. Va. 554, 562, 753 S.E.2d 52, 60 (2013) (emphasis in original).

The handful of instances where this Court has applied *expressio unius* to find implied limits on the Legislature's powers are in accord. In *State v. Gilman*, 33 W. Va. 146, 10 S.E. 283 (1889), two separate factors provided concrete reasons for finding that a grant of power (to regulate liquor sales) implied a prohibition on the Legislature's power (to regulate liquor possession). First, *Gilman* concluded that the prohibition on mere possession of liquor was "not a legitimate exertion of the police power." 33 W. Va. 146, 10 S.E. at 284. So, at the outset, *Gilman* did not involve the usual presumption that the Legislature had plenary power absent a specific prohibition. *Cf. Downey v. Sims*, 125 W. Va. 627, 26 S.E.2d 161, 163 (1943) (divided court held that *expressio unius* limited Legislature's power to impose additional reasons for disqualifying someone from office in part because ineligibility for office was, by default, "the exception"). Second, absent the constitutional grant of power over liquor sales, the Legislature already would have had "plenary and unrestricted authority" to regulate alcohol sales (but not mere possession). *Gilman*, 33 W. Va. 146, 10 S.E. at 285. Without *expressio unius* prohibiting other forms of liquor control, the provision would be "wholly nugatory and useless." *Id.* Here, by contrast, it is not necessary to apply *expressio unius* to give meaning: Section 1, after all, does not ***grant*** the Legislature ***power*** to establish a through and efficient system of public schools; it directs the Legislature to ***exercise*** its plenary ***power*** for that purpose. That is, it replaces the Legislature's discretion over ***whether*** to establish public schools, with "an irreducible minimum" that the Legislature must satisfy.

The other case Respondents cite similarly involves a clear textual justification for applying *expressio unius*. In *Dunham v. Morton*, the Constitution required local commissioners to be elected by county voters, but a statute sometimes permitted the Governor to appoint commissioners. 115 W. Va. 310, 175 S.E. 787, 788 (1934). It made sense to invalidate the statute under *expressio unius*: You cannot both elect and appoint a commissioner; you have to do one or the other. But there is no reason the Hope Scholarship Program cannot stand alongside public schools. West Virginia families can have both options.

C. Virtually Every State Supreme Court To Consider Respondents' *Expressio Unius* Argument Has Rejected It

Relying on plain meaning and common intuition, the overwhelming majority of state high courts around the country to consider the issue have expressly rejected Respondents' argument that the duty to provide public schools is a ceiling that prohibits legislatures from providing additional options. Opening Br. 18–20 (collecting cases). Respondents' effort to evade this clear weight of authority falls short.

Respondents argue that differences in the scope of the challenged programs distinguish those cases. Pls.' Br. 34–35. That is wrong for several reasons. ***First***, *Lopez* involved a ***universal*** scholarship program, and it explicitly rejected the *expressio unius* argument Respondents advance here. 382 P.3d at 898 ("The legislative duty to maintain a uniform public school system is not a ceiling but a floor upon which the legislature can build additional opportunities for school children" (internal quotation marks omitted)).[5] That *Lopez* enjoined the appropriations for the program (but not the program itself) on technical grounds involving the ordering of

[5] Plaintiffs incorrectly label this dictum. Pls.' Br. 35–36. In fact, a partial dissent questioned whether it was necessary to reach certain state establishment clause issues. *Lopez*, 382 P.3d at 903 (Douglas, J., concurring in part and dissenting in part). Yet not one justice questioned the need to resolve the legislature's power to enact the program.

appropriation bills is irrelevant; on every single issue relevant to this case, *Lopez* squarely rejected Respondents' position.

Second, Respondents overstate the limitations of other programs. Indiana's program, for instance, was limited by income, but nevertheless about 60% of students were eligible. *Meredith*, 984 N.E.2d at 1222–23. And of course, wealthy families already had the means to choose alternative options. Respondents offer no principle of constitutional law that says that educational choices can be available to the poor and the rich, but not to nurses, carpenters, and others who are neither rich nor poor.

And third, nothing about the *expressio unius* argument actually turns on the size of the program. If Respondents are correct that a duty to provide public schools excludes other educational options, then none of the programs upheld in Indiana, Ohio, Nevada, North Carolina, and Wisconsin would pass muster, regardless of their reach.

Respondents then assert those other state high court decisions are inapposite because they were interpreting constitutions requiring "uniform" public education. Pls.' Br. 35. But if anything, the requirement for uniformity would seem to be a higher bar than the one faced here: Those states did not merely require the state provide adequate public schools, but those schools also had to be "uniform." In any event, there is no daylight between the plaintiffs' arguments in those cases and Respondents' arguments here.[6] The common argument was that the ***duty*** to

[6] *See, e.g.*, *Jackson*, 578 N.W.2d at 627 ("The Respondents also argue that art. X, § 3 prohibits the State from diverting students and funds away from the public school system. Article X, § 3, the Respondents contend, requires that the district schools be the only system of state-supported education."); *Lopez*, 382 P.3d at 896 ("[T]he plaintiffs cite the maxim *expressio unius* . . . to argue that the expression in Section 2 requiring the Legislature to maintain a uniform system of common schools necessarily forbids the Legislature from simultaneously using public funding to pay for private education that is wholly outside of the public school system."); *Hart v. State*, 774 S.E.2d 281, 289 (2015) ("Plaintiffs contend that '[i]f the uniformity clause has any substance, it

provide for public education (whether "uniform" or "thorough and efficient") implies a ***prohibition*** on supporting other educational options. And the common answer was, "No." The duty is "not a ceiling but a floor." *Lopez*, 382 P.3d at 898 (quoting *Jackson*, 578 N.W.2d at 628).

D. Providing Additional Educational Choices To Families Does Not Violate The Constitution By "Exceeding" The Legislature's Duty To Support Public Education

Article 12, Section 1 clearly and unambiguously imposes one simple duty on the Legislature: it must provide for a "thorough and efficient" system of public schools. Plaintiffs flip this duty on its head, treating it as an "implied prohibition[] on actions that ***exceed***" the "constitutional obligation." 2 JA 64 ¶ 64 (emphasis added). But it tortures language to cast a duty as something that cannot be "exceeded." This Court should reject Respondents' arguments on that basis alone. Yet even setting aside Respondents' misunderstanding of what a duty is, neither of their specific arguments for why the Hope Scholarship Program supposedly "exceeds" the Legislature's duty make any sense.

1. Providing The Option To Use Scholarship Funds At Public Schools Does Not Violate The Legislature's Duty To Support Public Education

Respondents first argue that giving participating families the option to use a "pro rata share of [the] student's Hope Scholarships funds" to take classes from public schools, W. Va. Code § 18-31-8(f), somehow violates the duty to provide for "free schools." Pls.' Br. 22–23. This argument fails for at least three reasons. ***First***, with or without that option, students always have the choice to remain in their public school for free. And even if Respondents are correct (Pls.' Br. 23) that public schools right now do not charge homeschool or private school students for

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means that the State cannot create an alternate system of publicly funded private schools standing apart from the system of free public schools mandated by the Constitution.'"); *Meredith*, 984 N.E.2d at 1224 n.17 ("we are not persuaded by the plaintiffs' contention that we apply the canon of construction [*expressio unius*]").

their services (Parent-Intervenors do not concede that point, but nothing seems to turn on it), homeschooled and private-school students could continue to access those services for free by choosing not to participate in the Hope Scholarship Program. Families are better off because they have ***additional*** choices, but they always retain the ability to choose a free public education. ***Second***, even students who elect to apply a pro rata share of their scholarship funds to a public school are using their scholarship funds, so those services remain free. ***Finally***, even if subsection 18-31-8(f) were impermissible, the appropriate course would be to permit an aggrieved party (such as a family that does not want to pay tuition to the public school) to challenge the provision and, if successful, to sever it. W. Va. Code § 18-31-13(c).

2. Not Implementing Respondents' Preferred Oversight Policies Does Not Violate The Legislature's Duty To Support Public Education

Stranger still is Respondents' second argument, which speculates that some Program participants may not receive an education if their parents or others are able to evade the Program's various safeguards and limitations on how funds are used. Pls.' Br. 23–25. Parent-Intervenors have explained that this speculation directly conflicts with the text of the Hope Scholarship Program statute, which prohibits scholarship funds from going to parents, provides for payments directly to approved vendors (at the direction of parents), and provides for audits of both parents and education service providers. Opening Br. 3–4, 24–25 & n.10. And participants remain subject to West Virginia's compulsory education law, which the Hope Scholarship Program did not alter. W. Va. Code §§ 18-8-1 *et seq*. This includes mandatory annual assessments and other requirements for homeschooled students, *id.* § 18-8-1(c), and numerous requirements including approval or registration along with annual testing for private schools, *id.* §§ 18-8-1(b), (k); 18-28-3(a).

Respondents apparently believe these safeguards are insufficient. They posit farfetched hypothetical schemes by which parents might be able to bilk money from the Program and question whether the Hope Scholarship Board will diligently safeguard program funds. Pls.' Br. 24–25. This Court, however, does not invalidate legislation based on speculation and "mere fears conjured up by counsel" about future events. *State Rd. Comm'n*, 112 W. Va. 98, 163 S.E. at 819 ("A court will not anticipate prospective conditions which may never arise in order to declare a law unconstitutional[.]" (internal quotation marks omitted)). Respondents may disagree with the Legislature about the effectiveness of its chosen means of overseeing the Program or enforcing the State's compulsory education requirements, but that is no basis for invalidating the Program.

E. The Program Does Not "Frustrate" Anything Because The Legislature Can Support Both Public Education And The Hope Scholarship Program

Faced with a plain meaning of the text that contradicts their theory, and the near universal rejection of that theory by courts around the country, Respondents try a different tack. They ask the Court to invalidate the Hope Scholarship Program on the ground that it "frustrates" the Legislature's duty to provide for thorough and efficient public schools. Pls.' Br. 25–30. Notably absent, however, are any citations to decisions applying or striking down legislation based on this free-floating "frustration" rationale. Nor do Respondents cite to any authority for applying that theory in the extraordinary manner they suggest—essentially as a bar on any legislation perceived to have potentially undesirable policy outcomes in the future. Their novel theory is unprecedented and should be rejected.

1. The Frustration Theory Fails As A Matter Of Law Because Thorough and Efficient Public Schools Can Co-Exist With Hope Scholarships

Assuming that "frustration" is a cognizable theory under the West Virginia Constitution (which it isn't), it is at best a much more modest inquiry than the one Respondents set forth. A court might ask, for example, whether it is possible for the constitutional provision and the

statute to "stand[] together." *Swann*, 46 W. Va. 128, 33 S.E. at 91. That is, if it is possible for the Legislature to do both things, neither one frustrates the other. Here, especially in the context of a facial challenge, there is absolutely no basis to assume that a thorough and efficient system of public schools cannot peacefully co-exist alongside the Hope Scholarship Program. *Cf. Meredith*, 984 N.E.2d at 1222–23 (rejecting speculation that large-scale participation in school-choice program would prevent legislature from fulfilling duty to support public education). After all, such coexistence occurs across the country, including in states where Respondents' arguments have been rejected by state high courts and programs have been implemented. Respondents themselves specifically disavow any claim that the Legislature will fail to provide enough funding to provide a "thorough and efficient" system of public schools. Pls.' Br. 39. Because the Legislature can do both, there is no frustration, and this theory must fail.

Respondents' remaining "frustration" arguments should be viewed as what they are: thinly veiled policy disagreements. But this Court does not determine "[w]hether the Legislature has a certain power . . . simply by marshaling the reasons for and against," and deciding whether, on balance, it is wise or unwise policy. *See State Rd. Comm'n*, 112 W. Va. 98, 163 S.E. at 817. Nor does this Court find Legislative powers to be restricted based on "hypothetical and unreal possibilities" that the policy could have negative outcomes sometime in the future. *See id.* at 819 (courts "will not anticipate prospective conditions which may never arise in order to declare a law unconstitutional"). To the contrary, it is "settled law" that the Court "must assume" that the Legislature, Hope Scholarship Board, and other officials "will perform [their] duties legally." *Id.*; *see also Price v. Sims*, 134 W. Va. 173, 190, 58 S.E.2d 657, 667 (1950) ("[T]his Court must presume that [the Legislature] will faithfully [safeguard the appropriation of funds] in the interest of the State.").

2. Not Implementing Respondents' Preferred Spending Priorities Does Not Frustrate Public Education As A Matter Of Law

Under any conceivable version of a "frustration" test, it makes no sense to insist, as Respondents do, that if money is "available for education," then it must be spent on the public schools. Pls.' Br. 26. Other than the School Fund (*see infra* Part II.B), there is no specific pile of money "available for education." There is a budget that the Legislature spends as it sees fit, whether on roads, hospitals, universities, or other educational policies. Every penny the Legislature decides to spend is "available for education" until the Legislature decides to spend it on something else.

3. The Possibility That The Public-School Funding Formula Will Adjust To Lower Enrollment And Lower Costs In Future Budgets Does Not Frustrate Public Education As A Matter Of Law

Nor does it frustrate anything to provide options, which some families may use to choose alternatives to public schools. Pls.' Br. 26–27; BOE Br. 11–12. Respondents complain that empowering families to choose non-public schools could lower public-school enrollment, and that in future years when the school-funding formula calculates state aid to those schools, they will receive less money (for the sensible reason that their costs are lower). This is an entirely speculative hypothetical that may never occur.[7] It also flips the purpose of education on its head: schools exist to serve students; students do not exist to funnel money to schools. That some schools one day may not receive funds to educate students who are not enrolled does not frustrate the Legislature's duty to provide for thorough and efficient public schools.

[7] For example, as Respondents elsewhere complain, many participants never would have entered public schools regardless of the Program. And because net migration to West Virginia is positive for the first time in years, the net result may be little to no change in funding under the current school-funding formula. *See Gov. Justice: Record-setting revenue surpluses continue into new Fiscal Year*, https://governor.wv.gov/News/press-releases/2022/Pages/Governor-Justice-Record-setting-revenue-surpluses-continue-into-new-Fiscal-Year.aspx.

Respondents' argument that the Hope Scholarship Program supposedly incentivizes students to choose non-public education fails in at least two ways. Pls.' Br. 25, 26–27, 38; BOE Br. 11–15. First, incentivization is legally irrelevant to whether the Legislature is satisfying its duty to provide thorough and efficient schools. *See Meredith*, 984 N.E.2d at 1222–23 (rejecting speculation that large-scale participation in school-choice program would prevent legislature from fulfilling duty to support public education). Second, the Program in no way incentivizes families to leave public schools. The Program does not pay parents to induce them to use the Program; it expressly forbids such payments. W. Va. Code § 18-31-7(c). All the Program does is remove a financial obstacle that would otherwise prevent (non-wealthy) parents from choosing the education they think best for their child. *Id.* § 18-31-5(a); *see Jackson*, 578 N.W.2d at 619 (aid for private-school tuition "places on equal footing options of public and private school choice"). Indeed, to the extent there is any incentive, it is to attend public school, which is ***free***. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 654 (2002) (additional private-school tuition "clearly dispel[s] the claim that the program creates financial incentives for parents to choose a sectarian school" (cleaned up)).

Moreover, Plaintiffs explicitly disclaim that this is a challenge to public-school funding. Pls.' Br. 39. That is fatal to their theory. To accept the current school-funding formula as adequate is to accept that it correctly calibrates funding to the changes in costs as enrollment shifts. *See* W. Va. Code §§ 18-9A-1 to -24; BOE Br. 3 (purpose is to "calculate the financial cost" of a "thorough and efficient education"). That admits that there is no harm, no frustration, and no claim as a matter of law. If, by contrast, the funding formula failed to account for fluctuating costs (*e.g.*, BOE Br. 11–12), ***that*** would be a different lawsuit challenging the deficiencies in the school-funding formula, not the Hope Scholarship Program. *See, e.g.*, *Pauley*

v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). That lawsuit would first require the hypothesized funding shortfalls to materialize, because this Court presumes that the Legislature will comply with its constitutional obligations to adequately fund public schools in future budgets. *See Price*, 134 W. Va. at 190, 58 S.E.2d at 667; *State Rd. Comm'n*, 112 W. Va. 98, 163 S.E. at 819. The Legislature, after all, is free to and does change its appropriations for public education.[8] Assuming that some future budget does fail to appropriate enough money to public schools, that shortfall could be challenged. But it would have nothing to do with the Hope Scholarship Program.

4. The Imagined Participation Rates Of Low Income And Special Needs Students Does Not Frustrate Public Education As A Matter Of Law

Respondents' other frustration arguments would lead this Court even further down the policymaking rabbit hole. For instance, they forecast potential negative outcomes for lower-income or special-needs students. Pls.' Br. 27–28. But nothing on the face of the statute suggests those outcomes are inevitable or even likely. To the contrary, common sense and experience both show that those students with higher needs will be the primary beneficiaries. *See, e.g.*, Br. of Amicus Curiae Goldwater Institute 4–7 (discussing Arizona experience). After all, wealthy families can ***already*** afford private school, and they can ***already*** afford to move to zip codes with the schools they desire. The Hope Scholarship Program exists precisely to give those same choices to all families regardless of income. W. Va. Code § 18-31-5(a); *see also Meredith*, 984 N.E.2d at 1229 (scholarships for private-school tuition "provid[ed] lower-income Indiana families with the educational options generally available primarily to higher-income Indiana

[8] *See W. Va. Educ. Ass'n v. Leg.*, 179 W. Va. 381, 382 n.2, 369 S.E.2d 454, 455 n.2 (1988) (stating the Legislature "is free to amend the [public school support] plan, or to replace it with another provision"); *see also Gov. Justice: Record-setting revenue surpluses continue into new Fiscal Year*, *supra* note 7 (noting "largest pay raises ever" for teachers).

families"). Similarly, students with special needs stand to benefit most from the program—students are not one-size-fits-all, so greater choice increases their chances of finding an educational environment where they can thrive. *See* W. Va. Code § 18-31-7(a)(9) (authorizing "occupational, behavioral, physical, speech-language, and audiology therapies," among others). Indeed, both Parent-Intervenors have children with special needs and intend to use the Program precisely because it will help meet those needs. 4 JA 573–74 ¶¶ 10–12, 575–76 ¶¶ 4–10, 14.

5. Not Implementing Respondents' Preferred Accountability Policies Does Not Frustrate Public Education As A Matter Of Law

Respondents' predictions that the Program's accountability measures will fall short also miss the mark in at least two ways. First, they acknowledge, as they must, that families already had the choice to pursue private education and homeschooling. These options implicate parents' fundamental right "to direct the upbringing and education of [their] children." *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925)). Respondents' theory, untethered from any constitutional text, is that once the Legislature decides to assist with the exercise of that fundamental right, it must ensure the right is exercised correctly. But the Education Article concerns public schools. There is absolutely nothing in the text forcing the Legislature to provide a higher quantum of "accountability" for students who receive financial aid than for students who do not.

Second, Respondents are simply wrong as a matter of law to deny the existence or effectiveness of the existing accountability measures. As discussed earlier, both the Hope Scholarship Program and the pre-existing compulsory education law impose a variety of registration, curriculum, assessment, and other requirements on parents and education providers. *See supra* pp. 13–14. Far from "toothless" (Pls.' Br. 29), these are backed by criminal penalties. W. Va. Code §§ 18-8-2, 18-31-10(e). The Program also ***increases*** accountability to parents and

students, because families have greater opportunities to exit schools that are not meeting their needs. *Davis v. Grover*, 480 N.W.2d 460, 476 (Wis. 1992) ("parental choice preserves accountability for the best interests of the children").

* * *

At bottom, Respondents' "frustration" theory is nothing more than a policy disagreement underneath a thin constitutional veneer. To the extent the frustration theory is even valid (and, again, it is not), no court has ever applied it in the sweeping way Respondents propose. This Court should not be the first.

II. Respondents' Hodgepodge Of Other Theories Also Lacks Merit

The West Virginia Constitution is clear: The Legislature ***must*** provide for thorough and efficient public schools, but it ***may*** support additional educational options, too. Without any textual basis for their assertion that the duty to do one thing prohibits doing other things, Respondents turn to a hodgepodge of additional, novel theories for invalidating the Hope Scholarship Program. Each theory fails.

A. Strict Scrutiny Does Not Apply Because The Hope Scholarship Program Does Not Infringe Anyone's Rights

As Parent-Intervenors' Opening Brief explained, strict scrutiny does not apply because the Hope Scholarship does not deny or infringe anyone's right to an education. Opening Br. 23–25. It is funded by an entirely separate appropriation, W. Va. Code § 18-9A-25(a), and it does not and cannot touch the amounts that the Legislature is obligated to appropriate to public schools under the school-funding formulas. *Id.* §§ 18-9A-1 to -24. This Court has applied strict scrutiny to student expulsions, *Cathe A. v. Doddridge Cnty. Bd. of Educ.*, 200 W. Va. 521, 527, 490 S.E.2d 340, 346 (1997); to manifestly unequal appropriations between counties based on wealth, *Pauley*, 162 W. Va. 672, 255 S.E.2d 859 (applying strict scrutiny); to cutting ***current***

expenditures below the level previously authorized, *State v. Rockefeller*, 167 W. Va. 72, 73, 281 S.E.2d 131, 132 (1981); and to enacting ***current*** budgets that fall ***below*** the school-funding plan, *W. Va. Educ. Ass'n v. Legislature*, 179 W. Va. 381, 382–83, 369 S.E.2d 454, 455–56 (1988). But this Court has never applied strict scrutiny by speculating that, in a ***future*** budget, the school funding formula will calculate that a school's expenses have gone down and that the school therefore requires less support from the state. To the contrary, "the basic foundation program contained in article nine A has established public policy which is ***presumed*** to vindicate the constitution." *W. Va. Educ. Ass'n*, 179 W. Va. at 382, 369 S.E.2d at 455 (emphasis added). That presumptively constitutional funding formula, which Plaintiffs disavow challenging (Pls.' Br. 39), is untouched by the Hope Scholarship Program.

Respondents propose a few theories for how the Hope Scholarship Program might infringe someone's right to an education, but they all share one feature: They don't identify any actual infringement on anyone's right to a public education.

For instance, they argue that the Program "incentivize[s]" students to leave public schools, and that the reduction will lead to lower appropriations in future budget cycles. Pls.' Br. 36–37; BOE Br. 11–12. This falls short on multiple levels. ***First***, the program does not incentivize anyone to leave public schools, which remain free. *See supra* p. 17. ***Second***, any lower appropriations, if they materialize (*see supra* p. 18 and note 8), would only occur because the presumptively constitutional school funding formula calculates that a school's estimated costs have decreased. *See* BOE Br. 3 ("purpose" of the school-funding formula "is to calculate the financial cost" for a "'thorough and efficient' public education").[9] That is, no one's right to

[9] Plaintiffs appear to no longer argue that the school-funding formula miscalculates how to adjust expenses following an enrollment decline. Pls.' Br. 39. BOE Defendants, however, continue to

an education would be infringed because future appropriations can only decrease in proportion to a school's decrease in costs. And ***third***, if down the road the funding plan gets it wrong, this Court presumes that the Legislature will do its duty and fix it. *Price*, 134 W. Va. at 190, 58 S.E.2d at 667; *State Rd. Comm'n*, 112 W. Va. 98, 163 S.E. at 819. Respondents argue that we must assume that the Legislature will do nothing if things go awry (Pls.' Br. 38–39 n.30), but that just illustrates the folly of applying strict scrutiny to hypothetical future harms resulting from unenacted budgets. In the absence of any actual appropriation to challenge, it's just guesswork.[10]

Respondents then posit that strict scrutiny applies because Hope Scholarship Funds "could otherwise be used for public schools." Pls.' Br. 37. But that is true of everything the Legislature funds. *See supra* Part I.E.2. It is nonsensical to suggest that that every spending decision by the Legislature infringes the right to education.

Next, Respondents suggest that strict scrutiny applies because lower-income students and students with disabilities could be negatively impacted. Pls.' Br. 37. But that is not so. Those are precisely the students who stand to gain the most from the choices and flexibility that Hope Scholarships provide. *See supra* Part I.E.4.

Finally, Respondents suggest that participating families infringe their own rights to education by accepting scholarship funds instead of attending public school. Pls.' Br. 39. But

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critique the formula. BOE Br. 11–12. No matter. First, they are wrong. 4 JA 465–86 ¶¶ 52–104. Second, even if the issue were disputed, the solution would be to challenge the allegedly broken funding formula, most likely following the passage of an actual, allegedly defective appropriation rather than a hypothesized future budget.

[10] Respondents' effort to distinguish between decreased enrollment due to the Program and decreased enrollment due to other causes is unpersuasive. They suggest it is different if the budget goes down because students moved following a factory closing, because no state action is involved. Pls.' Br. 38; BOE Br. 15. But it is the ***state*** that decides, under its funding formula and during each budget cycle, what funds to appropriate to schools. If it infringes someone's right to an education for the state to appropriate less money to a school following an enrollment decline, it is hard to see why the ultimate source of the decline in enrollment matters to that person.

participants "do so by choice and may withdraw at any time and return to a public school." *Jackson*, 218 Wis. 2d at 895, 578 N.W.2d at 628. Neither providing that additional choice to families nor their decision to exercise that choice infringes their rights.[11]

B. The Program Does Not Touch The School Fund

Respondents argue that the Program uses funds reserved for public schools, but it does not. The West Virginia Constitution provides simple guidelines for funding public schools. Certain sources (delinquent lands, intestate estates) are reserved for the school fund; the Legislature must support public schools with the school fund, proceeds from all fines and forfeitures, and by general taxation; and the Legislature has the power to tax to support the public schools. Opening Br. 25–27 (citing W. Va. Const. art. 10, § 5, art. 12, §§ 4–5). The Hope Scholarship Program does not touch any sources reserved for the public schools, and is funded by an entirely different appropriation from the general fund, W. Va. Code § 18-9A-25(a); *id.* § 18-31-6(a). Thus, Respondents' claim that the Hope Scholarship Program use public-school funds fails as a matter of law.

Respondents say that the source of the funds "does not matter," that all public-education spending should be considered part of the "school fund." Pls.' Br. 44–45. That contention erases hundreds of words from the Constitution establishing the school fund and dedicating certain funding sources to it. Respondents point to the Legislature's modern practice of funding public schools well beyond the constitutional floor, such that most of the funding comes from general taxation. Pls.' Br. 44. But the Legislature's decision to go above the constitutional floor to fund public schools does not prohibit it from also going above and beyond to fund other educational

[11] Petitioners do not concede that the Hope Scholarship would fail strict scrutiny in the unlikely event it applies. The circuit court did not have the authority to resolve factual disputes necessary to apply strict scrutiny here. *See infra* Part III. Thus, the question ***whether*** strict scrutiny applies is properly before this Court, but not the question ***how*** it would apply to the facts of this case.

initiatives. And Respondents' suggestion that the Legislature could render the school-fund provisions "meaningless" by assigning everything to the general fund is simply wrong. Pls.' Br. 45–46. Certain revenue sources (delinquent and wasted lands, intestate estates, escheated lands) ***must*** go to the school fund to support public schools. That is the funding floor, which the Legislature can and does exceed.

Other high courts have rejected Respondents' strained reading of constitutional school-fund provisions in favor of common sense. Opening Br. 26 (citing *Hart*, 774 S.E.2d at 289); *see also Meredith*, 984 N.E.2d at 1225 n.18 ("That the school fund may only be used for support of the public schools, in no way limits the legislature's prerogative to appropriate other general funds to fulfill its duty to encourage educational improvement[.]"). Respondents' effort to distinguish *Hart*—based on language in North Carolina's Constitution that additional revenue "***may*** be set apart" for the school fund—backfires badly. Pls.' Br. 44 (emphasis added by Respondents) (quoting *Hart*, 368 N.C. at 132, 774 S.E.2d at 289). In fact, West Virginia's school-fund provision ***also*** grants discretion to set apart additional revenue for the school-fund. W. Va. Const. art. 12, § 4 (school fund includes "such sums as ***may from time to time*** be appropriated by the Legislature"). North Carolina's other provisions are also in accord. *Compare* N.C. Const. art. IX, § 2 (North Carolina legislature "***shall provide by taxation*** and otherwise for a general and uniform system of free public schools"), *with* W. Va. Const. art. 12, § 5 (West Virginia Legislature "***shall provide*** for the support of free schools . . . ***by general taxation***"). If, as Respondents contend, "may" is dispositive in North Carolina, then it is dispositive in West Virginia, too.

Finally, Respondents' reliance on Article 10, Section 5 is unavailing. That provision explicitly states that the Legislature's "power of taxation" extends to "the payment of the annual

estimated expenses of the State." W. Va. Const. art. 10, § 5. The Hope Scholarship Program is indisputably an "annual . . . expense of the State." Respondents contend, however, that the Legislature's power to tax for "the support of free schools" somehow negates the Legislature's power to tax to pay its annual expenses. As their only support, they paraphrase the section of the Scalia and Garner statutory-interpretation treatise on *expressio unius*, but without revealing that they are invoking that canon of interpretation. Pls.' Br. 42–43 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012)). Given how much of their case rides on (mis-) applying *expressio unius*, it is telling that they obscure its invocation here. The reason is clear. *Expressio unius* may sometimes imply that an omitted term was meant to be excluded, but it absolutely does not mean that things ***actually listed*** were meant to be excluded.

C. The Program Has Nothing To Do With The Board Of Education's Supervision Of Public Schools

The Constitution states: "The general supervision of the ***free schools*** of the State shall be vested in the West Virginia Board of Education." W. Va. Const. art 12, § 2 (emphasis added); *see* Opening Br. 27–28. Try as Respondents might, this language does not "squarely" vest the Board of Education with oversight over "public expenditure of funds on K–12 education." Pls.' Br. 46 (Board has "constitutional authority over public funding of education"); BOE Br. 20. Article 12, Section 2 says "free schools," not "K–12 education" and not "public funding of education." No amount of paraphrasing can transform the Board of Education's authority over public schools into a broader authority over all spending on education.

Plaintiffs basically admit this. They confess that the framers did not "give the [Board of Education] constitutional authority over such a system" as the Hope Scholarship Program but argue that the "reason" the framers did not do so is "[b]ecause a system of publicly funded education outside the free schools is constitutionally prohibited." Pls.' Br. 46. That just

repackages Plaintiffs other claims. As for the claim that the Hope Scholarship Program usurps the Board of Education's authority, Plaintiffs' admission is dispositive. The "reason" the framers did not vest authority over the Hope Scholarship Program does not matter for this claim, only that that they did not do so.

D. The Act Is A General Law

The Hope Scholarship Program is not a special law. A law is only "special" when "by force of an inherent limitation, it arbitrarily separates some persons, places, or things from others upon which, but for such limitation, it would operate." Opening Br. 28 (quoting *State v. Bachman*, 131 W. Va. 562, 568, 48 S.E.2d 420, 425 (1948)). It is undisputed that the Hope Scholarship Program does not treat anyone differently. 1 JA 16 ¶ 77 (describing lack of limitations on eligibility). Indeed, Respondents repeatedly critique the Program precisely because it is "universal." Pls.' Br. 4, 10, 34–36. That suffices to resolve the "special law" claim.

Despite the absence of any classifications on the face of the statute, Respondents read a "special law" problem into the Hope Scholarship Program by focusing on three supposed effects: (1) Hope Scholarship students will have to pay for supplemental public-school programs whereas other non-public-school students allegedly can obtain those services for free; (2) Hope Scholarship students may use private schools that do not have the same anti-discrimination policies as public schools; and (3) only wealthy, non-disabled students allegedly may participate.

As an initial matter, this approach misapplies the special-law inquiry. One must first identify actual classifications and then explain why they make impermissible distinctions. Respondents' chief authority in support of their special-law claim confirms this point. Pls.' Br. 47–48 (citing *State v. Bosely*, 165 W. Va. 332, 268 S.E.2d 590 (1980)). That case invalidated an obvious "legislative classification" apparent from the face of the statute: the largest (Class I) cities, and ***only*** the largest cities, could collect hotel occupancy taxes. 165 W. Va. at 333, 268

S.E.2d at 592. *Bosely* therefore turned on "whether the legislative classification" was "reasonable" and "appropriate to the purpose of the statute," concluding that it was irrational to expressly exclude smaller cities from the benefits of the tax revenue. 165 W. Va. at 340–41, 268 S.E.2d at 595–96.[12] Put differently, the analysis (1) identifies the "legislative classification," and (2) identifies whether it is "reasonable." *Bosely* did not, as Respondents advocate, gin up a classification by positing that some cities might view the occupancy tax as more beneficial than others (more hotels, for example, or more tourists), or that their different choices about whether to levy the tax would itself result in a classification. Yet that is just what Respondents are doing: ginning up special-law problems by positing that Hope Scholarship families will make different life choices—ones they are free to make—than other families. Respondents then argue that this "classification," one they have invented and that exists neither in the statute nor in reality, violates the special-law clause.

First, they argue that the Program creates a *de facto* classification because public schools will charge tuition to Hope Scholarship recipients to ensure the schools receive an "appropriate pro rata share" of the scholarship funds, W. Va. Code § 18-31-8(f), whereas non-participants who attend private school or are homeschooled can (according to Respondents) attend those classes for free. Pls.' Br. 49–50. But the statute operates uniformly on all students because they all have the exact same choice: accept Hope Scholarship funds (but use those funds to pay for any public-school courses) or decline the funds (and take public-school courses for free). *See Bailey v. Truby*, 174 W. Va. 8, 24, 321 S.E.2d 302, 318 (1984) (law is not "special" where it

[12] *Bosely* focused on the reasonableness of the classification, but it did briefly consider and reject an argument that there was no "legislative classification" because smaller municipalities could grow and become Class I cities, viewing that possibility as "abstractly attractive but unrealistic as a practical matter." *Id.* at 342–43, 268 S.E.2d at 596–97.

"applies uniformly to all counties who wish to take advantage of its provisions" and simply "permits flexibility" to accommodate "individualized" needs). And even if this were a legislative classification, it is eminently "reasonable" and "appropriate to the purpose of the statute," *Bosely*, 165 W. Va. at 340, 268 S.E.2d at 595, to ask someone receiving financial aid for education to use some of that aid to reimburse the school providing educational services.[13]

Second, Respondents argue that the Program creates classifications of students protected and unprotected by the antidiscrimination provisions applicable to public schools. Pls.' Br. 49–50. But as Parent-Intervenors have already shown, the Hope Scholarship Program did not touch West Virginia's antidiscrimination laws, which apply to education providers the exact same way with or without the Program. Opening Br. 29. Respondents counter that the Program creates a new class of "publicly funded students" (Pls.' Br. 50) (emphasis omitted), but that is a meaningless distinction. It's perfectly rational to treat public and private entities differently when it comes to anti-discrimination provisions, and there's no reason why providing financial aid to individuals changes that.

Finally, Respondents attempt to manufacture a classification because supposedly only wealthy and non-disabled students can participate. Pls.' Br. 49. That argument conflicts with the statutory text, which Respondents and the circuit court below acknowledged contains no such classifications. 1 JA 16 ¶ 77. It is also flat wrong to say that lower income and disabled students, the primary beneficiaries of the program, cannot meaningfully participate. *See supra* Part I.E.4. And setting aside the factual dispute about average tuition, *compare* Br. of State Petitioner 31 ($4,760), *with* Pls.' Br. ($6,315 and $6,903), it is a simple math error to jump to conclusions

[13] Even if § 18-31-8(f) posed a problem, Respondents are not the proper parties to challenge it, and the proper remedy would not be to invalidate the entire Program. *See supra* p. 13.

about affordability based on average tuition. *See, e.g.*, Br. of Amicus Curiae Goldwater Inst. 6 (explaining difference between average and median).[14] In any event, this type of unfounded conjecture about who might participate in the future is not a basis for facially invalidating the Program. The facial constitutionality of the Hope Scholarship Program does not turn, as Respondents appear to suggest, on the reliability of competing websites. *Cf.* Pls.' Br. 48 n.38.

III. This Court Cannot Affirm The Circuit Court Based On Disputed Facts About Speculative Policy Outcomes

The parties appear to agree that this appeal involves the interpretation of West Virginia's Constitution, a question of law that this Court Reviews de novo. *E.g.*, Pls.' Br. 17; *see also Cathe A.*, 200 W. Va. at 527, 490 S.E.2d at 346 ("Our appellate review of a circuit court's interpretation of the West Virginia Constitution is also de novo.").[15] Because the constitutional text here is unambiguous and nothing on the face of the Hope Scholarship statute exceeds any constitutional limitation, this Court can simply reverse the circuit court, reject Plaintiffs' claims as a matter of law, and direct entry of judgment in favor of Petitioners. There is no need for this Court to indulge Respondents' assorted policy arguments and speculative scenarios.

But if the Court believes that the facial constitutionality of the Program depends on an evidentiary duel in the trial court about (1) what possible negative effects the Program ***might*** have on public schools if implemented, and (2) what possible steps the Legislature ***might*** fail to

[14] To the extent Respondents' theory is that the Program is a special law or will violate equal protection because a private school may discriminate against them at some point, that would also be legally baseless. *See Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991) ("The claimed discrimination must be a product of state action as distinguished from a purely private activity."). It is well established that the Hope Scholarship funds are the ***families'*** money—not the government's and not the education provider's—and families' private, independent choices about where to spend that money is not a product of state action. Opening Br. 30 (collecting cases).

[15] It is only if the Program is found to violate the Constitution that the decision to enter an injunction is reviewed for an abuse of discretion. Pls.' Br. at 16–17*;* Brief of State Petitioner 11.

take to remedy those effects, then the Court must remand for proper factual development.[16] The current record is inadequate if those issues are relevant, and the procedures the circuit court used to reach final judgment were errors of law. If, as Parent-Intervenors understand, the circuit court *sua sponte* granted summary judgment, it was error to do so without notice or an opportunity for discovery. Opening Br. 11–12. On the other hand, if the circuit court silently consolidated the preliminary injunction hearing with a trial on the merits (Pls.' Br. 60), it was error to do so without notice "either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (discussing identical federal rule). Either way, the circuit court disregarded the valid procedures for making final determinations of any disputed facts.

To be clear, Plaintiffs' claims fail as a matter of law based on the clear constitutional text. This Court can correct the circuit court's mistaken interpretation to the contrary by reversing with instructions to enter judgment for Petitioners because Plaintiffs failed to state a claim. But if Plaintiffs are permitted to challenge the Program based on their speculative view of the facts, they must carry their burden to prove those facts.

CONCLUSION

Plaintiffs' lawsuit fails to state a viable legal claim. Parent-Intervenors therefore ask that this Court reverse the circuit court, lift the preliminary and permanent injunctions, and direct the circuit court to grant judgment in Petitioners' favor.

Dated: September 30, 2022

[16] And if it is remanded, the Court should reverse the preliminary injunction in the interim. Petitioners have not waived this request (*see* Pls.' Br. 9 n.6), and in fact specifically asked this Court to lift the preliminary injunction. Opening Br. 10–11, 31. Respondents have not and cannot carry their heavy burden to show that the Hope Scholarship Program is unconstitutional or that it will harm anyone. 4 JA 442–541, 547–555. To the contrary, if the Program has any impact, it will be to improve both the funding (by increasing per-pupil funding) and effectiveness (by introducing competition) of public schools. *E.g.*, 4 JA 465–86 ¶¶ 52–104, 533–35 ¶¶ 32–34.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2022, I served the foregoing document via the Court's e-filing system, and, for those parties who are not capable of receiving electronic service, by email, as agreed by the parties, on the following counsel:

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