

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 22-616

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STATE OF WEST VIRGINIA,

Petitioner,

and

KATIE SWITZER and JENNIFER COMPTON,

Petitioners,

v.

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

Respondents.

BRIEF OF *AMICUS CURIAE*
MARK E. BRENNAN,
BISHOP OF THE DIOCESE OF WHEELING-CHARLESTON
IN SUPPORT OF PETITIONER AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii,iii

I. IDENTITIES AND INTERESTS
OF *AMICUS CURIAE* AND AUTHORITY TO FILE.....1

II. ARGUMENT.....3

A. *The Circuit Court’s constitutional analysis is wrong and contrary to established
law*.....3

B. *The Kanawha County Circuit Court failed to consider the sweeping logical
conclusions of its ruling*.....6

III. CONCLUSION.....9

TABLE OF AUTHORITIES

CASES

<i>Cooper v. Gwinn</i> , 171 W. Va. 245, 298 S.E.2d 781 (1981)	3
<i>Justice v. AFL-CIO</i> , 246 W. Va. 205, 866 S.E.2d 613 (2021)	5
<i>Pauley v. Kelly</i> , 162 W. Va. 672, 255 S.E.2d 859 (1979)	3
<i>State ex rel. Appalachian Power v. Gainer</i> , 149 W. Va. 740, 143 S.E.2d 351 (1965)	5
<i>W.Va. Educ. Ass’n v. Legislature of State of W.Va.</i> , 179 W.Va. 381, 369 S.E.2d 454 (1988)	3, 11

WEST VIRGINIA CONSTITUTION

W. VA. CONST. art. XII, § 1	6, 10
W. VA. CONST. art. XII, § 12	6

WEST VIRGINIA STATUTES

W. Va. Code § 18-2-9	7
W. Va. Code § 18-2-25	8
W. Va. Code § 18-5-15(g)	8
W. Va. Code § 18-5-17(a)	8
W. Va. Code § 18-5-18	7
W. Va. Code § 18-5-21B	8
W. Va. Code § 18-5-49	9
W. Va. Code § 18-8-1	6
W. Va. Code § 18-8-1(c)(2)(C)	7
W. Va. Code § 18-8-1(c)(2)(C)(ii)	8
W. Va. Code § 18-8-1(c)(3)	8
W. Va. Code § 18-8-1(n)(4)	7

W. Va. Code § 18-8-1a(a)	6
W. Va. Code § 18-9-1	5
W. Va. Code § 18-9A-25(a).....	4
W. Va. Code § 18-31-1	10

WEST VIRGINIA RULES

126 W. Va. C.S.R. 13C-1 <i>et seq.</i>	7
W. Va. R. App. P. 30(e)(5).....	1

OTHER AUTHORITIES

<i>Granville, Parker</i> , FIRST CONST. CONVENTION OF W.VA. (Dec. 2, 1861)	10
HB 2013 (2021)	3, 4, 7
Non-Public School Accreditation, Policy 2330.....	7
<i>P.G. Van Winkle, Debates & Proc.</i> , FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862).....	10

I. IDENTITY AND INTEREST OF AMICUS CURIAE
AND AUTHORITY TO FILE¹

The Catechism of the Catholic Church states that parents “have the first responsibility for the education of their children.”² The *amicus curiae*, Mark E. Brennan, Bishop of Wheeling-Charleston, comes before this honorable Court to affirm that “parents who have the primary and inalienable right and duty to educate their children must enjoy true liberty in their choice of schools[;] [c]onsequently, the public power, which has the obligation to protect and defend the rights of citizens, must see to it, in its concern for distributive justice, that public subsidies are paid out in such a way that parents are truly free to choose according to their conscience the schools they want for their children.”³ The role of parents is paramount in shaping the education of their children,⁴ and the state has a proper interest in supporting parents and families in the execution of this sacred trust.

For more than a millennium, the Church has been an enduring force in teaching children throughout the world. The institution of Catholic education in West Virginia is older than the State itself. In 1838, the first Catholic school opened in Martinsburg. The Visitation nuns in Wheeling opened a Catholic school for girls in 1846. St. Francis Xavier Parish began a small school behind the Parkersburg church in 1856. Today, the Diocese of Wheeling-Charleston (“DWC”) and its parishes sponsor, finance, and operate 18 elementary or grade schools and six high schools: Central Catholic High School (Wheeling, 1865), St. Joseph Central Catholic High School (Huntington,

¹*Amicus* certifies 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. *Amicus* certifies that no person other than the *amicus curiae* made a monetary contribution specifically intended to fund the preparation or submission of this brief. W. Va. R. App. P. 30(e)(5).

² Catechism of the Catholic Church 2223.

³ Declaration on Christian Education, *Gravissimum Educationis*, Paul VI, October 28, 1965 (Available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html).

⁴ Canon 226 § 2, *Code of Canon Law*.

1872), St. Joseph School (Martinsburg, 1883), Sacred Heart Grade School (Charleston, 1903), St. Michael Parish School (Wheeling, 1905), St. Paul School (Weirton, 1911), St. Vincent de Paul School (Wheeling, 1912), Ss. Peter and Paul Catholic School (Oak Hill, 1913), St. Mary Central School (Clarksburg, 1914), St. Patrick School (Weston, 1914), St. Francis de Sales Central Catholic School (Morgantown, 1915), Corpus Christi School (Wheeling, 1916), Our Lady of Fatima School (Huntington, 1924), Charleston Catholic High School (Charleston, 1924), Notre Dame High School (Clarksburg, 1924), St. Joseph High School (Huntington, 1924), Fairmont Catholic Grade School (Fairmont, 1927), St. Francis of Assisi School (St. Albans, 1948), Madonna High School (Weirton, 1955), Parkersburg Catholic High School (Parkersburg, 1955), St. Francis de Sales School (Beckley, 1957), St. Joseph the Worker Grade School (Weirton, 1958), Our Lady of Peace School (Wheeling, 1970), and Parkersburg Catholic Elementary School (Parkersburg, 1970).

As pastor of many and leader of these strong and historic Catholic schools, Bishop Brennan has observed firsthand that many Catholic and non-Catholic families turn each year to West Virginia's Catholic schools to help meet that fundamental calling of parents to educate and form their children. In affirming and supporting families in their work to educate their children, Bishop Brennan, in 2021, instructed the Catholic Schools Department, and all of the Catholic schools in the State, to welcome Hope Scholarship students.⁵ Bishop Brennan saw in the Hope Scholarship Program a fundamental recognition by the State of the truth - that it is parents who bear the first

⁵ Catholic Schools have worked tirelessly to prepare for students and families that might desire to use the Hope Scholarship Program to attain a Catholic education. In preparing to serve these students, Catholic schools have adjusted and revised policies pertaining to tuition, record keeping, and administrative matters to meet the Hope Scholarship Program requirements and the DWC Catholic Schools Department has invested thousands of dollars and many hours to build a state-wide student application and enrollment platform for online registration and account management. The new system was designed to allow schools to assemble, aggregate, and process data that the Hope Scholarship Program would require. The Department of Catholic Schools also provided workshops, professional development opportunities for administration personnel preparing for Hope Scholarship requirements, and conducted work sessions and webinars for administrators and staff to work through issues and concerns.

responsibility for the education of their children, not the State, and that the State has a natural interest in supporting families in that crucial endeavor.

II. ARGUMENT

A. The circuit court’s constitutional analysis is wrong and contrary to established law.

In its “Final Order Granting Plaintiff’s Motion for Preliminary and Permanent Injunctive Relief and Declaratory Judgment and Ruling on Various Other Motions” (the “Circuit Court Order”), the circuit court finds that because public education is an essential constitutional right and that the State cannot impinge on that right without satisfying a strict scrutiny analysis, that *ipso facto* the constitutionality of the Hope Scholarship Program should be subject to a strict scrutiny analysis. (Circuit Court Order ¶ 73).⁶ As *amicus curiae*, Bishop Brennan admits, and in fact celebrates, that public education is an “essential constitutional right” in West Virginia. See Syl. Pt. 3, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979). He further acknowledges that the financing of public education “is, among mandated public services, the first constitutional priority.” *West Va. Educ. Ass’n v. Legislature of W. Va.*, 179 W. Va. 381, 382, 369 S.E.2d 454, 455 (citing *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781, 792 (1981)). However, Bishop Brennan takes issue with the circuit court’s tortuous logic and the manufactured alleged impingement on the right to a public education.

If the circuit court had cited to statutory provisions enacted in HB 2013 (2021) mandating the closure of free schools to free up resources to fund the Hope Scholarship Program, or if the circuit court had pointed to provisions in the Hope Scholarship Program requiring a certain percentage of students in each county to accept Hope Scholarships as a substitute for their right to attend free public schools, then perhaps impingement on a constitutional right could be shown and

⁶ Bishop Brennan cites to the circuit court order by paragraph as he does not have access to the Appendix in this appeal.

strict scrutiny review would be in order. However, such provisions do not appear in HB 2013 (2021) and so, instead, the circuit court offers conclusory statements that “HB 2013 impinges on the fundamental right to an education by reducing the funds available to public schools through the state-incentivized reduction in public school enrollment” and that “HB 2013 also trades a student’s fundamental right to a public education for a sum of money[,]” by “put[ting] in place a system that requires students to exchange their fundamental right to a public education for a payment of \$4,300.” (Circuit Court Order ¶¶ 74, 75, 69 respectively). The former of these statements is wholly dependent upon the assumption of the circuit court that the Legislature will not meet its constitutionally mandated duty to fund the State’s system of free schools while the latter statement reads into the statute a nonexistent mandate for students and families to accept Hope Scholarships. Both of these statements by the circuit court ignore the primacy of parents in shaping the education of their children and imply, instead, an overriding interest of the State in counting heads merely to populate the State’s free schools.

In fact, rather than reducing funding for free schools, W. Va. Code § 18-9A-25(a), adopted as a part of HB 2013 (2021), specifically provides that “for fiscal year 2023 and each fiscal year thereafter, *in addition to all other amounts required by this article*, the Department of Education shall include in its budget bill submitted to the Legislature, an appropriation to the Department of Education for the greater of an amount not less than two percent of net public school enrollment adjusted for state aid purposes or the total number of eligible Hope Scholarship applications received by the Hope Scholarship Board, if available, multiplied by the prior year’s statewide average net state aid allotted per pupil.” W. Va. Code § 18-9A-25(a) (emphasis added). In other words, the language of HB 2013 (2021) itself requires that funds necessary for the Hope

Scholarship Program shall be appropriated *in addition* to other funds required by statute for public school support (as set forth in W. Va. Code §§ 18-9-1, *et seq.*).

In this light, it is clear the circuit court should have declined the Respondents' invitation to enjoin the statute based on its constitutionality. When a court is asked to consider the constitutionality of a statute, it must exercise restraint in its review. *Justice v. AFL-CIO*, 246 W. Va. 205, 866 S.E.2d 613, 620 (2021). The court must proceed under the presumption that acts of the Legislature are constitutional. *Id.*, 866 S.E.2d at 621. A party making a facial challenge to the constitutionality of a statute faces an enormous burden – in considering constitutional restraint, the negation of legislative power must appear beyond a reasonable doubt. Syl. Pt. 1, in part, *State ex rel. Appalachian Power v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965). Respondents did not meet their burden, and the circuit court did not challenge them to do so.

If the circuit court had applied the appropriate analysis, it could have discussed the true nature of the Hope Scholarship Program. The Hope Scholarship Program is not a part of the State's system of thorough and efficient free schools. It is a separate program, created by the Legislature, to pursue the sensible State interest of facilitating the education of children who choose not to attend free schools by providing funds for use by those families in pursuit of educational endeavors. The question presented to this honorable Court is not whether the Hope Scholarship Program will utilize State dollars that might otherwise have been spent on free schools (which could logically be said of any State dollar spent on any interest of the State from highway spending, to providing for the State Police, to funding the budget of this honorable Court), but rather whether the State may make provision for parents to educate their children when they have chosen not to educate them using the State's system of free schools. Of course, the answer to that question is a resounding yes.

Article XII, Section 12 of the Constitution charges the Legislature to “foster and encourage moral, intellectual, scientific and agricultural improvements” and to “make suitable provisions for ... the organization of such institutions of learning as the best interests of general education in the State may demand.” Thus, our Constitution contemplates that two things can be true at once. The State must fund public schools, but also, it may embrace other programs oriented toward the education of its citizenry. The Legislature can satisfy the constitutional requirement to make free public education available to all, and it can provide separate programs for parents who choose not to utilize those free public schools.

B. The Kanawha County Circuit Court failed to consider the sweeping logical conclusions of its ruling.

The circuit court writes:

The State has no constitutional interest in subsidizing the expenses of those who choose private school or homeschooling. The State’s sole constitutional mandate is to create a thorough and efficient system of free schools.

(Circuit Court Order ¶ 76). This *non sequitur* sums up the logical fallacy in the circuit court’s argument,⁷ to wit: it does not follow that because the State is constitutionally mandated to provide a thorough and efficient system of free schools⁸ that the State is barred from facilitating the education of children whose parents choose for their children not to attend those schools.

To begin with, the State requires, by statute, that should a family choose not to enroll their child in public schools, they must provide otherwise for the education of that child under a permissible exception to the statutory education mandate. *See generally* W. Va. Code §§ 18-8-1a(a); 18-8-1. The State further evidences its interest in the education of children who are outside

⁷ See also Circuit Court Order ¶¶ 72, 74 stating, respectively, that “HB2013 [] frustrates Section 1,2, 4, and 5 by diverting public funds that could be used for West Virginia’s underfunded public schools...” and that “HB 2013 impinges on the fundamental right to an education by reducing the funds available to public schools...”

⁸ See W. VA. CONST. art. XII, § 1.

the system of free schools through a series of curriculum, reporting, testing, and accreditation requirements related to homeschooling and the operation of private schools. For example, the State asserts an interest in the curriculum of children outside free public schools when it mandates, by statute, that private schools provide at least one year of instruction, prior to the eighth grade, in the history of the State of West Virginia, along with regular courses prior to the twelfth grade in civics, the Constitution, and the history of the United States. *See* W. Va. Code § 18-2-9. The State asserts an interest in the quality of education received outside the system of free schools when it promulgates rules through the Board of Education for the independent accreditation of private schools and when it takes on the responsibility of approving accrediting organizations. *See* 126 W. Va. C.S.R. 13C-1 *et seq.*, Non-Public School Accreditation, Policy 2330; *see also* W. Va. Code § 18-5-18 (providing that the State Board shall establish guidelines and criteria relating to the establishment, operation, and successful completion of kindergarten programs to serve for the establishment and operation of nonpublic kindergarten programs and requiring the State superintendent to annually publish a list of approved nonpublic kindergarten programs). The State manifests its interest in the educational attainment of children outside the system of free schools when it requires a review of the academic progress of homeschooled or micro-schooled students, including by nationally normed standardized achievement tests or via the review of a portfolio of work by a certified teacher who determines whether the child's academic progress is in accordance with the child's abilities and whether progress in the areas of reading, language arts, mathematics, science, and social studies shows a need for remediation. *See* W. Va. Code §§ 18-8-1(c)(2)(C) and 18-8-1(n)(4). The statutory mandate for education, even if completed outside public school, together with the statutory and regulatory elements touching on the organization and character of

that education reflects the State’s interest in the education of children whose parents have chosen to educate them outside the State’s public school system.

Beyond this, the State already spends public funds subsidizing and facilitating parents in the education of their children in those families who choose not to attend free schools. For example, the State provides by statute that children receiving home instruction may attend any class offered by the county board including career technical education and virtual school programs and that children who are homeschooled or who attend private schools may attend classes at public vocational schools at no cost or expense greater than that charged to public school students. *See* W. Va. Code §§ 18-8-1(c)(3) and 18-5-15(g). The State subsidizes the testing requirements for homeschooled children, providing that homeschooled children may arrange for mandatory testing to be administered at a public school in their county. W. Va. Code § 18-8-1(c)(2)(C)(ii). West Virginia law also requires that county superintendents offer assistance – including textbooks, other teaching materials, and available resources – to parents or guardians providing home instruction and permits county boards of education to provide vision and hearing screenings for nonpublic school students *See* W. Va. Code §§ 18-8-1(c)(3) and 18-5-17(a). West Virginia Code § 18-2-25 provides that private and parochial schools that participate in the West Virginia Secondary School Activities Commission shall receive any monetary and other benefits in the same manner and in the same proportion as any public secondary school, and W. Va. Code § 18-5-21B provides that county boards of education may provide state-adopted textbooks for the use of pupils enrolled in private schools where their parents are not able to provide textbooks. The State has even authorized county boards of education to establish funds to facilitate the education of children “who are likely to perform better outside of the public school setting” including the authority of the county board to establish “[e]ligibility requirements for education service providers that can accept payments

from the fund[.]” W. Va. Code § 18-5-49. Thus, not only does the State have an interest in the education of children outside free schools, but it already permits or requires public funds to be expended supporting families in pursuit of that interest.

Contrary to the finding of the circuit court, the State of West Virginia has a well-founded and appropriate interest in supporting families in educating West Virginia’s children, regardless of whether they attend free schools. The State’s interest is reaffirmed through a statutory mandate for all children to be educated, even if outside of the free schools, and in the statutory and regulatory requirements to enable parents to evaluate the efficacy of that education. Furthermore, the State already authorizes the spending of public funds and utilizes property to subsidize or facilitate parents in the education of their children outside of free schools. That the State has proper interests other than the funding of free schools can be seen with every dollar spent on priorities other than traditional public schools, and the balancing of these sensible interests in the State’s budgets has only the most remote connection to the constitutional mandate to provide for free schools (and no more connection than any other public expenditure). Were this Court to uphold the ruling of the circuit court, any State spending to facilitate, subsidize, or support parents in seeking the educational attainment or development of children where they have chosen not to avail themselves of the State’s free schools would be constitutionally suspect, and many worthwhile programs and supports could be discontinued.

III. CONCLUSION

The circuit court emphasizes the value that West Virginia’s framers placed on education. Circuit Court Order ¶ 58. It quotes delegates to the First Constitutional Convention as noting that “the highest and most binding duty of any community is to provide for the education of its children ... [t]he State owes it as a duty to the children themselves who are to become its future citizens.”

Circuit Court Order ¶ 58 (citing *P.G. Van Winkle, Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862)). Unfortunately, the circuit court’s ruling interprets the State’s interest in education, and in an educated citizenry, as being wholly and infallibly expressed in the mandatory obligation to provide for free schools, to the exclusion of any other means of promoting or advancing that recognized value.

Nothing about the Hope Scholarship Program interferes with the State’s obligations under W. VA. CONST. art. XII, § 1, and nothing about the Hope Scholarship Program impinges on the “essential constitutional right” of children in this State to education in free schools any more than spending on any other lawful interest of the State so impinges. Nothing about W. Va. Code § 18-31-1, *et seq.*, orders free schools to close, precludes the use of State revenue to fund public schools, or forces children to surrender their right to attend free public schools. Indeed, quite the opposite, W. Va. Code § 18-31-1, *et seq.*, is a recognition of the value of education, the paramount importance of parents, rather than the State, in shaping that education, and the natural interest of the State in promoting and supporting the efforts of those parents. This recognition is nothing new in West Virginia; it is the same principle reflected by the delegates to the Constitutional Convention and quoted by the circuit court, “[V]irtue and general intelligence among the people ... is the only sure foundation on which Republican governments can rest[.]” Circuit Court Order ¶ 58 (citing *Granville, Parker*, FIRST CONST. CONVENTION OF W.VA. (Dec. 2, 1861)). These words reflect the sentiment underlying the Hope Scholarship Program and reflect of the truth revealed by Catholic moral teaching:

Since they have conferred life on their children, parents have the original, primary and inalienable right to educate them; hence they must be acknowledged as the first and foremost educators of their children. [] Parents have the right to educate their children in conformity with their moral and religious convictions, taking into account the cultural traditions of the family which favor the good

and the dignity of the child; they should also receive from society the necessary aid and assistance to perform their educational role properly. [] Parents have the right to freely choose schools or other means necessary to educate their children in keeping with their convictions. Public authorities must ensure that public subsidies are so allocated that parents are truly free to exercise this right without incurring unjust burdens. Parents should not have to sustain, directly or indirectly, extra charges which would deny or unjustly limit the exercise of this freedom. ... [] The primary right of parents to educate their children must be upheld in all forms of collaboration between parents, teachers, and school authorities, and particularly in forms of participation designed to give citizens a voice in the functioning of schools and in the formulation and implementation of educational policies.⁹

West Virginia's long-standing emphasis on education is reflective of the basic human truth exposed in these teachings. The provision for free schools in the State's founding document is evidence of the recognition of this moral imperative in West Virginia, but the constitutional mandate to fund free schools is not the exclusive expression of the interest of the State in an educated citizenry. The Hope Scholarship Program reaffirms the commitment of the State to education, partners with parents who are naturally the most invested parties in the education of a child, and does so without offending the essential constitutional right to public education.¹⁰

For these reasons, Bishop Brennan urges this Court to reverse the circuit's court order, dissolve the preliminary and permanent injunctions, and allow the implementation of House Bill 2013.

MARK E. BRENNAN,
BISHOP OF WHEELING-CHARLESTON

By his counsel,

⁹ Charter of the Rights of the Family, October 22, 1983 (Available at: https://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html)

¹⁰ Circuit Court Order, ¶ 73 (citing *W.Va. Educ. Ass'n v. Legislature of State of W.Va.*, 179 W.Va. 381, 382 (1988)).

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