THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA, Petitioner, and KATIE SWITZER and JENNIFER COMPTON, Petitioners, v. TRAVIS BEAVER and WENDY PETERS, Respondents.	CASE NO. 22-616 ICA CASE NOS. 22-ICA-1 22-ICA-3

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS SWITZER AND COMPTON AND IN SUPPORT OF REVERSAL

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IDENTITY AND INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE[1]

The identity and interest of amicus curiae is set for in the accompanying Motion for Leave to File.

SUMMARY OF ARGUMENT

Among the Circuit Court's errors was the conclusion that the Hope Scholarship Program will lead to reduced public school funding, which it said would violate the Legislature's constitutional obligation to operate a public school system. Arizona's experience, however, rebuts this premise. More than a decade ago, Arizona adopted a program almost identical to the Hope Scholarship Program—called the Empowerment Scholarship Account (ESA) program (A.R.S. § 15-2401 *et seq*.)—and during that time, per-pupil public school spending has *increased*, both because of larger appropriations and because the public dollars stay in the public system and are divided amongst fewer students when students choose the ESA alternative. The Circuit Court's legal conclusions also suffered from two fallacies: The first was that the Legislature's constitutional obligation to run a public school system bars it from augmenting that system or creating alternatives to it in addition to the existing system—a proposition this Court explicitly rejected in *Herold v. McQueen*, 71 W.Va. 43, 75 S.E. 313, 315–16 (1912), and *Casto v. Upshur County High School Board*, 94 W.Va. 513, 119 S.E. 470, 472 (1923). The second was that a government program is a "special law" if some members of the public find that program impracticable due to their own personal circumstances. This was incorrect because the "special law" analysis asks whether the classification *the Legislature adopted* was legitimate—not

[1] No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution specifically intended to fund the preparation or submission of the brief, nor did anyone other than the amicus curiae, its members, or its counsel, make any monetary contribution.

whether "diversity arises out of the use or application of a legislative act." *State ex rel. Baughn v. Ure*, 91 Neb. 31, 135 N.W. 224, 227 (1912). Because the classification here is rationally designed to serve the government's legitimate goal of improving education, it is not an unconstitutional special law.

ARGUMENT

I. The Circuit Court's fear that parental choice will cause public school funding to fall is not supported by Arizona's experience.

A. Arizona's school choice program has resulted in increased per-pupil spending in *public* schools.

The basis of the Circuit Court's ruling was its belief that the Hope Scholarship Program will "frustrate" the existing public school system by depriving it of funding. *See* Opinion at ¶ 71. But that has not been the experience in Arizona, which pioneered this type of school choice alternative though its ESA program. Rather, Arizona has witnessed increases in public school spending, alongside the expansion of education options—and improvements in performance by students in both the ESA program and the existing public schools.

The Circuit Court found that "HB 2013 will result in a reduction in public school funding" by causing a "reduction in public school enrollment." Opinion at ¶¶ 44, 74. This conclusion erred by conflating *total* funding with *per pupil* funding. The relevant measure of school funding is not the amount of money in absolute or raw terms, but rather the amount of funding available *per student*. The claim that the Hope Scholarship Program will reduce public school funding ignores this distinction, but Arizona's experience shows why it is important. Since Arizona's ESA program started over ten years ago, annual public school funding per class of 20 pupils has *increased* more than $30,000 in inflation-adjusted terms, even while the ESA program grew from 140 students (in 2012) to roughly 10,000 (by 2021). Matt Beienburg, *A*

Decade of Success: How Arizona's Empowerment Scholarship Accounts Have Saved Students and Inspired a National Movement 12 Goldwater Institute (2021).[2] And in the 2022–23 state budget, Arizona legislators appropriated more than $600 million of new public-school funding in the same year that they expanded eligibility to Arizona's ESA program to all K–12 aged students statewide,[3] further recognizing the ability to fund both a traditional public school system and ESA scholarships concurrently.

National data confirms that the Circuit Court erred in concluding that Hope Scholarships will reduce funding for public schools. Rather, an analysis of data from the U.S. Department of Education shows that states with *increasing* public school populations have struggled the most to sustain funding increases for their school-aged populations because available funding must be spread among more students. In contrast, states with overall *decreases* in public school enrollment have enjoyed the sharpest *increases* in *per-student* funding. Specifically, among states where public-school populations decreased between 2001 and 2015, total public school funding per student *increased* an average of 63%, the highest of any group in the country. States with stable public school student populations increased per pupil funding by an average of 52%, while states with the highest increases in public school enrollment boosted public school funding per pupil by just 31%. Matt Beienburg, *How Private Education Can Help Funding*, Goldwater Institute (Jan. 26, 2021).[4] In other words, if more students exit public schools for lower cost

[2] https://www.goldwaterinstitute.org/wp-content/uploads/2021/09/GWI-DECADE-OF-SUCCESS.FINAL_.pdf.
[3] Office of the Governor, News Release: Securing Arizona's Future: Governor Ducey Signs Fiscal Year 2023 Budget (June 28, 2022), https://azgovernor.gov/governor/news/2022/06/securing-arizonas-future-governor-ducey-signs-fiscal-year-2023-budget.
[4] https://www.goldwaterinstitute.org/policy-report/private-ed-public-funding/.

alternatives, the public school systems will, if anything, end up with *more funding* available per student.

Moreover, Arizona's experience also demonstrates that the Hope Scholarship Program is likely to further *increase* per-pupil public school spending because not all state and federal dollars are tied to the number of students in public schools. Arizona receives more than $1.1 billion in federal money to support K–12 students in each year—that is, more than $1,000 per pupil—and a substantial portion of this money stays in the public system even as students exit for alternatives like ESAs. Because of the way federal Title I dollars for low-income students are allocated, those funds typically do *not* follow a student to a private school, and instead remain with the public school even as it is no longer required to educate as many students. Matt Beienburg, *The Public School Benefits of Education Savings Accounts* 9 (Goldwater Institute Aug. 13, 2019).[5] The Circuit Court found that under the Hope Scholarship, students such as those with special needs may face discrimination among private schools, while "public schools will have fewer funds to educate a higher proportion of students with the most significant needs." Opinion at ¶ 47. Once again, Arizona's experience demonstrates the contrary. In the Grand Canyon State, ESAs awards have *helped* both family and school district finances when it comes to disadvantaged populations such as special-needs students. Fifty-eight percent of ESA students in Arizona had special needs as of 2019, including nearly 2,500 with severe disabilities. Beienburg, *Public School Benefits, supra* at 4.[6] These families have found the ESA program to

[5] https://www.goldwaterinstitute.org/wp-content/uploads/2019/08/Public-School-Benefits-of-ESAs_web.pdf.
[6] https://www.goldwaterinstitute.org/wp-content/uploads/2019/08/Public-School-Benefits-of-ESAs_web.pdf.

be a crucial means of obtaining the aid they need—aid not available to them in the public school system.

In addition to its financial aspects, growth in Arizona's ESA program has also coincided with a period of academic improvement in the *public* school system. Between the years of 2008 and 2018, Arizona outpaced national gains in student achievement: "Maricopa County students lead the nation among large urban counties in academic gains. … Perhaps even more impressive, Maricopa's strong performance ranked only third among Arizona's 15 counties. … Low-income students in Maricopa County had a rate [of academic growth for low-income students] 19% higher than the national average, which is easily the best nationwide among large urban counties." Matthew Ladner, *Stanford Academic Growth Data Has Good News for Arizona,* Chamber Business News (Feb. 18, 2021).[7]

Empirical research has found similar improvements for students who *remain* in the public school system in other states that have adopted school choice options. University of California researchers found, for instance, that after Florida expanded its school choice program (which was then the largest, with more than 100,000 participating students), the students who remained in *public* schools witnessed "improvements in their reading and math test scores, and were on average suspended less often and absent less often." Stephen Sawchuk, *What Happened to the Students Left Behind as Florida's Private School Vouchers Expanded?*, Education Week (Feb. 24, 2020).[8] The study concluded that the most likely explanation for this phenomenon was that

[7] https://chamberbusinessnews.com/2021/02/18/stanford-academic-growth-data-has-good-news-for-arizona/.
[8] https://www.edweek.org/leadership/what-happened-to-the-students-left-behind-as-floridas-private-school-vouchers-expanded/2020/02?cmp=eml-enl-eu-.

"[t]he competitive pressure that comes from students having a lot of school choices led the public schools to improve their offerings." *Id.*

B. School choice programs help everyone, but particularly lower income families.

The Circuit Court found that the Hope Scholarship Program would help only families that can pay the additional tuition, and therefore that "[s]tudents in poverty" do not benefit from the program. Opinion at ¶ 45. This reflects a common misconception about school choice programs. It is typically based on a comparison of *average* tuition costs—but that number fails to capture the actual *affordability* of private school options, since a small number of high-cost schools throw off the average. In actuality, private options are usually affordable. In Arizona, a 2021 statewide survey revealed that *median* private school tuition cost just $6,500 for elementary grades, with the median being $6,624 for grades 6 through 8. Beienburg, *Decade of Success, supra*, at 14.[9] This means Arizona's ESA program fully or almost fully covers the tuition rates at most of the state's private K–8 schools. And even where an ESA or Hope Scholarship award would not fully cover tuition costs, private school providers frequently offer modest, privately funded scholarship opportunities or partial tuition waivers that can close the gap. *Id*. at 13–16.

Arizona's experience shows that the highest rate of participation in the program is actually found in communities of *extreme poverty*. A 2019 Goldwater Institute report found that 8 out of the 10 school districts with the highest concentrations of ESA students had child poverty rates above the statewide average. Indeed, the district with the single highest ESA participation rate had a child poverty rate of 46.4%, more than double the state average of 19.3%. Matt

[9] https://www.goldwaterinstitute.org/wp-content/uploads/2021/09/GWI-DECADE-OF-SUCCESS.FINAL_.pdf.

Beienburg, *Education Savings Accounts Serving Low-Income Communities* 8 (Goldwater Institute, Nov. 19, 2019).[10]

The Circuit Court stated that the Hope Scholarship Program would allow children to attend private schools that do not require instructors to obtain traditional teacher certification. Opinion at ¶ 38. But research has repeatedly found that traditional teacher certifications do not increase teacher effectiveness in the classroom, unlike other factors such as years of experience. Scholars from Harvard, Columbia, and Dartmouth have found virtually no discernible difference in student outcomes as a result of teacher certification requirements common among public school systems. *See, e.g.,* Thomas Kane, et al., *What Does Certification Tell Us About Teacher Effectiveness? Evidence from New York City,* 27 Econ. of Educ. Rev. 615, 616 (2008)[11] (finding "no difference between Teaching Fellows and certified teachers or between uncertified and certified teachers," and that "students assigned to Teaching Fellows underperformed students assigned to certified teachers by 0.01 standard deviations [in reading]."); Jill Constantine, et al., *An Evaluation of Teachers Trained Through Different Routes to Certification* 74 (U.S. Dept. of Ed. Feb. 2009) (same).[12]

By contrast, the benefits of school choice are well documented. Research shows that programs like the Hope Scholarship typically have a positive impact on boosting student achievement (i.e., test scores) after an initial transition period, but also that the benefits of these programs are far larger and more consistent when it comes to improving students' educational

[10] https://www.goldwaterinstitute.org/wp-content/uploads/2019/11/Education-Savings-Accounts-Serving-Low-Income-Communities_web-1.pdf.
[11] https://www0.gsb.columbia.edu/faculty/jrockoff/certification-final.pdf.
[12] https://ies.ed.gov/ncee/pubs/20094043/pdf/20094043.pdf.

attainment (i.e., measures such as whether a student drops out or graduates from high school), and other life outcomes.

For example, University of Arkansas Professor Patrick Wolf reviewed sixteen different studies of school choice programs and found that they revealed an increase in student achievement "by an average of .13 standard deviations in reading by the fourth year after the study started. … The reading effect represents a gain of about four months of learning." Patrick Wolf, *Programs Benefit Disadvantaged Students,* Education Next (Feb. 13, 2018).[13] But other gains were even more noteworthy: one study found a 21% increase in the likelihood that students will graduate high school, and another found that such programs "increased college enrollment rates for African American and Hispanic students by 6 percentage points … [and] increased those students' college-graduation rates by 3.5 percentage points." *Id.* The Florida program produced an increase in college enrollment "by 15–43 percent, depending on how many years the individual used a scholarship," and in Milwaukee, participating students "enrolled and persisted in four-year colleges at higher rates than their matched public-school peers." *Id.* Wolf thus concludes that "*all* [research studies] report positive effects of private-school-choice on attainment for all participants or key subgroups, and these effects are both statistically significant and substantively large." *Id.* Other researchers have made similar findings. *See* Corey DeAngelis, *The Evidence on School Choice is Far from "Mixed,"* Cato Institute, Jan. 30, 2018.[14]

The anecdotal evidence is equally compelling. As one ESA mother testified to the Arizona Board of Education in 2020, "I am a parent of three children on ESA, but I also have a master's degree in elementary education, and ESA has saved the educational lives of my three

[13] https://www.educationnext.org/programs-benefit-disadvantaged-students-forum-private-school-choice/.
[14] https://www.cato.org/commentary/evidence-school-choice-far-mixed

children. … We have tried public, private, and charter schools … [and] my child was able to meet some of her IEP (Individualized Education Program) goals in four months that no school had helped her to achieve in four years." Beienburg, *Decade of Success, supra* at 8.[15]

II. HB 2013 does not deprive any West Virginia student of the right to an education

The Circuit Court found that the Hope Scholarship Program "impinges" on the right to an education by providing a practical and desirable alternative to the existing public school system, which "incentivize[s]" a "reduction in public school enrollment." Opinion at ¶ 74. This conclusion commits two fallacies.

The first lies in the ambiguous word "impinge." To "impinge" means "to have an effect" or "encroach." *Merriam-Webster Collegiate Dictionary* 624 (11th ed. 2014). But this Court has never said that any law that merely has an *effect* on education is constitutionally suspect. On the contrary, it has repeatedly recognized that while the Constitution requires the Legislature to implement a thorough and efficient system of education, it still possesses "'plenary, if not absolute' authority and responsibility for the school system." *Pauley v. Kelly*, 162 W.Va. 672, 692, 708, 255 S.E.2d 859, 870, 878 (1979).

As long as the Legislature "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically," *id.* at 705, 255 S.E.2d at 877, elected lawmakers retain the "unbridled power" and primary responsibility for enacting legislation "intended to improve education systems." *State ex rel. Trent v. Sims*, 138 W.Va. 244, 279, 77 S.E.2d 122, 142 (1953); *Kelly*, 162 W.Va. at 692, 255 S.E.2d at 870. That obviously

[15] https://www.goldwaterinstitute.org/wp-content/uploads/2021/09/GWI-DECADE-OF-SUCCESS.FINAL_.pdf.

applies to HB 2013, which represents the Legislature's considered judgment, based on "education expertise," of how to improve education in West Virginia. Such judgment falls within the Legislature's "[b]road legislative authority and discretion." *Id*. at 690, 255 S.E.2d at 869; *see also Leonhart v. Bd. of Educ. of Charleston Indep. Sch. Dist*., 114 W.Va. 9, 170 S.E. 418, 420 (1933) (the Legislature "has the right to make change[s] in the educational system as it may see fit."). Only a *deprivation* of the right to an education, or a policy that *amounts* to deprivation, violates the Constitution—not a change in the system, guided by educational expertise, or the creation of alternatives designed to improve education.

That much is made clear by *Herold*, 71 W.Va. 43, 75 S.E. 313, in which this Court said the Legislature "is not prohibited from augmenting, and making more efficient, the general system of free schools," including by the creation of alternatives, such as "special high schools," whenever the Legislature "may think it wise to do so." *Id*. at 315–16.

In *McQueen,* this Court rejected almost the exact reasoning that the Circuit Court adopted here. Taxpayers challenged the constitutionality of a statute authorizing their county to establish a new high school, arguing that it was a special law, *see id.* at 314, and also that an *exclusio alterius* reading of Article XII § 1 forbade the Legislature from creating educational options outside the existing system. *Id.* at 315. But this Court found that the statute "makes no change in the plan provided by general law for the creation of district high schools," but was merely "a creation of something in addition thereto," which the Legislature was free to do, and therefore that it was constitutional. *Id.* at 315. Emphasizing that questions "of expediency" are "matter[s] for legislative, and not judicial, judgment," *id.*, the Court rejected the special law argument (discussed more below, Section III). The Legislature's duty to operate a school system, it said, does not bar it from *adding* to that system, or offering parents new options alongside the existing

system. "The integrity of the different districts remains intact, and the several boards of education thereof have the same territorial jurisdiction, and the same amount of property on which to lay their levy to raise revenue to run the schools of their several districts that they had before the act was passed"—so there was no reason the Legislature could not establish a new school while leaving the existing system in place. *Id.* at 316.

HB 2013 is constitutional for the same reasons. It does not eliminate existing schools, reduce their funding, or deprive a single West Virginia student of the right to an education. It simply creates an additional, alternative option for parents to obtain the quality schooling to which their children are entitled. It gives them an option if, in their judgment, their children have needs the existing system does not serve. This is simply augmenting the existing system by creating something in addition thereto, which the Legislature, in its judgment regarding expediency, sees fit.

In *Casto*, 94 W.Va. 513, 119 S.E. 470, this Court upheld the constitutionality of a law creating and funding a county high school in territory already covered by an existing school district. *Id.* at 471. This, too, was challenged as a special law and as contradicting Article XII § 1, and once again the Court found that the Legislature is free to create alternatives to the existing public school system as long it adequately maintains the latter. "[T]he high school established by the act is an incident to the general system and in furtherance thereof," and did not deprive any student of an education. *Id.* at 472. "Was there a necessity for the establishment of this [alternative]?" the Court asked, and then it answered: "The Legislature has answered in the affirmative, and the courts cannot question the necessity, expediency, or the wisdom of the co-ordinate branch of the government in its action." *Id*. HB 2013 represents the same type of considered judgment about the means of improving the delivery of education in the state.

The second fallacy the Circuit Court committed lies in its conclusion that the Hope Scholarship Program eliminates the thorough and efficient system of education mandated by the Constitution because it purportedly creates an "incentive" for parents to use it instead of existing schools. Opinion at ¶ 74. As noted above, actual school choice programs already operating in other states have not led to a reduction in funding for existing schools, but even if it were otherwise, any such "incentive" consists solely of parental satisfaction: if parents prefer this alternative, and are satisfied by it, any results detrimental to existing schools will not be the Legislature's doing, but will occur "only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). It therefore will not contradict the Legislature's obligation to provide for a public school system.

As the Arizona Court of Appeals concluded, in upholding that state's ESA program, the law "does not limit the choices extended to families but expands the options to meet the individual needs of children," nor does it "force or encourage parents to use ESA funds to pay private school tuition." *Niehaus v. Huppenthal*, 233 Ariz. 195, 201 ¶ 22, 310 P.3d 983, 989 (Ct. App. 2013). The program is "neutral as to the parental choices offered," and simply gives families the "voluntary and reversible" option to "exchange … one type of educational service for another." *Id.*[16]

If one business opens next to another, and provides better services at lower prices, customers will choose to shop there instead of at the neighboring store—but this is not unfair competition. If the state offers a new public program better suited to West Virginians' needs

[16] Arizona's Constitution, like West Virginia's, requires the state's legislature to provide for the establishment and maintenance of a public school system, Ariz. Const. art. XI § 1, which state courts have interpreted as guaranteeing a fundamental right to an education. *Shofstall v. Hollins*, 110 Ariz. 88, 90, 515 P.2d 590, 592 (1973). In *Niehaus*, the appellate court found that the program did not violate this provision of the Constitution.

than an existing program, and people choose to take advantage of it rather than the existing program, that does not mean the state has abolished the first program. In fact, parents already have a legal right to withdraw their students from the public schools, or to relocate from one school district to another—and parents with sufficient means often do so already. Were they to do so in large numbers, the economic consequences would be precisely those that the Circuit Court referred to: the schools in one part of the state would suffer a decrease of enrollment and a consequent decrease in revenue. But nobody would suggest that this was unconstitutional. All HB 2013 does is to make it possible for less affluent families to make the same choice that better-off families can already make.

To hold that the Legislature is prohibited from creating such alternatives would be to paralyze its ability to fashion new solutions to educational challenges as "the state of education expertise" progresses. *Kelly*, 162 W.Va. at 705, 255 S.E.2d at 877. But this Court has said just the opposite: that "our Constitution is a living document that must be viewed in light of modern realities. Reasonable construction of our Constitution … permits evolution and adjustment to changing conditions as well as to a varied set of facts." *State ex rel. Workman v. Carmichael*, 241 W.Va. 105, 117, 819 S.E.2d 251, 263 (2018) (citation omitted). Or, in the famous words of Thomas Jefferson, "laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times." Letter to Samuel Kercheval, July 12, 1816, in *Jefferson: Writings* 1401 (Merrill Peterson, ed., 1984). West Virginia's Constitution gives the Legislature flexibility in discharging its duty to provide, in the manner it believes the best educational expertise warrants, for a school system that "develops…the minds, bodies and social

morality of its charges to prepare them for useful and happy occupations, recreation and citizenship," in an "economical[]" manner *Kelly*, 162 W.Va. at 705, 255 S.E.2d at 877.

HB 2013 represents the Legislature's considered judgment in serving that obligation. Because it does not deprive any West Virginian of any school options that he or she currently enjoys, it cannot violate Article XII § 1, and is therefore constitutional.[17]

III. HB 2013 is not a special law.

Nor is HB 2013 an unconstitutional special law. A special law is one which "arbitrar[ily]" or "irrational[ly]" creates a particular class of beneficiaries, while excluding others from entering that class to obtain that benefit. *State ex rel. City of Charleston v. Bosely*, 165 W.Va. 332, 339–40, 343, 268 S.E.2d 590, 595, 597 (W.Va. 1980).[18] The prohibition on special laws does not forbid the Legislature from establishing legal classifications—something

[17] For the same reason, the Circuit Court's assertion that the Hope Scholarship Program forces students to "exchange their fundamental right to a public education for a payment" is incorrect. Opinion at ¶ 69. As the *Niehaus* court concluded in rejecting a similar argument, the school choice program "does not require a permanent or irrevocable forfeiture of the right to a free public education," but is voluntary, and merely (and legitimately) requires a student not to be simultaneously enrolled in both systems. 233 Ariz. at 201 ¶ 20, 310 P.3d at 989. "Parents are free to enroll their children in the public school or to participate in the ESA; the fact that they cannot do both at the same time does not amount to a waiver of their constitutional rights or coercion by the state." *Id.* ¶ 21.

[18] Arizona courts have developed a particularly effective analysis for determining whether a law violates the state's special law clause. It asks first whether the challenged law creates a "closed class"—that is, whether it is possible for someone in the future to either become eligible for the benefit, or to cease being eligible for the benefit, conferred by the statute. *See, e.g., Long v. Napolitano*, 203 Ariz. 247, 258 ¶ 36, 53 P.3d 172, 183 (Ct. App. 2002). If it is possible for people to either enter or exit the class delineated by the law, then it is not closed and is therefore not a special law. If the class *is* closed, the court then asks whether the classification rationally serves a legitimate government interest. *Id*. This is lenient scrutiny, but the smaller the class, the more skeptical courts are of its legitimacy. *See, e.g., El Paso Nat. Gas Co. v. Ariz. Dep't of Revenue*, 174 Ariz. 470, 478, 851 P.2d 95, 103 (Ct. App. 1992). Here, the class is open, not closed: students who are not eligible for the ESA program now may become so in the future, and those who are now eligible can become ineligible in the future. The class is not small, but quite large. And the distinction is rationally drawn to serve the purpose of expanding educational opportunities.

practically all laws do; instead, it requires that laws that differentiate between groups of people do so on a legitimate basis that serves a general public good—or, as the Utah Supreme Court said, whether the distinction is "based on general policy concerns rather than individual circumstances," *Carter v. Lehi City*, 2012 UT 2 ¶ 52, 269 P.3d 141, 155 (2012)—as opposed to being designed solely for purposes of obtaining a private benefit. *Bosely*, 165 W.Va. at 339, 268 S.E.2d at 595.

This is a deferential standard. *Gallant v. Cnty. Comm'n of Jefferson Cnty.*, 212 W.Va. 612, 619–20, 575 S.E.2d 222, 229–30 (2002). "Whether a special act or a general law is proper, is generally a question for legislative determination," and "[s]pecial legislation is permitted where it serves a valid purpose and a general law cannot be made applicable." *State ex rel. Cooper v. Tennant*, 229 W.Va. 585, 605, 730 S.E.2d 368, 388 (2012) (citations omitted). There can be no denying that HB 2013 serves a valid public purpose in improving educational options, and that the classification involved (i.e., the broad eligibility criteria) is aptly suited to that purpose.

In *Atchison v. Erwin*, 172 W.Va. 8, 302 S.E.2d 78 (1983), this Court rejected a special law challenge to a statute that increased salaries for certain mining inspectors and supervisors, while simultaneously imposing new obligations on them. The proper analysis, the Court said, is to determine whether a law "operates uniformly on all persons and things of a class and such classification is natural, reasonable and appropriate to the purpose sought to be accomplished." *Id.* at 14, 302 S.E.2d at 83 (citation omitted). Because the law increased the inspectors' and supervisors' duties, it was constitutional to confer a benefit on them and not on other personnel. *Id.* Likewise here, the statute is intended to provide broader educational choice for parents and

students, and it is constitutional therefore to specify broad eligibility criteria—state residency, enrollment in a public school for a certain period, etc.

The Circuit Court described the Hope Scholarship Program as distinguishing between "students in private school or homeschooling who have to pay for public school resources—the voucher recipients—and those who do not—students without vouchers." Opinion at ¶ 87. But this is simply the Circuit Court's way of characterizing the obviously rational distinction between students who are eligible for the program and those who are not. That distinction is created by Section 18-31-2(5), which, as the Circuit Court observed, requires only that a student be enrolled in a public school for the previous year and be enrolled for 45 days before applying for the program. Opinion at ¶ 30. Some are also required to take a test to ensure that they are making educational progress. *Id.* at ¶ 40.

An eligibility/non-eligibility distinction is inherent in all government programs, of course, and is eminently rational. But the Circuit Court found it invalid on the grounds that some private schools are "unable to serve students with disabilities," which means these students will be "unable" to participate in the program, and therefore that HB 2013 creates an unconstitutional class of beneficiaries. *Id.* at ¶ 46. But that is fallacious. The special law analysis applies to the class *that the Legislature* has created—it does not hinge on the whether private citizens, due to their unique circumstances, find participation in a government program impractical. It has long been the rule that a law is not rendered unconstitutionally "special" by the fact that some potential beneficiaries choose not to join the class. *See, e.g., State ex rel. Keefe v. McInerney*, 63 Wyo. 280, 307, 182 P.2d 28, 38 (1947) (law allowing local communities to organize their governments was not rendered special by the fact that some communities chose not to

participate) (citing cases). Or does "the fact that diversity arises out of the use or application of a legislative act" make it a special law. *Ure*, 91 Neb. 31, 135 N.W. at 227.

The words of the Utah Supreme Court in *Abrahamsen v. Bd. of Rev. of the Indus. Comm'n of Utah*, 3 Utah.2d 289, 283 P.2d 213 (1955), are particularly apt. That case upheld an employment statute against a special law challenge where its applicability was triggered by a person being engaged in "an independently established trade." This excluded the plaintiff, who managed a magazine subscription business, which was not then considered an "independently established trade." *Id.* at 291, 283 P.2d at 214. He said this made the law non-uniform, but the court rejected that argument because the special law clause "does not … require that statutes be universal in their *application* or their *result*, or that they *operate* uniformly with respect to persons or things which are *in fact* different." *Id.* at 292, 283 P.2d at 215 (emphasis added).

By the Circuit Court's logic, *every* government program would be unconstitutional, because there is inevitably somebody whose particular situation is such that it is not advantageous to participate in that program. Medical benefits programs would be unconstitutional because some patients suffer from diseases that cannot be treated at clinics conveniently close to their homes. Food stamp programs would be unconstitutional because some recipients live in communities where restaurants do not accept them, or where restaurants are located in buildings that are not easily accessible to people with disabilities. Public arts programs would be "special laws" because some members of the public live too far away from theaters or galleries where funded exhibits or shows are held. Indeed, all education laws would be unconstitutional, because some people have children—and therefore receive direct return on their tax dollars—while some do not. That is obviously not how the special law inquiry works.

Instead, the focus is on the category that *the Legislature* has created—which, here, is all state resident children attending schools.

The Circuit Court's conclusion that HB 2013 created an unconstitutional classification was based on the premise that a law must be universal in its result, and operate uniformly with respect to students who are in fact different. That was reversible error. The categorization of eligible/non-eligible is plainly rational and constitutional.

CONCLUSION

The decision of the Circuit Court should be *reversed*. Dated this 2nd day of September 2022

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