IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-616

STATE OF WEST VIRGINIA,

Petitioner,

and

KATIE SWITZER and JENNIFER COMPTON,

Petitioners,

v.

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

Respondents.

BRIEF OF PETITIONERS KATIE SWITZER AND JENNIFER COMPTON

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1. The circuit court erred by converting Plaintiffs' Motion for Preliminary Injunction into a dispositive motion, and by entering a final judgment on the merits, without first providing the parties with notice and an opportunity to be heard.

2. The circuit court erred by concluding that the West Virginia Constitution prohibits K–12 financial aid programs like the Hope Scholarship Program.

3. The circuit court erred by concluding that the Hope Scholarship Program infringes on West Virginians' right to a public education.

4. The circuit court erred by concluding that the Hope Scholarship Program uses funds that the West Virginia Constitution exclusively earmarks for public schools.

5. The circuit court erred by concluding that the Hope Scholarship Board's administration of the Hope Scholarship Program "usurps" the Board of Education's constitutional authority.

6. The circuit court erred by concluding that the Hope Scholarship Program violates Article 6, Section 39, which prohibits a "special act . . . where a general law would be proper."

STATEMENT OF THE CASE

I. The Hope Scholarship Program Creates Education Savings Accounts, Which Families Can Use on an Array of Educational Services.

In 2021, the Legislature enacted H.B. 2013 to help families afford educational options that "better meet the individual education needs" of their children. W. Va. Code § 18-31-5(a). Specifically, the bill creates the Hope Scholarship Program, through which an eligible child can receive a Hope Scholarship Account to use on educational services. For instance, Petitioner Katie Switzer plans to use her family's Account to purchase homeschooling materials as well as courses from a local public charter school. 4 JA 572–73 ¶ 9.

Families can use these accounts for a variety of qualifying expenses: homeschooling, private school tuition, online learning, after-school or summer-learning programs, educational therapies (*e.g.*, speech or behavioral therapy), transportation costs, and more. W. Va. Code § 18-31-7(a). The amount of money deposited annually into a student's Hope Scholarship Account is a portion—about 61%—of what the State would have spent educating that student in the public schools. *Id.* § 18-31-6(b) (stating amount equals "prior year's statewide average net state aid share allotted per pupil"); 4 JA 470 ¶ 64 & n.28 (showing that approximately 39% of state funding is not allocated on a "per pupil" basis). For the current school year, that amount is about $4,300. *Id.* at 546.

To be eligible for a Hope Scholarship Account, a student must both be a resident of West Virginia and: (1) have been enrolled full-time in a West Virginia public elementary or secondary school the prior year; (2) be enrolled full-time and attending a West Virginia public school for at least 45 calendar days at the time of application for a Hope Scholarship Account; or (3) be entering kindergarten. W. Va. Code § 18-31-2(5). A participating student continues to receive deposits in her Account in future years until she graduates high school. *Id.* § 18-31-6(f)(4).

The Hope Scholarship Program does not draw on any constitutionally protected funding sources. It does not use any portion of the State's School Fund. Instead, it is funded by a new annual appropriation by the Legislature, which the Governor must request "in each budget bill." *Id.* § 18-9A-25(a). Section 18-9A-25(a) of the West Virginia Code then requires the Legislature to make an "appropriation to the Department of Education," from the General Revenue Fund. That appropriation, in turn, is transferred to the Hope Scholarship Board and deposited in a special revenue fund in the State Treasury called the "West Virginia Hope Scholarship Program Fund," which may "be used solely to meet . . . Hope Scholarship Program obligations." *Id.*; *see also id.* § 18-31-6(a). Once families receive their Accounts, they then direct the money to the providers of their choice.

II. The Circuit Court's Findings Seriously Misunderstand How the Program Works.

The circuit court's findings contain serious errors about the Program and its statutes. In order to accurately present how the Program operates, this section corrects the circuit court's most confusing errors.

Circuit court's finding: "[P]arents engaging in home schooling" are "education service providers" who can "receive[] payment from Hope Scholarship Accounts." 1 JA 7 ¶ 33 (quotation marks omitted).

Fact: Parents cannot receive payment for homeschooling. Instead, parents choose private educational service providers, and the State facilitates payment to those providers. W. Va. Code § 18-31-9(c). Providers must be registered with the State and offer the services approved under H.B. 2013. *Id.* §§ 18-31-2(4), 18-31-7(a). The labor of homeschooling, on its own, is not a qualifying service or expense. *See id.* § 18-31-7(a)(1)–(12). And "funds may not be refunded, rebated, or shared with a parent or student in any manner." *Id.* § 18-31-7(c). Thus, if parents are

homeschooling, payments are made to the provider from whom they purchase services, supplies, or materials, not to the parents themselves.

Circuit court's finding: "HB 2013 provides no safeguards to prevent private entities from emerging to take state dollars without sufficient means and/or intent of ensuring quality education in return. Nor does the statute provide safeguards preventing parents in poverty or battling drug addiction from taking the money for their own ends." 1 JA 8 ¶ 42.

Fact: H.B. 2013 requires entities receiving payments to be registered with the State and subjects them to various requirements, including background checks, reporting requirements, and non-discrimination requirements. W. Va. Code § 18-31-11(a). Parents may not use account money for non-educational ends—payment is made directly to service providers. *Id.* § 18-31-7(a). And both providers and parents are subject to audits and can be removed from the Program for misuse of Program funds. *Id.* § 18-31-10. Again, parents cannot receive money from their Accounts. *Id.* § 18-31-7(c).

Circuit court's finding: "Students in poverty cannot use" Hope Scholarship Accounts. 1 JA 9 ¶ 45.

Fact: Hope Scholarship Programs are open to all qualifying families, regardless of income. *See* W. Va. Code § 18-31-2(a)(5) (defining "[e]ligible recipient").

Circuit court's finding: "HB 2013 . . . requires students to pay for public school services." 1 JA 14 ¶ 70.

Fact: Students could already, before H.B. 2013, purchase services offered by a public school in which they were not enrolled. *See, e.g.*, W. Va. Code § 18-8-1(c)(3). H.B. 2013 simply states that it does not "prohibit[] a Hope Scholarship student from using the funds deposited in his or her account on both services provided by a public school or district and other qualifying

expenses." W. Va. Code § 18-31-8(f). Students are never required to pay for public school services because they always have the choice to enroll in a public school for free.

III. Parent-Intervenors Are Relying on the Hope Scholarship Program to Afford the Educational Options That Best Meet Their Families' Needs.

Petitioners Katie Switzer and Jennifer Compton ("Parent-Intervenors") represent just two of the thousands of families who were relying on the Hope Scholarship Accounts to best satisfy the individual educational needs of their families.

Parent-Intervenor Katie Switzer's son struggles in larger groups and would not prosper in a full-time public-school classroom. 4 JA 572 ¶ 8. To meet his needs, she carefully curated a combination of homeschool curricula and local charter school and educational co-op classes to create an educational plan in which her son can thrive. *Id.* at 572–73 ¶¶ 6, 9. Switzer had been relying on her Hope Scholarship funds to afford the necessary materials and classes. *Id.* at 572–74 ¶¶ 7–9, 12–13.

Parent-Intervenor Jennifer Compton's son has struggled in public-school environments and requires occupational therapy. *Id.* at 575–76 ¶¶ 5, 8, 10–12. In anticipation of the upcoming school year, Compton enrolled her son in a nearby private school that she believes will be a more suitable environment for his sensory sensitivity and that will provide him with more individualized attention. *Id.* ¶¶ 5, 9–10, 14. Compton was also relying on her Hope Scholarship funds to afford her son's tuition and occupational therapy. *Id.* at 576 ¶ 15.

Switzer and Compton's plans for educating their children were upended when the circuit court halted the Program. Switzer has enrolled her two oldest children in a public charter school. Meanwhile, Compton has enrolled her son at a hybrid-homeschooling school. She is deferring

her tuition payments and does not know what she would do if the Program were permanently struck down.[1]

IV. Procedural History

Respondents Travis Beaver and Wendy Peters ("Plaintiffs") filed their complaint challenging the constitutionality of the Hope Scholarship Program on January 19, 2022. 1 JA 31. Two days later, Parent-Intervenors intervened to defend the Program. *Id.* Over two months later, on March 30—***after*** the Hope Scholarship Program had already received applications and enrolled families—Plaintiffs moved for a preliminary injunction. *Id.* at 32. Parent-Intervenors then moved for judgment on the pleadings, and two sets of State Defendants moved to dismiss the complaint. *Id.* at 33–34. After the remaining set of State Defendants, who opposed the Hope Scholarship Program, announced that they would not defend it, the State of West Virginia intervened to defend the Program. *Id.* at 34.

The circuit court scheduled a hearing on all pending motions—the preliminary injunction motion, the motion for judgment on the pleadings, and the motions to dismiss—for July 6, 2022. 2 JA 159. At the outset of the hearing, the circuit court denied Parent-Intervenors' motion for judgment on the pleadings without hearing any argument, concluding that the Plaintiffs had stated viable legal claims. 5 JA 620–21. The court also rejected the State Defendants' Rule 12(b)(1) standing arguments. *Id.* at 621–22.

The circuit court then heard arguments on, and granted, Plaintiffs' motion for a preliminary injunction, concluding that the Plaintiffs were likely to succeed on all five of their claims. 1 JA 13–19 ¶¶ 63–89; 5 JA 677–82. The circuit court also *sua sponte* granted ***final***

[1] Because these up-to-date facts regarding Parent-Intervenors are not in the record, Parent-Intervenors do not rely upon them for purposes of this appeal. They offer them, however, in candor to the Court.

judgment, declaring that the Hope Scholarship Program violates the West Virginia Constitution and permanently enjoining the Program. 1 JA 24. The circuit court's grant of final judgment was made without notice to the parties. *See* 2 JA 159 (noticing a hearing only on "the Motion for Preliminary Injunction, Motions to Dismiss and Motion for Judgment on the Pleadings").

Both Parent-Intervenors and the State filed notices of appeal. 1 JA 34. The Intermediate Court of Appeals consolidated those appeals for decision. *Id.* at 35–36. Parent-Intervenors and the State then moved this Court for direct review, which was granted. This Court set an expedited schedule for briefing and oral argument.

SUMMARY OF ARGUMENT

The circuit court's judgment should be reversed and the Hope Scholarship Program reinstated because the West Virginia Constitution allows the Legislature to provide educational options in addition to properly funded public schools. The circuit court found that "public funds for K–12 education are for the free schools and to no other purpose whatsoever." 1 JA 17 ¶ 82. In short, it said that whenever the Legislature spends money on K–12 education, that money must be spent only on the public schools, and never on an educational alternative like the Program.

The circuit court was wrong. West Virginia can fund ***both*** public schools ***and*** financial aid to families using alternative educational options. The Hope Scholarship Program provides families with Accounts that they can spend on a variety of educational options: homeschooling, public-school fees, tutoring, transportation, therapy, or private-school tuition. The West Virginia Constitution does not prohibit this financial aid.

And there is no practical reason West Virginia can't have both. This year, the Program cost will be about $13.5 million. If the Program is successful and continues to grow, the State can continue to fund it and let it expand. If not, it can try other educational policies. There is no

contention that the State will not meet its constitutional obligation to fund public schools. And so long as it does that, it is free to craft, experiment with, and encourage other educational options. The Hope Scholarship Program does not in any way affect the State's duty to fund public schools, and it is therefore constitutional.

At the end of the day, the circuit court did not strike down H.B. 2013 because it was unconstitutional on its face. It did so because it did not trust the Legislature to adequately fund public schools once the Hope Scholarship Program is up and running. *See, e.g.*, 5 JA 649 (stating "we have struggled to fund so many things"). But the Legislature ***must*** adequately fund the public schools, no matter what. *See generally Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979). The circuit court did not find—and Plaintiffs did not allege[2]—that the Legislature will fail to adequately provide public schools. And most importantly for this case, the Program has nothing whatsoever to do with the current public-school funding system. The circuit court cannot *ipse dixit* decide that it doesn't trust the State to honor all of its budgetary commitments.

The circuit court's decision to strike down the Program should therefore be reversed for six reasons:

First, the circuit court erred by granting summary judgment *sua sponte*, relying on facts outside the pleadings, without first giving notice to the parties. Instead, the court could have, and should have, granted judgment to Petitioners, because Plaintiffs' lawsuit does not state viable claims as a matter of law.

[2] Plaintiffs did not allege that the State won't adequately fund public schools because they could not allege it: The State currently has a surplus, net migration to the State is up, and, according to the Governor's office, "[t]eachers and state employees have received their two largest pay raises ever." *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.

Second, the circuit court erred by finding that H.B. 2013's financial aid for children outside public schools is prohibited by the Constitution. The Constitution does not prohibit the State from funding educational options ***in addition to*** public schools. The Legislature has plenary power to enact any policy not expressly prohibited by the Constitution. The circuit court cannot invent a prohibition where there is none.

Third, the circuit court erred in finding that H.B. 2013 infringed on families' right to a public education. H.B. 2013 does not affect the availability of public schools, or families' ability to access them.

Fourth, the circuit court erred by finding that H.B. 2013 violated Article 12, Sections 4 and 5 by using public funds for non-public education. Sections 4 and 5 concern only the School Fund, not all public funds. The State is free to use the general fund to provide financial aid to families choosing non-public education.

Fifth, the circuit court erred by finding that H.B. 2013 unconstitutionally usurps the authority of the State Board of Education. The Board of Education has exclusive constitutional authority over the "free schools," W. Va. Const. art. 12, § 2, not over financial aid programs for children outside the free schools.

Finally, the circuit court erred by finding that H.B. 2013 is an unconstitutional special law. Special laws are those that apply differently to different people or places. But H.B. 2013 does not single out certain people or places. And it does not change any existing nondiscrimination rules for education providers.

For all those reasons, as detailed below, Plaintiffs' lawsuit does not state a claim as a matter of law. 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 Parent-Intervenors' favor.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument has already been set in this matter.

STANDARD OF REVIEW

Below, the circuit court granted final judgment before trial, relying on facts outside the pleadings. *See* 1 JA 24 (granting declaratory judgment and permanent injunction). The circuit court's order was therefore a *de facto* grant of summary judgment. *Heartwood Forestland Fund IV, LP v. Hoosier*, 236 W. Va. 480, 483, 781 S.E.2d 391, 394 (2015) (stating judgment as a matter of law entered before trial was "a *de facto* grant of summary judgment"); *Riffle v. C.J. Hughes Constr. Co.*, 226 W. Va. 581, 588, 703 S.E.2d 552, 559 (2010) (stating judgment relying on affidavit outside the pleadings converted motion to dismiss to motion for summary judgment).

"It is well established that a circuit court's entry of summary judgment is reviewed *de novo*." *State Farm Fire & Cas. Co. v. Nathaniel Realty, LLC*, ___ W. Va. ___, 874 S.E.2d 788, 791 (W. Va. 2022) (cleaned up). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(f). On summary judgment, a court "must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Henzler v. Turnoutz, LLC*, 243 W. Va. 459, 463–64, 844 S.E.2d 700, 704–05 (2020) (quotation marks omitted).

ARGUMENT

I. The Circuit Court Improperly Granted Summary Judgment *Sua Sponte*; Instead, It Should Have Granted Judgment on the Pleadings.

The first of the circuit court's many errors concerns this case's procedural posture. Pending before the circuit court were motions for a preliminary injunction, judgment on the pleadings, dismissal under Rule 12(b)(1), and dismissal under Rule 12(b)(6). But after ruling on those, the circuit court went further and issued a final judgment, without any notice to the parties and without any discovery. That is a reversible error. *See State ex rel. Nat'l Union Fire Ins. Co. v. Hummel*, 243 W. Va. 681, 685, 850 S.E.2d 680, 684 (2020) (holding circuit court should not have *sua sponte* dismissed a claim without giving parties notice and an opportunity to respond); *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 228 W. Va. 34, 44, 716 S.E.2d 696, 706 (2011) (reversing trial court's *sua sponte* summary judgment where it failed to provide adverse party notice and opportunity to be heard).

But there is a simple way forward. This Court should direct the lower court to enter final judgment for Petitioners because Plaintiffs' lawsuit fails to state a claim as a matter of law. This case turns only on a question of law: Does the West Virginia Constitution prohibit the Legislature from funding the Hope Scholarship Program in addition to funding the public schools? The answer is no. Even taking as true Plaintiffs' factual allegations, H.B. 2013 does not violate the Constitution as a matter of law. Parent-Intervenors ask that this Court reverse and grant final judgment in their favor.

If, however, the Court believes Plaintiffs have stated viable legal claims and that resolving this case requires examining the parties' evidentiary exhibits, then it must reverse and remand for discovery and summary judgment proceedings.[3]

II. West Virginia Can Provide Both Public Schools and Other Educational Options.

The majority of the circuit court's decision rests on a single conclusion: West Virginia's duty to create public schools keeps it from doing anything else to further K–12 education. 1 JA 14 ¶ 67 (stating "the Constitution require[s] the State to raise revenue for, fund, and maintain only a thorough and efficient system of free schools"). The circuit court attempted to ground its conclusion in Article 12, Section 1 of the Constitution, which says "[t]he Legislature shall provide, by general law, for a thorough and efficient system of free schools."

The circuit court's conclusion is unfounded. ***First***, the plain language controls constitutional analysis, and the plain language of the Constitution contains no prohibition on financial aid to families using alternatives to the public schools. The State's duty to provide thorough and efficient public schools has nothing to do with whether it can assist families who have opted out of public schools. ***Second***, a prohibition that does not exist in the plain language cannot be implied from the Legislature's affirmative duty to provide public schools. And ***third***, H.B. 2013 does not conflict with the State's duty to fund public schools. Neither the circuit court nor Plaintiffs have contended that H.B. 2013 will result in constitutionally defective public schools. The circuit court's decision was therefore wrong as a matter of law, and Plaintiffs have no viable claim under Article 12, Section 1.

[3] If this case is remanded, the preliminary injunction should be lifted. Again, this case—and the denial of any injunction—can be decided on the law alone. But even if the facts are necessary, Plaintiffs did not present facts sufficient to satisfy the standards for granting a preliminary injunction. *See* 2 JA 205–09.

A. The Constitution's text does not prohibit financial aid programs for K–12 students.

The simplest path to resolving this case is the Constitution's plain language. *Fields v. Mellinger*, 244 W. Va. 126, 129, 851 S.E.2d 789, 792 (2020) (for constitutional claims, "analysis must begin with the language of the [Constitution] itself"). The plain text of the Constitution does not prohibit the Hope Scholarship Program. "Because the West Virginia Constitution is a restriction of power rather than a grant of power, the Legislature may enact any statute which is not specifically prohibited by constitutional provision." *State v. Tennant*, 229 W. Va. 585, 615, 730 S.E.2d 368, 398 (2012). The absence of a specific prohibition is dispositive here. Because the Constitution does not forbid spending for K–12 education in addition to funding the public schools, the Hope Scholarship Program is constitutional. The circuit court should therefore be reversed, and judgment should be granted in favor of Parent-Intervenors.

That plain-text reading is bolstered by the Constitution's other plain text. *See Rice v. Underwood*, 205 W. Va. 274, 281, 517 S.E.2d 751, 758 (1998) ("This Court has held that constitutional provisions, concerning the same subject matter, must be read together."). The Constitution brims with express prohibitions, especially in Article 3's Bill of Rights. The framers and ratifiers knew how to insert prohibitions into the constitutional text. For instance, Article 12, Section 11 specifically prohibits funding for new normal schools, which were high-school-level schools that trained primary-school teachers.[4] If the ratifiers had meant to prohibit other educational policies, like financial aid programs, they could have banned them as they did

[4] A.R. Whitehill, *History of Education in West Virginia* 26, 36 (U.S. Gov't Printing Office 1902), available at https://www.google.com/books/edition/History_of_Education_in_West_Virginia/CNCgAAAAMAAJ.

normal schools. But they did not.[5] The absence of any prohibition indicates an intent to preserve the Legislature's plenary authority to enact what policies it thinks best, including the Hope Scholarship Program.

The constitutional provisions referenced by the circuit court contain no such prohibitions. Section 1 creates a duty to "provide, by general law, a thorough and efficient system of free schools." It does not contain any prohibitions. Section 4, in turn, creates a constitutional "School Fund," the interest of which "shall be annually applied to the support of free schools throughout the State, and to no other purpose whatever." It prohibits only misusing the "School fund"—a restricted fund that can be used only to fund the public schools. Section 4 is silent on using other public funds for education expenditures. Finally, Section 5 requires the Legislature to "provide for the support of [the] free schools" with the interest of the School Fund and other specified sources. It does not contain a prohibition.

That is all this Court needs to reverse the circuit court's decision to strike down the Program. Without a specific prohibition, "the Legislature may enact any statute," including H.B. 2013. *Tennant*, 229 W. Va. at 615, 730 S.E.2d at 398. Article 12 contains no such prohibition, so the circuit court must be reversed.

B. The Constitution does not by implication prohibit K–12 financial aid.

The circuit court and Plaintiffs know that the Constitution's plain text does not prohibit the Hope Scholarship Program. So they manufactured a supposedly implied prohibition from the Legislature's affirmative duty to adequately fund public schools. Instead of reading this

[5] Moreover if the Legislature was limited to funding the "free schools," as the circuit court held, this prohibition on funding "normal schools" would be surplusage. That interpretation must be rejected. *See Ringel-Williams v. W. Va. Consol. Pub. Ret. Bd.*, 237 W. Va. 702, 707, 790 S.E.2d 806, 811 (2016) (stating that "a cardinal rule of statutory construction" is that every part of the statute must be given "significance and effect" and that terms should not be rendered "superfluous" (quotation marks omitted)).

requirement for what it actually says—the Legislature must fund public schools—the circuit court and Plaintiffs tack something on: any spending for K–12 education must be spent ***only*** on the public schools. This is a classic *non sequitur*. It is like saying that, because parents have an affirmative duty to care for their children, they are banned from caring for other people's children.

Because it is so illogical, the circuit court's analysis is entirely conclusory. True, the court cites to Article 12, Sections 1, 4, and 5—and even to Article 10, Section 5,[6] which no party had ever raised. 1 JA 13–14 ¶ 66. But it never explains ***how*** "[t]aken together these provisions" impose a hidden prohibition on the Legislature that the plain text does not. *Id.* at 14 ¶ 67. If none of these provisions individually forbids the Hope Scholarship Program (*see* Part II.A., above and Part IV, below), then they cannot collectively do so.

The absence of any logical textual basis for prohibiting the Hope Scholarship Program drove the circuit court into even foggier territory. Adopting Plaintiffs' argument, it based its decision on the interpretive canon *expressio unius est exclusio alterius*, "the express mention of one thing implies the exclusion of another," *Progressive Max Ins. Co. v. Brehm*, ___ W. Va. ___, 873 S.E.2d 859, 865 (2022). The circuit court found that the affirmative duty to provide public schools implicitly prohibits the State from providing financial aid to families that opt out of the public schools.

This was error: *Expressio unius* just does not apply to affirmative duties like Section 1. And that's precisely how other state high courts have interpreted their constitutions.

[6] Article 10, Section 5 states, in part, "The power of taxation of the Legislature shall extend to provisions for the payment of the state debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State . . . ."

1. *The canon of* expressio unius *cannot apply to affirmative constitutional duties in the West Virginia Constitution.*

The crux of the circuit court's decision is that an affirmative constitutional duty—here, the duty to provide public schools—prohibits the Legislature from doing other things in that area. So, in the circuit court's view, the duty to provide public schools includes an implicit prohibition on providing financial aid for other K–12 options. 1 JA 14 ¶ 67 ("[T]he Constitution require[s] the State to raise revenue for, fund, and maintain ***only*** a thorough and efficient system of free schools." (emphasis added)). In reaching this conclusion, the lower court relied on the *expressio unius* canon.

But that canon cannot apply to an affirmative constitutional duty. It is axiomatic in West Virginia that the Legislature has plenary authority to "enact any statute which is not specifically prohibited by constitutional provision." *Tennant*, 229 W. Va. at 615, 730 S.E.2d at 398. As such, affirmative duties simply cannot be read as implicit prohibitions on anything. That is no surprise, because absurdities would follow. For example, Article 6, Section 36 imposes an affirmative duty: "the Legislature shall provide a means of regulating the bingo games and raffles." By the circuit court's logic, this affirmative duty to regulate bingo and raffles means that the ***only*** games of chance that the Legislature can regulate are bingo and raffles. But no one thinks it's unconstitutional to regulate slot machines. Likewise, "[t]he Legislature shall provide for the organization of all corporations." W. Va. Const. art. 11, § 1. No one seriously believes that that affirmative duty prohibits the Legislature from regulating ***un***incorporated businesses. In short,

the *expressio unius* canon simply does not make sense in the context of affirmative constitutional duties.[7]

This reveals a key difference between the federal and state constitutions. "[T]he Constitution of West Virginia is a restriction of power rather than a grant of power, as is the federal Constitution . . . ." *Tennant*, 229 W. Va. at 594, 730 S.E.2d at 377. Thus, the enumeration of specific federal powers implies that the federal government does ***not*** have other powers. But the enumeration of affirmative duties in a state constitution cannot imply a lack of authority to enact other, complementary laws, because states have plenary authority unless expressly restricted. Affirmative duties in state constitutions create a floor, but not a ceiling, on a legislature's power. West Virginia ***must*** provide public schools. But it can also do a whole lot else.

In any case, even if the *expressio unius* canon made sense for affirmative constitutional duties, it favors Petitioners, not Plaintiffs. The canon is about discerning the intent of the drafters, or, more accurately here, the ratifiers of the Constitution. The canon applies only when it can be "assum[ed] that certain omissions" from a text "are intentional" and were intended to restrict or prohibit what is omitted. *Young v. Apogee Coal Co.*, 232 W. Va. 554, 562, 753 S.E.2d 52, 60 (2013) (emphasis omitted). Put another way, "[the] *expressio unius* canon applies only when circumstances support a sensible inference that the term left out must have been meant to

[7] And the absurdities don't end there: If the Constitution "require[s] the State to raise revenue for, fund, and maintain ***only*** a thorough and efficient system for free schools," 1 JA 14 ¶ 67 (emphasis added), how could the State raise revenue for and maintain roads? Even if one cabins the circuit court's logic to education, how could the State raise revenue for and maintain universities? What about scholarships to private colleges? *See* W. Va. Code §§ 18C-7-1 to -7 (creating Promise Scholarships); *id.* § 17-2A-4b (creating Division of Highways Scholarship Program). Or, if focused on K–12 education, how could the State raise revenue for and maintain libraries? Or private-school textbooks? *See* W. Va. Code § 18-5-21b. This Court should reject an interpretation of Section 1 that endangers these basic legislative programs.

be excluded." *NLRB v. SW General, Inc.*, 480 U.S. 288, ___, 137 S. Ct. 929, 940 (2017) (cleaned up).

For example, *expressio unius* applies to a restaurant menu, which is an exhaustive list of available dishes. Chefs write menus ***intending*** to exclude other possible dishes. And customers would be surprised to learn of a secret, off-menu item.

But West Virginia's Constitution is not a restaurant menu: ***Any*** legislative policy is available, so long as it's not expressly prohibited. Here, there is no prohibition, and no indication that the Constitution's text means anything other than what it says: establish and properly fund public schools. There's certainly no indication that the text was meant to tie the Legislature's hands such that, generations hence, the people of West Virginia could not experiment with increasing the available educational options. That is why there is no express prohibition on K–12 financial aid programs. The Legislature must provide public schools. Whether or not to enact other policies is left to the Legislature. *Expressio unius* is a dead-end here.

2. *Other state high courts agree that a duty to fund public schools does not prohibit other educational policies.*

Numerous other state high courts agree: The obligation to provide public schools is a floor, not a ceiling, for state education policy. Legislatures are free to provide other educational options in addition to the public schools. *See Meredith v. Pence*, 984 N.E.2d 1213, 1223 (Ind. 2013) ("The school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren in accordance with the dictates of the Education Clause."); *Schwartz v. Lopez*, 382 P.3d 886, 898–99 (Nev. 2016) ("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. . . . [T]he plaintiffs have not established that the creation of an ESA program violates [the Constitution]." (quotation marks

and citations omitted)); *Hart v. State*, 774 S.E.2d 281, 289 (N.C. 2015) ("Article IX, Section 6 does not . . . prohibit the General Assembly from appropriating general revenue to support other educational initiatives."); *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) ("[T]he uniformity clause requires the legislature to provide . . . a free uniform basic education. . . . [E]xperimental attempts to improve upon that foundation in no way denies any student the opportunity to receive the basic education in the public school system."); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) ("[A]rt. X, § 3 provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin . . . ."). These courts, in other words, have expressly rejected the circuit court's reasoning.

Below, Plaintiffs relied on an outlier case, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), which held that Florida's free-school mandate meant that the state could not also provide other forms of education. That case is flat wrong,[8] and other courts have refused to follow it. *See Meredith*, 984 N.E.2d at 1224 n.17; *Schwartz*, 382 P.3d at 898. The Florida Supreme Court itself

[8] *See, e.g.*, Jamie S. Dycus, *Lost Opportunity:* Bush v. Holmes *and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & Educ. 415 (2006) (documenting critical flaws in court's reasoning, including failure to reconcile new interpretation of uniformity provision with past practice and precedent); Lila Haughey, Case Comment, *Florida Constitutional Law: Closing the Door to Opportunity: The Florida Supreme Court's Analysis of Uniformity in the Context of Article IX, Section 1*, 58 Fla. L. Rev. 945, 953 (2006) ("[W]hen the [*Bush v. Holmes*] court additionally required all state funded education programs to adhere to strict uniformity standards, it abandoned sixty-eight years of state education jurisprudence"); Clark Neily, *The Florida Supreme Court vs. School Choice: A "Uniformly" Horrid Decision*, 10 Tex. Rev. L. & Pol. 401, 412 (2006) ("The majority's opinion in [*Bush v. Holmes*] is among the most incoherent, self-contradictory, and ends-oriented court decisions in recent memory."); *Recent Developments*, 33 Fla. St. U. L. Rev. 1227, 1234–39 (2006) (discussing decision and pointing out that the dissent provides a more logical and persuasive framework than the majority); Editorial, *Why judges matter; School choice*, The Economist, Jan. 14, 2006 (N. Am. edition); George F. Will, Opinion, *Students disrupted by political struggles*, Miami Herald, Mar. 28, 2006, at A19; John Tierney, Opinion, *Black Students Lose Again*, N.Y. Times, Jan. 7, 2006, at A11; Andrew Coulson, Opinion, *War Against Vouchers*, Wall St. J., Jan. 9, 2006, at A13.

has failed to extend it beyond its facts. *See Crist v. Fla. Ass'n of Crim. Def. Laws., Inc.*, 978 So. 2d 134, 146 (Fla. 2008). But even on its own terms, *Holmes*' flawed reasoning should be distinguished. In a dubious reading of its own constitution, the *Holmes* majority insisted that Florida's free-school provision includes both a "paramount duty" to education and a requirement that that duty be fulfilled only via the funding of public schools. *Holmes*, 919 So.2d at 407. In contrast, West Virginia's Article 12, Section 1 merely states that that the Legislature must provide public schools—nothing more. There is no "paramount duty" language, and thus there is no language specifying how such a duty should be implemented. *Holmes*, therefore, is not persuasive authority for this Court.

This Court should follow the vast majority of other states and hold that a duty to fund public schools does not preclude funding additional K–12 educational options.

C. H.B. 2013's financial aid does not "frustrate" the Legislature's duty to provide public schools because it does not diminish funding for public schools.

Not only does H.B. 2013 not violate the text of Article 12, it also doesn't "frustrate" it, as the circuit court concluded. 1 JA 15 ¶ 72. The circuit court held that H.B. 2013 unconstitutionally "incentiviz[es] students enrolled in the public schools to leave public schools," which it found will result in a "decline" of public-school funding. *Id.* at 14 ¶ 71. It also held that H.B. 2013 frustrates Section 1 "by diverting public funds that could be used for . . . public schools." *Id.* at 15 ¶ 72. But the circuit court's conclusions lack merit.

As an initial matter, there is simply no basis for a "frustration" claim. The circuit court made no findings, and Plaintiffs did not allege, that the State has not met or will not meet its obligation to provide for a thorough and efficient system of public schools. Nor does the Program take any money from the public-school system. The Hope Scholarship Program is

funded by a new and distinct appropriation from the State's general fund. *See* W. Va. Code § 18-9A-25(a). H.B. 2013 does not affect public schools—period.

What's more, the circuit court's reasoning doesn't hold up even under its own logic. The circuit court was concerned about incentives to leave public schools. But to the extent State-created incentives affect parents' educational decisions, those incentives are to remain in public school. Public school is free. The circuit court noted that "private schools cost more than" the amounts provided in Hope Scholarship Accounts, "and there are many expenses outside tuition that families must cover." 1 JA 9 ¶ 45. Thus, even by the circuit court's reasoning, any family making choices strictly based on the cost of attendance will remain in the free public schools. That said, it bears repeating that the circuit court's concern with incentives is completely irrelevant to the actual issue: Does the Hope Scholarship Program prevent the State from providing public schools? It does not, and that ends the analysis.

As for whether the Program "divert[s] public funds that could be used for . . . public schools," 1 JA 15 ¶ 72, that criticism could be leveled at ***any*** use of public funds. By the circuit court's logic, highway funding could be said to "divert[] public funds that could be used for . . . public schools." Public-university funding? The same. Any general-fund expenditure uses public funds that conceivably could have gone elsewhere. That does not make the expenditure unconstitutional. It would be different if H.B. 2013 used money constitutionally set aside for public schools. But, as shown below in Part III, it does not. That H.B. 2013 is funded from the general fund is not a basis for striking it down.

West Virginia's education-funding system likewise undermines the circuit court's reasoning. Even if students leave public schools, those schools will actually have ***more*** resources left over for the remaining children. *See* 4 JA 513 ¶ 160 ("[S]tudents who remain in [West

Virginia] public schools experience increases in resources when their districts experience enrollment declines."). That's because public schools keep a majority of their funding when a student leaves.[9]

Finally, to the extent that public schools do lose some funding if a student leaves, that is a consequence of the public-school funding system, not the Hope Scholarship Program. As already discussed, the Program doesn't force anyone to leave. If students leaving—which can and does happen for any number of reasons—somehow results in inadequate funding for public schools, then maybe there is a constitutional problem with the public-school funding system. That might serve as the basis for a different lawsuit. *See generally Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979). But there is no basis for striking down a financial aid program that is funded by a separate legislative appropriation, does not diminish public school funding, and simply provides financial aid to families who have made the choice to leave public schools.

* * *

West Virginia's Constitution contains no prohibition on funding educational options in addition to public schools. This Court should follow other states and refuse to invent any such prohibition where there is none. The circuit court should therefore be reversed.

[9] Two-thirds of public-school funding is not based on enrollment numbers. 4 JA 471 ¶ 65. Nearly half of all school-district funding comes from non-state—*i.e.*, federal and local—funding sources, most of which is not based on enrollment numbers. *Id.* at 465–67 ¶¶ 52–54. And about 29% of state funding is not allocated by enrollment. *Id.* at 471 ¶ 65. In addition, when a student leaves, the school experiences a reduction in costs (even after accounting for fixed costs like building maintenance that the school pays regardless of enrollment), but a much more modest reduction in funding. *Id.* at 482–84 ¶¶ 92, 97. One estimate, for example, suggests that costs decrease by over $9,000 when a student leaves a public school, while funding decreases by only about $5,000, leaving a $4,000 surplus for the students who remain. *Id.* at 484 ¶ 98. In other words, public-school funding ***increases*** per capita whenever a student leaves. Even teacher salaries have historically risen with lower student enrollment. *Id*. at 456 ¶ 32, 465 ¶ 51.

III. The Hope Scholarship Program Does Not Infringe the Right to Access Public Education.

Section 1 of the Constitution demands that the Legislature provide K–12 public schools, and access to those schools is a constitutional right. *Cathe A. v. Doddridge Cnty. Bd. of Educ.*, 200 W. Va. 521, 527, 490 S.E.2d 340, 346 (1997). H.B. 2013 does not impede access to those schools. Rather, it provides financial aid for families who choose not to attend those public schools. Thus, H.B. 2013 does not violate the right to an education.

The circuit court, however, concluded that H.B. 2013 violates this right in two ways: by reducing funds available to public schools and by "trad[ing] a student's fundamental right to a public education for a sum of money." 1 JA 15 ¶ 75. The circuit court was wrong on both counts.

First, as a matter of law, the Program does not reduce public-school funding. As already discussed, it is funded by a separate general-fund appropriation. The circuit court's injunction did not add a single dollar to the public schools' budget.

In that regard, this Court's right-to-education cases are concerned with whether the Legislature appropriated enough money to public schools. In *State v. Rockefeller*, the Legislature authorized "a 2% cut in the expenditures authorized by the Legislature for public education in the 1981 fiscal year." 167 W. Va. 72, 73, 281 S.E.2d 131, 132 (1981). And in *West Virginia Education Ass'n v. Legislature*, State officials admitted "that the current budget . . . fail[ed] to appropriate sufficient dollars" for education and that the State "created an unconstitutional budget."179 W. Va. 381, 382–83, 369 S.E.2d 454, 455–56 (1988).

But here, the circuit court did not find, and Plaintiffs did not allege, that the Hope Scholarship Program cut any budgets or that the Legislature needed to appropriate more money to public schools. Instead, this lawsuit was aimed at a bill creating a financial aid program and having nothing to do with public-school funding. There has been no allegation that the State

cannot afford to fund both public schools and the Hope Scholarship Program. Therefore, as a matter of law, Plaintiff's lawsuit fails to allege that the right to access public education has been infringed.

Second, offering Hope Scholarship Accounts to families who choose non-public education does not force anyone to relinquish their right to a public education. The whole point is that the families ***chose*** an alternative option. The State is just providing financial aid to families who have made that choice.

Denying the right to a public education means denying someone access to public education. In *Cathe A.*, which was cited by the circuit court, a student was expelled from public school for one year after bringing two knives onto a school bus. 200 W. Va. at 525, 490 S.E.2d at 344. This Court held that, even though forcibly removing a student from public school may be necessary for safety reasons, "providing educational opportunities and services to such children is constitutionally mandated." *Id.* at 351, 400 S.E.2d at 532. Any refusal to provide an education to expelled students would have to satisfy strict scrutiny. *Id.* at 350–51, 400 S.E.2d at 531–32.

But H.B. 2013 does not concern the forcible removal of a student from public school. The circuit court did not find, and Plaintiffs did not allege, that any students wishing to attend their public school will be kept from doing so. Thus, there is no need for this Court to employ strict scrutiny to any part of the Hope Scholarship Program. It simply does not infringe on the right to a public education.

The circuit court suggests that children will be deprived of their right to an education because parents or private educators may not adequately educate those children. 1 JA 15 ¶ 75.[10]

[10] Elsewhere, the circuit court suggests that parents "in poverty or battling drug addiction" may use Hope Scholarship Accounts "for their own ends." 1 JA 8 ¶ 42. This is incorrect, as the

But, even without H.B. 2013, families already may choose private educators—indeed, they have a fundamental constitutional right to: "Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility . . . yield[s] to the right of parents to provide an equivalent education in a privately operated system." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925)). When families choose to exercise that right, they are not "trad[ing] a student's fundamental right to a public education." 1 JA 15 ¶ 75. They are exercising their right, and "high duty," to "direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534–35.

The Hope Scholarship Program changes none of that. West Virginia's private education providers remain what they always have been: an alternative for families that wish to opt out of public schools. What the Program does is provide money to families, who then can choose alternative educational options that work for them.

The Hope Scholarship Program does not prohibit any families from attending public school. Rather, it helps families afford other additional educational options should they want them—something wealthy families can already do. For those reasons, the circuit court should be reversed.

IV. The Program is Not Funded by the School Fund or by Any Other Constitutionally Restricted Funds.

The circuit court concluded H.B. 2013 violated Article 12, Sections 4 and 5 because, when read together with Article 10, Section 5, the provisions "make[] clear that public funds for K–12 education are for the free schools and to no other purpose whatsoever." 1 JA 17 ¶ 82. This was error. Section 4 merely protects the School Fund, which H.B. 2013 does not touch. And

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Account monies are disbursed straight to service providers the parents have chosen, not to the parents themselves. W. Va. Code § 18-31-9(c)–(d).

those other constitutional provisions do not say anything about financial aid for families who choose not to attend public schools.

The Hope Scholarship Program is not funded from the School Fund, and it does not use any money restricted to public education or any other restricted use. Article 12, Section 4 creates the "School Fund" and says that "interest [from the Fund] shall be annually applied to the support of free schools throughout the State, and to no other purpose whatever." But H.B. 2013 is funded by a new annual legislative appropriation from general revenue. W. Va. Code § 18-9A-25(a); *id.* § 18-31-6(a). For that reason, the Program cannot, as a matter of law, violate Section 4. As the North Carolina Supreme Court held in rejecting a similar challenge to that state's educational choice program, "[b]ecause the . . . Program was funded from general revenues, not from sources of funding that [the state constitution] reserves for our public schools, plaintiffs are not entitled to relief." *Hart*, 774 S.E.2d at 289.

For its part, Article 12, Section 5 provides four ways that the Legislature shall provide for public schools: (1) interest from the School Fund, (2) proceeds from forfeitures and fines, (3) general taxation, and (4) permitting, by statute, localities to raise their own funds for their schools. But Section 5 does not have anything to say about how the Legislature funds things ***besides*** public schools. And it certainly never says that taxation can be used ***only*** for public schools.

Likewise, Article 10, Section 5 says "[t]he power of taxation of the Legislature shall extend to provisions for the payment of the state debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the State." Here, H.B. 2013 is funded from an annual general-fund appropriation. In other words, H.B. 2013 is part "of the annual estimated expenses of the State." This provision contains no prohibition against funding

educational opportunities besides K–12 public schools—no one is contending that libraries or public universities exceed the State's taxing powers. In fact, Plaintiffs themselves never raised Article 10, Section 5 as a ground to invalidate the Program. *See generally* 2 JA 42–68. The circuit court was wrong to rely on this provision.

There is simply no cognizable claim that the Hope Scholarship Program uses or in any way violates the School Fund or any other protected fund. It doesn't, and the circuit court's decision should be reversed.

V. The Board of Education Has Constitutional Authority Over Public Schools, Not Financial Aid for Families Using Other Options.

The circuit court should also be reversed because it held that the Hope Scholarship Program violates Article 12, Section 2 of the Constitution by "usurp[ing] the constitutional authority" of the West Virginia Board of Education. 1 JA 17–18 ¶ 83. The Program does no such thing.

The Board of Education's constitutional authority is over the "general supervision of the free schools of the State," W. Va. Const. art. 12, § 2, not over financial aid programs for students who opt out of the free schools. The circuit court has no authority for its assertion that the Board has "supervisory and rule-making authority over public funds spent to educate the state's children." 1 JA 18 ¶ 85. Article 12, Section 2 does not mention "funds" or "money" or any similar term. It just says that "supervision of the free schools of the State shall be vested in the West Virginia Board of Education." Nothing says that the Board of Education has exclusive supervision over financial aid for children not in the free schools.

Nor does *West Virginia Board of Education v. Hechler*, 180 W. Va. 451, 455, 376 S.E.2d 839, 842 (1988), cited by the circuit court, support its reading of Section 2. That case concerned the "day-to-day supervision of [public] schools," and specifically "rules governing the design

and operation of school buses . . . ***owned and operated by any county board of education***." *Id.* at 454–55 & n.5, 376 S.E.2d at 842 & n.5 (emphasis added, quotations marks omitted). This Court struck down a legislative commission's mandatory review of the Board's rules and regulations—including the public-school bus rules—as infringements on the Board's constitutional authority. *Id.* at 453, 376 S.E.2d at 841. But here, no one disputes that the Board has constitutional authority over the day-to-day operations of public schools or, indeed, public-school buses. That authority, however, does not give it sole authority over non-public-school educational policies.

The Board of Education has authority over the "free schools." It does not have exclusive authority over Hope Scholarship Program's financial aid for families ***not*** using the free schools. Plaintiffs have not stated a viable claim under Article 12, Section 2.

VI. H.B. 2013 Is Not a Special Law Because It Does Not Treat Some People or Places Differently Than Others.

H.B. 2013 is not a special law. "A law is special in a constitutional sense 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." *State v. Bachman*, 131 W. Va. 562, 568, 48 S.E.2d 420, 425 (1948) (cleaned up). The Program does not treat some people differently than others, or exempt some from the treatment others are getting. In fact, the circuit court itself found that the Hope Scholarship Program is open to all comers:

> There is no limitation on eligibility based on geography, family income, school performance, or the particular educational needs of the student . . . . HB 2013 offers a voucher to every child starting kindergarten without regard to whether their family can already afford private school or homeschooling. In three years, the voucher program can be available to every child in the State, and it will definitely be available to all such students when fully implemented because each new class of kindergarten students can start with a voucher . . . .

1 JA 16 ¶ 77.

Still, the circuit court concluded that H.B. 2013 creates a class of students "who have to pay for public school resources . . . and those who do not." 1 JA 19 ¶ 87. But it doesn't. Even before H.B. 2013, families already had the option of purchasing courses offered by public schools in which they were not enrolled full-time. *See, e.g.*, W. Va. Code § 18-8-1(c)(3) (stating "[a]ny child receiving home instruction may upon approval of the county board exercise the option to attend any class offered by the county board"). H.B. 2013 simply provides funding to help families afford this educational option that already existed.

The circuit court also found that H.B. 2013 unconstitutionally differentiates "students protected from all discrimination, and students unprotected from most types of discrimination." 1 JA 19 ¶¶ 87–88. It cites Section 18-31-11(d), which states that "[a] participating school or education service provider is not required to alter its creed, practices, admission policy, hiring policy or curriculum in order to accept" Hope Scholarship students.

But H.B. 2013 does not treat anyone differently with respect to discrimination rules—H.B. 2013 does not affect discrimination rules at all. The Hope Scholarship Program does not exempt private schools or service providers from any anti-discrimination law. They remain subject to the same anti-discrimination laws to which they were subject before the Program was enacted. Section 18-31-11(d) merely recognizes that preexisting anti-discrimination law remains ***unaltered***. If Plaintiffs do not agree with the status quo, they can work to change those laws. But H.B. 2013 has no bearing on that status quo.

To the extent that families may spend their Account money on providers who, in the circuit court's words, "remain free to discriminate," 1 JA 19 ¶ 88, it is not the Program that chooses the providers but families themselves. Families are the ones who choose to opt out of public schools, and it is families who choose their alternative educational providers, whether

private schools, or public schools, or speech therapists, or other educational service providers. And that is as it should be, because funds in Hope Scholarship Accounts are the ***families' money, not the State's, and not the private education providers'***. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 649, 653 (2002) (upholding educational choice programs that "provide aid directly to a broad class of individuals, who, in turn, direct the aid to . . . schools or institutions of their own choosing"); *Magee v. Boyd*, 175 So. 3d 79, 135 (Ala. 2015) ("[T]he Section 8 tax-credit provision was designed for the benefit of parents and students, and not for the benefit of religious schools." (emphasis omitted)); *Meredith v. Pence*, 984 N.E.2d 1213, 1228–29 (Ind. 2013) ("The direct beneficiaries under the voucher program are the families of eligible students and not the schools selected by the parents for their children to attend."); *Schwartz*, 382 P.3d at 899 ("The parent decides where to spend [ESA] money for the child's education . . . [so] [a]ny decision by the parent to use the funds in his or her account to pay tuition at a religious school does not involve the use of 'public funds.'"); *Jackson v. Benson*, 578 N.W.2d 602, 620 (Wis. 1998) (holding educational choice program "provide[d] a neutral benefit directly to children of economically disadvantaged families").

Money only flows to providers through the independent decisions of families using their money for those providers' services. That some providers might have policies different from Plaintiffs' preferred ones "certainly did not arise as a result of the program." *Zelman*, 536 U.S. at 657.[11] And when families choose a certain provider, they are choosing to abide by its policies. The Program is one "of true private choice" and allows families "to exercise genuine choice among options public and private." *Id.* at 662. That's the case whether those families are using

[11] Moreover, "scrutinizing whether and how a religious [education provider] pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism." *Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022).

money from their savings, money they've received through other government transfer programs, or the money deposited in their Hope Scholarship Accounts. Parents have always been free to use their money on the educational providers they choose. The Program does not change a thing.

CONCLUSION

Nothing in the Constitution says that West Virginians can't fund ***both*** public schools ***and*** financial aid for families using alternatives to public schools. For that reason and the others detailed above, 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 6, 2022

Respectfully submitted,

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I hereby certify that on September 6, 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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