IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 22-616

SCA EFiled: Sep 06 2022
09:58PM EDT
Transaction ID 68045926

STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

TRAVIS BEAVER and WENDY PETERS, et al.,

Respondents.

PETITIONER STATE OF WEST VIRGINIA'S OPENING BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

Lindsay S. See (WV Bar # 13360)
Solicitor General
Michael R. Williams (WV Bar #14148)
Senior Deputy Solicitor General
Caleb A. Seckman (WV Bar # 13964)
Assistant Solicitor General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305-0220
Email: Lindsay.S.See@wvago.gov
Michael.R.Williams@wvago.gov
Caleb.A.Seckman@wvago.gov
Telephone: (304) 558-2021
Facsimile: (304) 558-0140

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provisions

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Statutes

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Rule

Other Authorities

ASSIGNMENTS OF ERROR

I. The circuit court should have dismissed Respondents' suit for lack of jurisdiction on standing and ripeness grounds because the Hope Scholarship Act does not now and might never harm Respondents.

II. The circuit court was wrong to refashion the Legislature's duty to provide a thorough and efficient system of free schools into a constitutional bar against funding any non-public educational initiatives that may affect public school enrollment.

III. The circuit court misread the Hope Scholarship Act to find that it takes money from the School Fund, interferes with the State Board of Education's role, and is a special law.

INTRODUCTION

When the West Virginia Legislature passed the Hope Scholarship Act eighteen months ago, it sought to open more doors for our State's most vulnerable population—our children. Building on the success of similar programs in other States, the Legislature designed the Act to give West Virginia families greater freedom to pursue the best education possible for their kids. By funding education-savings accounts administered by the State Treasurer, the law put options like private schools and homeschooling on the table for students who may not have been able to consider them before. Unsurprisingly, then, thousands of families applied and were approved to receive scholarships through the Act.

Nothing about this initiative should have created constitutional concern. The Act did not purport to touch our State's public schools. It did not draw a cent from the School Fund or take anything from appropriations reserved for public education. It did not modify the Board of Education's traditional authority. It *did* introduce more flexibility, further empowering parents to select a nonpublic education should they choose. Courts have recognized the power to make that

choice as a constitutional right for nearly a century. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

Despite all that, the circuit court here found that the Hope Scholarship Act violates at least five provisions of the West Virginia Constitution. Along the way, the court did violence to some of our State's most fundamental legal doctrines. Standing and mootness, for instance, would become an afterthought in nearly every case; any taxpayer could challenge just about any law based on any potential future harm from it. The circuit court also straightjacketed the Legislature on educational matters, barring it from spending state funds on any educational initiative beyond traditional public schools. It set new budget levels by judicial fiat—for, in the circuit court's view, *any* movement in funding levels, no matter how indirectly traced to a particular law, generates a constitutional problem. And it redrafted the law itself, dubbing the Act a burden on the School Fund, an attack on the Board of Education, and a special law targeted at some undefined class even when the law expressly says otherwise.

These problems in the circuit court's decision require reversal. Adding words to several constitutional provisions was wrong. Racing to find fault with the law based on policy disagreements was wrong. And enjoining the entire Act on the doorstep of a new school year was wrong. The Court should thus reverse and set things right. Parents and children deserve the chance to enjoy the opportunities the Hope Scholarship Act offers.

STATEMENT

In March 2021, the West Virginia Legislature passed and the Governor signed House Bill 2013, the Hope Scholarship Act. W. VA. CODE § 18-31-1, *et seq.* The Legislature intended the Act to give West Virginia families greater freedom "to better meet" their children's "individual education needs"—whether through public school, private school, homeschooling, or another individualized educational option. *Id.* § 18-31-5(a).

1. The Act creates and funds State-controlled education-savings accounts that parents can use to pay for "qualifying expenses to educate the student." W. VA. CODE § 18-31-7. Each annual scholarship equals "the prior year's statewide average net aid share allotted per pupil" in a public school, "based on net enrollment adjusted for state aid purposes," and "prorated" if students are not in the program the entire fiscal year. *Id.* § 18-31-6(b). Hope Scholarship funds do not go to scholarship recipients or their parents. Rather, the Treasurer deposits funds directly into an "eligible recipient account"; half is deposited no later than August 15, and the other half comes no later than January 15. *Id.* § 18-31-6(d). Scholarship "funds may not be refunded, rebated, or shared with a parent or student." *Id.* § 18-36-7(c).

Unlike some similar laws in other States, the Hope Scholarship Act is not a voucher program. Students can use scholarship funds for many educational ends beyond paying "tuition and fees at a participating school." W. VA. CODE § 18-31-7(a). Other qualifying expenses include "tutoring services" by non-family members, "preparatory courses" for advanced placement and college admissions exams, homeschool "curriculum," and special "educational services" like "occupational, behavioral, physical, speech-language, and audiology therapies." *Id.* But in all cases, recipients can use program funds for only approved "educational purposes in accordance" with the Act. *Id.* § 18-31-7(b).

The program is open to any child who resides in the State and either has attended public school for at least 45 days or is eligible to enroll in kindergarten. W. VA. CODE § 18-31-2(5). The Act does not restrict who can participate based on income level, learning disability, or the like. Parents apply on their children's behalf. When they do, they must sign an agreement promising to "provide an education … in at least the subjects of reading, language, mathematics, science, and social studies"; "use the Hope Scholarship funds exclusively for qualifying expenses"; "comply

with the rules and requirements of the" program; and "afford the Hope Scholarship student opportunities for educational enrichment." *Id.* § 18-31-5(d)(3).

For funding, the Act creates a special revenue fund that the Treasurer administers. W. VA. CODE § 18-31-6(a). The Department of Education includes a special request for the program in its annual budget request—beyond "all other amounts required" for funding public schools—that the Governor includes in the annual budget bill. *Id.* § 18-9A-25(a). The Legislature appropriates the funds from general revenue. *E.g.*, S.B. 250 (2022), Title II, Section 1 (Appropriations for general revenue), 2022 Leg., Reg. Session. 33-34. When the Department of Education receives this appropriation, it transfers the amount to the program. W. VA. CODE § 18-9A-25(a). The Act does not draw on any funds or income sources set aside for public education.

For oversight, the Act creates the Hope Scholarship Board. W. VA. CODE § 18-31-3. This nine-member board includes the State Superintendent of Schools, the State Auditor, and other state officials or their designees. *Id.* § 18-31-3(b). Among other duties, the Board ensures that funds are used for qualifying educational expenses only. *Id.* § 18-31-4(5). It also verifies every year that Hope Scholarship students attend participating schools or that they are making adequate academic progress based on test scores or certified-teacher reviews. *Id.* § 18-31-8(a)(3) to (4).

The Act further tasks the Hope Scholarship Board with continuing financial oversight. The Board must make sure that program funds are paid into the education-savings accounts and do not go to parents or students "in any manner." W. VA. CODE § 18-31-7(c). Each account is kept separate, and co-mingling funds through "personal deposits into a Hope Scholarship account [is] not permitted." *Id.* § 18-31-7(d). The Board can audit both Hope Scholarship recipients and education service providers that receive program funds to ensure that they fulfill the program's requirements. *Id.* § 18-31-10. If an audit reveals "intentional and fraudulent misuse," or discovers

that an education service provider "has intentionally and substantially misused" funds, the Board may remove the parent or student from the program or bar the provider from receiving payments. *Id.* § 18-31-10(b) to (d). If the abuse is severe enough, the Board can refer cases to the Auditor for further action, including "potential criminal investigation." *Id.* § 18-31-10(e).

2. The Act went into effect in the summer of 2021. Respondents waited until late January 2022—weeks before the scholarship application period was set to open on March 1, W. VA. CODE § 18-31-5(c)—to file a complaint for injunctive and declaratory relief in Kanawha County Circuit Court. JA Vol. 2, at 42. Respondents named the State Treasurer, State Superintendent, President of the Board of Education, President of the Senate, Speaker of the House, and Governor as defendants. They alleged that the Act was unconstitutional for five reasons. *First*, Respondents argued that public schools are the only educational program that the Constitution allows the Legislature to fund. *Second*, they alleged that strict scrutiny applies to this funding program, and the law violates that standard. *Third*, Respondents insisted that the Act took money from the "School Fund" defined in Article XII, Section 4 of the West Virginia Constitution. *Fourth*, they claimed that the Act usurps the Board of Education's authority. And *fifth*, they called the Act an unconstitutional "special law." JA Vol. 2, at 43-45.

Respondents moved for a preliminary injunction two months later. JA Vol. 1, at 4. Despite alleging grave harms, they did not seek a temporary restraining order, ask the court to proceed on an expedited basis, or otherwise request immediate relief. Meanwhile, several named defendants moved to dismiss, a group of intervening parents moved for judgment on the pleadings, and the State of West Virginia moved to intervene. JA Vol. 1, at 4-5.

All the while, the Hope Scholarship Program continued under its statutory timeframes. Thousands of families from across the State applied for funds. By early summer, the Board had

approved over 3,100 students to receive scholarships, with hundreds more still in the application process. *See* JA Vol. 1, at 10; Jeff Jenkins, *Hope Scholarship numbers grow, some late applications will be processed*, METRONEWS (June 21, 2022 7:17 PM), https://bit.ly/3PqWuM9. On July 1, the program met its statutory deadline to become "operational." W. VA. CODE § 18-31-5(a). And it was on course to disburse millions of dollars in scholarships by the statute's August 15 deadline to deposit the first half of this school year's funds. *See id.* § 18-31-6(d).

3. The circuit court changed all that. At what the parties thought was the long-awaited preliminary injunction hearing on July 6, the court granted "preliminary and permanent injunctive relief enjoining the state from implementing [the Act]." JA Vol. 5, at 680. Respondents had never moved for a permanent injunction or even summary judgment, and the circuit court gave the parties no notice that it planned to issue final judgment.

The court made sweeping findings of unconstitutionality at the hearing and in its later written order. At its core, the circuit court's decision read the Legislature's duty to provide "for a thorough and efficient" public school system to mean that the State can "raise revenue for, fund, and maintain *only* a thorough and efficient system of free schools supervised by the [State Board of Education]." JA Vol. 1, at 13-14 (citing W. VA. CONST. art. XII, §§ 1, 2). The circuit court recognized that our state Legislature (unlike Congress) starts with power to do anything the Constitution does not forbid. JA Vol. 1, at 13. Even so, it applied a canon of construction to find that a textual duty to fund public schools impliedly restricts the Legislature's power over non-public education. The court also concluded both that the Act creates an incentive to leave public schools and that indirectly "reducing the funds available to public schools" under current funding metrics is enough to "impinge[] on the fundamental right to an education." JA Vol. 1, at 15.

The circuit court agreed with Respondents on all their remaining claims, too. The court first held that constitutional provisions related to the non-general revenue School Fund and the Legislature's taxing power "comprise the constitutional parameters for raising and spending public dollars on K-12 education." JA Vol. 1, at 17. When it comes to primary and secondary education, public funds "are for the free schools and no other purpose whatsoever." JA Vol. 1, at 17. Next, the court reasoned that the State Board of Education's power to supervise public schools implies authority over all "public funds spent to educate the state's children." JA Vol. 1, at 18. And it held that the Act is an unconstitutional special law, as Hope Scholarship students may not receive all the benefits public-school students enjoy based on the voluntary choice to pursue different school options. JA Vol. 1, at 19.

On jurisdiction, the court found that Respondents "have taxpayer standing" because they "pay state and local taxes" and the Act "uses taxpayer funds to subsidize" non-public schools. JA Vol. 1, at 22. It also found the "elements of traditional standing met" because alleged constitutional violations are "per se harm" and reduced public school enrollment from students using the Act will "diminish[] the funds available for public education." JA Vol. 1, at 22-23. On ripeness, the circuit court did not discuss when that financial injury might occur. Instead, it concluded that "[p]assage and near implementation of an unconstitutional statute is sufficient to make it ripe for adjudication." JA Vol. 1, at 23-24.

The court also repeatedly questioned the policy decisions that the Legislature made in passing the Act. It insisted that the Legislature "might need to reevaluate"—but then, not content to wait for the Legislature, the court asked: "Isn't that what I'm supposed to do here today?" JA Vol. 5, at 654. It was "troubled" by how the Legislature chose to oversee the program and found it "problematic" that scholarship funds would purportedly "divert[]" money from "a historically

underfunded public school system." JA Vol. 5, at 678; *see also, e.g.*, JA Vol. 1, at 15 ("[The Act] divert[s] public funds that could be used for West Virginia's underfunded public schools."). It also guessed that "many disabled or special needs students are not going to be utilizing" the Act, so "public schools will be left with less funds to educate the students with the most needs." JA Vol. 5, at 679; *see also, e.g.*, JA Vol. 1, at 9, 14. And it speculated (without including statutory support) that "[s]tudents in poverty cannot use" the Act. JA Vol. 1, at 9. At the same time, the court thought the Act included no "safeguards preventing parents in poverty or battling drug addiction from taking the money for their own ends." JA Vol. 1, at 8.

The circuit court thus "preliminarily and permanently enjoined" the State from implementing the Act and granted declaratory relief that the statute is unconstitutional. JA Vol. 1, at 24-25. It also granted the State's motion to intervene and dismissed all defendants except the Superintendent and President of the Board of Education. JA Vol. 1, at 24, 28. Lastly, it denied the State's request for a stay. JA Vol. 5, at 682. The circuit court issued a written order memorializing these decisions on July 22. JA Vol. 1, at 1.

4. With program deadlines looming, the State and intervening parents sought a stay pending appeal first from the Intermediate Court of Appeals and later from this Court. The State timely noticed this appeal in the Intermediate Court on July 25. This Court refused the motions for stay but assumed jurisdiction over this appeal and the related, consolidated appeal from the parent-intervenors. It then set both appeals for expedited briefing and consideration.

SUMMARY OF ARGUMENT

The circuit court lacked jurisdiction. Beyond that, Respondents did not meet their burden to show that the Act is unconstitutional beyond a reasonable doubt. The circuit court never should have permanently enjoined the Hope Scholarship Act.

I. The circuit court should have dismissed for lack of jurisdiction because Respondents did not establish concrete, imminent, and non-speculative injury. The court wrongly applied the near-extinct taxpayer standing doctrine without considering its most important element—whether the Act involves the administration of justice. The court also accepted an attenuated theory of injury based on potential funding shortages in public schools that—if they happen at all—are likely two years away. And it embraced a weakened theory of ripeness that asks only whether a statute is in force and nearly implemented, even though Respondents could only speculate that the Legislature would not address any funding shortages that might arise.

II. The Act does not violate the constitutional right to a thorough and efficient system of public schools.

A. The Legislature must fund public schools, but that duty does not imply that the Legislature cannot fund any other types of education in the State. Although the circuit court relied on an often-criticized canon of construction to find that limit implicitly, this Court does not restrict the Legislature's almost plenary lawmaking authority without clear constitutional grounds. Nothing in Article XII, Section 1's text restricts funding for other educational initiatives. And the circuit court's negative-implication approach could significantly hamstring the Legislature both inside and outside the education realm.

B. The circuit court was wrong to use strict scrutiny to strike down the Act because Respondents did not meet their burden to show that the Act denies or infringes the right to education. The Act opens more options for West Virginia families to choose the best educational approach for their children while keeping public schools as one of those choices. Respondents' argument—that public school funding will decline under the current funding formula as Hope Scholarship students leave public schools—falters at what should have been the first step in the

constitutional analysis. A challenger must do more than show some loss in funding; the circuit court should have required Respondents to show that any drop will be large enough to fall below the constitutional floor. Then Respondents would still need to show that the Act is responsible for the drop—and they did not. The Court should direct Respondents to existing remedies for potential funding shortages rather than creating a new remedy that could cast doubt on almost any spending program the Legislature enacts.

III. Respondents' remaining constitutional arguments fail as well.

A. The Act does not take any funds constitutionally or statutorily reserved to the State's public schools. It creates a new appropriation that the State Board of Education transfers to the Hope Scholarship Board to administer the program. It does not draw down the School Fund described in Article XII, Section 4. The circuit court also misapplied provisions concerning the Legislature's mandatory duty to fund schools to infer that the Legislature cannot use tax revenue for any other educational purposes.

B. The Act does not intrude on the Board of Education's general supervisory authority because it does not change any laws relating to public schools. The circuit court read select authorities to suggest that the state Board has power over all public funds for education. But the Constitution, statutes, and case law confirm that the Board's power of "general supervision" applies to the State's free schools, not all schools.

C. The Act is not a special law because it applies uniformly to all West Virginia families with school-age kids. Everyone who wants to receive the Hope Scholarship is subject to the same requirements, restrictions, and funding caps. The circuit court credited objections that students who receive scholarships might not receive all the benefits public school students enjoy. But this

potential difference reflects families' voluntary choices; it does not result from a discriminatory classification in the Act.

The Court should reverse the circuit court's order and dissolve the permanent injunction.

STATEMENT ON ORAL ARGUMENT AND DECISION

The Court scheduled this consolidated appeal for oral argument on October 4, 2022, under Rule 20 of the West Virginia Rules of Appellate Procedure.

STANDARD OF REVIEW

This Court will dissolve a permanent injunction on a "clear showing of an abuse of discretion." Syl. pt. 1, *Chapman v. Catron*, 220 W. Va. 393, 647 S.E.2d 829 (2007). When "reviewing challenges to [the underlying] findings and rulings," the Court considers "factual findings under a clearly erroneous standard," and "[q]uestions of law are subject to a de novo review." Syl. pt. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000). The Court reviews a declaratory judgment de novo. *Orville Young, LLC v. Bonacci*, 246 W. Va. 26, __, 866 S.E.2d 91, 96 (2021).

ARGUMENT

West Virginia is not the first State to craft a school-choice program for parents who choose non-public schools for their children. Nor is the Act the first to face legal challenges like this one. But many other courts have rejected those challenges, reasoning that state legislatures can support *both* public and non-public education. *See, e.g.*, *Schwartz v. Lopez*, 382 P.3d 886, 897 (Nev. 2016) (rejecting the idea that "the public school system is the *only* means by which the Legislature could encourage education in Nevada" and enjoining law based only on lack of separate appropriation for school-choice program (emphasis in original)); *Hart v. State*, 774 S.E.2d 281, 289 (N.C. 2015) (explaining that the state legislature could "appropriat[e] general revenue to support other educational initiatives"); *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."); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) ("[The Wisconsin Constitution] provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin."). The West Virginia Constitution points to the same result here.

The circuit court should have stopped at the outset because Respondents lack standing and their claims are not ripe. Respondents' claims fail on the merits, too, because they do not overcome the Act's "presumption of constitutionality," syl. pt. 6, *Gibson v. W. Va. Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991), "beyond reasonable doubt," syl. pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965). The circuit court enjoined the Act in full because it found that it might lead to constitutionally troubling consequences under the existing school-funding formula. But it was Respondents' burden to show that "no set of circumstances" exists "under which [the Act] would be valid." *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991). They did not show that. The Legislature can fund educational initiatives beyond public options, and the Act does not frustrate public school students' right to attend thorough and efficient schools.

I. The Circuit Court Lacked Subject-Matter Jurisdiction.

The Act does not harm Respondents now and it might never do so. No matter how many students leave the public schools that Respondents' children attend to become Hope Scholarship recipients, those schools will not see any decrease in funding based on lower enrollment until at least next year. Maybe longer, maybe never. Any injury the Act might pose to Respondents is thus speculative—the opposite of concrete and imminent. So the circuit court should have dismissed the case for lack of jurisdiction on standing and ripeness grounds. *See State ex rel.*

TermNet Merch. Servs., Inc. v. Jordan, 217 W. Va. 696, 700, 619 S.E.2d 209, 213 (2005) ("any decree made by a court lacking jurisdiction is void").

First, this is not a taxpayer standing case. The circuit court started well enough in describing this demanding theory of standing: "Taxpayers in West Virginia may challenge the constitutionality of a statute which affects the administration of justice and requires the payment of public funds." JA Vol. 1, at 21. But it went off course applying it, finding taxpayer standing without even suggesting how the Act "affects the administration of justice."

The court's whole analysis on this point reads: "[Respondents] are residents of West Virginia who pay state and local taxes. [The Act] uses taxpayer funds to subsidize private education and homeschooling. [Respondents] have taxpayer standing here." JA Vol. 1, at 22 (citations omitted). This wide-open approach suggests that any challenge to a public-funding program is fair game for taxpayer standing as long as the plaintiff pays West Virginia taxes. In reality, taxpayer standing is rare. This Court has not applied it in any recent case; the circuit court cited two from the past two decades, and both only noted the doctrine's existence without discussing it further. *See Affiliated Constr. Trades Found. v. W. Va. Dep't of Transp.*, 227 W. Va. 653, 657 n.8, 713 S.E.2d 809, 813 n.8 (2011); *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Kanawha Cnty.*, 231 W. Va. 386, 397, 745 S.E.2d 424, 435 (2013). In federal court, the doctrine "has continued to fade away" outside the narrow context of Establishment Clause cases. *Taxpayer Suits*, 13B FED. PRAC. & PROC. JURIS. §3531.10.1 (3d ed.). And for good reason. The doctrine stretches the bounds of a justiciable case or controversy by allowing standing to vindicate an injury "not distinct from that suffered in general by other taxpayers or citizens." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007).

If the doctrine still has life in West Virginia practice, the few cases applying it rely on the "administration of justice" prong that the circuit court elided. This factor is not a throwaway: The doctrine started from the idea that taxpayers have "inherent interest in the proper administration of justice." Syl. pt. 1, *Howard v. Ferguson*, 116 W. Va. 362, 180 S.E. 529 (1935). Spending public funds was added later as another factor—it has never been sufficient for standing. *See, e.g.*, syl. pt. 1, *State ex rel. Goodwin v. Cook*, 162 W. Va. 161, 248 S.E.2d 602 (1978). And here, the Act does not affect the administration of justice in the sense the circuit court's authorities describe. The concept focuses on civil and criminal legal proceedings, permitting a relaxed standing analysis to "prevent usurpation of authority in the entire judicial program." *Howard*, 116 W. Va. at 362, 180 S.E. at 531; *see also Myers v. Frazier*, 173 W. Va. 658, 676, 319 S.E.2d 782, 800 (1984) (writ of prohibition against a special circuit judge's order); *Cook*, 162 W. Va. at 164-65, 248 S.E.2d at 603-04 (challenge to a statute authorizing a judge to appoint special prosecutors). It has the same meaning outside the taxpayer standing context, too, as when the Court interpreted the statutory phrase "conduct that is prejudicial to the administration of justice" to mean "conduct which interferes with civil or criminal litigation processes." *Law. Disciplinary Bd. v. Kupec*, 202 W. Va. 556, 571, 505 S.E.2d 619, 634 (1998) (citations omitted). The Act has nothing to do with legal proceedings or the integrity of the judiciary. Respondents cannot claim taxpayer standing.

Second, Respondents lack standing on traditional grounds. They did not establish any "concrete and particularized" injury from the Act that is also "actual or imminent and not conjectural or hypothetical." *Men & Women Against Discrimination v. Fam. Prot. Servs. Bd.*, 229 W. Va. 55, 61, 725 S.E.2d 756, 762 (2011). Their children are enrolled in public schools, so they are eligible for Hope Scholarship funds. *See* W. VA. CODE §§ 18-31-2(5), 5, 6. The Act on its face also takes nothing from public school funding. So Respondents' theory is necessarily

indirect—they reason that enrollment will go down as students apply for Hope Scholarships, and that the decrease in enrollment will in turn lead to lower public-school funding. But because plaintiffs must establish harm "particularized" to themselves, Respondents cannot just show decreased "funds available for public education" generally, as the circuit court seemed to allow. JA Vol. 1, at 23. Instead, they would need to show that funds allocated to their own kids' schools will fall.

Getting there is more A to E than A to B. In fact, the process proves to be an exercise in speculation. The Act *could* encourage students to leave Respondents' kids' public schools, which *could* lead to a drop in enrollment if incoming students do not balance things out, which *could* lead to lower state funding, which *could* be ignored by the Legislature, which *could* lead to schools limiting or cutting programs Respondents' children use. Tracing this attenuated logic defeats it. Concrete injury requires more than a "speculative chain of possibilities," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013), or "conjectural" "prospective injury," *Tabata v. Charleston Area Med. Ctr., Inc.*, 233 W. Va. 512, 517, 759 S.E.2d 459, 464 (2014); *see also Justice v. W. Va. AFL-CIO*, 246 W. Va. 205, __, 866 S.E.2d 613, 628 (2021) (characterizing "unsubstantiated fears of what the future may have in store" as "conjecture"). So even if Respondents are right about what might happen at their public schools in future years, feared harm "dependent upon contingent events" is not an "actual controvers[y]." *Zaleski v. W. Va. Mut. Ins. Co.*, 224 W. Va. 544, 552, 687 S.E.2d 123, 131 (2009) (citation omitted).

The harm Respondents claim is also not imminent. The circuit court reasoned that the Act will "imminently siphon millions in dollars in public funds that may otherwise be used for the support of public schools." JA Vol. 1, at 22. But funding Hope Scholarships is not the same as de-funding Respondents' children's schools. If it occurs at all, *that* potential harm is a year or

more away. The Legislature separately appropriated Hope Scholarship dollars out of general revenue, not public school appropriations. *See* W. VA. CODE § 18-9A-25(a). Projected enrollment drops do not create an imminent threat, either, as "state aid funding is based on the prior year['s] enrollment." *See* W. VA. DEP'T OF EDUC., H.B. 2013 FISCAL NOTE (2013), https://bit.ly/3OavM9H. Because students must be enrolled in public school to qualify for the Program (except for incoming kindergartners), the schools they leave will likely see a net *increase* in funding the first year because those students were included in the prior year's head count. And at this point, any decrease would likely not affect a district's funding until at least the 2024 academic year: This school year has already started, and state funding looks to the preceding year's enrollment numbers in the second month, *see, e.g.*, W. VA. CODE §§ 18-5-16(e)(1)-(2), 18-9A-15(b).

Finally, the circuit court was wrong to think that it could overlook conjectural, non-imminent harms because "[c]onstitutional violations are recognized as per se harm." JA Vol. 1, at 22. At least for standing, that's not the case. The circuit court cited four cases about the irreparable harm factor for awarding injunctive relief; none mentions standing. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (2021); *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009); *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987). At most, these cases show that "denial of a constitutional right, if denial is established," may get a party over the line for injunctive relief. *Ross*, 818 F.2d at 1135. But that idea does not mean that any party pleading a constitutional claim skips the need to show a "concrete" and "imminent" harm to get into court in the first place. *Men & Women Against Discrimination*, 229 W. Va. at 61, 725 S.E.2d at 762.

Third, Respondents' claims are not ripe. Parties need not wait until the danger is on top of them to sue. JA Vol. 1, at 23-24. But the circuit court lacked jurisdiction to "adjudicate rights which are merely contingent or dependent upon contingent events." *State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 210, 737 S.E.2d 229, 238 (2012). Courts must not "act to prematurely reach ultimate constitutional issues." *Wampler Foods, Inc. v. Workers' Comp. Div.*, 216 W. Va. 129, 146, 602 S.E.2d 805, 822 (2004). And this Court has been even more emphatic about the standard for issuing declaratory relief: "*Future and contingent events will not be considered.*" *State Farm Mut. Auto. Ins. Co.*, 230 W. Va. at 211, 737 S.E.2d at 239 (emphasis in original).

Here, the circuit court incorrectly declared the Act's "[p]assage and near implementation" to be enough for ripeness. JA Vol. 1, at 24. If that were right, a statutory challenge would always be ripe. Not even the circuit court's authority sweeps so broad: "[S]peculative" claims are not "susceptible to resolution." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298-99 (1979) (quoted at JA Vol. 1, at 23-24). Respondents are not suffering any injury now.

And even if the schools Respondents' children attend will see decreased funding next year or the year after under the existing funding formula, that shortfall would only injure Respondents if the Legislature were to fail to step in. The Legislature can adjust the Hope Scholarship Program or other state spending as needed to address future funding challenges. Not to mention, it can amend the funding formula itself—as it has many times before. Respondents' injury thus turns on a hypothetical future in which the Legislature decides not to address public-school funding concerns through any of these avenues. This contingent circumstance is particularly speculative here because nothing suggests the Legislature is unable or unwilling to act. After all, the Act does not affect the Legislature's "absolute and mandatory duty" to provide for public schools. *State ex*

rel. Brotherton v. Blankenship, 157 W. Va. 100, 125, 207 S.E.2d 421, 436 (1973). Courts presume that the Legislature will act in good faith and consistent with its constitutional duties. *See Price v. Sims*, 134 W. Va. 173, 189, 58 S.E.2d 657, 667 (1950). Nor is it likely that the Legislature would be unable to fix any funding concerns. Far from evidence that the State will not have enough money to fund both Hope Scholarships and public schools, last fiscal year's revenue collections closed more than $1.3 billion ahead of estimates. W. VA. STATE BUDGET OFFICE, REVENUE COLLECTIONS FISCAL YEAR 2022 (2022), https://bit.ly/3O5LqDa. True, the State may not always be in the same financial situation as this year. But ripeness is concerned with *now*.

In short, Respondents' feared injury is too speculative. It may never come to pass. Respondents lack standing, their claims are not ripe, and the circuit court should have dismissed for lack of jurisdiction on either or both grounds.

II. The Act Does Not Violate The Constitutional Provisions Requiring The Legislature To Ensure A Thorough And Free System Of Public Education.

Plaintiffs' primary charge against the Act is twice flawed, and the circuit court was wrong to accept it. The circuit court held that because the Legislature is required to fund public schools, it cannot fund anything else related to education. And as an apparent backstop for when that new and narrow view of legislative power fails, the court further endorsed the equally novel theory that the Legislature cannot create programs that lead to a decrease in school funding without satisfying strict scrutiny. The Constitution says otherwise. The Legislature must fund public schools, but the Constitution does not bar it from doing more. The court was also wrong to presume that any drop in public school funding is unconstitutional. Even if a particular drop does reach constitutional magnitude, a court should not set aside a particular spending program it might find distasteful—it should direct plaintiffs to the path this Court has already set for challenging funding shortages directly.

A. The Constitution's Command To Fund Public Schools Does Not Strip Away The Legislature's Discretion To Support Other Types Of Education.

Our Constitution says the Legislature "shall provide" for "a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1. This command makes public education a strong state priority. The Legislature need not fund other educational initiatives, and any discretionary forays into the non-public education sphere cannot come at the expense of its duty to provide thorough and efficient public schools. So far so good. But then the circuit court took this constitutional directive defining what the Legislature "shall" do and reshaped it into something the Legislature "shall not" do—fund anything else related to education. Trouble is, nothing in the text "require[s] the State to raise revenue for, fund, and maintain *only* a thorough and efficient system of free schools." JA Vol. 1, at 14 (emphasis added). So with no textual hook, the circuit court looked to the *expressio unius est exclusio alterius* canon—meaning "the expression of one thing, being the exclusion of the other." JA Vol. 1, at 13. Yet no amount of Latin can stretch the Constitution's plain English command into a hidden restriction on lawmaking authority.

The circuit court seemed to start by forgetting important rules about legislative power. Canons of construction can help resolve ambiguity by filling in common-sense background presumptions about what a provision's drafters likely meant. *See, e.g., Pajak v. Under Armour, Inc.*, ___ W. Va. ___, ___, 873 S.E.2d 918, 923 (2022) (finding it "not necessary" to "rely on canons of statutory construction" when construing "clear and unambiguous language"). But even if Article XII, Section 1's command were ambiguous, the Court has already made the relevant background principles plain. A "fundamental principle" provides that the Legislature has "almost plenary" power to pursue any policy goal it chooses in the absence of a contrary constitutional limit. *Lewis*, 185 W. Va. at 690, 408 S.E.2d at 640. The circuit court recognized as much when it contrasted the federal Constitution's enumerated powers with our Constitution's "restriction of

power" model. JA Vol. 1, at 13. It should have followed that logic further: The Legislature "has the authority to enact any measure not inhibited" by the Constitution. Syl. pt. 1, *Foster v. Cooper*, 155 W. Va. 619, 186 S.E.2d 837 (1972); *see also State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 594, 730 S.E.2 368, 377 (2012) (same).

Negative implication canons start from a different place. They can add words to the text despite the "imperative" not to "arbitrarily read into" a provision "that which it does not say." *State v. Butler*, 239 W. Va. 168, 178, 799 S.E.2d 718, 728 (2017) (citation omitted). Applied to legislative power, their implicit approach flouts the rule against "defy[ing] legislative will on mere implication" instead of only when a statute "is plainly, palpably, contra the Constitution." *State v. King*, 64 W. Va. 546, 606, 63 S.E. 468, 493 (1908). And reaching for them too quickly minimizes the "presumption of constitutionality with regards to legislation." Syl. pt. 6, *Gibson v. W. Va. Dep't of Highways*, *supra*. That concern has special force here because "the negation of legislative power" must "appear beyond reasonable doubt." Syl. pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, *supra*. The circuit court's exceptional brand of constitutional interpretation thus forgot the rule that if the Constitution does not explicitly forbid legislators from acting, "they may." *Robertson v. Hatcher*, 148 W. Va. 239, 251, 135 S.E.2d 675, 683 (1964) (cleaned up).

For much the same reasons, the *expressio unius* canon is often a bad fit for constitutional interpretation. A hundred years ago this Court refused to apply *expressio unius* to limit legislative power, holding that the Legislature could create a fourth category of people who will take title to forfeited state lands even though Article XIII, Section 2 only provides for three. *King*, 64 W. Va. at 606-07, 63 S.E. at 493. Since then, the Court has warned that the canon is "not of universal application." *State Rd. Comm'n v. Kanawha Cnty. Court*, 112 W. Va. 98, 163 S.E. 815, 817 (1932). It is often "unreliable," as it can be dangerous to "infer … from silence." *State v. Euman*,

210 W. Va. 519, 524, 558 S.E.2d 319, 324 (2001) (McGraw, J., concurring). And this Court is not alone. "Virtually all the authorities who discuss" the canon agree that "it must be applied with great caution." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012).

When used properly, the canon most often confirms the "assumption that certain omissions *from a statute* … are intentional." *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 492, 647 S.E.2d 920, 928 (2007) (emphasis added). If the Legislature "explicitly limits" a rule's "application," courts may well presume that the statute does not reach further implicitly. *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995). So too for statutes defining criminal conduct or otherwise limiting personal liberty, *e.g.*, *State v. Gilman*, 33 W. Va. 146, 150, 10 S.E. 283, 285 (1889) (quoted at JA Vol. 1, at 13), or when the Legislature imbues a board or commission with a specific, limited set of powers. The circuit court erred in applying the same method of construction to the Legislature itself, which "can do anything not forbidden by the Constitution." *King*, 64 W. Va. at 605, 63 S.E. at 493.

The circuit court's approach would also sweep too broadly, especially when read against other constitutional provisions and existing laws. If the mandate that the Legislature "shall" pass laws funding public schools means it cannot enact other educational programs, does the command that the Legislature "shall" enact laws "to protect the property of married women" from their spouses' debts, W. VA. CONST. art. VI, § 49, mean that it cannot pass laws protecting other types of marital property, or the property of married men? And what would the circuit court's reasoning do for the many other provisions in the Code that create programs supporting non-public education? The Court has already said that county school boards may constitutionally provide bus transportation for kids who attend religious schools. *See Janasiewicz v. Bd. of Educ. of Cnty. of*

Kanawha, 171 W. Va. 423, 426, 299 S.E.2d 34, 37 (1982) (analyzing W. VA. CODE § 18-5-13(f)(1)(A)). County boards may also pay for "state-adopted textbooks" for private school students who need financial assistance. W. VA. CODE § 18-5-21b. And if private schools comply with certain requirements, they may "participate in any state operated or state sponsored program otherwise made available" by law. *Id.* § 18-28-4. The circuit court's theory that the Legislature cannot fund non-public educational initiatives would threaten all that.

The question the circuit court should have asked is simple: "Where is the provision" that limits the Legislature's power? *King*, 64 W. Va. at 605, 63 S.E. at 493. None can be found—not in the opinion below, and not in the provisions the court cited. If anything, Article XII, Section 12's directive to "foster and encourage" "intellectual … improvement" cuts against the public-schools-and-nothing-else theory. That provision becomes a redundancy under the circuit court's view. *Contra* syl. pt. 2, *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 122 S.E.2d 436 (1961) ("[I]f possible, effect should be given to every part and to every word of a constitutional provision."). And contrast the Constitution's directive for legislative sessions, for example. Though it starts with a command similar to Article XII, Section 1's that the "Legislature shall assemble annually at the seat of government," it also says, "and not oftener unless convened by the Governor." W. VA. CONST. art. VI, § 18. Article XII, Section 1 does not read that the Legislature must fund public schools *and no others*. This Court should take out the words the circuit court's theory requires adding in.

B. The Act Does Not Frustrate The Right To A Thorough And Efficient System Of Public Schools.

Because the Legislature may support education beyond the public schools, the remaining question considers whether how it did so here crossed any constitutional lines. It did not. The exacting strict scrutiny standard applies only when the challenged law amounts to a "denial or

infringement of the fundamental right to an education." *Cathe A. v. Doddridge Cnty. Bd. of Educ.*, 200 W. Va. 521, 527-28, 490 S.E.2d 340, 346-47 (1997). So before the circuit court could enjoin the Act for purportedly violating strict scrutiny, JA Vol. 1, at 15, it was required to hold Respondents to their burden to show actual denial or infringement. Instead, it credited speculation and assumed harms. This Court should look closer: Expanding educational choice does not mean the Legislature will shirk its duty to ensure that the thorough and efficient system of free schools remains an option for all West Virginia students.

To begin, the circuit court mischaracterized the Hope Scholarship Program. The court accepted a theory that the Act "trades a student's fundamental right to a public education for a sum of money"; the court also thought that no "safeguards" exist to "prevent[] parents in poverty or battling drug addiction from taking the money for their own ends." JA Vol. 1, at 8, 15. This shorthand constitutional analysis does not satisfy the beyond-reasonable-doubt standard. The Hope Scholarship Program is voluntary and requires annual renewal, W. VA. CODE § 18-31-8, and families always have the option to reenroll a student in public school. The Act does not force anyone to "trade" away a public-school education. Respondents cannot even argue that the Act unduly induces anyone to leave, as the scholarships likely will not cover all nonpublic school expenses—free is still the cheapest option. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 654 (2002) (suggesting that a school funding program created "financial *dis*incentives" for private schools, as "[p]arents that ch[o]se to participate in the scholarship program and then to enroll their children in a private school … [had to] copay a portion of the school's tuition"). The circuit court also ignored every protection in the statute to ensure that parents (or educational providers) cannot take scholarship money and run. *See supra*, pp. 4-5. Parents do not receive money to use as they choose. The Treasurer deposits funds into state-controlled and state-audited accounts, and the Act

allows payment for approved educational purposes only; the money may not be shared with parents or students "in any manner." W. VA. CODE §§ 18-31-4(5), 6(d), 7(a)-(d), 10.

Respondents' second—and primary—theory of infringement fares no better. That argument's meat is that "[f]unding for the public schools, based largely on enrollment numbers, will decline." JA Vol. 1, at 14. Even if true, that statement assumes infringement without finishing the argument. Respondents *also* have to show that the "decline" is large enough to fall below the constitutional floor, and that the Act causes that result. They cannot.

1. The circuit court allowed Respondents to presume harm by showing likely funding decreases for some public schools once the Act takes effect. But not every drop in public school funding is unconstitutional. So it skips a key step in the analysis to conclude that "reducing the funds available to public schools" through decreased "public school enrollment" is enough to violate the Constitution. JA Vol. 1, at 15. Respondents had to show that the Act will reduce public school funding not just by some amount, but by an amount large enough to cross the constitutional line. By not holding them to that task the court effectively declared that today's funding level *is* the constitutional minimum. Working from that flawed premise, any decrease infringes the right to a thorough and efficient public school system. Because the order below makes no attempt to identify or grapple with the real constitutional standard—much less explain how Respondents showed any future funding loss would be significant enough to violate it—this Court can reverse on that basis alone.

In any event, the Act does not offend the Constitution. The Legislature denies or infringes the right to education only when it fails to ensure "adequate funding of our public school system." *State ex rel. Bd. of Educ., Kanawha Cnty. v. Rockefeller*, 167 W. Va. 72, 75, 281 S.E.2d 131, 133 (1981). Eliminating school funds "in their entirety," for instance, satisfies the standard. Syl. pt.

9, *State ex rel. Brotherton v. Blankenship*, *supra*. Short of that, showing that funds fall below an "adequate" level is a much tougher task than identifying "some" funding loss. For example, although the Governor cannot include school funding in an across-the-board state budget cut without special justification, *Rockefeller*, 167 W. Va. at 78, 281 S.E.2d at 135, he *can* cut all education spending in response to an expected budget deficit—and no "mandatory duty" obliges him to "restore funds to public education" if that deficit never materializes. *State ex rel. Bd. of Educ. of Cnty. of Kanawha v. Caperton*, 190 W. Va. 652, 655 & n.6, 441 S.E.2d 373, 376 & n.6 (1994).

So Respondents must show funding loss "to such an extent that a constitutionally mandated function could not be performed." *State ex rel. W. Va. Bd. of Educ. v. Gainer*, 192 W. Va. 417, 420 n.1, 252 S.E.2d 733, 736 n.1 (1994). They have to explain how school districts will be unable to "provide a thorough and efficient system of education" after the Act goes into effect, and that the difficulty "is not a result of inefficiency and failure to follow existing school statutes." *Pauley v. Kelly*, 162 W. Va. 672, 707-08, 255 S.E.2d 859, 877-78 (1979). This is Respondents' "case" to "prove," and they can rely on evidence of "overall disparities and discriminatory adverse effects." *Pendleton Citizens for Cmty. Sch. v. Marockie*, 203 W. Va. 310, 317-18, 507 S.E.2d 673, 680-81 (1998). They can also point to districts' inability to provide "good physical facilities, instructional materials and personnel," *Pauley*, 162 W. Va. at 706, 255 S.E.2d at 877—though even here, Respondents must also do more than show that some students would do better with different facilities. *See Pendleton*, 203 W. Va. at 317, 507 S.E.2d at 680 (holding that larger school sizes and increased travel time from consolidation do not violate the thorough and efficient education right). And given the Legislature's significant "authority and responsibility for the school system," reviewing courts will measure all this evidence against the "great weight" the Constitution

demands be "given to legislatively established standards." *Pauley*, 162 W. Va. at 708, 255 S.E.2d at 878. Respondents needed to make this type of showing before the circuit court enjoined the Act under strict scrutiny.

Respondents cannot make it here. The Act does not reduce any funds reserved for public school spending; Hope Scholarship dollars come from a new, general revenue appropriation "in addition to all other amounts" needed for public schools. W. VA. CODE § 18-9A-25(a); *see also id.* § 18-31-6(a). The consequences for future years are not as dire as Respondents predict, either. Some districts will lose money if students leave their public schools and the Legislature does not change the current funding structure. But the funding formula is based on student enrollment only in part. The circuit court was concerned with districts' fixed costs, JA Vol. 1, at 8, yet the formula largely accounts for these costs separate from per-pupil allocations. The formula involves a complicated process to determine how much it will cost to deliver public education in a district based on the needed resources' costs. *See* W. VA. CODE §§ 18-9A-10, 11, 22; *id.* § 18A-4-2. Many aspects of the formula bake fixed costs in—flat sums to improve instructional programs and technology, for instance, *id.* § 18-9A-10(a)(2)(A); a local share from local levies, *id.* § 18-9A-11; and minimum salary supplements for personnel with certain specialized training, *id.* § 18A-4-2b. The Act touches none of that.

When it comes to the per-pupil allocation, at least two factors lessen decreased enrollment's sting. First, no one disputes that some costs go down when schools have fewer students to teach. And the Act ties scholarship amounts to the part of the school funding formula that approximates this per-student cost. W. VA. CODE § 18-9A-25(a) (annual scholarships set at amount of "student aid allotted per pupil"). A safety valve in the formula further protects counties with enrollment under 1,400 students. *Id.* § 18-9A-2(i)(5). The same statute directs the Legislative

Oversight Commission on Education Accountability to review the scheme "every three interim periods" to ensure that it continues to "properly address the needs of counties with low enrollment." *Id.* § 18-9A-2(i)(5)(E).

At bottom, some loss of per-pupil funding that does not touch any funding derived from any other aspect of the formula—including the tool to make sure low-enrollment counties do not fall between the cracks—is not a constitutional crisis. Public school enrollment numbers fluctuate for many reasons after all. West Virginia's have been declining for some time, yet no one suggests these drops are enough to create across-the-board constitutional injury. Indeed, Respondents have not even met the lesser standard for an as-applied challenge that the schools their children attend will suffer an unconstitutional funding decrease. The circuit court was thus wrong to find that they met the higher burden to win a facial challenge: showing that there are "no set of circumstances under which [the Act] would be valid." *Lewis*, 185 W. Va. at 691, 408 S.E.2d at 641.

2. If Respondents could clear the first hurdle to show an unconstitutional funding decrease, they would still have to show that the Act is responsible for that result to justify striking the whole thing down. Again, they did not. This action is materially different from prior Article XII, Section 1 funding challenges. Those cases attacked statutes or orders directly responsible for decreased school funding. Consider *Rockefeller*'s challenge to the Governor's statewide budget cut, 167 W. Va. at 78, 281 S.E.2d at 135; the attack on how the funding metric treated certain counties' contributions, *Bd. of Educ. of Cnty. of Kanawha v. W. Va. Bd. of Educ.*, 219 W. Va. 801, 803, 639 S.E.2d 893, 895 (2006); or the Lincoln County parents' plea in *Pauley* to fix inequities in the funding statutes more generally, 162 W. Va. at 673, 255 S.E.2d at 861. But the Act does not mandate lower public school spending. Respondents' challenge is of a different sort.

The only thing Respondents alleged that the Act does itself is encourage other students to leave their children's schools. The circuit court characterized this approach as a problem of "incentivizing students enrolled in the public schools to leave public schools," which in turn means "[f]unding for public schools … will decline." JA Vol. 1, at 14. The Court should not bless this novel collateral-consequences theory for invalidating new spending programs.

The "incentives" concern is a non-starter. Nothing requires the Legislature to encourage students to attend only public schools. Just as the Constitution does not limit education spending to public schools, it does not stop the Legislature from passing statutes that make it easier for parents to choose non-public options. The best private school will never be the right fit for every kid. Even the best public school will not be the best option for every student, either. As long as the Legislature continues to meet its separate duty to the State's public schools, it can pass laws reflecting that reality.

Make no mistake: Respondents' theory means that any statute that indirectly reduces public school funding, JA Vol. 1, at 14, denies or infringes the right to thorough and efficient public schools. The "indirect" part is important, as funding loss on this theory take places through calculations under the separate laws that make up the current funding formula. Respondents' complaint thus isn't with the Act, but with the funding metric and whether it will stand up under future circumstances.

The circuit court glossed over this disconnect by treating the formula as a given—and so held the Legislature responsible for any change (here, the Act) that could lead to an unconstitutional shortage under it. The formula itself is not the constitutional requirement, though. The Legislature is not bound to "forever fully fund the public school support plan as it now stands on the statute books." *W. Va. Educ. Ass'n v. Leg. of State of W. Va.*, 179 W. Va. 381, 382 n.2, 369

S.E.2d 454, 455 n.2 (1988). It is "free to amend the plan"—as it has done before—"so long as any new statute meets constitutional muster." *Id.*

So the broad injunction the circuit court ordered is incongruent with the claim Respondents are making. After all, if the current funding regime were to fail—for any reason—the Legislature would be duty bound to come up with something else under its "absolute and mandatory" responsibility to provide for public schools. *Brotherton*, 157 W. Va. at 125, 207 S.E.2d at 436. And the Court has already explained how an aggrieved parent should proceed if the Legislature does not: Bring a *Pauley* action alleging that the "system for financing public schools violates West Virginia's Constitution." 162 W. Va. at 673, 255 S.E.2d at 861. The reason is that any denial of the right to education in that scenario would flow from the Legislature's independent, hypothetical refusal to change the formula or otherwise supplement public-school funding in response to enrollment declines. A spending program's collateral consequences thus might be a basis to challenge school appropriations more generally under *Pauley*, but it would not justify enjoining the program itself.

The Court should reject Respondents' request to stretch *Pauley* to reach this case.

For one thing, though this challenge involves an education-related program, Respondents and the circuit court have endorsed reasoning that reaches beyond educational laws. On the court's logic, any action with consequences for school enrollment could frustrate the constitutional right. Approving a company's request to build a major plant in one county, for example, might "incentivize" families with school-age kids to move there to enjoy new job opportunities. Under the *Pauley* line of cases, parents in the counties those families left could sue for adjustments to the formula if lower per-pupil allocations create a funding shortage. The circuit court's approach would let them challenge the business-development decision itself based on its foreseeable

downstream effects on school funding. No surprise, then, that the circuit court pointed to no precedent barring programs that might have collateral effects on school-funding metrics.

And the circuit court's approach is not limited to laws that might affect school enrollment. If collateral consequences are enough to challenge a statute directly, then any law that draws down the State fisc might violate the Constitution if it might not leave enough money to cover public education needs. Parents or educators might be skeptical, for instance, whether the State can afford expensive capital-improvement or infrastructure projects and have enough left to fund public education. But unless something in their enabling statutes takes money from public schools, courts do not strike down programs that the Legislature is otherwise constitutionally entitled to enact.

This last point flags the separation-of-powers concerns with Respondents' theory of relief. The Legislature could fix a funding shortage in many ways. Repealing a program that might contribute to it is one, but so are updating the funding formula overall, providing other appropriations targeted to affected districts, or enacting countervailing "incentives" to bring kids back to public schools. When the Court has found that the constitutional right to education was violated before, it has insisted on "comity" to its co-branches, refusing to direct specific remedies in favor of extending the "mutual deference accorded to equals" because the "law presumes the Legislature to know its duty." *W. Va. Educ. Ass'n*, 179 W. Va. at 383, 369 S.E.2d at 456. By enjoining the Act for its potential consequences (rather than any inherent constitutional flaw), the circuit court deprived the Legislature of its right to choose how to solve a funding shortfall. The courts can hold that a co-sovereign branch has responsibility to fix an unconstitutional funding situation. Courts do not get to dictate which fix must follow.

In the end, the circuit court's order reflects significant doubts about the Act's wisdom. The court gave its opinion at the hearing that even "if not unconstitutional," it seemed "fundamentally

inappropriate" "to do what this statutory mechanism suggests." JA Vol. 5, at 666. Then it criticized the Act in its order for "siphon[ing] millions of dollars in public funds that may otherwise be used for the support of public schools to subsidize more affluent families' private education." JA Vol. 1, at 22. The idea that the Act benefits only affluent families is not based in the record or reality: The roughly $4,300 annual scholarship is nearly 10 percent the $48,850 annual median income for West Virginia households. *See* Sean O'Leary, *How West Virginia's History Affects its Residents*, WEST VIRGINIA CENTER ON BUDGET & POLICY (Apr. 21, 2022), https://bit.ly/3zayqXu. And private school tuition in the State averages $4,760, only a few hundred dollars more than Act provides. Melanie Hanson, *The Average Cost of Private School*, EDUCATION DATA INITIATIVE (Dec. 27, 2021), https://bit.ly/3c3szMa. More to the point, the court's approach reflects a policy disagreement about what the people's representatives should and should not fund. The court was concerned about "divert[ing]" funds because it believes that West Virginia has a "historically underfunded public school system." JA Vol. 5, at 678. But Respondents did not challenge existing funding levels and—personal commentary aside—the court did not take evidence or grant relief on those grounds. The circuit court's opinion that any "extra" money should go to public schools instead of Hope Scholarships is just that.

The answer to the court's question—"[i]sn't that what I'm supposed to do here today," decide whether the Legislature "might need to reevaluate," JA Vol. 5, at 654—is "No." A court may not "substitute[] its beliefs for the constitutional principles" of the State. *Meadows on Behalf of Pro. Emps. of W. Va. Educ. Ass'n v. Hey*, 184 W. Va. 75, 77, 399 S.E.2d 657, 659 (1990); *see also Butler*, 239 W. Va. at 176, 799 S.E.2d at 726 ("[A] judicial challenge is not a license for this Court to judge the wisdom, fairness, or logic of legislative choices." (cleaned up)). Reasonable minds may disagree about what makes the best education policy for West Virginia. That debate

should not play out in the courts. And the presence of disagreement does not show that the path the Legislature chose denies or abridges the right to thorough and efficient public schools.

III. The Act Otherwise Complies With The Constitution.

The circuit court should not have credited Respondents' remaining, scattershot attacks on the Act. By finding that the Act simultaneously harmed certain public-school-funding sources and the State Board of Education's powers, the circuit court again added language to the constitutional text and drew inferences the Court has never endorsed. The Court should not approve this sort of freewheeling revisionism now. The Act's generally applicable eligibility criteria are also more than enough to keep the statute within a general law's bounds. The circuit court's holding otherwise misunderstood what it means to be a "special law."

A. The Act Does Not Take Money Reserved Exclusively For Public Schools.

The circuit court should have rejected Respondents' objections to the Act's funding. Instead, it declared that the Constitution "require[s] that state taxation and funding pay only for *public* K-12 education." JA Vol. 1, at 16. It's no accident that this conclusion of law lacks a citation. The constitutional provisions the court invoked say nothing of the sort.

First, the Act does not draw from the constitutionally defined "School Fund." The circuit court is correct that this dedicated fund must be used to pay for "free schools throughout the State" and "no other purpose whatever." JA Vol. 1, at 16 (quoting W. VA. CONST. art. XII, § 4). In fact, "no other purpose whatever" is the sort of express prohibition that could have salvaged the circuit court's reading of Article XII, Section 1 had the drafters included one. So here the lower court's error is factual, not legal: Under its express terms, the Act does not touch the School Fund.

The Act's funding provisions do not take money from the School Fund or any other dollars earmarked for public schools. If the circuit court thought that all money spent on schools in West Virginia necessarily derives from the School Fund, it was wrong—the School Fund is built from

certain specific funding sources, and it is "set apart as separate" from the General Fund. W. VA. CONST. art XII, § 4; *see also id.* amend. 2. The Act creates a new "special revenue fund" out of general revenue and sets up a mechanism for new appropriations every year to come. W. VA. CODE § 18-31-6; *id.* § 18-9A-25. The Fiscal Year 2023 Budget Bill, too, notes that the Act's appropriation comes from general revenue, not the School Fund. *See* S.B. 250 (2022), Title II, Section 1 (Appropriations for general revenue), 2022 Leg., Reg. Session. 33-34. Other States have recognized that specific sources of funding matter when considering similar challenges, upholding programs "funded from general revenues, not from sources of funding" exclusively "reserve[d] for … public schools." *Hart*, 774 S.E.2d at 289. Because the Act is funded the same way, it does not violate our Constitution's restrictions on using the "permanent and invested school fund." W. VA. CONST. art XII, § 4.

Second, provisions about the Legislature's power and duty to fund public schools through tax revenue do not disable the Legislature from using taxes to fund other educational programs. The circuit court reasoned that Article XII, Section 5 and Article X, Section 5 (along with the School Fund provision) "comprise the constitutional parameters for raising and spending public dollars on K-12 education." JA Vol. 1, at 17. But only the School Fund is textually limited to a single purpose; these provisions are silent on the circuit court's much broader "public funds can be used for 'no other purpose whatsoever'" test. JA Vol. 1, at 17.

Here is what the Constitution's tax provisions do say. Article XII, Section 5 lists "general taxation of persons and property or otherwise" as one way in which the Legislature "shall provide" for public schools. This provision describes the "mandatory manner" by which the Legislature must "provide financial support for free schools." *Brotherton*, 157 W. Va. at 125, 207 S.E.2d at 436. It does not say that funding public schools is the only permissible way to use tax revenue for

educational ends. Article X, Section 5 says that "[t]he power of taxation" extends to—among other things like paying state debt—the "support of free schools." That provision "sets out *generally* the State's power of taxation." *Rockefeller*, 167 W. Va. at 78, 281 S.E.2d at 135 (emphasis added). It does not list every way the Legislature can direct tax revenue. And even if it did, its list includes paying the "annual estimated expenses of the State." W. VA. CONST. art. X, § 5. Appropriations under a new spending program like the Act fit that bill.

The Court has already explained what inference to draw from school-funding provisions like these—our Constitution gives "preferential treatment" to public schools. *Gainer*, 192 W. Va. at 419, 452 S.E.2d at 735. Preferential is different from exclusive. Nothing in the constitutional text supports the circuit court's leap.

B. The Act Respects The State Board Of Education's Authority.

The Act does not "improperly usurp[]" the state Board of Education's "constitutional authority." JA Vol. 1, at 17. The Board has all the same powers over the State's free schools under the Act as it did before. If anything, it has more power now. The Act gives the State Superintendent of Schools a mandatory seat on the Hope Scholarship Board and requires "consultation" with the Department of Education before the board adopts rules touching on public schools. W. VA. CODE §§ 18-31-3(b)(4), 8(f). So the circuit court's objection is grounded in something different—it saw constitutional error in not giving the Board "supervisory and rule-making authority" over *all* "public funds spent to educate the state's children." JA Vol. 1, at 18. That approach is a claim for new power without constitutional or statutory backing. This Court should reject it.

The Constitution vests in the Board of Education "[t]he general supervision of the free schools of the State." W. VA. CONST. art. XII, § 2. The plain text thus shows that the Board has

authority over the State's public schools, not all schools. The Act does not restrict or otherwise limit that power.

The statute the circuit court cited does not support a broader rule, either. True, Section 18-2-5 lists ways the Board is responsible for "carrying into effect the laws and policies of the state related to education." W. VA. CODE § 18-2-5(a) (quoted at JA Vol. 1, at 17). But that responsibility is only part of the Board's "general supervision *of the public schools* of the state." W. VA. CODE § 18-2-5(a) (emphasis added). If that language left doubt about whether the Legislature meant to remake the Board's powers through this statute, the provision starts by emphasizing that the Board's authority is "[s]ubject to and in conformity with the Constitution and laws of this state." *Id.* And the next subsection shows how the Legislature understands that constitutional power: It references the Board's "constitutional responsibility for the general supervision *of public schools.*" *Id.* § 18-2-5(b) (emphasis added).

The circuit court also misread a leading case on the Board's authority, *West Virginia Board of Education v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988). *Hechler* did not hold that "general supervision" means that all "[d]ecisions that pertain to education must be faced by" the Board. JA Vol. 1, at 18 (quoting *Hechler*, 180 W. Va. at 455, 376 S.E.2d at 842). Had the circuit court read two sentences on, it would have seen that *Hechler* was discussing the meaning of "'general supervision' of *state* schools." 180 W. Va. at 455, 376 S.E.2d at 843 (emphasis added). This focus on supervising the State's free schools is all over the case. *E.g.*, syl. pts. 2-3, *id.* (stating holdings relating to "the meaning of 'general supervision' of state schools"); *id.* at 454, 376 S.E.2d at 842 (discussing supervision "of state schools" and "free schools").

The circuit court's objection to the Hope Scholarship Board overseeing program funds thus falls away given this authority; it supports the state Board's supervision of public schools, but not

every educational matter involving state dollars. The Board has no claim to this money and no right to direct how it is spent. Nor does the money come at the expense of funds the Board does oversee: The Act's annual appropriation is distinct and on top of "all other amounts required" for public schools. W. VA. CODE § 18-9A-25(a). That the Act's funds "flow directly through the [Board]," JA Vol. 1, at 18, is also irrelevant to the Board's constitutional powers. The funds have their own calculation formula and the only thing the Board does is include the calculated amount in its annual "budget request" and then transfer it to the Hope Scholarship Board. W. VA. CODE § 18-9A-25(a). The circuit court should have required more before finding the Hope Scholarship Board "unconstitutional." JA Vol. 1, at 18.

C. The Act Is A General Law.

The Constitution prohibits passing "a special act" "where a general law would be proper." W. VA. CONST. art. VI, § 39. The Act checks the box—it is not a special law.

The "special law" provision's goal is to prevent "the unequal conferring of statutory benefits" through "arbitrary" classes that can and cannot benefit from a law. *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 339-40, 268 S.E.2d 590, 595 (1980). Thus, a law is special only when it would apply equally "but for" "arbitrarily separat[ing] some persons, places, or things from others." *State ex rel. Dieringer v. Bachman*, 131 W. Va. 562, 568, 48 S.E.2d 420, 425 (1948). Perfection is not required. A law does not have to be "uniform in its operation and effect" to remain general. Syl. pt. 7, *State ex rel. Heck's, Inc. v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965). It just needs to operate "alike on all persons and property similarly situated." *Id.*

The Act does. It applies "uniformly [to] all persons and things of a class." *Gallant v. Cnty. Comm'n of Jefferson Cnty.*, 212 W. Va. 612, 620, 575 S.E.2d 222, 230 (2002) (citation omitted). That class—parents and guardians of school-aged children—is "natural, reasonable and appropriate to the [Act's] purpose." *Id.* All these families have the same choice whether to apply,

are subject to the same eligibility criteria, must follow the same spending restrictions, and receive the same scholarship amounts. *See* W. VA. CODE §§ 18-31-5(d), 6(b), 7. The Act does not create special hurdles for anyone. It "applies uniformly" to all families "who wish to take advantage of its provisions." *Bailey v. Truby*, 174 W. Va. 8, 24, 321 S.E.2d 302, 318 (1984).

The circuit court did not dispute any of that. But Respondents persuaded the court to look at a different concern. Rather than asking whether the Act arbitrarily makes some families ineligible for scholarship funds, the circuit court feared that families might put *themselves* in a disfavored class by choosing to take those funds. It thought that some scholarship recipients would have to pay for public school resources, and others might not have the same anti-discrimination protections as public-school students. JA Vol. 1, at 18-19. Yet the special-law analysis looks at who qualifies for the "statutory benefits" the challenged law extends. *Bosely*, 165 W. Va. at 339-40, 268 S.E.2d at 595. The fact that the very families the circuit court thought it was protecting qualify for Hope Scholarship funds shows that the Act is not "special." And regardless whether the circuit court is right about the consequences that might flow from accepting scholarship funds, freely giving up the right to attend public schools does not create an unconstitutionally discriminatory class. *Cf. Jones v. W. Va. State Bd. of Educ.*, 218 W. Va. 52, 59, 622 S.E.2d 289, 296 (2005) (finding no equal-protection violation from choice not to extend certain benefits to homeschooled students, as parents had "*voluntarily* chosen not to participate in the free public school system" and thus "forego[ne] the privileges incidental to a public education" (emphasis in original)). This Court always "favor[s] the construction which would result in a statute being viewed as a general law." *State ex rel. Rickey v. Sims*, 122 W. Va. 29, 29, 7 S.E.2d 54, 56 (1940). That should have been enough to defeat this claim.

In any event, nothing supports the circuit court's concerns. For one thing, a plaintiff's duty to establish standing runs to "each claim asserted." Syl. pt. 1, *State ex rel. W. Va. Univ. Hosps. – East, Inc. v. Hammer*, 246 W. Va. 122, 866 S.E.2d 187 (2021). So even if this Court concludes that Respondents have standing for their other claims based on the Act's purported consequences for public-school funding, only Hope Scholarship recipients could be harmed by the "special" classes. Respondents lack standing to vindicate the interests of other parents' kids.

Moving to the court's specific objections, the Act does not "create[] a class of students in private school or homeschooling who have to pay for public school resources." JA Vol. 1, at 19. The statute's relevant provision deals with double-dipping into state education dollars. Hope Scholarship students who receive some public-school services will owe tuition to ensure that the public school "receives the appropriate pro rata share" of scholarship funds "based on the percentage of total instruction provided to the student by the public school." W. VA. CODE § 18-31-8(f). But the State still picks up the tab: Recipients can use scholarship funds to pay this "tuition." *Id.* So the Act effectively pro-rates scholarships for dual-enrolled students. Public school services remain free.

Finally, the Act does not create "two classes of students who receive public funds," those "protected from all discrimination, and students unprotected from most types of discrimination." JA Vol. 1, at 19. The circuit court's theory is that some anti-discrimination laws do not reach all private schools based on those schools' "creed[s], practices, [or] admission polic[ies]." JA Vol. 1, at 19 (citation omitted). But even if true, the Act did not create the situation. Differences in how laws apply from one school to another pre-date the Act; the Act itself does not exempt any private schools or education service providers from complying with existing anti-discrimination laws. Nor does the Act force anyone into this "less protected" category: All students can still

attend public school for free. In giving families another choice, the Legislature did not discriminate against anyone. And because that same choice is available to all families, the Act is not a special law.

* * *

The circuit court had to stretch constitutional text and this Court's precedents to find for Respondents on each of their claims. However much a court might imply and infer, our Constitution does not say that the Legislature may support only public schools with public funds. It also does not say that the State Board has power over all educational matters that involve state money. Yes, the circuit court and Respondents may disagree with how the Legislature decided to support educational choice in our State. But policy disagreements cannot overcome the presumption of constitutionality for a validly enacted law. The Act is one of many discretionary funding programs the Legislature is entitled to enact. And as with any other new line item the Legislature adds to the budget, choosing to fund the Hope Scholarship Program does not mean that the Legislature will fall down on its duty to provide a thorough and efficient system of free schools. Thousands of West Virginia's parents and children have been waiting long enough, wondering when they will be able to walk through the doors the Act opens. It's time to end the wait.

CONCLUSION

The Court should dissolve the permanent injunction and remand with direction to dismiss the action.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

_/s/ Lindsay S. See_____
Lindsay S. See (WV Bar # 13360)
Solicitor General
Michael R. Williams (WV Bar #14148)
Senior Deputy Solicitor General
Caleb A. Seckman (WV Bar # 13964)
Assistant Solicitor General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305-0220
Email: Lindsay.S.See@wvago.gov
Michael.R.Williams@wvago.gov
Caleb.A.Seckman@wvago.gov
Telephone: (304) 558-2021
Facsimile: (304) 558-0140

Counsel for Petitioner State of West Virginia

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 22-616

STATE OF WEST VIRGINIA, et al.,

Petitioners,

v.

TRAVIS BEAVER and WENDY PETERS, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Lindsay S. See, do hereby certify that the foregoing Petitioner State of West Virginia's Opening Brief is being served on all counsel of record by email and File & Serve Xpress this 6th day of September, 2022.

/s/ Lindsay S. See
Lindsay S. See
Solicitor General