No. 22-616

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE OF WEST VIRGINIA,

Petitioner/Defendant,
KATIE SWITZER and JENNIFER COMPTON,
Petitioners,
v.
TRAVIS BEAVER and WENDY PETERS,
Plaintiffs/Respondents.

On Appeal from the Intermediate Court of Appeals at Case No. 22-ICA-1, Circuit Court of Kanawha County Case Nos. 22-P-24, 22-P-26

BRIEF OF RESPONDENTS TRAVIS BEAVER AND WENDY PETERS

John H. Tinney, Jr.
(WV Bar No. 6970)
Hendrickson & Long, PLLC
214 Capitol St.
Charleston, WV 25301
Phone: (303) 346-5500
Email: jtinney@handl.com

Jessica Levin*
Wendy Lecker*
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
973-624-1815
Email:
wlecker@edlawcenter.org
jlevin@edlawcenter.org

Counsel for Parent Respondents

Tamerlin J. Godley*
Timothy D. Reynolds*
Philip M. Hwang*
Kiaura Clark*
Paul Hastings LLP
515 South Flower Street
25th Floor
Los Angeles, CA 90071
Phone: (213) 683-6000
Email:tamerlingodley@paulhastings.com
timothyreynolds@paulhastings.com
philiphwang@paulhastings.com
kiauraclark@paulhastings.com

Zoe Lo*
Benjamin S. Gilberg*
Paul Hastings LLP
200 Park Avenue
New York, NY 10166
Phone: (212) 318-6000
Email: zoelo@paulhastings.com
benjamingilberg@paulhastings.com

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STATEMENT OF CASE

In 2021, the Legislature enacted House Bill 2013 ("HB 2013" or the "Voucher Law"), codified as W. Va. Code§ 18-31-1 *et seq*. Petitioners[1] refer to it repeatedly as "financial aid,"[2] and describe it as an extra spending "initiative."[3] They contend it is a "scholarship" that all children can apply for to augment their core education.

But those are not the circumstances here. The deceptively entitled "Hope Scholarship"[4] does not operate as a supplement to students' core public education. If they take a Hope voucher, it *is* their core education. HB 2013 is a seismic shift in how the State purports to meet its Constitutional obligation to the children of West Virginia. Under HB 2013, students can *either* go to public school or receive ~$4300—the money the state would have, on average, spent on educating them in public school. As State Petitioners admit, students accepting the vouchers have to pay for any public school resources and services they may still need beyond the $4300. SB at 38. Petitioners also admit this is not enough to attend private school in West Virginia. SB at 31; *see also* JA Vol. 4, at 559-60.

That is decidedly not what the Education Article established for the children of West Virginia. Parents have always been free to choose private education or home-schooling for their children at their own expense and they remain free to do so. But, if public funds are involved, the state takes on a duty to provide a thorough and efficient system of public education, including provision for a full education—not financial aid for part of one, plus educational rigor and

[1] "Petitioners" refers to the State of West Virginia ("State-Petitioners") and Intervenors Switzer and Compton ("Intervenor-Petitioners").
[2] Intervenor-Petitioners' Brief ("IB") at 1, 7, 9, 12-16, 18, 20, 22-24, 26-28, 30.
[3] *Id.* at 19; State-Petitioner's Brief ("SB") at 1-2, 9, 12, 19, 22.
[4] Voucher proponents euphemistically use the term "scholarship" when what they are really describing are private school vouchers. In fact, the West Virginia Legislature "explicitly refers to . . . allotments from the Hope Scholarship Program (HSP) as 'vouchers' in its official blog." JA Vol. 2, at 70-90; JA Vol. 4, at 436-37.

academic standards, accountability for the expenditure of the public funds, and protections against discrimination. This fundamental right cannot be exchanged for $4300.

Nor is the Voucher Law "financial aid" for *all* students. The Voucher Law on its face is necessarily limited to use by:

- Students whose parents are affluent enough to pay for the remaining private school tuition and fees, and other expenses covered in public schools—such as food, transportation, and special education services—beyond the $4300.
- Students whose parents are affluent enough for one parent, who also has the skills to educate their child, to stay home so the child can be home-schooled.
- Students whose parents will make use of the funds and *not* make sure their children are educated.
- Students who do not have disabilities or other special needs that can only be met in public schools. Most private schools in West Virginia do not provide special education services.
- Students who are not LGBT, as LGBT students would not be accepted at most private schools since 90% of the private schools are religious schools that likely have creeds barring LGBT students. *See* JA Vol. 4 at 593.

Thus, to the extent the Voucher Law is "financial aid," it is only for a select group. The West Virginia Constitution does not allow public funds to be raised or spent on education subsidies for the private education of more affluent families and those without special needs.

Likewise, when the Voucher Law is fully implemented, all students in private and home-schooling will receive this public subsidy, which the West Virginia Department of Education ("WVDOE") anticipates will cost an additional $120 million a year over the funds that are currently needed to maintain the system of public schools. There is not another state in the country that subsidizes all private and home schooling—including the private and home schooling of the wealthy. State constitutions, like West Virginia's, do not allow it.

The Voucher Law is also an intentional expenditure of public funds that could be used for

public schools but instead will be given away to a subset of non-disabled, non-LGBT, more affluent students to subsidize their private education. Petitioners argue that the state is flush with cash—this year. Many states are experiencing the benefits of Covid federal relief monies. But good economies come and go and education is far too important to bear the brunt of fluctuating economic conditions. *See State ex rel. Board of Educ., Kanawha Cty. v. Rockefeller*, 167 W. Va. 72 (1981). Thus, the framers of the Constitution limited the expenditure of public funds for K-12 education to a system of thorough and efficient free schools—in good and bad times. The public money raised and spent meeting a child's fundamental right to an education "*shall*" be for the support of the free schools.

The Voucher Law also on its face provides a public enticement—public money—to lure more affluent and lower-need students out of the public schools. This intentional act decreases state public school funding, which is largely based on enrollment. Luring students out of the public schools will necessarily silo students in poverty and those with special needs in the public schools because these students cannot use the vouchers. These children are more costly to educate because of their increased needs. Thus, HB 2013 will disproportionately concentrate these students in the public schools while diminishing the public funds available for educating them.

Simply put: the West Virginia Constitution sets up a very specific structure for the publicly funded education of its children. It did *not* set up a framework that allows more affluent students to get "financial aid" for their private school attendance; the poor, marginalized, and children with disabilities to be siloed in the public schools; and the State to abdicate its obligation to a student by paying out $4300. The Legislature can attempt to amend the Constitution if that is the framework they want to create. But it is not allowed by the current

Constitution. Indeed, there is *not a single* universal voucher program operating in the U.S. This Court would allow implementation of the first. The circuit court's permanent injunction of HB 2013 must be upheld.

SUMMARY OF ARGUMENT

As the circuit court correctly determined, the Voucher Law is unconstitutional on five separate and independent grounds. The Voucher Law: (1) exceeds and frustrates the Legislature's powers and duties under the Education Article of the Constitution; (2) impinges on a student's fundamental right to an education without meeting strict scrutiny; (3) violates constitutional requirements that the public money raised and spent to meet a child's fundamental right to an education "*shall*" be for the support of the free schools; (4) usurps the Board of Education's constitutional authority over publicly funded K-12 education; and (5) treats similarly situated students differently, with some treated in a disadvantageous manner, rendering it an impermissible special law.[5] Petitioners' failure to successfully refute any *one* of these grounds requires this Court to affirm the Circuit Court Order.

First, the circuit court correctly found that the Education Article sets up a specific framework for providing publicly funded education in West Virginia. The Legislature must provide a thorough and efficient system of free schools, with specific funding sources, and overseen by the WVBOE. Under the doctrine of *expressio unius*, the Legislature cannot frustrate or exceed this constitutional duty. The Voucher Law impermissibly *exceeds* the Legislature's constitutional duty by setting up a separate system, led by a different Board, which uses public monies for private educational expenses. Nor can the Legislature shirk its duty to the children of

[5] JA Vol. 1 at 1-26 (Kanawha circuit court's Final Order Granting Plaintiff's Motion for Preliminary and Permanent Injunctive Relief and Declaratory Judgment and Ruling on other motions (the "Circuit Court Order")).

West Virginia by giving them $4300 and leaving them otherwise on their own. The alternative system the Voucher Law creates leaves children vulnerable to fly-by night private school scams promising and not delivering education for $4300 (or an adult choosing the $4300 without providing any education at all).

HB 2013 *frustrates* the Legislature's duty by diverting scarce public dollars to subsidize the private education of more affluent students. It also incentivizes more affluent students to leave public education—reducing state funding of public schools, which allocations are based substantially on enrollment numbers. This act further concentrates poor students and those with disabilities—who often have additional educational needs—in the public schools, with less funding to meet their educational needs. It is unconstitutional for the Legislature to take intentional actions that negatively and directly impact the public schools.

Second, a quality, free education is a constitutional right that can only be abridged if the action meets strict scrutiny—that is, an action narrowly tailored to meet a compelling state interest. Petitioners argue that strict scrutiny does not apply because HB 2013 "may" ultimately not reduce public school funding below a thorough and efficient funding baseline. But, this misunderstands the nature of the impingement. As much as Petitioners want to convince the Court that this is a funding case, it is not. What is at issue is whether the Legislature can intentionally take actions that harm public schools and the children in them. It is uncontested that HB 2013 will reduce public school enrollment. It is also agreed that it will cost the State more than $120 million a year to subsidize all current private and home-schooled students when fully implemented. It is plain on the face of the statute that it cannot be used by students without the money to supplement the cost of a private education or by students with needs that cannot be met in private schools—siloing them in the public schools. And, Petitioners concede that a child

trades his or her fundamental right to an education for $4300 and must then pay for any additional public school courses or resources. These are real and certain harms that impinge on childrens' fundamental education rights. As such, HB 2013 must be narrowly tailored to meet a compelling state interest. Petitioners *do not even try to* make this showing, conceding that strict scrutiny cannot be met.

Third, the Voucher Law violates Article XII, Sections 4 and 5 and Article X, Section 5. Taken together, these provisions establish a Constitutional requirement that *public* funds raised and used to meet a child's fundamental right to a public education may only be used to fund the system of free schools. Section 4 initially provided the only Constitutional funding mechanism for education. It makes clear that public funds, in the form of the interest on the "School Fund," must go to "free schools . . . and to no other purpose whatever." W. VA. CONST. art. XII, § 4. The subsequent addition of Section 5 provided additional funding mechanisms, including "general taxation," but did not change this limitation on education spending. It specified that the additional sources of funding "shall" be for "free schools." *Id.* § 5. The Taxation Article also specifies taxation for the "support of free schools." *Id.* Petitioners argue this is of no consequence; the Legislature can spend money on any educational expense it wants. But, this would make all of the language about free schools in the Constitution surplusage—why specify free schools if money can be raised and spent for any educational expenditure. It must mean something. And, what it plainly says is that taxing and spending to meet a child's fundamental right to an education is restricted to the free schools.

Fourth, the Voucher Law unconstitutionally strips the WVBOE's exclusive constitutional authority to supervise state-funded K-12 education. W. VA. CONST. art. XII, § 2. The Voucher Law creates the Hope Scholarship Board, which is separate from the WVBOE, to oversee the

administration of the voucher program. It bars the WVBOE from exercising any oversight over the use of the public funds devoted to vouchers. The WVBOE cannot establish any quality or accountability standards. Petitioners argue the Hope Scholarship Program falls outside the WVBOE's authority because it is "non-public education" and "financial aid." But, there is a reason that the Constitution refers only to the public schools in discussing the authority of the WVBOE. The Constitution provides only for one system of publicly funded education: a thorough and efficient system of free schools supervised by the WVBOE. HB 2013's creation of a second system of publicly funded education governed by a different board is unconstitutional.

Fifth, the Voucher Law is an unconstitutional "special law". W. VA. CONST. art. VI, § 39. This Court's decision in *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 343-44 (1980), makes evident that no law shall be created that confers benefits to a select few, favoring some similarly situated persons over others. That is precisely what the Voucher Law does here. It offers private education subsidies to the subset of "eligible" students who can actually use them—more affluent, without disabilities, and non LGBTQ. It favors the more urban dwellers over the rural, who have limited or non-existent private school options—until unqualified schools pop up, as they will, to get their hands on public funding. It treats students in private and home schooling who choose to receive vouchers differently from those who do not choose vouchers. Voucher students have to pay for public school resources and non-voucher students do not. (Intervenor Petitioners are simply wrong that any home-schooled or private school students have ever had to pay for public school classes prior to HB 2013. IB at 29.) Furthermore, students receiving a publicly funded education in public school are protected by the full panoply of anti-discrimination laws while students receiving public funds for vouchers are subject to discrimination by private schools on the basis of protected categories including religion, gender

identity, sexual orientation, disability, and academic achievement. Public funds may not be allocated in this manner under the Constitution's strong presumption against special laws that lead to differential treatment among similarly situated students.

State Petitioners—but notably not the Intervenor Petitioners—further raise jurisdictional arguments regarding standing and ripeness. These contentions are also wrong.

Respondents have standing. As is evident in the voucher cases cited by Petitioners, parents of children in public schools have standing to seek to enjoin a voucher statute. HB 2013 causes harm to public schools, which harms students attending public schools. HB 2013 creates a voucher program that Respondents could not use, even if they wanted to do so, because they do not have the necessary income to afford to pay for the additional costs of private school beyond the voucher and/or no private schools near them provide the special education services they need. All of these harms are redressed by permanently enjoining the statute. Traditional standing is met. Plaintiffs also have taxpayer standing to object to the unconstitutional expenditure of public funds and public interest standing to object to an unconstitutional statute of significant public importance. There is standing here.

Ripeness. Strangely, State Petitioners complain that Respondents were both too late ("Respondents waited until late January 2022" to bring suit), SB at 5, and too early ("their claims are not ripe"). *Id.* at 12. Petitioners claim that Respondents can only bring suit when the funding at their specific schools drops below constitutional standards as a direct result of HB 2013. But, again, this is not a funding case. HB 2013 is unconstitutional regardless of funding levels. A suit to protest an unconstitutional statute is ripe when the statute is enacted and going into effect.

Permanent Injunction. Finally, Petitioners complain that the circuit court permanently enjoined HB 2013 instead of simply preliminarily enjoining it. But, when a law is facially

unconstitutional it must be permanently enjoined. The constitutionality of a statute is a question of law for a court to decide. All parties were on notice that the constitutionality of HB 2013 was in question and briefed it in multiple filings. Intervenor Petitioners brought a motion for judgment on the pleadings arguing that HB 2013 was constitutional as a matter of law, which Respondents opposed. Likewise, certain individual state defendants brought a motion to dismiss on these same grounds and that was also opposed. All parties briefed the constitutionality of HB 2013 on the preliminary injunction motion. The court found the law was unconstitutional as a matter of law, which is the flip side of their motions for judgment and dismissal, and fully within the circuit court's discretion. The permanent injunction was properly issued.[6]

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

BACKGROUND OF CASE

I. House Bill 2013

On March 17, 2021, the Legislature enacted House Bill 2013, codified as W. Va. Code§ 18-31-1 *et seq.*, and on March 27, the Governor signed it into law. Petitioners object to the term "vouchers" but the official "West Virginia Legislature Blog" describes HB 2013 this way: "The Hope Scholarship Program would give students a *voucher* equal to about $4,600 a year to start, but that could fluctuate depending on the annual state School Aid Formula. The *vouchers* could be used for things like tuition at a private school, for tutoring, for standardized exams, or for after

[6] Petitioners do not argue, and have waived the claim that the preliminary injunction was improperly issued. Accordingly, even if the permanent injunction were somehow deemed inappropriate—which it is not—the preliminary injunction remains in place and the matter should be remanded to the circuit court for further proceedings.

school programs." Christopher Marshall, *Senate Completes Hope Scholarship Program*, W. Va. Legis. Blog (Mar. 17, 2021), https://tinyurl.com/5n873md3 (emphasis added). Plainly, the Legislature thinks HB 2013 provides vouchers.

Under the Voucher Law, every student in the State could theoretically obtain an "education savings account" ("ESAs" or "vouchers"). A child is eligible to receive a voucher for private school or homeschooling if the child is a resident of the State, and either (a) is enrolled full time in public school for at least 45 days; (b) is enrolled full time in public school for the entire term of the previous year; or (c) is eligible at the time of application to enroll in kindergarten. W. Va. Code § 18-31-2(5). If less than 5% of eligible students enroll after two years, the eligibility expands to any student in the state, regardless of whether they have ever attended public school. *Id.* There is no income limit, need- or means-based eligibility requirement, enrollment cap, or funding restraint. *See generally id.* Even if voucher eligibility does not expand to every student in 2026, universal eligibility will occur over time, as each year every student newly eligible for kindergarten becomes eligible to receive vouchers for the duration of their elementary and secondary education. In as little as four years and a maximum of twelve years, the State will be subsidizing the private education of every student who attends private school or is homeschooled, regardless of family income or any other criterion.

Parents submit voucher applications and if the minimal requirements are met, the Hope Scholarship Board "shall" approve the application. W. Va. Code § 18-31-5(d). Funds are deposited into each voucher recipient's personal education savings account. W. Va. Code § 18-31-6(d). Parents have discretion to use the funds for a wide array of private education and homeschool expenditures, including: "[t]uition and fees at a participating school"; "[t]utoring services"; "[f]ees for nationally standardized assessments, advanced placement examinations,

any examinations related to college or university admission, and tuition and/or fees for preparatory courses"; "[t]uition and fees for online non-public learning programs"; [t]uition and fees for alternative education program"; "[f]ees for transportation"; "curriculum"; "[f]ees for after-school or summer education programs"; and "[a]ny other qualified expenses as approved by the board." W. Va. Code § 18-31-7(a). Parents can provide these services themselves except for tutoring, which cannot be provided by an immediate family member but can be provided by a friend or non-immediate family member. W. Va. Code § 18-31-7 (a)(3).[7]

Each ESA receives on a yearly basis an amount "equal to 100 percent of the prior year's statewide average net state aid share allotted per pupil based on net enrollment adjusted for state aid purposes," W. Va. Code § 18-31-6(b), which would be approximately $4,600 in 2023 under the current School Aid Formula, according to the State Treasury. W. VA. STATE TREAS., HOPE SCHOLARSHIP PROGRAM, FAQ. HOPESCHOLARSHIPWV.COM, HTTPS://WWW.HOPESCHOLARSHIPWV.COM/FAQ.

Currently students in private or home-schooling can enroll in public school classes, and regularly do, free of charge. JA Vol. 4 at 560; W. Va. Code § 18-8-1(c)(3). Under HB 2013, for the first time, "[c]ounty boards shall charge tuition to Hope Scholarship students who enroll for services in a public school." W. Va. Code, § 18-31-8(f).

The Voucher Law created a new entity called the Hope Scholarship Board to "administer the Hope Scholarship Program." W. Va. Code § 18-31-4.

In terms of academic requirements, all that is required is a promise. Parents "promis[e] to do all of the following:"

[7] "Tutoring services provided by an individual or a tutoring facility: *Provided*, That such tutoring services are not provided by a member of the Hope Scholarship student's immediate family." Tutoring for one family by another, and vice versa, is allowed.

a. Provide an education for the student "in at least the subjects of reading, language, mathematics, science, and social studies"
b. Use the funds "exclusively for qualifying expenses" as provided in W. Va. Code § 18-31-7;
c. "[C]omply with the rules and requirements of the Hope Scholarship program"; and
d. "[A]fford the Hope Scholarship student opportunities for educational enrichment such as organized athletics, art, music, or literature." W. Va. Code § 18-31-5(d)(3).

Students may renew their voucher every year. W. Va. Code § 18-31-8(a). For a student who chooses to attend a "Participating School," renewal requires only "annual confirmation of his or her continued attendance at a nonpublic school." W. Va. Code § 18-31-8(a)(3). No academic achievement or advancement is required. A "Participating school" means any private school providing education to elementary and/or secondary students that gives notice that it intends to participate and "promises" to follow the rules. W. Va. Code § 18-31-2(9). That's it.

For those who choose "an individualized instructional program," such as homeschooling, renewal requires a showing of <u>one</u> of the following: (1) the student "has annually taken a nationally normed standardized achievement test of academic achievement" and "[t]he mean of the child's test results in the subject areas of reading, language, mathematics, science and social studies for any single year is within or above the fourth stanine or, if below the fourth stanine, show improvement from the previous year's results"; or (2) "[a] certified teacher conducts a review of the student's academic work annually" and "[t]he certified teacher determines that the student is making academic progress commensurate with his or her age and ability." W. Va. Code § 18-31-8(a)(4). The student's test results or teacher's determination is "reported to the county superintendent." W. Va. Code § 18-31-8(a)(4)(A)(iii), (B)(iii). A recipient who fails to renew may reapply. W. Va. Code § 18-31-8(d).

The statute expressly forbids oversight of entities that will be publicly funded by the voucher program. It states: "Education service providers shall be given maximum freedom . . . without governmental control" and "[t]his article does not expand the regulatory authority of the state, its officers, or any school district to impose any additional regulation of education service providers beyond those necessary to enforce the requirements of the program." W. Va. Code § 18-31-1l(c), (e). "Education service provider" is defined as "a person or organization that receives payments from Hope Scholarship accounts to provide educational goods and services to Hope Scholarship students." W. Va. Code § 18-31-2(4). Parents can be education service providers except for providing tutoring to their own child. W. Va. Code § 18-31-7(3).

The Voucher Law restricts the State's ability to audit private schools and education service providers (including parents) to ensure the voucher funds are used for educational expenses, even though the funds flow through the Department of Education. W. Va. Code § 18-9A-25. The Voucher Law states that the Hope Scholarship Board "may" provide for random audits of parents of voucher recipients on an "as needed" basis. W. Va. Code § 18-31-l0(a). Further, the Hope Scholarship Board "may" audit education service providers, but only if it first meets the burden of determining that the provider has "[i]ntentionally and substantially misrepresented information or failed to refund any overpayments in a timely manner" or "[r]outinely failed to provide students with promised educational goods or services." W. Va. Code § 18-31-10(c). These audits are only permitted; they are not required under the statute. *Id.* The WVBOE, for its part, has no authority to identify and remedy ineffective use of public funds, fraud, abuse, insufficient academic progress, or any other educational deficiency.

The Voucher Law does not prohibit discrimination on the basis of religion, gender identity, sexual orientation, or disability. The Voucher Law includes limited federal

antidiscrimination protections under 42 U.S.C. § 1981[8] – which covers racial discrimination – and otherwise expressly states that any ESP that accepts voucher funds need not "alter its creed, practices, admission policy, hiring policy or curriculum[.]" W. Va. Code § 18-31-11(d).The Legislature refused to adopt an amendment to HB 2013 that would have made it illegal to discriminate against voucher recipients on the grounds barred in public schools. Ryan Quinn, *WV House passes sweeping bill providing public money to home-, private-school families*, CHARLESTON GAZETTE-MAIL (Mar. 4, 2021).[9]

The financial impact of the Voucher Law will be substantial. A fiscal note prepared by the Legislative Auditor for HB 2013 projects over $100 million in annual costs to fund the voucher program once eligibility extends to all private and home schooled students in as little as four years. W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021).[10] The WVDOE's own fiscal note projects that the cost of funding the voucher program will exceed $120 million annually by fiscal school year 2027. W. VA. DEP'T OF EDUC., H.B. 2013 FISCAL NOTE (2021).[11]

II. Procedural History

Respondents Travis Beaver and Wendy Peters are parents of students enrolled in West Virginia public schools. Respondent Travis Beaver is a resident of Putnam County, West Virginia. He has two children in West Virginia public schools. Mr. Beaver's son, S.B., is in the seventh grade. Mr. Beaver's daughter, J.B., is in the sixth grade. J.B. has been diagnosed with nonverbal/preverbal autism and ADD/ADHD. J.B. has an individualized education program ("IEP") to address her need for special education and related services. Mr. Beaver is not aware of

[8] W. Va. Code § 18-3l-ll(a)(4).
[9] *Available at* https://www.wvgazettemail.com/news/legislative_session/wv-house-passes-sweeping-bill-providing-public-money-to-home--private-school-families/article_314bf68d-dba0-55d1-a036-b2c883eb83dd.html.
[10] *Available at* https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799669695.
[11] *Available at* https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152.

any private school in his area that would accept J.B. or be able to meet her special education needs. JA Vol. 4, at 416-19. Mr. Beaver could not afford the extra tuition, costs and fees that would be necessary to use the voucher to attend a private school even if there was a private school that could serve his children. *Id.* at 418-19.

Respondent Wendy Peters is a resident of Raleigh County, West Virginia and teaches middle school English Language Arts in the Raleigh County School District. Ms. Peters has been an educator for twenty years. Her child, M.P., is in fourth grade and has autism. M.P. has an IEP. Ms. Peters is likewise not aware of any private school in her area that would accept M.P. JA Vol. 4, at 410-15. The voucher would not cover M.P.'s speech therapy or other costs of private education even if there was a school that provided these services. *Id*. at 414.

On November 1, 2021, Petitioners notified the State of the pending lawsuit, JA Vol. 2, at 40-41, which was widely publicized. On January 19, 2022, Respondents brought this suit. *Id.* at 42-69. A judge was finally assigned at the end of April. JA Vol. 1, 33. Even before a judge was finally assigned, on March 30, 2022, Plaintiffs filed a Motion for Preliminary Injunction. JA Vol. 2 at 70-90. Defendants West Virginia State Treasurer Riley Moore and Governor Jim Justice filed a Motion to Dismiss on April 4, 2022. *Id.* at 91-115. Defendants President of the West Virginia Senate Craig Blair and Speaker of the West Virginia House of Delegates Roger Hanshaw filed their own Motion to Dismiss on the same day. *Id.* at 116-30. On April 8, 2022, Parent-Intervenors filed a Motion for Judgment on the Pleadings. *Id.* at 131-57. Defendants State Superintendent of West Virginia W. Clayton Burch and President of West Virginia's Board of Education Miller L. Hall filed a response in support of granting Plaintiff's Motion for Preliminary Injunction on June 15, 2022. *Id.* at 163-81. The State of West Virginia filed its Motion to Intervene on June 29, 2022. JA Vol. 3 at 330-41.

The circuit court held a hearing on all of the pending motions on July 6, 2022. The circuit court preliminarily and permanently enjoined HB 2013 on five separate and independent grounds. JA Vol. 1 at 1-26. The Court denied Parent-Intervenors' Motion for Judgment on the Pleadings and Defendants' Blair, Hanshaw, Moore and Justice's motions to dismiss on the merits. *Id.* at 25. The Court granted the State's Motion to Intervene, *id.*, and dismissed Defendants Blair, Hanshaw, Moore, and Justice individually. *Id.* at 27-28. The Court denied the State's oral motion during the hearing to stay the injunction. *Id.* at 25.

The State and Parent-Intervenors filed motions to stay before the Intermediate Court of Appeals on July 19, 2022. The Court denied these motions on August 2, 2022 and consolidated *State v. Beaver*, case no. 22-ICA-1 and *State v. Peters*, case no. 22-ICA-1. Petitioners filed another round of motions to stay, along with a motion for direct review, before this Court on August 4, 2022. The Court refused these motions on August 18, 2022 and transferred jurisdiction from the Intermediate Court of Appeals on its own direction. The Court expedited this matter for briefing and consideration with oral argument set for October 4, 2022.

ARGUMENT

I. Legal Standard

As the State Petitioners set forth, a court's grant of a permanent injunction will not be disturbed absent a clear showing of abuse of discretion. *See Weatherholt v. Weatherholt*, 234 W. Va. 722, 726, 769 S.E.2d 872, 876 (2015) (quoting *Stuart v. Realty Corp.,* 141 W. Va. 627, 92 S.E.2d 891 (1956)) ("[T]he power to grant or refuse or to modify, continue, or dissolve a temporary or a permanent injunction, whether preventive or mandatory in character, ordinarily rests in the sound discretion of the trial court . . . and its action in the exercise of its discretion

will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion.").

Where an issue on an appeal from the circuit court is a question of law, this Court applies a *de novo* standard of review. *See Kanawha County Pub. Library Bd. v. Bd of Educ. of Kanawha*, 231 W. Va. 386, 395 (2013).

II. HB 2013 is Unconstitutional on Five Separate and Independent Grounds

A. It is Beyond a Reasonable Doubt that HB 2013 Violates the Education Article

1. The Primacy of Public Education for the Framers of the Constitution

The framers of the Constitution focused particularly on the importance of public education. JA Vol. 4 at 433-435, ¶¶ 3-5 ("The desire to push towards universal free, public education garnered more support among the delegates than any other issue[.]")). Prior to West Virginia becoming a separate state, "Virginia's failure to provide a system of free public education had long rankled the western counties" that seceded to form West Virginia. *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 15 (1995) (quoting Robert M. Bastress, The W. Va. State Const.—A Reference Guide 271 (1995)); *see also* JA Vol. 4, 433. As this Court acknowledged, "[t]he framers of our Constitution lived among the ruins of a system that virtually ignored public education and its significance to a free people." *Adams,* 196 W. Va. at 15. As a result, when the convention met in 1861 to create West Virginia's first constitution, the Framers gave high priority to public education, stating that the "virtue and general intelligence among the people . . . is the only sure foundation on which Republican governments can rest." Granville

Parker, *Debates & Proc*., FIRST CONSTITUTIONAL CONVENTION (Dec. 2, 1861)[12]. The delegates cemented public education as a sacrosanct constitutional right in West Virginia.

The drafters were explicit about the mandate to create and maintain a system of public schools, and *only* a system of public schools. A report from the Constitutional Convention Committee explained: "[a]ll money. . . shall be . . . sacredly devoted and applied to the support of primary education in common schools throughout the State, and to no other purpose whatever." Rev. Gordon Battelle, *Debates & Proc*., FIRST CONST. CONVENTION OF W. VA. (Dec. 19, 1861) (prefacing what would become Article XII, § 4).[13] West Virginia would provide quality public education and would allocate funds for that educational purpose *only*. *See e.g., Adams*, 196 W. Va. at 14 (referring to Article XII § 1 as "a constitutional provision that seeks broadly to overcome all hostility to quality public education"). Private schools existed at the time and the Framers could have decided to fund private schools or subsidize private school tuition—they chose not to do this. The framers could also have chosen to pay parents a sum to take care of the education of their children themselves. The framers of the Constitution did not do so.

Instead, the Constitution sets out an express framework for publicly funded education. Under Section 1 of the Education Article, the Legislature has a duty to provide a "thorough and efficient system of free schools" for the children of the State. W. VA. CONST. art. XII, § 1. Section 2 vests "general supervision" of public funds spent on K-12 education in the West Virginia Board of Education. W. VA. CONST. art. XII, § 2. Section 4 creates a fund "applied to the support of free schools throughout the State, and to no other purpose whatever." W. VA. CONST. art. XII, § 4. Section 5 directs the Legislature to "provide for the support of free schools," by various additional measures. W. VA. CONST. art. XII, § 5. The Taxation Article

[12] *Available at* https://archive.wvculture.org/history/statehood/cc120261.html.
[13] *Available at* https://archive.wvculture.org/history/statehood/cc121961.html.

further provides that taxation "shall" be for the support of the "free schools." W. VA. CONST. art. X, § 5.

2. The Education Article Governs the Legislature's Powers and Duties Regarding Education

The Education Article plainly instructs the Legislature on how it is to provide for the public education of West Virginia's children. Creating a second competing system that pays public money to parents in lieu of providing an education and subsidizes private education, with a separate Board and oversight, exceeds and frustrates the Legislature's duties and powers set forth in the Constitution. This is exactly what HB 2013 does on its face and why it is unconstitutional.

The principle of constitutional construction known as *expressio unius est exclusio alterius* ("*expressio unius*") prohibits statutes that exceed or frustrate express constitutional powers and duties. *State v. Gilman*, 33 W. Va. 146, 150 (1889); *see also State ex rel. Downey v. Sims*, 125 W. Va. 627, 633 (1943). As this Court has explained, the doctrine of *expressio unius* is "axiomatic law" in West Virginia, *Dunham v. Morton*, 115 W. Va. 310, 313 (1934), and is relied on in cases "simply overwhelming in number." *State ex rel. Downey*, 125 W. Va. at 633. This Court has applied it more than a dozen times in just the last decade.

Petitioners acknowledge that the State constitution is not a grant of power like the federal constitution; it is a restriction on power. *Robertson v. Hatcher*, 148 W. Va. 239, 250, 135 S.E.2d 675, 682-83 (1964). Where the Constitution addresses a topic, it limits the Legislature that otherwise would have unlimited power to act. As this Court explained regarding a constitutional provision governing the sale of alcohol:

> The express power here given to regulate or prohibit the sale of liquors, unless it was intended to limit the legislative authority, would render this provision of the constitution wholly nugatory and useless; because, as we have seen, without this provision the legislature would have had plenary power over the whole subject.

Gilman, 10 S.E. at 285.[14] Because the Constitution provided only for the regulation of the sale of alcohol, the Legislature could not regulate the possession of alcohol. The same is true here. Without the Education Article, the Legislature could have done as it pleased in regard to education. But, with the Education Article, the Framers carefully set forth the Legislature's powers and duties regarding publicly funded education. After much debate, the Framers decided that the Legislature "shall" provide a system of thorough and efficient free schools. JA Vol. 4, 433-44.

Thus, the way the State must educate K-12 students is through a system of free schools supervised by the Board of Education ("WVBOE"), subject to academic standards and accountability measures. HB 2013 plainly exceeds the clear mandate of these provisions. It applies taxpayer money to a separate system of private education governed by a separate board, without meaningful academic requirements or financial oversight. It exchanges a student's fundamental right to a public education for $4,300 without protections for ensuring the child is educated. It requires voucher students to pay for otherwise-free public school classes and resources they want or need. W. Va. Code § 18-31-8(f). All of this is unconstitutional.

Other *expressio unius* cases are all aligned. Where the Constitution outlines the framework for action the Legislature cannot do more or differently. In *State ex rel. Downey v. Sims*, the Legislature attempted to invalidate the Governor's appointment of a person for a vacant office during a recess. 125 W. Va. at 627. The Governor's appointment had been previously rejected by the Senate for a different position but not for the position at issue. The Constitution states: "[i]n case of a vacancy, during the recess of the Senate ... [n]o person, after being rejected by the Senate ... shall ... be appointed to the same office during the recess of the Senate." 125 W.

[14] State Petitioners assert that *Gilman* applies the doctrine to a statute and not Legislative power bound by the Constitution. SB at 21. This is not correct.

Va. at 631-32. Because the Constitution gave the Senate "express grant ... to render a person ineligible for" the previously rejected appointment during a recess, this Court held that the Senate did not have the power to exceed that constitutional mandate by invalidating the appointment of a person for a different position. *Id.* at 637.

Likewise, in *Dunham v. Morton*, this Court applied *expressio unius* to invalidate a statute allowing the Governor to break ties in votes for county commissioners. The Constitution specifies that commissioners "shall be elected by the voters of the county." *Dunham*, 115 W. Va. at 313. This Court held that "constitutional specification of the one method ... operates to the exclusion of all other methods," including a tiebreaking vote by the Governor. *Id.* It is no different here. The words "shall provide for a thorough and efficient system of free schools" mean that is what the Legislature shall do and it cannot add to that by creating an additional system for publicly funding education.

In each of these cases, the Constitution did not say: "The legislature cannot regulate the possession of alcohol" or "it cannot reject an appointment for a different position" or "the Governor cannot break ties." The express words of prohibition were not necessary. Because the Constitution limited Legislative power by saying what the Legislature "shall" do, actions that were more or different from the mandate were prohibited.

This defeats Petitioners' primary argument. They contend that HB 2013 is only unconstitutional if the Constitution expressly bars the specific conduct at issue. *See* IB at 9 ("the circuit court cannot invent a prohibition where there is none"); *id*. at 12 ("the plain language of the Constitution contains no prohibition"); *id*. at 14 ("without a specific prohibition, 'the Legislature may enact any statute'"); SB at 22 ("'Where is the provision' that limits the Legislature's power. . . none can be found."). Under their theory, in order for HB 2013 to be

unconstitutional, the Constitution would have to say: "The Legislature cannot subsidize private school expenditures and the Legislature cannot pay a sum of money to a child's family in lieu of providing a thorough and efficient education."

But, this position is wholly refuted by the case law. *See, e.g., Gilman,* 10 S.E. at 285; *Dunham*, 115 W. Va. at 313; *Downey,* 125 W. Va. at 637. Where the Constitution says that the Legislature "shall," actions that do not fit within the mandated conduct are unconstitutional. If the Legislature decided to set up a system of tuition based schools, in addition to the public schools, this conduct would plainly violate the Legislature's obligation to provide a system of free schools. That is true even though the Constitution does not say that in so many words. The action would be barred because it is outside of the Constitution's mandate. It is no different for a system of private school subsidies or cash payments. They are barred because they are outside of what the Legislature "shall" do. For this reason, Petitioners must argue that HB 2013 is not governed by the Education Article at all. It is extra and separate. But, that is not how the Constitution works. Specific mandates constrain Legislative power. The Education Article has to mean something and HB 2013 has to fit within the provision's mandate. It does not.

3. The Voucher Law Exceeds the Education Article

There is no doubt that the Voucher Law exceeds the Education Article. First, the Constitution expressly states that the Legislature shall provide "free" schools. Under HB 2013, a student who uses a voucher has to pay for public school resources. W. Va. Code § 18-31-8(f). The Hope Scholarship Board will set the price for these services. *Id.* The public schools will invoice and then collect from the student. *Id.* The system of "free schools" is no longer free. The State argues that this is to prevent "double-dipping." SB at 38. But, the Constitution requires that a student is entitled to a publicly funded education—not a set amount of money. You do not

double-dip on a fundamental constitutional right. Children at private schools often take classes not offered by their private school in the public schools and they do so for free. JA Vol 4 at 559-60 (Pauley Aff.), ¶ 17. But, once a student uses a voucher to subsidize private education they have to pay for the public resources to obtain the education they deserve. The Constitution simply does not allow the public schools to charge for a child's core education.

Strangely, Intervenor Petitioners assert that requiring parties to pay to receive public school resources is not new, citing W. Va. Code § 18-8-1(c)(3), but that is simply not the case. JA Vol. 4 at 559-60, ¶ 17. Nothing in that statute includes any *payment* obligation for the parents of a home schooled child to attend a public school class. *See* IB at 29. Indeed, the very same provision notes that county superintendent "shall offer such assistance, including textbooks, other teaching materials and available resources, all subject to availability as may assist the person or persons providing home instruction." *Id.* Until HB 2013, home schooled and private school students have always been able to use the public school resources for free.

Second, the Education Article says that the Legislature "shall" provide a "thorough and efficient system of free schools." This is a very specific framework for providing a publicly funded education. Through HB 2013, the Legislature wants to offer either attendance in a public school system *or* money. But, the Constitution does not include an option for meeting a child's fundamental right to an education by a payment.

The Voucher Law is particularly alarming for families in poverty. For 2016-2020, the median income in West Virginia was $27,346. U.S. CENSUS BUREAU, *QuickFacts W. Va.*[15] If a family at the median income had three children, they could receive ~$13,000 from the state, increasing their annual income by 48%. They could do so on the mere promise that they would

[15] *Available at* https://www.census.gov/quickfacts/fact/table/WV#

educate their children at home. W. Va. Code § 18-31-5(d)(3). Of course, most families would take this obligation seriously. But even the most well-meaning family facing housing and food insecurity will be tempted to consider the option and may struggle to provide adequate education at home despite trying their best, because educating children—particularly those with elevated needs—can be a profoundly difficult task. The situation created by the Voucher Law is even more intolerable when you consider children of parents in the throes of addiction. *See* Paris Dunford, *More recovering addicts relapse after receiving stimulus checks*, 59 NEWS (May 24, 2021).[16] An equally difficult risk is the inevitable emergence of fly-by-night scammers promising a private education for $4300 and then not delivering. *See, e.g.,* Leslie Postal et al., *Florida Private Schools Get Nearly $1 Billion in State Scholarships with Little Oversight, Sentinel Finds*, ORLANDO SENTINEL (Oct. 17, 2017)[17].

Petitioners contend this is not an issue because parents do not get the money, "Education Service Providers" do. SB at 3, 4. But, Education Service Providers are defined only as individuals or entities that get Hope Scholarship money. W. Va. Code § 18-31-2(4). Parents can join together to create a homeschooling pod, create invoices, and obtain payment from their ESA. Likewise, a parent can "tutor" a friend's child and the friend can "tutor" their child—creating invoices so both are paid. The opportunities for abuse by low-quality private schools that spring up to take voucher money and by other types of Education Service Providers ("ESPs")[18] are abundant.

The Constitution expressly protects children from the vagaries of their circumstance,

[16] *Available at* https://www.wvnstv.com/news/local-news/more-recovering-addicts-relapse-after-receiving-stimulus-checks/.
[17] *Available at* https://www.orlandosentinel.com/news/education/os-florida-school-voucher-investigation-1018-htmlstory.html.
[18] An ESP is defined as "a person or organization that receives payments from Hope Scholarship accounts to provide educational goods and services to Hope Scholarship students." W. Va. Code. § 18-31-2(4).

requiring the state to provide a thorough and efficient system of free schools. W. VA. CONST. art. XII, § 1; *Pauley v. Kelly*, 162 W. Va. 672, 705-06 (1979); *see also* JA Vol. 4 at 410-415, ¶¶ 13-16. Whether children live in families of poverty or wealth, they are entitled to a thorough and efficient system of free schools. Whether children live in families of health or addiction, they are entitled to a thorough and efficient system of free schools. Whether children have disabilities or not, they are entitled to a thorough and efficient system of free schools. Families can always choose private school, if they pay for it privately, and home schooling if they have the time and expertise to provide it. That is a relatively small subset of children. But, no matter their circumstances, all children are entitled to a thorough and efficient system of free schools provided by the State.

HB 2013 turns this on its head. Under the Voucher Law, a child is entitled to $4300 and nothing more. If, for reasons beyond their control, a child's family chooses the $4300, that child loses the guarantee of a thorough and efficient public education. If after a year or two, the Hope Scholarship Board recognizes and determines that sufficient education has not occurred, the student has lost crucial time and educational opportunities. This is in complete contradiction to the constitutional mandate to provide the children of West Virginia a thorough and efficient education and, thus, outside what the Legislature can legally do.[19]

4. The Voucher Law Frustrates the State's Constitutional Obligation to Provide a Thorough and Efficient System of Free Schools

[19] Of course, parents can choose private education and home schooling that they pay for and it can also not go well. But, in that situation, no public funds are involved and the State has no Constitutional obligations. Likewise, with HB 2013, the public money creates an incentive that may lure families into private or home-schooling that would not otherwise choose it.

Exceeding constitutional authority alone bars the Voucher Law, but the statute also actively frustrates the Legislature's constitutional obligation in multiple ways.[20]

HB 2013 subsidizes private education with public dollars that could be used for public education. The State estimates the voucher program will cost at least ~$120 million a year when fully implemented. This is the cost for subsidizing the education of privately educated students including those who would never have gone to public schools—all of the students currently in private schools and home-schooled before HB 2013 existed. HB 2013 for the first time anywhere in the country requires public funds to be used to subsidize the private education of every private and homeschooled student in the State. The State will be subsidizing the private education of even the most wealthy families. These are funds that are no longer available for public education and that the state must pay over and above the funds needed to maintain the public school system. JA Vol. 2 at 70-71; *see* W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021); JA Vol. 4 at 556, ¶ 16. If there is $120 million available for education, it frustrates the purposes of the Education Article to redirect this money for private education expenditures.

Petitioners argue that this is true of every State expenditure. *See* SB 22-27. Money spent on other State priorities is then unavailable for education. This is true and irrelevant. The Constitution allows for all types of spending unrelated to education. But, when the taxation and spending is *for education*—it frustrates the Education Article not to spend those funds on public schools. Because public resources are scarce and public education is so important, if the State is going to tax and spend for education it "shall be for the support of the free schools."

HB 2013 decreases state funding by decreasing enrollment. State funding of public schools is based largely on enrollment. JA Vol. 2 at 164, JA Vol. 4 at 556, ¶¶ 7, 10-16*; see also* JA Vol. 2 at 168 ("[A] significant majority of the funding formula is attributable directly or indirectly to enrollment figures from the prior year."). There is no dispute that the Voucher Law

[20] *Gilman,* 33 W. Va. at 146 ("Every positive direction contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision."); *Geeslin v. Workmen's Comp. Com'r*, 170 W. Va. 347,351 (1982).

decreases enrollment in the public schools. Every student who is incentivized away from the public schools means less state funding.

Petitioners argue that enrollment goes up and down for a variety of reasons. But, the Voucher Law would be an intentional act *by the Legislature* that directly decreases enrollment. Petitioners say the circuit court ruling would mean any indirect act by the Legislature that happened to have an impact on enrollment would be barred. SB ar 29. Not so. It is a statute that causes a direct decrease of public school enrollment—through a system that provides a financial incentive for moving out of the public schools—that is barred. The State argues that "[n]othing requires the Legislature to encourage students to attend only public schools." SB at 28. But this is not correct. Public education is, among mandated public services, *the first constitutional priority*." 179 W. Va. at 382 (emphasis added); *State ex rel. Bd. of Educ. Of Cnty. of Kanawha v. Caperton*, 190 W. Va. 652, 653 (1994); *W. Va. Educ. Ass'n v. Legislature of State of W. Va.*, 179 W. Va. at 382; *State ex rel. Bd. of Ed., Kanawha Cty. v. Rockefeller*, 167 W. Va. 72, 76 (1981); JA Vol. 4, 435-36, ¶ 7. The Legislature has a paramount duty to the public schools and it cannot frustrate that duty by supporting and incentivizing other systems that directly detract from them.

HB 2013 silos students from low-income families, students with disabilities, and other marginalized students in the public schools. Because the Voucher Law admittedly does not provide enough money for a student to attend a private school or afford the additional fees and costs associated with private schooling, SB at 31, only more affluent students can practically use vouchers. Further, because private schools generally do not provide special education services, students with disabilities also will not use vouchers.[21] The same is true for LGBT students, who would not be accepted at private schools. The framework of HB 2013, on its face, will result in the concentration of these students in the public schools. In fact, the primary peer-reviewed

[21] We have identified only one private institution in the entire state that serves students with disabilities-a kindergarten through third grade program for students with autism, with approximately ten enrollees. Augusta Levy Learning Ctr., PRIVATE SCH. REV., https://www.privateschoolreview.com/augusta-levyleaming-center-profile.

finding regarding voucher programs is increased socio-economic segregation and concentration of students with disabilities without sufficient funds to meet their heightened needs. JA Vol. 4 at 420, ¶¶ 23, 30. It is just common sense. If people cannot use vouchers, they remain in the public schools. JA Vol. 4 at 556, ¶ 15. The State cannot take actions that create this outcome.

By concentrating more costly-to-educate students in the public schools, the Voucher Law also increases the average cost per student, while at the same time luring out students that are less expensive to educate—and losing the state funding for their attendance. This creates higher costs and lower revenue and frustrates the Legislature's mandate to provide a *thorough* and *efficient* system of schools.

HB 2013 eliminates public accountability. The Constitution squarely requires accountability for the public funding of the free schools. The education West Virginia's children receive must be "thorough and efficient." This Court has repeatedly explained that under the "thorough and efficient" standard, the State "has a duty to ensure that the constitutionally mandated educational goals of quality and equality are achieved." *Nicholas*, 239 W. Va. at 713 (quoting *Bailey v. Truby*, 174 W. Va. 8, 16 (1984)).

Under the Voucher Law, there is no meaningful public accountability for the use of the public funds. The WVBOE has no ability to ensure that students receiving the vouchers receive an adequate education—or are actually educated at all or to determine whether an entity or person receiving the funds is an appropriate service provider. There is no ability to protect vulnerable children and ensure that they are in appropriate educational settings. The Voucher Law expressly states that ESPs "shall be given maximum freedom to provide for the educational needs of Hope Scholarship students without governmental control" and are "not required to alter [their] creed, practices, admission policy or curriculum in order to accept eligible recipients."

W. Va. Code §§ 18-31-11(c), (e).

Parents who choose private school and home-schooling use their own funds and take on this responsibility for themselves. But, the children who are educated using taxpayer dollars are protected by the accountability and oversight of the State. Under HB 2013, this oversight is replaced by a "promise." HB 2013 asks parents of voucher students to promise that they will:

> **a.** Provide an education for the eligible recipient in at least the subjects of reading, language, mathematics, science, and social studies;
> **b.** Use the Hope Scholarship funds exclusively for qualifying expenses as provided for in § 18-31-7;
> **c.** Comply with the rules and requirements of the Hope Scholarship program; and
> **d.** Afford the Hope Scholarship student opportunities for educational enrichment such as organized athletics, art, music, or literature.

W. Va. Code § 18-31-5(d)(3). The Voucher Law then prescribes one toothless measure to enforce these promises, and places responsibility in the Hope Scholarship Board—not the WVBOE. The Hope Scholarship Board "may" provide random audits of parents receiving the funds on an "as needed" basis. *Id.* § 18-31-10(a). Before any audit of an ESP (which may include parents providing services), the Hope Scholarship Board must determine that the ESP has "[i]ntentionally and substantially misrepresented information or failed to refund any overpayments in a timely manner" or "[r]outinely failed to provide students with promised educational goods or services." *Id.* § 18-31-10(c).

Vouchers are renewed year after year with just a showing that the child is attending a school—any school—with no ability to determine if the schools is sufficient, appropriate, employing trained personnel, or effective in any way. All these "schools" need do is notify the state and promise to provide background checks. W. Va. Code § 18-31-11. Literally, anyone can open a school and receive HB 2013 funds. For the students being home-schooled, all that is needed is for a certified teacher to vouch for some advancement. This is another mechanism

vulnerable to abuse and fraud; companies are certain to spring up to grant this approval for a fee. All of these provisions of HB 2013, eviscerate the state's ability to deliver on its constitutional mandate to provide the children of West Virginia with a quality education. The Legislature cannot intentionally frustrates its Education Article mandate in these ways.

5. Petitioners' Arguments Do Not Change the Analysis

Petitioners argue that *expressio unius* does not apply here because they claim two cases in the last 120 years questioned the doctrine. *State v. King*, 64 W. Va. 546, 63 S.E. 468 (1908); *State Road Comm'n v. Kanawha County Court*, 112 W. Va. 98 (1932). SB at 20; *see* IB at 17. In fact, *expressio unius* is a long-used and well-recognized doctrine regularly applied by this Court.

Moreover, the two cases Petitioners cite do not reject the doctrine; they did not apply the doctrine because it was inapplicable to the facts at hand. *State Road Commission* involved a challenge to the constitutionality of a statute requiring counties to pay for road improvements ordered by the State. 112 W. Va. at 98. The Constitution gave the State authority to create and maintain a highway system. *Id*. The plaintiffs argued the State should pay. The Court found that counties are subdivisions of the State and, thus, whether the State or the counties pay for the roads, it is all within the Legislature's constitutional powers. *Id*. *Expressio unius* did not apply because the State's action did not exceed its constitutional mandate.

Likewise, in *King*, the parties disputed the State's ability to sell certain land. The Court concluded that the phrasing of the statute at issue encompassed the State's action such that there was no basis for applying the doctrine. Petitioners also cite to Justice McGraw's concurrence in *State v. Euman*, 210 W. Va. 519,524 (2001) (McGraw, J., concurring). SB at 20. But this concurrence specifically acknowledges that *expressio unius* "is a well-accepted canon." *Euman*, 210 W. Va. at 523 (quoting *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128 (1995)). Like the

cases above, the doctrine was inapplicable to the facts of that case. In *Euman*, the court addressed a statute penalizing driving after a license has been revoked for a DUI. *Id*. at 521. A driver contended that he should not receive a citation for driving with a revoked license because his license was revoked in Ohio and not West Virginia and the statue just said "revoked." *Id*. The court rightly held that this was nonsense. The statute clearly applied to any revoked license, not just one revoked in West Virginia. *Id*. at 522. The doctrine of *expressio unius* was irrelevant to the disposition of the matter, and that case has no guidance for the Court here.[22]

Intervenor Petitioners for their part boldly assert that *expressio unius* does not apply to affirmative constitutional duties—without citing a single case that reaches that conclusion or analyzes the issue.[23] Nor is there a basis for distinguishing between powers and duties or types of duties. Since the Legislature has plenary power, where the Constitution lays out specific duties and mandates—as here for education, the Constitutional provisions serve as a limitation on what the Legislature otherwise can do in regard to education.

Petitioners assert that there would be a litany of absurd results if *expressio unius* is applied. IB at 16-17 and n.7. All of them can be readily dispatched. If the circuit court is correct, they say, "how could the State raise revenue for and maintain roads?" This question alone underscores the inanity of the argument. What the Constitution provides regarding education has nothing to do with roads or anything else unrelated to education. Indeed, the Constitution expressly requires the State to build and maintain roadways. W. VA. CONST. art. VI, § 39.

[22] State Petitioners also argue that *expressio unius* does not apply to Constitutional provisions. But, that is plainly not the case. *See supra* at II.A.2.

[23] IB at 15. The one case they cite in this section, *State v. Tenant*, 229 W. Va. 585, 730 S.E.2d 131 (1981), does not address *expressio unius* or Article XII. It does recite the oft-repeated guidance about court review of legislation. This Court determined that the redistricting at issue did not exceed any of the Legislature's Constitutional mandates.

They go on, "how could the State raise revenue for and maintain universities? What about scholarships to private colleges?" But, University funding is based upon Section 12 of the Education Article. *United Mine Workers of Am. Int'l Union by Trumka v. Parsons*, 172 W. Va. 386, 394, 305 S.E.2d 343, 350–51 (1983). And, anything related to colleges is not impacted by Sections 1-5 of the Education Article, which deal solely with K-12 education.

Intervenor Petitioners further contend that the provision banning the funding of additional "normal schools" establishes that private school subsidies are allowed because they are not expressly banned. IB at 13-14 and n.5. But the Normal School provision proves exactly the opposite. Section 11 of the Education Article states: "No appropriation shall hereafter be made to any state normal school, or branch thereof, except to those already established in operation or now chartered." W. VA. CONST. art. XII, § 11. State normal schools were state funded secondary schools (high schools) for the purpose of training teachers.[24] Apparently they were controversial at the time. *Id.* Because the Education Article expressly provided for provision of a thorough and efficient system of free K-12 schools, which would include normal schools, the Constitution had to expressly set out the parameters for their funding if it intended to bar the same. In contrast, private schools and private school subsidies were not included in the mandate for a system of free schools, so an express prohibition in the Constitution was unnecessary.

Petitioners also argue that, under the circuit court's order, "the mandate that the Legislature 'shall' pass laws funding public schools means it cannot enact other educational programs," and that this cannot be. SB at 21; *see* IB at 17-18. According to Petitioners, nothing stops the state from giving "scholarships" in addition to running public schools because the

[24] Barbara J. Howe, Normal schools, W. VA. ENCYCLOPEDIA, https://www.wvencyclopedia.org/articles/1686#:~:text=Over%20time%2C%20the%20normal%20schools,Concord%20University%2C%20and%20Shepherd%20University. ("All the normals but Fairmont were essentially high schools in the early years").

system of free schools is just the "floor." But, this would be like saying that the constitutional provision regarding the sale of alcohol at issue in *Gilman* was just a "floor"—the Legislature could do anything it wanted in regard to the regulation of alcohol. Alcohol is a known vice with negative health outcomes; one could argue that in addition to that provided in the Constitution, the Legislature could take all means of action to regulate it for the greater good. But the court held otherwise. *State v. Gilman*, 33 W. Va. 146 (1889). A power to regulate the sale of alcohol prohibited the Legislature from regulating possession. Specific constitutional provisions by which the State "shall" accomplish a specific end are a limit on the Legislature. They are not a floor.[25]

Finally, Petitioners claim that the circuit court's ruling would impact textbooks for students in poverty in private schools and bussing provided for private school students. SB at 21-22; IB at 17. But, public school resources are available to students in private and home schooling free of charge in a variety of contexts. *See* W. Va. Code § 18-8-1(c)(3) (public school classes available for free to home schooled and private school students); §18-2E-11(c) (public school advanced career education offered for free); *id*. § 18-5-15(g) (public school vocational education offered for free); *id*. § 18-5-17(a) (public school hearing, vision, speech and language testing offered for free); *id.* § 18-5-13(f)(1)(A) (public school bussing for students in private school free of charge); *id*. § 18-5-21b (sharing public school textbooks with students in poverty in private school).[26] Presumably under HB 2013 and the State's position, students with vouchers

[25] Certain *amici* briefs argue similarly that the State can "augment" the Education Article, relying on *Herald v. McQueen*, 71 W. Va. 43, 75 S.E. 313 (1912). But this case addressed whether the Legislature could establish a public high school in Nichols County. This is plainly within the mandate of the Education Article. They also rely on *Casto v. Upshur Couty High School Board*, 94 W. Va. 513, 119 S.E. 470 (1923), which address the very same issue in a different county. Public schools are squarely within the Education Article and constitutional. These cases have no bearing on whether the Legislature can fund private school subsidies.

[26] It is outside the scope of this matter whether any of these statutes are Constitutional. The only question before the Court is whether HB 2013 is Constitutional, and it squarely is not.

will now have to pay for these resources so they are not "double-dipping." But, extension of *public* school resources to children in private and home schooling free of charge is fully consistent with maintaining a thorough and efficient system of *free* schools. This is not the same thing as creating a new system for paying *private* school charges and expenses with public money, which is creating and supporting a second, private, not free system. This is not allowed under the Education Article.

Realizing the limitations imposed by Article XII, Sections 1-5, Petitioners try to support HB 2013 on the thin reed of Section 12, arguing this vague and general sentence gives the Legislature the ability to do whatever it wants in regard to education. SB at 7-8; IB at 9-10. Section 12 states that the Legislature "shall foster and encourage, moral, intellectual, scientific and agricultural improvement . . . ." W. VA. CONST. art. XII, § 12. West Virginia law makes plain that "[g]eneral and indefinite terms of one provision of a Constitution, literally embracing numerous subjects, are impliedly limited and restrained by definite and specific terms of another[.]" *Lawson v. Kanawha County Court*, 80 W. Va. 612, 92 S.E. 786, 787 (1917). Thus, Section 12 is constrained by Sections 1-5, which specifically relate to the means, oversight and funding of K-12 education.[27]

6. Petitioners' Out-of-State Case Law Does Not Change the Analysis

Finally, Petitioners' argue that other states have validated voucher laws under their state constitutions and so this court should too. SB 11; IB 18. In fact, the only court that has addressed a universal voucher law like HB 2013, permanently enjoined the statute under the Nevada Education Article. *Lopez*, 381 P. 3d 886.[28]

[27] The State's courts have explicitly rejected Section 12 as a grant of power to support private institutions. In *State ex rel. State Bldg. Comm'n v. Casey*, 232 S.E.2d 349, 351–52 (1977), the court expressly found that the state could not subsidize a private corporation operated by the West Virginia Society for the Blind and Severely Disabled under Section 12.

[28] Arizona passed a universal voucher law in 2017, which was repealed by public initiative in 2018 and never implemented. It has now passed another universal voucher law. If it is not repealed by public initiative, which efforts

In regard to a more limited program, the Florida court also struck down a voucher statute under the canon of *expressio unius*. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). The remaining cases involve limited voucher programs that were restricted by income, participation levels, and/or specific districts and are inapplicable to the expansive, universal voucher program contained in HB 2013. At most, they support the notion that a small, limited voucher program may not be enough to exceed or frustrate the Legislature's constitutional duties and powers under different state constitutions. Two of the cases involve the *same* small "experimental" program in Milwaukee. *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992); *Jackson v. Benson*, 578 N.W. 2d 602 (Wis. 1998). The other two cases involve limited programs in Indiana and North Carolina, respectively. *Meredith v. Pence*, 984 N.E. 2d 1213 (Ind. 2013); *Hart v. State*, 368 N.C. 122, 774 S.E. 2d 281 (N.C. 2015). That's it. *Not a single court* in the United States has approved a universal voucher program that allows the State to either educate a child in the public schools or pay the family to take care of it themselves. This Court would be the very first.

The Milwaukee, North Carolina and Indiana cases also all addressed a different issue—uniformity—that is not at issue here. Their state constitutions required a "uniform" system of schools. The Plaintiffs argued that the private schools receiving the voucher funds were not uniform with the public schools. The courts held that the uniformity clause did not preclude vouchers because only the public schools had to be uniform. The West Virginia Constitution does not have a uniformity requirement and, thus, it is not an issue in this lawsuit. Those holdings are irrelevant here.

Likewise, the Indiana case turned on the fact that the Indiana Constitution expressly gave the Legislature the power to use "all suitable means" to promote education *and* provide for a common school system. *Meredith v. Pence*, 984 N.E. 2d at 1222. The *Lopez* court—in dicta given that the voucher statute was permanently enjoined on other grounds—also relied on this

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are underway, it will be challenged in the courts. It is not currently being implemented. https://www.azmirror.com/2022/08/17/public-school-advocates-blocked-a-voucher-expansion-in-2018-can-they-do-it-again/. No state in the United States has implemented a universal voucher law.

language to find the voucher program fit within Nevada's constitutional mandate. *Lopez*, 382 P.3d 899-902. The West Virginia Constitution, like the Florida Constitution, does not have language allowing the Legislature to use "all suitable means" in addition to providing for a system of thorough and efficient free schools. Instead, all of the provisions provide only for the support of a system of free schools. The reasoning in *Meredith* and *Lopez* does not apply here.

There is a reason that voucher proponents started small—proponents did not think that large scale programs could pass state constitutional muster. They are right. Nevada was the first state to try a universal voucher program—it was permanently enjoined by the Nevada Supreme Court. *Lopez,* 382 P.3d at 899-902. Other state courts, such as Ohio's, have warned that the same could well result if universal voucher programs were enacted. *Simmons-Harris* v. *Goff,* 711 N.E.2d 203, 212 n.2 (1999). The circuit court properly enjoined this universal voucher statute.

B. HB 2013 Infringes on the Fundamental Right to an Education Without Meeting Strict Scrutiny

All parties agree that strict scrutiny applies to state actions that impinge on the fundamental right to an education. *See Cathe A v. Doddridge Cnty. Bd. of Educ.,* 200 W. Va. 521, 525 (1997) ("If the State takes some action which denies or infringes upon a person's fundamental right to an education, then strict scrutiny will apply."). Thus, in order to infringe on the fundamental right to an education, the State must demonstrate that the actions at issue are narrowly tailored to achieve a compelling state interest. *Pauley*, 162 W. Va. at 708; *Bd. of Educ. of Cnty. of Kanawha v. W. Va. Bd. of Educ.*, 219 W. Va. 801, 807 (2006); *Cathe A.*, 200 W. Va. at 528 ("[A]ny denial or infringement of the fundamental right to an education for a compelling State interest must be narrowly tailored.") (citation omitted).

1. Strict Scrutiny Applies in the Present Case

HB 2013 impinges on the fundamental right to an education in four distinct ways: (i) it intentionally reduces the state funds that will be appropriated to public schools through state-

incentivized reduction in enrollment; (ii) it diverts $120 million a year in public funds to private and home-schooled students that could otherwise be used for public schools; (iii) it silos students in poverty and students with disabilities in the public schools; and (iv) it trades a student's fundamental right to a public education for a sum of money.

Petitioners erroneously contend that these harms do not infringe a child's fundamental right to an education. First, Petitioners argue that HB 2013 does not reduce public school funding. This assertion is fully refuted by the Legislative history. The proponents of HB 2013 originally claimed the Voucher Law would cost nothing because it would strictly be a *transfer of funds* away from the public schools to the ESAs. *See* JA Vol. 2 at 228 (PI Mot. at 16); JA Vol. 2 at 140 (Int. Def. Mot. for Judg. on the Pleadings at 2). This is an intentional reduction in funding to public schools. The analysts also realized, however, that the Voucher Law, when fully implemented, would for the first time in U.S. history, subsidize the families that always intended to choose private school and home-schooling—which the WVBOE estimate will cost the state an additional ~$120 million a year. W. VA. DEP'T OF EDUC., H.B. 2013 FISCAL NOTE (2021).[29]

So the Voucher Law both reduces the funding for public schools because it decreases enrollment *and* decreases the public funds available for public schools by paying that money out to private and home-schooled students. JA Vol. 2 at (PI Mot. at 19); *see also* JA Vol. 2 at 168 (ODR at 6). This intentional reduction of actual funds and available funds to provide much-needed resources impairs public school students' fundamental right to a quality education and must meet strict scrutiny. Indeed, the case law establishes that public school funding is a first priority even when the economy turns south or third party actions like a coal strike diminish incoming funds. *See Rockefeller*, 167 W. Va. at 81. Certainly, the Legislature cannot itself create

[29] *Available at* https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152.

the harm by designating $120 million for private school subsidies when public school districts—particularly low-income districts—lack necessary resources. If the state has the money to spend for education, it must be spent for public schools. *See W. Va. Educ. Ass'n* v. *Leg. of State of W. Va*., 179 W. Va. 381, 382 (1988) ("financing of education is ... the first constitutional priority").

Petitioners speculate that the Legislature will act to mitigate any harm to the public schools in the future. SB at 17; IB at 8. This position proves the point. The State cannot take actions that harm the public schools, requiring future mitigation. Instead, the court must decide the case based on the existing legal landscape, not on hypothetical future changes.

Second, Petitioners assert that there would be no "constitutional crisis" based on funding changes tied to school enrollment because "[p]ublic school enrollment numbers fluctuate for many reasons" SB 27; *see* IB 21-22. But, when a student moves to a different location or chooses private or home-schooling, they do so for individual reasons that are unrelated to state action. Here, however, a student will be moving out of the public schools at the enticement of the Legislature. It is the Legislature's action that is causing the drop in enrollment and the concomitant drop in public school funding. The Legislature cannot take action that harms public schools.

Likewise, when a student opts out of the public school system, the funds to educate that student stay with the State; they do not leave the public treasury. That is not true under HB 2013. When a child takes a voucher, the State pays that amount. Thus, the Voucher Law is entirely different from the ordinary ebb and flow of enrollment and funding that is encapsulated in the school funding formula. It is the action of the State in enacting the Voucher Law-not the funding formula itself-which negatively impacts the schools.[30]

[30] The Court also cannot speculate that at some later point the Legislature may change the funding formula. The statute must be judged based on the circumstances currently in place. *State ex rel. Blankenship v. Richardson*, 196

Third, Petitioners argue that HB 2013 does not deprive children of their right to an education because parents have a fundamental right to choose private education. IB at 25. This mixes two different concepts. The question here is not whether the parents can voluntarily choose private or homeschooling for their child. Of course they can. The issue is whether the State can abdicate its obligation to provide a thorough and efficient education with public money by paying a student a lump sum. The State cannot. *Pauley*, 162 W. Va. at 689 (The duty placed on the Legislature by Section 1 is "absolutely mandatory."). The State cannot abdicate its responsibilities by paying a sum of money that is insufficient to accomplish the task. It also cannot create the lure of cash that is certain to be misappropriated and misused by scammers and desperate people, impinging on some students' fundamental right to an education. The State is not permitted to do any of this without meeting strict scrutiny.

Petitioners' primary argument that HB 2013 does not infringe on the right to education is that the reduction in funding may not fall below the constitutional floor. SB at 24; IB at 18. But, the Court has squarely rejected this position. *Kanawha Couty Pub. Library Board v. Board of Education*, 231 W. Va. 386, 404, 745 S.E.2d 424, 443 (2013) ("[T]he Library contends that insofar as students are not being deprived of a 'thorough and efficent' education, inequalities that result in a county's budget are not subject to equal protection scrutiny. This interpretation . . . is squarely at odds with [governing precedent].") And, this is *not* a funding case. A student's fundamental right to an education is infringed not only when funding fails to meet the thorough and efficient threshold. It is also infringed by other state action. *Bd. of Educ. of Cnty. of Kanawha v. W. Virginia Bd. of Educ.*, 219 W. Va. 801, 807, 639 S.E.2d 893, 899 (2006); *Pauley v. Kelly, 162 W. Va. 672, 707, 255 S.E.2d 859, 878 (1979)*. This is true when the action reduces

W. Va. 726, 731, 474 S.E.2d 906, 911 (1996) (noting that the Court does not opine on what the legislature may do, rather "it is the duty of the Court, . . . , to determine the constitutionality of the legislation").

actual and available state funding for the public schools. The Court has placed the "*affirmative burden"* on the State to demonstrate the necessity of diminishing expenditures for public education which has been accorded a constitutional preference. . . ." Syl. Pt. 3, *State ex rel. Bd. of Educ., Kanawha Cnty. v. Rockefeller*, 167 W. Va. 72, 79, 281 S.E.2d 131, 135 (1981) (emphasis added). It is also true when the State abdicates its obligation to the student by a cash payment, which Petitioners acknowledge is just 61% of the cost of educating the child, (IB at 2) insufficient to afford private schools and fees, (SB at 31) and provides no meaningful mechanisms for ensuring education occurs. *See supra*. These actions impinge a child's fundamental rights.

2. Strict Scrutiny is Not Met

Thus, HB 2013 fails if it cannot meet strict scrutiny. Petitioners fully concede that HB 2013 cannot do so. Petitioners do not make a single statement in their briefs about HB 2013 being narrowly tailored or serving a compelling governmental purpose. Nor can they do so. As proponents tout, the statute is the "most expansive" voucher program in the country. *Hope Scholarship Program*, EDCHOICE .[31] It does not limit eligibility by family income, school performance, or the particular educational needs of the student, nor does it cap the number of students or place a limit on the amount of public funds that can be spent on the program. *See* W. VA. CODE § 18-31-1 *et seq*.; JA Vol. 4 at 422 (Lubienski Aff. ¶ 8). The Voucher Law requires virtually no educational standards and demands no educational expertise from providers. W. VA. CODE § 18-311(c); JA Vol. 4 at 423 (Lubienski Aff. ¶ 11). Nor is there a compelling state interest in creating a system to provide private school subsidies. HB 2013 does not meet strict scrutiny and the permanent injunction must be upheld.

[31] *Available at* https://www.edchoice.org/school-choice/programs/hope-scholarship-program.

C. The Voucher Law Violates Constitutional Taxation and Spending Requirements

All of the provisions of the Constitution that address taxation and spending for K-12 education expressly state that both "shall" be for the support of the "free schools." W. VA. CONST. art. XII, §§ 4-5; *id.* art. X, § 5. These provisions mean something. Petitioners' position would make them wholly surplusage. That cannot be. Because HB 2013 uses public funds for a new system of private and home school subsidies, it violates the express terms of the Constitution.

1. The Text of the Constitution Expressly Limits the Raising And Spending of Public Funds for K-12 Education to the Support of Public Education

"[When] the language of a constitutional provision is plain and unambiguous it is not subject to judicial interpretation." *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973).

The language of Article XII, Section 4 is straightforward. It states that the "School Fund" must be used to support "free schools throughout the State, and *to no other purpose whatever.*"[32] W. VA. CONST. art. XII, § 4 (emphasis added). The School Fund was the only source of revenue that the delegates at the 1861 Constitutional Convention contemplated, for the "thorough and efficient system of free schools." *See* JA Vol. 4 at 433 (Bastress Affidavit, ¶ 3). So from the outset, the drafters of the West Virginia Constitution intended the state to use public money only for *public* schools.

This intent is furthered in the language of Article XII, Section 5, which is also plain.[33] It states: "The Legislature *shall* provide *for the support of free schools* by appropriating thereto the

[32] The 1902 amendment to Section 4 stated that interest from the School Fund would accrue to the General School Fund only "for the support of free schools." CONST. AMEND. THE IRREDUCIBLE SCHOOL FUND AMENDMENT, CONST. OF W. VA. (1872); *State v. Conley*, 118 W. Va. 508, 510 (1937).
[33] This section was added by the delegates of the 1872 Constitutional Convention.

interest of the invested 'School Fund,' the net proceeds of all forfeitures and fines accruing to this state under the laws thereof and by general taxation of persons and property or otherwise." W. VA. CONST. art. XII, § 5 (emphasis added). Here, the Constitution's explicit statement that revenues raised "*shall*" (not "*may*") be used for "the support of free schools" makes evident that, when funds are spent for education, these funds *must* go towards public education. *Id. See Terry v. Sencindiver*, 153 W. Va. 651, 657 (1969) ("The word 'shall' connotes a mandatory duty.").[34] Taken together, Sections 4 and 5 comprise the constitutional parameters for spending public dollars on K-12 education. *See also Herald v. McQueen*, 71 W. Va. 43, 75 S.E. 313, 315–16 (1912) (Article 12 applies to public education).

Additionally, Article X, Section 5 states: "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. . . ." W. VA. CONST. art. X, § 5 (emphasis added).[35] As explained by the late Justice Antonin Scalia, a listing of particulars limits a designated power to those items listed. Antonin Scalia & Bryan A. Garner, *Reading Law: The Intepretation of Legal Texts* at 107 (2012).[36] Section 5 specifically lists the support of K-12 free schools. It does not include support for private K-12 education. Thus, the Constitution expressly provides that when West Virginia taxes its citizens to raise funds for education, it must do so to support the *public* schools.

State Petitioners contend that the K-12 free schools only get "preferential treatment" in

[34] Courts have long established that in interpreting law, "we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it," stating further that it is always better to "adhere to a plain and common-sense interpretation of the words of a statute." *Heydenfeldt v. Daney Gold & Silver Mining Co*., 93 U.S. 634, 638 (1876).

[35] Intervenor Petitioners assert that Respondents did not raise Article X in the briefing before the circuit court. This is not correct. JA Vol. 3 at 321 (Pl. Omnibus Reply in Support of Pl.'s Mot. for Prelim. Inj. at 15).

[36] He further noted that "[m]andatory words [like shall] impose a duty; permissive words grant discretion." *Id.* at 112; *see also Sencindiver*, 153 W. Va. at 657.

State spending, citing *State ex rel. W. Va. Bd. of Educ. v. Gainer*, 192 W. Va. 417, 419 (1994). SB at 34. *Gainer* only addresses whether the Legislature or the WVBOE sets the Superintendent's salary. It has no bearing on the issues presented here. When it says education funding gets "preferential treatment," it means over non-education spending—not that free schools get preferential treatment over subsidies for non-free education. *Id.* at 419. The case says nothing about whether the State can use public dollars to fund K-12 private education. Indeed, in the last 150 years, no one has taken the position that the State can raise and spend public funds to support a system of private education subsidies. This speaks volumes.

Public school resources are available to students in private and home schooling free of charge in a variety of contexts. *See* W. Va. Code § 18-8-1(c)(3) (public school classes available for free to home schooled and private school students); §18-2E-11(c) (public school advanced career education offered for free); *id*. § 18-5-15(g) (public school vocational education offered for free); *id*. § 18-5-17(a) (public school hearing, vision, speech and language testing offered for free); *id.* § 18-5-13(f)(1)(A) (public school bussing for students in private school free of charge); *id*. § 18-5-21b (sharing public school textbooks with students in poverty in private school).[37] Presumably under HB 2013 and the State's position, students with vouchers will now have to pay for these resources so they are not "double-dipping." But, extension of *public* school resources to children in private and home schooling free of charge is fully consistent with maintaining a thorough and efficient system of *free* schools. This is not the same thing as creating a new system for paying *private* school charges and expenses with public money, which is creating and supporting a second, private, not free system. This is not allowed under the Education Article.

[37] It is outside the scope of this matter whether any of these statutes are constitutional. The only question before this Court is whether HB 2013 is constitutional, and it squarely is not.

2. The Source of Funds Does Not Matter

Petitioners' primary argument that the Voucher Program does not violate Constitutional spending and taxation is that it is funded from the General Revenue Fund as opposed to the School Fund. But it is not the fund that matters; it is the directives of the Constitution. Section 4 of the Education Article provided the original and only moneys for publicly funded education at the outset of the State's history. *See* JA Vol. 4 at 433 (Bastress Affidavit, ¶ 3). The Framers made clear that, in the realm of education, public funds would go to public schools and "to no other purpose whatever." W. VA. CONST. art. XII, § 4. When these funds were insufficient, Section 5 was added to create additional streams of revenue that expressly "shall" be for "the support of the free schools." *Id.* § 5. This directive is mandatory.

Petitioners rely on *Hart v. State*, 774 S.E.2d 281 (N.C. 2015) to argue that public money can be used for private education expenses. But this case proves Respondents' point. In *Hart*, the court relied on the fact that the North Carolina constitution provides only that a portion of the state's revenue "*may* be set apart" for "establishing and maintaining a uniform system of free public schools." *Id*. at 289 (emphasis added). That is not the situation here. The West Virginia Constitution has mandatory provisions requiring support of only the free schools. The word "shall" must be given effect. In short, while revenue from states like North Carolina "may" support free schools—West Virginia revenue *must*. W. VA. CONST. art. XII, § 5; *id.* art. X, § 5.

The focus on the fund is also a distinction without a difference. Most of the money in the School Fund comes from the General Revenue Fund because it comes from general taxation. It is not the presence in the School Fund that makes the money sacrosanct—such that money appropriated from general taxation to the School Fund is protected for the free schools and money from taxation kept in the General Revenue Fund can be spent on non-public education.

That makes a mockery of the Constitution. All the Legislature would need to do to avoid the limitations on public taxation and funding on education would be to keep money in the General Fund—making any limitations meaningless. That is exactly what the Legislature tried to do here to avoid the plain wording of the Constitution. This sleight of hand cannot be countenanced.

D. The Voucher Law Improperly Usurps the Authority of the West Virginia Board of Education

HB 2013 improperly usurps the constitutional authority of the WVBOE. Article XII, Section 2 of the Constitution provides that the Board of Education bears responsibility for the "general supervision of free schools." W. VA. CONST. art. XII, § 2. This includes the duty to "carry[] into effect the laws and policies of the state relating to education." W. Va. Code § 18-2-5; *see also W. Va. Bd. of Educ. v. Bd. of Educ. of the Cnty. of Nicholas*, 239 W. Va. 705, 714 (2017) (citing statute). These rules relate to, among other topics, the "[e]ducation of *all* children of school age." W. Va. Code § 18-2-5(a)(3) (emphasis added). The Board's power is broad, "particularly in the area of state educational policy." *Hechler*, 180 W. Va. at 454. Indeed, the WVBOE promulgates regulations for public and private institutions, including regulations governing private schools, accreditation of non-public schools, and other matters. *See, e.g.*, W. Va. Code St. R. § 126-13C-2 (governing voluntary accreditation for non-public schools); W. Va. Code §§ 18-2-7 (providing that English shall be the basic language of instruction), 18-2-9 (requiring at least one year of instruction in West Virginia history prior to completion of eighth grade; and regular courses in United States history, civics, constitution and governments of West Virginia and United States by completion of twelfth grade). And when the Legislature passes laws that "interfere[]" with the Board's constitutional supervisory authority over education, those laws are "unconstitutional." *Id.*

HB 2013 creates a separate Hope Scholarship Board to "administer" the State's

expenditure of public funds for private and home schooling. W. Va. Code § 18-31-3. According to State Petitioners, the role of the Hope Scholarship Board includes determining whether "funds are used for qualifying educational expenses"; "verif[ying] 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"; and "financial oversight." SB at 4. The WVBOE has no authority over any aspect of the public funding of the private and home schooling subsidies, even though the funds flow through the Department of Education. W. Va. Code § 18-9A-25. Because the Voucher Law "interfere[s]" with the Board's constitutional authority over public funding of education, it is "unconstitutional." *See Hechler*, 180 W. Va. at 454-55.

Intervenor-Petitioner's main argument in response is that the voucher program is not "public education" but "financial aid"; the WVBOE has no authority over "education savings account programs" or "financial aid programs." IB at 28. But, there can be no dispute that the vouchers are publicly funded, and the Constitution squarely places the Board of Education over the public expenditure of funds on K-12 education.

It is true that the Constitution repeatedly refers to the WVBOE's oversight of the "free schools." But that is because the Constitution only allows one system for the expenditure of public funds on education—the system of free schools. The Legislature cannot set up a second system—with a different board—for education with public funds. Because a system of publicly funded education outside the free schools is constitutionally prohibited, there was no reason for the framers to give the WVBOE constitutional authority over such a system. As the West Virginia Supreme Court has explained:

> "General supervision" is not an axiomatic blend of words designed to fill the pages of our State *Constitution,* but it is a meaningful concept to the governance of schools and education in this state. Decisions that pertain to education must be faced by those who

> possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens.

Hechler, 180 W. Va. at 455.

There is a reason the Legislature tried to bypass the state's top education experts in the WVBOE in implementing HB 2013—they knew that the Board would not support this unconstitutional plan. They were right. The Legislature's attempt to evade the constitutionally authorized supervisory authority of the WVBOE over publicly funded education is unconstitutional.

E. The Circuit Court Correctly Held That the Voucher Law Is An Unconstitutional Special Law

The West Virginia Constitution has a strong presumption against laws that treat people differently, requiring generally applicable laws wherever possible. W. VA. CONST. art. VI, § 39 ("in no case shall a special act be passed, where a general law would be proper"). This constitutional provision operates as "an equal protection clause [that is designed] to prevent the arbitrary creation of special classes, and the unequal conferring of statutory benefits." *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 339-40 (1980); *see also Bailey v. Truby*, 174 W. Va. 8, 24 (1984) (holding that every law must operate alike "on all persons and property similarly situated"). Legislation like the Voucher Law must be invalidated where, as here, the law excludes without reasonable basis persons that "would otherwise be subject to a general law." *State ex rel. Cty. Ct. of Cabell Cnty. v. Battle*, 147 W. Va. 841 (1963); *see also State ex rel. Taxpayers Protective Ass'n of Raleigh Cnty. v. Hanks*, 157 W. Va. 350, 355-56 (1973). At a minimum, such special laws must meet strict scrutiny as discussed in Section II(B), *supra*, which HB 2013 cannot meet.

This Court's decision in *State ex rel. City of Charleston v. Bosely* ("*Bosely*") is

instructive. 165 W. Va. 332. In *Bosely*, this Court considered legislation that imposed a tax on hotel occupancy in municipalities over a certain population threshold. 165 W. Va. at 341. While there was no special treatment for those hotels for which the occupancy tax applied, the problem was that it did not apply to *all hotels* within the state but only to those in certain more populous jurisdictions and therefore it was an improper special law. *Id.* at 342. The legislation, while abstractly open to all municipalities that eventually reach the population threshold, was practically speaking an irrational legislative effort that "set big city people above small town people, or for that matter, urban people above country people." *Id.* at 343-44.

State-Petitioners cite *Bosely*, but ignore its application. As the circuit court expressed in its order, "[b]ecause private schools cost more than the voucher amount, . . . vouchers can only be used by families with the resources to pay for the additional private school tuition and expenses or by families affluent enough for a parent with the necessary skills to stay home to educate their child. Students in poverty cannot use them." JA Vol. 1 at 9; *see id.* at Vol. 4 at 429 (Lubienski Aff. ¶ 23). State Petitioners *concede* that the voucher is not enough for private school tuition.[38] Similarly, students with disabilities "will be unable to use the vouchers" because private schools are unwilling and/or unable to serve these students. *Id.* Vol. 1, 9; *id.* Vol. 4 at 427-28 (Lubienski Aff. ¶ 18); *id.* 412-14 (Peters Aff. ¶¶ 9, 10, 23); *id.* at 418 (Beaver Aff. ¶¶ 12-14). Practically, the Voucher Law creates irrational classifications parallel to those this Court found unconstitutional in *Bosely*—setting affluent students above those with less means, people from larger cities with numerous private school options above people from rural or smaller

[38] SB at 31 (admitting that private school tuition in West Virginia exceeds the amount of the voucher). State-Petitioners cite to a website "Education Data Initiative" to suggest the average tuition for private school is $4,760. *Id*. This information does not appear reliable (e.g., there is no source or link to any data that supports the methodology). The record reflects, correctly, that the average cost for private elementary schools in the state is $6,315 and $6,903 for private high schools. JA Vol. 4 at 429 (Lubienski ¶ 23 (citing *Best West Virginia Private Schools* (2022) Private School Review, https.;;//www.privateschoolreview.com/westvirginia (containing link to sources from 119 private schools in the State.).

municipalities in the state with fewer options. *See Bosely*, 165 W. Va. at 344.

But the Voucher Law goes further still. As the circuit court held, the Voucher Law "creates separate classes of students with different benefits and protections" because: (1) it "creates a class of students in private school or homeschool who have to pay for public school resources—the voucher recipients—and those who do not—students without vouchers"; and (2) it "creates two classes of students who receive public funds for education: students protected from all discrimination, and students unprotected from most types of discrimination." JA Vol. 1 at 19. West Virginia specifically prohibited this dual classification treatment, noting that it was the "intent of the framers [] to preserve uniformity and consistency in the statutory enactments of the state." *Bosely*, 165 W. Va. at 339.

Petitioners make three arguments on appeal to try to save the special law from its infirmities. Each fails. First, State-Petitioners contend that the Voucher Law is a general law because parents and guardians of school-aged children are treated the same. SB at 36-37. But as the Supreme Court in *Bosely* made clear, an otherwise natural classification is arbitrary, unreasonable, and irrational if in practical terms it sets one group above another. 165 W. Va. at 343-44. That is precisely what the Voucher Law does. It confers benefits on a select few—those with means to use the voucher funds to offset some but not all of the costs of private school, and those without disabilities – and otherwise creates classes of students that are treated differently by the state. JA Vol. 1 at 9, 19.

Second, Petitioners challenge the circuit court's findings that the Voucher Law impermissibly creates two distinct classifications of students—those who must pay for public school resources and those who do not, plus those who receive antidiscrimination protection and those who do not. State-Petitioners contend that the Voucher Law's provisions that require those

accepting the voucher to pay for access to public school resources do not create arbitrary classifications because it is "effectively pro-rat[ing]" vouchers for "dual enrolled students." SB at 38; *see* IB at 29. Of course, there are no "dual enrolled students" as Petitioners suggest. Instead, the Voucher Law offers to exchange the State's constitutional requirement to educate students for a lump sum of cash resulting in distinct classifications that treat differently those students who may access public school resources freely and those who must pay for them.

Petitioners also argue that the Voucher Law did not change how anti-discrimination laws are applied and thus did not create the classification treating students differently because those that remain in public school are afforded higher anti-discrimination protections than those students that accept vouchers and attend private schools. SB at 38; IB at 29. But, it is the enactment of HB 2013 that creates a class of *publicly funded* students subject to discrimination and one that is not. The Legislature considered provisions that would eliminate discrimination for voucher students, but rejected them.

Third, and finally, State-Petitioners argue that even if the law is a special law, Respondents are not the ones who have standing to challenge it because "only [voucher recipients] could be harmed by the special classes." SB at 38. It is true that Respondents could not use the vouchers even if they wanted to. There are no private schools near them that provide the services their children need. JA Vol. 4 at 413, 418. But, the fact that Respondents cannot use the vouchers underscores the fact that HB 2013 creates different classes and is unconstitutional. The State cannot provide education benefits that only some children can use. The harm created by the special interest Voucher Law thus extends far beyond those that may accept a voucher and Respondents have standing to challenge its constitutional failings.[39]

[39] It would also be nonsensical to limit standing to challenge special laws to those who fall into the favored classification, excluding those who are in the disfavored classification.

III. The Other Issues Raised by Petitioners are Without Merit

A. Plaintiffs have Standing to Bring this Suit

Respondents are citizens of West Virginia and parents of public school children in the state. While any theory of standing is sufficient for subject matter jurisdiction, here Respondents meet the standing requirements under multiple doctrines—traditional, taxpayer, and public interest. *See Men & Women Against Discrimination v. Fam. Prot. Servs. Bd*., 229 W. Va. 55, 61 (2011) (laying out the traditional standing requirements); *Kanawha Cnty. Pub. Libr. Bd.*, 231 W. Va. at 397 (recognizing theories for "taxpayer standing" and "public interest standing").

As an initial matter, plaintiffs in the voucher cases touted by Petitioners included parents of children in schools harmed by the voucher program. *See Meredith*, 984 N.E.2d at 1227; *Schwartz v. Lopez*, 382 P.3d 886, 898-99 (Nev. 2016); *Davis*, 480 N.W.2d at 474; *Jackson*, 578 N.W.2d at 628; *Bush*, 919 So. 2d 392. No decision has held such parents lacked standing to challenge the voucher law.[40] State-Petitioners cite and rely on these state court cases to support their position, but then selectively ignore the issue of standing.

1. Plaintiffs Meet the Elemental Requirements for Traditional Standing

Respondents have traditional standing. Namely Respondents articulate, and the circuit court properly found, Respondents have an "injury-in-fact" or "an invasion of a legally protected interest which is (a) concrete and particularized" and "(b) actual or imminent and not conjectural or hypothetical"; the injury is tied to the Voucher Law as the conduct forming the basis of the lawsuit; and Respondents' injury was redressed by the circuit court's preliminary and permanent injunction of the unconstitutional statute. *Men & Women Against Discrimination*, 229 W. Va. at

[40] In *Hart v. State*, 368 N.C. 122, 140 (2015), the Court found that—while conceding taxpayer standing was a viable doctrine in North Carolina—plaintiffs did not have taxpayer standing to support the religious discrimination claim on behalf of their children because the parents were not part of the class of persons against which the program allegedly discriminated. The parents otherwise had standing to pursue the remaining claims in that case.

61 (reciting elements for traditional standing); *see also Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 84 (2002) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). That is all that is required for standing.

First, Respondents' injury is concrete, particularized, actual and imminent. Respondents' children are students in West Virginia's public school system and have particular disabilities (e.g., autism) that require special education services that Respondents affirm would make their children *ineligible* to attend private schools in their vicinity. JA, Vol. 4 at 411 (Peters Aff. ¶¶ 3, 5-6, 8); *id.* at 413 (¶ 19); *id.* at 417-18 (Beaver Aff. ¶¶ 3, 8-9, 12-14).[41] Further, Respondents work and cannot home school their children and the $4300 is not sufficient to pay the costs and fees to educate their children. *See id.* at 412, 417-18. Thus, the Voucher Law directly impacts Respondents now because they cannot obtain the benefits conferred by the unconstitutional law even if they wanted to.

The Voucher Law also incentivizes affluent students to leave public schools in exchange for money, which *will* result in fewer students attending public schools. It is further undisputed that fewer students means less funding for public schools. *See* JA Vol. 4 at 558-59 (Pauley Aff. ¶¶ 12-15) (explaining the financial impacts on public school districts resulting from the Voucher Law); *see also* W. VA. DEP'T OF EDUC., HB 2013 FISCAL NOTE (2021) (fiscal note highlighting the financial impact of $120 million annual cost resulting from the Voucher Law).[42] Far from the "speculative" harm State-Petitioners preach, (SB at 12), the legal mechanism is plain—money will be taken from public schools as a result of the Voucher Law. Respondent's harm is thus actual and not speculative or hypothetical. *Men & Women Against Discrimination*, 229 W.

[41] Not to be ignored, Ms. Peters is also a public school teacher. JA Vol. 4 at 411, 414-15 (Peters Aff. ¶¶ 4, 26-28). The Voucher Law will negatively impact funding for her district which may impact her job. (*Id.*)
[42] *Available at* http://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152.

Va. at 61.

Second, contrary to State-Petitioners' rhetoric, Respondents' articulated harm is imminent. State-Petitioners argue that because the State allocates budgets based, in part, on enrollment for the prior year, any harm is a year off. *See* SB at 15. But this argument puts the proverbial cart before the horse. The record is clear that public school funding based on student enrollment is backward-looking—meaning West Virginia evaluates funding levels for the next fiscal year based on prior year enrollment. JA Vol. 4 at 557-58 (Pauley Aff. ¶ 8.) Thus, providing vouchers *this year* that cause student enrollment to decrease *this year* is an imminent harm because it undeniably reduces school funding for next year. *See id.*

State-Petitioners essentially quibble with the *amount* of the harm, suggesting that because the amount of the budget reduction to public schools is not known, that injury is not imminent. But that is not the inquiry courts are concerned with when evaluating whether an injury is imminent. *See, e.g.*, *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 137 S. Ct. 973, 984, 197 L.Ed.2d 398 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"); *see also N. N.M. Stockman's Ass'n v. U.S. Fish & Wildlife Serv.*, 30 F.4th 1210, 1220 (10th Cir. 2022) *Campaign Legal Ctr. v. Fed. Election Comm'n*, 507 F. Supp. 3d 79, 89 (D.D.C. 2020), *rev'd on other grounds*, No. 21-5081, slip. op. (D.C. Cir. Apr. 19, 2022); *Younger v. Turnage,* 677 F. Supp. 16, 20 (D.D.C. 1988) (same). With fewer public school students, there will be less money appropriated to the public schools. The loss of this funding will impact public school students, including Respondents' children who have special needs that can only be met through West Virginia's public schools. JA Vol. 2 at 45, 46, 53 (Compl. ¶¶ 10, 12, 33); *see* JA Vol. 4 at 412-13 (Peters Aff. ¶¶ 13, 15); JA Vol. 4 at 419 (Beaver Aff. ¶ 16); JA Vol. 4 at 588 (Lubienski Aff. ¶ 28).

Third, the circuit court's Order redresses Respondents' harm. The circuit court enjoined the statute, stopping its implementation before vouchers were distributed and thus curbing the harm to Respondents. *See, e.g.*, *Foster v. Cooper*, 155 W. Va. 619, 623 (1972) (holding the legislature "acted in an unconstitutional manner" and the act was "*unconstitutional, void and of no effect*.") (emphasis added); *see also Morton v. Godfrey L. Cabot, Inc*., 134 W. Va. 55, 61 (1949) ("An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.") (citation and quotations omitted).[43]

2. Taxpayer Standing Applies

Respondents may also challenge the constitutionality of the Voucher Law under the taxpayer standing doctrine. *Myers v. Frazier*, 173 W. Va. 658, 676 (1984). There is a "logical link" between the plaintiffs' taxpayer status and "the precise nature of the constitutional infringement alleged"; and a "nexus" between taxpayer status and "the precise nature of the constitutional infringement alleged." *Flast v. Cohen*, 392 U.S. 83, 102, 106 (1968). Respondents are residents of West Virginia who pay state and local taxes. JA Vol. 4 at 411 (Peters Aff. ¶¶ 1-2); JA Vol. 4 at 416 (Beaver Aff. ¶¶ 1-2). The Voucher Law is unconstitutional, in part because it diverts taxpayer dollars away from public schools to fund private education and homeschooling. JA Vol. 2 at 58 (Compl. ¶ 46).

State-Petitioners make two arguments to challenge application of the taxpayer standing doctrine. Both are unavailing. First, State-Petitioners argue that because taxpayer standing is rarely applied it should not be applied here. (SB at 13.) Of course, State-Petitioners concede, as they must, that the doctrine is recognized and has been reaffirmed as a doctrine for nearly a

[43] Plaintiffs also have representational standing to vindicate the rights of their children. *Kanawha Cnty. Pub. Libr. Bd.*, 231 W. Va. at 397.

century in West Virginia. *See Kanawha Cnty. Pub. Libr. Bd.*, 231 W. Va. at 397 ("We note that there are other concepts of standing, e.g.,…taxpayer standing…") (quoting *Affiliated Constr. Trades Found. v. W. Va. Dep't of Transp.,* 227 W. Va. 653, 657 n.8 (2011); *see also State ex rel Goodwin v. Cook*, 162 W. Va. 161, 164-65 (1978) (Syllabus Point 1) *Howard v. Ferguson*, 116 W. Va. 362 (1935) (Syllabus Point 1).[44]

Second, State-Petitioners make much to do about the "administration of justice," suggesting it is the linchpin to the application of the doctrine. SB at 14. No case cited by State-Petitioners so states. To the contrary, taxpayer standing is found without the mention of "administration of justice" in matters concerning writs of mandamus. *See, e.g.*, *State ex rel. Brotherton v. Moore*, 159 W. Va. 934, 230 S.E.2d 638, 639 (1976) (Syllabus Point 1) ("A citizen and taxpayer of this State has a right to maintain a mandamus proceeding in order to compel a public official to perform a nondiscretionary constitutional duty."); *Delardas v. Cnty. Ct. of Monongalia Cnty.*, 155 W. Va. 776, 779, 186 S.E.2d 847, 850 (1972) ("The petitioner, as a citizen and a taxpayer of Monongalia County, suing in his own behalf and in behalf of all other taxpayers of that county, has a right to maintain the mandamus proceeding in order to test the constitutionality of the action of the respondents in increasing their official salaries."). While not direct appeals, there is no distinction in the case law limiting the application of taxpayer standing here. *See Campbell v. Kelly*, 157 W. Va. 453, at 371-72 (1974).

[44] Oddly, State-Petitioner's argument appears to hinge on whether the doctrine has been applied recently stating that "this Court has not applied it in any recent case." SB at 13. This is not true. This Court discussed taxpayer standing as recently as this past June, suggesting in *Jefferson County Foundation, Inc*. that this court would not discount taxpayer standing. *See Jefferson Cnty. Found., Inc*. *v. W. Va. Econ. Dev. Auth.*, 875 S.E.2d 162, 171 n.18 (W. Va. Sup. Ct. 2022) ("[Defendant] relies upon *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332 (2006) (holding that state taxpayers 'have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers').") (parallel citations omitted).

3. Respondents Also Meet the Requirements for Public Interest Standing

West Virginia also recognizes public interest standing for litigants challenging legislative expenditures or appropriations of significant public importance. *See Kanawha Cnty. Pub. Libr. Bd.*, 231 W. Va. at 397 (recognizing "other concepts of standing" such as public interest standing) (quoting *Affiliated Constr. Trades Found.*, 227 W. Va. at 657 n.8). Courts applying this doctrine articulate that the case must involve an issue of significant public importance, involve a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the [state] Constitution, and the plaintiff must be an "appropriate" party, meaning that there is no one else in a better position who will likely bring an action, and the plaintiff is fully capable of fully advocating his or her position in court. *See, Schwartz*, 382 P.3d at 894-95.

Respondents plainly meet all three requirements. The Voucher Law violates the fundamental right to education, an "essential constitutional right" in West Virginia, thus it involves an issue of significant public importance. *W. Va. Educ. Ass'n v. Legis. of W. Va.*, 179 W. Va. 381, 382 (1988). The case is also a challenge to legislative appropriation of over $120 million a year towards private schooling, in violation of Article XII, Sections 1, 2, 4, and 5 and Article VI, Section 39 of the West Virginia Constitution. W. VA. DEP'T OF EDUC., HB 2013 FISCAL NOTE (2021).[45] Finally, Respondents, as parents of children directly impacted by HB 2013, are the most "appropriate" party to bring the present suit. No other party is more directly impacted by HB 2013, or more capable of advocating their position in court. Indeed, courts have found public interest standing in multiple voucher cases highlighted by Petitioners themselves. *See Meredith*, 984 N.E.2d at 1217 n.4; *Schwartz*, 382 P.3d at 894-95. Respondents thus have standing to bring the present suit on multiple grounds.

[45] *Available at* http://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152.

B. This Dispute is Ripe

State-Petitioners attempt to argue that Respondents' claims are not ripe. Notably, Intervenor-Petitioners do not contest this point. Nor has any litigation involving vouchers found that the dispute was not ripe after the statute became law. The issue is meritless here as well.

State Petitioners, for their part, argue both that the suit is too late and too early. *See* SB at 5 ("Respondents waited until late January 2022. . . to file a complaint. . . ."), 17 ("Respondent's claims are not ripe."). State Petitioners raise the same failed arguments used to challenge Respondents' standing, suggesting Respondents' injury is speculative and dependent upon whether the Legislature will or will not step in and mitigate the harm that HB 2013 does to public schools. SB at 17-18. But, the law does not require actual harm to a child's education to create a ripe controversy. *See State ex. rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 345 n.15 (2017) (Ripeness does not require a party to "await consummation of threatened injury before bringing … action.") (citation and internal quotations omitted). Instead, a suit challenging an unconstitutional statute is ripe when the statute is going into effect. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *State ex rel. Rist v. Underwood*, 206 W. Va. 258, 271-72, 524 S.E.2d 179, 192-93 (1999).

Nor can Petitioners claim the dispute is not ripe because in the future the Legislature could "adjust the Hope Scholarship Program or other state spending as needed to address future funding challenges." SB at 17. The speculations that the Legislature could subsequently "cure" the harm does not negate the fact that harm exists. As the State Petitioners themselves argue, the concern is "now" (SB at 18), not whether the Legislature may mitigate the harm in the future.

Petitioners also contend the claim is not ripe because schools "will not see any decrease in funding based on lower enrollment until at least next year." SB at 12. This argument ignores that state funding for any given school year at a public school is based in significant part on the

enrollment figures certified by the Department of Education on October 1st of that year. JA Vol. 4 at 557-58 (Pauley Aff. ¶ 8). Thus, if there had been any *present year* reduction resulting from public school students accepting the unconstitutional voucher and not enrolling in public school this year, this would have negatively impacted public funding for the public schools. To date, it has been reported that over 3,000 applications for vouchers have been accepted which would have resulted in decreased funding for the public schools except for the permanent injunction. Staff Reports, *More than 2,000 Hope Scholarships have been awarded in W. Va; application deadline May 16*, EYEWITNESS NEWS WCHS FOX (May 3, 2022).[46] Further, without the injunction, public funds would have been dispersed to families on August 15—public funds that could not be clawed back. Thus, Respondents' claims were, and remain, ripe.

C. The Circuit Court Properly Issued a Permanent Injunction

The circuit court properly granted a permanent injunction to enjoin HB 2013 and Petitioners fail to show that the Court abused its discretion in doing so. *See Weatherholt*, 234 W. Va. at 726, 769 S.E.2d at 876 (quoting *Stuart*, 141 W. Va. 627, 92 S.E.2d 891) (Syllabus Point 11) ("[T]he power to grant. . . a permanent injunction. . . will not be disturbed on appeal in the absence of a clear showing of an abuse of such discretion.").

The question of whether a statute is constitutional on its face is a question of law for the court. *Kanawha Cnty. Pub. Libr. Bd.*, 231 W. Va. at 395, 745 S.E.2d at 433 (whether a statute violates the Constitution is "clearly a question of law"). A question of law can be decided at the circuit court's discretion. *Betts v. Rector and Visitors of the Univ. of Va.*, 113 F. Supp. 2d 970, 981 (W.D. Va. 2000), *rev'd on other grounds*, 18 F. App'x 114 (4th Cir. 2001) ("A court may

[46] *Available at* https://wchstv.com/news/local/more-than-2000-hope-scholarships-have-been-awarded-in-wva-application-deadline-may-16.

raise and consider a dispositive question of law even if it has been ignored, or agreed upon, by the parties."). Having determined that HB 2013 was unconstitutional there was nothing further to be done. The circuit court properly granted a permanent injunction.

None of Petitioners' arguments or cases change the analysis. In *Hummel*, this Court held that the circuit court committed clear error by dismissing a claim because no party asked the court to dismiss the claim and the issue was not briefed. *State ex rel. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hummel*, 243 W. Va. 681, 684-85, 850 S.E.2d 680, 683-84 (2020); IB at 11. The adverse party was therefore not afforded an opportunity to be heard. The Court made a similar finding in *Loudin*, holding that the trial court improperly granted summary judgment because the opposing party did not have the opportunity to brief the issue. *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 228 W. Va. 34, 44, 716 S.E.2d 696, 706 (2011); IB at 11.

That certainly is not the case here. Each party had the opportunity to file at least 3 briefs before the circuit court on the constitutionality of HB 2013. Intervenor Petitioners filed a motion for judgment on the pleadings, with an opening and reply brief. They also filed an opposition to the motion for preliminary injunction. The State defendants filed seven briefs on the issue.[47] All of these briefs addressed whether or not HB 2013 was unconstitutional on its face. Unlike in *Hummel* and *Loudin*, whether the Voucher Law violates the West Virginia Constitution was fully briefed and argued by both sides. Further, the elements to obtain a permanent injunction are nearly identical to those of a preliminary injunction, and, by extension, the arguments for and

[47] JA Vol. 2 at 91-115 (Defendants Moore and Justice's Motion to Dismiss); JA Vol. 2 at 116-130 (Defendants Blair and Hanshaw's Motion to Dismiss); JA Vol. 2 at 163-84 (Defendants Burch and Hall's Response in Support of Plaintiffs' Motion for Preliminary Injunction); JA Vol. 2 at 213-32 (Defendants Moore, Blair, Hanshaw, and Justice's Response to Plaintiffs' Motion for Preliminary Injunction); JA Vol. 3 at 342-54 (State of West Virginia's Motion to Dismiss); JA Vol. 3 at 355 (Defendants Blair and Hanshaw's Reply to Plaintiffs' Omnibus Opposition to Their Motion to Dismiss); JA Vol. 3 at 363-85 (Defendant Moore and Justice's Reply to Plaintiffs' Omnibus Opposition to their Motion to Dismiss).

against them. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success."). As such, Petitioners were not unfairly prejudiced by the Court's ruling.

Respondent's Complaint further makes clear the intention to seek a permanent injunction, which too put Petitioners on notice. *See Franciscan All., Inc. v. Becerra*, No. 21-11174, 2022 WL 3700044, at *6 (5th Cir. Aug. 26, 2022). Even if not set forth in the Complaint, West Virginia Civil Procedure Rule 54(c) allows circuit courts to grant "relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."

Petitioners also had notice of a permanent injunction because the possibility of an injunction was squarely raised by the preliminary injunction motion. Courts around the country regularly use their discretion to transform a preliminary injunction motion into a motion for a permanent injunction where the circumstances are warranted. *See Amos v. Higgins*, 996 F. Supp. 2d 810, 812 (W.D. Mo. 2014) (treating a motion for preliminary injunction as a motion for permanent injunction); *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir.1999) (affirming treatment of Preliminary Injunction motion as Motions for Permanent Injunction); *Minn. Dep't of Econ. Sec., State Servs. for the Blind and Visually Handicapped v. Riley*, 107 F.3d 648, 649 (8th Cir. 1997) (same); *Cummings v. Husted*, 795 F. Supp. 2d 677, 681 n.3 (S.D. Ohio 2011) (turning a preliminary injunction into a permanent injunction."); *Citibank*, Case Nos. 3:04-cv-1076-J-32MCR, 3:04-cv-1205-J-20MCR, at *9 (M.D. Fla. Sep. 19, 2006) (same); *Am. Civ. Liberties Union of Ky. v. McCreary Cnty.*, 607 F.3d 439, 445 (6th Cir. 2010) (same); *MGM Resorts Int'l v. Unknown Registrant of www.Imgmcasino.Com*, No. 2:14-cv-1613-GMN-VCF, slip op. at *2 n.2 (D. Nev. Sep. 23, 2015) (same).

CONCLUSION

For all the foregoing reasons, the circuit court's order should be affirmed in its entirety.

TRAVIS BEAVER AND WENDY PETERS

By Counsel,

HENDRICKSON & LONG, PLLC

/s/ John H. Tinney, Jr.

John H. Tinney, Jr. (WVSB#6970)
Hendrickson & Long, PLLC
214 Capitol Street
Charleston, WV 25301
(303) 346-5500
(304) 400-4548 (direct)
jtinney@handl.com

Jessica Levin*
Wendy Lecker*
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
Phone: 973-624-1815
Fax: 973-624-7339

Tamerlin J. Godley*
Timothy D. Reynolds*
Philip Hwang*
Paul Hastings LLP
515 South Flower Street, 25th Floor
Los Angeles, CA 90071
1 (213) 683-6000

Kiaura Clark*
Paul Hastings LLP
1999 Avenue of the Stars
27th Floor
Los Angeles, CA 90067
1 (310) 620-5700

Zoe Lo*
Benjamin S. Gilberg*
Paul Hastings LLP
200 Park Avenue
New York, NY 10166
1 (212) 318-6000

Attorneys for Respondents
** Pro Hac Vice Forthcoming*

CERTIFICATE OF SERVICE

I, the undersigned counsel for Respondents, do hereby certify that on this 23rd of September, 2022, the foregoing "**BRIEF OF RESPONDENTS TRAVIS BEAVER AND WENDY PETERS**" was filed with the West Virginia Supreme Court of Appeals and served via the Court's e-filing system, as well as a courtesy copy via email, on the following counsel:

Brent Wolfingbarger, Sr. Deputy Attorney General
OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305
Email: Brent.W.Wolfingbarger@wvago.gov

Lindsay S. See (WV Bar # 13360)
Michael R. Williams (WV Bar # 14148)
Caleb A. Seckman (WV Bar # 13964)
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

Kelly C. Morgan, Esquire
Michael W. Taylor, Esquire
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
P.O. Box 3710
Charleston, WV 25337-3710
Email: kmorgan@baileywyant.com
mtaylor@baileywyant.com

Michael A. Kawash (WV Bar No. 5110)
Jonathon C. Stanley (WV Bar No. 13470)
ROBINSON & MCELWEE PLLC
700 Virginia Street East, Suite 400
Charleston, WV 25301
Phone: (304) 347-8315

Joshua A. House (CA Bar No. 284856)

Joseph Gay (DC Bar No. 1011079)
Jeff Rowes (TX Bar No. 24104956)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Fax: (703) 682-9321
Email: jhouse@ij.org; jgay@ij.org; jrowes@ij.org

Michael Bindas (WA Bar No. 31590)
INSTITUTE FOR JUSTICE
600 University Street, Suite 1730
Seattle, WA 98101
Phone: (206) 957-1300
Fax: (703) 682-9321
Email: mbindas@ij.org

/s/ John H. Tinney, Jr.
John H. Tinney, Jr. (WVSB#6970)
Hendrickson & Long, PLLC
214 Capitol Street
Charleston, WV 25301
(303) 346-5500
(304) 400-4548 (direct)
jtinney@handl.com