IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
Docket No. 23-ICA-174

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ALEXANDER FLEMING, CAROLE CARTER, CAROL GALLANT, BARBARA HUMES, and BENJAMIN BUCKLEY,

Petitioners,

v.

MITCH CARMICHAEL, in His Official Capacity as Secretary of the West Virginia Department of Economic Development, and MIKE GRANEY, in His Official Capacity as Director of the West Virginia Department of Economic Development,

Respondents.

RESPONDENTS' BRIEF

Circuit Court of Kanawha County
Case Nos. 22-C-20 to 22-C-24

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INTRODUCTION

This case concerns an example of West Virginia residents' power to vote and the Legislature's "wisdom [in] … pass[ing] such laws as the good of the State requires and none other." *State v. Buchanan*, 24 W. Va. 362, 381 (1884).

A decade ago, our Legislature emphasized the importance of tourism to the state by creating a sales-tax credit for new or expanded tourism development projects. The tax credit would advance the state's economic well-being, preserve and create local jobs, and increase the revenue flowing to state and local municipalities. Several years later, the Legislature passed another law targeting those benefits at related tourism projects in five small towns across West Virginia. Small towns hold some of the State's most significant treasures, but those communities often lack the resources to support large-scale tourism projects.

Harpers Ferry is a perfect example of the sort of town that stands to benefit from these legislative efforts. A developer had planned a major project for the small town: it would rejuvenate the historically and culturally significant Hill Top Hotel. Although some residents of Harpers Ferry were initially skeptical, they largely changed course by voting a new town council in to move the project forward. The developer then applied for one of the five designations that the Legislature had made available.

But the Harpers Ferry project still needed to clear some hurdles. A few of the town's residents remained opposed to the project, and they anonymously formed a nonprofit corporation to sue the developer and the town to stop all progress for the project. During that suit, the constitutionality of the Legislature's decision to create the tourism development district in Harpers Ferry came into question. The circuit court upheld the law. Even so, the disaffected residents

reconvened and made those same arguments in *another* suit in *another* court. That circuit court rejected their arguments again, and it dismissed the second suit.

This Court should affirm. The District Act is within the Legislature's wheelhouse. It is within our constitutional limits, too. And these development efforts stand to bring many benefits to Harpers Ferry and four other communities like it. The town should not have to wait any longer to enjoy them.

STATEMENT OF THE CASE

1. Almost two decades ago, the West Virginia Legislature sought to promote the "general welfare and material well-being" of West Virginians by passing the Tourism Development Act. W. VA. CODE § 5B-2E-2. The Development Act induced "the creation or expansion of tourism development projects" in West Virginia by making available a tax credit on "consumers sales and service taxes collected on the gross receipts generated" by certain "new or expanded tourism development projects." *Id*. To obtain a credit, developers would seek approval from the West Virginia Department of Economic Development's predecessor office by providing the project's description, location, and anticipated expenditures. *Id.* § 5B-2E-5(a)-(b). Once approved, the office could "enter into an agreement" with the developer based on an "amount of approved costs," a quarter of which would receive the sales tax credit. *Id* §§ 5B-2E-6(1), 5B-2E-7(a)-(b). In 2019, the Legislature extended the deadline for any such approvals to December 31, 2025. *Id.* § 5B-2E-11. But the Legislature did not stop there.

One year later, in 2020, the Legislature passed the Tourism Development District Act. With the District Act, the Legislature once again found that the "development and expansion of tourism in the state" contributed directly to "the general welfare and material well-being of the citizens of the state, including "relieving unemployment by preserving and creating jobs" and

creating "greater sources of revenue" for "state and local government[s]." W. VA. CODE § 5B-1-9(b). This time around, the Legislature facilitated the flow of these benefits specifically to "small municipalities"—that is, those "with a population of 2,000 or less"—by "induc[ing] and assist[ing] in tourism development … through the creation of tourism development districts." *Id.* § 5B-1-9(a)-(b).

To that end, the Legislature linked the District Act with the earlier Development Act. Under the new law, up to five developers who had "entered into an agreement" under the earlier act could seek designation as one of these development Districts; they qualify so long as they have "aggregate project costs" of "not less than $25 million," are located "within the corporate limits" of a qualifying small municipality, and "create significant economic development activity." W. VA. CODE § 5B-1-9(d)-(f). And because these Districts could end up in any of the nearly 200 small municipalities that span West Virginia, the Legislature sought to "to promote uniform and consistent application of the act within the state" by "occupy[ing] the whole field of [their] creation and regulation of tourism development districts." *Id.* § 5B-1-9(b)

Once a tourism district is designated, a regulatory shift occurs for a District within the municipality. A District is not subject to the municipality's "legal jurisdiction" as to certain regulations—including municipal ordinances as to zoning, historic preservation, noise, land use, building permitting, inspection, and licensing. Instead, regulations of that sort will come from the West Virginia Department of Economic Development, as specified in the District agreement. W. VA. CODE § 5B-1-9(1); *see also* W. VA. CODE R. § 146-16-9.2.2. At the same time, though, much of the municipality's authority remains intact. Municipalities can still collect business, occupation, sales, hotel-occupancy, and use taxes from District projects. They can likewise impose fire, police, sanitation, and utility service fees. Municipalities need only show that these taxes and

fees were collected from other similarly situated businesses. W. VA. CODE § 5B-1-9(m). Districts are also "entitled to municipal police protection" and "fire protection" like similarly situated businesses. *Id.* § 5B-1-9(m)(8). Each District (and associated rights) will continue even if the Legislature does not extend the Development Act's December 2025 termination date. *Id.* § 5B-1-9(o).

2. The particular District at issue here concerns a famous hotel in an area rich with West Virginia history: Harpers Ferry. In 1859, federal troops captured abolitionist John Brown and his followers in Harpers Ferry, creating a "showdown [that would] set the stage for the U.S. civil war." Hamil R. Harris, *A Symbol Of Racial Harmony, Condemned Harpers Ferry Hotel Gets Second Life*, ZENGER NEWS (Aug. 24, 2021), https://bit.ly/3R1kJVj. Three decades later, having "lived through the bloody civil war and the violent 'Jim Crow' era," "African-American entrepreneur Thomas Lovett" vowed to build a hotel near the spot of Brown's capture—and he did. *Id.* It did not take long for Lovett's Hill Top House Hotel to become a magnet for American icons like Calvin Coolidge, Alexander Graham Bell, Mark Twain, and W.E.B. Du Bois. *Id.* But almost as quickly as it rose to prominence, the hotel started to fall. Lovett sold it during the Great Depression, its "fortunes declined [further] with the collapse of the West Virginia coal industry," and by 2008, "the building was shuttered." *Id.* The once-great structure that stood for and facilitated so much had deteriorated into a "dangerous ruin." *Id.*

In 2007, SWaN Hill Top House Hotel, LLC ("SWaN") tried to turn things around. It bought Hill Top intending to reconstruct it. A.R. 52-53. But the rebuild languished for over a decade as friction grew between the developer and certain town residents who opposed the project. A.R. 83. In 2019, things started to change. The town of Harpers Ferry held an election that included "five at-large seats on the Harpers Ferry Town Council." *Johnson v. Case*, 243 W. Va.

382, 385, 844 S.E.2d 153, 156 (2020). And after a heated contest and a vote-recount effort that made it all the way to West Virginia high court, a new slate of officials was sworn into office. Soon after, the town council began working with SWaN to execute street sale agreements that SwaN needed move the Hill Top project forward. A.R. 53.

Not long after that election, SWaN applied for Hill Top to receive one of the five designations available under the District Act, A.R. 73-74, reporting expected costs of more than $138 million, *see* Tourism Development Act Agreement between SWaN Hill Top House Hotel, LLC and West Virginia Development Office (Dec. 17, 2019), https://tinyurl.com/563zdxc9—far above the District Act's $25 million threshold. Around that same time, the predecessor office to the West Virginia Department of Economic Development was elevated to the "separate and distinct" executive department it is now. W. VA. CODE § 5B-2-1(a). And in August 2021, after a "comprehensive review" of Hill Top's application, the department designated Hill Top as an "Approved District" under the Act. A.R. 76-77. The reasons for the approval were simple, echoing those that led the Legislature to pass both Development Act and the District Act: The District "will have a significant economic impact on the state and the region including: a commitment by the developer to make a substantial financial investment in the district; a marked increase in jobs and payroll in the district; and stimulated growth of economic development activity including new and existing business activity and diversification of the local economy." A.R. 77; *cf.* W. VA. CODE § 5B-2E-2 (stating the tourism's "paramount importance to the state and its economy" includes preserving and creating new jobs, and preserving and creating "sources of revenues for the support of public services"); *Id.* § 5B-1-9(b) (similar for the District Act).

3. The Department's choice to grant SWaN's application did little to stifle what was left of the opposition to the Hill Top project. In September 2021, a group of anonymous town

residents—through a nonprofit corporation called Public Asset Protection, Inc. ("PAP")—filed a complaint against the town and SWaN in the Circuit Court of Jefferson County to "prohibit and enjoin … any development of the [Hill Top] project." A.R. 97; *see generally* A.R. 79-100 (complaint and exhibits). PAP claimed to represent the interests of Harpers Ferry residents who continued to object to the Hill Top project and had signed petitions in 2019 and 2020 to stop it. A.R. 79, ¶ 2; A.R. 80, ¶ 7; *see also* A.R. 137, ¶ 22. PAP alleged, among other things, that Harpers Ferry's recent sale of certain undeveloped streets to SWaN was unlawful, the Home Rule Board Program under which the town effected the sale did not provide the requisite legal authority, and the Hill Top Hotel project violated several of Harpers Ferry's municipal ordinances. A.R. 84-87 (citing W. VA. CODE § 8-1-5a (2019)).

Harpers Ferry and SWaN each moved to dismiss the complaint, and the State of West Virginia filed a brief as *amicus curiae* to defend the constitutionality of the Home Rule Board Program that PAP had challenged. A.R. 54-55. As the parties briefed those motions, SWaN advised the circuit court that Hill Top had been designated an Approved District under the District Act—and it could not have violated municipal ordinances it was never bound to follow. A.R. 65. PAP responded by arguing that the District Act "is an unconstitutional local law in violation of" the West Virginia Constitution's prohibition against "special laws," *id.* (citing W. VA. CONST. art. VI, § 39), so the designation did not allow SWaN to move forward with the Hill Top project, A.R. 123-125.

PAP's attack on the District Act's constitutionality was not the only piece that PAP added in its attempt to fend off the motions to dismiss. PAP also submitted affidavits from Harpers Ferry residents Alexander Fleming—one of the five Petitioners here on appeal—and Myles Morse. A.R. 130-131 (Fleming); A.R. 132-137 (Morse). Petitioner Fleming's affidavit sought to show the

concrete nature of the injuries PAP alleged in its complaint for injunctive relief, A.R. 130-131, ¶¶ 3-8; *see also* A.R. 112, while Mr. Morse focused on the purpose and makeup of PAP itself. Morse conceded that PAP was formed to "provide for protection of [its] members" during legal actions to challenge the Hill Top project. A.R. 134, ¶ 12. While PAP's membership had shrunk from nine Harpers Ferry residents to five over time, he was adamant that the "current and previous members" shared a common interest in preventing the Hill Top project and that each would "suffer the same loss" if the development proceeded. A.R. 134, ¶¶ 20-21.

On January 13, 2022, the Circuit Court of Jefferson County granted Harpers Ferry's and SWaN's motions and entered a final order dismissing PAP's complaint. A.R. 52-71. The Home Rule Program, the court held, gave Harpers Ferry the statutory authority to sell its undeveloped streets to SwaN. A.R. 60-63. More important here, the circuit court also held that PAP's argument that the District Act violated the West Virginia Constitution lacked merit. A.R. 64-67. The circuit court held that the District Act "is not unconstitutional" because it "is a general statute" that was "not specially crafted for Harpers Ferry." A.R. 67. What's more, the District Act satisfied "equal protection principles" because it "is certainly within the category of economic statutes because it concerns the development of commerce through tourism"; at the same time, the law was "reasonably related to a proper governmental purpose" of supporting the economic development of small municipalities. A.R. 67. PAP did not appeal these rulings. *See* A.R. 193-194, 8:22-9:3.

4. Two days before the Jefferson County Circuit Court issued the written order dismissing the anonymous residents' case, Petitioner Fleming—this time named in the case caption—and five other Harpers Ferry residents filed separate challenges to the District Act in Kanawha County Circuit Court. A.R. 6-11. In June 2022, Petitioner Fleming amended his original complaint to add the other residents (whose cases had been consolidated with his) and swap in Secretary Carmichael

for Secretary Gaunch as a defendant. A.R. 20-25. Both pleadings reiterated the arguments that the District Act (1) is a special law that violates W. Va. Const. art. VI § 39 and 39a, and (2) violates equal protection by "restricting the availability of [Districts] to towns under 2,000." A.R. 9-10, ¶¶ 21-22; A.R. 24, ¶¶ 22-23. Petitioners also alleged that the District Act negates their "right to self-rule," infringes on their "right to vote," and poses safety concerns for the town's residents. A.R. 10, ¶¶ 20, 23; A.R. 24, ¶¶ 21, 24. And they contended that the Act tries to "bind future Legislatures" by providing for a ninety-nine-year life of a designated District. A.R. 10, ¶ 24; A.R. 24, ¶ 25. The plaintiffs asked the circuit court to declare that the District Act is null and void, enjoin the Secretary Carmichael and Director Graney from enforcing it, and compel Respondents to pay Petitioners' attorneys' fees and costs. A.R. 10; A.R. 24-25.

On June 24, 2022, Respondents moved to dismiss the amended complaint for failing to state a claim. A.R. 26-49 (motion and brief); A.R. 50-139 (brief exhibits). The parties fully briefed the motion. A.R. 140-166 (response and exhibits), A.R. 167-185 (reply). And the circuit court held a hearing on August 11, 2022. A.R. 186-204 (transcript). On March 29, 2023, the court granted the motion and dismissed the amended complaint with prejudice. A.R. 205-221.

First, before moving to the merits of the claims, the court discussed the collateral estoppel effect of the Jefferson County matter on the special-law and equal-protection arguments that Petitioners had reasserted in their Kanawha County pleadings. A.R. 211-213. The court pointed out how the residents' "home-county circuit court" had explicitly rejected the very same arguments that the District Act was a special law or a violation of equal protection. And the Jefferson County court's decision satisfied the four conditions needed to apply collateral estoppel. A.R. 211. Those issues—both raised and "conclusively decided" in the Jefferson County case—were identical to the Petitioners' first two claims here. A.R. 211. The Jefferson County decision "was a final

adjudication on the merits." A.R. 212. The Petitioners' interests—including Petitioner Fleming, who "actively participated in the prior suit"—were "fully aligned with those asserted by PAP" and Harpers Ferry residents who opposed the Hill Top project, creating the privity necessary for collateral estoppel to apply. A.R. 212-213. Lastly, the Jefferson County action provided a "full and fair opportunity" to litigate the special-law and equal-protection claims. A.R. 213.

Second, the circuit court addressed the merits of the estopped claims, too. A.R. 213-217. The circuit court agreed that, rather than "bestow[ing] unique benefits or burdens on particular entities," the District Act was "a true class-based law." A.R. 214-215. The law provided five open designations for which developers can apply; Hill Top may have been the first project to receive such a designation, but the Act's benefits were not somehow denied or cheapened for "four more similarly situated projects" in the future. A.R. 215. And by issuing that designation, the Act neither singled out Hill Top nor its town for "unique treatment," and it did not "draw its class lines so narrowly that entry is closed to future applicants." *Id.* The class lines it did draw, the court held, are rational ones: "An influx of large tourism investments would clearly aid the state and its economy," they "may grant access to investment otherwise unavailable to West Virginia's smallest towns," they give "developers the type of regulatory certainty that is necessary for the significant expenditure[s]" such large tourism projects would inevitably require, and they keep the West Virginia Department of Economic Development's regulatory costs from spinning out of control. A.R. 215-217.

Third, the circuit court confirmed that the District Act does not infringe on the Harpers Ferry residents' right to vote or violate any right to "self rule." A.R. 217-220. For starters, the circuit court noted, the right to "self rule" "appears nowhere in the text of the West Virginia Constitution." A.R. 218. Municipalities have only the power that the Legislature chooses to grant

them, and the Legislature can modify those grants at any time. A.R. 218. Among other things, the Legislature may "transfer[] certain authority over areas within a municipality's geographic limits to various state agencies," as the District Act did here. A.R. 219.

The circuit court likewise found no voting-rights infraction of any kind. Petitioners' rights—same as their fellow residents of Harpers Ferry, and all West Virginians—were unaffected by the Legislature's passing of the Development Act and the District Act. A.R. 219. And it would destabilize the whole system if local interests like these could trump the Legislature's statewide goals just because "[s]ome local voters' wishes may differ from the directives of the Legislature." *Id.* That logic covers Petitioners' safety concerns over the shift from municipal regulation to agency regulation, too. Although the West Virginia Department of Economic Development's "uniform [scheme of] regulation" preempts some local laws, the District Act did not jeopardize key protections for "the health and safety of town residents" that remain in place. *Id.*

Lastly, the circuit court rejected plaintiffs' claim that the District Act sought to bind future legislatures. A.R. 220. The circuit court pointed out that the claim itself was a nonstarter: plaintiffs had mistakenly referred to the wrong statute to make their claim. A.R. 220. Plaintiffs had referenced the Development Act while taking aim at the District Act—when the latter "simply anticipates [the Development Act's] termination and states that the [District] Act will not be repealed by implication if the [Development Act's] tax credit … expires." *Id.* The circuit court found nothing nefarious about an anti-implied-repeal provision. *Id.* So the court dismissed that claim along with the others.

Having failed to plausibly allege any facts "that would entitle them to a declaration that the [District] Act is unconstitutional or that [Respondents] should be enjoined from enforcing it," the

circuit court granted the Respondents' motion and dismissed the amended complaint with prejudice. A.R. 210, 220-221.

On May 1, 2023, Petitioners—all plaintiffs below except for plaintiff Mead, who decided "not [to] participate in the appeal"—filed a notice of appeal from all the Kanawha Circuit Court's rulings (save the one about the District Act binding future legislatures). Because the notice was untimely, they also filed a motion for leave to file the notice out of time. A.R. 222-228. This Court granted the motion and allowed the appeal to move forward.

SUMMARY OF THE ARGUMENT

Petitioners' brief is nearly identical to the one they filed in opposition to Respondents' motion to dismiss below. *See* A.R. 140-152. It is no more persuasive now than was then.

I. The circuit court was right to deny Petitioners a second chance as to their special-act and equal-protection attacks on the District Act. The nonprofit corporation representing Petitioners' interest—and possibly Petitioners themselves—raised those exact arguments in the earlier action. And Petitioners' home-county forum provided a full and fair opportunity to litigate those arguments on its way to resolving them with a final judgment. Petitioners were not entitled to relitigate those same claims again in a second action just because those claims were about to fail in the first one. Collateral estoppel was intended to prevent litigants from burdening their opponents and the courts by relitigating issues over and over again in different forums.

II. In its alternative holding on the merits of Petitioners' estopped claims, the circuit court correctly held that the District Act is a general law the satisfies equal protection principles. The Act does not target certain persons or entities. Nor does it set up certain things for success to the detriment of others. It simply grants a benefit to up to five large tourism development projects that private parties want to locate in small municipalities—towns that will reap the outsized

benefits of tourism without bearing the (often insurmountable) burden of regulating the large projects. This distinction is a rational and reasonable classification that the Legislature is empowered to make.

III. Petitioners' remaining arguments have no merit—the circuit court was correct to dismiss those, too. Petitioners fret that the District Act will transform Harpers Ferry into a regulation-free zone. But the District Act merely transfers a subset of regulation to the State while leaving the rest in place. This shift does not infringe on any sort of right to "self rule" (chiefly because it does not exist), impair the Petitioners' right to vote (because it is not implicated), or give rise to safety concerns (because the Act is economic, and town-driven safety measures remain firmly in place).

STATEMENT REGARDING ORAL ARGUMENT

Petitioners' arguments lack support in the relevant record and case law, and thus fail identify any basis for reversal. Oral argument is not necessary, and a memorandum decision affirming the ruling below is appropriate. *See* W. Va. R. App. P. 21. That said, Respondents stand ready to appear in defense of this important economic legislation if this Court finds it helpful.

STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*" Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). When, as here, an "appeal requires [this Court] to pass upon the constitutionality" of a statute, "the constitutionality of [that] statute is a question of law which this Court reviews de novo," as well. *Morrisey v. W. Virginia AFL-CIO*, 243 W. Va. 86, 99, 842 S.E.2d 455, 468 (2020); *see also* syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or

involving an interpretation of a statute, we apply a de novo standard of review."). Yet, the Court "must be cognizant of the separation of powers and the near plenary authority of the Legislature to act within constitutional boundaries." *Morrisey,* 243 W. Va. at 99, 842 S.E.2d at 468. So parties challenging the constitutionality of statutes generally face an uphill climb. "[A]cts of the Legislature are presumed to be constitutional," and they should be interpreted "in any reasonable way which will sustain [their] constitutionality." *Id.* To prevail, challengers must negate that presumption "beyond [a] reasonable doubt." *Id.*

ARGUMENT

I. Collateral estoppel barred two of Petitioners' claims.

Petitioners' special-law and equal-protection arguments in the Kanawha County Circuit Court were doomed at the start for one basic reason: collateral estoppel. That doctrine that prevents a party from relitigating "issues in a second suit" if those same exact issues were already "litigated in the earlier suit." Syl. pt. 2, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983). The doctrine operates to "preclude[] a plaintiff from relitigating identical issues by merely switching adversaries." *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 329 (1979) (cleaned up). And its purpose is twofold: to "protect[] litigants from the burden of relitigating an identical issue with the same party or his privy," and to "promot[e] judicial economy by preventing needless litigation." *Holloman v. Nationwide Mut. Ins.*, 217 W. Va. 269, 277, 617 S.E.2d 816, 824 (2005) (quoting *Parklane Hosiery Co.*, 439 U.S. at 326).

For collateral estoppel to take effect, four elements must hold: (1) the issue decided in the first action must be "identical to the one presented in the [subsequent] action," (2) the first action must have resulted in "a final adjudication on the merits," (3) the party resisting the application of collateral estoppel must have been "a party or in privity with a party to a prior action," and (4) that party must have had "a full and fair opportunity to litigate the issue in the prior action." Syl. pt. 4,

Abadir v. Dellinger, 227 W. Va. 388, 709 S.E.2d 743 (2011). Each of those four conditions was met here. Petitioners' home-county circuit court resolved the special-law and equal-protection issues by upholding the District Act's constitutionality. So, when Petitioners—at least one of whom openly participated in that earlier suit—shifted to a new forum just to litigate them again, the new circuit court it was unwilling to start the exercise all over again. This Court should affirm that ruling.

A. The circuit court correctly held that the first factor was satisfied because the plaintiff in Kanawha County Circuit Court raised identical issues to those decided that the Jefferson County circuit court decided in the earlier matter. A.R. 211-212. Both suits challenged the constitutionality of the District Act. *Compare* A.R. 123-124 (PAP's response to motion to dismiss) *with* A.R. 24-25, ¶¶ 22-23 (Petitioners' amended complaint). Both suits objected to the legal framework facilitating reconstruction of Hill Top. *Compare* A.R. 79, ¶ 2 *with* A.R. 23-24, ¶¶ 13-21. Both suits argued that the District Act was a "special law" that related specifically to Hill Top and Harpers Ferry. *Compare* A.R. 123 (arguing that the District Act "targets Harpers Ferry with surgical precision") *with* A.R. 23, ¶¶ 14, 16 (alleging that the District Act "bestows a substantial benefit upon one particular private venture" and "was drafted … for the purpose of benefitting SWaN"); *cf.* Br. at 12 (contending that the District Act "realistically" applies only to Harpers Ferry); A.R. 146 (same). Both suits claimed that it was unlikely that another project would qualify as a District. *Compare* A.R. 123 (PAP response brief arguing that "[n]o other proposed project known to [PAP] involves both such a small municipality and such a large project") *with* A.R. 23, ¶ 15 (alleging that "it is highly unlikely that any other project or entity can or will ever satisfy the [District Act's] criteria … as an undertaking exceeding $25,000,000 in a town under 2,000 population"). And both suits argued that limiting District designations to towns with a population

of less than 2,000 people was arbitrary and unreasonable. *Compare* A.R. 124-125 *with* A.R. 23-24, ¶¶ 22-23; *cf.* Br. at 11 ("Restricting tourism development to five towns under 2,000 ... is on its face absurd."); A.R. 145 (same). It is hard to imagine any more overlap between these two issues as asserted in both actions.

Petitioners cannot, and thus do not, contest the substance of that objective overlap. Instead, they say the "two cases raise[d] different issues" because of the supposedly different purposes behind each case—PAP's goal in the first suit being to "*negate* the exercise of municipal power," and their goal in the second suit being to "*protect"* it. Br. at 7. But this characterization of the parties' subjective motives is not even a relevant distinction. The abstract goals behind each suit are beside the point; the operative question is whether the "issue[s] previously decided" in the first suit were "identical to the one[s] presented" in the second suit. Syl. pt. 4, *Abadir*, 227 W. Va. 388, 709 S.E.2d 743 (2011). An "issue" for these purposes is defined broadly as "any right, fact or legal matter which is put in issue" in a case. *In re B.C.,* 233 W. Va. 130, 138, 755 S.E.2d 664, 672 (2014). And an issue in a later suit is considered "identical" to one raised in a prior suit if "the facts are similar" and "the legal standards and procedures used to assess the facts are similar." *City of Huntington v. Bacon,* 196 W. Va. 457, 463, 473 S.E.2d 743, 749 (1996). That perfect identity existed below, and the circuit court was right to say so. A.R. 211-212.

B. The circuit court was also correct to treat the Jefferson County court's final order as a final adjudication on the merits of these two issues. Petitioners do not seem to dispute this condition; nor could they. The earlier court held that the District Act "is a general law, and is not unconstitutional" because it "operates uniformly on all persons and things of a class." A.R. 66. In addition, the statute satisfied "equal protection principles" because it is economic legislation that was "reasonably related to a proper governmental purpose" of "supporting small municipalities[']"

tourism development efforts; and it was "not specially crafted for Harpers Ferry." A.R. 66-67. Accordingly, the Jefferson County circuit court dismissed the part of PAP's complaint related to these issues under West Virginia Rule of Civil Procedure 12(b)(6) and confirmed that the dismissal was a final order. A.R. 67, 70. Such a dismissal "is a final judgment" on the merits that bars subsequent relitigation. *B.R. v. W. Va. Dep't of Health & Human Res.*, No. 18-1141, 2020 WL 6043852, at *3 (W. Va. Oct. 13, 2020) (Mem. Decision).

The two aspects of the order Petitioners *do* quibble with do not merit reversal, either. They say their home-county circuit court should have talked more about the issues that they tried to relitigate in the second suit. Br. at 7 (complaining of "only two and a half pages of cursory analysis in the circuit court's opinion" on "the constitutionality of the [District Act]"). But no minimum-page requirement must be met for an order to qualify as a final adjudication on the merits of an issue. Given the number of final judgments and orders that come by way of one-sentence summary dispositions, that rule would hardly make sense. In any event, the Jefferson County Circuit Court's ruling was more than long enough to explain that it had rejected PAP's arguments (and lay out why). Petitioners also complain that the court "did not address" other claims raised in the second suit, like those "involving equal protection, safety, and voting rights." Br. at 7. But as explained here, it *did* engage the equal-protection issue. And as to the other issues, Respondents never argued that collateral estoppel should bar them below, and they do not argue that here. *See Conley*, 171 W. Va. at 588, 301 S.E.2d at 220 (cleaned up) (collateral estoppel bars "only those matters which were actually litigated in the former proceeding"). Even so, Petitioners cannot launch a second round of litigation on the two already-adjudicated issues just by adding a few new issues in the second suit.

C. Despite Petitioners' framing, they also shared far more than "a common residency in Harpers Ferry" with the plaintiff (and its backers) from the first suit, Br. at 8; their interests were "fully aligned," as the circuit court correctly held. A.R. 212-213. On this point—that is, privity between parties litigating identical issues in different suits—context is king: There is no "generally prevailing definition of privity," so courts have to examine "the circumstances of the case and the rights and interests of the parties to be held in privity." *Baker v. Chemours Co. FC, LLC*, 244 W. Va. 553, 562, 855 S.E.2d 344, 353 (2021) (cleaned up). If a person, for example, is "so identified in interest with another that he represents the same legal right," privity exists. *Id.* Or if a "party … acts as the nonparty's representative," *Rowe v. Grapevine Corp.*, 206 W. Va. 703, 715 527 S.E.2d 814, 826 (1999) (cleaned up), privity exists. Or when a "closely held corporation" represents the interests of its members, and the company and the members' "interests" "generally fully coincide," privity exists between them, too. *Jordache Enters. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 204 W. Va. 465, 479, 513 S.E.2d 692, 706 (1998). Put simply, failing to be "formally joined as a party in the prior litigation" is not a get-out-of-collateral-estoppel-free card. *Beahm v. 7 Eleven, Inc.*, 223 W. Va. 269, 273, 672 S.E.2d 598, 602 (2008). If the party in the first suit and the party in the second share a set of interests that is functionally indistinguishable, then collateral estoppel is proper.

PAP advanced Petitioners' interests in the first suit. PAP represented "concerned residents of Harpers Ferry," like Petitioners, who objected to the Hill Top project. A.R. 79, ¶ 2. Those residents, like Petitioners, sought to invalidate the statutes that facilitate the Hill Top project. *Compare* A.R. 123-124 *with* A.R. 24, ¶¶ 22-25. Those residents, like Petitioners, were concerned about protecting the town's "beauty and heritage." Br. at 15; *cf.* A.R. 81-82, ¶ 12 (alleging that Hill Top will "compromise[] the essence of Harpers Ferry's neighborhoods and historic qualities").

Those residents, like Petitioners, wanted to preserve "public access" to the viewsheds at the heart of PAP's suit. *Compare* Br. at 16 (criticizing the District Act for making "no allowance for public access" to viewshed) *with* A.R. 80, ¶ 3 (describing the viewsheds as "world-renowned landscapes"), 82-83, ¶ 16 (alleging that PAP filed suit "to attempt to ensure that the lands that provide access to these viewsheds remain in the public trust"). And those residents, like Petitioners, were intent on enforcing "preexisting Harpers Ferry ordinances" that the District Act supposedly displaced. Br. at 16-17 (citing HARPERS FERRY, W. VA., PROJECT AND ZONING CODE art. 1313 (2017)); *cf.* A.R. 89-91, ¶¶ 52-64 (accusing Harpers Ferry and Hill Top of violating several town ordinances, including art. 1313).

Beyond that, all of PAP's nine past and present members were town residents who petitioned the town in 2019 and 2020 to stop the Hill Top project, shared a common interest in the litigation, "would suffer the same losses" if the project proceeded, and would "testify in court" in support of PAP's complaint, if necessary. A.R. 136, ¶¶ 20-21. Although those residents chose to remain anonymous, A.R. 134, ¶ 12, Petitioner Fleming took the extra step and submitted an affidavit in support of PAP's suit, specifically to confirm the concrete nature of the injuries PAP alleged in its complaint for injunctive relief. A.R. 130-131, ¶¶ 3-8. All these facts make one thing clear: these residents' interests were as closely aligned as possible, and if PAP had succeeded in convincing the Jefferson County circuit court to invalidate the District Act, Petitioners would have received the full benefit of that win. When that challenge looked set to fail, Petitioners scrambled to file a new action in Kanawha County to try to avoid preclusion just days before the adverse order came down. "[W]hen a nonparty's actions involve deliberate maneuvering or manipulation in an effort to avoid the preclusive effects of a prior judgment, he may be deemed to be bound by

such judgment." *Beahm*, 223 W. Va. at 274, 672 S.E.2d at 603. So for all these reasons, the circuit court held that they must bear the brunt of the loss. This Court should affirm that ruling.

D. Petitioners say that they could not have had the [required] 'full and fair opportunity' in that case to advance their claims" because they were neither "in privity with [PAP]" nor "parties in the [PAP] litigation. Br. at 8. Not so. As explained above, Petitioners *were* in privity with the parties in the PAP litigation. *See, e.g.*, DEFENSE AGAINST A PRIMA FACIE CASE § 13:3 (revised ed. Apr. 2023) ("Where a person *or one in privity with him or her* has been afforded a full and fair opportunity to litigate a particular issue he or she will not be permitted to do so again." (emphasis added)); *see, e.g.*, *United States v. 111 E. 88th Partners*, No. 16 CIV. 9446 (PGG), 2020 WL 1989396, at *11 (S.D.N.Y. Apr. 27, 2020) ("[C]ollateral estoppel is applicable only if ... the party *or one in privity* had a full and fair opportunity to contest the decision now said to be controlling." (cleaned up and emphasis added)). And apart from that, nothing indicates that the Jefferson County Circuit Court matter presented "a different legal standard," "differences in the quality or extensiveness of" procedures, or "substantially different procedural rules" such that Petitioners would have been deprived a chance to litigate their case or denied a chance to join the first suit as parties. Syl. pts. 2 & 3, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). And the proceeding itself "possessed all of the indicia of an adversarial judicial proceeding," so it provides a full and fair litigation opportunity (with reasonable notice and opportunity to be heard). *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 300, 359 S.E.2d 124, 133 (1987). PAP was given the same opportunity in that court as it would have received in any other circuit court in this state. The members of PAP were represented by counsel in the prior suit. The court permitted their counsel to fully brief their claims that the District Act was a special law and unreasonable. A.R. 123-125. And PAP had the

option to appeal the circuit court's adverse decision, but it declined to take it. This prior adjudication gave the circuit court grounds to bar the repeat claims in the second suit.

E. Lastly, Petitioners mistakenly conflate offensive and defensive collateral estoppel, just as they did below. *Compare* A.R. 143 *with* Br. at 8-9. Petitioners are correct that the "[o]ffensive application [of collateral estoppel] is often disfavored," as it may "encourage a party to deliberately avoid consolidation or joinder in the first action to "wait and see" its outcome with nothing to lose and everything to gain. *W. Va. Dep't of Transp. v. Veach*, 239 W. Va. 1, 10, 799 S.E.2d 78, 87 (2017). But for this "offensive" rule to make sense (and apply), it must be the "*plaintiff* [who] presses for collateral estoppel … as an affirmative device to avoid having to prove liability *against the defendant." Conley*, 171 W. Va. at 591, 301 S.E.2d at 222 (emphasis added). When, as here, "the *defendant* asserts collateral estoppel *against the plaintiff*, it is termed 'defensive' because the defendant seeks to defend and bar the plaintiff's cause of action by a prior adverse judgment rendered against the plaintiff." *Id.* (emphasis added). Respondents thus asserted defensive collateral estoppel here, as they asserted it to bar Petitioners' re-litigation of issues decided in the prior suit. Far from "disfavored," as Petitioners suggest, the ordinary rule of defensive collateral estoppel properly applied to prevent Petitioners below "from relitigating identical issues by merely switching adversaries." *Parklane Hosiery Co.*, 439 U.S. at 651-52 (cleaned up). Unlike offensive collateral estoppel, Respondent's use of doctrine fulfilled the doctrine's purpose to protect against "the expense and vexation" of "multiple lawsuits" on the District Act's constitutionality, and it created a way to "conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility" that the second circuit court's decision would be "inconsistent" with the first one. *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

II. The District Act is a general law.

Because collateral estoppel applies, the Court need not decide (again) whether the District Act is a special law. But if this Court decides to reach the issue anyway, it should hold (as two other courts have) that the law is a general law, not a special one.

A. Our Constitution prohibits passing "a special act" "where a general law would be proper," W. VA. CONST. art. VI, § 39, and requires that the Legislature "provide ... for the … government of cities, towns and villages" "by general laws." W. VA. CONST. art. VI, § 39a. But otherwise, the powers of the Legislature to pass statutes governing municipal affairs "are almost plenary," Syl. pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965): "the Legislature may at any time modify, change or withdraw any power" "granted by general law" to municipalities. Syl. pt. 3, *Cooper v. City of Charleston*, 218 W. Va. 279, 624 S.E.2d 716 (2005). As the circuit court held below, the District Act is not a special law. A.R. 213-217.

The touchstone here is our high court's repeated recognition that the Legislature has "the power … to make reasonable classifications for legislative purposes." *State v. Beaver*, 248 W. Va. 177, ___, 887 S.E.2d 610, 634 (2022) (quoting syl. pt. 7, *Gainer*, 149 W.Va. 740, 143 S.E.2d 351). The point of the "special law" provision is to simply prevent "the unequal conferring of statutory benefits" through "arbitrary" classes that can and cannot benefit from a law. *Beaver*, 248 W. Va. at ___, 887 S.E.2d at 634 (quoting *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 339-40, 268 S.E.2d 590, 595 (1980)). A law is "special" only if it would apply equally "but for" "arbitrarily separat[ing] some persons, places, or things from others." *State ex rel. Dieringer v. Bachman*, 131 W. Va. 562, 568, 48 S.E.2d 420, 425 (1948). So, in the past, laws have violated this prohibition by empowering one lone county to create a public airport, *State ex rel. Greenbrier Cnty. Airport Auth. v. Hanna*, 151 W. Va. 479, 490, 153 S.E.2d 284, 290 (1967), excluding two

judicial circuits from a state-wide judicial pay raise statute, *State ex rel. Cnty. Ct. of Cabell Cnty. v. Battle*, 147 W. Va. 841, 847, 131 S.E.2d 730, 734 (1963), allowing only two cities to levy a hotel occupancy tax, *Bosely*, 165 W. Va. at 340, 268 S.E.2d at 595, and exempting two counties from a requirement that their courthouses remain open on Saturdays, *State ex rel. Taxpayers Protective Ass'n of Raleigh Cnty. v. Hanks*, 157 W. Va. 350, 358, 201 S.E.2d 304, 308 (1973). Nevertheless, the Constitution affords plenty of room for diverse lawmaking before the "special law" threshold is crossed. A law need not be "uniform in its operation and effect" to remain general. Syl. pt. 7, *State ex rel. Heck's, Inc. v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965). It just needs to operate "alike on all persons and property similarly situated." *Id.*

B. The District Act does just that. It does not relate "to particular persons, entities or things." Syl. pt. 7, *Gainer*, 149 W.Va. 740, 143 S.E.2d 351. Nor does it bestow unique benefits or burdens on particular entities like the special laws courts have invalidated. Rather, it grants a benefit to any large tourism development project located in the State's smallest municipalities that is approved as a District under the statute.

Hill Top may be the only development project that has sought designation as a District so far, but that does not mean the District Act is constitutionally flawed. The designation remains open to other qualifying developers, and Respondents are still aware—as they were at oral argument below—of other projects across West Virginia that would qualify if they chose to apply. A.R. 202. The statute's requirements—projects with an "aggregate" cost of "$25 million," W. VA. CODE § 5B-1-9(d), in a small municipality, *id.* § 5B-1-9(a)—are broad enough to encompass different kinds of qualified applicants. Other projects involve aggregate costs many times higher than that threshold. And other municipalities are already primed for such a hosting opportunity,

id. § 8-1-3(4)—whether part of the Home Rule Program, *id.* § 5B-1-9(m)(2), or not, *id.* § 5B-1-9(m)(2).

One thing that is certain about the District Act: it is not a "veiled attempt" to "singl[e] out" Hill Top or Harpers Ferry, Br. at 12-13, as "particular persons, entities or things" slated to receive unique treatment. Syl. Pt. 7, *Gainer*, 149 W.Va. 740, 143 S.E.2d 351. Instead, it applies "uniformly [to] all persons and things of a class." *Gallant v. Cnty. Comm'n of Jefferson Cnty.*, 212 W. Va. 612, 620, 575 S.E.2d 222, 230 (2002) (citation omitted). The class—large tourism development projects located in small municipalities—is "natural, reasonable and appropriate to the [Act's] purpose." *Id.* It creates no special hurdles for municipalities and projects that meet the general qualifications, and it "applies uniformly" to all developer-municipality combinations "who wish to take advantage of its provisions." *Bailey v. Truby*, 174 W. Va. 8, 24, 321 S.E.2d 302, 318 (1984).

C. Petitioners' attacks on specific aspects of the District Act did not convince the circuit court otherwise. A.R. 216-217. They are no more convincing here on appeal.

For starters, it is not "absurd" and "unconstitutionally unmistakable" for the District Act to create a class for tourism development for "five towns under 2,000" residents." Br. at 11 (citing W. VA. CODE § 5B-1-9(j)). The West Virginia Code teems with these sorts of class-size restrictions. *See, e.g.*, W. VA. CODE § 5B-2L-14(d) (2022) (permitting only three BUILD WV Act middle-class housing development districts); *id.* §§ 18-5G-1(g), 18-5G-13(a)(1) (2021) (allowing only ten in-person charter schools and two virtual charter schools during the 2023 school year); *id* § 15A-4A-3 (2021) (authorizing the West Virginia Division of Corrections and Rehabilitation to create "no more than a total of five" expanded work release locations); *id.* § 8-1-5a(c) (2019) (allowing only four Class IV municipalities to join the permanent Home Rule Program each year).

Earlier versions of these statutes often imposed even more significant class-size limitations. *See, e.g.*, W. VA. CODE § 8-1-5a(c) (2007) (restricting the original Home Rule Pilot Program to a total of five municipalities); *id.* § 18-5G-1(g) (2019) (limiting the number of in-person charter schools to three). Under Petitioners' logic, all these laws should be deemed unconstitutional as unreasonable class restrictions. But class-size restrictions like these are constitutional because determinations of "the group or class to be" favored by a statute are "peculiarly a legislative judgment." *Gibson v. W. Va. Dep't of Highways*, 185 W. Va. 214, 220, 406 S.E.2d 440, 446 (1991). And a law is still "general" "even though the class" it creates "is a small one." *Battle*, 147 W. Va. at 848, 131 S.E.2d at 735. Restrictions like these can serve as sensible and cost-effective beta tests of legislative wisdom and effectiveness before the Legislature expands a statute to apply more broadly.

Petitioners cite no authority to say otherwise. The statute in *Groves v. County Court of Grant County*, 42 W. Va. 587, 26 S.E. 460 (1986), for example, Br. at 12-13, had the clear effect of applying to a single county without mentioning that county by name. How? By explicitly applying only to counties "where the county seat" had "been relocated by a special act of the legislature" "since the first day of January, 1872." *Groves*, 42 W. Va. at 590, 26 S.E. at 461. The statute raised suspicions right out of the gate as it became clear that "Grant county stood alone as the one county having this peculiarity in its history." *Id.* at 592, 26 S.E. at 461. To make things worse, no other county could ever "break into this closed circle of classification," as the ratification of Article VI, Section 39 of the Constitution later prohibited the relocation of county seats by special law. *Id.* With Grant County locked in as the only possible member of the class without the people's repeal or a court's overruling of that constitutional provision, it was clear that the Legislature had created it using a forbidden special law.

The Legislature ran into a different sort of problem in *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332 268 S.E.2d 590 (1980). There, the Supreme Court of Appeals of West Virginia considered a statute that authorized a municipal "excise tax upon the occupancy of hotel rooms" to fund the development of "arenas, auditoriums, civic centers and convention centers." *Id.* at 333, 341, 268 S.E.2d at 592, 595 (citing W. VA. CODE § 8-13-3 (1975). But only cities of a certain size—specifically, those with at least 50,000 residents—were allowed to collect this tax. *Bosely*, 165 W. Va. at 341, 268 S.E.2d at 596. In practice, this provision meant only the cities of Huntington and Charleston could qualify. *Id.* at 343, 268 S.E.2d at 597. Because there was "no rational reason to restrict the benefits of the tax to" just two cities, the Court held that this statute was a special law. *Id.* at 341, 268 S.E.2d at 596. The "promotion of tourism and the development of civic facilities," after all, were "statewide concerns," and "every community, perhaps more so in the case of our smaller municipalities," had an interest in "stimulat[ing] economic growth." *Id.* at 341-42, 268 S.E.2d at 596. It was therefore "arbitrar[y] and unreasonabl[e]" for the Legislature to provide a "mechanism to local governments to further these goals if it excludes a single municipality on the basis of population." *Id.*

The District Act could not be more different from the statutes in *Groves* and *Basely*. For starters, the act is an actual class-based law: It permits the West Virginia Department of Economic Development to designate up to five tourism development projects as special Districts so long as they meet the municipality-size and aggregate-cost-total requirements. W. VA. CODE § 5B-1-9(d), (e)(f). True, Hill Top is the only project that has sought this designation so far, and it is in Harpers Ferry. But the District Act does not "take[] as the class characteristic ... the idiosyncra[s]y or peculiarity of" the Hill Top project or Harpers Ferry as did the statute in *Groves*. *Groves*, 42 W. Va. at 592-93, 26 S.E. at 462. Nor is afflicted by the means-ends disconnect that doomed the

Bosely legislation. There, the Legislature designed the statute to "implement a general statewide program of civic and economic development," syl. pt. 4, *Bosely*, 165 W. Va. 332, 268 S.E.2d 590, but by choosing to "confer these benefits only upon those cities with a population in excess of fifty thousand," it failed to satisfy those statewide goals, *id.* at 341, 268 S.E.2d at 596. The "concept of population-based classification" was therefore "not [in] question," but the "relationship *between* the classification and the legislative purpose of promoting statewide tourism and municipal development." *Id.* at 343, 268 S.E.2d at 597; *see also id.* at 340, 268 S.E.2d at 595 ("legislative classifications based on population are not per se invalid," and are constitutional so long as they "natural, reasonable and appropriate to the purpose of the statute"); *accord Donaldson v. Gainer*, 170 W. Va. 300, 307, 294 S.E.2d 103, 110 (1982) (approving population-based classes if "they are found to be reasonable and rationally related to the statutory purpose involved").

Here, the District Act's designation here is broad enough to include projects with an "aggregate" cost of "$25 million," W. VA. CODE § 5B-1-9(d), and those—like Hill Top—whose aggregate costs are six times higher than that threshold. And the District Act applies to small municipalities, including Harpers Ferry *and* any of the State's other nearly 200 qualifying small towns and villages. *Id.* § 8-1-3(4). The Legislature contemplated that the statutes would apply to these other towns. *See, e.g.*, A.R. 53 (noting that Harpers Ferry has been part of the Municipal Home Rule Program since 2015); W. VA. CODE §§ 8-13C-4, 8-13C-5, 5B-1-9(m)(2) (allowing Home Rule Program towns to collect the sales tax exclusively available to that program's participants *and* the collection of sales taxes available for non-Home Rule Program participants). And it is accomplishing precisely what it set out to accomplish: improving economic development and tourism in the state by channeling it to small towns who are key to that development, yet

typically unable to take it on due to a lack of resources—a kind and degree of struggle that larger towns and cities do not have to face.

The District Act is also rational. The Legislature reasonably found large tourism projects to be "of paramount importance to the state and its economy." W. VA. CODE § 5B-1-9(b). These projects could "reliev[e] unemployment" and create "greater sources of revenue" for "state and local government[s]." *Id.* Likewise, the statute applies to towns "with a population of 2,000 or less" because the Legislature determined that "it is in the best interest of the state to induce and assist in tourism development in small municipalities." *Id.* § 5B-1-9(a), (b)*; see also, e.g.*, UN-HABITAT, SMALL TOWN DEVELOPMENT APPROACHES 23-27 (2012), https://bit.ly/3EsNWAS (describing case studies of small mountain towns that fostered development through tourism). These small-town areas—many of which are economically distressed—are "likely to receive the greatest benefit from the State's aid" by having "greater access to the natural beauty that attracts tourism to this State" while possessing insufficient "personnel or financial resources to manage such large projects." A.R. 216. And the Legislature found that empowering the West Virginia Department of Economic Development to "occupy the whole field of the creation and regulation" of these large projects would ensure the type of "uniform and consistent" regulation such large investments need—while requiring the Department to monitor just five possible Districts. A.R. 217.

* * * *

The District Act's benefits are open to any large tourism development projects in the State's smallest municipalities. That class "is not arbitrary or unreasonable" and "applies throughout the state." Syl. pt. 5, *Gallant,* 212 W. Va. 612, 575 S.E.2d 222 (cleaned up). And "[b]ecause the Act operates uniformly on all" developers "who voluntarily choose to" apply for

one of the four remaining designations, "the Act must be considered a general law." *Beaver*, 248 W. Va. at ___, 887 S.E.2d at 634-35.

III. The District Act does not violate equal protection.

Given that collateral estoppel applies, the Court need not reach the merits of the equal-protection issue, either. But if it does, Petitioner's arguments fail here, too.

"[E]qual protection" lays "essentially" the same demands on the Legislature as the prohibition against special laws: it prevents the "arbitrary creation of special classes, and the unequal conferring of statutory benefits." *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 605, 730 S.E.2d 368, 388 (2012); *accord Beaver*, 248 W. Va. ___, 887 S.E.2d at 634 (quoting *Tennant*, 229 W. Va. at 605, 730 S.E.2d at 388) ("[T]he 'special legislation' prohibition is essentially an equal protection clause."). Legislation cannot treat "similarly situated persons" "in a disadvantageous manner." *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 717, 715 S.E.2d 405, 415 (2011). But if the legislative class is "reasonable, proper and based on sound exercise of' the Legislature's prerogatives, and all entities within that class are treated equally," it will be upheld. *Gallant*, 212 W. Va. at 620, 575 S.E.2d at 230. And where, as here, a statute relates to "economic rights," it clears the equal protection bar's lowest possible rung: as long as the classes created are "rational," "based on social, economic, historic or geographic factors," and "bear[] a reasonable relationship to a proper governmental purpose," the Constitution creates no obstacle. Syl. pt. 4, *Gibson*, 185 W. Va. 214, 406 S.E.2d 440.

The district Act satisfies these equal protection requirements. The statute relates to economic rights: it concerns the promotion of tourism development projects that are expected to "create[e] new and greater sources of revenues" and "reliev[e] unemployment." W. VA. CODE § 5B-1-9(b). And it "bears a reasonable relationship to" those goals. The Legislature reasonably limited the class of development projects to those with aggregate costs of not less than $25 million,

id. § 5B-1-9(d), because—again—it considered these large projects to be "of paramount importance to the state and its economy." *Id.* § 5B-1-9(b). Likewise, it limited the statute to towns "with a population of 2,000 or less" because it determined that "it is in the best interest of the state to induce and assist in tourism development in small municipalities." *Id.* And it found that empowering the West Virginia Department of Economic Development to "occupy the whole field of the creation and regulation" of these large projects it would promote "uniform[ity] and consisten[cy]." *Id.*

These determinations are rational. Again, an influx of large tourism investments will help the state and its economy. An influx of these investments into large projects in small towns and villages will amplify the Legislature's interests even further. *Bosely*, 165 W. Va. at 341-42, 268 S.E.2d at 596 (noting that there was a greater "interest" in "stimulat[ing] economic growth" "in the case of [West Virginia's] smaller municipalities"). And it is rational for the State to assume the responsibility and burden of regulating these large projects. Because of the District Act, the small towns where Districts are located will reap the economic benefit of these large projects without bearing the significant burden of overseeing and regulating them. Instead, the State's involvement may facilitate investment otherwise unavailable to West Virginia's smallest towns and open up "greater access to the natural beauty that attracts tourism to this State" that may have been inaccessible due to a lack of "personnel or financial resources to manage [] large projects" granting that access. A.R. 216. And it may provide developers the type of regulatory certainty that is necessary for the significant expenditure of time, effort, and capital demanded by these large tourism development projects.

In this way, everyone wins: the state's smallest towns receive a great benefit that may have otherwise been unavailable to them; developers receive the sort of regulatory certainty that

is necessary given the significant expenditure of time, effort, and capital that their large tourism development projects require (especially if the smaller town does not have enough personnel to assist with the larger project); and the state agency can provide strong regulatory oversight without itself being weighed down by an uncapped number of large projects to regulate. *See* W. VA. CODE R. § 145-16-9.2.4 (explaining that the agency is responsible for "monitoring on-going compliance" with the District agreements); W. VA. CODE § 5B-1-9(b) (requiring the agency to "uniform[ly] and consistent[ly]" regulate each district); *Armour v. City of Indianapolis*, 566 U.S. 673, 686 (2012) (reducing administrative expenses may "provide[] a rational basis" under equal protection). And even if there's room for disagreement on whether these positive outcomes will play out as expected, the "wisdom or desirability of [such] legislative policy" decisions are rational and not subject to judicial review. *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991). So equal protection is respected.

Petitioners try to muddy the waters by insinuating that the District Act is somehow unconstitutional because it is supposedly a product of improper lobbying efforts by SWaN or any other entity working on its behalf. Br. at 12. These aspersions are, as Petitioners seem to admit, just unsupported guesses. *Id.* But either way, this Court should ignore the *ad hominem*. "Lobbying and corporate communications with elected officials occur on a regular basis." *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 355 (2010). And those communications are afforded First Amendment protection. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 n.31 (1978). Just because the "access" exists "does not mean that these [elected] officials are corrupt." *Citizens United,* 558 U.S. at 359. Indeed, the Constitution's bar on special laws "discourages" "arbitrary and exclusive legislation" as well as the "corruption and bribery" it engenders. *Hanks,* 157 W. Va. at 353, 201 S.E.2d at 306. But since its founding, West Virginia courts have refused

to "presume fraudulent intent and corrupt purpose on the part of the Legislature." Syl. pt. 10, *Slack v. Jacob,* 8 W. Va. 612, 1875 WL 3439 (1875). Federal courts do the same, *Cir. City Stores, Inc. v. Adams,* 532 U.S. 105, 120 (2001), and refuse to "impute the motives of entities lobbying for legislation to the [legislature] itself." *Legend Night Club v. Miller,* 637 F.3d 291, 298 (4th Cir. 2011). And our high court has, too. *Morrisey,* 243 W. Va. at 99, 842 S.E.2d at 468 ("acts of the Legislature are presumed to be constitutional" and should be interpreted "in any reasonable way which will sustain [their] constitutionality").

The District Act is no exception. It creates reasonable classes that rationally serve the statute's purposes, and its benefits and burdens apply equally to all those within the established classes. Especially given how Petitioners lean on innuendo and speculation, this Court should not infer any corrupt or fraudulent intent by the Legislature. Instead, it must presume that the statute is constitutional. And it "must favor a construction" that "regard[s] [the District Act] as general rather than special." *Gainer,* 149 W. Va. at 757, 143 S.E.2d at 363. Maybe lobbying efforts could merit a mention in a case featuring a winning special-law claim. But its relevance would be limited, and it would only merit a mention after a challenged statute is found to be an impermissible special law. *See, e.g.*, *Bosely,* 165 W. Va. at 342 n.2, 268 S.E.2d at 596 n.2 (noting that the "hotel occupancy tax" was "the only instance" where taxing "authority is restricted to one class of municipalities," triggering the "inescapable" "conclusion" that the "statute resulted from lobbying by special interest"). That is not necessary here. As they did below, Petitioners fail to show here that the District Act is a specific law that violates equal protection.

IV. The District Act does not infringe on any other constitutional rights.

Lastly, the circuit court also got it right when it confirmed that the District Act does not infringe on Petitioners' right to vote, does not violate some sort of right Petitioners have to "self

rule," and does not give rise to any sort of constitutionally founded safety concerns. A.R. 217-220.

A. To level set, the District Act is not the "virtually unprecedented … intrusion into local matters" that Petitioners say it is. Br. at 14. Rather than eliminate regulation of designated Districts, the District Act simply transfers a subset of regulation from a municipality to the West Virginia Department of Economic Development. The Department is the state agency responsible for considering and approving a developer's application for a District designation, and it executes the agreements that will govern a District's eventual construction and operation. W. VA. CODE § 5B-1-9(b), (d); *see also id.* § 5B-2E-6(1). The Legislature was careful in structuring the substance and effect of these agreements. The Department must establish a process through which it will "monitor[] on-going compliance" with the agreement. W. VA. CODE R. § 145-16-9.2.4. And it must further implement "[t]he rules, regulations, standards, processes, or procedures for design, acquisition, construction, installation and equipping, and subsequent operation" of the District, including its compliance with building codes, land use and permitting, historic preservation, demolition permitting, noise and lighting ordinance. *Id.* § 145-16-9.2.2. This sort of responsibility shift is not uncommon. *See Robinson v. City of Bluefield*, 234 W. Va. 209, 211, 764 S.E.2d 740, 742 (2014) (anytime a "municipal ordinance conflicts with a statute, the ordinance is void").

This economic-development law is far from a legislative attempt to "wipe[] out" a municipal government and "replace[] it with a new one." Br. at 14 n.3 (citing *Booten v. Pinson*, 77 W. Va. 412, 89 S.E. 985 (1915)). That rhetoric ignores how the District Act leaves much of a municipality's authority intact. Municipalities, just as they do from other similarly situated businesses, can still collect business, occupation, sales, hotel-occupancy, and use taxes from

Districts, and impose fees for fire, police, sanitation services, and utilities. W. VA. CODE § 5B-1-9(m). In turn, then, Districts are "entitled to municipal police protection" and "fire protection" like similarly situated businesses. *Id.* § 5B-1-9(m)(8). This parsing of responsibility is a measured shift, not a drastic one.

Setting aside the shift itself, Petitioners cannot claim any guaranteed right to "self-rule." As the circuit court pointed out, "[a] right to 'self rule' appears nowhere in the text of the West Virginia Constitution." A.R. 218. Petitioners cite constitutional provisions that recognize an individual's "inherent rights" "of life[,] liberty," "property," and the pursuit of "happiness," W. VA. CONST. art. III, § 1, the derivation of government power from "the people," *id.* art. III, § 2, and the reservation of the peoples' right "to reform, alter or abolish" the government, *id.* art. III, § 3. But none of these rights—either separately or mashed together—form a sort of nebulous right to "self rule."

The Supreme Court of Appeals of West Virginia has never recognized a right to "self rule," either. If anything, the opposite has been true. The Court has stressed that "[m]unicipalities have no inherent power" and "depend[] solely upon grants of power" from "the Legislature." Syl. pt. 1, *State ex rel. Plymale v. City of Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963); *accord City of Mullens v. Union Power Co.*, 122 W. Va. 179, 183, 7 S.E.2d 870, 872 (1940) (rejecting the claim that "municipalities are clothed with the right of self-determination" which prohibited state agency oversight). Our Legislature, on the other hand, has "almost plenary" "general powers," subject only to the "constitutional limits." *Tennant*, 229 W. Va. at 593, 730 S.E.2d at 376 (quoting syl. pt. 1, *Gainer*, 149 W.Va. 740, 143 S.E.2d 351). So long as it is "not interdicted by the Constitution," *Tennant*, 229 W. Va. at 594, 730 S.E.2d at 377, the Legislature "may at any time modify, change or withdraw any power" "granted by general law" to municipalities, syl. pt. 3,

Cooper, 218 W. Va. 279, 624 S.E.2d 716; *accord City of Morgantown v. Nuzum Trucking Co.*, 237 W. Va. 226, 231-32, 786 S.E.2d 486, 491-92 (2016) (state agency's "designation" of roads within city limits as a "connecting parts of the state road system" preempted city ordinance regulating vehicles' weight and size); *Delardas v. Morgantown Water Comm'n*, 148 W. Va. 776, 781, 137 S.E.2d 426, 431 (1964) (statute put municipality's operation of a public utility "under the supervision of and subject it to regulation by the" state agency); *Chesapeake & Potomac Tel. Co. of W. Va. v. City of Morgantown*, 144 W. Va. 149, 162, 107 S.E.2d 489, 496 (1959) (state agency's authority to regulate local telephone company is "paramount to rights given to the city"); *Brackman's Inc., v. City of Huntington*, 126 W. Va. 21, 35, 27 S.E.2d 71, 78 (1943) (state agency "has final decision on who shall be entitled to sell non-intoxicating beer in" city and the city's power "must yield to the predominant power of the State").

Nothing prevented the Legislature, through the District Act, from transferring certain authority over areas within a municipality's geographic limits to the West Virginia Department of Economic Development. The circuit court was right to dismiss Petitioners' "self-rule" claims, A.R. 218-219, and this Court would be right to affirm that ruling.

B. The circuit court also appropriately dismissed Petitioners' "right to vote" claim. A.R. 219. The Constitution provides that the "citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside." W. VA. CONST. art. IV, § 1. But the District Act, like the Development Act before it, does not affect this right. The statute does not limit Petitioners' right to participate in any election, including any changes to "qualifications and disqualifications" for such participation. A.R. 219; *see Simms v. Cnty. Ct. of Kanawha Cnty.*, 134 W. Va. 867, 871, 61 S.E.2d 849, 851 (1950) (same). The District Act merely transfers the authority to regulate up to five Approved Districts within small municipalities to the West Virginia

Department of Economic Development, and it preempts those municipal ordinances that would interfere with the "uniform and consistent" creation and regulation of these same Districts. W. VA. CODE § 5B-1-9(b). Like a restriction on municipal control over local utility companies, *Mullens,* 122 W. Va. at 183, 7 S.E.2d at 872, or regulation of state roads that run through a city's geographic boundaries, *Nuzum,* 237 W. Va. at 231, 786 S.E.2d at 491, or the regulation of alcohol, *Brackman's Inc.,* 126 W. Va. at 35, 27 S.E.2d at 78, the District Act merely modifies powers previously granted to municipalities with zero effect on the municipality residents' right to vote. That these residents may *disagree* with the modification is a separate issue—one they can try to remedy the next time they step to a ballot box. But to allow "these local interests [to] trump the statewide goals of the Legislature" by some other way would "be subversive and destructive [to our] entire system" of state government. *Mullens,* 122 W. Va. at 183, 7 S.E.2d at 872. The state's general law "predominates," *Brackman's Inc.,* 126 W. Va. at 24, 27 S.E.2d at 73, just as it should.

C. Finally, the circuit court rightly rejected the sparse mentions of safety concerns in Petitioners' amended complaint. A.R. 219; *cf.* A.R. 23-24, ¶¶ 19-21. These concerns are no more "constitutionally founded" than the others the court dismissed. A.R. 219. Here again, this issue starts and ends with what the power vested in the West Virginia Legislature. Among the other powers already discussed is a "wide discretion in determining what the public interest requires." Syl. pt. 5, *In re Brandi B.,* 231 W. Va. 71, 743 S.E.2d 882 (2013). And the public interest naturally encompasses the best way to "provide for the protection of the safety, health, morals, and general welfare of the public." Syl. pt. 1, *W. Va. Water Serv. Co., v. Cunningham,* 143 W. Va. 1, 98 S.E.2d 891 (1957). Whether the Legislature decides to delegate those powers to municipalities, *id.,* or withdraws them, syl. pt. 3, *Cooper,* 218 W. Va. 279, 624 S.E.2d 716, the "wisdom or desirability"

of those decisions are generally not subject to judicial review, *Lewis*, 185 W. Va. at 692, 408 S.E.2d at 642.

Petitioners are right that "safety" guarantees within the state constitution's substantive due process clauses have prohibited certain restrictions that "necessarily impinge on … safety." Br. at 14-15 (quoting *Women's Health Cntr. of W. Va., v. Panepinto*, 191 W. Va. 436, 443, 446 S.E.3d 658, 665 (1993) (abortion funding)); *but see* W. VA. CONST. art. VI, § 57 (2018) (later affirming that "Nothing in this Constitution ... requires the funding of abortion."). But the District Act is economic and does not affect "suspect classes or fundamental rights." *Gibson*, 185 W. Va. at 219, 406 S.E.2d at 445. As a result, and for good reason, it is subject to highly-deferential "rational-basis" standards. *Verizon W. Va., Inc., v. W. Va. Bureau of Emp. Programs*, 214 W. Va. 95, 121, 586 S.E.2d 170, 196 (2003). "[A]djusting the burdens and benefits of economic life," after all, is a task the Legislature is uniquely qualified to perform. *Id.*

The Legislature performed that task here by crafting a specific suite of regulations that the West Virginia Department of Economic Development will administer for the five possible approved Districts. The District Act requires the Department to "ensure compliance with" its rules. W. VA. CODE R. § 146-16-9.2.3. At the same time, it allowed other state agencies to exercise the enforcement powers they have always had under their statutes—powers that ensure regulation will continue to address each of the safety issues over which Petitioners expressed concern. Building codes under this regime, for example, must not be "less restrictive than" those promulgated by the State Fire Marshall. W. VA. CODE R. § 146-16-9.2.2.a (2021); W. VA. CODE § 5B-1-9(m)(9) (explicitly subjecting Districts to the "State Building Code"). Historic preservation standards may not be "less restrictive than the requirements of the West Virginia State Office of Historic Preservation." W. VA. CODE R. § 146-16-9.2.2.c. Regulation of asbestos abatement and

hazardous-material disposal remain strong as ever, enforced by the Bureau of Public Health and the Division of Environmental Protection, respectively. W. VA. CODE §§ 16-32-1 *et seq.* (2016); *id.* §§ 22-18-1 *et seq.* (1994). And the absence or failure of any of these does not trigger a constitutional crisis for Petitioners to solve; it would merely highlight the various administrative and civil avenues each statute provides. *See, e.g.*, W. VA. CODE § 22-18-19(a) (civil actions against persons "alleged to be in violation" of hazardous waste management statutes). In other words, if Petitioners have a problem with the health, building, and safety codes themselves, they should take that up not by attacking the District Act, but by challenging those codes through the channels that are already in place.

So for all these reasons, Petitioners' last grab-bag of constitutional claims poses no real challenge to the District Act, either.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
Docket No.

Docket No. 23-ICA-174

ALEXANDER FLEMING, CAROLE CARTER, CAROL GALLANT, BARBARA HUMES, and BENJAMIN BUCKLEY,

Petitioners,

v.

MITCH CARMICHAEL, in His Official Capacity as Secretary of the West Virginia Department of Economic Development, and MIKE GRANEY, in His Official Capacity as Director of the West Virginia Department of Economic Development,

Respondents.

CERTIFICATE OF SERVICE

I, Michael Williams, do hereby certify that the foregoing has been served on the following counsel of record via the E-Filing System:

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