

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 25-642

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WEST VIRGINIA BOARD OF EDUCATION,
and MICHELE BLATT, in her capacity as
State Superintendent of Schools,

Petitioners,

v.

KRIS WARNER, in his capacity as
West Virginia Secretary of State,

Respondent.

RESPONDENT KRIS WARNER'S
RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE.....	3
I. The 1863 Constitution and First School Law	3
II. The 1872 Constitution and the Superintendent.....	5
III. The Superintendent Supervises: 1872-1958	7
A. Reports and Recommendations to the Legislature.....	7
B. Interpretations of State Law—Not Legislation.....	9
C. Accountability to Voters.....	11
IV. The 1958 Constitutional Amendment and the Board.....	12
V. Legislative Oversight Anew: 1988-Today	20
SUMMARY OF ARGUMENT	25
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	26
LEGAL STANDARD	26
ARGUMENT	27
I. House Bill 2755 is a constitutional exercise of the Legislature’s power of oversight over education.....	27
A. The Legislature has broad powers in the educational realm.....	28
B. Article XII, Section 2 of the West Virginia Constitution does not bar the Legislature from the educational realm	29
1. “Shall Be Vested”	30
2. “Supervision”	32
3. “General”	34
4. “Such Duties”.....	35
5. “Prescribed by Law”	36
C. History and context confirm that the Legislature can play a role	40

D.	Other persuasive authorities confirm that the Legislature can review education-related rules	43
II.	<i>Hechler</i> does not render House Bill 2755 unconstitutional	47
A.	<i>Hechler</i> is distinguishable.....	47
B.	Alternatively, the Court should overrule <i>Hechler</i>	49
III.	Failed proposed constitutional amendments are irrelevant.....	53
	CONCLUSION.....	55

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Aguillard v. Treen</i> , 440 So. 2d 704 (La. 1983)	46
<i>State ex rel. Allen v. Bedell</i> , 193 W. Va. 32, 454 S.E.2d 77 (1994).....	19
<i>State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.</i> , 151 W. Va. 207, 151 S.E.2d 102 (1966).....	26
<i>Appalachian Power Co. v. Pub. Serv. Comm’n of W. Va.</i> , 170 W. Va. 757, 296 S.E.2d 887 (1982).....	32
<i>Appalachian Power Co. v. State Tax Dep’t of W. Va.</i> , 195 W. Va. 573, 466 S.E.2d 424 (1995).....	1
<i>Arslain v. Alderson</i> , 126 W. Va. 880, 30 S.E.2d 533 (1944).....	28
<i>State ex rel. Barker v. Manchin</i> , 167 W. Va. 155, 279 S.E.2d 622 (1981).....	43
<i>Bailey v. Truby</i> , 174 W. Va. 8, 321 S.E.2d 302 (1984).....	19, 49, 50
<i>Barrington v. Neuse River Ferry Co.</i> , 69 N.C. 165 (1873)	6
<i>Bateman v. Bd. of Examiners of State of Utah</i> , 322 P.2d 381 (Utah 1958).....	46
<i>State ex rel. Bd. of Ed., Kanawha Cnty. v. Rockefeller</i> , 167 W. Va. 72, 281 S.E.2d 131 (1981).....	55
<i>Bd. of Educ. of Cnty. of Kanawha v. W. Va. Bd. of Educ.</i> , 184 W. Va. 1, 399 S.E.2d 31 (1990).....	30
<i>State ex rel. Bd. of Educ. of Kanawha Cnty. v. Casey</i> , 176 W. Va. 733, 349 S.E.2d 436 (1986).....	55
<i>Bd. of Educ. of Sch. Dist. No. 1 in City & Cnty. of Denver v. Booth</i> , 984 P.2d 639 (Colo. 1999).....	34
<i>Bd. of Educ. of State of Haw. v. Waihee</i> , 768 P.2d 1279 (Haw. 1989)	46
<i>State ex rel. Blankenship v. Richardson</i> , 196 W. Va. 726, 474 S.E.2d 906 (1996).....	27
<i>Blue v. Tetrick</i> , 69 W. Va. 742, 72 S.E. 1033 (1911).....	31

<i>Bridges v. Shallcross</i> , 6 W. Va. 562 (1873)	31
<i>Bufkin v. Collins</i> , 604 U.S. 369 (2025).....	42
<i>Chapman v. Huntington W. Va. Hous. Auth.</i> , 121 W. Va. 319, 3 S.E.2d 502 (1939).....	32
<i>Citizens Protecting Mich.’s Const. v. Sec’y of State</i> , 921 N.W.2d 247 (Mich. 2018).....	54
<i>State ex rel. Cnty. Ct. of Cabell Cnty. v. Battle</i> , 147 W. Va. 841, 131 S.E.2d 730 (1963).....	37
<i>Collins v. Yellen</i> , 594 U.S. 220 (2021).....	1
<i>State ex rel. Cooper v. Caperton</i> , 196 W. Va. 208, 470 S.E.2d 162 (1996).....	55
<i>State ex rel. Cooper v. Tennant</i> , 229 W. Va. 585, 730 S.E.2d 368 (2012).....	28
<i>In re D.H.</i> , No. 23-416, 2024 WL 4763258 (W. Va. Nov. 13, 2024)	32
<i>Detch v. Bd. of Educ. of Greenbrier Cnty.</i> , 145 W. Va. 722, 117 S.E.2d 138 (1960).....	17
<i>State ex rel. Dillon v. Braxton Cnty. Ct.</i> , 60 W. Va. 339, 55 S.E. 382 (1906).....	37
<i>State ex rel. Discover Fin. Servs., Inc. v. Nibert</i> , 231 W. Va. 227, 744 S.E.2d 625 (2013).....	38, 49
<i>Duncan v. Baltimore & O.R. Co.</i> , 68 W. Va. 293, 69 S.E. 1004 (1910).....	37
<i>Edlis, Inc. v. Miller</i> , 132 W. Va. 147, 51 S.E.2d 132 (1948).....	43
<i>El Centro De La Raza v. State</i> , 428 P.3d 1143 (Wash. 2018).....	45
<i>F.W. Woolworth Co. v. Town of Greenwich</i> , 690 A.2d 405 (Conn. Ct. App. 1997).....	35
<i>State ex rel. Farley v. Spaulding</i> , 203 W. Va. 275, 507 S.E.2d 376 (1998).....	1
<i>State ex rel. Fox v. Brewster</i> , 140 W. Va. 235, 84 S.E.2d 231 (1954).....	15
<i>Fractional Sch. Dist. No. 1 of Barry Twp. v. Twp. Sch. Dist. of Barry Twp.</i> , 259 Mich. 75 (1932)	34

<i>Frazier v. Burcker</i> , 248 W. Va. 21, 886 S.E.2d 356 (2023).....	47
<i>Free Speech Coal., Inc. v. Paxton</i> , 606 U.S. 461 (2025).....	47
<i>Ex parte Glass</i> , 81 W. Va. 111, 93 S.E. 1036 (1917).....	37
<i>Gundy v. United States</i> , 588 U.S. 128 (2019).....	31
<i>Hammons v. W. Va. Off. of Ins. Com’r</i> , 235 W. Va. 577, 775 S.E.2d 458 (2015).....	50
<i>Harbert v. Harrison Cnty. Ct.</i> , 129 W. Va. 54, 39 S.E.2d 177 (1946).....	1
<i>Heath v. Johnson</i> , 36 W. Va. 782, 15 S.E. 980 (1892).....	8
<i>Hill v. Barbour Cnty. Ct.</i> , 117 W. Va. 288, 185 S.E. 227 (1936).....	37
<i>Hodges v. Pub. Serv. Comm’n</i> , 110 W. Va. 649, 159 S.E. 834 (1931).....	16
<i>Hudson v. Kelly</i> , 263 P.2d 362 (Ariz. 1953).....	39
<i>Huffman v. Goals Coal Co.</i> , 223 W. Va. 724, 679 S.E.2d 323 (2009).....	43
<i>Huntington Chamber of Com. v. Pub. Serv. Comm’n</i> , 84 W. Va. 81, 99 S.E. 285 (1919).....	37
<i>Interstate Fire & Cas. Co. v. Roman Cath. Church of Diocese of Phoenix</i> , 761 F.3d 953 (9th Cir. 2014)	35
<i>Jarrett Printing Co. v. Riley</i> , 188 W. Va. 393, 424 S.E.2d 738 (1992).....	27
<i>Jelly v. Dils</i> , 27 W. Va. 267 (1885)	39
<i>Johnson v. Commonwealth ex rel. Meredith</i> , 165 S.W.2d 820 (Ky. 1942)	39
<i>State ex rel. Justice v. King</i> , 244 W. Va. 225, 852 S.E.2d 292 (2020).....	30
<i>State ex rel. K.M. v. W. Va. Dep’t of Health & Hum. Res.</i> , 212 W. Va. 783, 575 S.E.2d 393 (2002).....	40
<i>In re Kanawha Val. Bank</i> , 144 W. Va. 346, 109 S.E.2d 649 (1959).....	49

<i>Knick v. Twp. of Scott</i> , 588 U.S. 180 (2019).....	49
<i>Koschkee v. Taylor</i> , 929 N.W.2d 600 (Wisc. 2019).....	44
<i>State ex rel. Kucera v. City of Wheeling</i> , 153 W. Va. 538, 170 S.E.2d 367 (1969).....	27
<i>Laidley v. Cent. Land Co.</i> , 30 W. Va. 505, 4 S.E. 705 (1887).....	16
<i>State ex rel. Langer v. Totten</i> , 175 N.W. 563 (N.D. 1919)	46
<i>Lawson v. Kanawha Cnty. Ct.</i> , 80 W. Va. 612, 92 S.E. 786 (1917).....	36
<i>Long v. City of Weirton</i> , 158 W. Va. 741, 214 S.E.2d 832 (1975).....	52
<i>MacDonald v. City Hosp., Inc.</i> , 227 W. Va. 707, 715 S.E.2d 405 (2011).....	28
<i>In re Mary Silvestri’s Teaching Cont. With Indep. Sch. Dist. No. 695</i> , 480 N.W.2d 117 (Minn. Ct. App. 1992).....	18, 30, 35
<i>State ex rel. Mattson v. Kiedrowski</i> , 391 N.W.2d 777 (Minn. 1986).....	44
<i>McCulley v. State</i> , 53 S.W. 134 (Tenn. 1899).....	39
<i>Middleton v. State</i> , 309 Ga. 337, 846 S.E.2d 73 (2020).....	42
<i>State ex rel. Miller v. Bd. of Educ. of Unified School Dist. No. 398</i> , 511 P.2d 705 (Kan. 1973)	20
<i>State ex rel. Morgan v. Miller</i> , 177 W. Va. 97, 350 S.E.2d 724 (1986).....	34
<i>State ex rel. Mountaineer Park, Inc. v. Polan</i> , 190 W. Va. 276, 438 S.E.2d 308 (1993).....	53
<i>Nelson v. W. Virginia Pub. Emps. Ins. Bd.</i> , 171 W. Va. 445, 300 S.E.2d 86 (1982).....	40
<i>N.C. State Bd. of Educ. v. State</i> , 814 S.E.2d 54 (N.C. 2018).....	44, 45
<i>Pauley v. Bailey</i> , 174 W. Va. 167, 324 S.E.2d 128 (1984).....	19, 20, 33, 50
<i>Pauley v. Kelly</i> , 162 W. Va. 672, 255 S.E.2d 859 (1979).....	3, 28

<i>Payne v. Staunton</i> , 55 W. Va. 202, 46 S.E. 927 (1904)	25
<i>People v. Brophy</i> , 120 P.2d 946 (Cal. Ct. App. 1942)	33
<i>People v. Regents of Univ. of Mich.</i> , 18 Mich. 469 (1869)	5
<i>In re Persons</i> , 334 N.W.2d 471 (N.D. 1983)	33
<i>Powers v. State</i> , 318 P.3d 300 (Wyo. 2014)	39
<i>In re R.M.</i> , No. 24-357, 2025 WL 3158180 (W. Va. Nov. 12, 2025)	49
<i>Randolph Cnty. Bd. of Educ. v. Adams</i> , 196 W. Va. 9, 467 S.E.2d 150 (1995)	3, 28, 29, 40
<i>Richardson-Merrell, Inc. v. Main</i> , 402 P.2d 746 (Or. 1965)	35
<i>State ex rel. Rist v. Underwood</i> , 206 W. Va. 258, 524 S.E.2d 179 (1999)	42
<i>S.D. Bd. of Regents v. Meierhenry</i> , 351 N.W.2d 450 (S.D. 1984)	46
<i>Savannah Invs. v. Centimark Corp.</i> , No. 405CV038, 2005 WL 8156293 (S.D. Ga. Sept. 9, 2005)	31
<i>Speidel v. Schlosser</i> , 13 W. Va. 686 (1879)	37
<i>State Bd. of Educ. v. Honig</i> , 16 Cal. Rptr. 2d 727 (Cal. Ct. App. 1993)	45
<i>State v. Baltimore & O.R. Co.</i> , 78 W. Va. 526, 89 S.E. 288 (1916)	35
<i>State v. Beaver</i> , 248 W. Va. 177, 887 S.E.2d 610 (2022)	28, 32, 34
<i>State v. Cottrill</i> , 31 W. Va. 162, 6 S.E. 428 (1888)	39
<i>State v. Euman</i> , 210 W. Va. 519, 558 S.E.2d 319 (2001)	32
<i>State v. Gattavara</i> , 47 P.2d 18 (Wash. 1935)	6
<i>State v. Gaughan</i> , 55 W. Va. 692, 48 S.E. 210 (1904)	36

<i>State v. Huber</i> , 129 W. Va. 198, 40 S.E.2d 11 (1946).....	2, 36
<i>State v. Johnson</i> , 60 P. 1068 (Kan. 1900)	31
<i>State v. Stephens</i> , 387 N.E.2d 252 (Ohio Ct. App. 1978).....	49
<i>State v. Sutherland</i> , 231 W. Va. 410, 745 S.E.2d 448 (2013).....	49
<i>Stepp v. Cottrell on behalf of Est. of Cottrell</i> , 246 W. Va. 588, 874 S.E.2d 700 (2022).....	42
<i>Straus v. Governor</i> , 592 N.W.2d 53 (Mich. 1999).....	45, 46
<i>Sutherland v. Miller</i> , 79 W. Va. 796, 91 S.E. 993 (1917).....	1
<i>United States v. Craft</i> , 535 U.S. 274 (2002).....	23
<i>United States v. Lathrop</i> , 17 Johns. 4 (N.Y. Sup. Ct. 1819).....	31
<i>In re Validation Proceeding to Determine the Regularity & Legality of Multnomah Cnty. Home Rule Charter Section 11.60 & Implementing Ordinance No. 1243 Regulating Campaign Fin. & Disclosure</i> , 462 P.3d 706 (Or. 2020)	54
<i>W. Va. Bd. of Educ. v. Hechler</i> , 180 W. Va. 451, 376 S.E.2d 839 (1988)	1, 2, 21, 23, 24, 26, 47, 48, 49, 50, 51, 52, 53
<i>State ex rel. W. Va. Citizen Action Grp. v. Tomblin</i> , 227 W. Va. 687, 715 S.E.2d 36 (2011).....	33
<i>W. Va. Tr. Fund, Inc. v. Bailey</i> , 199 W. Va. 463, 485 S.E.2d 407 (1997).....	38
<i>State ex rel. W. Va. Bd. of Educ. v. Gainer</i> , 192 W. Va. 417, 452 S.E.2d 733 (1994).....	43
<i>W. Va. Bd. of Educ. v. Bd. of Educ. of the Cnty. of Nicholas</i> , 239 W. Va. 705, 806 S.E.2d 136 (2017).....	38, 39, 48
<i>Yoshisato v. Superior Ct.</i> , 831 P.2d 327 (Cal. Ct. App. 1992)	54
 Constitutional Provisions	
U.S. CONST. art. I, § 1	30

W. VA. CONST. art. III, § 16.....	52
W. VA. CONST. art. IV, § 9.....	30
W. VA. CONST. art. VI, § 1.....	29
W. VA. CONST. art. VII, § 1 (1872).....	6, 38
W. VA. CONST. art. VIII, § 1.....	30
W. VA. CONST. art. VIII, § 3.....	30
W. VA. CONST. art. X, § 1 (1863).....	3
W. VA. CONST. art. X, § 2 (1863).....	3
W. VA. CONST. art. X, § 3 (1863).....	3
W. VA. CONST. art. X, § 4 (1863).....	3
W. VA. CONST. art. XII, § 1 (1872).....	5
W. VA. CONST. art. XII, § 1 (1958).....	28
W. VA. CONST. art. XII, § 2 (1872).....	5, 16, 21, 36, 41
W. VA. CONST. art. XII, § 2 (1958).....	16, 29, 30, 36
W. VA. CONST. art. XII, § 12 (1872).....	5

Statutes

W. VA. ACTS, c. 27, § 128 (1908).....	11
W. VA. ACTS, c. 27, § 130 (1908).....	38
W. VA. ACTS, c. 64 (1891).....	9
W. VA. ACTS, c. 74, § 47 (1866).....	11
W. VA. ACTS, c. 123, § 67 (1872-73).....	7
W. VA. ACTS, c. 137 (1863).....	4
W. VA. ACTS, c. 137, § 28 (1863).....	4, 10, 11
W. VA. ACTS, c. 137, § 31 (1863).....	4, 7
W. VA. ACTS, 3rd Ex. Sess., c. 7 (1988).....	20
W. VA. ACTS, c. 74 (1990).....	22
W. VA. CODE § 18-2-1 (1959).....	17
W. VA. CODE § 18-2-5 (1959).....	17
W. VA. CODE § 18-3-6 (2025).....	10
W. VA. CODE § 18-3-8 (2025).....	7
W. VA. CODE § 18-9A.....	29

W. VA. CODE § 18-9G	29
W. VA. CODE § 29-12A-5	52
W. VA. CODE § 29A-3-9 (2025)	22
W. VA. CODE § 29A-3A-3 (1988).....	20, 47
W. VA. CODE § 29A-3A-10 (1988).....	20, 47
W. VA. CODE § 29A-3A-13 (1988).....	21
W. VA. CODE § 29A-3A-16a (1988).....	21, 47
W. VA. CODE § 29A-3B-8 (1990).....	22, 23
W. VA. CODE § 29A-3B-8 (2025).....	24
W. VA. CODE § 29A-3B-9 (1990).....	22
W. VA. CODE § 29A-3B-9 (2025)	23, 24, 48
W. VA. CODE § 29A-3B-10 (2025).....	24, 48

Rules and Regulations

W. VA. CODE R. § 126-3A-1.....	18
W. VA. CODE R. § 126-14-1.....	18
W. VA. CODE R. § 126-126-1.....	18
W. VA. CODE R. § 126-172-1.....	18
W. VA. R. APP. P. R. 20.....	26

Other Authorities

1945 W. Va. S. Con. Res. 6	13
A.L. WADE, THIRD ANNUAL REPORT OF COUNTY SUPERINTENDENT OF FREE SCHOOLS OF MONONGALIA COUNTY, WEST VIRGINIA (1878).....	9
Amicus Curie Br. of W. Va. Educ. Ass’n, W. Va. Bd. of Educ. v. Hechler, 180 W. Va. 451, 376 S.E.2d 839 (1988).....	47
Amelia Ferrell Knisely, New report: WV education outcomes still nearly last in country, fewer kids attending preschool, W. VA. WATCH (June 12, 2025), https://tinyurl.com/mr4d5wev	51
AM. JUR. 2D CON. LAW (2025 update)	53
B.L. BUTCHER, BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE YEARS 1883 AND 1884 (Jan. 1, 1885)	8

B.S. MORGAN, BIENNIAL REPORT OF THE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE YEARS 1885 AND 1886 (Jan. 1, 1886)	8
B.S. MORGAN, BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE YEARS 1887 AND 1888 (Dec. 26, 1888)	11
Brad McElhinny, <i>Amendment Two on personal property taxes is resoundingly defeated</i> , METRONews (Nov. 8, 2022), https://tinyurl.com/4zb6sdr4	23
CHARLES H. AMBLER, A HISTORY OF EDUCATION IN WEST VIRGINIA: FROM EARLY COLONIAL TIMES TO 1949 (1951)	4, 6, 8, 9, 10, 12, 13
<i>Courses of Study for Junior and Senior High Schools of West Virginia</i> , W. VA. BD. OF EDUC. (1929), https://tinyurl.com/mrx9pp55	18
C.J.S. SCHS. & SCH. DIST. (May 2025 Update)	29
Darrell V. McGraw, <i>Practical Political Considerations in Constitutional Revision</i> , 71 W. VA. L. REV. 320 (1969)	54
David B. Magleby, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984)	54
DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA (Ambler, et al., eds. 1863)	3
Derek W. Black, <i>The Constitutional Compromise to Guarantee Education</i> , 70 STAN. L. REV. 735 (2018)	5, 41
Duncan Slade, <i>West Virginia Is Taking Control Of More Local School Systems</i> , MOUNTAIN STATE SPOTLIGHT (Sept. 4, 2025), https://tinyurl.com/4rd6zzjf	51
<i>Duty</i> , BLACK’S LAW DICTIONARY (12th ed. 2024)	35
EDUC. POLICIES COMM’N, THE STRUCTURE AND ADMINISTRATION OF EDUCATION IN AMERICAN DEMOCRACY (1938), https://tinyurl.com/5927f9hb	14
<i>General</i> , JOHNSON’S DICTIONARY OF THE ENGLISH LANGUAGE (1872)	34
<i>General</i> , LATHAM’S DICTIONARY OF THE ENGLISH LANGUAGE (1866)	34
<i>General</i> , OXFORD ENGLISH DICTIONARY (2d ed. 1989)	34

<i>General,</i>	
SULLIVAN’S DICTIONARY (1873).....	34
H. Hudgins & R. Vacca,	
LAW AND EDUCATION (2d ed. 1985).....	50
House Bill 2755 (2025).....	1, 2, 23, 24, 25, 26, 27, 30, 47, 48, 49, 53, 55
House Concurrent Resolution 13 (1956)	14
James Scott McClain,	
<i>The Voting Rights Act and Local School Boards: An Argument for Deference to Educational Policy in Remedies for Vote Dilution,</i>	
67 TEX. L. REV. 139 (1988)	50
Jed Handelsman Shugerman,	
<i>Vesting</i> , 74 STAN. L. REV. 1479 (2022)	31
J.R. TROTTER,	
THE SCHOOL LAW OF WEST VIRGINIA AND OPINIONS OF THE ATTORNEY- GENERAL AND DECISIONS OF THE STATE SUPERINTENDENT OF FREE SCHOOLS: WITH EXPLANATIONS AND FORMS (1897).....	10, 11
<i>June 15, 1960: Educator W. W. Trent Dies,</i>	
W. VA. PUB. BROAD. (June 15, 2020: 11:00 AM), https://tinyurl.com/59dyb2c9	12, 13
Laura Guglani & Tori Gastón,	
<i>Why World Language Teachers Stay: Teacher Retention in West Virginia, Challenges and Opportunities,</i>	
60 DIMENSIONS 96 (2025)	51
Marlee Schwartz & Dan Balz, <i>Rejection in West Virginia,</i>	
WASH. POST (Sept. 17, 1989).....	22
Martin S. Flaherty,	
<i>The Most Dangerous Branch</i> , 105 YALE L.J. 1725 (1996).....	32
M.P. SHAWKEY,	
BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF WEST VIRGINIA FOR THE TWO YEARS ENDING JUNE 30, 1912 (Dec. 2, 1912).	13
Neal Devins & David E. Lewis,	
<i>The Independent Agency Myth,</i>	
108 CORNELL L. REV. 1305 (2023).....	2
<i>Prescribe,</i>	
BLACK’S LAW DICTIONARY (12th ed. 2024).....	36
<i>Prescribe,</i>	
WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1988)	36

PUBLIC WORKS LLC, EDUCATION EFFICIENCY AUDIT OF WEST VIRGINIA’S PRIMARY AND SECONDARY EDUCATION SYSTEM (Jan. 3, 2012), https://tinyurl.com/mus54w9b ;	52
Quinn Yeagain, <i>Democracy and State Education Governance</i> , 11 BELMONT L. REV. 384 (2024)	16, 42
REX M. SMITH, FIFTY-FOURTH REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE PERIOD JULY 1, 1966 TO JUNE 30, 1967 (1967)	19
REX M. SMITH, 48TH REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA (Oct. 6, 1961)	9
Robert J. Reinstein, <i>The Limits of Executive Power</i> , 59 AM. U. L. REV. 259 (2009)	31
Senate Concurrent Resolution No. 3 (1955)	14
Such, BLACK’S LAW DICTIONARY (12th ed. 2024)	35
Supervise, JOHNSON’S DICTIONARY OF THE ENGLISH LANGUAGE (1872)	33
Supervise, SULLIVAN’S DICTIONARY OF THE ENGLISH LANGUAGE (1873)	33
Supervise, WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE (1866)	33
Supervision, BLACK’S LAW DICTIONARY (12th ed. 2024)	33
Supervisor, WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY (1967)	33
Taylor A. Hatridge, <i>Begging the Question: Judicial Review of Ballot Questions for Referred State Constitutional Amendments in Wisconsin</i> , 2023 WIS. L. REV. 1418 (2023)	54
T.B. McCain, <i>Salutatory</i> , 1 W. VA. SCH. J. 1, 12 (Nov. 1881)	11
T.C. MILLER, THE SCHOOL LAW OF WEST VIRGINIA AND OPINIONS OF THE ATTORNEY-GENERAL AND DECISIONS OF THE STATE SUPERINTENDENT OF FREE SCHOOLS: WITH EXPLANATIONS AND FORMS (1908)	10

T.C. MILLER, THE SCHOOL LAW OF WEST VIRGINIA AND OPINIONS OF THE ATTORNEY-GENERAL AND DECISIONS OF THE STATE SUPERINTENDENT OF FREE SCHOOLS: WITH EXPLANATIONS AND FORMS (1908)	10, 11
W.K. PENDLETON, BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE YEARS 1877 AND 1878 (Jan. 1, 1878)	8
W. VA. DEP'T OF EDUC., <i>2025 Green Book: Summary of Public Education Bills Enacted During the 2025 Regular Session</i> (2025), https://tinyurl.com/yc2k7d9m	29
W. VA. DEP'T OF EDUC., <i>July 14, 2025 Special Board Meeting</i> (July 14, 2025), https://tinyurl.com/3suft4am	24
W. VA. DEP'T OF EDUC., <i>Minutes</i> (May 14, 2025), https://tinyurl.com/fhz9pj83	24
W. VA. DEP'T OF EDUC., <i>October 2025 Board Meeting</i> (Oct. 1, 2025), https://tinyurl.com/5n6ua4d5	25
W. VA. DEP'T OF EDUC., WEST VIRGINIA'S VOICE (May 2019), https://tinyurl.com/47yunvcr	52
W. Va. <i>Governor Blamed for Defeat of Three Referendums</i> , ASSOCIATED PRESS (Sept. 11, 1989)	22
W. VA. H. J. RES. 102 (2022)	23
ROBERT M. BASTRESS, THE WEST VIRGINIA STATE CONSTITUTION (2d ed. 2016)	3, 38
<i>West Virginians Getting 'Fed Up' With Corrupt Political Leaders</i> , ST. LOUIS POST DISPATCH (Sept. 17, 1989)	22
W.W. TRENT, THE REORGANIZATION OF SCHOOLS UNDER THE COUNTY UNIT AND RECOMMENDATIONS TO THE WEST VIRGINIA LEGISLATURE OF 1935 FROM THE BIENNIAL REPORT FOR THE TWO YEARS ENDING JUNE 30, 1934 (1934)	9
W.W. TRENT, THIRTY-THIRD BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA: JULY 1, 1936 TO JUNE 30, 1938 (1988)	18

INTRODUCTION

It's perhaps the closest thing to a truism in the law: "our government" comprises "three branches": "the legislative, the executive, and the judiciary." *Harbert v. Harrison Cnty. Ct.*, 129 W. Va. 54, 62, 39 S.E.2d 177, 184 (1946). Each branch exercises its "power and authority under the Constitution solely and strictly in accordance with the will of the sovereign." *Id.* And like the federal constitution, the West Virginia constitution doesn't contemplate any fourth branch of government that operates on its own. Quite the opposite: "[f]ew things could be more perilous to liberty than some 'fourth branch' that does not answer even to [an] executive official who is accountable to the body politic." *Collins v. Yellen*, 594 U.S. 220, 278-79 (2021) (Gorsuch, J., concurring in part); *see also, e.g., State ex rel. Farley v. Spaulding*, 203 W. Va. 275, 287, 507 S.E.2d 376, 388 (1998) (Davis, J., dissenting) (criticizing a decision for "erod[ing] the essence of our tripartite form of government and, in effect, creat[ing] a fourth branch of state government"). So West Virginia's Constitution forecloses rogue boards and agencies.

House Bill 2755 (2025) applies these basic principles in the educational realm. Under our Constitution, "[t]he Legislature shall provide, by general law, for a thorough and efficient system of free schools." W.V. CONST. art. XII, § 1. House Bill 2755 thus explains that, when the West Virginia Board of Education proposes *legislative* rules for the free schools, it must give the Legislature (as the *legislative* body) a chance to review them. The Legislature can pass a law approving, rejecting, or amending the rule; if it doesn't do so in a timely way, then the proposed rule becomes law automatically. The Legislature applies similar processes across state government. That's unsurprising given that "it is the exclusive province of the Legislature to declare the scope and extent" of statutes, *Sutherland v. Miller*, 79 W. Va. 796, 91 S.E. 993, 997 (1917), and "legislative rules" are "treated ... as statutory enactments," *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 584, 466 S.E.2d 424, 435 (1995).

Yet the Board and the State Superintendent of Schools (referred to together here as “the Board”) ask this Court to declare House Bill 2755 unconstitutional, as they see the bill’s modest review process as a “power grab,” a “usurp[ation], and a “Constitutional coup.” Pet. 2. The Board objects that review will purportedly subject it to the “political whims” and “partisan politics” of elected officials. *Id.* at 21-22; *but cf.* Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1368 (2023) (“[I]ndependent agencies are no more expert or apolitical than their executive counterparts and the evidence of their political insularity is decidedly mixed.”). The Board seeks a writ ordering the Secretary of State to ignore the bill and accept a recently proposed Board rule as a final rule without the required legislative review.

The Court should deny the Board’s request. The Legislature’s power is “practically and essentially unlimited,” while the powers of executive agencies like the Board are “more limited.” *State v. Huber*, 129 W. Va. 198, 207, 40 S.E.2d 11, 18 (1946). Nothing in the Constitution upsets that usual balance of power in the education context. To be sure, the Constitution assigns the Board (alongside local authorities) the day-to-day responsibility of overseeing West Virginia’s public schools. But text, history, and context show that the assignment wasn’t meant to exclude the Legislature from *any* role in educational rulemaking. And while this Court has placed some limits on the Legislature’s role in the past, *see W. Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988), House Bill 2755 doesn’t offend those limits. (If *Hechler* does foreclose even the limited review embodied in House Bill 2755, then the Court should overrule it.) Lastly, subsequent efforts to amend the Constitution are beside the point. The Court’s charge is to construe the language of the Constitution, not poll the present-day electorate.

In short, the Secretary has merely respected the Legislature’s constitutional instructions, issued through a duly enacted law. The Court should thus deny the petition.

STATEMENT OF THE CASE

I. The 1863 Constitution and First School Law

West Virginia's first Constitution, ratified in 1863, directed the "Legislature" to "provide" for a "thorough and efficient system of free schools." W. VA. CONST. art. X, § 2 (1863). The Legislature was required to appropriate money, *id.* §§ 1-2, using it to "foster and encourage moral, intellectual, scientific and agricultural improvement" through "such institutions of learning as the best interests of general education in the State may demand," *id.* § 4. From the beginning, then, education was "a subject expressly assigned to the Legislature by the West Virginia Constitution." *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 24, 467 S.E.2d 150, 165 (1995). These provisions served as a "clear mandate to the Legislature" to make "public education [] a Prime function of our State government." *Pauley v. Kelly*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979).

As part of that mandate, the Constitution charged the Legislature with "electi[ng] and prescribing the powers, duties and compensation of a General Superintendent of free schools for the State." W. VA. CONST. art. X, § 3 (1863). The General Superintendent was meant to aid the Legislature in its responsibilities; the office "would exercise such powers as the Legislature bestowed." ROBERT M. BASTRESS, *THE WEST VIRGINIA STATE CONSTITUTION* 326 (2d ed. 2016). The role was thus circumscribed. One delegate at the first Constitutional convention, for instance, said the position would not even be "necessary" until "the legislature is really ready to go to work in this business." 2 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 1142 (Ambler, et al., eds. 1863). And "[w]hen it [wa]s needed, the legislature [wa]s authorized to provide for it." *Id.* at 1143; *see also* W. VA. CONST. art. X, § 3 (1863) (allowing "for the organization, whenever it may be deemed expedient, of a State Board of Instruction"). So

as even the Board acknowledges, the Superintendent's powers were "not independent" of the Legislature precisely because the Legislature "prescribed" them. Pet. 3.

Consistent with the first Constitutional Convention's expectation, the Legislature passed an act in December 1863 "providing for the establishment of a system of Free Schools" and setting out the State Superintendent's duties in detail. W. VA. ACTS, c. 137 (1863). Under that law, the Superintendent was directly accountable to the Legislature. He or she was to be elected by majority vote of both houses and "charged" "with the general supervision of all county superintendents and all the free schools of the state." *Id.* § 28; *see also* CHARLES H. AMBLER, A HISTORY OF EDUCATION IN WEST VIRGINIA: FROM EARLY COLONIAL TIMES TO 1949 138 (1951) (explaining that the Superintendent's "chief general duty" was to "perfect the system of free schools," while his "chief administrative duty" was to "supervis[e] and instruct[] ... county superintendents"). The Superintendent was to ensure that "the school system is, as early as practicable, carried into effect and put in uniform operation;" deciding "upon ... the interpretation and construction of the school laws;" and publishing "all [] school acts in force," with decisions and "forms, regulations and instructions" attached. W. VA. ACTS, c. 137, § 28 (1863).

Given that "[d]etails of the new system were left to the Legislature," Ambler, *supra*, at 138, the 1863 Act also required the Superintendent to "make a report" annually on "the condition of free schools within the state." *Id.* § 31. The reports were meant to "embrac[e] all statistics compiled from the reports of the county superintendents," and to propose "plans" "for the management and improvement of the free school fund, and for the better and more perfect organization and efficiency of free schools." *Id.* These advising and reporting requirements—which subjected the Superintendent's administrative actions to direct legislative oversight—would

persist for nearly a century. They confirmed that the Superintendent's role *complemented* the Legislature's task.

II. The 1872 Constitution and the Superintendent

After the Civil War, West Virginia adopted a new Constitution in 1872. From all appearances, the Convention began with no clear consensus about how to continue to manage the schools. Various proposals suggested abolishing the position of Superintendent, reassigning its responsibilities to the Secretary of State, or making it “imperative” rather than “discretionary with the Legislature.” JOURNAL OF CONSTITUTIONAL CONVENTION 34, 43, 48 (1872).

In the end, the Convention largely landed where it had a few years before: the Legislature would handle school-related legislative items, and the Superintendent would then execute them. Article XII continued the Legislature's primary responsibility: “The Legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. VA. CONST. art. XII, § 1 (1872). And as the 1863 Constitution did, Section 12 likewise stresses that it is “[t]he Legislature” that must “foster and encourage, moral, intellectual, scientific and agricultural improvement.” *Id.* § 12; *see also* A.R. WHITEHALL, HISTORY OF EDUCATION IN WEST VIRGINIA 23 (1902) (“The legislature was charged with the duty of carrying out the [education-related] provisions of the constitution.”). Still, Section 2 did vest “general supervision of free schools” in the State Superintendent, who would “perform such other duties in relation thereto as may be prescribed by law.” W. VA. CONST. art. XII, § 2 (1872). This slight change in language suggested that, unlike in the initial 1863 Constitution, some separate well of authority might exist for the Superintendent beyond those powers expressly granted by the Legislature.¹ *But see, e.g., People v. Regents of*

¹ It was this 1872 wording change, then, that reflected a “Reconstruction-era practice of constitutionalizing state superintendents and boards of education[.]” Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 812 (2018). As shall

Univ. of Mich., 18 Mich. 469, 482 (1869) (dividing equally on the question of whether a broader constitutional provision granting regents “the power of general supervision of the university” foreclosed involvement by the Legislature); *cf. State v. Gattavara*, 47 P.2d 18, 19 (Wash. 1935) (holding similar language as to Attorney General “[wa]s not self-executing”). But the new Section 2 was perhaps most directly intended to “extend the benefits of education to the whole of the state.” Ambler, *supra*, at 148.

The 1872 Constitution then placed the State Superintendent in Article VII—the Executive Department—alongside the Governor, Secretary of State, Auditor, Treasurer, and Attorney General. W. VA. CONST. art. VII, § 1 (1872). Like these officers, the Superintendent was elected by popular vote to four-year terms. *Id.* Yet nothing in either the language of the 1872 Constitution or contemporaneous materials suggested that the Superintendent was to operate entirely independently from the Legislature. Nor did the Legislature act like it did, having passed a “new code” in the 1870s that “redefined the powers and duties of the state superintendent.” Ambler, *supra*, at 150. And indeed, just down the road at around the same time, another high court held that similar “general supervision” constitutional language did *not* divest the Legislature of power over schools. *See Barrington v. Neuse River Ferry Co.*, 69 N.C. 165, 173 (1873) (rejecting the argument that a constitutional provision giving “commissioners of counties a general supervision and control over the schools ... of their counties[,] as may be prescribed by law, deprives the Legislature of the power of special legislation over those subjects”).

be seen, a later 1958 amendment *rolled back* this “constitutionalization” to some degree—so it is not accurate to use this description for the 1958 amendment. *Contra* Pet. 7 (omitting “Reconstruction-era” from the relevant quotation).

III. The Superintendent Supervises: 1872-1958

For more than 85 years, various state Superintendents then exercised “general supervision” over the State’s schools alongside the Legislature. Several features of their work are relevant here.

A. Reports and Recommendations to the Legislature

West Virginia law has always required the Superintendent to report regularly to the Legislature and Governor. *See* W. VA. CODE § 18-3-8 (2025); *see also* W. VA. ACTS, c. 137, § 31 (1863); W. VA. ACTS, c. 123, § 67 (1872-73). “On or before November 1,” the Superintendent’s reports must summarize the annual reports of county superintendents, transmit statistics on school conditions, provide “such information about the public schools of the state as the Governor or the Legislature may have previously requested,” and make “recommendations ... respecting needed legislation on behalf of the schools.” W. VA. CODE § 18-3-8. The timing of these reports with legislative sessions—along with their advisory content—confirm that the reports function as legislative oversight tools. *See, e.g.,* W. VA. ACTS, c. 137 § 31 (1863) (“He shall, annually . . . at each session of the legislature, make a report ... together with such plans as he may have matured for ... the better and more perfect organization and efficiency of free schools.”); W. VA. ACTS, c. 123, § 67 (1873) (“He shall [] make a report ... transmitted to the next regular session of the legislature.”). And the Governor transmitted these reports to lawmakers along with executive recommendations, integrating educational accountability into broader executive-legislative relations. *Id.*

In the elected Superintendent era, these reports explained how Superintendents had implemented legislative enactments, identified problems requiring legislative attention, and recommended—but did not directly implement—policy changes. For instance, Superintendent Butcher’s 1883-84 report urged that “[o]ur law should permit or direct the State Superintendent to

prepare and publish for the guidance of teachers and school officers throughout the State a Course of Study for the Common Schools.” B.L. BUTCHER, BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE YEARS 1883 AND 1884, 7 (Jan. 1, 1885). Superintendent Morgan’s 1885-86 report recommended numerous changes: adjustments to teacher salaries, modifications to sheriff commissions on district school levies, extension of the school term, development of a graded course of study for high schools, reform of appointments to the county board of examiners, revision of teacher certificate requirements, improvements in school supervision, standards for schoolhouse architecture, inclusion of moral training, and enhancement of the school fund. B.S. MORGAN, BIENNIAL REPORT OF THE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE YEARS 1885 AND 1886, 4-19 (Jan. 1, 1886). In short, the Superintendents all recommended revisions to the existing school law; they did not issue administrative decrees.

The Legislature sometimes adopted Superintendent recommendations, sometimes rejected them, and sometimes modified them. For example, when Superintendent Pendleton recommended that authority to select textbooks be vested in a state commission, the Legislature in 1879 rejected the proposal and adhered to the existing statute requiring only an approved list. *See Ambler, supra*, at 157; *see also* W.K. PENDLETON, BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE YEARS 1877 AND 1878, 21 (Jan. 1, 1878). The Legislature continued to select textbooks itself for several more decades. *See Ambler, supra*, at 225-27; *see also, e.g., Heath v. Johnson*, 36 W. Va. 782, 15 S.E. 980, 981 (1892) (explaining that the State Superintendent has a “duty to enforce the use” of textbooks “prescribed” by the Legislature.). Likewise, Alexander D. Wade’s development of a “Graduating System” for country schools showed the same pattern. Wade, serving as Monongalia County Superintendent, developed

and tested the system locally, and he documented its success in reports. *See generally* ALEXANDER D. WADE, A GRADUATING SYSTEM FOR COUNTRY SCHOOLS (1881); A.L. WADE, THIRD ANNUAL REPORT OF COUNTY SUPERINTENDENT OF FREE SCHOOLS OF MONONGALIA COUNTY, WEST VIRGINIA (1878). When the system gained broader attention, *see* Ambler, *supra*, at 163, the Legislature implemented the program statewide through statutory enactment—not through administrative adoption by the State Superintendent, *see id.* at 221; W. VA. ACTS, c. 64 (1891).

The 1934 biennial report perhaps best exemplifies the Superintendent’s relationship with the Legislature. Superintendent Trent oversaw consolidation of 398 local school districts into 55 county systems. W.W. TRENT, THE REORGANIZATION OF SCHOOLS UNDER THE COUNTY UNIT AND RECOMMENDATIONS TO THE WEST VIRGINIA LEGISLATURE OF 1935 FROM THE BIENNIAL REPORT FOR THE TWO YEARS ENDING JUNE 30, 1934 (1934). Even for this massive structural reform, Superintendent Trent reported to the Legislature and sought legislative enactments on buses, textbooks, libraries, art, physical education, and recreation. *Id.* at 30-32. He did not claim autonomous authority to impose the reorganization through administrative order, instead seeking from the Legislature “slight revision of the county unit law” to “remove all question[s] of legality.” *Id.* at 32. This pattern repeated across decades. *See, e.g.*, REX M. SMITH, 48TH REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA (Oct. 6, 1961) (seeking legislation establishing an educational television commission to oversee use of digital media in schools). Major policy changes moved through the Legislature, not around it.

B. Interpretations of State Law—Not Legislation

The State Superintendent also acted as something of a legal advisor to the schools, but the Superintendent’s authority in this space differed fundamentally from modern administrative rulemaking. The first school law in 1863 required the Superintendent to “decide upon a written

statement of the facts, all questions and controversies arising out of the interpretation and construction of the school laws in regard to the rights, powers and duties of township boards of education, school commissioners and county superintendents,” and to “publish[]” such “decisions” “with [] forms, regulations and instructions as he may judge expedient.” W. VA. ACTS, c. 137, § 28 (1863). This authority remains intact. *See* W. VA. CODE § 18-3-6 (2025).

Legal compilations were one of the State Superintendent’s most important ways of communicating this informal guidance. In early statehood, the Superintendent’s compilations were typically published monthly in the *West Virginia School Journal*. Ambler, *supra*, at 216. The *Journal* served as “the organ of the state department of free schools” and was “an enterprise of the state superintendent who justified it on the ground that the state law authorized the state superintendent to aim at perfecting the system of free schools.” *Id.* As the school law continued to grow in length and nuance, the Superintendent turned towards a more formal means of publishing decisions. In 1897, Superintendent Trotter published *The School Law of West Virginia and Opinions of the Attorney-General and Decisions of the State Superintendent of Free Schools: With Explanations and Forms*, where he compiled the Constitution’s education provisions and annotated the school law. *See* J.R. TROTTER, THE SCHOOL LAW OF WEST VIRGINIA AND OPINIONS OF THE ATTORNEY-GENERAL AND DECISIONS OF THE STATE SUPERINTENDENT OF FREE SCHOOLS: WITH EXPLANATIONS AND FORMS (1897). Superintendent Miller issued revised versions in similar form in 1903 and 1907. *See, e.g.*, T.C. MILLER, THE SCHOOL LAW OF WEST VIRGINIA AND OPINIONS OF THE ATTORNEY-GENERAL AND DECISIONS OF THE STATE SUPERINTENDENT OF FREE SCHOOLS: WITH EXPLANATIONS AND FORMS (1903); T.C. MILLER, THE SCHOOL LAW OF WEST VIRGINIA AND OPINIONS OF THE ATTORNEY-GENERAL AND DECISIONS OF THE STATE SUPERINTENDENT OF FREE SCHOOLS: WITH EXPLANATIONS AND FORMS (1908). Regardless of the medium, the

Superintendent’s “decisions” functioned like the Attorney General’s “opinions”—authoritative interpretations of law by an elected constitutional officer, not independent regulations with legislative force. And the subjects addressed were typical and routine of the Superintendent’s executive supervision: curriculum standards, teacher qualifications, school operations, and financial administration. *See generally* Trotter, *THE SCHOOL LAW, supra*; Miller, *THE SCHOOL LAW, supra*. The authority derived from legislative enactments. *See e.g.*, W. VA. ACTS, c. 137, § 28 (1863); W. VA. ACTS, c. 74, § 47 (1866); W. VA. ACTS, c. 27, § 128 (1908).

Historical guidance bore the personal stamp of individual officers—Superintendent Miller’s “decisions,” *see* Miller, *THE SCHOOL LAW, supra*, Superintendent Butcher’s “constructions,” *see* T.B. McCain, *Salutatory*, 1 W. VA. SCH. J. 1, 12 (Nov. 1881). Not “Department regulations.” Not “Board policies.” But personal executive actions that were subject to electoral accountability. The Superintendent did not, and could not, create those programs through independent rulemaking. *See, e.g.*, B.S. MORGAN, *BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE YEARS 1887 AND 1888*, 6 (Dec. 26, 1888) (recommending “that the school law be so amended that the State Board of Examiners, under the direction of the State Superintendent, be required to prepare a manual and graded course of study.”). Altogether, this exercise was executive administration that was subordinate to legislative policy, not legislative rulemaking or codified regulations characteristic of modern administrative law.

C. Accountability to Voters

For eighty-six years—from 1872 through 1958—the State Superintendent was elected by popular vote every four years. This vote provided democratic accountability. Voters dissatisfied

with the Superintendent's administration could remove him at the ballot box. Electoral mandates provided legitimacy for policy decisions, and political accountability operated continuously.

Superintendent Trent again exemplifies this dynamic. Trent served from 1933 to 1957—twenty-four years spanning the Depression, World War II, and post-war expansion. *See Ambler, supra*, at 617. He successfully resisted multiple reform attempts that would have curtailed his authority, including the Short Ballot Amendment of 1938 and recommendations in the 1945 Strayer Report. *Id.* at 638-39. His ability to resist derived from political strength. He “polled more votes statewide than the party candidate for governor” in several elections. *See June 15, 1960: Educator W. W. Trent Dies*, W. VA. PUB. BROAD. (June 15, 2020: 11:00 AM), <https://tinyurl.com/59dyb2c9>, and even saw “favored increases even in the depths of the Depression,” Ambler, *supra*, at 638. This set-up, then, was democratic accountability in action. An elected official with popular support wielded substantial authority, but that authority remained fundamentally political, not bureaucratic.

The pre-1958 system combined specialized expertise with democratic responsibility. Superintendents developed educational knowledge in pedagogy, school administration, and teacher training. Superintendent Trotter “was active in building up public school libraries.” Ambler, *supra*, at 225. A decade later when Superintendent Shawkey took office, there were just 20 public high schools—each operating without a “uniform standard” and featuring “all sorts of diversities” in curriculum, teaching, length, supervision, and facilities. *Id.* at 405. By the end of his first term, 125 new high schools were built, and enrollment had nearly quintupled. *Id.* at 407. Superintendent Shawkey went on to win two more elections. *Id.*

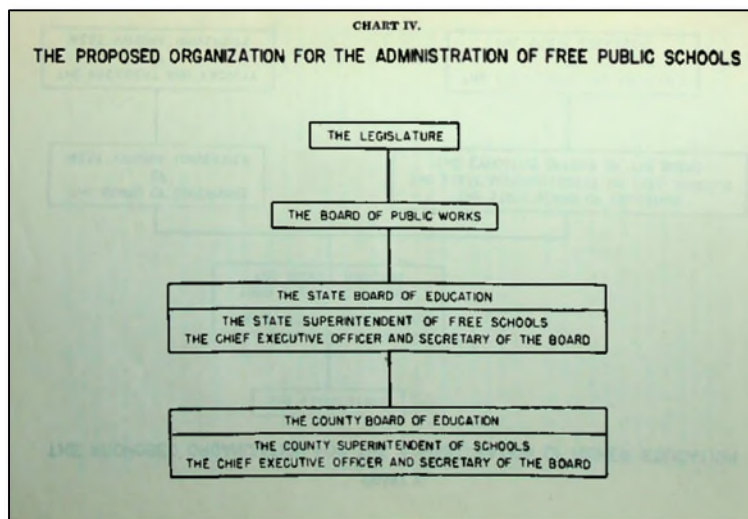
The superintendents' expertise made their recommendations valuable to legislators. But it did not transfer legislative power to the executive. The Legislature could, and did, reject

Superintendent recommendations, modify proposals, or enact different approaches. *See, e.g.,* Ambler, *supra*, at 157 (rejecting Superintendent’s recommendation that textbook selection be vested in a commission). Legislative supremacy over policy remained intact, voters provided the ultimate check on executive action, and Superintendents kept their “emphasis [] upon form rather than upon substance,” *id.* at 407, serving “as a rallying point for the various educational movements and a clearing house of educational ideas.” M.P. SHAWKEY, BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF WEST VIRGINIA FOR THE TWO YEARS ENDING JUNE 30, 1912, 7 (Dec. 2, 1912).

IV. The 1958 Constitutional Amendment and the Board

In the mid-1900s, West Virginia again began considering changes to its educational system. But at each stage, the Legislature’s role in education remained central.

It started in 1945, when the Legislature formed an interim committee to study the educational system. *See* 1945 W. Va. S. Con. Res. 6; A.R. 380-82. That committee in turn worked with Columbia University Professor George Strayer and others to



produce a report. A.R. 391. And as relevant here, the Report recommended that the State move responsibility over education into the hands of the previously established Board of Education to obviate the problems of many competing boards exercising control. A.R. 397. The Report further suggested that the Board be gubernatorially appointed to nine-year staggered terms with

confirmation by the Senate and subsequent removal protections. A.R. 400-01, 409. But despite these changes, the Report contemplated throughout that the Legislature would remain ultimately in control of West Virginia's free schools, as the diagram above shows. A.R. 407.

It's not surprising that Strayer expected the Legislature to work together with the Board in West Virginia. Elsewhere, he explained how state boards generally should "instigat[e] legislation" for the operation of schools and "propose a program of state financing"—not just go rogue. EDUC. POLICIES COMM'N, THE STRUCTURE AND ADMINISTRATION OF EDUCATION IN AMERICAN DEMOCRACY 86, 92 (1938), <https://tinyurl.com/5927f9hb>. Strayer recognized that "[t]he constitutions of most of the states require that the legislature establish a system of free public schools open to all of the children of the state." *Id.* at 77. And "[u]nder this mandate, the legislature determines the form of organization and control of the public school system." *Id.*

Ultimately, though, Strayer's report was not enough of an impetus for action, as voters rejected a proposed constitutional amendment reflecting many of the committee's proposals in 1946. *See* A.R. 566-67.

The cycle repeated about a decade later, when the Legislature again commissioned a study. *See* 1955 Senate Concurrent Resolution No. 3; 1956 House Concurrent Resolution 13; A.R.0568-71. Like the Strayer report, this "Peabody" study suggested moving many functions related to education from the Superintendent and others to the Board of Education. A.R. 595-99. But the report also recognized that the Legislature's continuing authority over the subject, describing the Legislature's power in exceptionally broad terms:

Court decisions interpreting the Constitution in West Virginia have made clear that the Legislature has broad and almost unrestricted power to be the sole judge as to the kind or kinds of schools that should be established and supported and also the power to make changes in the school system as it sees fit, subject only to a few restrictions in the Constitution. ...

How shall West Virginia be organized at the state level of government to assure: competent planning for an adequate state-wide system of education; sound, well-balanced, and properly coordinated state education policy for all aspects of public education; *broad and general rules and regulations which will set uniformly high minimum standards yet be flexible enough to permit adaptations to meet local educational needs and problems*; proper state supervision which will be consistent with the concept of a desirable decentralization of the control and management of the schools; and adequate financial support equitably distributed? In West Virginia it is clearly the responsibility of the Legislature to find satisfactory answers to all such questions concerning the legal framework within which public education is to be administered.

A.R. 593 (emphasis added). The report thus recommended that “[t]he State board of education ... serve as the single board for determining State education policies *within the statutory framework provided by the legislature.*” A.R. 602 (emphasis added); *see also* FRED F. BEACH & ROBERT F. WILL, THE STRUCTURE AND CONTROL OF PUBLIC EDUCATION AT THE STATE LEVEL 8 (1955) (cited with approval in the Peabody report) (“The great responsibility of regulatory boards is to develop policies consonant with the authority *vested in them by the legislature.*” (emphasis added)).

Another effort at a constitutional amendment soon followed, and this one was successful. The proposed amendment appeared on the November 1958 ballot (with no stated purpose) and passed. A.R. 737-38. Among other things, the amendment elevated the Board of Education to a constitutional office,² declared that Board members were gubernatorially appointed to nine-year staggered terms, and rendered the Superintendent a Board-appointee. A.R. 730-31. Partisan politics thus remained a part of the system—after all, “while an unelected office may not be subjected to partisan *electoral* politics, partisan preferences obviously play a role in gubernatorial

² The amendment did *not* “create[] the West Virginia Board of Education.” Pet. 7. In the early 1900s, the Legislature created a Board of Examiners, and later the Board of Education, by statute. *See, e.g., State ex rel. Fox v. Brewster*, 140 W. Va. 235, 240, 84 S.E.2d 231, 235 (1954) (explaining how the Board was “not created by the Constitution of the state of West Virginia,” so the Legislature at that time had the power to “prescrib[e] the terms of office, powers, duties and compensation of members of the West Virginia Board of Education”).

appointments.” Quinn Yeargain, *Democracy and State Education Governance*, 11 BELMONT L. REV. 384, 400 (2024); *contra* Pet. 8 n.3.

But most importantly for today, the amendment clarified how the “general supervision” power (which now was assigned to the Board) was supposed to be understood. Recall that the 1872 Constitution said the Superintendent “shall have a general supervision of free schools, and perform such other duties in relation thereto as may be prescribed by law.” W. VA. CONST. art. XII, § 2 (1872). As noted, the reference to “other duties”—as distinct from “general supervision”—*might* be read to suggest that the Board had both an inherent “general supervision” power *and* any additional powers imparted by the Legislature. *See, e.g., Laidley v. Cent. Land Co.*, 30 W. Va. 505, 4 S.E. 705, 708 (1887) (reading provisions as distinct where they were “repeat[ed] ... as separate and different provisions, and connect[ed] ... by the conjunctive word ‘and’”); *cf. Hodges v. Pub. Serv. Comm’n*, 110 W. Va. 649, 159 S.E. 834, 836 (1931) (reading “other jurisdiction” to encompass distinct juridical proceedings “not named in the section”).

The 1958 amendment changed that. Now, the “general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform *such duties as may be prescribed by law*.” W. VA. CONST. art. XII, § 2 (1958) (emphasis added). “Other” duties were eliminated; the conjunction “and” is gone. As the Attorney General later recognized in a 1966 opinion letter, these changes were significant:

The gist of Article XII, Section 2, as amended in 1958 was to take from the State Superintendent of Free Schools and to place the authority to supervise the free school system in the West Virginia Board of Education, but that in such supervision by the West Virginia Board of Education, the Legislature might by statute (hence, “prescribed by law”) clarify the duties to be performed by the West Virginia Board of Education. There is no indication that the power of the State Superintendent of Free Schools, in “general supervision of free schools” as it existed in the Constitution between 1872 and 1958, was so limited.

A.R. 374-75. In other words, the 1958 amendment introduced a *further* limit on the “general supervision” authority. And one thing beyond that limit is certain, too: the amendment said nothing about ending the traditional relationship between education governance and the Legislature.

After voters ratified the amendment, the 1959 Legislature again enacted implementing legislation. The Legislature implemented the nine-member State Board of Education appointed by the Governor with Senate confirmation. *See* W. VA. CODE § 18-2-1 (1959). The Board would appoint a State Superintendent to serve as its executive officer. *See id.* § 18-2-5. And the Board could then exercise authority to “supervise” the schools, appoint county superintendents, prescribe courses of study, and adopt textbooks. *Id.* Finally, the Board was empowered to “make rules for carrying into effect the laws and policies of the State relating to education.” *Id.*

Initially, the Board operated within the traditional framework. It reported to the Legislature, and the Legislature retained control over education policy through statutory enactments. The Board administered legislative programs. And these legislative programs largely mirrored the pre-1958 system, except that the appointed Board had replaced the elected Superintendent as the body exercising “general supervision” (per the 1959 statutes). In *Detch v. Board of Education of Greenbrier County*, 145 W. Va. 722, 725, 117 S.E.2d 138, 140 (1960), for instance, the Court acknowledged that the newly empowered Board had rulemaking authority, particularly considering the statutes that the Legislature had passed saying so, *id.* at 728-29, 117 S.E.2d at 142. But it could “not be contended that the granting of such authority to the state board empowers it to promulgate rules contrary to clearly expressed legislative enactments within constitutional limitations.” *Id.* at 729, 117 S.E.2d at 142.

Yet over the following decades, the Board’s rulemaking activity expanded. Perhaps because of the removal of electoral accountability, the Board began acting as a quasi-legislative

body. What began as limited administrative guidance evolved into comprehensive regulatory authority. *Compare Courses of Study for Junior and Senior High Schools of West Virginia*, W. VA. BD. OF EDUC. (1929), <https://tinyurl.com/mrx9pp55>, with W. VA. CODE R. § 126-14-1, *et seq.* (“West Virginia Measures of Academic Progress”). Board policies proliferated, covering curriculum standards, assessment systems, graduation requirements, personnel qualifications, facilities specifications, transportation requirements, and operational mandates affecting every aspect of education. *See e.g.*, W. VA. CODE R. § 126-14-1 (“West Virginia Measures of Academic Progress”); *id.* § 126-126-1 (“Procedures for Designated Hiring and Transfer of School Personnel”); *id.* § 126-172-1 (“Handbook on Planning School Facilities”). This expansion occurred gradually, without constitutional amendment. Those policies became more detailed, more comprehensive, more binding. Local school systems complied—not because statutes specifically required it, but because the Board demanded it. The Board’s administrative apparatus grew. And the Board increasingly claimed authority derived not from legislative delegation, but from constitutional “general supervision.”

The character of Board authority changed. Unlike the personal “decisions” and “rulings” of pre-1958 Superintendents, post-1958 Boards promulgated formal “policies” and “regulations” through systematic processes. *See* W. VA. CODE R. § 126-3A-1 (“West Virginia Board of Education Rulemaking Process”). In contrast to pre-1958’s informal, advisory, guidance subject to legislative override, post-1958 rules were codified, mandatory, and claimed immunity from legislative review. And as Board rulemaking expanded, legislative oversight diminished. The statutory requirement for annual reports continued, but the reports became less substantive. Pre-1958 biennial reports ran hundreds of pages, documenting implementation of legislative policies, identifying problems, and recommending legislation. *See e.g.*, W.W. TRENT, THIRTY-THIRD

BIENNIAL REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA: JULY 1, 1936 TO JUNE 30, 1938 (1988) (616 pages); *compare* REX M. SMITH, FIFTY-FOURTH REPORT OF THE STATE SUPERINTENDENT OF FREE SCHOOLS OF THE STATE OF WEST VIRGINIA FOR THE PERIOD JULY 1, 1966 TO JUNE 30, 1967 (1967) (71 pages). Post-1958 annual reports became shorter, more formulaic, less focused on providing information useful for legislative oversight. The reporting process thus remained, yet it lost its function by dwindling to a summary of administrative documentation rather than a legislative oversight tool.

The year 1984 then marked a low point. A West Virginia circuit court had just recently held that “the West Virginia Board of Education ha[d] violated its statutory duties to determine educational policies of the State in conformity with constitutional and statutory mandates.” *Pauley v. Bailey*, 174 W. Va. 167, 171, 324 S.E.2d 128, 131 (1984) (cleaned up). Even so, the Court found occasion to offer a newly expansive vision of the Board’s powers soon thereafter. In *Bailey v. Truby*, the Court found the Legislature had not vested exclusive control of extracurricular activities in county boards of education, which would have rendered unlawful a Board rule about minimum grade-point average for extracurriculars. 174 W. Va. 8, 16, 321 S.E.2d 302, 311 (1984). The Court principally found that the statute at issue did not give county boards that kind of broad authority, so the state Board had room to act. *Id.* at 17-18, 321 S.E.2d at 311-12. But in an alternative holding, it also found that any statute purporting to grant county boards exclusive authority would have unconstitutionally “interfere[d]” with the Board’s self-executing powers of “general supervision” over the state’s educational system. *Id.* at 18, 321 S.E.2d at 312; *but see State ex rel. Allen v. Bedell*, 193 W. Va. 32, 39 n.8, 454 S.E.2d 77, 84 n.8 (1994) (Cleckley, J., concurring) (“Alternative holdings ... are nothing more than advisory opinions that solve questions that do not require answering in order to resolve the issues raised by the parties.”).

In so holding, *Bailey* mistakenly relied on *State ex rel. Miller v. Board of Education of Unified School District No. 398*, 511 P.2d 705 (Kan. 1973), which construed a “general supervision” provision in the Kansas Constitution. 174 W. Va. at 15-16, 18, 321 S.E.2d at 309-10, 312. Kansas’s constitution echoed the 1872 version of West Virginia’s “general supervision”: it delineated a “general supervision” power without express limits and a separate “other duties” power. *Bailey*, 174 W. Va. at 15, 321 S.E.2d at 309 (quoting KAN. CONST. art. VI, § 2(a)); *see also Miller*, 511 P.2d at 709-10 (treating the “general supervision” and “other duties” provisions as separate). *Bailey* did not acknowledge how the 1958 amendment had moved West Virginia’s constitution away from that construct. It also did not engage with contrary authority on the issue. In fact, it did not address the specific “prescribed by law” language in West Virginia’s constitution at all.

V. Legislative Oversight Anew: 1988-Today

Truby seemed to launch a protracted back-and-forth over the degree of the Board’s powers. The pattern repeats: the Legislature exercises some oversight, the Board resists, and the people are left to question who they can hold accountable.

In 1988, as part of an omnibus educational reform package, the Legislature attempted to reassert itself over Board rulemaking—in decidedly aggressive fashion. W. VA. ACTS, 3rd Ex. Sess., c. 7 (1988). The Legislature largely purported to “revoke[]” the Board’s “power and authority to promulgate a legislative rule” unless the Board met certain conditions. W. VA. CODE § 29A-3A-3(b) (1988). As to any non-emergency legislative rules that the Board wished to implement, the statute required the Board to “apply[] to the Legislature for permission, to be granted by law, to promulgate such rule.” *Id.* § 29A-3A-10 (1988). The proposed rule did not have “full force and effect until authority to do so [wa]s granted by law.” *Id.* If the Legislature

did not approve the proposed rule after its submission through the Legislative Oversight Commission on Education Accountability, then the Board could not “thereafter issue any rule or directive or take any other action to implement such rule or part thereof unless and until otherwise authorized or directed to do so.” *Id.* § 29A-3A-13 (1988). And while the Board could promulgate emergency rules that became effective immediately, the Secretary of State was empowered, in certain provided circumstances, to terminate that rule immediately. *Id.* § 29A-3A-16a.

This scheme led to this Court’s decision in *West Virginia Board of Education v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988). There, the Board sought a writ of mandamus against the Secretary of State after he refused to accept for filing a school-bus-related regulation from the Board that did not comply with the new legislative-approval provisions. *Id.* at 453, 376 S.E.2d at 840. The Court issued the writ. “The newly enacted provisions,” the Court found, “pose[d] an interference with the Board’s rule-making power, and consequently, the Board’s general supervisory functions.” *Id.* at 455, 376 S.E.2d at 843. The Court held that “rule-making by the State Board of Education” was “within the meaning of ‘general supervision’ of state schools pursuant to art. XII, § 2 of the West Virginia Constitution.” *Id.* Thus, the Court deemed “any statutory provision that interferes with such rule-making,” including the new legislative approval scheme, “unconstitutional.” *Id.* The new statute’s “attempt to undertake the Board’s general supervisory powers violate[d] the provision of art. V, § 1 of the State Constitution.” *Id.* at 455-56, 376 S.E.2d at 843.

The Governor responded in 1989 by proposing an even more aggressive move: a constitutional amendment that would have abolished both the constitutional Board of Education and the constitutional office of the superintendent—instead vesting “supervision of the free schools” in a to-be-determined executive agency. A.R. 851-52. But reports at the time said nothing

about legislative power over education. Instead, the focus of the reform effort appeared to be more about who could appoint the relevant personnel—namely, then-Governor Gaston Caperton—and not who would approve rules and regulations. *See, e.g.*, A.R. 844. Caperton was unpopular after having raised taxes the same year. *See West Virginians Getting ‘Fed Up’ With Corrupt Political Leaders*, ST. LOUIS POST DISPATCH (Sept. 17, 1989) (“House Speaker Chuck Chambers, a Democrat, said the results [on the proposed amendments] amounted to a referendum on Caperton’s performance and showed voters were unhappy about the tax increase.”). And because the amendment was packaged with other Caperton-backed amendments making the Secretary of State, Treasurer, and Agriculture Commissioner appointed positions, opposition also pressed the idea that Caperton had grown “power hungry.” Marlee Schwartz & Dan Balz, *Rejection in West Virginia*, WASH. POST (Sept. 17, 1989); *see also, e.g., W. Va. Governor Blamed for Defeat of Three Referendums*, ASSOCIATED PRESS (Sept. 11, 1989). Unsurprisingly, then, the amendment failed. A.R. 854.

The Legislature reinstituted a more restrained legislative review process in 1990. W. VA. ACTS, c. 74 (1990). This time, the Legislature did not purport to “revoke” any authority of the Board or force the Board to “apply” to the Legislature for permission. But the Board was still directed to send its proposed legislative rules to the Legislature (again by way of the Legislative Oversight Commission on Education Accountability) to allow the Legislature the chance to evaluate it. W. VA. CODE § 29A-3B-9 (1990). Assuming the Legislature did not adopt “any statutory changes needed to clarify the legislative intent of the statute upon which the rule is based or to otherwise modify the activity subject to the rule,” *id.* § 29A-3B-9(c), the rule would then become effective no sooner than 30 days after filing with the Secretary of State, *id.* § 29A-3B-8; *contrast with* W. VA. CODE § 29A-3-9 (2025) (requiring every other state agency or board to obtain

approval from the Legislature before their legislative rules take effect). As before, emergency rules could take effect immediately, but the Secretary of State no longer had the power to terminate them. *See id.* § 29A-3B-8 (1990). These review provisions (and other administrative rulemaking requirements for the Board) continued largely unchanged—and unchallenged—through 2025.

Meanwhile, in 2022, the Legislature placed another constitutional amendment on the ballot concerning the Board. In particular, the proposed amendment would have added a line to Article XII, § 2 reading: “Under its supervisory duties, the West Virginia Board of Education may promulgate rules or policies which shall be submitted to the Legislature for its review and approval, amendment, or rejection, in whole or in part, in the manner prescribed by general law.” A.R.0856. The amendment failed, A.R. 860, though it’s not clear why. Among other things, its description on the ballot as an effort to “clarify” the Constitution might have led voters to believe that the amendment was unnecessary. W. VA. H. J. RES. 102 (2022); *see also, e.g., United States v. Craft*, 535 U.S. 274, 287 (2002) (describing legislative history of a failed statutory amendment suggesting that the “clarification” offered via the amendment was rejected “only because it [was] found ... superfluous” (cleaned up)). The amendment also went on the ballot with a controversial property tax exemption, perhaps inviting a blanket “No” vote on all the proposed amendments. *See Brad McElhinny, Amendment Two on personal property taxes is resoundingly defeated*, METRONews (Nov. 8, 2022), <https://tinyurl.com/4zb6sdr4>.

In any event, in 2025, the Legislature passed into law House Bill 2755. *See* H.B. 2755, W. Va. Leg., Reg. Sess. (2025). The law largely left in place the unchallenged administrative rulemaking scheme that was implemented in 1990. Unlike the 1988 statute at issue in *Hechler*, for instance, the 2025 revision does *not* repudiate the Board’s rulemaking powers; rather, it reaffirms that, “[u]nder its supervisory duties, the [Board] may promulgate rules or policies.” W.

VA. CODE § 29A-3B-9(a) (2025). The statute also does *not* require legislative action before a Board rule can become effective; rather, it says a rule “shall become effective as initially promulgated” by the Board if the Legislature does not “review and approve, or reject, in whole or in part, the rule” within 15 months. *Id.* § 29A-3B-9(b); *see also id.* § 29A-3B-8 (omitting former provision stating that a submitted rule becomes effective after 30 days from filing or a date specified in the rule). And the statute does not reinstate the Secretary of State’s power to terminate emergency rules; the Board retains the power to issue an immediately effective rule by that route. *Id.* § 29A-3B-10. Perhaps the most substantive changes are directed at the Legislature, not the Board. For example, the law now lists the specific recommendations that the Legislative Oversight Commission on Education Accountability can make as to a submitted rule and prescribes seven express grounds for review. *Id.* § 29A-3B-9(e)-(f).

Even so, before House Bill 2755 became effective, the Board voted in May 2025 to “pursue litigation to contest the constitutionality of House Bill No. 2755 regarding the [B]oard’s independent policymaking authority.” W. VA. DEP’T OF EDUC., *Minutes* 8 (May 14, 2025), <https://tinyurl.com/fhz9pj83>. The Board then convened at a special meeting in July 2025 for just one reason: voting to file a Board policy governing school bus design and equipment with the Secretary of State with a 30-day effective date. *See* A.R. 877-78. Board counsel advised the Board that House Bill 2755 “looks [] almost exactly like” the law that prompted *Hechler*, arguing that the Legislature “ignored” the decision and even “admitted that [the bill] was unconstitutional.” W. VA. DEP’T OF EDUC., *July 14, 2025 Special Board Meeting*, at 19:02-21:57 (July 14, 2025), <https://tinyurl.com/3suft4am>. The filing was thus an effort to challenge the bill. The Board approved it. *Id.* at 23:00-23:24.

The Secretary of State declined to publish the rule because the Board had not submitted it for legislative review in compliance with H.B. 2755. A.R. 879. Although Board counsel demanded that the Secretary “disregard” H.B. 2755’s requirements, A.R. 881, the Secretary could not. *See Payne v. Staunton*, 55 W. Va. 202, 46 S.E. 927, 929 (1904) (“It is a very grave assumption of power for an officer exercising ministerial functions to say that the highest, the sole, lawmaking power has violated the Constitution, and he will therefore disobey its will.”). So the Board responded by filing this petition.

But even as it pressed litigation asserting its control over the schools, the Board told the public that it was not *really* in charge. Clutching a copy of the state education laws, Board President L. Paul Hardesty insisted last month that the Board was only an agent of the Legislature:

There is a real misconception amongst the voters and the general public in the State of West Virginia of what that book actually is and who the actual author of that book is. Ladies and gentlemen, I assure you the author of that book is not the West Virginia Board of Education nor the West Virginia Department of Education. This is a book of school law created by legislators past, present, and hopefully in the future, right across the way. Every law in this book was passed by a legislature, a bicameral legislature. Not this Board. Not the Department.

W. VA. DEP’T OF EDUC., *October 2025 Board Meeting*, at 18:43-19:33 (Oct. 1, 2025), <https://tinyurl.com/5n6ua4d5>. Hardesty encouraged voters to use their voices to “make ‘em [legislators] show you” what they would do for the schools. *Id.* at 30:49-33:07. And pointing his finger toward the Capitol—and the Legislature—Hardesty was clear: “There’s 134 members of the Legislature. They have the oversight.” *Id.* at 20:40-20:51.

SUMMARY OF ARGUMENT

I. A careful analysis of the relevant constitutional provisions confirms that House Bill 2755 is constitutional. The Legislature has broad power in education. Although the Board insists that the provision giving it “general supervision” divests the Legislature of authority when it comes to the Board’s own regulations, a careful reading of the plain language of that constitutional

provision shows otherwise. What’s more, the historical development of the relevant constitutional provisions show that the Legislature was meant to exercise oversight by way of general law. And that oversight is structurally sound considering the Legislature exercises similar oversight as to essentially every other aspect of state government.

II. *Hechler* does not render House Bill 2755 unconstitutional. For one thing, House Bill 2755 recognizes and respects the Board’s rulemaking authority. Unlike the law at issue in *Hechler*, it does not require another state actor to approve the Board’s work before a regulation can take effect. And if *Hechler* really does go so far as to block even a more limited law like House Bill 2755, then it should be overruled. The decision—so applied—would be legally unsound and unjustified by today’s conditions.

III. Unsuccessful efforts to amend the Constitution in the past are not relevant here. The language of the Constitution must decide this case. Courts don’t look to the present popular vote when construing the Constitution. And it’d be especially dangerous to draw inferences about the popular will from *failed* amendment proposals.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case deserves oral argument under Rule 20. The interpretation of Article XII, § 2 of the West Virginia Constitution, and the relationship between the Legislature and the Board, is exactly the sort of “case[] involving issues of fundamental public importance” that Rule 20(a) contemplates. W. VA. R. APP. P. 20(a)(2).

LEGAL STANDARD

“Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.” Syl. Pt. 1, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W. Va. 207, 151 S.E.2d 102, 103 (1966). But “[a] writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a

legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 539, 170 S.E.2d 367 (1969).

ARGUMENT

In seeking a writ, the Board asks this Court to focus on just about everything *but* the relevant constitutional provisions. But a close reading of that plain language—along with relevant history and other authority—confirms that House Bill 2755 is constitutional. In arguing otherwise, the Board relies on a single distinguishable case, questionable inferences drawn from a failed vote a few years ago, and even naked policy judgments. But the Court should not be misled. “Courts are not concerned with the wisdom or expediencies of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution.” Syl. pt. 2, *Jarrett Printing Co. v. Riley*, 188 W. Va. 393, 394, 424 S.E.2d 738, 739 (1992) (cleaned up).

The language of the Constitution confirms that House Bill 2755 is constitutional. The Secretary thus lacks any “clear legal duty” to accept a Board rule that does not conform to that law. The Court should deny the petition and refuse the writ.³

I. House Bill 2755 is a constitutional exercise of the Legislature’s power of oversight over education.

On a matter as important as this one, it makes sense to return to first principles. Doing so confirms that the Legislature had the power to enact House Bill 2755.

³ Although the Board asks this Court to “declare the laws enacted by House Bill 2755 unconstitutional,” Pet. 26, most of those laws have nothing to do with the specific provisions about which the Board complains. This Court has previously refused to consider the constitutionality of legislative provisions that “do not relate to any of [the petitioners’] claims.” *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 732 n.8, 474 S.E.2d 906, 912 n.8 (1996). The Court should similarly confine its review here.

A. The Legislature has broad powers in the educational realm.

Start from the beginning: the Legislature’s broad power. “[T]he West Virginia Constitution [is] a restriction of power rather than a grant [of power].” Syl. pt. 5, *State ex rel. Cooper v. Tennant*, 229 W. Va. 585, 589, 730 S.E.2d 368, 372 (2012). Thus, the “test of legislative power in this State is constitutional restriction, and what the people have *not* said in the organic law their representatives shall not do, *they may do*.” *Id.* at 594, 730 S.E.2d at 377. Put differently, “[u]nless the power of the Legislature over a subject matter is negated by the Constitution, the Legislature has plenary power.” *Arslain v. Alderson*, 126 W. Va. 880, 30 S.E.2d 533, 537 (1944); *see also State v. Beaver*, 248 W. Va. 177, 191, 887 S.E.2d 610, 624 (2022) (“The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.” (cleaned up)). Thus, “[i]n considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches.” Syl. pt. 1, *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 710, 715 S.E.2d 405, 408 (2011).

This same broad power exists in the field of public education. “Courts have often declared that legislatures have plenary authority to determine the bounds of thorough, efficient education.” *Pauley v. Kelly*, 162 W. Va. 672, 692, 255 S.E.2d 859, 870 (1979). That’s no different in West Virginia, where “[t]he mandatory requirements of ‘a thorough and efficient system of free schools’ found in Article XII, Section 1 of the West Virginia Constitution” charge “the Legislature” with meeting that responsibility through the “general law.” Syl. pt. 3, *Pauley*, 162 W. Va. at 672, 255 S.E.2d at 861; W. VA. CONST. art. XII, § 1. In other words, it is “the Legislature” that must “develop a high quality State-wide education system.” *Randolph Cnty. Bd. of Educ.*, 196 W. Va.

at 16, 467 S.E.2d at 157 (cleaned up). So education is a “subject expressly assigned to the Legislature by the West Virginia Constitution.” *Id.* at 24, 467 S.E.2d at 165; *accord* 78 C.J.S. SCHS. & SCH. DIST. § 93 (May 2025 Update) (“The legislature is ultimately responsible for public education.”). That makes sense, as the Constitution says that “[t]he legislative power shall be vested in a Senate and House of Delegates,” W. VA. CONST. art. VI, § 1. It doesn’t say that the legislative power shall be vested there *except* when it comes to public schools.

Consistent with that broad power, the Legislature has passed all manner of laws that govern our public schools. Just this year, the “Green Book”—a compendium of laws related to education passed in the last legislative session—runs more than 200 pages long. *See* W. VA. DEP’T OF EDUC., *2025 Green Book: Summary of Public Education Bills Enacted During the 2025 Regular Session* (2025), <https://tinyurl.com/yc2k7d9m>. Chapter 18, which covers education, contains more than 100 articles, covering all sorts of issues both big (*see, e.g.*, West Virginia Code Article 9A, addressing public school funding) and small (*see, e.g.*, West Virginia Code Article 9G, covering water bottle filling stations). Overall, the Legislature has exercised its primary power to pass “general law” regulating education in all manner of ways—ways that not even the Board has seen fit to question. *Contra* Pet. 22 n.5 (arguing that Section 1 “simply requires the Legislature to develop a public school system and fund it”).

B. Article XII, Section 2 of the West Virginia Constitution does not bar the Legislature from the educational realm.

Against this background, the Board asks the Court to recognize an implied limit on the Legislature’s power through the constitutional provision establishing the Board as a constitutional office. That provision provides: “The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law.” W. VA. CONST. art. XII, § 2. “An examination of the actual language”

confirms that this provision does *not* prevent the Legislature from exercising oversight in the way it did in House Bill 2755. *State ex rel. Justice v. King*, 244 W. Va. 225, 231, 852 S.E.2d 292, 298 (2020).

1. “Shall Be Vested.”

The Constitution says that “general supervision ... shall be vested” in the Board, W. VA. CONST. art. XII, § 2, but that statement does not afford the Board *exclusive* power over educational regulation.⁴ In fact, this provision says nothing about rulemaking at all, in contrast to other parts of the Constitution. *See, e.g.*, W. VA. CONST. art. VIII, § 3 (giving this Court rulemaking authority). So put aside, for a moment, the immediate conflict that the Board’s argument creates with Article XII, Section I. All on its own, Section 2’s language reveals the Board’s overreach. Three considerations drive the analysis: missing terms, usual understandings, and the prohibition on negative implications.

Most obviously, some conspicuous terms are missing. The drafters could have used words like “sole,” “exclusive,” “all,” “alone,” and similar phrasing; likewise, the provision omits more muscular language like “power” and “authority.” *Contrast* W. VA. CONST. art. IV, § 9 (“The House of Delegates shall have the sole power of impeachment.”), *with* W. VA. CONST. art. VIII, § 1 (“The judicial power of the [S]tate shall be vested solely in a supreme court of appeals and in the circuit courts, and [certain other courts].”), *and* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States.” (cleaned up)). “But they did not insert those words, and not having inserted them [the Court should] not feel authorized in the discharge of [its] duty under the authorities to insert them by construction, and read the section as though

⁴ Relatedly, many of the Board’s cited cases consider whether the Board has a given power but do not consider the *Legislature’s* role or the exclusive nature of that power. *See, e.g., Bd. of Educ. of Cnty. of Kanawha v. W. Va. Bd. of Educ.*, 184 W. Va. 1, 5, 399 S.E.2d 31, 35 (1990).

they were therein contained.” *Bridges v. Shallcross*, 6 W. Va. 562, 593 (1873). Indeed, this Court already recognized that similar vesting clauses don’t confer exclusive power, approvingly citing language about the similarly non-exclusive nature of executive power in the U.S. Constitution. *See Blue v. Tetrick*, 69 W. Va. 742, 72 S.E. 1033, 1034 (1911) (“The Constitution of the United States provides that the executive power of the nation shall be vested in the President; but it will certainly not be contended that it was intended by this that the President was to be the sole and exclusive executive officer of the nation.”); *accord Gundy v. United States*, 588 U.S. 128, 159 (2019) (Gorsuch, J., dissenting) (“[L]egislative authority sometimes overlaps with authority the Constitution separately vests in another branch.”).

Consistent with this understanding, historical analyses of early constitutional drafting have found that “the word ‘vest’ generally meant a simple grant of powers without the constitutional significance of exclusivity or indefeasibility.” Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1485 (2022) (cleaned up); *see also* Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 309 (2009) (explaining why the analogous federal executive power is still subject to “legislative constraints and constitutional prohibitions”). Early cases in all sorts of contexts suggest much the same. *See, e.g., United States v. Lathrop*, 17 Johns. 4, 5 (N.Y. Sup. Ct. 1819) (“The vesting of jurisdiction in newly-constituted courts, without any words of exclusion of the jurisdiction possessed by other courts before, does not, *ex vi termini*, oust those courts of jurisdiction.”); *State v. Johnson*, 60 P. 1068, 1080 (Kan. 1900) (explaining that vesting “is only a declaration of the general system or theory of our government, and was never intended to fix exact and impassable limits to each department.”). Modern courts do, too. *See, e.g., Savannah Invs. v. Centimark Corp.*, No. 405CV038, 2005 WL 8156293, at *2 (S.D. Ga. Sept. 9, 2005) (explaining that a “shall be vested” clause in a forum selection provision does not “unambiguously state that

the [identified forum] shall be the *exclusive* forum.” (cleaned up)). In a vacuum, this reading hints that the Board cannot be *divested* of powers, but the Legislature would still have room to exercise oversight power of its own in the same space.⁵

Thus, “[t]he argument made for exclusivity is conclusory and rests mainly on an implicit negative inference.” Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1789 (1996) (addressing similar presidential Vesting Clause of the U.S. Constitution). But that runs into another problem: the Court has declined to employ the *expressio unius* canon and its negative implication—specifically in the context of Article XII—when the provision “does not contain any negative or restrictive language ... [or] contain a series of two or more terms or things that should be understood to go hand in hand.” *Beaver*, 248 W. Va. at 194, 887 S.E.2d at 627 (cleaned up). The reluctance acknowledges that negative implications are often “unreliable,” and it can be dangerous to “infer[] ... from silence.” *State v. Euman*, 210 W. Va. 519, 524, 558 S.E.2d 319, 324 (2001) (McGraw, C.J., concurring). It would be especially wrong to rely on a negative implication to find a limit on *legislative* power.⁶

2. “Supervision.”

The word “supervision” also does not grant the Board the exclusive power it now claims. Remember that “[w]ords used in a state constitution ... should be taken in their general and

⁵ But Section 2’s later language suggests even this anti-divestment reading is questionable, as discussed below.

⁶ The separate separation-of-powers clause does not aid the Board. “[T]his Court has long recognized that it is not possible that division of power among the three branches of government be so precise and exact that there is no overlapping whatsoever.” *In re D.H.*, No. 23-416, 2024 WL 4763258, at *5 (W. Va. Nov. 13, 2024) (cleaned up); *see also, e.g., Appalachian Power Co. v. Pub. Serv. Comm’n of W. Va.*, 170 W. Va. 757, 759, 296 S.E.2d 887, 889 (1982); *Chapman v. Huntington W. Va. Hous. Auth.*, 121 W. Va. 319, 336, 3 S.E.2d 502, 510 (1939). The real question, then, is whether there is something so unique in the Board’s powers that this assumed flexibility is prohibited and the Legislature’s legislative power curtailed. As explained above, there is not.

ordinary sense.” Syl. pt. 4, *State ex rel. W. Va. Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 690, 715 S.E.2d 36, 39 (2011). And “supervision” has never mandated *total* control. “Supervision” today contemplates merely “managing, directing, or overseeing persons or projects,” while older sources contemplated an even more passive role of observations. *Compare Supervision*, BLACK’S LAW DICTIONARY (12th ed. 2024), with *Supervise*, SULLIVAN’S DICTIONARY OF THE ENGLISH LANGUAGE (1873) (“to overlook, to oversee”), and *Supervise*, JOHNSON’S DICTIONARY OF THE ENGLISH LANGUAGE (1872) (same), and *Supervise*, WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE (1866) (“[t]o oversee; to superintend; to inspect”).

But neither the older or newer understanding of “supervision” says anything about who (if anyone) will in turn oversee *that* supervisor; nor does the word imply that a supervisor must act alone. In a business, for instance, a “supervisor” will often report to several other persons with ultimate decision-making authority; the same is just as true in governments. *See Supervisor*, WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY (1967) (defining supervisor as “an administrative officer in charge of any of various, business, government, or school units or operations.”). That’s why this Court has already endorsed a definition of general supervision that “means something more than to advise and confer with *but something less than to control*.” *Bailey*, 174 W. Va. at 16, 321 S.E.2d at 310 (cleaned up, emphasis added); *accord People v. Brophy*, 120 P.2d 946, 953 (Cal. Ct. App. 1942) (explaining how “direct supervision” “does not contemplate absolute control and direction.” (cleaned up)). And indeed, depending on the context, the word “supervision” can be even narrower than that. *See, e.g., In re Persons*, 334 N.W.2d 471, 474 (N.D. 1983) (rejecting the argument—in another context—that “[t]he word ‘supervision’ requires greater involvement ... than rendering mere technical assistance.”).

3. “General.”

The word “general” is no help to the Board, either; that word describes the scope and breadth of the Board’s power, but not its exclusivity (or non-exclusivity). See, e.g., *General*, SULLIVAN’S DICTIONARY, *supra* (“not specific or particular, but extending to all; relating to the whole” (cleaned up)); *General*, JOHNSON’S DICTIONARY OF THE ENGLISH LANGUAGE, *supra* (“usual, common, extensive”); *General*, LATHAM’S DICTIONARY OF THE ENGLISH LANGUAGE (1866) (“Whole; totality; main, without insisting on particulars.”). The word “general” merely tells us that the School Board’s charge is not limited to some particular aspect of the public-school system but instead embraces all of it. *General*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (“Concerned with, or established for, the whole of a certain territory or organization”); see also, e.g., *Fractional Sch. Dist. No. 1 of Barry Twp. v. Twp. Sch. Dist. of Barry Twp.*, 259 Mich. 75, 83 (1932) (collecting common definitions of “general”). The language might also serve to draw a line between the statewide powers of the Board and the more locally oriented powers of the county school boards. See *State ex rel. Morgan v. Miller*, 177 W. Va. 97, 104, 350 S.E.2d 724, 732 (1986) (distinguishing between “general” and “local or special” laws). In the same way that the Legislature can provide for education through “general law” applying to the whole state, *Beaver*, 248 W. Va. at 201, 887 S.E.2d at 634, so too may the Board exercise its oversight throughout the whole state. *Accord Bd. of Educ. of Sch. Dist. No. 1 in City & Cnty. of Denver v. Booth*, 984 P.2d 639, 647 (Colo. 1999) (“[O]ur definition [of ‘general supervision’] begins with the presumption that the framers intended the State Board to provide direction, inspection, and critical evaluation of ‘the whole’ in the sense of contributing a statewide perspective to decisions affecting public schools.”).

4. “Such Duties.”

The phrase “such duties” is another good sign that the Board has no wellspring of exclusive authority. “Duties,” of course, are the Board’s responsibilities, *see Duty*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“legal obligation[s]”), which carry with them the “implied” authority to carry out those responsibilities, *State v. Baltimore & O.R. Co.*, 78 W. Va. 526, 89 S.E. 288, 291 (1916). But more important is the Constitution’s use of the unadorned word “such.” That word means “of this or that kind ... that or those; having just been mentioned.” *Such*, BLACK’S LAW DICTIONARY (12th ed. 2024). Looking to its ordinary meaning, other courts have said that “[t]he word ‘such’ is defined as ‘of the sort previously indicated or contextually implied; before mentioned, previously characterized or specified; of the same kind or class as something mentioned.’” *Richardson-Merrell, Inc. v. Main*, 402 P.2d 746, 748 (Or. 1965); *see also, e.g., Interstate Fire & Cas. Co. v. Roman Cath. Church of Diocese of Phoenix*, 761 F.3d 953, 955 (9th Cir. 2014) (“[T]he word ‘such’ is defined as ‘of a kind or character about to be indicated, suggested, or exemplified’ or ‘having a quality already or just specified—used to avoid repetition of a descriptive term.’” (cleaned up)); *In re Mary Silvestri’s Teaching Cont. With Indep. Sch. Dist. No. 695*, 480 N.W.2d 117, 120 (Minn. Ct. App. 1992) (“The word ‘such’ is defined as ‘meaning of the sort or degree previously indicated or contextually implied; having the quality already or just specified.’” (cleaned up)); *F.W. Woolworth Co. v. Town of Greenwich*, 690 A.2d 405, 406 (Conn. Ct. App. 1997) (“The common definition of the word ‘such’ includes ‘having a quality already ... specified ... of the sort ... previously indicated or implied ... previously characterized or specified’; and ‘aforementioned.’” (cleaned up)). Thus, “such” links “duties” to that which was previously mentioned: that is, “general supervision.” In plain English: “such duties” is coextensive with “general supervision” in Section 2. The provision effectively reads: “The Board has general

supervision of the free schools ... which shall perform *those general supervisory* duties as may be prescribed by law.”

Of course, the Constitution could have broken this link by using different language. For instance, the 1872 Constitution spoke of “such *other* duties *in relation thereto* as may be prescribed by law.” W. VA. CONST. art. XII, § 2 (1872) (emphasis added). The additional words make plain that the “duties” are related to “general supervision” but nevertheless distinct. But the 1958 amendment *removed* those broadening words, *see* W. VA. CONST. art. XII, § 2 (1958), so “such duties” became coterminous with “general supervision” rather than describing two separate sources of authority. The Court must give weight to that choice.

5. “Prescribed by Law.”

The last clause—“prescribed by law”—then proves to be critical, as it gives meaning to “such duties” *and*, by extension, “general supervision.” Ordinary meaning, paired with a simple chain of logic, again points the way. “[T]he Legislature makes the laws.” *State v. Gaughan*, 55 W. Va. 692, 48 S.E. 210, 214 (1904). “The phrases, ‘prescribed by law’ and ‘provided by law,’ when used in Constitutions, generally mean prescribed or provided by statutes.” *Lawson v. Kanawha Cnty. Ct.*, 80 W. Va. 612, 92 S.E. 786, 789 (1917); *see also State v. Huber*, 129 W. Va. 198, 213, 40 S.E.2d 11, 20 (1946) (“[T]he expression ‘prescribed by law’ means that the Legislature may prescribe law in regular course.”). The Legislature’s statutes then “prescribe”—that is, “dictate, ordain, ... direct[,] [or] establish authoritatively”—the Board’s duties, which in turn shape its powers of general supervision. *Prescribe*, BLACK’S LAW DICTIONARY (12th ed. 2024); *see also, e.g., Prescribe*, WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1988) (“to set down as a rule or guide; enjoin ... to establish rules, law, or directions”).

And indeed, this Court has often construed similar phrasing to grant the Legislature broad oversight power. For instance, where the constitution allowed for appeals from justices “in such manner as may be prescribed by law,” the Court recognized that the language “implies” a power over “more than method;” it also implies a power over what appeals may be decided at all. *Duncan v. Baltimore & O.R. Co.*, 68 W. Va. 293, 69 S.E. 1004, 1006 (1910). Where county courts were to operate under such regulations as may be prescribed by law, “the Constitution, in that respect, was intended to be inoperative, until put into effect by legislative enactments.” *Speidel v. Schlosser*, 13 W. Va. 686, 695 (1879); accord *State ex rel. Cnty. Ct. of Cabell Cnty. v. Battle*, 147 W. Va. 841, 847, 131 S.E.2d 730, 734 (1963) (noting how this language “indicat[es] considerable retention of power over counties by the legislature”); *State ex rel. Dillon v. Braxton Cnty. Ct.*, 60 W. Va. 339, 55 S.E. 382, 385 (1906) (explaining how this language places “a clear right in the Legislature” to “control” county courts); see also, e.g., *Hill v. Barbour Cnty. Ct.*, 117 W. Va. 288, 185 S.E. 227, 228 (1936) (“Free rein is given the Legislature” via similar constitutional language charging it with establishing a road system and placing it under the control of “such state officers and agencies as may be prescribed by law.”). Likewise, a section of the Constitution “vesting in justices of the peace such jurisdiction and power in criminal cases as may be prescribed by law, impliedly authorizes the Legislature to give or withhold such jurisdiction.” Syl., *Ex parte Glass*, 81 W. Va. 111, 93 S.E. 1036 (1917). When the Legislature is denied the right to act *despite* a provision saying powers or authority shall be exercised as may be “prescribed by law,” then that language is improperly rendered “a dead letter.” *Huntington Chamber of Com. v. Pub. Serv. Comm’n*, 84 W. Va. 81, 99 S.E. 285, 286 (1919).

The Court has even explained how these words function when it comes to constitutional offices specifically. In evaluating the powers of the Attorney General, for instance, the Court noted

how Article VII, Section 1 of the Constitution says that the Attorney General “shall perform such duties as may be prescribed by law.” These words “expressly authorize[] the Legislature to establish duties of the Attorney General’s office.” *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 243, 744 S.E.2d 625, 641 (2013). Although “the Office of Attorney General retains inherent common law powers” as a matter of historical practice, he retains those authorities only “when not expressly restricted or limited by statute.”⁷ *Id.* at 247, 744 S.E.2d at 645; *see also id.* at 248, 744 S.E.2d at 646 (noting a Virginia court’s view that the Attorney General has “such common law powers as have not been specifically repealed by statute”). So long as the Legislature does not purport to “nullify all of the inherent powers”—which could have the effect of erasing the Attorney General’s constitutionally mandated role—it has room to regulate the Attorney General’s actions. *Id.* at 247, 744 S.E.2d at 645; *see also* Syl. pt. 9, *W. Va. Tr. Fund, Inc. v. Bailey*, 199 W. Va. 463, 485 S.E.2d 407 (1997) (holding much the same as to the State Treasurer).

Against this substantial authority, the Board effectively insists that *West Virginia Board of Education v. Board of Education of the County of Nicholas*, 239 W. Va. 705, 806 S.E.2d 136 (2017), renders “prescribed by law” a meaningless appendage. It does no such thing. *County of Nicholas* says that the Board cannot be rendered “powerless.” *Id.* at 713, 806 S.E.2d at 144. Citing *Bailey*, the Court reiterated that “constitutional grants of authority” cannot be “derogated or eliminated.” *Id.* at 714, 806 S.E.2d at 145. *County of Nicholas* also cites a Wyoming case holding a law unconstitutional where it “transfer[red] the bulk of the Superintendent’s previous [constitutional] powers and duties to the Director,” such that the Superintendent’s function was effectively

⁷ The Board cannot claim common law powers. The Legislature created the Board by statute, W. VA. ACTS, c. 27, § 130 (1908), while the Superintendent (from which many of the Board’s present powers were transferred) was not a common law carryover from Virginia but rather originated as an entity exercising only authority that the Legislature “bestowed.” *Bastress, supra*, at 326.

“eliminated.” *Powers v. State*, 318 P.3d 300, 303 (Wyo. 2014); *Id.* The focus of *County of Nicholas*, then, was an effort to *eliminate* the Board’s supervisory power, not exercise some control and oversight over it. *Accord Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953) (holding the Legislature cannot “denude the office”); *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820, 828-29 (Ky. 1942) (holding that the power to “prescribe” a constitutional office is “subject to the limitation that the office may not be stripped of all duties and rights so as to leave it an empty shell”); *McCulley v. State*, 53 S.W. 134, 164 (Tenn. 1899) (“It is equally well settled that the legislature may, ... diminish or increase the duties ... but it cannot destroy either the officer or the office in toto.”). Ultimately, the Court upheld a statute affecting education in *County of Nicholas* precisely because it did not reduce the Board to a “mere compliance officer.” 239 W. Va. at 147, 806 S.E.2d at 716.

There’s quite a difference between the rules that *Powers* and *County of Nicholas* lay down and what the Board now argues. The cases say the Legislature cannot erase an office by “prescribing” all its powers away. The Board now argues that the Legislature cannot *touch* functions that, through some ambiguously defined method, are deemed to be very special “supervisory” functions. The former idea finds company with many other West Virginia authorities from the earliest times of our State. *See, e.g., State v. Cottrill*, 31 W. Va. 162, 6 S.E. 428, 443 (1888) (“[T]he manner in which this [jury] trial [right] may be had must be prescribed by law, subject only to the limitation imposed on the legislative will, that the exercise of the right shall not be denied, or clogged with conditions so unreasonable as to amount to a practical denial of the right itself.”); *Jelly v. Dils*, 27 W. Va. 267, 280 (1885) (explaining how the Legislature—under a “prescribe by law” provision—must “grant appeals from the decisions of ... municipal courts[,] but it can attach to such appeal any condition in regard to security [for instance,] provided always

that it is clogged with no unreasonable restrictions”). But the latter idea is wholly foreign to West Virginia law. *Nelson v. W. Virginia Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1982) (“It is implicit in our system of government that public officers will perform their duties in accordance with statute.”). At least some amici go further and suggest that the “prescribes by law” provision acts as a one-way ratchet: that the Legislature can give powers but never place limits or take them away again. But no authority can be found for that idea, either.

* * *

Applying these principles to State Bill 2755 confirms that it is constitutional. The law reflects an appropriate legislative effort to meet its Section 1 responsibilities as to the “free schools.” In doing so, the Legislature has “prescribed” a way in which the School Board should perform “such duties,” and it has done so “by law.” And “general supervision” is not such an expansive font of authority that it must foreclose even this degree of oversight—oversight that expressly recognizes the Board’s continuing rulemaking power and maintains the Board’s right to exercise it. Instead, Section 2 should be read consistent with the many other constitutional provisions that allow the Legislature to exercise its nearly plenary power.

C. History and context confirm that the Legislature can play a role.

The Board leans heavily on its own reading of the history of education regulation in West Virginia. That choice—to engage with history first rather than the Constitution’s text—is a mistake. “History is indeed very important, but it alone cannot be permitted to overwhelm or replace the constitutional provision in question.” *Randolph Cnty.*, 196 W. Va. at 21, 467 S.E.2d at 162. And the plain language of the relevant provisions is enough to decide this case.

But truth be told, even if one looks to “the history known to or experienced by the framers of the Constitution,” *State ex rel. K.M. v. W. Va. Dep’t of Health & Hum. Res.*, 212 W. Va. 783,

795, 575 S.E.2d 393, 405 (2002), it favors the Legislature’s reading, not the Board’s. Remember that West Virginia’s first superintendent was an unelected individual who looked entirely to the Legislature for his powers. *See* Background, Section I. The State then pivoted to an elected Superintendent, and the relevant constitutional provisions seemed to provide the newly empowered superintendent two independent sources of power: “general supervision” authority *and* “such other duties” that the Legislature might prescribe. W. VA. CONST. art. XII, § 2 (1872); *see also* Background, Section II. But even with these two separate sources of power, the Superintendent of the time did not act independently from the Legislature. He acted as an advisor to the Legislature, filled in the interstitial gaps of legislation where they might exist, and generally ensured that the school system was run in line with the electorate’s wishes. *See* Background, Section III; *see also, e.g.*, Black, *supra*, at 815 n.421 (“To be clear, ... the typical superintendent and state board of education [as empowered through Reconstruction-era reforms] were not free of all politics and were still subject to the legislature’s control.”); *contra* Pet. 8 (citing same article as support for the notion that the Board is “insulate[d]”). The Strayer and Peabody reports later concluded that this last obligation should be lessened—that the people running the schools should not face the burden of running for election every few years—but nothing in those reports suggested that the Legislature should be pushed aside or the Board should be vested with even broader power than the Superintendent. *See* Background, Section IV. Quite the opposite: the reports continue to acknowledge the supreme role of the Legislature. *Id.*

So sure enough, when the public adopted the constitutional amendment shifting responsibilities to the Board in 1958, the amendment reflected that the “duties” and “general supervision” would no longer be entirely distinct; “such duties” and “general supervision” were connected, making the Legislature’s role a part of the constitutional promise. *See* A.R. 374-75

(1966 Attorney General opinion noting that shift in language). By tying those two back together, the amendment ensured that the voters maintained some degree of indirect influence over school board operations even if the board members themselves were not forced to run for election. And by asserting that influence through the Legislature, the information deficit that was so problematic in direct elections was lessened. *See, e.g.,* Yeargain, *supra*, at 389 (explaining that the shift to appointed positions resulted from a belief that “voters, while well-intentioned, were poorly positioned to select qualified candidates given the realities of partisan elections”).

The 1958 change in Section 2’s wording—“such other duties” becoming “such duties,” and “in relation thereto” dropping out entirely—is an especially important bit of constitutional history. “[N]o part of the fundamental law should be regarded as surplusage.” *State ex rel. Rist v. Underwood*, 206 W. Va. 258, 270, 524 S.E.2d 179, 191 (1999). And applying that canon, courts “ordinarily presume that ... ‘it [is] intend[ed] [that the] amendment [will] have real and substantial effect.’” *Bufkin v. Collins*, 604 U.S. 369, 386 (2025) (addressing statute); *see also Stepp v. Cottrell on behalf of Est. of Cottrell*, 246 W. Va. 588, 594, 874 S.E.2d 700, 706 (2022) (explaining that the Court generally applies the same canons of construction as to constitutional provisions as it does to statutes). In other words, as another court has put it, “changes in [the relevant] language generally indicate an intent to change the meaning of the” amended provision. *Middleton v. State*, 309 Ga. 337, 345, 846 S.E.2d 73, 81 (2020). Yet the Board ignores the 1958 change in the “duties” language, focusing only on the other part of the amendment empowering the Board as an appointed constitutional office. A *complete* view of the history undercuts the Board’s view.

Really, many of the Board’s discussions of history read more as policy or equitable arguments in disguise. (Worse, some of the Board’s amici merely push policy points expressly.) The Board may earnestly believe, for example, that a technocratic approach to education will

produce the best outcomes. But “equity arguments can have nothing to do with the authority of the State Board versus the authority of the Legislature.” *State ex rel. W. Va. Bd. of Educ. v. Gainer*, 192 W. Va. 417, 419, 452 S.E.2d 733, 735 (1994). And neither statutory nor constitutional construction leaves room for this Court to “pass upon the political, social, economic or scientific merits” of the laws in question. Syl. pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009). For good reason: these policy questions are matters of hot dispute. After all, “[l]egislative rule-making review has purpose and merit and may be beneficially exercised and employed when contained within its proper and constitutional sphere.” *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 175, 279 S.E.2d 622, 634 (1981). For exactly that reason, every other constitutional office in the State is subject to such rulemaking review. And rules are subject to review even when they concern issues of substantial complexity (such as the Department of Environmental Protection’s regulations) or with grave, life-or-death implications (such as miner safety regulations). All this is to say: the policy interests aren’t as plain as the Board might perceive them to be. Rather than weighing the costs and benefits, the Court stands of firmer ground by staying focused on the words of the Constitution.

In short, the history and development of our Constitution confirm that the Legislature has room to exercise oversight over the Board’s rulemaking function.

D. Other persuasive authorities confirm that the Legislature can review education-related rules.

Although not binding, the experience of other States also supports the Legislature’s choice to exercise some degree of oversight over rulemaking. See *Edlis, Inc. v. Miller*, 132 W. Va. 147, 167, 51 S.E.2d 132, 141-42 (1948) (noting that decisions of other jurisdictions are “entitled to great respect and should be regarded as persuasive authority”). Some amici have looked to out-of-state authority, but their preferred cases are largely inapplicable because they either (a) concern

differently written constitutional provisions, such as provisions that do not tie “duties” to “general supervision”; or (b) address far more aggressive assertions of legislative power, such as attempts to remove the functions of the office entirely. *See, e.g., State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986) (“The limitation implicit in [a constitutional provision establishing an office] serves only to prevent the legislature from abolishing *all* of the independent functions inherent in an executive office.” (emphasis added)). The *relevant* cases support the law’s constitutionality.

In *Koschkee v. Taylor*, 929 N.W.2d 600 (Wisc. 2019), for example, the Supreme Court of Wisconsin considered a statute that required the Superintendent of Public Instruction to submit proposed rules to the Governor for approval. As the West Virginia Constitution does for the Board, Wisconsin’s constitution granted the Superintendent “supervision of public instruction” with duties prescribed by the Legislature. *Id.* at 607-10. The Board insisted the Governor’s new rulemaking-review intruded on its core functions, but the Supreme Court disagreed. It concluded that the Legislature could appropriately assign the Governor an oversight role over the Superintendent’s rulemaking because “rulemaking is not ‘supervision of public instruction.’” *Id.* at 610. Rather, rulemaking was a delegated, legislatively prescribed function. *Id.* at 610-11.

North Carolina State Board of Education v. State, 814 S.E.2d 54 (N.C. 2018), is perhaps even more on point. There, the Supreme Court of North Carolina considered the constitutionality of “laws requiring the [State] Board [of Education] to submit the rules and regulations it proposes to a statutorily created committee for review and approval.” *Id.* at 56. The Board in North Carolina is given the constitutional power to “supervise and administer the free public school system,” including the power to “make all needed rules and regulations in relation thereto.” *Id.* at 61. But as in West Virginia, these powers are “subject to laws enacted by the General Assembly” in North

Carolina. *Id.* So applying the “plain language” of the Constitution, the Supreme Court held that the Legislature could subject the Board to oversight through a commission. *Id.* at 63. “[T]he history of the relevant amendments to the constitution d[id] not indicate that the document’s framers intended that the Board would have the unbridled power to adopt rules and regulations of its own volition.” *Id.* And the Court was particularly unconvinced by the Board’s argument—like the Board’s argument here—that concerns of the past rendered any oversight via the laws of today unconstitutional:

[T]he Board’s present contention that the Commission’s review of the Board’s rules is ‘consistent with the mischief sought to be remedied’ from the 1930s is without merit. There are major differences [I]n the past the General Assembly created new boards that allegedly stripped the Board of much of its power in response to unflattering reports about the Board’s administrative shortcomings; in the present, the General Assembly has delegated authority to a sole entity—the Commission—that has a well-defined role, subject to legislative oversight, regarding the Board’s and other agencies’ rulemaking procedures. In the 1930s multiple state boards had the power to exercise authority over various aspects of public educational matters; now, that power has been consolidated into the Board. The Commission’s authority to review the Board’s proposed rules is not a corrective measure, but a process that applies uniformly to numerous state agencies like the Board.

Id. (noting other distinctions, too, such as specified criteria for review).

Decisions like these aren’t aberrations. In many contexts, and in many places, courts have recognized that constitutionally charged “supervisors” of the schools may still be subject to required procedures, approval, adjustment, and oversight by other actors. *See, e.g., El Centro De La Raza v. State*, 428 P.3d 1143, 1154 (Wash. 2018) (holding that Legislature’s assignment of certain responsibilities related to charter schools to separate commission did not violate Superintendent’s general supervisory power); *Straus v. Governor*, 592 N.W.2d 53, 62 (Mich. 1999) (holding that the transfer of certain “administrative” powers from the board of education to another did not violate a “supervision” provision); *State Bd. of Educ. v. Honig*, 16 Cal. Rptr. 2d 727, 750 (Cal. Ct. App. 1993) (“Although the Superintendent is a constitutional officer whose office cannot

be extinguished by the Legislature, the powers and duties of that office may, and have been, increased and diminished by the Legislature under its plenary authority.”); *Bd. of Educ. of State of Haw. v. Waihee*, 768 P.2d 1279, 1285, 1289 (Haw. 1989) (holding that, despite the Board’s constitutional power “to formulate policy and to exercise control over the public school system,” “there [was] no basis for a court to rule [the Governor] exceeded his powers in adopting a preliminary approval procedure [for Board rules]”); *Aguillard v. Treen*, 440 So. 2d 704, 708 (La. 1983) (“[The Board’s] supervision therefore is not unfettered, but subject to laws passed by the Legislature.”); *Bateman v. Bd. of Examiners of State of Utah*, 322 P.2d 381, 390 (Utah 1958) (holding that, despite the Board of Education’s supervisory power, the Board was still subject to spending oversight by a separate board and commission “in a similar manner to other departments of state government”); *State ex rel. Langer v. Totten*, 175 N.W. 563, 566 (N.D. 1919) (rejecting the argument that the Legislature’s educational laws infringed on supervisory powers of the Superintendent considering how “the Legislature, since statehood, ha[d] assumed both the right and the duty under the constitutional provisions to regulate the system of education in this state and of public schools existing for such purpose”); *cf. S.D. Bd. of Regents v. Meierhenry*, 351 N.W.2d 450, 451 (S.D. 1984) (addressing a “control” provision empowering the board of regents: “It does not grant that board political autonomy. Consequently, the board of regents is not a fourth branch of government independent of legislative policies. Legislative powers remain.” (internal citations omitted)).

In short, courts have consistently held that a board of education “is not a fourth branch of government,” even when the board is constitutionally recognized. *Straus*, 592 N.W.2d at 58. “To so hold would be to directly contravene the plain meaning” of the Constitution’s separation-of-powers provision. *Id.* Indeed, even the West Virginia Education Association (a predecessor to one

of the Board’s amici here) once recognized that “the framers did not intend to create a fourth, independent branch of government to run our schools.” Amicus Curie Br. of W. Va. Educ. Ass’n at 3, *W. Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988) (supporting legislative review). The Court should thus hold that the Legislature has authority to exercise its legislative oversight through avenues like House Bill 2755.

II. *Hechler* does not render House Bill 2755 unconstitutional.

For the most part, the Board relies on a single case—*Hechler*—to contend that House Bill 2755 is unconstitutional. But *Hechler* is distinguishable; it enjoined a critically different law. And even if it weren’t distinguishable, the Court has strong reason to overrule it. Thus, *Hechler* should not be used to enjoin enforcement of House Bill 2755.

A. *Hechler* is distinguishable.

“[R]espect for past judgments also means respecting their limits.” *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 491 (2025). So “an opinion is not binding precedent on an issue it did not address.” *Frazier v. Burcker*, 248 W. Va. 21, 27, 886 S.E.2d 356, 362 (2023). And although the Board repeatedly argues that *Hechler* addresses the same law as House Bill 2755, it simply does not. Thus, the Court could leave both *Hechler* and the present law in place.

Recall how *Hechler* addressed an effort to completely erase the Board’s rulemaking powers. If the Legislature “fail[ed] to act on a rule submitted to it,” then the Board could do *nothing*. *Hechler*, 180 W. Va. at 453, 376 S.E.2d at 840. The law there “revoked” the Board’s rulemaking authority and expressly required the Board to apply to the Legislature for “permission” to act. W. VA. CODE §§ 29A-3A-3(b), 29A-3A-10 (1988). The Board could not even promulgate an emergency rule unless the Secretary of State agreed one was necessary. *Id.* § 29A-3A-16a (1988). The Court thus found that this total subjugation of the Board—depriving it of any ability

to issue rules independently under any circumstance—“pose[d] an interference with the Board’s rule-making power, and consequently, the Board’s general supervisory functions.” *Hechler*, 180 W. Va. at 455, 376 S.E.2d at 843. It constituted an effort to “undertake the Board’s general supervisory powers” in the face of an “exclusive delegation of rulemaking functions.” *Id.* at 455-56, 376 S.E.2d at 843. But even the Board recognizes that “exclusive” cannot be read to foreclose *any* legislative role in rulemaking, as the Board concedes that “the Legislature can direct the Board to make rules related to specific education objectives.” Pet. 7 n.2.

House Bill 2755 is much different than the statute *Hechler* faced. “[T]he statute itself appears to acknowledge and pay deference to the [Board’s] expansive rule-making authority.” *Cnty. of Nicholas*, 239 W. Va. at 717, 806 S.E.2d at 148; *see* W. VA. CODE § 29A-3B-9(a). And it substantively respects that authority, too. To be sure, the law builds in time for some legislative review before a rule becomes immediately effective. But a rule “shall become effective as initially promulgated” by the Board if the Legislature does not “review and approve, or reject, in whole or in part, the rule” within 15 months. *Id.* § 29A-3B-9(b). And the Board can also make rules immediately effective—if the circumstances warrant—by way of emergency rules. *Id.* § 29A-3B-10 (2025). Thus, the Board still originates rules, and those rules still become law. The effective-date adjustment only leaves the Legislature room to perform its concomitant legislative function, too.

Neither *Hechler* nor any other decision of this Court has said that the Legislature is foreclosed from imposing any processes or guardrails on the Board’s rulemaking power. Indeed, experience belies that suggestion, as the Board has complied with other aspects of the Administrative Procedures Act for many years and without objection. And even the broadest language in *Hechler*—condemning attempts to “impede” the Board’s rulemaking—would not

defeat a bill like House Bill 2755, which still permits the Board to act in a timely way. *Cf. State v. Stephens*, 387 N.E.2d 252, 253 (Ohio Ct. App. 1978) (holding that an officer was not “impeded” where there was no “substantial stoppage of the officer’s progress”). Reading *Hechler* to foreclose *any* legislative involvement in *any* matter that might be labelled “general supervision” could throw into doubt the constitutionality of all manner of state laws.

The Court should recognize that the Legislature has not repeated history but instead adopted a careful and constitutional effort to exercise its legislative authority.

B. Alternatively, the Court should overrule *Hechler*.

If the Court disagrees and concludes that *Hechler* would extend so far as to foreclose House Bill 2755, then the Court should now overrule that decision.

Stare decisis is not an unbreakable rule, and opinions are not “sacrosanct.” *In re R.M.*, No. 24-357, 2025 WL 3158180, at *10 (W. Va. Nov. 12, 2025). The Court has always been willing to “part ways with precedent that is not legally sound.” *State v. Sutherland*, 231 W. Va. 410, 417, 745 S.E.2d 448, 455 (2013). “[I]t is better to be right, than to be consistent with the errors of a hundred years.” *In re Kanawha Val. Bank*, 144 W. Va. 346, 382, 109 S.E.2d 649, 669 (1959). And especially when “it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from [stare decisis] is warranted.” *Nibert*, 231 W. Va. at 248, 744 S.E.2d at 646 (overruling a prior precedent on the powers of a constitutional office). Lastly, stare decisis should be “at its weakest when [this Court] interpret[s] the Constitution, ... because only this Court or a constitutional amendment can alter [its] holdings.” *Knick v. Twp. of Scott*, 588 U.S. 180, 202-03 (2019).

As should be clear by this point, *Hechler*’s reasoning is not compelling. It principally repeated language from *Bailey v. Truby*, *supra*, that described the breadth of the Board’s

supervisory power. *Hechler*, 180 W. Va. at 454, 376 S.E.2d at 842. But as already explained, *Bailey v. Truby* expressly relied on a Kansas case that in turn construed distinct constitutional language—language much more like the pre-1958 iteration of West Virginia’s constitution, which provided for *separate* “duties” and “supervision.” See Background, Section IV. Beyond that reference, *Hechler* mostly did not engage with the language of the West Virginia Constitution or related cases (such as the many prior cases addressing “prescribed by law” language). See *Hammons v. W. Va. Off. of Ins. Com’r*, 235 W. Va. 577, 594, 775 S.E.2d 458, 475 (2015) (“[A] precedent-creating opinion that contains no extensive analysis of an important issue is more vulnerable to being overruled.”). Instead, having construed *Bailey* to mean that a broad swath of supervisory authority was untouchable, the Court then declared—without real explanation—that independent rulemaking must be a part of that supervisory power. *Hechler*, 180 W. Va. at 455, 376 S.E.2d at 842. And it indulged in a bit of policy, stressing that educational issues are important and declaring that “[d]ecisions that pertain to education must be faced by those who possess expertise in the educational area.” *Id.*; but see, e.g., James Scott McClain, *The Voting Rights Act and Local School Boards: An Argument for Deference to Educational Policy in Remedies for Vote Dilution*, 67 TEX. L. REV. 139, 173-74 (1988) (describing a contrary view that the “trustee nature of school boards causes educational government to be less responsive to immediate community desires and neglects the distinct ‘values, needs, and aspirations of the various subcultures’ falling under the boards’ remit). In a last remark, the Court even gave the Board “special standing” because it was empowered by a constitutional provision—forgetting that other constitutional officers have long been subject to legislative oversight. *Hechler*, 180 W. Va. at 455, 376 S.E.2d at 843; see also, e.g., H. Hudgins & R. Vacca, LAW AND EDUCATION § 1.5, at 18 (2d ed. 1985) (cited

in *Hechler*) (noting how “the legislature” is ultimately charged with “the responsibility of organizing, providing for, and administering a state system of education”).

Although *Hechler* insists that “general supervision” is not an “axiomatic blend” of words, *id.*, it provides little in the way of substantive support for what those words mean—and even less in the way of guidance as to how they apply. It does not take note of the change in constitutional wording in 1958. It does not consider the historical functions of the Board or the Superintendent. It instead appears to assume that a power over “day-to-day operations” necessarily *excludes* the Legislature from taking action that somehow falls in that sphere, all without explaining why the Board’s power in even that space is *exclusive*. It largely eschews prior precedent. It is, in short, legally unsound.

To the extent that (inappropriate) policy beliefs partly drove *Hechler*, time has shown the assumptions underlying those beliefs have changed, too. The Board has felt empowered, as more than 100 active Board regulations can now be found in the state administrative code. And it has flexed its administrative muscle over a range of key issues, from consolidation to county takeovers and more. *See, e.g.*, Duncan Slade, *West Virginia Is Taking Control Of More Local School Systems*, MOUNTAIN STATE SPOTLIGHT (Sept. 4, 2025), <https://tinyurl.com/4rd6zzjf>. But results have been mixed at best. “West Virginia ranks 45th in education,” according to one recent report. Amelia Ferrell Knisely, *New report: WV education outcomes still nearly last in country, fewer kids attending preschool*, W. VA. WATCH (June 12, 2025), <https://tinyurl.com/mr4d5wev>; *see also, e.g.*, Laura Guglani & Tori Gastón, *Why World Language Teachers Stay: Teacher Retention in West Virginia, Challenges and Opportunities*, 60 DIMENSIONS 96, 96 (2025) (“West Virginia faces ongoing challenges, including critically low standardized test scores and a widespread failure to

meet benchmarks.”). And at least some suggest that these disappointing results stem in part from today’s centralized, less accountable, state-centered structure:

We have encountered no other state that insulates its education system so much from gubernatorial – or voter – control; restricts local initiative so much on the part of districts, building principals, and teachers; and vests so much authority for education at the state level. This is, of course, the citizens’ choice. But it runs counter to most of the concern and thinking in educational reform today that individual initiative and accountability should be encouraged, while responsibility for education must ultimately come to a single point at the top of the pyramid and that the individual ultimately responsible must him- or herself be accountable to the voters.

PUBLIC WORKS LLC, EDUCATION EFFICIENCY AUDIT OF WEST VIRGINIA’S PRIMARY AND SECONDARY EDUCATION SYSTEM 15 (Jan. 3, 2012), <https://tinyurl.com/mus54w9b>; *see also, e.g.*, W. VA. DEP’T OF EDUC., WEST VIRGINIA’S VOICE 28 (May 2019), <https://tinyurl.com/47yunvcr> (describing “an overwhelming outcry and support for flexibility at the local school level”). Allowing legislative oversight returns a more direct degree of accountability to the voters and ensures that local interests are considered. *See* W. VA. CONST. art. III, § 16 (providing that the “right of the people ... to instruct their representatives ... shall be held inviolate”). But it also retains the benefit of the Board’s expertise by ensuring that its power to pass regulations is preserved. Thus the arrangement addresses the educational problems of today.

Lastly, if the Court understands *Hechler* to mean that the Legislature is barred from touching anything that might be labelled “day-to-day” management (as the Board has suggested before), then the Court should abandon that line as “unworkable.” *Long v. City of Weirton*, 158 W. Va. 741, 783, 214 S.E.2d 832, 858 (1975), *superseded by statute on other grounds*, W. VA. CODE § 29-12A-5. Such a categorization provides no real direction to either the Legislature or the Board. Which side of the line do curriculum decisions fall on? Can the Legislature provide direction as to which personnel to hire? How they are to be paid? Where educational needs are greatest? It’s

unclear. It would be far better to abandon these fuzzy lines of demarcation and return to the structure that the Constitution intends—one in which the Board and the Superintendent exercise substantial powers but remain ultimately accountable to the Legislature.

In short, if the Court concludes that *Hechler* reaches so far as to block House Bill 2755, then the Court should rectify that error and overturn it.

III. Failed proposed constitutional amendments are irrelevant.

In a last argument, the Board abandons any argument grounded in the Constitution and appeals to a false sense of the majoritarian will, arguing that failed ballot proposals on this subject mean that the Legislature cannot now act. But unsuccessful efforts to amend the Constitution in the past say nothing about what the Constitution provides today.

The Board’s argument inappropriately moves away from the text. It bears repeating: “analysis must begin with the language of the constitutional provision itself.” *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W. Va. 276, 283, 438 S.E.2d 308, 315 (1993). In 1989 and 2022, voters were not being asked what they thought the language of today’s Constitution presently means (or even should mean). Rather, they were being asked whether to add still more language—language that ultimately did not make its way into the Constitution. The Board is thus inviting this Court to enforce a constitutional provision that does not exist, to interpret language that was never adopted, and to restrict legislative authority based on voter rejection of a *proposal*. That’s not how government works. A failed constitutional amendment leaves the landscape unchanged. Text is neither added nor altered—it simply “remains unchanged as to that particular issue.” 16 AM. JUR. 2D CON. LAW § 25 (2025 update). Without constitutional text, the Court has nothing to interpret or enforce.

At bottom, the Board invites this Court to draw conclusions from a *failed* vote—a dangerous proposition. “[C]ourts have frequently observed that as evidences of legislative intent[,] unpassed bills have little value. This is all the more so when the intent at issue is not that of the Legislature, but the voters at large.” *Yoshisato v. Superior Ct.*, 831 P.2d 327, 335 n.7 (Cal. Ct. App. 1992) (cleaned up); *accord In re Validation Proceeding to Determine the Regularity & Legality of Multnomah Cnty. Home Rule Charter Section 11.60 & Implementing Ordinance No. 1243 Regulating Campaign Fin. & Disclosure*, 462 P.3d 706, 721 (Or. 2020) (same); *Citizens Protecting Mich.’s Const. v. Sec’y of State*, 921 N.W.2d 247, 273 n.166 (Mich. 2018) (same). Rightly so. There’s a laundry list of reasons why voters may reject an amendment. “Most voters make snap judgments.” David B. Magleby, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* 179 (1984); *see also* Taylor A. Hatridge, *Begging the Question: Judicial Review of Ballot Questions for Referred State Constitutional Amendments in Wisconsin*, 2023 WIS. L. REV. 1418 (2023) (“When deciding how to cast their votes, voters often rely on the ballot question itself.”); Darrell V. McGraw, *Practical Political Considerations in Constitutional Revision*, 71 VA. L. REV. 320, 321 (1969) (arguing that many voters are indifferent to constitutional revision and roughly 20% will vote “no” “on any proposition”). And as noted already, there’s strong evidence that voters in 1988 and 2022 acted more in response to *other* proposals on the ballot than the educational amendments. Be that as it may, one thing is certain: voter rejection does not clearly express a policy preference, implied law, or constitutional mandate. Rejection means the voters declined to make a constitutional change—not that they intended to restrict legislative discretion within the existing constitutional framework.

And here, too, the Board’s position is unworkable. For every rejected amendment, subsequent legislative acts involving the same issue would be put to the test. Voters would

inadvertently place the law in a time capsule, and legal development would sit dormant until another ballot measure is issued. This “implied vote” constraint would severely limit legislators’ ability to exercise their lawmaking power and serve the constituents who elected them. And in a sad twist, *this* approach would “cast aside the will of West Virginia voters,” Pet. 25, as it is just as “important[t] [to] giv[e] effect to already stated expressions of the popular will,” including the constitutional language adopted in 1958. *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 218, 470 S.E.2d 162, 172 (1996) (cleaned up); *see also State ex rel. Bd. of Ed., Kanawha Cnty. v. Rockefeller*, 167 W. Va. 72, 87, 281 S.E.2d 131, 137 (1981) (Harshbarger, J., concurring) (“[O]ur Constitution[] [is] the written dictate of our people in their most majoritarian sense.”).

For all these reasons, then, the Court should not consider the failed ballot proposals.

* * *

At the end of the day, House Bill 2755 is constitutional. Thus, the Secretary of State appropriately declined to accept a rule that did not comply with it. And “[m]andamus will not lie to compel the performance of an illegal or unlawful act.” Syl. pt. 3, *State ex rel. Bd. of Educ. of Kanawha Cnty. v. Casey*, 176 W. Va. 733, 349 S.E.2d 436 (1986). The Court should not issue any writ here.

CONCLUSION

This Court should deny the petition for writ of mandamus.

Respectfully submitted,

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November 24, 2025

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 25-642

**WEST VIRGINIA BOARD OF EDUCATION,
and MICHELE BLATT, in her capacity as
State Superintendent of Schools,**

Petitioners,

v.

**KRIS WARNER, in his capacity as
West Virginia Secretary of State,**

Respondent.

CERTIFICATE OF SERVICE

I certify that on November 24, 2025, I served the foregoing Respondent Kris Warner's Response to Petition for Writ of Mandamus via File & Serve Xpress on all counsel of record.

/s/ Michael R. Williams

Michael R. Williams