

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia *ex rel.*
The West Virginia Board of Education and
Michele Blatt in her capacity as State
Superintendent of Schools,

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Petitioners,

v.) no. 25-642

Kris Warner in his capacity as
West Virginia Secretary of State,

Respondent.

	BRIEF OF <i>AMICUS CURIAE</i> CARDINAL INSTITUTE FOR WEST VIRGINIA PUBLIC POLICY, INC. IN SUPPORT OF RESPONDENT KRIS WARNER IN HIS CAPACITY AS WEST VIRGINIA SECRETARY OF STATE	

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I.

INTRODUCTION

The Cardinal Institute for West Virginia Public Policy, Inc.¹, founded in 2014, is a West Virginia nonprofit corporation dedicated to researching, developing, and communicating free market public policies for West Virginia. The Cardinal Institute works to enhance freedoms for West Virginia families in the means of educating their children and for opportunities in the workplace. To vouchsafe these freedoms, the Cardinal Institute desires to be an *amicus curiae* to advocate the proper division of powers of the State of West Virginia as its Constitution mandates.

A *Petition for Writ of Mandamus* is before this Court asking it to declare HB 2755 as unconstitutional in accord with *W. Va. Bd. of Educ. v. Hechler*, 1180 W. Va. 451, 376 S.E.2d 839, 1988 W. Va. LEXIS 208 (1988). To the contrary, the Cardinal Institute urges this Court to refuse the Petition because *Hechler* itself infringes on the power of the West Virginia Legislature in violation of Article V of the West Virginia Constitution mandating that “[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others . . .”

Rather than to affirm *Hechler*, as Petitioners ask, now is the time to overturn it.

II.

ARGUMENT

HECHLER VIOLATES THE DIVISION OF POWER

Syllabus Point 2 in *Hechler* states: “Rulemaking by the State Board of Education is within the meaning of ‘general supervision’ of state schools pursuant to art. Article XII, § 2 of the West Virginia Constitution, and any statutory provision that interferes with such rulemaking is un-

¹ The Cardinal Institute alone paid its counsel who are the sole authors of this brief.

Constitutional. Consequently, W. Va. Code 29A-3A-12 (1988) and W. Va. Code 29A-3A-13 (1988) are hereby declared to be unconstitutional.” Syl. Pt. 2, *W. Va. Bd. of Educ. v. Hechler*, 1180 W. Va. 451, 376 S.E.2d 839, 1988 W. Va. LEXIS 208 (1988). Syllabus Point 2 itself is unconstitutional. It improperly gives a part of the executive department—the Board of Education—the power to block the legislative department’s exercise of its power to review and approve its rules where other parts of the executive department do not have that same blocking power.

Article V of the West Virginia Constitution is inviolate. This Court remains hard-bitten against State action, including action of the courts themselves, that deforms the framework of the division of power ensconced in Article V:

That language is clear and free from ambiguity and its requirement of the separation of the powers of government must be strictly enforced . . . the legislative, executive and judicial departments of government must be kept separate and distinct and that each must be protected in its legitimate sphere of action. *State ex rel. Miller v. Buchanan*, 24 W. Va. 362. It has also said that no question can be raised as to the plain meaning of the Article, *State v. Huber*, 129 W. Va. 198, 40 S. E. 2d 11, 168 A.L.R. 808

State ex rel. State Bldg. Comm’n v. Bailey, 151 W. Va. 79, 83-84 (1966). This Court forcefully declares that “its plain language calls not for construction but only for obedience.” *Id.* (citing *Hodges v. Public Service Commission*, 110 W. Va. 649, 159 S. E. 834 (1931); *State ex rel. Richardson v. The Cnty. Court of Kanawha Cnty.*, 138 W. Va. 885, 78 S. E. 2d 569 (1953)).

THE THREE DEPARTMENTS ARE CO-ORDINATE, NOT CO-EQUAL

It is a misnomer to say, as some do, that the three departments—legislative, executive and judicial—are co-equal; they are not co-equal because they do not have the same powers. Rather, the three departments are co-ordinate, each exercising a power distinct from those of the others as

a check against the powers of the others. In its jurisprudence, this Court acknowledges that each department possesses its unique power and exercises it in interplay with the powers of the others:

Inherent in the constitutional concept of separation of powers is the acknowledgment that the powers granted and exercised by each department separately must in some way be conjoined to produce a governmental entity. Equally important is the acknowledgement that each separate department, in addition to its specific powers, has certain inherent powers without which its specific powers would be meaningless, and these inherent powers must also be conjoined to produce a governmental entity.

State ex rel. Joint Comm. on Gov't & Fin. v. Bonar, 159 W. Va. 416, 419 (1976).

THE LEGISLATIVE POWER IS THE MOST POTENT

Of the three departments, the legislative, perhaps as the first among them, has the edge. James Madison, the author of THE FEDERALIST NO. 48, described the legislative power as the most potent because it is expressed through elected assemblies whose members are closest to the people:

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

Madison, James, THE FEDERALIST NO. 48, "These Departments Should Not be So Far Separated as to Have No Constitutional Control Over Each Other," *New York Packet* (Feb. 1, 1788).

Thus, inherent in the legislative department is the power to prescribe or proscribe, within the explicit limits of the Constitution, the exercise of the power of the executive department. As this Court holds: “The general powers of the legislature are almost plenary. It can legislate on every subject not interdicted by the Constitution itself. In considering constitutional restraint, the negation of legislative power must appear beyond reasonable doubt.” *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 747, 143 S.E.2d 351, 357 (1965).

In the case of the free schools, the prerogative of the legislative department is patently stated in the West Virginia Constitution itself. Article XII § 2 explicitly mandates the Board of Education in its general supervision of the free schools to “perform such duties as may be prescribed by law.” Article XII § 2 goes on to mandate that the Board of Education “in the manner prescribed by law, select the state superintendent of free schools who . . . shall have such powers and shall perform such duties as may be prescribed by law.” *Hechler* oddly neglects to consider these direct statements of the legislative power as a preferential control of the action of the Board of Education.

THE BOARD OF EDUCATION IS PART OF THE EXECUTIVE DEPARTMENT

Hechler has conferred a quality of independence on the Board of Education that it cannot have under Article V of the West Virginia Constitution. Given *Hechler*, the Board of Education has grabbed a degree of immunity from the countervailing power of the legislative department to which it is not entitled. In this vein, Petitioners mischaracterize Article XII § 2 with their false claim that “[i]n 1958, the West Virginia voters amended the West Virginia Constitution to add Article XII, § 2, which created the West Virginia Board of Education (the Board) *as an independent constitutional body*.” Pet. 2 (emphasis added). The Board of Education is a Constitutional body but it is thereby not independent of the executive department.

It again has come to this Constitutional crisis² because, without the countervailing legislative power, *Hechler* itself contains no limiting principle that prevents it from violating Article V. If rulemaking of the Board of Education is immune from legislative review and approval under *Hechler*'s interpretation of Article XII § 2, then the Board of Education also must be immune from judicial review and correction. If rulemaking of the Board of Education is immune from legislative review and approval notwithstanding HB 2755, then all action of the Board of Education also must be immune from the exercise of any legislative power whatsoever.³ *Hechler* certainly calls into doubt the Constitutionality of virtually all of chapter 18 of the Code of West Virginia, concerning the free schools, as invalid exertions of the legislative power. These presumptions cannot be true. To confine these queries to *Hechler* or the instant case alone, if rulemaking of the Board of Education uniquely is immune from the exertion of the legislative power, then what could be the Constitutional basis for the narrow distinction?

The Board of Education is a creature of the Constitution, but it is not independent of the executive department. *See W. Va. Bd. of Educ. v. Bd. of Educ.*, 239 W. Va. 705, 713 (2017), (describing the Board of Education's duty as one of "executive delivery and maintenance" of the school system); *see also Hodges v. Pub. Serv. Comm'n*, 110 W. Va. 649, 653, 159 S.E. 834, 836 (1931) (including the State superintendent of schools in the executive department). As a part of the executive department, the Board of Education must be subject to the checks and balances of other departments. "The legislature has, by general law, provided a system of free schools throughout the state. But it will be noted that it is not prohibited from augmenting, and making

² It is proper to name the clash as a Constitutional crisis.

³ Petitioners ruminate that "[i]t is hard to imagine how one could supervise anything without being able to craft the rules that govern it." Pet. 21. No one, it appears to the Cardinal Institute, disputes the power of the Board of Education to craft its rules. The Constitutional question presented to this Court is whether the legislative department has the power to review and approve them under HB 2755.

more efficient, the general system of free schools” *Herold v. McQueen*, 71 W. Va. 43, 49 (1912).

Article V of the West Virginia Constitution demands that this Court must now declare that the Board of Education is a part of the executive department, that it is not a fourth department, and that it is not immune from the exertion of the legislative power except to the extent that the Constitution itself explicitly provides or requires.⁴

HECHLER’S EXPANSIVE CLAIMS ARE TEXTUALLY UNSUSTAINABLE

Hechler also is weakly premised on its expansive textual claim that the Constitution’s delegation of the “general supervision” of the State’s free schools to the Board of Education makes it independent of the legislative department. *Hechler* imparts superseding meaning and effect to the term “general supervision” that the clause in its ordinary meaning and effect simply does not entail. “That which the words declare is the meaning of the instrument; and neither the courts nor the legislature have the right to take away from that meaning.” *Leonhart v. Board of Educ.*, 114 W. Va. 9, 13-14 (1933). In its plainest meaning and effect, all that this clause achieves is a specific delegation of the executive power over the State’s free schools to the Board of Education, and nothing more.

If there is doubt about the meaning of the term “general supervision,” then the doubt must be resolved in favor of defining its meaning to avoid incursion on the traditional limits of power of the legislative department as it is applied generally to other parts of the executive department. The term “general supervision” does not limit the power of the legislative department over the Board of Education that co-extends to the rest of the executive department.

⁴ For example, the legislative department is Constitutionally required to levy taxes “for the support of free schools”. Article XII § 5 of the West Virginia Constitution.

STARE DECISIS DOES NOT SUPERSEDE AN UNCONSTITUTIONAL ACT

Petitioners' emphatic appeal to *stare decisis* to leave *Hechler* alone is a signal to this Court that its precedent is unsound. In obedience to the Constitution, this Court has no choice but to overrule Syllabus Point 2 in *Hechler*. "Where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution." *Appalachian Power Co. v. Public Serv. Comm'n*, Syl. Pt. 2, 170 W. Va. 757, 758 (1982). "When this Court has overruled its own precedent and thereby brought itself into alignment with a contrary majority view, it is because we have determined that the majority view is a 'better and more legally sound approach.'" *Romeo v. Antero Res. Corp.*, 917 S.E.2d 26, 34 (2025) (quoting *State v. Sutherland*, 231 W. Va. 410, 418, 745 S.E.2d 448, 456 (2013)).

When *Hechler* is overruled, the value to the public will be unsurpassable because the essential nature of government will be preserved. Overruling *Hechler* will restore equipoise between the executive and legislative departments, the balance as the framers intended and the division of powers requires. *State v. Varlas*, 243 W. Va. 447, 458 (2020) (Hutchison, J. dissenting)(explaining that "[t]he legally sound way to resolve the issue raised in" *Varlas* "was to overrule the badly conceived precedent set by *Eden* and its progeny.").

The benefit to the public in the future is of greater moment than any incorrect decision in the past. Where vital and important public and private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as well as the right of the court to consider them carefully, and to allow no previous error to continue, if it can be corrected.

Musick v. Univ. Park at Evansdale, LLC, 241 W. Va. 194, 202 (2018) (quoting *Adkins v. St. Francis Hosp.*, 149 W.Va. 705, 719, 143 S.E.2d 154, 163 (1965)).

Against the great weight of these principles, *stare decisis* cannot save *Hechler*.

III.

CONCLUSION AND PRAYER FOR RELIEF

For these reasons, the Cardinal Institute for West Virginia Public Policy, Inc., as *amicus curiae*, asks this Court to reject the *Petition for Writ of Mandamus*, to deny Petitioners' requested relief, and, most crucially, to overturn Syllabus Point 2 of *West Va. Bd. of Educ. v. Hechler*, 1180 W. Va. 451, 376 S.E.2d 839, 1988 W. Va. LEXIS 208 (1988) as a violation of the division of powers of Article V of the West Virginia Constitution.

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CERTIFICATE OF SERVICE

I, Mark A. Sadd, do hereby certify that on November 13, 2025 the foregoing *Brief of Amicus Curiae Cardinal Institute for West Virginia Policy, Inc.* has been served on counsel of record via the Court's E-Filing System.

/s/ Mark A. Sadd
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