

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Nov 17 2025
03:36PM EST
Transaction ID 77797325

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

Petitioners,

Case No. 25-642

v.

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

Respondent.

***AMICUS CURIAE* BRIEF OF CONSTITUTIONAL LAW PROFESSOR
DEREK W. BLACK AND EDUCATION LAW CENTER
IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF MANDAMUS**

Joshua E. Weishart (WVSB # 12639)
P.O. Box 1295
Morgantown WV 26507-1295
(510) 295-8837
Joshua.Weishart@gmail.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY	1
INTRODUCTION	2
ARGUMENT	3
A. The West Virginia Constitution Establishes the Board as a Constitutionally Independent Body and this Court Has So Interpreted It for Decades.....	3
B. West Virginia’s Approach is Consistent with the Majority of States	5
1. Most State Constitutions Create Independent State Education Officers	5
2. Constitutionally Independent State Education Officers Share a Common Genealogy..	6
3. States Created Constitutionally Independent Education Officers to Ensure Professional, Apolitical Leadership and Management of a Core Pillar of Republic Government— Public Education	8
C. Rulemaking Authority Is an Inherent Power of Constitutionally Independent SEOs, which a Legislature Cannot Infringe	9
1. Education Clause Mandates Constrain the Power of State Legislatures	10
2. In Furtherance of the Overall Goals of Education Clauses, SEO Clauses Empower Independent Constitutional Officers and Necessarily Circumscribe the Power of Legislatures	11
3. Legislative Authority Is Limited to Expanding or Defining, Not Retracting, SEO Power	13
4. SEOs Possess Inherent Core Power That Legislatures Cannot Invade.....	15
5. The SEOs’ General Power of Supervision Includes Those Subsidiary Powers Necessary to Carry Out Their Function	18
6. A Constitutional SEO’s Core Power Necessarily Includes Rulemaking	21
D. HB 2755 Violates West Virginia’s Constitution and Precedent, Contravenes the Similar Principles Reflected in Other State Constitutions, and is a Dangerous Breach of the Separation of Powers	23
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Bailey v. Truby</i> , 174 W.Va. 8, 321 S.E.2d 302 (1984)	4, 5, 18, 21
<i>Bd. of Educ. of Kanawha Cnty. v. W. Va. Bd. of Educ.</i> , 184 W.Va. 1, 399 S.E.2d 31 (1990)	5, 11, 15, 18
<i>Bd. of Educ. of Sch. Dist. No. 1 v. Booth</i> , 984 P.2d 639 (Colo. 1999)	20
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	13
<i>Claremont Sch. Dist. v. Governor</i> , 635 A.2d 1375 (N.H. 1993)	10
<i>Cruz-Guzman v. State</i> , 916 N.W.2d 1 (Minn. 2018)	11
<i>Detch v. Bd. of Educ. of Greenbrier Cnty.</i> , 145 W.Va. 722, 117 S.E.2d 138 (1960)	4
<i>Dist. Twp. of Dubuque v. City of Dubuque</i> , 7 Iowa 262 (1858)	12
<i>El Centro de la Raza v. State</i> , 428 P.3d 1143 (Wash. 2018)	20
<i>Engelmann v. State Bd. of Educ.</i> , 3 Cal.Rptr. 2d 264 (Cal.Ct.App. 1991)	21
<i>Evans v. Andrus</i> , 855 P.2d 467 (Idaho 1993)	13
<i>Hudson v. Kelly</i> , 263 P.2d 362 (Ariz. 1953)	12, 16
<i>Koschkee v. Taylor</i> , 929 N.W.2d 600 (Wis. 2019)	9, 21, 22
<i>Lake View Sch. Dist. No. 25 v. Huckabee</i> , 91 S.W.3d 472 (Ark. 2002)	10
<i>Leandro v. State</i> , 488 S.E.2d 249 (N.C. 1997)	14
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137,(1803)	13, 16
<i>N.C. State Bd. of Educ. v. State</i> , 814 S.E.2d 54 (N.C. 2018)	23
<i>Opinion of the Justices (Reformed Pub. Sch. Fin. Sys.)</i> , 765 A.2d 673 (N.H. 2000)	10, 11
<i>P.J. Willis & Bro. v. Owen</i> , 43 Tex. 41 (1875)	13
<i>Pauley v. Kelly</i> , 162 W.Va. 672, 255 S.E.2d 859 (W.Va. 1979)	14
<i>Powers v. State</i> , 318 P.3d 300 (Wyo. 2014)	13, 15, 17, 20
<i>Rose v. Council for Better Educ., Inc.</i> , 790 S.W.2d 186 (Ky. 1989)	10, 11, 14
<i>State ex rel. Gaston v. Black</i> , 74 So. 387 (Ala. 1917)	12

<i>State ex rel. Horton v. Brechler</i> , 202 N.W. 144 (Wis. 1925).....	13
<i>State ex rel. Josephs v. Douglas</i> , 110 P. 177 (Nev. 1910)	16
<i>State ex rel. Kennedy v. Brunst</i> , 26 Wis. 412 (1870)	16
<i>State ex rel. Lambert by Lambert v. W. Va. State Bd. of Educ.</i> , 191 W.Va. 700, 447 S.E.2d 901 (1994)	5
<i>State ex rel. Langer v. Totten</i> , 175 N.W. 563 (N.D. 1919)	17, 18
<i>State ex rel. Mattson v. Kiedrowski</i> , 391 N.W.2d 777 (Minn. 1986).....	16, 17
<i>State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398</i> , 511 P.2d 705 (Kan. 1973).....	21
<i>State ex rel. Workman v. Carmichael</i> , 241 W.Va. 105, 819 S.E.2d 251 (2018)	24
<i>Thompson v. Craney</i> , 546 N.W.2d 123 (Wis. 1996).....	8, 21
<i>United States v. Curtiss-Wright Exp. Corp.</i> , 299 U.S. 304 (1936)	16
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	16
<i>W. Va. Bd. of Educ. v. Bd. of Educ. of the Cnty. of Nicholas</i> , (“Nicholas”), 239 W.Va. 705, 806 S.E.2d 136 (2017)	3, 5, 13, 14, 15, 17, 20
<i>W. Va. Bd. of Educ. v. Hechler</i> , 180 W.Va. 451, 376 S.E.2d 839 (1988)	3, 4, 5, 18, 19, 20, 21, 22
<i>Welling v. Bd. of Educ. for the Livonia Sch. Dist.</i> , 171 N.W.2d 545 (Mich. 1969).....	21
<i>William Penn Sch. Dist. v. Pa. Dep't of Educ.</i> , 170 A.3d 414 (Pa. 2017)	11
<i>Ybarra v. Legislature</i> , 466 P.3d 421 (Idaho 2020).....	18
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	16

Statutes

HB 2755	2, 4, 9, 23, 24, 25
Ala. Const. art. XIV, §§ 262(1), (2)	6
Ala. Const. of 1868, art. XI, § 2	19
Ariz. Const. art. XI, §§ 2-4	6, 13
Colo. Const. art. IX, § 1(1)-(3)	6, 12, 13, 25
Conn. Const. art. VIII, § 1	14
Fla. Const. art. IX, § 2	6, 13
Ga. Const. art. VIII, §§ I, para. I, II, para. I(b)	6, 10
Haw. Const. art. X, §§ 2, 3	13
Idaho Const. art. IX, § 2	7, 15
Ill. Const. art. X, § 2(a)	6, 13
Ind. Const. art. VIII, § 8	6
Kan. Const. art. VI, § 2(a), (b)	6
Kan. Const. of 1859, art. VI, § 1	7

Ky. Const. § 183.....	14
La. Const. art. VIII, §§ 2-3(A)	6, 12, 13
Mich. Const. art. VIII, § 3	6
Mich. Const. of 1850, art. XIII, § 1	7
Minn. Const. art. XIII, § 1.....	9
Mo. Const. of 1865, art. IX, § 3.....	6, 7
Mont. Const. art. X, § 9(3)(a).....	6
N.C. Const. art. IX, § 2(1).....	15
N.C. Const. art. IX, §§ 4, 5.....	6, 13
N.D. Const. art. VIII, § 6(6)(a).....	6
Nev. Const. art. XI, § 1.....	6
N.M. Const. art. XII, § 6(d).....	6
Neb. Const. art. VII, §§ 2-4	6
Ohio Const. art. VI, § 4	6
Okla. Const. art. XIII, § 5	6, 13
Or. Const. art. VIII, § 1	6, 12
Pa. Const. art. IV, § 8.....	11
Pa. Const. of 1874, art. X, § 1	8
S.C. Const. art. VI, § 7	12
S.C. Const. art. XI, § 1	6
S.C. Const. art. XI, § 3	14
Tex. Const. art. VII, § 8.....	6
U.S. Const. art. III, §§ 1-2.....	13
Utah Const. art. X, § 3	6
Va. Const. art. VIII, §§ 4, 5, 6	6
W. Va. Const. art. XII, § 2	2, 3, 4, 6, 13, 23
W. Va. Code § 29A-3B-1(a)(1) (2025).....	24
Wash. Const. art. III, §§ 1, 22	6
Wis. Const. art. X, § 1.....	6, 13
Wis. Const. of 1848, art. X, § 1	7

Rules

Rule 30 of the West Virginia Rules of Appellate Procedure	1, 2
---	------

Other Authorities

78 C.J.S. Schools and School Districts §111 (2023)	22
<i>Proceedings of the Constitutional Convention of South Carolina</i>	25
<i>Asymmetric Constitutional Hardball</i> , 118 Colum. L. Rev. 915 (2018).....	24
<i>Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment</i> , 81 N.C. L. Rev. 1286 (2003)	25
<i>Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education</i> , 6 Stan. J. C.R. & C.L. 83 (2010)	10
Revised Statutes of Pa. 197	7

Legislature to Define Powers and Duties of the Superintendent of Public Instruction, Wash. AGO 1998 no. 6 (Wash. Att’y Gen. Mar. 9, 1998)	20
<i>Reforming School Discipline,</i> 111 Nw. U. L. Rev. 1 (2016).....	25
<i>The Constitutional Challenge to Teacher Tenure,</i> 104 Calif. L. Rev. 75 (2016).....	10
<i>The Constitutional Compromise to Guarantee Education,</i> 70 Stan. L. Rev. 735 (2018).....	7, 8, 9, 25
<i>The Education Power,</i> 110 Va. L. Rev. 341 (2024).....	2
<i>The Fundamental Right to Education,</i> 94 Notre Dame L. Rev. 1059	9
Journal of the Convention to Form a Constitution for the State of Wisconsin	9

I. STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY¹

This *amicus curiae* brief is submitted on behalf of Professor Derek W. Black and Education Law Center (“*Amici*”). *Amici* have significant expertise and experience in education law and litigation, particularly under state constitutions.

Derek Black is a Professor of Law and the Ernest F. Hollings Chair in Constitutional Law at the University of South Carolina School of Law, where he also directs the Constitutional Law Center. He is one of the nation’s foremost experts in education law and policy and has spent two decades studying and teaching about state constitutional provisions of the sort that are at issue in this case. He has published more than thirty scholarly journal articles on education law, policy, and history in journals such as Yale Law Journal, Stanford Law Review, N.Y.U. Law Review, California Law Review, Cornell Law Review, and Northwestern University Law Review. He is the author of a leading casebook on education law and two other books dealing with specific topics in education law, policy, and history. Both state and federal courts have cited his scholarship and qualified him as an expert in education policy and history.

Education Law Center (“ELC”) is a non-profit organization that pursues justice and equity for public school students by enforcing their right to a high-quality education in safe, equitable, non-discriminatory, integrated, and well-funded learning environments. ELC seeks to support and improve public schools as the center of communities and the foundation of a multicultural and multiracial democratic society. To achieve these goals, ELC engages in federal and state litigation nationwide—including frequently serving as *amicus curiae*—as well as research and data analysis, policy advocacy, and public communications.

¹ Pursuant to West Virginia Rule of Appellate Procedure 30(e)(5), *Amici* affirm that no counsel for any party authored this brief in whole or in part; no party or counsel made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than the amici, their members, or their counsel, made such a monetary contribution.

Both *Amici* have a significant interest in this case because they are dedicated to promoting the fulfillment of students’ education rights under state constitutions. An important component of that is ensuring that all state actors, including state boards of education and legislatures, carry out their proper roles in the delivery of adequate and equitable educational opportunities to all students. Professor Black believes strongly in upholding a proper role for courts in enforcing constitutional rights, particularly where majoritarian democratic processes may have caused violations of the rights of disfavored minorities or otherwise crossed constitutional boundaries. ELC frequently invokes state constitutional Education Clauses and related provisions to enforce the rights of public school students across the country and, in doing so, depends upon courts’ proper interpretation and enforcement of these constitutional mandates.

Amici respectfully submit this brief to provide the Court with additional textual, historical, and national context regarding the role and powers of constitutionally independent entities, like Petitioner West Virginia Board of Education, that are charged with authority over public education.² The brief aims to situate Article XII, Section 2 of the West Virginia Constitution in a broader context that can assist the court in interpreting this provision and properly framing the powers of the Board of Education.

Amici submit this brief consistent with Rule 30 of the West Virginia Rules of Appellate Procedure. *Amici* have received consent to file the brief from counsel for all parties.

II. INTRODUCTION

HB 2755, which requires legislative approval of all rules and regulations promulgated by the West Virginia Board of Education (“Board”), attempts to deprive the Board of power that

² The content of this brief is drawn from Professor Black’s article, *The Education Power*, 110 Va. L. Rev. 341 (2024), which includes comprehensive treatment of caselaw and state constitutions on this topic.

Article XII, Section 2 of the West Virginia Constitution clearly vests in the Board. This conclusion flows directly from the fact that the state constitution establishes the Board as a constitutionally independent body. Indeed, this Court has held that the Board’s constitutionally independent status carries with it the constitutional authority to engage in certain action unfettered by the legislature, including the power to make rules and regulations.³ In other words, the basic constitutional structure—and the separation of powers it establishes—precludes the legislature from depriving the Board of its constitutional authority.

West Virginia’s approach is also consistent with a majority of state constitutions, which likewise vest substantial public education authority in State Boards of Education and/or State Superintendents, hereinafter “state education officers” (“SEOs”). States have specifically opted for constitutionally independent SEOs to insulate certain aspects of education policymaking from outside politics. While other jurisdictions have yet to address the specific infringement at stake in this case, the constitutional independence of SEOs necessarily includes rulemaking. And this Court has, in fact, provided some of the clearest and most robust analysis of the contours of the power of an SEO, correctly identifying rulemaking as a power of the Board that cannot be infringed by the legislature. This Court should once again affirm that principle in the case at bar.

III. ARGUMENT

A. The West Virginia Constitution Establishes the Board as a Constitutionally Independent Body and this Court Has So Interpreted It for Decades

The plain text of Article XII, Section 2 establishes the West Virginia Board of Education as a constitutionally independent body. It provides, in relevant part: “The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall

³ See, e.g., *W. Va. Bd. of Educ. v. Hechler*, 180 W.Va. 451, 376 S.E.2d 839 (1988); *W. Va. Bd. of Educ. v. Bd. of Educ. of the Cnty. of Nicholas* (“*Nicholas*”), 239 W.Va. 705, 806 S.E.2d 136 (2017).

perform such duties as may be prescribed by law.” As explained below, *infra* Section III.C.3, the inclusion of “as may be prescribed by law” or similar phrases does not limit the Board’s power of general supervision, but rather helps define and even amplifies that power.

Since the current version of Article XII, Section 2 was enacted in 1958, this Court has repeatedly affirmed that the Board is an independent body constitutionally imbued with the power to supervise public schools, and that it specifically has the authority to regulate without interference by the legislature. Even before this Court’s seminal ruling in *West Virginia Board of Education v. Hechler*, it affirmed the Board’s independent rulemaking authority by upholding the Board’s 1959 age eligibility rule,⁴ and its 1983 rule about academic eligibility for extracurriculars.⁵ Plaintiffs in those cases alleged that the Board’s rules contradicted statutes enacted by the legislature, but the Court made clear that the legislature could not validly enact statutes that would infringe on the Board’s general power of supervision over public education.⁶

In *Hechler*, the Court dealt with, and roundly rejected, an attempt by the legislature—strikingly similar to the one at issue here—to usurp the Board’s rulemaking authority wholesale. The Court invalidated legislation that subjected the Board’s rulemaking to the state Administrative Procedure Act, which, as with HB 2755, would require the Board to gain approval of its rules from the legislature. The Court held firm that ““any statutory provision that interferes with the State Board of Education’s “general supervision of the free schools of the State” under article XII, § 2 of the West Virginia Constitution is void.””⁷ It based its holding explicitly on the fact that the Board

⁴ *Detch v. Bd. of Educ. of Greenbrier Cnty.*, 145 W.Va. 722, 117 S.E.2d 138 (1960).

⁵ *Bailey v. Truby*, 174 W.Va. 8, 321 S.E.2d 302 (1984).

⁶ *Detch*, 145 W.Va. at 728-32, 117 S.E.2d at 142-44 (noting Board’s “wide discretion” in promulgating rules and thus reconciling rule and statute at issue to avoid conflict); *Bailey*, 174 W.Va. at 18, 321 S.E.2d at 312 (holding that legislature’s “grant of authority over extracurricular activities [to county boards of education] must fail to the extent that it interferes with the State Board of Education’s constitutional exercise of ‘general supervision’ over our state’s educational system”).

⁷ *Hechler*, 180 W.Va. at 454, 376 S.E.2d at 842 (quoting *Bailey*, 174 W.Va. at 18, 321 S.E.2d at 312).

was created and imbued with its general power of supervision by a *constitutional* provision: “unlike most other administrative agencies which are constituents of the executive branch, the Board enjoys a special standing because such a constitutional provision exists.”⁸ And the Court confirmed that rulemaking is squarely encompassed within the Board’s authority, holding that any “attempt to impede” that rulemaking process “is not consistent with the general supervisory powers conferred upon the Board by art. XII, § 2 of the State Constitution.”⁹

Since *Hechler*, the Court has reiterated these holdings numerous times.¹⁰ Consistently, the Court’s basis for upholding the Board’s independent rulemaking authority is the principle that “constitutional grants of authority . . . cannot be derogated or eliminated by legislative or executive action.”¹¹

B. West Virginia’s Approach is Consistent with the Majority of States

The constitutional text that creates and empowers SEOs varies to some extent by state, but a few aspects are relatively constant: constitutional text that vests supervisory power in a state superintendent or state board of education, and constitutional text that directs the legislature to flesh out or add to that power—not shrink it. The genealogy of SEO clauses reveals a common heritage and set of motivations.

1. Most State Constitutions Create Independent State Education Officers

Today, thirty-five state constitutions establish a state-level education entity—either a state superintendent or state board of education.¹² Twenty-four states mandate both a state

⁸ *Id.* at 180 W.Va. at 455, 376 S.E.2d at 842–43.

⁹ *Id.* at 180 W.Va. at 454–55, 376 S.E.2d at 842.

¹⁰ *Nicholas*, 239 W.Va. 705, 806 S.E.2d 136; *State ex rel. Lambert by Lambert v. W. Va. State Bd. of Educ.*, 191 W.Va. 700, 447 S.E.2d 901 (1994); *Bd. of Educ. of Kanawha Cnty. v. W. Va. Bd. of Educ.*, 184 W.Va. 1, 399 S.E.2d 31 (1990).

¹¹ *Nicholas*, 239 W.Va. at 714, 806 S.E.2d at 145 (quoting *Bailey*, 174 W.Va. at 18, 321 S.E.2d at 312).

¹² See Nat’l Ass’n of State Bds. of Educ., *State Education Governance Matrix* (2022), <https://nasbe.nyc3.digitaloceanspaces.com/2022/11/Governance-matrix-December-2022.pdf>.

superintendent and board.¹³ State boards and superintendents still exist in states without a constitutional provision, but they are statutory rather than constitutional creations.¹⁴

State constitutions most commonly articulate SEOs as having the power of “supervision” over the school system,¹⁵ often characterizing this as a “general” supervisory power¹⁶ or one of “control” over education.¹⁷ Twenty state constitutions indicate that this power is subject to further explication by the legislature.¹⁸ Colorado’s constitution, for instance, indicates that the board of education shall have the power of general supervision in education but further specifies that the “powers and duties shall be . . . prescribed by law.”¹⁹

2. Constitutionally Independent State Education Officers Share a Common Genealogy

Most SEO clauses originated in the mid-nineteenth century or at the point of statehood.²⁰ Michigan’s 1835 constitution was the first to provide for an SEO, establishing a superintendent of

[<https://perma.cc/8KHJ-N7CM>] (listing all state boards of education and whether their existence arises from statutory or constitutional provisions).

¹³ See *id.*

¹⁴ See *id.*

¹⁵ Ala. Const. art. XIV, § 262(1)-(2); Ariz. Const. art. XI, §§ 2-4; Colo. Const. art. IX, § 1(1)-(3); Fla. Const. art. IX, § 2; Idaho Const. art. IX, § 2; Kan. Const. art. VI, §§ 2(a), 4; La. Const. art. VIII, §§ 2-3(A); Mich. Const. art. VIII, § 3; Mo. Const. art. IX, § 2(a)-(b); Mont. Const. art. X, § 9(3)(a); N.C. Const. art. IX, §§ 4-5; Okla. Const. art. XIII, § 5; Utah Const. art. X, § 3; Va. Const. art. VIII, §§ 4-5; Wash. Const. art. III, §§ 1, 22; W. Va. Const. art. XII, § 2; Wis. Const. art. X, § 1; Wyo. Const. art. VII, § 14.

¹⁶ See, e.g., Kan. Const. art. VI, § 2(a); Idaho Const. art. IX, § 2; W. Va. Const. art. XII, § 2.

¹⁷ See, e.g., Kan. Const. art. VI, § 2(b); Utah Const. art. X, § 3.

¹⁸ See Ala. Const. art. XIV, § 262(2); Colo. Const. art. IX, § 1(3); Ga. Const. art. VIII, § II, para. I(b); Idaho Const. art. IX, § 2; Ind. Const. art. VIII, § 8; Mich. Const. art. VIII, § 3; Mo. Const. art. IX, § 2(a)-(b); Mont. Const. art. X, § 9(3)(a); Neb. Const. art. VII, §§ 2-4; Nev. Const. art. XI, § 1; N.M. Const. art. XII, § 6(d); N.C. Const. art. IX, § 5; N.D. Const. art. VIII, § 6(6)(a); Ohio Const. art. VI, § 4; Okla. Const. art. XIII, § 5; Or. Const. art. VIII, § 1; S.C. Const. art. XI, § 1; Tex. Const. art. VII, § 8; Va. Const. art. VIII, § 6; W. Va. Const. art. XII, § 2. A few constitutions do not articulate any SEO powers, but simply name the state board or superintendent and direct the legislature to specify their duties and powers. See, e.g., Ohio Const. art. VI, § 4.

¹⁹ Colo. Const. art. IX, § 1.

²⁰ W.S. Deffenbaugh & Ward W. Keesecker, *State Boards of Education and Chief State School Officers: Their Status and Legal Powers*, Studies of State Dep’ts Educ., 6 Bull. 23-27 (1940), <https://files.eric.ed.gov/fulltext/ED543914.pdf>. Statutory SEOs sometimes preceded constitutional ones in certain states. See, e.g., Act of May 31, 1838, ch.52, 1838 Conn. Pub. Acts 45; see also Revised Statutes

public instruction to “supervise not only the primary schools,” but also higher education.²¹ The Wisconsin constitution followed in 1848, providing for a state superintendent “and such other officers as the legislature shall direct.”²² Wisconsin’s constitutional convention explained the rationale for constitutionalizing the office: only a statewide constitutional officer would maintain “constant and vigilant watch...over [the] public schools,” whereas the legislature might grow lax over time.²³ Wisconsin’s constitution became a model for several other states. In the 1850s and 1860s, states continued to replicate this approach, including the creation of a constitutionally independent board of education.²⁴

During Reconstruction, a separate wave of SEO clauses spread across the South. All but one southern state rewrote its constitution to guarantee public education.²⁵ They made state education officers part of this constitutional transformation. Prior to the Civil War, only two southern states referenced a chief education officer, or state superintendent, in their constitution.²⁶ Nationally, only one-quarter of state constitutions provided for a superintendent.²⁷ But by 1870,

of Pa. 197 (David Derickson & W.M. Hall eds., 1871) (establishing a state superintendent of public instruction).

²¹ Willis F. Dunbar, *The Michigan Record in Higher Education* 55 (1963).

²² Wis. Const. of 1848, art. X, § 1.

²³ The Convention of 1846, at 538, 568-71 (Milo M. Quaife ed., 1919) [hereinafter 1846 Wis. Convention]; see also William C. Whitford, *Historical Sketch of Education in Wisconsin* 40-41 (1876).

²⁴ See Mich. Const. of 1850, art. XIII, § 1 (“The Superintendent of Public Instruction shall have the general supervision of public instruction, and his duties shall be prescribed by law.”); Kan. Const. of 1859, art. VI, § 1 (“The State Superintendent of Public Instruction shall have the general supervision of the common school funds and educational interest of the State, and perform such other duties as may be prescribed by law.”); Journal of the Missouri State Convention 197, 199, 229 (1865); Mo. Const. of 1865, art. IX, § 3; Richard B. Collins & Dale A. Oesterle, *The Colorado State Constitution* 4 (2d ed. 2020) (indicating Colorado relied on Missouri’s 1875 constitution); 1 Proceedings and Debates of the Constitutional Convention of Idaho 1889, at 638 & n.1 (I.W. Hart ed., 1912) (indicating Idaho borrowed from Colorado).

²⁵ Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 Stan. L. Rev. 735, 789 n.287 (2018).

²⁶ John Mathiason Matzen, *State Constitutional Provisions for Education: Fundamental Attitude of the American People Regarding Education as Revealed by State Constitutional Provisions, 1776-1929* 36-51 (1931).

²⁷ *Id.*

eighty percent of the readmitted southern states included a state superintendent in their constitution.²⁸ And while nonexistent prior to the Civil War, eight of eleven readmitted states provided for a state board of education in their constitutions.²⁹ These trends also extended northward after the war, with several northern states adding Education Clauses and SEOs to their constitutions.³⁰

3. States Created Constitutionally Independent Education Officers to Ensure Professional, Apolitical Leadership and Management of a Core Pillar of Republic Government—Public Education

The initial creation and proliferation of state constitutional education officers, in conjunction with a public education mandate, reflected several concerns and goals. First, constitutional delegates firmly understood education to be a pillar of republican government.³¹ As such, it deserved its own constitutional officer. Second, this pillar was designed to be apolitical. Much like the judiciary, public education should not be sullied by the political process.³² Constitutional independence was to allow SEOs to remain independent from governors and legislatures, rather than serving as their delegates.³³

²⁸ *Id.* “Readmitted” states, as used here, means those states that formally reentered the union pursuant to the Reconstruction Act.

²⁹ *Id.* at 4-14. Alabama, however, discontinued its board shortly thereafter in 1875. *Id.* at 4 n.4.

³⁰ Black, *The Constitutional Compromise to Guarantee Education*, at 790-92. Pennsylvania's 1873 constitutional convention, for instance, produced the state's first constitutional education mandate. Pa. Const. of 1874, art. X, § 1. It also mandated a state superintendent's office. *Id.* art. IV, §20.

³¹ Black, *The Constitutional Compromise to Guarantee Education*, at 743.

³² *See, e.g.*, 2 Debates of the Convention to Amend the Constitution of Pennsylvania 385-91 (1873) [hereinafter Pennsylvania Debates] (emphasizing the superintendent should be free "from all the contaminating influences of political manipulation and management"); Black, *The Constitutional Compromise to Guarantee Education*, at 808-16 (detailing the ways southern constitutional conventions shielded education from manipulation and politics).

³³ *See, e.g.*, Pennsylvania Debates, at 392 (discussing the independence of the superintendent); 1 The Debates and Proceedings of the Constitutional Convention of the State of Michigan 351 (1867) (demonstrating a desire to protect the superintendent of public instruction from removal by governor); 2 Report of the Proceedings and Debates of the Constitutional Convention State of Virginia, at 1831 (1906) (discussing the need to prevent legislative meddling in education matters); *Thompson v. Craney*, 546 N.W.2d 123, 130-31 (Wis. 1996) (noting that the constitutional delegates argued against making the superintendent an appointed position and wanted it to be distinct from all other offices).

Third, constitutional convention delegates wanted to ensure a permanent officer who fully understood the needs of public education and had the political independence to properly care for them. SEOs would be educational professionals rather than politicians—even if they were elected.³⁴ This leadership structure was to promote stability across time and safeguard education policies and practices from political manipulation.³⁵ Finally, states believed that education would not flourish of its own accord³⁶ but needed someone in charge of growing, coordinating, and managing the education systems on a statewide basis.³⁷ The legislature might fund such a system, but it could not effectively run or micromanage it.

C. Rulemaking Authority Is an Inherent Power of Constitutionally Independent SEOs, which a Legislature Cannot Infringe

As demonstrated by the present challenge to HB 2755, tension remains between SEO power and legislative discretion. SEOs are constitutionally independent, yet legislatures retain authority to further define and expand upon this power. That legislative power, however, can neither invade the inherent authority of the SEO, nor contradict the overall structure and purpose of the state constitution’s Education Clause, which gives further depth and meaning to the SEO

³⁴ 1846 Wis. Convention, at 571 (stating that the superintendent should be a person of “eminent learning and ability”); Journal of the Convention to Form a Constitution for the State of Wisconsin 327 (1848) (arguing the superintendent should be like a “professor” and knowledgeable of what has been done in other states); Pennsylvania Debates, at 386 (stressing the need for independence from the executive branch).

³⁵ See, e.g., 1846 Wis. Convention, at 568-71 (wanting to preserve superintendent office across time); Whitford, *supra* note 51, at 40-41 (same).

³⁶ See Derek W. Black, *The Fundamental Right to Education*, 94 Notre Dame L. Rev. 1059, 1097-99 (detailing the motivation to secure a republican form of government through education); Black, *The Constitutional Compromise*, at 783-89 (recounting constitutional convention delegates' emphasis on a republican form of government); Minn. Const. art. XIII, § 1 (mandating education to preserve republican government).

³⁷ See, e.g., Whitford, Historical Sketch of Education in Wisconsin 40-41 (1876) (discussing the imperative of a statewide constitutional officer for education); *Koschkee v. Taylor*, 929 N.W.2d 600, 608 (Wis. 2019) (stating that superintendent should “travel over the state, organize the system, and awaken people to the importance of [public education]” (alteration in original) (quoting 1846 Wis. Convention, at 569)).

clause. In other words, while the SEO clause is the starting point, it is not the ending point of constitutional interpretation. An SEO clause works in service of the Education Clause and the overall education article in which they reside.

Education Clause mandates, in particular,³⁸ offer additional guideposts for navigating any tension between SEO powers and the legislature. First, state Education Clauses establish absolute mandates regarding equity and quality that extend to all state actors.³⁹ SEOs necessarily fall within this mandate. Second, while legislatures exercise extensive discretion in carrying out this mandate, the constitutional mandate itself places limits on their discretion. The same logic follows with their actions toward SEOs. Third, the fact that state constitutions create independent constitutional officers to administer the education system is significant in itself. It creates another officer whose purpose is to reinforce the Education Clause's goals and places yet another limit on the legislature.

1. Education Clause Mandates Constrain the Power of State Legislatures

Every state constitution contains an Education Clause and courts in most states have interpreted them to mandate the provision of an adequate or equal education to all students.⁴⁰ These cases make clear that Education Clauses impose absolute duties on the state.⁴¹

³⁸ For an overview of the litigation under these clauses, its premises, relevant doctrines, and evidentiary requirements, see Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 Calif. L. Rev. 75, 109-23 (2016).

³⁹ *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993) (discussing “[t]he right to an adequate education mandated by the constitution”); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205 (Ky. 1989) (noting that the General Assembly had an “obligation . . . to provide for a system of common schools”); Ga. Const. art. VIII, § I, para. I (“The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.”); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 495 (Ark. 2002) (holding that the constitution “imposes upon the State an absolute constitutional duty to educate our children”).

⁴⁰ See Black, *The Constitutional Challenge to Teacher Tenure*, at 109-23; see also Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 Stan. J. C.R. & C.L. 83, 89-95 (2010) (surveying outcomes in the three waves of school finance litigation).

⁴¹ Black, *The Constitutional Challenge to Teacher Tenure*, at 114-17 (reviewing cases that enforce a duty or right against the state); see also, e.g., *Opinion of the Justices (Reformed Pub. Sch. Fin. Sys.)*, 765 A.2d

Constitutions typically place responsibility for carrying out the Education Clause mandate on legislatures. But as a mandate, the discharge of the duty is not merely left unfettered to the political process. The constitution, not legislators, is the ultimate benchmark of education quality, sufficient education resources, and preferred educational governance and responsibility. More simply, legislators are stewards of the constitutional education mandate.⁴² So too are courts.⁴³ Courts would renounce their duty to uphold state constitutions if they allowed legislators to run roughshod over education mandates.⁴⁴

2. In Furtherance of the Overall Goals of Education Clauses, SEO Clauses Empower Independent Constitutional Officers and Necessarily Circumscribe the Power of Legislatures

State constitutions establish SEOs to serve the goals embedded in Education Clauses, not to further administrative bureaucracy or legislative discretion.⁴⁵ Indeed, this Court has held that “[c]learly. . . the State Board is empowered to take whatever steps are necessary to fulfill its obligation to achieve the constitutionally mandated educational goals of quality and equality. . . .”⁴⁶ The notion that legislatures can contract or shape SEO power as they see fit would render SEO clauses pointless. Legislative power to create administrative education officers exists without an

673, 676 (N.H. 2000) (“The State may not shift any of this constitutional responsibility to local communities.”).

⁴² See, e.g., *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018) (explaining that “the Education Clause constitutes a mandate to the Legislature, not a grant of power”) (quotations omitted).

⁴³ *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 463 (Pa. 2017) (finding “clear majority” of courts hold it is “their judicial duty” to apply Education Clause to “ensure legislative compliance”).

⁴⁴ *Rose*, 790 S.W.2d at 209 (“To avoid deciding the case because of ‘legislative discretion,’ ‘legislative function,’ etc., would be a denigration of our own constitutional duty.”); *William Penn*, 170 A.3d at 464 (indicating that the court owes it to the people to “police [the legislature’s] fulfillment of its constitutional mandate”).

⁴⁵ See generally Pennsylvania Debates, at 385-91 (discussing the role of the state superintendent in advancing the constitution’s education mandate).

⁴⁶ *Bd. of Educ. of Kanawha Cnty.*, 184 W. Va. at 5, 399 S.E.2d at 35 (quotations omitted).

SEO clause.⁴⁷ In fact, some statutory state superintendents preceded constitutional ones.⁴⁸ The affirmative decision to, nonetheless, constitutionalize an educational officer serves independent purposes, regardless of the specific text of the SEO clause.

That independent purpose is to create a structurally independent constitutional officer who is not directly accountable to the legislature or governor, but rather the constitution.⁴⁹ State constitutions that provide for the election of SEOs demonstrate this point clearly.⁵⁰ No other state official or body controls the SEO's decision-making. Even in states where SEOs are appointed by the state board, the appointment process acts to insulate the superintendent from undue political influence.⁵¹ The appointment process is intended to remove superintendents from the pressure of elections and encourage competent individuals to seek the position,⁵² not render them subservient to other state actors.⁵³ And regardless of how SEOs attain their office, they retain special standing as constitutional officers that renders them more like judicial officers than executive agency

⁴⁷ See *Dist. Twp. of Dubuque v. City of Dubuque*, 7 Iowa 262, 277 (1858) (pointing out that the SEO clause would have solved no "mischief" if its only effect was to confer legislative power that already existed).

⁴⁸ See, e.g., Act of May 31, 1838, ch. 52, 1838 Conn. Pub. Acts 45; Act of June 27, 1845, §§ 1, 3, 1845 R.I. Pub. Laws 1, 1-2.

⁴⁹ See, e.g., *Hudson v. Kelly*, 263 P.2d 362, 369 (Ariz. 1953) (holding that "[a] constitutional office cannot be destroyed nor an incumbent legislated out of it," nor can a legislature do this indirectly (citing *State ex rel. Gaston v. Black*, 74 So. 387, 388 (Ala. 1917))); Pennsylvania Debates, at 386 (rejecting stylistic drafting changes that might imply the superintendent was a member of the executive branch and under the governor).

⁵⁰ See, e.g., La. Const. art. VIII, § 2; Or. Const. art. VIII, § 1; S.C. Const. art. VI, § 7.

⁵¹ See, e.g., Colo. Const. art. IX, § 1 (providing for the appointment of the superintendent by the state board, which is elected, rather than the governor).

⁵² See, e.g., Pa. Const. art. IV, § 8; Larry Wood, *Amendment 1 Would Allow S.C. Voters to Decide How State Superintendent of Ed Is Chosen*, Aiken Standard (Nov. 3, 2018)

<https://www.postandcourier.com/aikenstandard/education/amendment-1-would-allow-s-c-voters-to-decide-how-state-superintendent-of-ed-is/article_f64aa339-fae3-58ec-a646-8cf917f54ec2.html> (quoting previously elected superintendent as saying that elections discouraged qualified candidates from seeking the position).

⁵³ Wood, *Amendment 1*, at 161.

administrators.⁵⁴ While Congress can, for instance, set certain aspects of the U.S. Supreme Court's jurisdiction, it cannot interfere with or direct the Court as to how to decide a case or interpret the Constitution.⁵⁵ Similar logic follows with constitutionally independent SEOs. Legislatures may specify certain aspects of SEOs' powers or jurisdiction, but SEOs' structural independence carves out space and constitutional authority that legislators and governors cannot invade, shrink, or transfer.⁵⁶

3. Legislative Authority Is Limited to Expanding or Defining, Not Retracting, SEO Power

The difficult practical question is not whether SEOs are independent but instead how to draw the line that delineates SEOs' power from legislatures' power. The answer lies in examining legislatures' role in further specifying SEOs' duties. Constitutional provisions, including West Virginia's Article XII, Section 2, regularly stipulate that SEO powers are "subject to law" or "prescribed by law."⁵⁷ These stipulations, however, do not mean that SEO powers are at the complete discretion of the legislature.

⁵⁴ See generally *Powers v. State*, 318 P.3d 300 (Wyo. 2014) (holding that a legislature cannot pass laws that interfere with constitutional or inherent authority of constitutional education officers); *State ex rel. Horton v. Brechler*, 202 N.W. 144, 147 (Wis. 1925) (characterizing the SEO's power as "quasi judicial").

⁵⁵ U.S. Const. art. III, §§ 1-2 (specifying the Court's original jurisdiction but allowing Congress to make "exceptions" to the Court's jurisdiction in other cases); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147-48 (1803) (discussing the Court's jurisdiction and Congress's role in setting it); *id.* at 177 (writing that "[i]t is emphatically the province and duty of the judicial department to say what the law is"); *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997) (emphasizing the need for each branch of government to "respect[] both the Constitution and the proper actions and determinations of other branches" and striking down Congress's attempt to override the Court's interpretation of the constitution).

⁵⁶ See, e.g., *Powers*, 318 P.3d at 308 (finding that a "majority of courts" conclude that "the phrase 'as prescribed by law' does not" give the legislature the authority to shrink or eliminate the "inherent powers of a constitutionally created office"); *P.J. Willis & Bro. v. Owen*, 43 Tex. 41, 55 (1875) (invalidating the transfer of the state superintendent's powers notwithstanding an as provided clause); *Evans v. Andrus*, 855 P.2d 467, 471 (Idaho 1993); *Nicholas*, 239 W.Va. at 713-14, 806 S.E.2d at 144-45.

⁵⁷ At least twelve constitutions apply this limit to the power of supervision. Ariz. Const. art. XI, § 4; Colo. Const. art. IX, § 1; Fla. Const. art. IX, § 2; Haw. Const. art. X, §§ 2, 3; Idaho Const. art. IX, § 2; Ill. Const. art. X, § 2(a); La. Const. art. VIII, §§ 2, 3(A); N.C. Const. art. IX, § 5; Okla. Const. art. XIII, § 5; W. Va. Const. art. XII, § 2; Wis. Const. art. X, § 1; Wyo. Const. art. VII, § 14.

Similar language in Education Clauses is instructive. Most state constitutions indicate that the legislature “shall provide” for a system of education.⁵⁸ Vesting power in the legislature implies some measure of discretion, and some clauses contain explicit language to that effect, such as directing the legislature to enact “appropriate legislation.”⁵⁹ However, extensive judicial precedent emphasizes that such language does not grant legislatures unfettered discretion, but rather obligates the legislature to implement the constitution’s education mandate. The mandate and meaning of the Education Clause, along with other provisions, constrains legislative discretion.⁶⁰ Thus, legislative discretion only exists within the range of policies that produce the constitutionally required education opportunities.⁶¹

Against this background, SEO clauses must be understood as additional mechanisms for implementing Education Clauses. As such, the same logic applies to legislative discretion regarding SEOs. The purpose of assigning a legislature to further specify SEO powers is to direct the legislature to further the Education Clause’s goals in a very specific way: empowering an SEO. While the legislature can exercise discretion in that task, the legislature cannot wield that discretion in ways that are contrary to the constitutional design for delivering education, which includes an independent SEO.⁶² Just as with the Education Clause, the constitution constrains legislative

⁵⁸ S.C. Const. art. XI, § 3; Ky. Const. § 183; N.C. Const. art. IX, § 2(1).

⁵⁹ Conn. Const. art. VIII, § 1.

⁶⁰ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989) (explaining the constitutional limits on legislature); *Pauley v. Kelly*, 162 W.Va. 672, 699, 255 S.E.2d 859, 874 (W.Va. 1979) (rejecting unbounded legislative discretion).

⁶¹ *See Rose*, 790 S.W.2d at 216 (requiring the legislature to ensure that delegated constitutional duties are performed efficiently); *Leandro v. State*, 488 S.E.2d 249, 261 (N.C. 1997) (supporting deference for legislative action regarding providing basic education).

⁶² This Court has forcefully rejected the argument that “the ‘as may be prescribed by law’ language of Article XII, section 2 renders the WVBOE powerless in absence of enabling legislation.” *Nicholas*, 239 W.Va. at 713, 806 S.E.2d at 144.

discretion regarding SEOs.⁶³ To afford the legislature vast discretion regarding SEO powers—the type of power that the legislature clearly lacks in regard to the Education Clause—would invert the entire constitutional structure for education. Rather than a structure in which the right and duty of education reigns supreme, the legislature would suddenly have the power to minimize or manipulate education. The point of a constitutionally grounded and independent zone of SEO authority is to check legislative manipulation.⁶⁴

4. SEOs Possess Inherent Core Power That Legislatures Cannot Invade

While the principle of independent SEO power is obvious, the full scope of that power requires further explanation. The contours of that power can be discerned from three sources: the Education Clause, the core power of supervision, and the implied or inherent powers attendant to an SEO's position. As indicated above, legislatures' task in regard to SEOs is to afford them with the powers necessary to deliver education opportunities that are consistent with the Education Clause mandate. But even in the absence of legislation, an Education Clause's qualitative parameters bind the SEO in its discharge of duties.⁶⁵ Constitutions grant SEOs the core power of "supervision" to empower the SEOs to carry out the Education Clause's mandate, not to simply supervise as a general principle.

By virtue of that explicit power and being the chief constitutional education officer, SEOs also possess some inherent power.⁶⁶ While the concept of inherent or core power can be elusive, cases involving exercises of presidential and federal judicial power have generated deep analysis

⁶³ *Powers v. State*, 318 P.3d 300, 304-06, 308 (Wyo. 2014) (indicating most courts reject legislative discretion to eliminate or shrink SEO powers).

⁶⁴ *See, e.g.*, Pennsylvania Debates, at 385, 387-91 (arguing for an independent superintendent).

⁶⁵ *See, e.g.*, *Bd. of Educ. of Kanawha Cnty.*, 184 W.Va. at 5, 399 S.E.2d at 33-35 (Board has power to take "whatever steps are necessary" to comply with constitutional mandates for education).

⁶⁶ *See, e.g.*, *Powers*, 318 P.3d at 308 (discussing "the inherent powers"); *Nicholas*, 806 S.E.2d at 145 (same).

of inherent power.⁶⁷ The U.S. Supreme Court has explained that inherent executive powers are “constitutionally based” even though “[n]owhere in the Constitution . . . is there any explicit reference to” them.⁶⁸

Several state courts have also recognized the notion that state constitutional officers possess inherent powers that preclude interference from the legislative branch. The Arizona Supreme Court, for instance, held that the legislature’s power to proscribe the state auditor’s duties did not mean the legislature could strip the auditor of “its *inherent* powers and duties.”⁶⁹ Otherwise, the legislature could turn the office into “an empty shell.”⁷⁰ Other courts have denounced similar legislative efforts.⁷¹ As early as 1910, the Supreme Court of Nevada wrote that it was “well settled” that “the [l]egislature, in the absence of special authorization in the Constitution, is without power to abolish a constitutional office or to change, alter, or modify its constitutional powers and functions.”⁷² “As provided by law” clauses did not change that thinking. State appellate and supreme courts continued to hold that state legislatures cannot “transfer *inherent or core* functions of executive officers to appointed officials.”⁷³

While the logic of this precedent applies directly to SEOs, very few courts have acknowledged it. To be clear, they do not reject the logic; they simply fail to recognize SEO

⁶⁷ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch), 137, 177 (1803) (“It is emphatically the province and duty of the Judicial Department to say what the law is.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-47 (1952) (Jackson, J., concurring); *United States v. Nixon*, 418 U.S. 683, 705-06 (1974) (powers flow from the nature of the office); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (discussing presidential power in international relations as that which “does not require as a basis for its exercise an act of Congress”).

⁶⁸ *Nixon*, 418 U.S. at 711.

⁶⁹ *Hudson v. Kelly*, 263 P.2d 362, 368 (Ariz. 1953) (emphasis added).

⁷⁰ *Id.*

⁷¹ See *State ex rel. Josephs v. Douglas*, 110 P. 177, 180 (Nev. 1910); *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 414-15 (1870); *Warner v. The People ex rel.*

⁷² *Douglas*, 110 P. at 180.

⁷³ *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 780 (Minn. 1986) (emphasis added) (summarizing precedent).

disputes implicate issues of inherent power. But the few courts that have recognized the issue typically affirm the concept of inherent SEO power.⁷⁴ The Supreme Court of Wyoming offered the most extensive analysis when its legislature displaced the superintendent of public instruction as head of the state department of education.⁷⁵ Drawing from a Minnesota Supreme Court case, the Wyoming court similarly concluded that its constitution

prevent[s] the legislature from abolishing all of the independent functions *inherent* in an executive office. To allow the legislature to abolish all such functions of an executive office is to allow it to do violence to the title the drafters afforded the office and the *core functions* necessarily implied therefrom.⁷⁶

The Court then explained that the constitution’s express entrustment of “the power of ‘general supervision of the public schools’ to the Superintendent” provides an explicit basis from which to infer power.⁷⁷

In granting the superintendent inherent or core power, the constitution necessarily limits the legislature’s power to proscribe the superintendent’s duties.⁷⁸ As the Wyoming Supreme Court wrote, the legislature cannot “interfere” with, “abolish or transfer, either directly or indirectly, the inherent powers of [the] constitutionally created office” of the superintendent.⁷⁹ The Supreme Court of Idaho was more succinct but equally forceful, writing that the “inherent characteristic duties and powers” of the state superintendent “carr[ied] over from Idaho’s territorial days” and

⁷⁴ *Powers v. State*, 318 P.3d 300, 308-09 (Wyo. 2014) (holding that the legislature could not strip the board of its “independent core functions”); *Nicholas*, 239 W.Va. at 714, 806 S.E.2d at 145 (finding that the board’s general powers necessarily require some rulemaking capacity); *see also State ex rel. Langer v. Totten*, 175 N.W. 563, 566 (N.D. 1919) (acknowledging the concept of inherent powers but holding it did not extend to the curriculum because that power was vested in the legislature).

⁷⁵ *Powers*, 318 P.3d at 302-03 (discussing the change in SEO power).

⁷⁶ *Id.* at 309 (quoting *Mattson*, 391 N.W.2d at 782) (emphases added).

⁷⁷ *Id.* (quoting Wyo. Const. art. VII, § 14).

⁷⁸ *Id.*

⁷⁹ *Id.* at 307-08.

that these “characteristic duties belonging to a constitutional officer - those never repealed or expounded on by the Constitution - cannot be taken away by the Legislature.”⁸⁰

Most important, the Supreme Court of Appeals of West Virginia has also acknowledged the inherent powers of the State Board of Education. It has reasoned that “any statutory provision that interferes” with the powers implied by the explicit grant of supervisory power is “void.”⁸¹ Elsewhere, it reasoned that the legislature cannot interfere with the state board’s power “to take whatever steps are necessary to fulfill its obligation to achieve ‘the constitutionally mandated educational goals of quality and equality.’”⁸²

5. The SEOs’ General Power of Supervision Includes Those Subsidiary Powers Necessary to Carry Out Their Function

Exclusive and inherent SEO power rests in the constitutional terms “supervision” and “control.” When states enacted their first SEO provisions, dictionaries defined “supervise” as “[t]o oversee; to superintend; to inspect,” and to “direct or watch with authority [over] the work or proceedings or progress,” which would entail the power to “press for correction.”⁸³ A “superintendent” was “[o]ne who has the oversight and charge of something, with the power of direction”⁸⁴ or “management” and “arrange[ment].”⁸⁵ More contemporary dictionaries add “to be

⁸⁰ *Ybarra v. Legislature*, 466 P.3d 421, 430 (Idaho 2020). The superintendent in North Dakota claimed an inherent power to decide the course of study in public schools, reasoning that such a power had been exercised since statehood. *State ex rel. Langer v. Totten*, 175 N.W. 563, 566 (N.D. 1919). The court implicitly acknowledged the legitimacy of the concept but rejected his specific claim. *Id.*

⁸¹ *Hechler*, 180 W.Va. at 454, 376 S.E.2d at 842 (W.Va. 1988) (quoting *Bailey v. Truby*, 321 S.E.2d 302, 312 (W.Va. 1984)).

⁸² *Bd. of Educ. of Kanawha Cnty.*, 184 W.Va. at 5, 399 S.E.2d at 35 (quoting *Bailey*, 174 W.Va. at 16, 321 S.E.2d at 310).

⁸³ 2 Noah Webster, *An American Dictionary of the English Language* 86 (1828); *The Concise Oxford Dictionary of Current English* 883 (Henry W. Fowler & Francis G. Fowler eds., 1919) [hereinafter *Oxford Dictionary of 1919*].

⁸⁴ Webster, *An American Dictionary of the English Language*, at 85.

⁸⁵ *Oxford Dictionary of 1919*, at 882.

responsible for the good performance of an activity or job, or for the correct behavior or safety of a person.”⁸⁶

Applied most narrowly to SEOs, supervision could be little more than a mechanical task. The legislature creates an education system, provides for teachers, and sets standards for schools. The SEO simply monitors and directs that system to ensure its compliance with the legislature’s vision. In this narrow version, the SEO is the equivalent of an on-site construction foreman who builds a structure according to the architect’s specifications.

But this narrow interpretation is inconsistent with the constitutionalization of SEOs. An officer with such narrow power requires no constitutional grounding. That officer could, and did, exist as a statutory creature prior to constitutionalization.⁸⁷ By constitutionalizing SEOs, states elevated SEOs to a level on par with the other branches of government.⁸⁸ Legislatures, of course, play a role in defining SEOs’ duties, but as demonstrated earlier, SEOs are not merely the legislature’s subservient delegates.

Moving beyond the simplistic synonyms like oversight, inspection, and direction, this Court emphasized in *Hechler* that “[g]eneral supervision’ is not an axiomatic blend of words designed to fill the pages of our State Constitution, but it is a meaningful concept to the governance of schools and education in this state.”⁸⁹ Vesting such power in an SEO serves a larger purpose: to

⁸⁶ Supervise, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/supervise> [<https://perma.cc/UK28-4BUZ>] (last visited Dec. 17, 2023); see also Supervise, Collins Dictionary, <https://www.collinsdictionary.com/us/dictionary/english/supervise> [<https://perma.cc/9CJT-V64X>] (last visited Dec. 17, 2023) (defining “supervise” as to “make sure that the activity is done correctly or that the person is doing a task or behaving correctly”).

⁸⁷ See, e.g., Act of May 31, 1838, ch. 52, 1838 Conn. Pub. Acts 45; Act of June 27, 1845, §§1, 3, 1845 R.I. Pub. Laws 1, 1-2.

⁸⁸ Alabama’s constitution initially placed the superintendent’s election on par with the governor and assigned him an office in the capital. Ala. Const. of 1868, art. XI, § 2. It also indicated the Board would meet at the capital during the same session as the legislature and receive the same pay. *Id.* § 9.

⁸⁹ 180 W.Va. at 455; 376 S.E.2d at 842.

ensure that “[d]ecisions that pertain to education [are made] by those who possess expertise in the educational area.”⁹⁰ And, as this Court has emphasized, the SEO’s supervisory power is shaped by the “duty to ensure that the constitutionally mandated educational goals of quality and equality are achieved.”⁹¹

Several other courts have confirmed the logic of a broader interpretation of SEOs’ supervision power. The Wyoming Supreme Court cautioned against technical or circumstantial interpretations of supervision that might shrink an SEO’s power. It emphasized that an SEO’s powers and duties must be understood “collectively.”⁹² While some legislative incursions into an SEO’s powers might appear insignificant or mundane, small incursions can render an SEO’s powers “piecemeal” rather than “general.”⁹³ In other words, adding the modifier “general” intentionally broadens the scope of supervision.⁹⁴ The Supreme Court of Washington reasoned that supervision entails two concrete aspects: (1) the “power to take corrective action” and (2) authority that is not subordinate to another entity.⁹⁵

The foregoing suggests two principles and a core list of supervisory powers. First, SEOs have their own jurisdiction. While their powers may overlap and intermingle with those of the legislature, the supervision of schools, and all that it entails, is uniquely theirs. Second, within that jurisdiction, an SEO is the supreme educational authority in the state. They are not subservient to

⁹⁰ *Id.*

⁹¹ *Nicholas*, 239 W.Va. at 713, 806 S.E.2d at 144 (quotation omitted).

⁹² *Powers*, 318 P.3d at 321.

⁹³ *Id.* at 320-21; *see also* Authority of the Legislature to Define Powers and Duties of the Superintendent of Public Instruction, Wash. AGO 1998 no. 6 (Wash. Att’y Gen. Mar. 9, 1998), <https://www.atg.wa.gov/ago-opinions/authority-legislature-define-powers-and-duties-superintendent-public-instruction> [<https://perma.cc/L76R-HY5Q>] (stating that if the policy “shifts so many responsibilities to other officers or agencies that the [CSO] no longer ‘supervises’ the public school system, the proposal is probably unconstitutional”).

⁹⁴ *Powers*, 318 P.3d at 320-21; *see also Bd. of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 646-47 (Colo. 1999) (en banc) (discussing significance of “general” supervision).

⁹⁵ *El Centro de la Raza v. State*, 428 P.3d 1143, 1153 (Wash. 2018).

the legislature any more than courts are subservient to those who appoint them. Third, while the precise scope and definition vary with specific constitutional text or legislative history, this supervisory power presumptively includes the power to set educational policies on matters within the SEO's jurisdiction, enforce the legislature's educational policy, take corrective action against local schools, hire and fire certain personnel, structure SEO offices as necessary to carry out supervision, ensure that education practices are consistent with the constitutional mandate of educational equality or adequacy, and any other power necessary for an SEO to discharge its explicit constitutional power to supervise schools.⁹⁶

6. A Constitutional SEO's Core Power Necessarily Includes Rulemaking

An SEO's constitutional power to supervise education necessarily entails rulemaking power. Rulemaking is little more than giving those whom you supervise advance notice of how you will supervise. So long as the rules address matters within an SEO's area of supervision, the rules should be within core SEO power. Consistent with this logic, this Court and several others have held that rulemaking is inherent in supervision.⁹⁷ Constitutional text or history could negate this general presumption in a specific state, but otherwise the power to supervise necessarily entails the power to promulgate rules.

⁹⁶ Ironically, legislatures have at times suggested such broad interpretations themselves. *See, e.g., Koschkee v. Taylor*, 929 N.W.2d 600, 609 (Wis. 2019) (discussing 1848 law giving superintendent power “to adjust and decide all controversies and disputes arising under the school lands” (quoting *Thompson v. Craney*, 546 N.W.2d 123, 133 (Wis. 1996))).

⁹⁷ *Hechler*, 180 W.Va. at 455, 376 S.E.2d at 843 (holding that legislature cannot interfere with state board's rulemaking because it “is within the meaning of ‘general supervision’”); *Welling v. Bd. of Educ. for the Livonia Sch. Dist.*, 171 N.W.2d 545, 546 (Mich. 1969) (per curiam) (asserting that part of the constitutional office's responsibility is “to promulgate regulations”); *Engelmann v. State Bd. of Educ.*, 3 Cal.Rptr. 2d 264, 269 (Cal.Ct.App. 1991) (acknowledging that some rulemaking power has a source in the constitution); *State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398*, 511 P.2d 705, 711 (Kan. 1973) (asserting that the “authority to supervise the public schools” includes the authority “to adopt regulations”); *Bailey*, 174 W.Va. at 18, 321 S.E.2d at 313 (holding that the “promulgation of a rule requiring students to maintain” a minimum grade point average “is a legitimate exercise” of the state board's supervision power). *But see Koschkee*, 929 N.W.2d at 610 (overturning a prior opinion that had validated independent SEO rulemaking and instead subjecting it to gubernatorial oversight).

The more important question is not whether SEOs have rulemaking power as a general principle, but whether a particular rule addresses a matter beyond supervision. Additional issues may arise when a constitutionally valid SEO rule conflicts with generally valid exercises of legislative power. The conflict arises most clearly regarding whether SEO rulemaking must comply with a state’s administrative procedures act. The constitutional implications of this issue, however, have tended to elude courts, which have repeatedly upheld legislation or executive action that subjects SEOs’ rulemaking to outside authority and processes.⁹⁸ These courts fail to distinguish between rulemaking that is a function of purely statutory authority and rulemaking based on constitutional authority.⁹⁹ Statutory rulemaking is, without question, subject to administrative procedure acts, but the logic does not hold with constitutional rulemaking or procedures that invade SEOs’ core supervision powers. At least two courts, including this one, have recognized this crucial distinction.

In *Hechler*, this Court found that administrative procedure act requirements are unconstitutional when they prohibit or delay the Board from taking action on rules pertaining to its supervisory function.¹⁰⁰ Though less forceful, the Supreme Court of North Carolina recognized this distinction but managed it differently. It stressed that North Carolina’s administrative oversight

⁹⁸ See, e.g., *Koschkee*, 929 N.W.2d at 610.

⁹⁹ See generally 78 C.J.S. Schools and School Districts §111 (2023) (failing to distinguish between different types of rulemaking); *id.* §112 (indicating rules that do not comply with procedure acts are invalid); see also James A. Rapp, Education Law §3.02[6][a] (2005), LEXIS (database updated Sept. 2023) (indicating SEO regulatory power is “relative to the statutes they are bound to administer” and must comply with administrative procedure acts).

¹⁰⁰ 180 W.Va. at 455, 376 S.E.2d at 843.

of SEO rules did not involve a substantive review but was purely “procedural in nature.”¹⁰¹ On that basis, the court reasoned it did not raise constitutional concerns.¹⁰²

In sum, rulemaking is inherent in SEOs’ supervisory power. The scope of supervisory power will determine the scope of rulemaking power. Thus, while SEOs have general rulemaking power in education, the subject matter of those rules has limits. For instance, the judiciary still retains the authority to review whether a particular SEO rule adopted a policy that was within the scope of the SEO’s supervisory authority or consistent with the Education Clause (assuming a proper party with standing challenging the rule). But when a rule addresses matters within the scope of supervision, SEO rules should be exempt from any general statewide administrative procedures that substantively—and maybe even procedurally—interfere with the SEO’s power.

D. HB 2755 Violates West Virginia’s Constitution and Precedent, Contravenes the Similar Principles Reflected in Other State Constitutions, and is a Dangerous Breach of the Separation of Powers

HB 2755 violates Article XII, Section 2 and this Court’s precedent interpreting it, in the most direct way imaginable. The West Virginia Constitution establishes the Board as an independent entity and imbues it with the power of general supervision of public education. This Court has repeatedly interpreted that power to include rulemaking, and held that legislative action cannot encroach upon the Board’s authority to engage in rulemaking that carries out its duty of general supervision of public schools.¹⁰³ That interpretation aligns with the principles embodied in similar SEO clauses across the country. But HB 2755 gives the legislature the ultimate power to approve or reject Board regulations. This is squarely at odds with the text of West Virginia’s

¹⁰¹ *N.C. State Bd. of Educ. v. State*, 814 S.E.2d 54, 63 (N.C. 2018). *But see id.* at 66 (Martin, C.J., dissenting) (“[T]he phrase ‘subject to laws enacted by the General Assembly’ does not mean - and cannot mean - ‘subject to determinations by the Rules Review Commission.’”).

¹⁰² *Id.* at 63 (majority opinion).

¹⁰³ *See supra* Section III.A.

SEO clause and the purpose of constitutionalizing state education officers. It would, quite simply, grant the legislature the authority to void regulations as it sees fit even when those regulations are squarely and solely within the Board’s constitutional authority.

Through HB 2755, the legislature has indeed attempted to grant itself a vast and broad set of powers. It begins with the assertion that the constitution “gives the Legislature primacy of authority over education in the State.”¹⁰⁴ It then attempts to shrink the power of the Board by implying that the Board can only regulate pursuant to grants of statutory authority—and that the legislature is the arbiter of whether the Board has exceeded that authority.¹⁰⁵ And in addition to giving the legislature the power to approve or reject the Board’s regulations, HB 2755 allows the legislature to “[a]uthorize the promulgation of the legislative rule with certain amendments.”¹⁰⁶ In other words, the legislature can write its own rule, a complete usurpation of the role of the Board.

There are dangerous long-term implications of invading the authority of constitutional education officers. Exercising illegitimate or uncertain power erodes the rule of law, provokes confrontations between constitutional branches of government, and undermines predictability.¹⁰⁷ This Court has noted that “[a] system of divided powers . . . helps to prevent government tyranny” and that the separation of powers “ensures that no one person or institution will become too powerful and allow ambition to supersede the public good”¹⁰⁸

¹⁰⁴ W. Va. Code § 29A-3B-1(a)(1) (2025).

¹⁰⁵ *See id.* § 29A-3B-9(e).

¹⁰⁶ *Id.* § 29A-3B-9(f)(3).

¹⁰⁷ *See* Steven Levitsky & Daniel Ziblatt, *How Democracies Die* 8-9 (2018) (arguing that executive power must be exercised with restraint to maintain healthy democracy); Joseph Fishkin & David E. Pozen, *Essay, Asymmetric Constitutional Hardball*, 118 Colum. L. Rev. 915, 927 (2018) (“[C]onstitutional hardball lends itself to retaliation and escalation.”).

¹⁰⁸ *State ex rel. Workman v. Carmichael*, 241 W.Va. 105, 128, 819 S.E.2d 251, 274 (2018) (quoting Robert M. Bastress, *The West Virginia State Constitution*, at 141-44 (2011)).

Political power grabs are particularly corrosive in public education. Public education has long stood as a foundational pillar of the nation's republican form of government that,¹⁰⁹ like the judiciary, should stand outside the normal political process. For that reason, all state constitutions guarantee public education,¹¹⁰ and most attempt to insulate education from political pressure through various nuanced proscriptions and power structures.¹¹¹ This Court should continue its long tradition of upholding the wise structure and principles embodied in Article XII, Section 2 by rejecting this latest attempt by the legislature via HB 2755 to invade the Board's rightful authority.

IV. CONCLUSION

For the foregoing reasons, *Amici* ask the Court to grant Petitioners their requested relief.

Respectfully submitted,

/s/ Joshua Weishart

Joshua E. Weishart (WVSB # 12639)
P.O. Box 1295
Morgantown WV 26507-1295
(510) 295-8837
Joshua.Weishart@gmail.com

Counsel for Amici Curiae

¹⁰⁹ See, e.g., George Washington, *Eighth Annual Message to Congress* (Dec. 7, 1796), in *Presidential Speeches*, Univ. of Va. Miller Ctr., <https://millercenter.org/the-presidency/presidential-speeches/december-7-1796-eighth-annual-message-congress> [<https://perma.cc/N9GV-3UKK>] (last visited Feb. 4, 2024); Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. Rev. 1286, 1286 (2003); Ross J. Pudaloff, *Education and the Constitution: Instituting American Culture*, in *Laws of Our Fathers: Popular Culture and the U.S. Constitution* 23, 26-27 (Ray B. Browne & Glenn J. Browne eds., 1986) ("By a necessary definition, a republican education was a mass education."); *Proceedings of the Constitutional Convention of South Carolina* 692, 696 (J. Woodruff ed., 1868) (emphasizing education's necessity in a republican form of government); see also Derek W. Black, *The Fundamental Right to Education*, at 1097-99 (explaining the early connection between a republican form of government and public education).

¹¹⁰ Derek W. Black, *Reforming School Discipline*, 111 Nw. U. L. Rev. 1, 10 (2016).

¹¹¹ See, e.g., Pennsylvania Debates, at 388 (emphasizing the superintendent should be free "from all the contaminating influences of political manipulation and management"); Derek W. Black, *The Constitutional Compromise to Guarantee Education*, at 808-16 (2018) (detailing southern constitutional conventions' mechanisms to shield education from manipulation and politics); Colo. Const. art. IX, § 1 (providing for the appointment of the superintendent by the state board, which is elected, rather than by the governor).

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CASE NO. 25-642**

THE 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, Joshua E. Weishart, do hereby certify that I have served a copy of the foregoing Joint Amici Curiae Brief in Support of Petition for Writ of Mandamus on November 17, 2025, by using the Court's e-filing system which will provide notice to the following counsel of record:

Michael R. Williams
Offices of the W. Va. Attorney General
1900 Kanawha Blvd. E. Rm 1 Rm E-26
Charleston, WV 25305
Counsel for Respondent

Christopher D. Smith
Benjamin Bailey
Bailey & Glasser
209 Capitol Street
Charleston, WV 25301
Counsel for Petitioners

Denali S. Hedrick
94 Long Street, Suite 200
Westover, WV 26501
Counsel for Petitioners

Christopher D. Pence
Michael W. Taylor
Harrison M. Cyrus
Pence Law Firm PLLC
10 Hale Street, 4th Floor
Charleston, WV 25301
*Counsel for Amicus Curiae
League of Women Voters
of West Virginia, Inc.*

Jeffrey G. Blaydes
Blaydes Law, PLLC
2442 Kanawha Blvd., E.
Charleston, WV 25311
*Counsel for Amicus Curiae
Education West Virginia*

Marc E. Williams
Shaina D. Massie
Anna Joyce Williams
Nelson Mullins Riley & Scarborough LLP
949 Third Ave. Suite 200
Huntington, WV 25701
Counsel for Amicus Curiae
West Virginia Parent Teacher Association

Mark A. Sadd
Jack D. Snively
Lewis Gianola PLLC
P.O. Box 1746
Charleston, WV 25326
Counsel for Amicus Curiae
Cardinal Institute for West Virginia
Policy Inc.

Jason S. Long
Mary Catherine Tuckwiller
Lauren E. Motes
Dinsmore & Shohl LLP
1033 Court Street N
Lewisburg, WV 24901
Counsel for the West Virginia Association of
School Administrators and the
West Virginia School Board Association

/s/ Joshua Weishart
Joshua E. Weishart (WVSB # 12639)