IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

No. 24-373

FILED
November 13, 2026
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

v.

MATT HERRIDGE, Secretary of the West Virginia
Department of Commerce, and TODD HOOKER,
Acting Executive Director of the West Virginia Division of Economic Development,
Defendants Below, Respondents.

Appeal from the Intermediate Court of Appeals
No. 23-ICA-174

AFFIRMED

Submitted: October 21, 2026
Filed: November 13, 2026

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JUSTICE WOOTON delivered the Opinion of the Court.

CHIEF JUSTICE BUNN dissents and reserves the right to file a separate opinion.

JUSTICE TRUMP, deeming himself disqualified, did not participate in the decision of this case.

JUDGE D. ANDREW McMUNN, sitting by temporary assignment.

SYLLABUS BY THE COURT

1. "In reviewing an Intermediate Court of Appeals' decision from a circuit court's grant of a motion to dismiss, this Court applies a de novo standard of review." Syl. Pt. 1, *Folse v. Rollyson*, 251 W. Va. 566, 915 S.E.2d 344 (2025).

2. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc*., 194 W. Va. 770, 461 S.E.2d 516 (1995).

3. "The constitutionality of a statute is a question of law which this Court reviews *de novo.*" Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137 (2008).

4. "When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967).

5. "In due recognition of fundamental principles relating to the separation of powers among the legislative, executive and judicial branches of government, courts recognize the power of the legislature to make reasonable classifications for legislative purposes. Courts are bound by a presumption that legislative classifications are reasonable, proper and based on a sound exercise of the legislative prerogative. If a statute enacted by the legislature applies throughout the state and to all persons, entities or things within a class, and if such classification is not arbitrary or unreasonable, the statute must

be regarded as general rather than special. In making classifications for legislative purposes, a wide range of discretion must be conceded by the courts to the legislature. In any case of doubt, courts must favor a construction of a statute which will result in a statute being regarded as general rather than special. A statute must be regarded as general rather than special when it operates uniformly on all persons, entities or things of a class. A law which operates uniformly upon all persons, entities or things as a class is a general law; while a law which operates differently as to particular persons, entities or things within a class is a special law." Syl. Pt. 7, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965).

6. "A basic purpose of Article VI, Section 39 of the Constitution of West Virginia is to preserve uniformity and consistency in the statutory enactments of this State." Syl. Pt. 1, *State ex rel. Taxpayers Protective Ass'n of Raleigh Cnty. v. Hanks*, 157 W. Va. 350, 201 S.E.2d 304 (1973).

WOOTON, Justice:

In this appeal from the Intermediate Court of Appeals ("ICA"), the petitioners are several citizens of the Town of Harpers Ferry[1] who challenge the constitutionality of West Virginia Code § 5B-1-9 (2020) ("the Act"). The respondents defending the constitutionality of the Act are Matt Herridge, the current Secretary of the Department of Commerce, and Todd Hooker, the acting Executive Director of the West Virginia Division of Economic Development. The Circuit Court of Kanawha County entered an order that rejected the petitioners' constitutional challenges; that order was affirmed in the ICA decision on appeal.

After consideration of the parties' briefs and oral argument, and the record on appeal, we find no error. As we discuss below, we affirm the circuit court and ICA's decisions.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2004, the Legislature adopted the "Tourism Development Act" with the goal of promoting "the general welfare and material well-being of the citizens of the state" through "the creation or expansion of tourism development projects[.]" W. Va. Code § 5B-

[1] Those plaintiff-petitioners are Alexander Fleming, Carole Carter, Carol Gallant, Barbara Humes, and Benjamin Buckley. Roberta Mead was a plaintiff below who chose not to participate in the appeal because she filed to run for a seat on the Harpers Ferry Town Council.

2E-2 (2004). The Tourism Development Act permits the qualifying developers of new or expanded tourism projects to seek certain tax credits from the respondents.

In 2020, the Legislature adopted the Act at issue in this case, which the parties refer to as the "Tourism Development District Act," West Virginia Code § 5B-1-9. The Act seeks "to induce and assist in tourism development in small municipalities through the creation of tourism development districts[.]" W. Va. Code § 5B-1-9(b). Distilled down to its essence, the Act permits the respondents to approve the creation of a "tourism development district" to encompass projects qualified under the Tourism Development Act. Those new or expanded tourism projects within the district are thereafter virtually immunized from local regulations, including municipal zoning and land use ordinances, municipal regulations on the sale of liquor, beer, or wine, and municipal building codes.[2]

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[2] West Virginia Code § 5B-1-9(l) provides:

> . . . [N]otwithstanding any provision of this code to the contrary, or any municipality's home rule powers with respect to ordinances and ordinance procedures, including any authority pursuant to the Municipal Home Rule Program under §8-1-5a of this code, designated tourism development districts, and the tourism development projects or tourism development expansion projects therein, may not be subject to the following:
>
> (1) Municipal zoning, historic preservation, horticultural, noise, viewshed, lighting, development, or land use ordinances, restrictions, limitations, or approvals;
>
> (2) Municipal regulation of the sale of alcoholic liquor, nonintoxicating beer, or wine for consumption within the tourism development district;

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Moreover, the Act expressly prohibits municipalities "from enacting, adopting, implementing, or enforcing ordinances, regulations, or rules" which impede new and expanded tourism projects within a district. W. Va. Code § 5B-1-9(c). Instead, the tourism development district is subject to building code, land use and other regulations monitored by the respondents. *See* W. Va. Code R. § 145-16-9.2.2 (2026).

This case arises from limitations imposed by the Act on the creation of tourism development districts. First, the Act only applies to new or expanded tourism projects "which are located in, or partially in, municipalities with a population of 2,000 or less[.]" W. Va. Code § 5B-1-9(a). Second, tourism development districts may only be created for projects "with aggregate projected costs of construction, reconstruction,

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> (3) Municipal building permitting, inspection, or code enforcement;
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> (4) Municipal license requirements;
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> (5) The legal jurisdiction of the municipality in which the tourism development district is entirely or partially located, except as specifically provided in this article;
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> (6) The implementation of any tax, fee, or charge by the municipality, except as specifically provided in this section; or
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> (7) Any requirement under state law for the consent or approval of the municipality in which the tourism development district is entirely or partially located of any state or county action pursuant to this code, specifically including, but not limited to, §7-11B-1 et seq. of this code, for formal consent of the governing body of a municipality for county or state action regarding the establishment of tax increment financing development or redevelopment districts or the approval of tax increment financing development or redevelopment plans.

restoration, rehabilitation, or upgrading of not less than $25 million[.]" W. Va. Code § 5B-1-9(d). Third, the respondents are permitted to approve no more than five tourism development districts in the State. W. Va. Code § 5B-1-9(j).

Since adoption of the Act in 2020, only one tourism development project has been approved as a tourism development district. In 2007, a company known as SWaN Hill Top House, LLC ("SWaN") bought the century-old, historic, derelict Hill Top House Hotel in Harpers Ferry with the goal of reconstructing it into a luxury hotel. The project languished for over a decade, but when SWaN began moving forward with the project in 2019, friction developed with residents of Harpers Ferry. Soon thereafter, the Legislature adopted the Act and SWaN's Hill Top House development project became the only applicant and recipient of a tourism development district designation from the respondents. SWaN said it intends to spend more than $138 million redeveloping the hotel.

The petitioners are citizens, residents, and registered voters in Harpers Ferry. According to the most recent Census, in 2020 the Town of Harpers Ferry had a population of 269 residents. In January 2022, the petitioners filed a complaint in the Circuit Court of Kanawha County against the respondents challenging the constitutionality of the Act. Specifically, the petitioners alleged that the Act violates the prohibitions on special laws contained in Article VI, §§ 39 and 39a, and violates equal protection principles contained in Article III, § 10, all within the West Virginia Constitution. The petitioners also asserted that, by transferring political control and power of the Town of Harpers Ferry to a private entity, the Act negates the plaintiffs' right to self-rule guaranteed under the West Virginia

Constitution by Article III, §§ 1, 2, and 3, and Article VI, §§ 39 and 39a; and negates their right to vote, guaranteed by Article VI, § 1.[3] The respondents moved to dismiss the petitioners' complaint.

In an order dated March 29, 2023, the circuit court granted the respondents' motion to dismiss. The circuit court found the Act had a rational basis when it created a class of large tourism development projects located in West Virginia's smallest municipalities and had a reasonable relationship to the policy goals outlined in the Act, and so found it did not violate equal protection principles or the constitutional prohibition on special laws. Further, the court found no guaranteed right to "self-rule" in the Constitution and found no "right to vote" was violated because municipalities have no inherent powers, only those granted to them by the Legislature.[4]

[3] The petitioners also alleged that the Act attempts to bind future legislatures by providing for the perpetual existence of tourism development districts for 99 years, in violation of Article VI of the West Virginia Constitution. The circuit court found the Act does not express an intent to bind future legislatures, and the petitioners do not appeal this ruling.

[4] In August 2021, an association of anonymous citizens called "Public Asset Protection, Inc." or "PAPI" sued Harpers Ferry and SWaN in the Circuit Court of Jefferson County to preclude the Hill Top Hotel project. In the course of the suit, PAPI argued that the Act violated the constitutional prohibition against special laws. On January 13, 2022, that circuit court granted a motion to dismiss and concluded that the Act "is not unconstitutional" because it satisfied equal protection principles and "is a general statute" that was "not specifically crafted for Harpers Ferry." *See Public Asset Prot., Inc. v. The Corporation of Harpers Ferry, West Virginia*, Civil Action No. 2021-C-134 (Jefferson County, January 13, 2022).

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The petitioners appealed the circuit court's dismissal order to the ICA. The ICA affirmed, finding the Act was not a constitutionally impermissible special act; the Act was rationally related to achieve a proper governmental purpose, and therefore, did not violate any right to equal protection; the Act did not infringe on the rights of citizens to regulate their municipality; and the Act did nothing to impair the petitioners' right to vote in municipal elections. *Fleming v. Carmichael*, 250 W. Va. 67, 902 S.E.2d 199 (Ct. App. 2024).

The petitioners now appeal to this Court.

II. STANDARD OF REVIEW

Our standard of review is de novo. First, we are asked to review an ICA ruling on a circuit court's order dismissing a complaint. "In reviewing an Intermediate Court of Appeals' decision from a circuit court's grant of a motion to dismiss, this Court applies a de novo standard of review." Syl. Pt. 1, *Folse v. Rollyson*, 251 W. Va. 566, 915 S.E.2d 344 (2025). Likewise, our long-standing rule is that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel.*

Respondents below argued, and the Circuit Court of Kanawha County agreed, that the January 2022 ruling against PAPI in Jefferson County collaterally estopped the petitioners' special law and equal protection claims. The circuit court found privity exists because the interests of PAPI aligned with the interests of the petitioners, and one of the petitioners (Dr. Fleming) filed an affidavit in the prior suit. We decline to address whether collateral estoppel applies and, instead, focus on the merits of the parties' arguments.

McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995). Finally, as the parties ask us to address the constitutionality of the Act, "[t]he constitutionality of a statute is a question of law which this Court reviews *de novo.*" Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137 (2008).

III. DISCUSSION

The petitioners make three arguments on appeal. The petitioners' first argument is that the Act (West Virginia Code § 5B-1-9) creates special legislation that violates Article VI, §§ 39 and 39a of our Constitution. Second, the petitioners contend the Act creates an arbitrary and irrational classification that violates equal protection principles embodied in Article III, § 10 of the Constitution. Finally, the petitioners assert that shifting oversight of tourism development projects from municipalities to the state agency level does not provide an adequate regulatory scheme to protect the safety, security, and enjoyment of life of Harpers Ferry residents, and therefore violates the Article III, § 1 inherent right of individuals to life, liberty, and the pursuit of happiness; and the Article III, § 3 right to government for the common benefit, protection, and security of the people. We consider these arguments in turn.

The petitioners' first argument focuses on Article VI, § 39, which specifically prohibits the Legislature from enacting "local or special laws" in eighteen enumerated categories as well as in any situation "where a general law would be proper, and can be made applicable to the case[.]" "'Special laws' include laws that focus on individual cases

or that classify a narrow class of individuals, groups, or entities for special treatment. 'Local laws' limit their application to a specific locale within the state rather than applying statewide. Thus, special laws classify by persons, places, or things, and local laws classify by places." Robert M. Bastress, Jr., *The West Virginia Constitution*, 195 (2nd Ed. 2016). *See also Tweel v. W. Va. Racing Comm'n*, 138 W. Va. 531, 546, 76 S.E.2d 874, 883 (1953) ("Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances; local laws are laws special as to place."). The petitioners bolster their arguments by noting that Article VI, § 39a provides that "[t]he Legislature shall provide by general laws for the . . . government of cities, towns and villages[.]"

The petitioners contend that the Act, by creating no more than five tourism development districts for projects costing at least $25 million in towns under 2,000 in population, offends the principles of Sections 39 and 39a of Article VI of our Constitution. These two sections promote equal protection throughout the State and forestall special treatment favoring or disadvantaging particular groups or locales. The petitioners insist that the Act flaunts those goals because it was written by and for one developer (SWaN) and is framed in such narrow – essentially, "special" – terms that its purpose to bestow benefits on that one developer should be patent. Restricting tourism development districts to five towns under 2,000 residents is, the petitioners argue, "on its face absurd."

"When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality,

and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967). Our guiding principle is one of deference to legislative policy choices in making classifications:

> In due recognition of fundamental principles relating to the separation of powers among the legislative, executive and judicial branches of government, courts recognize the power of the legislature to make reasonable classifications for legislative purposes. Courts are bound by a presumption that legislative classifications are reasonable, proper and based on a sound exercise of the legislative prerogative. If a statute enacted by the legislature applies throughout the state and to all persons, entities or things within a class, and if such classification is not arbitrary or unreasonable, the statute must be regarded as general rather than special. In making classifications for legislative purposes, a wide range of discretion must be conceded by the courts to the legislature. In any case of doubt, courts must favor a construction of a statute which will result in a statute being regarded as general rather than special. A statute must be regarded as general rather than special when it operates uniformly on all persons, entities or things of a class. A law which operates uniformly upon all persons, entities or things as a class is a general law; while a law which operates differently as to particular persons, entities or things within a class is a special law.

Syl. Pt. 7, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965). The goal of the "special law" provisions of the Constitution is "to prevent the arbitrary creation of special classes, and the unequal conferring of statutory benefits[,]" *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 339-40, 268 S.E.2d 590, 595 (1980), and to "preserve uniformity and consistency in the statutory enactments of this State." Syl. Pt. 1, *State ex rel. Taxpayers Protective Ass'n of Raleigh Cnty. v. Hanks*, 157 W. Va. 350, 201 S.E.2d 304 (1973). "The test of constitutionality is whether the

classification is capricious, unreasonable or arbitrary." *Gainer*, 149 W. Va. at 758, 143 S.E.2d at 363.

After reviewing the Act, we reject the petitioners' argument. The Act does not target specific people or entities, and it does not establish any one project for success to the detriment of others. It does not relate "to particular persons, entities or things[.]" *Id.*, 149 W. Va. at 742, 143 S.E.2d at 354, Syl. Pt. 7. The Act merely encourages tourism development projects in small municipalities by granting benefits to up to five large projects that private entities want to locate in small communities. The petitioners have pointed to nothing specific to indicate the classifications are capricious, unreasonable, or arbitrary. Accordingly, we find no error by the ICA or the circuit court in their conclusions that the Act does not violate the special law prohibitions of the Constitution.

The petitioners' second argument is that the Act creates an arbitrary and irrational classification that violates the equal protection principles contained within Article III, § 10 of our Constitution.[5] Similar to the analysis of whether a statute contains unfair classifications that make it an improper special law, an equal protection analysis regarding economic rights requires an inquiry into "whether the classification is a rational

[5] We have found equal protection rights protected by Article III, § 10 of the West Virginia Constitution, which provides: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." *See Israel by Israel v. W. Va. Secondary Schs. Activities Comm'n*, 182 W. Va. 454, 460, 388 S.E.2d 480, 486 (1989) ("[W]e have recognized that although the phrase 'equal protection' is not found in our constitution, its principles are an integral part of our constitutional law.")

one based on social, economic, historic or geographic factors," and whether the classification "bears a reasonable relationship to a proper governmental purpose[.]" Syl. Pt. 4, *Gibson v. W. Va. Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991). Petitioners cursorily argue that restricting tourism development districts to five towns with populations under 2,000 bears no reasonable relationship to promoting tourism. We disagree.

The Act certainly involves economic rights because it concerns tourism projects focused on "preserving and creating new and greater sources of revenues" and "relieving unemployment by preserving and creating jobs[.]" W. Va. Code § 5B-1-9(b). Moreover, the Act contains rational classifications to achieve these goals: limiting the statutory benefits to the hundreds of small towns in West Virginia "with a population of 2,000 or less" because the Legislature determined that "it is in the best interest of the state to induce and assist in tourism development in small municipalities[,]" *id.*; and limiting the class of development projects to those with aggregate costs not less than $25 million, because the Legislature believed these large projects are of "paramount importance to the state and its economy[.]" *Id.* As articulated by the Legislature, the rational classifications are reasonably related to proper, stated, legislative goals. In sum, we find no error by the ICA and the circuit court in their determination that the Act does not violate equal protection principles.

Third, and last, the petitioners contend that the Act improperly transfers dominion over tourism projects from the localities where they are located to a State agency.

In so doing, the petitioners argue the Act unconstitutionally infringes upon their right to vote and violates their constitutional right to self-rule. They suggest these rights are embodied two places in the West Virginia Constitution: first, in Article III, § 1, which establishes that individuals "have certain inherent rights" including the "enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." And second, they are embodied in Article III, § 3, which provides that "[g]overnment is instituted for the common benefit, protection and security of the people . . . or community[,]" and is best "capable of producing the greatest degree of happiness and safety[.]"

Taken together, the petitioners assert these provisions entitle citizens to safety in their communities, and the term "safety . . . conveys protection from harm." *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 191 W. Va. 436, 443, 446 S.E.2d 658, 665 (1993). By precluding municipalities from regulating tourism projects located within tourism development districts, the petitioners assert the Act dilutes their right to vote in municipal elections (guaranteed by Article IV, § 1 of the Constitution) by diminishing the municipalities' power to regulate the safe use of land within the town.

The circuit court and the ICA found no inherent right to "self-rule" in the text of the West Virginia Constitution, and no case creating such a right. In fact, the opposite is true because "[m]unicipalities have no inherent power" and "depend[] solely upon grants of power by Acts of the Legislature, and the Legislature may at any time modify, change or withdraw any power so granted by general law[.]" Syl. Pt. 2, in part, *State ex rel.*

Alexander v. Cnty. Ct. of Kanawha Cnty., 147 W. Va. 693, 130 S.E.2d 200 (1963). Moreover, the Act does nothing to contravene the petitioners' right to participate in any election. The Act merely modifies powers previously granted to small municipalities with no impact on the municipalities' residents' right to vote. Whether the Legislature chooses to delegate powers to municipalities or decides to withdraw them, the "wisdom or desirability of [those] legislative policy determinations" are generally not subject to judicial review. *Lewis v. Canaan Valley Resorts, Inc*., 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991). *See also*, Syl. Pt. 2, *Huffman v. Goals Coal Co*., 223 W. Va. 724, 679 S.E.2d 323 (2009) ("This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation."). In conclusion, we find no error by the ICA or the circuit court in rejecting the petitioners' final challenge to the Act.

IV. CONCLUSION

We find no error in the ICA's or the circuit court's assessment that the Act, as challenged by the petitioners, is constitutional.

Affirmed.