

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**SAM BRUNETT, ROBERT McCLOUD,  
And JACLYN SANCHEZ,**

**Petitioners-Plaintiffs,**

v.

**Case No. 21-P-340  
Judge Jennifer F. Bailey**

**WEST VIRGINIA PROFESSIONAL  
CHARTER SCHOOL BOARD, RANDY  
SMITH, in his Official Capacity as  
President of the West Virginia Senate,  
ROGER HANSHAW, in his Official  
Capacity as Speaker of the West Virginia  
House of Delegates, PATRICK  
MORRISEY, in his Official Capacity as  
Governor of West Virginia,**

**Respondents-Defendants.**

**ORDER GRANTING PERMANENT INJUNCTION, DENYING MOTIONS TO  
DISMISS, AND GRANTING MOTION TO STAY PENDING APPELLATE REVIEW**

This is an action to enforce article 12, section 10 of the West Virginia Constitution. Pending before this Court are Plaintiffs' *Permanent Injunction Motion* and Defendants' and Intervenors' *Motions to Dismiss*. Based upon the verified First Amended Complaint, the parties' memoranda of law, and the oral arguments of counsel together with the testimony presented at hearing on November 1, 2024, as well as the entire record in this case, including the prior Orders, the Court **GRANTS** Plaintiffs' *Permanent Injunction Motion* and **DENIES** Defendants' and Intervenors' *Motions to Dismiss*. Furthermore, the Court **GRANTS** Defendant West Virginia Public Charter School Board's motion to stay pending appellate review, made orally at the hearing on November 1, 2024. In support of this Order, the Court makes the following Findings of Fact and Conclusions of Law:<sup>1</sup>

---

<sup>1</sup> This Order reproduces many of the factual findings and legal conclusions relating to the section 10 claim that were previously made by the Court in its January 20, 2022 "Order Granting Motion for Preliminary Injunction and Denying

## I. FINDINGS OF FACT

### A. Relevant History Relating to the Adoption of Article 12, Section 10

1. Under the West Virginia Constitution of 1863, the Legislature had exclusive authority to create school districts, including “independent school districts,” i.e., those created by special acts to operate independently of existing township districts. Those township districts would later evolve into so-called “magisterial school districts.” Both types of districts, independent and magisterial, were considered part of the general system of public education.

2. The Legislature’s authority to create independent school districts was challenged after it had created, by special act of 1868, an independent school district in Wellsburg, without the assent of the citizens of Brooke County. In *Kuhn v. Board of Education of Wellsburg*, the West Virginia Supreme Court rejected the challenge, reasoning that the Legislature had ample and exclusive authority to create the Wellsburg school district under two sections of the 1863 Constitution obligating the Legislature to (1) provide for a “thorough and efficient system of free schools” and (2) “foster” education through “such institutions of learning as the best interests of general education in the State may demand.”

---

Motion to Dismiss” (2022 Order). The operative portions of the 2022 Order represent the law of the case. See *West Virginia Reg’l Jail & Corr. Facility Auth. v. Est. of Grove*, 244 W. Va. 273, 283, 852 S.E.2d 773, 784, n.14 (2020) (observing that circuit court’s decision on a motion to dismiss became “the law of the case”) (citing *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W. Va. 696, 702, 619 S.E.2d 209, 215 n.14 (2005) (“The law of the case doctrine provides that a prior decision in a case is binding upon subsequent stages of litigation between the parties in order to promote finality.”)). Defendants provide no factual or legal basis for the Court to “reconsider, rescind, or modify” the 2022 Order’s factual findings and legal conclusions regarding the section 10 claim. Syl. Pt. 4, *Hubbard v. State Farm Indemnity Co.*, 213 W. Va. 542, 584 S.E.2d 176 (2003); cf. *State ex rel. Frazier & Oxley v. Cummings*, 214 W. Va. 802, 812 n. 14, 591 S.E.2d 728, 738 n.14 (2003), (noting an exception to the mandate rule, which is “a special aspect of the law of the case doctrine,” upon “a showing that a blatant error in the prior decision will result in a manifest injustice if uncorrected”). This Order is nonetheless supported by its own factual findings and legal conclusions based on the entire record of evidence presented in this action including during the hearing on these matters.

3. Although those two provisions remained in the West Virginia Constitution of 1872 (now, as article 12, section 1 and article 12, section 12), another section was added—article 12, section 10—to nullify the decision rendered the prior year in *Kuhn*.

4. For the next sixty years, many school districts operated within the counties—at one point nearly 400 magisterial school districts and more than 50 independent districts. The operation of many school districts was characteristic of public education in late nineteenth and early twentieth century, still then dominated by small schools and small, independent districts.

5. The public education system changed in 1933 with the enactment of West Virginia Code § 18-1-1 which defines a “district” for purposes of the Code’s chapter on public education as a “county school district” and a “board” as a “county board of education” and section 18-1-3 which further provides, “A school district shall include all the territory in one county.” The effect of these statutes was to abolish the pre-existing magisterial and independent school districts and replace them with the 55 county school districts, governed by five-member boards. That governance structure of the public education system has remained in effect until the enactment of the charter school law at issue in this action.

#### **B. The 2019 Charter School Law**

6. When it was first introduced in the 2019 regular session, education omnibus S.B. 451 defined a “Public charter school” by reference to its organizational independence: “a public corporate body, exercising public power through its governing board” as having “autonomy over decisions relating to finance, personnel, scheduling, curriculum, and instruction,” and as “independent of a county board.” S.B. 451 would have also approved the creation of a mostly independent “West Virginia Public Charter School Commission” as a charter school authorizer.

7. Some senators objected to S.B. 451 on the ground that it allowed for the creation of independent school organizations without the consent of a majority of voters in the county in which the charter school would operate—in violation of article 12, section 10.

8. A strike-and-insert version of S.B. 451 passed the Senate but did not advance in the House which adopted instead a motion to postpone indefinitely.

9. Governor Justice thereafter called a special legislative session on education matters.

10. The West Virginia Department of Education held a series of “public forums as part of a statewide listening tour,” seeking input from the public and key stakeholders on issues raised by S.B. 451 in advance of the special session.

11. The Department thereafter released a report, “West Virginia’s Voice,” stating that “[m]ost participants reported opposition to the creation of charter schools” and noting that “88% disagreed with creating charter schools,” among the 690 who submitted comment cards.

12. The report recommended to “Place oversight/authorization responsibility with the West Virginia Board of Education and local boards of education.”

13. As relevant here, H.B. 206, the charter school bill introduced during the 2019 special session, provided as follows:

- H.B. 206 specified that “All public charter schools established under this article are public schools and are part of the state’s public education system.”
- H.B. 206 defined “Public charter school” as “a public school or program within a public school [that] meets the general criteria, governance structure and statutory compliance requirements [contained in the statute].”
- H.B. 206 clarified that “The school district in which the public charter school is located remains the local educational agency for all public charter schools authorized by the county board and the public charter school is a school within that local educational agency except that the public charter school is treated as a local educational agency for purposes of applying for competitive federal grants.”
- H.B. 206 contained no provision authorizing the creation of a “West Virginia Public

Charter School Commission.” Instead, county boards of education were designated as the primary charter school authorizers with oversight authority over all authorized charter schools.<sup>2</sup> (§21.)

14. H.B. 206 passed both the House and Senate and was signed into law by Governor Justice in June 2019.

### **C. H.B. 2012**

15. National charter school groups publicly voiced displeasure with the 2019 charter school law, disapproving that it limited charter school authorizers primarily to county school boards. Then-State Superintendent Steven Paine said . . . that the National Alliance for Public Charter Schools [was] so displeased with West Virginia’s law, they wouldn’t provide assistance in designing the state’s new charter school policy.” “They don’t think it’s going to work,’ [Paine] said.” “They’re used to dealing with private companies that try to make money off of charter schools,’ Paine said. ‘There are many diverse authorizers that are out there and they think the more the merrier.’”

16. On July 24, 2020, West Virginia Academy submitted the first and, at that time, the only application for a charter school to county boards of education—in that instance, to the boards of education for Monongalia County and Preston County. The Monongalia County Board of Education unanimously voted to deny that application on November 30, 2020.

17. Shortly thereafter, commenting on the upcoming 2021 regular legislative session, Senator Patricia Rucker emphasized the need to make changes to the 2019 charter school law, to “establish an authorizing body for approving [charter] schools.” “Rucker noted she planned to

---

<sup>2</sup> The State Board could also be a charter school authorizer at the request of a county school board or when the State Board has already intervened and limited the power of the county board. (§21 n.2.)

push changes before the local boards' decisions," contending that "local education leaders will reject charter schools, as they perceive the institutions as competition to public institutions."

18. H.B. 2012 reversed provisions of the 2019 charter school law that previously subjected charter schools to the oversight of state and county boards of education. The relevant changes included the following:

- Striking language maintaining the county school district as the "local educational agency," H.B. 2012 provides instead that "Any public charter school authorized pursuant to this article shall be treated and act as its own local education agency for all purposes."
- H.B. 2012 strikes language that required the charter school contract to include "The specific commitments of the authorizer relating to its obligations to oversee, monitor the progress of, and supervise the public charter school."
- H.B. 2012 permits a charter school applicant to appeal the decision of a county board of education denying the application. It further permits such an appeal when a county board of education fails to renew a charter contract.
- H.B. 2012 establishes the "West Virginia Professional Charter School Board" (PCSB) as a charter school authorizer. PCSB "shall report directly to and be responsible to the state board separate from the Department of Education," although it is subject to the State Board's supervision "solely for the purposes of accountability for meeting the standards for student performance."
- PCSB is appointed by the Governor; confirmed by the Senate; permitted to appoint an executive director and staff; authorized to create, renew, nonrenew, or revoke charter schools; entitled to civil liability immunity; afforded discretion to audit PCSB-authorized charter schools; and empowered to "take corrective actions or exercise sanctions" for charter school law violations.
- H.B. 2012 divests county boards of education of "management and control" over PCSB-authorized charter schools. Except on the issue of "student performance," H.B. 2012 also divests the State Board of general supervision over PCSB-authorized charter schools. (*Id.*)

19. H.B. 2012 passed the House and Senate and was signed into law by Governor Justice on March 11, 2021. On July 2, 2021, Governor Justice appointed five individuals to PCSB.

#### **D. PCSB Authorized Charter Schools Without the Consent of County Voters**

20. On November 10, 2021, PCSB approved three applications for brick-and-mortar charter schools: Nitro Preparatory Academy in Kanawha County, Panhandle Preparatory Academy in Jefferson County, and West Virginia Academy in Monongalia County.

21. A week later, PCSB approved two applications for virtual charter schools: West Virginia Virtual Academy and Virtual Preparatory Academy of West Virginia. PCSB authorized both virtual charter schools to operate statewide.

22. Four of those five PCSB-authorized charter schools began operating in the fall 2022. The fifth, Nitro Preparatory Academy, obtained a deferral and extensions to push back its opening while it searched for a facility but was apparently unsuccessful in those efforts. Nitro Preparatory Academy no longer appears on the PCSB website list of “Authorized Charter Schools.”

23. Among the brick-and-mortar charter schools in operation, Eastern Panhandle Preparatory Academy will, according to its charter, “recruit primarily from Jefferson County and all contiguous counties.”<sup>3</sup> West Virginia Academy provides a detailed description on its website of its primary recruitment area which includes parts of Monongalia and Preston Counties.<sup>4</sup>

24. In November 2022, PCSB authorized the M.E.C.C.A. Business Learning Institute (MBLI) for middle- and high school students. In its charter, MBLI designates its primary recruitment area as Berkeley County.<sup>5</sup> According to PCSB, MBLI is set to begin operations in fall 2025.

---

<sup>3</sup> See Eastern Panhandle Preparatory Academy “Charter Agreement,” available at <https://wvcharters.org/schools>.

<sup>4</sup> <https://www.westvirginiaacademy.org/general-7>

<sup>5</sup> See MBLI “Charter Agreement,” available at <https://wvcharters.org/schools>.

25. Also in November 2022, PCSB authorized the Workforce Initiative for Nurses (WIN) Academy for high school students. Bridge Valley Community and Technical College will operate WIN Academy which opened in Kanawha County in fall 2023. In its charter, WIN designates its primary recruitment area as including “10 counties (Boone, Cabell, Clay, Fayette, Jackson, Kanawha, Lincoln, Mason, Putnam, and Wayne).”<sup>6</sup>

26. In 2024, PCSB authorized the Clarksburg Classical Academy which began operation in fall 2024. Its charter lists Harrison County as the primary recruitment area.<sup>7</sup>

27. In late 2024, PCSB authorized the Wisdom Academy to begin operation in fall 2025. Its charter lists as its primary recruitment counties, “Monongalia, Preston, Marion, Harrison, Taylor, Wetzel, and Doddridge Counties.”<sup>8</sup>

28. Regarding each of these PCSB-authorized charter schools, no special election has been held to obtain the consent of a majority of affected county voters before their creation.

#### **E. Legislature Enacts Supportive Charter School Laws**

29. During the pendency of this action, the Legislature passed, and the Governor signed into law, *inter alia*, a bill relating to charter school contract and enrollment application deadlines for 2022, *see* W. Va. Code § 18-5G-16, a bill establishing a charter school stimulus fund to provide \$300,000 grants to charter schools for start-up costs and additional grants up to \$100,000 thereafter, *see id.* § 18-5G-17, and a bill raising the amounts charter schools receive, from 90 percent to “99 percent of the per pupil total basic foundation allowance,” *see id.* § -5a.

#### **F. Procedural History**

30. Plaintiffs commenced this action on September 29, 2021. Prior to PCSB’s

---

<sup>6</sup> *See* WIN Academy “Charter Agreement,” available at <https://wvcharters.org/schools>.

<sup>7</sup> *See* Clarksburg Classical Academy “Charter Agreement,” available at <https://wvcharters.org/schools>.

<sup>8</sup> *See* Wisdom Academy “Charter Agreement,” available at <https://wvcharters.org/schools>.

authorization of its first five charter schools, Plaintiffs moved for a preliminary injunction on November 2, 2021. Defendants moved to dismiss. A hearing on the respective motions was held on December 14, 2021.

31. On January 20, 2022, the Court granted the preliminary injunction motion and denied the motion to dismiss. The 2022 Order preliminarily enjoined the further enforcement of House Bill 2012 temporarily halting the creation of PCSB charter schools by Governor Justice and those within his executive charge, namely PCSB.

32. Defendants noticed their appeal and moved to stay the preliminary injunction. The Supreme Court of Appeals of West Virginia Court granted the stay on February 23, 2022. A week later, Plaintiffs-Appellees moved to expedite the briefing to mature the appeal for consideration by June 1, 2022—prior to PCSB-authorized charter schools receiving the first state funding disbursement. The Court denied the motion to expedite the appeal and subsequently set argument for May 2023.

33. By its Opinion of June 8, 2023, the Supreme Court of Appeals of West Virginia held that Plaintiffs lacked standing to seek the requested injunctive relief as against Governor Justice because (i) his knowledge of the alleged constitutional infirmity “does not establish causation in this case where the PCSB, a nonparty, exercises its own, independent statutory authority to approve or reject charter school applications,” (ii) he lacked “statutory authority to exercise control over, or override the PCSB’s statutory authority,” and (iii) Governor Justice was powerless to redress a claim for injunctive relief because he “does not control the PCSB’s ability to approve or reject charter school applications.” The Court therefore reversed on standing without addressing the likelihood of success on the merits, dissolved the preliminary injunction, refused to review the interlocutory order denying the motion to dismiss, and remanded for further

proceedings.

34. This Court subsequently granted leave for Plaintiffs to file their First Amended Complaint to (i) add PCSB as a named defendant, (ii) particularize their claims for relief against Defendants in conformity with the Opinion, (iii) allege additional facts relevant to charter school authorizations and developments that have occurred in the months since this action was initiated and while on appeal, and (iv) add an additional named plaintiff, Jaclyn Sanchez.

35. Following time for notice and service of the First Amended Complaint to PCSB in early 2024, Plaintiffs moved for a permanent injunction. Defendants moved to dismiss. The Court granted motions to intervene by PCSB charter schools, West Virginia Academy, Eastern Panhandle Preparatory Academy, Workforce for Initiative for Nurses Academy, and later Clarksburg Classical Academy. Intervenor-Defendants also moved to dismiss.

36. A hearing on the respective motions was held on November 1, 2024, during which time the Defendants presented testimony from (i) James Paul, PCSB's executive director, (ii) Sarah White, a WIN Academy student, and (iii) Jodi Dalton, a student success manager at West Virginia Academy.

37. Following the hearing and prior to the entry of this Order, Jim Justice was elected to the United States Senate, Patrick Morrisey was elected as Governor of West Virginia, Randy Smith succeeded Craig Blair as President of the West Virginia Senate, and Roger Hanshaw remained Speaker of the House of Delegates. Accordingly, Governor Morrisey and Senate President Smith now replace their predecessors as named defendants in the official capacities. *See* W. Va. R. Civ. P. 17(d).

## II. CONCLUSIONS OF LAW GRANTING PERMANENT INJUNCTION

### A. Legal Standard

38. The Court has “the power to grant . . . a permanent injunction, whether preventive or mandatory in character, . . . according to the facts and the circumstances of the particular case.” Syl. Pt. 11, *Stuart v. Lake Wash. Realty*, 141 W. Va. 627, 92 S.E.2d 891 (1956).

39. In addition to the facts and circumstances, the Court should consider “the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.” Syl. Pt. 4, *State v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932).

### B. Plaintiffs Prevail on the Merits Because H.B. 2012 Violates Section 10

40. The Court begins, as it must, with the text of the Constitution:

No independent free school district, or organization shall hereafter be created, except with the consent of the school district or districts out of which the same is to be created, expressed by a majority of the voters voting on the question.

W. Va. Const. art. 12, § 10.

41. Where, as here, “a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be *applied* and *not construed*.” Syl. Pt. 2, *State ex rel. W. Va. Citizen Action Grp. v. Tomblin*, 227 W. Va. 687, 690, 715 S.E.2d 36 39 (2011) (emphasis added).

42. Section 10 is clear in its terms—it plainly prohibits a “independent free school...organization” from being “created” without the “consent” of “a majority of the voters” in the affected, existing “school district or districts.” Thus, for section 10 to be applicable here, PCSB charter schools must be (1) independent, (2) free school organizations, (3) created in existing school district or districts.

43. There is no question that PCSB charter schools are free school organizations for purposes of section 10 because they are statutorily defined as free, public schools, *see* W. Va. Code § 18-5G-1(c), which must achieve “Organizational capacity and infrastructure,” *see id.* §18-5G-6(a)(2)(A).

44. Defendants maintain, however, that (1) the creation of PCSB charter schools does not offend section 10 and (2) PCSB charter schools are not independent. The Court disagrees for the reasons addressed in turn below.

### **1. PCSB Charter Schools Cannot Be Created Without Voter Consent**

45. Defendants contend that section 10’s prepositional phrase “out of which” must be *construed* to apply only when an independent public school is created by “carving out” a “geographic territory” from an existing school district(s) territory. That construction is not supported by the actual language of section 10 which nowhere references or implies carving out geographic territory.

46. The phrase “out of which” instead modifies “school district or districts” to indicate which voters must consent to the creation of the independent public school. This application of the phrase is linguistically correct in that it gives effect to the “entirety” of section 10, that is, “*every word or phrase* within the provision.” *Comm. to Reform Hampshire Cnty. Gov. v. Thompson*, 223 W. Va. 346, 353, 674 S.E.2d 207, 214 (2008) (emphasis added) (citation omitted).

47. Defendants’ “out of which”-equals-“carved out” construction, on the contrary, defies the grammar and would effectively force the Court to rewrite section 10 as follows:

No independent free school district, or organization shall hereafter be ~~created~~ *carved out*, ~~except with the consent~~ of the *geographic territory of an existing* school district or districts ~~out of which the same is to be created~~, *except with the consent* expressed by a majority of the voters voting on the question *in the school district or districts out of which the same is to be carved out*.

48. Such a tortured construction is indefensible, this Court “may not add to, distort or

ignore the plain mandates” of a constitutional provision “clear in its terms.” *Fields v. Mellinger*, 244 W. Va. 126, 129, 851 SE.2d 789, 792 (2020) (emphasis added) (citations omitted).

49. Still, Defendants point to three decisions—*Kuhn*, *Herold*, and *Casto*—that they say support their “out of which”-equals-“carved out” construction. The Court is unpersuaded.

50. The locus of the decision in *Kuhn* was expressly not the carving out of geographic territory for the new Wellsburg school district. Rather, it was the Legislature’s *creation* of an “institution of learning” that had “jurisdiction for school purposes only over a definite territory embracing one township and parts of two others.” *Kuhn v. Bd. of Educ. of Wellsburg*, 4 W. Va. 499, 511 (1871). In other words, the claimed offense was creating an independent school whose jurisdiction *overlapped*—but did not carve out—the territory of other townships. The consent of people in those townships was not required, the Supreme Court reasoned, because under the 1863 Constitution the Legislature had “the exclusive power to *create* such districts [or schools].” *Id.* at 512 (emphasis added). When the People ratified section 10 a year later, nullifying *Kuhn*, they were thus prohibiting the Legislature’s creation of independent schools without the consent of the affected voters, not the carving of geographic territory for school purposes (which again did not happen in that case).

51. Neither did carving out geographic territory serve as the predicate offense in *Herold v. Queen*, 71 W.Va. 43, 75 S.E. 313 (1912). There, the creation of a Nicholas County high school did not alter the territories of existing school districts, their governing school boards, or the “amount of property on which to lay their levy.” *Id.* at 316. That is, there was no carving out from the existing school districts geographic territory for the new independent high school. And yet the legislative act which created the new high school complied with section 10, providing for a “special election [to be] ordered and taken,” on the creation of this high school “and a majority of the votes

cast in the whole county was for the high school.” *Id.* Although the Supreme Court observed that majority of voters in other school districts within the county were against the high school’s creation, *id.*, that was not dispositive to trigger section 10’s “out of which” phrase because, again, the Court found that the act did not, in fact, create the high school “out of any part of” those other districts, *id.* at 316. So, their consent was not required.

52. Eleven years later, a legislative act created a new high school in Upshur County supervised by its own board of education and superintendent. *Casto v. Upshur Cnty. Sch. Bd.*, 94 W. Va. 513, 516-17, 119 S.E. 470, 471–72 (1923). There too, the “out of which” phrase of section 10 was not triggered to require the consent of the voters in that separate “Buckhannon independent district” because, contrary to *Casto*’s assertions, the new Upshur County high school was not going to be “carved out” of the Buckhannon independent district, whose territory would be “left intact” and its board “functioning as before.” *Id.* This suggests that the true significance of the “carved out” language in that decision was simply a way for the Supreme Court to delineate, perhaps inartfully, why the consent of voters in the Buckhannon independent district was not required by section 10 (giving effect to the “out of which” phrase).

53. Moreover, the “carved out” language of *Casto* is arguably dicta given that the Court determined that section 10 was not even applicable since the Upshur County high school, while new, would not be “independent of the general system”—“We do not have an independent district”—rather, the Court determined that the new school would function as “part of the general scheme of education.” *Id.* at 517, 119 S.E. at 472.

54. Even if *Kuhn*, *Herold*, and *Casto* were more helpful to Defendants’ argument, these decisions ultimately cannot be determinative on the question. The reason section 10 was not offended in *Herold* and *Casto* is no longer of consequence because in 1933 the Legislature

abolished the system in which counties could have more than one school district and replaced it with the single county school districts. Thus, any new independent public school organization created today will necessarily operate within an existing county school district or districts.

55. That fact alone triggers section 10's "out of which" phrase *each and every time* an independent public school is proposed to be created in any county school district. And that would be true as well for independent charter schools with recruitment or attendance areas overlapping more than one county school district, in which case section 10 anticipates that possibility, requiring then "the consent of the school district or *districts* out of which the same is created."

56. Two additional considerations convince the Court to reject Defendants' carving out geographic territory construction. First, as the Supreme Court has instructed, when considering a constitutional provision that may be silent on an issue, a court should interpret that provision "to further advance the goals of the framers" who adopted it. *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 22, 467 S.E.2d 150, 163 (1995). Adding the words "geographic territory" to section 10 would have the opposite effect because it would render the word "organization" in section 10 meaningless. As commonly understood then and now, school districts have territory, organizations do not. Yet the framers included the word "organization" in section 10 for a reason. An independent school organization could be created within the geographic or jurisdictional territory of an existing school district. That is what PCSB-charter schools are, independent school organizations, not districts.

57. Second, if there is any remaining doubt in the meaning of "out of which," this Court must "look to *contemporaneous* and *practical* construction." *Chesapeake & O.R. Co. v. Miller*, 19 W. Va. 408 (1882) (emphasis added). To that end, whatever remaining precedential value the phrase "carved out" from Herold and Casto still has, it must be understood consistent with the

actual language of section 10 and as applied to our twenty-first century school system. Accordingly, it is certainly possible to carve out a *jurisdiction* for an independent public school organization without altering the geographic territory of an existing school district(s). In fact, that is what H.B. 2012 appears to do for PCSB charter schools—carve out a jurisdiction, students, and financial resources from existing school districts without altering the geographic territory and in some instances enabling PCSB charter schools to transcend the territorial jurisdiction to enlarge their recruitment and attendance areas to encompass multiple school districts. In either event, it is the *creation* of an independent public school in an existing school district(s), not the particular dimensions of its geographic territory, that triggers section 10.

## **2. PCSB-Charter Schools Are Independent**

58. Independence is a defining feature of charter schools, as several state courts have recognized. *See generally* Preston C. Green, III, et al, *The Legal Status of Charter Schools in State Statutory Law*, 10 U. MASS. L. REV. 240 (2015) (collecting cases). H.B. 2012 creates independent school organizations comprising of PCSB charter schools. The West Virginia law exempts these charter schools “from all statutes and rules applicable to noncharter public schools,” with few exceptions (e.g., relating to federal law, immunizations, attendance, student assessments, reporting). W. Va. Code § 18-5G-3(c). Charter schools are therefore freed from regulations pertaining to governing, budgeting, staffing, and curriculum, despite being publicly funded.

59. H.B. 2012 establishes PCSB to set up charter school authorization and oversight independent of the county school boards. Most notably, H.B. 2012 (1) empowers an unelected board, the PCSB, as a charter school authorizer, (2) removes the oversight and supervisory powers of county school boards over PCSB charter schools within their districts, and (3) designates the charter school itself as the local education agency “for all purposes.”

60. By removing or restricting the county school board's authority and oversight of PCSB charter schools, H.B. 2012 also deprives the State Board of Education of its general supervisory authority over charter schools. PCSB and PCSB charter schools "are subject to the general supervision of the state board solely for the purpose of accountability for meeting the standards for student performance required of other public school students." W. Va. Code § 18-5G-15(a) (emphasis added). That supervision over student performance alone is far from the general supervision constitutionally mandated by article 12, section 2. The State Board's supervisory powers extend to "all facets of education under the [education] provisions of...the West Virginia Code." *Pauley v. Bailey*, 174 W. Va. 167, 174, 324 S.E. 2d 128, 135 (1984) (emphasis added). Indeed, the Supreme Court has repeatedly emphasized 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.'" *West Virginia Bd. of Educ. v. Bd. of Educ. of the Cty. of Nicholas*, 239 W. Va. 705, 715, 806 S.E.2d 136, 146 (2017) (citations omitted).

61. The PCSB is independent in other relevant respects: (1) PCSB members are appointed by the Governor and confirmed by the Senate; (2) PCSB is permitted to appoint an executive director and staff; (3) PCSB is empowered not only to authorize charter schools but also to renew, nonrenew, or revoke charter schools; (4) PCSB is entitled to civil liability immunity; (5) PCSB is afforded discretion to audit the charter schools it authorizes; and (6) PCSB is empowered to "take corrective actions or exercise sanctions" for charter school law violations.

62. Defendants yet maintain that PCSB charter schools are not independent for purposes of section 10 because their independence does not mirror, in all the exact same ways, the nineteenth century independent school districts.

63. As an initial matter, PCSB charter schools can never be exactly like their nineteenth-century predecessors (nor could any new independent public school for that matter) because the Legislature abolished those independent school districts in 1933. Thus, to follow Defendants' argument to its logical end, section 10 would be effectively dead letter today. Indeed, Intervenor's expressly assert that section 10 is a "relic" and "an antiquity," because they say the 1933 legislative switch to single county school districts "relegated Section 10 to the dustbin of history."

64. This Court cannot follow Defendants' express or implied arguments to that conclusion because the Constitution cannot be amended by the Legislature or by judicial decision, but only as ratified by the People. *See Fields*, 244 W. Va. at 129, 851 SE.2d at 792. And unless and until then, it is this Court's duty to effectuate every word of the Constitution. *Id.*

65. Notably, in the same year that the Legislature abolished independent school districts, it also considered the statute implications for section 10. *See Leonhart v. Bd. of Educ. of Charleston Indep. Sch. Dist.*, 114 W. Va. 9, 170 S.E. 418 (1933). Had section 10 been rendered dead letter by that 1933 statute, the Supreme Court's opinion would have easily said so, in a relatively short opinion. Instead, the Court conducted a full analysis, taking section 10 to be good law.

66. Furthermore, it would be rather arbitrary to hold that independence means only what it meant for the now-abolished, pre-1933 independent school districts. For instance, Defendants contend PCSB-charter schools are not independent because, unlike their nineteenth century predecessors, they (i) cannot levy taxes, (ii) cannot vary the length of their school year, and (iii) are subject to the same state performance standards as traditional public schools. But charter schools do not need to levy taxes to operate because the State now guarantees their funding

through the State aid formula. W. Va. Code § 18-5G-5(a). That ensures their independence, even more so than their predecessors, who had to rely on their own tax bases. It is also true that PCSB charter schools, unlike their nineteenth century predecessors, cannot vary the school year and are held to state performance standards. But that is because the statutorily prescribed school year and State standards did not exist in the nineteenth century. They are not fair points of comparison.

67. The most salient point on independence is that PCSB-charter schools are free from “the control and charge of the [county] board of education.” *Cf. State ex rel. Nangle v. Bd. of Educ. of Dist. of W. Union*, 81 W. Va. 353, 355, 94 S.E. 500, 502 (1917). Indeed, H.B. 2012 was designed to make PCSB charter schools as independent as they could possibly be and still be called public schools—that was the whole point, to evade county school board authorization and supervision, as the Court’s factual findings make clear.

68. Wherefore, because H.B. 2012 approves the creation of PCSB charter schools—as independent free school organizations—without the consent of a majority of voters in the county or counties in which PCSB charter schools are created and will operate with their own jurisdiction and governing boards, the Court **FINDS** and **CONCLUDES** that Plaintiffs prevail on the merits of establishing that H.B. 2012 violates article 12, section 10 of the West Virginia Constitution.

### **C. The Balance of the Hardships and Public Interest Favor a Permanent Injunction**

69. A permanent injunction enforcing section 10 effectuates the People’s will and thereby serve the public interest. *See Casto*, 94 W. Va. at 517, 119 S.E. at 471 (noting section 10 “requires the sanction of the people affected.”) (emphasis added); *cf. United Mine Workers of Am. Int’l Union by Trumka v. Parsons*, 172 W. Va. 386, 398, 305 S.E.2d 343, 354 (1983) (“[T]o operate in the ‘public interest’ is analogous to the obligation imposed upon state government by the West Virginia Constitution to act ‘for the common benefit, protection and security of the people.’”)).

70. In their papers and through the testimony of their witnesses, Defendants and Intervenor have made much of the fact that six of eight authorized charter schools are already operating with an estimated 3,500 children enrolled and approximately 100 classroom teachers employed. They assert that any permanent injunction that subjects these charter schools to a special election in their affected counties would be disruptive and, depending on the outcome of those elections, possibly detrimental to the education of their students and the employment of their teachers and staff.

71. Recognizing the potential for disruption particularly during the current school year, Plaintiffs have voluntarily modified their request for relief, proposing that equitable relief be issued in stages, first through a permanent injunction enjoining PCSB from authorizing *new* charter schools without the consent of affected county voters. This first stage would not affect the operations of any of the eight PCSB charter schools already authorized. Thus, no charter school student, parent, or educator will endure any hardship as a result of the first stage of relief.

72. Plaintiffs thereafter propose allowing a reasonable time for the Legislature and Governor to respond to the permanent injunction through either legislative-authorized or governor-called special elections to obtain the consent of affected county voters in compliance with section 10. If those special elections occur, this matter will be resolved, no second stage of relief will be needed. Otherwise, the second stage will entail a second permanent injunction, this time enjoining PCSB from permitting the continued operations of the eight previously authorized charter schools.

73. If the second permanent injunction does not result in any corrective action, then the third stage of relief would entail the Court's consideration of mandamus and declaratory relief against the Governor and Legislature to ensure compliance with section 10, as discussed further below.

74. The Court agrees with the Plaintiffs' proposed staging of relief and concludes it will prevent or substantially mitigate any hardships to charter school children, parents, and educators. The Court further concludes that even if the second stage of relief becomes necessary and a permanent injunction thereafter enjoins the continued operations of the eight authorized charter schools until their county voters consent, that injunction ultimately will not jeopardize the education of schoolchildren. The current and would-be charter school children can still be educated in traditional public schools, where the state has a constitutional duty to educate them adequately and equitably, as article 12, section 1 requires. *See Pauley v. Kelly*, 162 W. Va. 672, 672, 255 S.E.2d 859, 861 (1979). Consequently, charter school students will not be irreparably harmed by an injunction.

75. To be sure, an injunction that halts new or continued charter school operations until the voters consent will temporarily frustrate the school choice objectives of H.B. 2012. But there is no right under the West Virginia Constitution to attend a publicly subsidized school of one's choice. And any *statutory* right to attend a PCSB-authorized charter school conferred by the unconstitutional provisions of H.B. 2012, should they conflict, must yield to the *constitutional* right of affected county voters to decide whether those charter schools should be created in the first place. The Constitution takes priority over any objectives of H.B. 2012, however laudable. "The provisions of the Constitution, the organic and fundamental law of the land, and stand upon a higher plane than statutes, and they will as a rule be held mandatory in prescribing the exact and exclusive methods of performing the acts permitted or required." *Simms v. Sawyers*, 85 W. Va. 245, 250, 101 S.E. 467 (1919).

76. The Court is also informed by the testimony of PCSB's executive director that, should a charter school fail to obtain the consent of county voters as section 10 requires, the school

could reconstitute itself as a private school and obtain eligible funds through the Hope Scholarship program. That further mitigates the potential hardship of an event that may never happen.

77. The supposed hardship of a special election for charter schools should also be discounted by the benefits that could accrue in a charter school's favor from the special election process, as admitted in the following testimony of PCSB's executive director under cross examination:

Q Would you expect that if such a special election took place that the charter schools and their proponents would conduct campaigns to inform the public about the benefits of the charter schools?

A I haven't contemplated what a charter school would do if that were to happen.

Q Well, then let me ask you about in your experience with these public forums. I think it was your testimony these public forums are an opportunity for the schools to inform the potential students and parents about the benefits of the school?

A That is correct.

Q Would you agree with me that a campaign informing potential voters of the benefits of those schools would be a good thing if a special election was held?

A Would it be a good thing? It would perhaps be in the charter school's interest to communicate the benefits of the school that it offers if it was required to put that issue before the voters.

Q Okay, and would you agree with me if an election was held and a charter school was approved by the voters, that that would be of incredible benefit to the charter school?

A If a charter school was required to hold an election and receive a majority vote in order to operate, it would be a positive development for that school if they received a majority vote.

78. Accordingly, the Court **FINDS** and **CONCLUDES** that the balance of the hardships and the public interests favor the permanent injunction against PCSB, enjoining it from authorizing any new charter schools without the consent of affected county voters.

#### **D. PCSB's Remaining Arguments Are Without Merit**

79. The Court rejects PCSB's contention that a permanent injunction motion is premature. The operative, undisputed facts—nearly all of which are matters of public record—have been established for more than four years, when PCSB began authorizing charter schools without the consent of affected county voters. During that time, PCSB was aware of these proceedings and, in fact, tried to intervene on appeal soon after this Court granted the preliminary injunction. PCSB was not prejudiced then and has not been prejudiced now by this permanent injunction motion that builds on the facts and law in the 2022 Order.

80. The Court further rejects PCSB's argument that this Court lacks jurisdiction to issue the requested permanent injunction. Mischaracterizing Plaintiffs' motion as seeking a "statewide injunction," PCSB contends this Court lacks jurisdiction to enjoin acts and actors outside of the Kanawha County, namely acts of charter school operators. But Plaintiffs have moved for a permanent injunction against PCSB only, to enjoin its statutory authority and actions under H.B. 2012 which offend article 12, section 10. There is no question that this Court has jurisdiction over PCSB. It was an issue raised on appeal, *see Blair v. Brunett*, 248 W. Va. 495, 502, 889 S.E.2d 68, 75 (2023) (observing that this dispute centers on the "decisions and action taken by the PCSB . . . [which] exercises its own, independent statutory authority to approve or reject charter school applications"), and Defendants have, throughout the course of this action, insisted that PCSB is a proper defendant.

81. To be sure, enjoining PCSB will affect the operations of charter schools outside Kanawha County, including those that have intervened in this action and those who have not. But to suggest that PCSB cannot be so enjoined because of those incidental, though unavoidable, effects outside Kanawha County is to effectively argue either that (1) section 10 cannot be

effectuated at all by injunctive relief because PCSB's statutory authority necessarily extends beyond Kanawha County or (2) that section 10 only applies to Kanawha County schools and to no other counties. Neither rationale can be reconciled with the state law permitting suit against the state officials and state agencies in any circuit court "or, alternatively, in the circuit court of Kanawha County." W. Va. Code § 14-2-2. Nor can they be reconciled with precedent recognizing Kanawha County with the exclusive jurisdiction over mandamus actions, like this one, relating to writs against state officials or agencies, notwithstanding the venue statute, as amended in 2018. *See State ex rel. Frazier v. McGraw*, 243 W. Va. 721, 724, 850 S.E.2d 720, 723 (2020). Indeed, it would be rather perverse logic to permit, much less require, an action be brought in a circuit court and then deprive that very court of jurisdiction to grant injunctions.

82. Moreover, the requested injunction here does not offend the general rule that "a court may issue an injunction to enjoin only those acts occurring within that court's territorial jurisdiction." *Kessel v. Leavitt*, 204 W. Va. 95, 150, 511 S.E.2d 720, 775 (1998). The statutory acts of PCSB sought to be enjoined occur, at least officially for purposes of state law, in Kanawha County, the seat of the state government. *See* W. Va. Const. art. VI, § 20; *see also King v. Heffernan*, 214 W. Va. 835, 840, n.7, 591 S.E.2d 761, 766, n.7 (2003) (noting prior version of venue statute required suits against "state agencies be brought in the Circuit Court of Kanawha County, the circuit court of the county in which the seat of West Virginia State government is located").

83. The prohibition on extraterritorial injunctions, even if contemplated here (it is not), is "applicable only where an injunction is the *exclusive relief* sought and inapplicable where injunctive relief is merely ancillary or incidental to the primary claim and purpose of the law suit." *See* Syl. Pt. 3, *Shobe v. Latimer*, 162 W. Va. 779, 792, 253 S.E.2d 54, 62 (1979) (emphasis added).

PCSB says that exception does not apply because Plaintiffs only seek a permanent injunction with this motion. But Plaintiffs maintain that the injunctive relief they initially seek is incidental to the suit's primary purpose which is to obtain a declaration that H.B. 2012 is facially unconstitutional or, as applied, mandamus compelling state officials to comply with section 10.

84. Furthermore, at the hearing on November 1, 2024, Defendant PCSB orally moved to stay any injunctive relief this Court would order, pending appellate review. West Virginia Rule of Civil Procedure 62 provides that:

On motion and on such conditions for the security of the opposing party as are proper, the court may stay the issuance of execution upon a judgment and any other proceedings for its enforcement for such reasonable time, to be specified by the court in the stay order, as will enable the moving party to present to an appellate court an appeal from the judgment.

W. Va. R. Civ. P. 62(e).

85. The grounds for the Defendant's motion for stay are well taken, and the Court **FINDS** and **CONCLUDES** that a stay pending appellate review pursuant to West Virginia Rule of Civil Procedure 62(e) is warranted, as it will maintain the status quo while the parties proceed through the appellate process.

### **III. CONCLUSIONS OF LAW DENYING MOTIONS TO DISMISS**

#### **A. Motions to Dismiss For Failure to State a Claim Are Denied**

86. Defendants and Intervenors move to dismiss, contending that H.B. 2012 does not violate section 10 in authorizing the creation of PCSB charter schools. The Court, having granted the permanent injunction motion because H.B. 2012 does indeed violate section 10, denies the motions to dismiss on the merits of the constitutional claim.

#### **B. Governor and Presiding Officers Motions to Dismiss for Lack of Standing Is Denied**

87. Standing refers to "party's right to make a legal claim or seek judicial enforcement

of a duty or right.” *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002). “The focus of a standing analysis is not on the validity of the claim but instead is on the appropriateness of a party bringing the questioned controversy to the court.” *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017). Standing is thus “gauged by the specific common law, statutory or constitutional claims that a party presents.” *Commonwealth, Penn. Fish & Boat Comm’n v. Consol Energy, Inc.*, 233 W. Va. 409, 414, 758 S.E.2d 762, 767 (2014). In evaluating “the three elements set forth in *Findley*,” a court views “the complaint in the light most favorable to [the plaintiff].” *Id.*

#### **1. Plaintiffs Have Standing Against Presiding Officers for Declaratory Relief**

88. On appeal in this action, the Supreme Court of Appeals of West Virginia clarified that to maintain a claim for *injunctive* relief against a state official (in that appeal, the Governor) the official “must have a specific duty to enforce” the state law being challenged as unconstitutional. *Blair v. Brunett*, 248 W. Va. 495, 502, 889 S.E.2d 68, 75 (2023) (quoting *Disability Rights South Carolina v. McMaster*, 24 F.4th 893, 901 (4th Cir. 2022)) (internal quotations omitted). That rationale comports with the rule favored by some federal courts in the context of injunctive relief claims brought under the *Ex parte Young* exception to the Eleventh Amendment.

89. That rationale does not hold for *declaratory* relief claims which, if granted, settled the parties’ legal rights under a statute *before* further enforcement. *See City of Bridgeport v. Matheny*, 223 W. Va. 445, 450, 675 S.E.2d 921, 926 (2009). A declaration that a statute is unconstitutional invalidates its enforcement. Limiting such suits to statutory enforcers thus makes little sense for standing purposes and would preclude *all* declaratory relief claims against the Legislature, since it obviously has no enforcement powers over the laws it enacts. Applying such

a bar would further preclude declaratory relief claims based on legislative inaction, where, as here, a constitutional provision compels the Legislature to act.

90. Both drastic implications cannot be reconciled with *Committee to Reform Hampshire County Government v. Thompson*, a declaratory judgment action brought against the House Speaker (effectively against the Legislature) seeking enabling legislation to comport with certain constitutional demands. 223 W. Va. 346, 348, 674 S.E.2d 207, 209 (2008). Although the Supreme Court of Appeals of West Virginia ultimately concluded that the state constitution did not require the Legislature to pass enabling legislation in that instance, it fully entertained and decided the merits of the declaratory relief claim. Significantly, the Court did *not* dismiss the appeal outright on standing grounds following the rationale Defendants proffer here, that since the Legislature had no further enforcement role in the enabling legislation, the House Speaker was an improper party.

91. That rationale would ban virtually all declaratory relief claims against the Legislature which also cannot be squared with *West Virginia Education Association v. Legislature of State of West Virginia*, 179 W. Va. 381, 369 S.E.2d 454 (1988). Although styled as a mandamus action, the Court issued declaratory relief instead for failing to comply with the demands of the state constitution—there, the Legislature’s failure to pass proper budget. 179 W. Va. at 383, 369 S.E.2d at 456.

92. The permissibility of declaratory relief claims against legislatures (or their presiding officers) for alleged unconstitutional legislative acts has been recognized in other states as well. *See, e.g., Community Success Initiative v. Moore*, 384 N.C. 194, 886 S.E.2d 16 (2023); *Markwell v. Cooke*, 482 P.3d 422 (Colo. 2021); *League of Women Voters of Fla. v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013); *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C.

552, 713 S.E.2d 604 (2011); *Romer v. Colorado Gen. Assembly*, 810 P.2d 215 (Colo. 1991); *Williams v. State Legislature of State of Idaho*, 111 Idaho 156, 722 P.2d 465 (1986); *Schulz v. New York State Legislature*, 244 A.D.2d 126, 676 N.Y.S.2d 237 (1998).

93. To be sure, a causal connection is still required for a declaratory relief claim. But that connection is established here according to the dictates of controlling precedent: As against the Senate President and House Speaker, the Supreme Court of Appeals has instructed that “litigants should be careful to bring all cases involving the legislature against the presiding officers of the House and Senate.” *Common Cause of W. Virginia v. Tomblin*, 186 W. Va. 537, 539, 413 S.E.2d 358, 360 (1991).

94. This case “involves” the Legislature in that it challenges the constitutionality of H.B. 2012, which explicitly implicates the Legislature’s affirmative obligations under article 12, section 1 to maintain a thorough and efficient system of free schools. *See* W. Va. Code § 18-5G-15 (“The mission of [PCSB] is to authorize high-quality public charter schools throughout the state that provide more options for students to attain a *thorough and efficient* education”) (emphasis added). Therefore, as the Supreme Court of Appeals has explained, because the Legislature’s mandatory duties respecting public education are implicated, the House Speaker and Senate President are “essential” parties to this action. *See Pauley v. Kelly*, 162 W. Va. 672, 718, 255 S.E.2d 859, 883 (1979) (instructing trial court on remand to “require the suit to be amended to include the Speaker of the House of Delegates and the President of the Senate of West Virginia as defendants”).

95. Redressability likewise must be met for declaratory relief claims. Defendants’ contention that a declaration against the Presiding Officers here “would do nothing to prevent Plaintiffs alleged injury,” since they “can’t amend statutes on their own” is belied by Defendants’

concession that the Legislature has modified the charter school laws since H.B. 2012.

96. Plaintiffs have also sufficiently alleged that a decision of this Court could redress their asserted constitutional injuries. At minimum, Plaintiffs' requested declaratory relief could redress their constitutional injury because "[t]he law presumes the Legislature to know its duty" and "the Governor to know his duty" as to how to respond to an unconstitutional law. *W. Virginia Educ. Ass'n v. Legislature of State of W Va.*, 179 W. Va. 381, 383, 369 S.E.2d 454, 456 (1988).

97. Therefore, the Court concludes that the Plaintiffs have standing to maintain their claim for declaratory relief against the Presiding Officers.

## **2. Plaintiffs Have Standing Against Defendants for Mandamus Relief**

98. Defendants insist that section 10 is "proscriptive," not "prescriptive" and thus creates no mandatory duty on them to act. This Court disagrees. The clear legal right to vote conferred by section 10 also entails an enforceable, affirmative duty against the state, as the Supreme Court of Appeals of West Virginia explained in *Casto v. Upshur County High School Board*: "If we are dealing with an act creating an independent district [or school organization without the consent of county voters], the solution would be simple, the constitutional mandate would be carried out, and the act would be declared unconstitutional." 94 W. Va. 513, 517, 119 S.E. 470, 472 (1923). Declaratory relief would not suffice; section 10's "mandate," i.e., county vote, would have to be "carried out."

99. The Supreme Court has said in no uncertain terms that, under section 10, "the people have a *right to speak* before an independent school district may be [created]." *Leonhart v. Bd. of Educ. of Charleston Indep. Sch. Dist.*, 114 W. Va. 9, 14, 170 S.E. 418, 420 (1933) (emphasis added). Such a right imposes a correlative duty. *See Hedges v. Price*, 2 W. Va. 192, 224 (1867). Section 10, after all, includes the word "shall" which the "Court has held on numerous occasions

... connotes a mandatory duty.” Sly. Pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 657, 171 S.E.2d 480, 483 (1969).

100. Defendants argue, however, that section 10 says only what the Legislature “can’t do,” not what it “must do.” But that displaces entirely the first-order claim-right conferred by section 10 with a mere second-order immunity. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). Section 10 confers both (i) an active claim-right on affected county residents to vote, imposing a correlative state duty to cause that vote to happen before the creation of independent public schools and (ii) a passive immunity with a correlative disability on the Legislature (or anyone else) preventing the alteration of the claim-right enjoyed by county residents. Declaratory and injunctive relief effectuate the immunity, mandamus effectuates the claim-right. All such remedies are available to Plaintiffs at their election and to this Court at its discretion.

101. Defendants make much of section 10’s silence as to which entity should carry out its mandate to direct special elections in affected counties before the creation of independent public schools. They suggest that silence means mandamus cannot lie against the Governor, that there is “no basis for reading a *grant of executive power* into...*a restriction on legislative powers*.” Yet the “basis” is Supreme Court precedent which instructs what to do when a constitutional provision is silent on the “power in question”—here the power to order special elections—this Court is supposed to take a historical view about whether the power “existed at the time of the adoption” of the Constitution. See *State ex. rel. Dillon v. Braxton Cnty. Court*, 60 W. Va. 339, 384, 55 S.E. 382, 384 (1906).

102. That historical view takes us back to the first constitutional convention, when the governor was granted such authority to provide “for a special election to fill such vacancy,” in the

event that an elected officer failed to take his oath of office. *See Hawver v. Seldenridge*, 2 W. Va. 274, 279 (1867). That the governor was entrusted with such power during the organization of the state government demonstrates faith in his office. Later, the governor’s power to “issue a writ of election” to fill a vacancy on the Supreme Court was ratified in the 1872 Constitution. W. Va. Const. 1872 art. 8, § 7. That power to “issue a directive of election to fill such a vacancy” on the Supreme Court and the circuit courts was retained in the current Constitution, as amended. W. Va. Const. art. 8, § 7.

103. Regarding Presiding Officer Defendants, both the Constitution of 1863 and 1872 also empowered the Legislature to prescribe the general laws for conducting elections. W. Va. Const. 1863 art. 3, §§ 8, 12; W. Va. Const. art. 4, §§ 7, 8; art. 7, § 2. And the Legislature has since exercised that authority, for example, to empower the governor, in turn, to fix times for special elections in other instances. *See, e.g.*, W. Va. Code §§ 3-10-1(c)(1), 3-10-2, 3-10-4(a)(1). But, importantly, the Legislature has failed to prescribe general laws relating to the manner of conducting section 10 special elections. In the absence of such implementing statutory law, it is incumbent on a governor, in the first instance, to discharge his or her constitutional authority to take care that the laws be faithfully executed, to carry out section 10’s mandate.

104. The fact that section 10 does not name or direct a government officer or entity responsible for issuing special elections makes it non-self-executing—not unenforceable, as Defendants would have it. Under these circumstances, the Supreme Court has explained the approach that it and lower courts should take:

When the Constitution is silent on a particular issue, the solution cannot be found in a methodology that requires [the Court] to assume or divine the framers’ intent on an issue which most likely was never considered. Rather, the solution must be found in a study of the specific provision of the Constitution and the best method to further advance the goals of the framers in adopting such a provision.

*Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 22, 467 S.E.2d 150, 163 (1995).

105. This Court cannot now discern, nor should we presume to understand, the reasons the framers omitted from section 10 a responsible government officer or entity. It “most likely was never considered” in earnest. Nevertheless, the solution here presents itself, considering that, when section 10 was ratified in 1872, the governor was the only statewide officeholder entrusted with express constitutional authority to fix a time for a special election. *Cf. State ex rel. McGraw v. Burton*, 212 W. Va. 23, 36–40, 569 S.E.2d 99, 112–16 (2002) (employing Adams approach to ascertain attorney general’s constitutional functions). So, recognizing the governor’s authority to faithfully execute section 10 is not inconsistent with the framers’ goals; indeed, it advances those goals most efficiently.

106. The Supreme Court followed similar logic in a case that is decidedly on point: *Citizen Action*. There, the Court was tasked with interpreting another non-self-executing constitutional provision—article 7, section 16—that also does not name or direct a government officer or entity to execute its mandate to hold a special election for governor when there is a vacancy in the office. 227 W. Va. at 694, 715 S.E.2d at 43. Like section 10 here, the Court observed that the language of section 16 there was “plain and unambiguous” and of a “mandatory nature” also employing the word “shall.” Syl Pt. 5, *id.*

107. The Court further emphasized that section 16 was consistent with “the right of the people to elect their highest public officials,” rejecting other constructions that “would be in conflict with [that] right.” *Id.*, 227 W. Va. at 695, 715 S.E.2d at 44. Plaintiffs are here seeking to give the same effect to the People’s right to vote enshrined in section 10. Unlike with section 10, however, the Legislature enacted implementing statutory law for section 16—W. Va. Code § 3-10-2—recognizing, as the Court noted, that it needed “to create a mechanism to fulfill [its]

constitutional mandate.” *Id.* Although the statute mostly “reproduces verbatim” section 16, it included language that “the acting governor shall issue a proclamation, fixing a time for a special election to fill such vacancy.” *Id.*, 227 W. Va. at 696, 715 S.E.2d at 45. The statute provides such a proclamation “by the person acting as Governor *pursuant to the State Constitution,*” section 16, specifically. W. Va. Code § 3-10-2(b) (emphasis added).

108. Exercising its original jurisdiction, the Supreme Court granted a writ of mandamus that directed then-acting Governor Tomblin “in executing *his duty to act as governor,* forthwith to issue a proclamation to fix a time for a new statewide election to fill the vacancy.” 227 W. Va. at 697, 715 S.E.2d at 46 (emphasis added).

109. Here too, it advances the framer’s goals for section 10 to allow for the possibility that the governor is best positioned to fix times for special elections in affected counties before the creation of independent schools. For PCSB charter schools in particular, the timing for the creation of such schools will vary, depending on the circumstances of the counties in which they are authorized. Only the governor or designate can act expeditiously with statewide authority to ensure that a special election in the affected counties takes place.

110. Section 10 causally connects the Governor to this mandamus action and provides the basis for redressability, consistent with precedent. Accordingly, this Court concludes that mandamus properly lies against the Governor to compel his compliance with a mandatory constitutional duty.

111. As for the Presiding Officer Defendants, this Court herein answers the Supreme Court’s question about the precise basis for that mandamus relief. *Brunett*, 248 W. Va. at 500, 889 S.E.2d at 73, n.9. Defendants say that mandamus cannot take the form of an “order directing [the Presiding Officers] *to enforce* the charter school law” or to “exercise their legislative functions,”

or even to “compel [them] to introduce legislation.” But Plaintiffs are not asking the Defendants to enforce the charter school law, Plaintiffs are seeking to enforce section 10 *against* the charter school law.

112. Regarding legislation, Defendants are wrong to suggest that a court is without judicial power to order the Legislature to legislate. The Supreme Court did just that in *State ex rel. Meadows v. Hechler*, granting mandamus to “direct the Legislature to promptly draft legislation to replace the unconstitutional section of [a statute] and additionally, to consider passage of legislation that would exempt certain administrative regulations.” 195 W. Va. 11, 19, 462 S.E.2d 586, 594 (1995). Notwithstanding its attempts to be deferential, “[a]s a matter of comity to the Legislature,” the Supreme Court did not hesitate there to caution that “[s]hould the Legislature fail to exercise its proper prerogative to consider these regulations and to consider such recommended legislation, then this Court will be required to fill these legal voids.” *Id.*, 195 W. Va. at 19-20, 462 S.E.2d at 594-95.<sup>9</sup>

113. The Supreme Court similarly granted mandamus against the Presiding Officers and other state officials that required “the Legislature to only include as part of the budget digest information that has been the subject of discussion, debate, and decision prior to the final legislative enactment of the budget bill.” *State ex rel. League of Women Voters of W. Va. v. Tomblin*, 209 W. Va. 565, 578, 550 S.E.2d 355, 368 (2001).

114. Considering this line of precedent, the Supreme Court made it abundantly clear in *State ex rel. Workman v. Carmichael* that a court would have authority “to entertain an extraordinary writ against the Legislature when the law permits.” 241 W. Va. 105, 121-22, 819

---

<sup>9</sup> Notably, *Hechler* observed in a footnote that the Presiding Officer were properly named as defendants “pursuant to this Court’s admonition in *Common Cause of West Virginia v. Tomblin*, 186 W.Va. 537, 539, 413 S.E.2d 358, 360 n. 2 (1991).” *Id.* 195 W. Va. at 12, 462 S.E.2d at 587.

S.E.2d 251, 267-68 (2018).

115. Although this Court would thus have the authority to issue mandamus against the Presiding Officers to cause the Legislature to consider legislation to comply with section 10 and mandamus against the Governor to set times for special elections in compliance with section 10, the Court will suspend that mandamus relief at this time out of deference to the other coordinate branches of government. *See United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607–608 (1957) (observing courts of equity are “clothed with large discretion to model their judgments to fit the exigencies of the particular case”).

116. Should the permanent injunction against PCSB ordered herewith not prompt corrective legislation or executive action within a reasonable time, and a second-stage permanent injunction also work to no avail, then the Court will consider exercising its discretion to issue mandamus against the Governor to call special elections and, as last resort, against the Presiding Officers in the form of instructions to consider appropriate legislation.

117. In any event, no matter the sequence, the Court concludes that Plaintiffs have standing to maintain their mandamus action against both the Governor and the Presiding Officers.

### **C. Defendants’ Motion to Dismiss Based on Legislative Immunity Statute is Denied**

118. After commencement of this action—possibly in direct response to this action—the Legislature passed a statute that prohibits any suit that “name[s] the Legislature or the presiding officers thereof, in any action challenging the constitutionality of a statute” as well as the issuance of “a writ of mandamus, a writ of prohibition, or an injunction against the Legislature.” W. Va. Code § 55-17-3a(b) (2022). Both immunities are to be enforced “summarily” by courts and “applied retrospectively and *retroactively*.” *Id.* at § 55-17-3a(c)-(d) (emphasis added).

119. Although the statute purports to base the immunity on “separation of powers,” it

directly undercuts the principle, intruding on judicial review, the power of courts to “say what the law is,” to determine constitutionality. “It makes absolutely no sense to us, under any meaningful system of separation of powers, to allow the legislative branch to pass such a law and then avoid judicial review of a broad category of constitutional challenges by individuals injured by the law.” *Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987). A legislature “may not deny to a person attacking a statute ‘the independent judgment of a court on the ultimate question of constitutionality.’” *Id.* at 706 (quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring)).

120. Moreover, the Legislature’s immunity statute runs afoul of *Workman*, a decision which, as previously explained, not only clarified that mandamus could lie against the Legislature but extolled at length on the importance of separation of powers to our system of government. As the Supreme Court of Appeals of West Virginia reiterated there, courts are “vital to the preservation of the constitutional separation of powers where that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislative branches of government.” 241 W. Va. at 129, 819 S.E.2d at 275 (quotations omitted). The Legislature’s new immunity statute usurps a most vital judiciary power.

121. The Legislature’s immunity statute also directly conflicts with *Common Cause*, wherein, as mentioned before, the Supreme Court of Appeals directed parties to “bring all cases involving the legislature against the presiding officers.” 186 W. Va. at 539, 413 S.E.2d at 360.

122. Beyond policing these boundaries of separation of powers, “there is a due process right to have the scope of constitutional rights determined by some independent judicial body.” *Bartlett*, 816 F.2d at 706. “The courts of this State shall be open, and every person, for an injury done to him, in his person, property, or reputation, shall have remedy by due course of law; and

justice shall be administered without sale, denial, or delay.” W. Va. Const. art. 3, § 17.

123. Furthermore, the *ex post facto* nature of the Legislature’s immunity statute infringes on the “constitutional liberty embodied in the due process clauses of the [state and federal] Constitutions.” *Cf. State v. Hensler*, 187 W. Va. 81, 83, 415 S.E.2d. 885, 887 (1992). “[A] retroactive statute which . . . disturbs vested rights” is unconstitutional. *See State ex rel. Williams v. Bd. of Trustees*, 147 W. Va. 795, 803, 131 S.E.2d 612, 616 (1963). Plaintiffs’ constitutional right vested when section 10 was ratified and remains vested thereafter before the creation of independent public schools. No other preconditions are required to further vest that constitutional right.

124. Defendants suggest that the constitutionality of the Legislature’s immunity statute can be left for another day. But it is of immediate concern because, although H.B. 2012 currently empowers PCSB to authorize charter schools, the Legislature could have created (and still could create) charter schools through regular legislation, as it did in the pre-1933 days of independent school districts. Hence, that possibility is far from “hypothetical.” Plaintiffs therefore want to be assured now and going forward that, should the Legislature attempt to legislate the creation of charter schools, it must comply with section 10 by authorizing a special election to obtain the consent of affected county voters. That is the essence of their claim for declaratory relief against the Legislature.

125. Accordingly, the Court concludes that the Legislature’s immunity statute provides no lawful basis for dismissal of the declaratory and mandamus relief claims against the Presiding Officer Defendants.

For the foregoing reasons, the Court grants Plaintiffs' *Motion for a Permanent Injunction* and denies Defendants' and Inventors' *Motions to Dismiss*. Furthermore, the Court grants Defendant's *Motion for Stay Pending Appeal*.

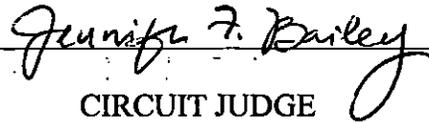
Wherefore, the Court hereby **ORDERS** as follows:

- A. Plaintiffs have prevailed on the merits of their claim that provisions of House Bill 2012 relating to PCSB-authorized charter schools violate article 12, section 10 of the West Virginia Constitution as set forth in their verified First Amended Complaint;
- B. Petitioners have further demonstrated that the balance of the hardships and public interests weigh in favor of issuing a permanent injunction; and
- C. A permanent injunction shall issue to **ENJOIN** the further enforcement of House Bill 2012, specifically PCSB is enjoined from authorizing any new charter schools without the consent of affected county voters.
- D. Following a reasonable time for compliance and appeal of this Order, Plaintiffs' counsel shall contact the Court to establish a Scheduling Order for further adjudication of this matter should the permanent injunction not result in corrective legislative or executive action consistent with this Order. During those further proceedings, the Court shall consider (i) a further permanent injunction, enjoining PCSB from permitting the continued operations of previously authorized charter schools without the consent of affected county voters, and (ii) such mandamus and declaratory relief against the Governor and/or Presiding Officer as may be necessary to ensure compliance with article 12, section 10.

E. Execution of this judgment and any other proceedings for its enforcement are **STAYED** for sixty (60) days to enable Defendants to present this judgment to an appellate court.

The objections of the Defendants are noted and preserved for the record. The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTERED December 3, 2025

  
CIRCUIT JUDGE